293 N.C. App.—No. 2 Pages 184-362

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 13, 2024

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

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OF

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[1] Died 9 April 2024.

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Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Staff Attorneys
Michael W. Rodgers
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes[2]

[2] Appointed Assistant Appellate Division Reporter 23 September 2024.

COURT OF APPEALS

CASES REPORTED

FILED 2 APRIL 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Conveyance of cemetery land—swapping horses on appeal—argument not advanced at trial—In an action where the North Carolina Cemetery Commission sought to void a transfer of cemetery land by a corporation to its sole shareholder (together, defendants) that violated the minimum acreage statute of the North Carolina Cemetery Act, defendants could not argue on appeal that the trial court should have granted summary judgment in their favor under the Marketable Title Act, since defendants did not raise this argument before the trial court and could not "swap horses" to "get a better mount" on appeal. **N.C. Cemetery Comm'n v. Smoky Mountain Mem'l Parks, Inc., 270.**

Interlocutory order—denying motion to compel arbitration—substantial right—statutory right of appeal—In a legal dispute between a law firm and one

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Motion to partially dismiss defendant's appeal—motion to dismiss plaintiff's cross-appeal—plaintiff's petition for certiorari—In an action filed by plaintiff-landowner challenging a county board's rezoning of land located adjacent to plaintiff's property, where the trial court granted plaintiff's motion to enforce a settlement agreement he claimed to have entered into with defendant-company (the party who applied for the rezoning), plaintiff's motion to partially dismiss defendant's appeal was denied where, although defendant did not properly notice appeal from two interlocutory orders denying its motions to dismiss and for summary judgment, appellate review of those orders was permissible under N.C.G.S. § 1-278 because they involved the merits of the case and necessarily affected the trial court's final judgment. Further, defendant's motion to dismiss plaintiff's cross-appeal was granted where plaintiff did not give timely notice of cross-appeal within the required ten-day period. Additionally, plaintiff's petition for a writ of certiorari to permit review of his cross-appeal was denied. **Garland v. Orange Cnty., 232.**

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Motion to compel arbitration—by nonparty to a contract—no claims arising from contract—no equitable estoppel—In a lawsuit where an attorney alleged that his former law firm had breached its duties under a series of contracts between them, the trial court properly denied the firm's motion to compel arbitration pursuant to an agreement memorializing plaintiff's purchase of a partnership interest in the company from which the firm leased office space. In certain circumstances, a signatory to a contract containing an arbitration clause may be equitably estopped from arguing against a nonsignatory's efforts to enforce the arbitration clause. Here, however, because none of the attorney's claims against the firm (a nonsignatory to the purchase agreement) asserted the breach of a duty created under the purchase agreement, the firm could not enforce the agreement's arbitration clause under an equitable estoppel theory. **Griffing v. Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., 243.**

Motion to compel arbitration—profit-sharing agreement—between law firm and two associates—"participating attorney" to agreement—neither an individual party nor third-party beneficiary—In a lawsuit where an attorney (plaintiff) alleged that his former law firm had breached its duties under a series of contracts between them, the trial court properly denied the firm's motion to compel

arbitration pursuant to an agreement detailing how the firm and two of its associates would share profits from a class action that the associates were working on. Plaintiff was not bound by the arbitration clause in that agreement because, although he had signed the agreement as a "participating attorney," the plain text of the agreement demonstrated that the true parties to it were the firm and the two associates; further, none of plaintiff's claims against the firm—including that the firm failed to reimburse him for expenses he advanced in the class action—arose from the agreement. Additionally, plaintiff was not obligated to arbitrate his claims as a third-party beneficiary to the agreement because any benefits he received from the profits made in the class action were incidental rather than directly intended under the agreement. **Griffing v. Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., 243.**

CEMETERIES

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Sale of cemetery property—North Carolina Cemetery Act—minimum acreage statute—applicability—land designated for cemetery purposes—After a corporation transferred two cemeteries to its sole shareholder, who then subdivided the property into five tracts and recorded surveys asserting that three of those tracts were not part of the cemeteries, the trial court properly granted summary judgment to the North Carolina Cemetery Commission in its lawsuit seeking to void the conveyance pursuant to the minimum acreage statute of the North Carolina Cemetery Act, which forbids transfers of cemetery property that would result in a cemetery having less than thirty acres. All five tracts were subject to the minimum acreage requirement because they were "designated for cemetery purposes" under the Act where, in seeking licensure to operate the two cemeteries, the corporation and its shareholder had sent annual reports to the Commission that included all five tracts in their acreage calculation. **N.C. Cemetery Comm'n v. Smoky Mountain Mem'l Parks, Inc., 270.**

Sale of cemetery property—North Carolina Cemetery Act—minimum acreage statute—not void for vagueness—"cemetery" defined—After a corporation transferred two cemeteries to its sole shareholder, who then subdivided the property into five tracts and recorded surveys asserting that three of those tracts were not part of the cemeteries, the trial court properly granted summary judgment to the North Carolina Cemetery Commission in its lawsuit seeking to void the conveyance pursuant to the minimum acreage statute of the North Carolina Cemetery

multiple punishments for the same offense when it entered judgment upon his convictions for both first-degree kidnapping and the sex offenses that served to elevate the kidnapping charge to one of the first degree; therefore, the sentencing order was vacated and the matter was remanded for resentencing. **State v. Hernandez, 283.**

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Settlement agreement—formation—statutory requirements—signature by party or designee—acceptance versus counter-offer—In an action filed by plaintiff-landowner challenging a county board's rezoning of land located adjacent to plaintiff's property, the trial court erred in granting plaintiff's motion to enforce a settlement agreement he claimed to have entered into with defendant-company (the party who applied for the rezoning). Although defendant's counsel sent an email memorializing the proposed settlement terms and promising to draft a settlement agreement for the parties to sign, this email reflected, at best, an agreement to agree. Even if the email had supported the formation of a contract, it did not comply with the statutory requirements for mediated settlement agreements because defendant did not sign it, there was no evidence that defendant's counsel was a designee for purposes of the statute, and, at any rate, defense counsel's name typed at the bottom of the email did not constitute an electronic signature. Further, plaintiff never accepted defendant's settlement offer given that he replied to the email with a counter-offer proposing revisions to the agreement. **Garland v. Orange Cnty., 232.**

COURTS

Trial court—interpretation of instructions for remand—discretion to order new trial on specific issues—In a legal dispute arising from the plumbing and HVAC installation services that plaintiff business provided for defendant customer, where defendant counterclaimed that plaintiff engaged in unfair and deceptive trade practices (UDTP) by selling him duplicate warranties, and where the appellate court in a prior appeal remanded the matter for "further fact-finding" on defendant's UDTP claim (and, specifically, on the issue of whether defendant could have discovered the duplicate warranties through reasonable diligence), the trial court did not abuse its discretion on remand by ordering a new trial on the UDTP claim. The appellate

court's instructions could not have been a directive for the trial court to make new findings without a new trial, since the appellate court emphasized that there were no jury findings made and no evidence presented on the reasonable diligence issue in the first trial. Additionally, where defendant had also counterclaimed for breach of contract under three theories, and where the appellate court explicitly remanded for a new trial on defendant's breach of contract claim under one theory only (failure to perform in a workmanlike manner), the trial court did not abuse its discretion by complying with the appellate court's order because trial courts may in their discretion order a partial new trial on just one issue or part of a claim. **Dan King Plumbing Heating & Air, LLC v. Harrison, 222.**

CRIMINAL LAW

Jury instructions—sexual exploitation of a minor—inadvertent reference by trial court to sexual assault—There was no plain error in defendant's trial for two counts of first-degree sexual exploitation of a minor where the trial court, while instructing the jury on acting in concert, inadvertently misstated the offense as sexual assault rather than exploitation. The trial court otherwise properly instructed the jury on the offense and its elements, including correctly naming the charged crime as "sexual exploitation" three times during the instruction as a whole. **State v. Walker, 316.**

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Negligent infliction—enrollment contract terminated by private school—only intentional conduct alleged—In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent infliction of emotional distress was properly dismissed where plaintiffs based their claim on intentional conduct by a school administrator; only negligent conduct, not intentional conduct, may satisfy the negligence element of the claim. **Turpin v. Charlotte Latin Schs., Inc., 330.**

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in the record that the judge had prepared a written order that was ready to be signed upon her term's expiration. Therefore, the trial court was entitled to exercise its discretion to appoint a new trial judge to hold a new hearing and enter a written ruling on the unresolved motion. **Dan King Plumbing Heating & Air, LLC v. Harrison, 222.**

LIBEL AND SLANDER

Defamation—private school curriculum dispute—school characterization of parents' concerns—accuracy—In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' defamation claim—based on their assertion that school administrators mischaracterized plaintiffs' presentation to the school board as including racist accusations regarding the faculty and students—was properly dismissed where administrators accurately characterized the "gist or sting" of plaintiffs' allegations that the school was compromising its academic excellence by promoting diversity, equity, and inclusion among its faculty and student body; therefore, the administrators' statements did not constitute false statements. **Turpin v. Charlotte Latin Schs., Inc., 330.**

NEGLIGENCE

Negligent misrepresentation—enrollment contract terminated by private school—curriculum challenge—assurances of non-retaliation—In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent misrepresentation—based on plaintiffs' assertion that they justifiably relied on statements from school administrators that plaintiffs' complaints would not result in retaliation—was properly dismissed where plaintiffs failed to demonstrate that school officials owed them a duty of care, since such a duty is limited to situations involving a professional relationship in the context of a commercial transaction, which was not at issue in the instant case. **Turpin v. Charlotte Latin Schs., Inc., 330.**

Negligent retention or supervision—private school curriculum dispute—actions by school administrator—incompetency not shown—In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent supervision of the head of school was properly dismissed where the claim could not be proven by plaintiffs' related claims for fraud, unfair and deceptive trade practices, or defamation, all of which the appellate court determined had no merit, and where plaintiffs' assertion that the head of school had exhibited "animus" or "hostility" toward them was insufficient to establish incompetency or inherent unfitness. **Turpin v. Charlotte Latin Schs., Inc., 330.**

PUBLIC OFFICERS AND EMPLOYEES

Dismissal of social worker—use of racial epithet—unacceptable personal conduct—just cause analysis—An administrative law judge (ALJ) correctly determined that a county department of social services (DSS) lacked just cause to dismiss

a career state employee (petitioner, a social worker supervisor) for one instance of using a racial epithet during a private conversation with her supervisor about what the abbreviation "NR" might mean in the "race" category of a client intake form. Although there was no dispute that petitioner's conduct constituted unacceptable personal conduct, the ALJ's conclusion regarding just cause was supported by its findings of fact, which were in turn supported by substantial evidence. Therefore, the ALJ's decision to retroactively reinstate petitioner with back pay and attorneys' fees, subject to certain conditions, was affirmed. **Ayers v. Currituck Cnty. Dep't of Soc. Servs., 184.**

SEARCH AND SEIZURE

Search warrants—probable cause—supporting affidavits—nexus between items sought and alleged crimes—In a prosecution for kidnapping and sex offenses against minors, the trial court did not commit plain error in denying defendant's motion to suppress video evidence obtained from media storage devices seized from his home—the site of the alleged crimes—where two separate search warrants were issued upon a proper determination of probable cause. The supporting affidavits attached to the warrant applications were not purely conclusory, but rather contained facts showing a nexus between the list of items to be seized and the alleged offenses sufficient for the magistrate to reasonably infer that the requested searches would reveal incriminating evidence. Further, the description of the electronic categories listed in the affidavits were sufficient to encompass the specific media storage devices recovered from defendant's home. **State v. Hernandez, 283.**

SEXUAL OFFENSES

Jury instructions—first-degree sexual exploitation of a minor—second-degree sexual exploitation is not a lesser-included offense—In defendant's trial for first-degree exploitation of a minor, the trial court did not commit plain error by failing to instruct the jury on the offense of second-degree sexual exploitation of a minor because the latter offense—which requires an actual recording or photograph of sexual activity—is not a lesser-included offense of first-degree exploitation—which can be committed by the use or coercion of a minor to engage in sexual activity for the purpose of producing a visual representation of the activity, whether or not an actual recording is made. **State v. Walker, 316.**

Sexual exploitation of a minor—acting in concert—video recording of sexual activity—inference of common plan—In a prosecution for two counts of first-degree sexual exploitation of a minor, the State presented sufficient evidence from which a jury could conclude that defendant acted for the "purpose of producing material" portraying sexual activity with a minor by acting in concert with others, including: testimony relating that, prior to attending a party, a number of defendant's friends discussed a plan to find a girl at the party, have sex with her, and film it; and three cell phone videos recorded later that evening showing defendant and others variously engaging in or watching sexual activity with a minor. Defendant's behavior in the videos, including laughing and looking toward the phone, demonstrates that he was aware the recordings were being made and was actively participating in their production. **State v. Walker, 316.**

UNFAIR TRADE PRACTICES

Enrollment contract terminated by private school—curriculum challenge—alleged retaliation—elements not met—In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for unfair and deceptive trade practices (UDTP)—based on plaintiffs' assertion that school administrators were deceptive and unfair when they assured plaintiffs that their complaints would not lead to retaliation and instructed plaintiffs that they could raise future concerns—was properly dismissed where the claim could not be established through plaintiffs' related fraud claim, which the appellate court determined had no merit, and where the school's assurances pertained only to plaintiffs' initial presentation of their concerns to the school board and did not extend to plaintiffs' continued expression of the same concerns in perpetuity. **Turpin v. Charlotte Latin Schs., Inc., 330.**

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.

JUDITH M. AYERS, PETITIONER
v.
CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA23-420

Filed 2 April 2024

Public Officers and Employees—dismissal of social worker—use of racial epithet—unacceptable personal conduct—just cause analysis

An administrative law judge (ALJ) correctly determined that a county department of social services (DSS) lacked just cause to dismiss a career state employee (petitioner, a social worker supervisor) for one instance of using a racial epithet during a private conversation with her supervisor about what the abbreviation "NR" might mean in the "race" category of a client intake form. Although there was no dispute that petitioner's conduct constituted unacceptable personal conduct, the ALJ's conclusion regarding just cause was supported by its findings of fact, which were in turn supported by substantial evidence. Therefore, the ALJ's decision to retroactively reinstate petitioner with back pay and attorneys' fees, subject to certain conditions, was affirmed.

Judge TYSON concurring in result only.

Judge COLLINS dissenting.

Appeal by Respondent from final decision entered 31 January 2023 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 1 November 2023.

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

Teague, Campbell, Dennis & Gorham, L.L.P., by Luke A. West and Jennifer B. Milak, and The Twiford Law Firm, P.C., by Courtney Hull, for respondent-appellant.

MURPHY, Judge.

For the third time, Respondent-Appellant Currituck County Department of Social Services ("DSS") appeals from an Office of

Administrative Hearings ("OAH") final decision reversing the dismissal of Petitioner-Appellee Judith Ayers from her position as Social Worker Supervisor III for unacceptable personal conduct ("UPC"). Having twice remanded, we now affirm.

A State agency may only discipline a career state employee for just cause. N.C.G.S. § 126-34.02 (2023). "Just cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Wetherington v. N.C. Dep't of Pub. Safety* ("*Wetherington I*"), 368 N.C. 583, 591 (2015) (marks omitted). This requires the agency to consider various factors and balance the equities to arrive at the appropriate level of discipline. *See Wetherington v. N.C. Dep't of Pub. Safety* ("*Wetherington II*"), 270 N.C. App. 161, 194, *disc. rev. denied*, 374 N.C. 746 (2020). It does not permit the agency to manipulate its inquiry to contrive just cause for a preordained level of discipline. *See id.* at 185-201 (reversing the ALJ's determination of just cause where the agency shoehorned a per se rule into the case's eponymous multifactor just cause analysis).

An agency's determination of just cause is subject to both administrative and judicial review. *See Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, *aff'd per curiam*, 370 N.C. 386 (2017). At both levels, the tribunal reviews whether the facts support the existence of just cause de novo. *Id.* at 100, 102. However, "the [administrative law judge ('ALJ')] is the sole fact-finder, and the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility." *Id.* at 108.

Where the ALJ concluded the agency lacked just cause based on its findings of fact and where those findings were supported by substantial evidence, the agency must show the ALJ's determination was an error of law. In such cases, if the agency merely argues how its own version of the facts might have supported a contrary conclusion without demonstrating that the ALJ committed errors of law, the agency does not carry its burden of proving it acted with just cause because "we defer to the ALJ's findings of fact [when supported by substantial evidence], even if evidence was presented to support contrary findings." *Id.*

Here, we hold the ALJ's findings of fact, to the extent necessary for the ultimate just cause determination, were supported by substantial evidence in the record. We further hold, upon de novo review, that there was no error in the ALJ's determination that DSS lacked just cause to dismiss Ayers for her single instance of UPC in light of the facts and circumstances of this case. Accordingly, we affirm the ALJ's final decision

to retroactively reinstate Ayers with back pay and attorneys' fees, subject to a two-week suspension without pay and subject to her taking additional cultural diversity and racial sensitivity training.

BACKGROUND

The facts of Ayers's UPC and DSS's initial response are fully set out in the initial appeal. *Ayers v. Currituck Cnty. Dep't of Soc. Servs.* ("*Ayers I*"), 267 N.C. App. 513, 514-19 (2019). The facts of the ALJ's Final Decision on Remand from *Ayers I* are fully set out in the second appeal. *Ayers v. Currituck Cnty. Dep't of Soc. Servs.* ("*Ayers II*"), 279 N.C. App. 514, 515-19 (2021). Partially borrowing from *Ayers II*, "we include a recitation of the facts and procedural history relevant to the issues currently before us":

A. Prior to Incident

> . . . Ayers had been employed with DSS from 2007 until the incident in 2017. Ayers was the supervisor for the Child Protective Services Unit at DSS who reported directly to the DSS Director. Neither party contests that Ayers was a career State employee.
>
> Ayers consistently received positive work performance reviews and had never been disciplined as a DSS employee before the incident occurred. Until 30 June 2017, her boss was the DSS Director, Kathy Romm, who had hired Ayers; Romm had asked Ayers whether she wanted to take her position upon Romm's retirement. Ayers declined to pursue the position, and Romm hired another DSS employee, Samantha Hurd. Both Ayers and Hurd are Caucasian women.
>
> Prior to Hurd's promotion, she supervised DSS's Foster Care Unit, and she and Ayers had a history of disagreements and conflict in their roles. The disagreements and conflict continued after Hurd's promotion.

B. Incident

> On 3 November 2017, Hurd asked Ayers about a racial demarcation–"NR"–that a social worker had included on a client intake form; Hurd did not recognize the demarcation, asked Ayers what it stood for multiple times, and Ayers responded with a racial epithet. Ayers claimed she said "nigra rican," while Hurd claimed Ayers said "[n-----]

rican" ("the N word"). According to testimony from Hurd and Ayers, Ayers initially laughed about the comment, but became apologetic and embarrassed soon afterward. After investigation, Hurd and Ayers discovered the client referred to on the form was Caucasian.

C. Disciplinary Action

The incident occurred on Friday, 3 November 2017, and Hurd conferred with DSS's counsel over the following weekend. After receiving guidance, Hurd applied a twelve-factor test, derived from a guide for North Carolina public employers published by the University of North Carolina at Chapel Hill Institute of Government, to Ayers's comment and instituted disciplinary proceedings against her on Monday, 6 November 2017. . . .

. . . .

After meeting with Ayers, Hurd placed her on investigatory status with pay, and subsequently terminated her employment with DSS; Ayers appealed, and Hurd affirmed her decision. Ayers filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings.

D. 13 June 2018 ALJ Decision

An ALJ held a contested case hearing on 19 April 2018 and reversed Hurd's termination decision in a *Final Decision* filed 13 June 2018 ("First ALJ Order"). Findings of Fact 23 and 47 in the First ALJ Order described Ayers's and Hurd's different recollections of the word Ayers used, but the First ALJ Order also included the word "negra-rican," which was a third variation of the word. A fourth variation, "negro-rican," appeared in Conclusion of Law 13. The ALJ applied the three-prong test from *Warren*, determined the first prong of "whether the employee engaged in the conduct the employer alleges[,]" was not met in light of the disagreements on verbiage, and reversed Hurd's termination of Ayers. DSS appealed the First ALJ Order.

E. *Ayers I*

In an opinion filed 1 October 2019, we vacated and remanded the First ALJ Order. We noted Finding of Fact 23 from the First ALJ Order, which included a third and

incorrect variation of the word used when describing the disagreement on epithet verbiage between Ayers and Hurd, was the "critical finding driving the ALJ's analysis" in its reversal of Hurd's termination decision. We found,

> the ALJ's [f]inding is not supported by the evidence in the [r]ecord[, particularly Ayers's own testimony]. It is then apparent the ALJ carried out the remainder of its analysis under the misapprehension of the exact phrase used and that the ALJ's understanding of the exact phrase used was central to both the rest of the ALJ's [f]indings and its [c]onclusions of [l]aw. Therefore, we vacate the [First ALJ Order] in its entirety and remand this matter for the ALJ to reconsider its factual findings in light of the evidence of record and to make new conclusions based upon those factual findings.

In addition to noting "the ALJ's conclusions and considerations of the 'totality of the circumstances' were also grounded in its misapprehension of the evidentiary record[,]" we held either " 'n----- rican' or the variant 'nigra rican' " "constitute[d] a racial epithet[,]" and DSS "met its initial burden of proving [Ayers] engaged in the conduct alleged under *Warren*." In vacating the First ALJ Order, we instructed the ALJ to "make new findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline."

F. ALJ Decision on Remand

On remand, the ALJ entered its *Final Decision on Remand* ("Second ALJ Order") on 5 May 2020, made additional findings of fact and conclusions of law, applied the three-prong *Warren* test, and reversed DSS's termination of Ayers. The ALJ decided the first two prongs of the *Warren* test–Ayers engaging in the conduct alleged and the conduct constituting unacceptable personal conduct–were met. . . . [Specifically, the ALJ concluded Ayers's conduct was that for which no reasonable person should expect to receive prior warning, a willful violation of DSS's written personnel policy, and conduct unbecoming

> of an employee.] However, the ALJ concluded the third prong of the *Warren* test–whether DSS had just cause for the disciplinary action taken under N.C.G.S. § 126-35(a)–was not met. In concluding a lesser disciplinary measure was warranted, the Second ALJ Order focused on: Ayers's "ten-year employment history with no prior disciplinary actions" and high performance reviews; that Hurd "did not think it was significant whether anyone heard [Ayers's] comment"; the lack of evidence that this one-time comment was harassment of a specific individual or caused actual harm to DSS, until DSS revealed the incident to others; and that DSS's decision "was influenced by . . . past philosophical differences [between Hurd and Ayers] and their past history." However, the Second ALJ Order also found that "[DSS] did not consider if [Ayers's] . . . comment caused any actual harm to the agency's reputation. [DSS] only considered potential harm to the agency." The Second ALJ Order also acknowledged the lack of resolution regarding whether anyone other than Hurd heard Ayers's epithet, which the ALJ deemed a "necessary consideration." Despite the lack of resolution of the resulting harm factor from *Wetherington I*, the Second ALJ Order retroactively reinstated Ayers with a two-week suspension without pay, ordered back pay, and ordered reimbursement of Ayers's attorney fees.

Id. (alterations in original) (citations omitted); (citing *Warren v. N.C. Dep't of Crime Control & Pub. Safety* ("*Warren I*"), 221 N.C. App. 376, *disc. rev. denied*, 366 N.C. 408 (2012)).

G. *Ayers II*

DSS appealed the Second ALJ Order, arguing "(A) 'the ALJ made findings of fact not supported by substantial evidence' in its Second ALJ Order; (B) specific conclusions of law from the Second ALJ Order are erroneous; and (C) DSS 'had just cause to dismiss [Ayers].' " *Id.* at 520 (alterations in original). In an opinion filed 5 October 2021, we determined we could not meaningfully conduct our appellate review because, "[f]or us to conduct meaningful appellate review regarding just cause for disciplinary action, the ALJ must [have made] complete findings of fact regarding the harm to DSS resulting from Ayers's UPC, including whether any occurred"; but

> the ALJ found that Hurd, as DSS's representative in the disciplinary decision regarding Ayers, did not consider

> the necessary resulting harm factor, and thus did not consider all of the required factors.
>
> . . . .
>
> Substantial evidence support[ed] the ALJ's determination that Hurd, and DSS, did not consider a required factor under *Wetherington I*.

Id. at 520, 524-26. Accordingly, we "remand[ed] to the ALJ with instructions to remand to DSS to conduct a complete, discretionary review regarding Ayers's UPC and corresponding disciplinary action." *Id*. at 526.

H. DSS's Investigation on Remand and Final Agency Decision Addendum

Per our instructions, the ALJ further remanded to DSS "to conduct a complete disciplinary review[.]" In the course of this investigation, Hurd reviewed the prior documentation of the case: the First and Second ALJ Orders; our *Ayers I* and *Ayers II* opinions; conference and hearing transcripts; termination, reply, and appeal letters between Ayers and Hurd; various DSS policies and job descriptions; the North Carolina State Administrative Code; and the case file whose incomplete reporting was the genesis this now-half-decade-long series of appeals and remands. Hurd additionally reviewed DSS's daily reception logs of visitors and determined a client was in the building at the time of Ayers's UPC but did not further investigate whether the client was aware of the incident. Hurd also, for the first time, interviewed Tiffany Sutton, a black employee under Ayers's supervision whom Hurd previously identified as speculatively having overheard Ayers's UPC. Sutton had not overheard Ayers's UPC but learned of it at some indeterminable time from gossip surrounding Ayers's absence. Hurd did not interview any other employee as part of this investigation.

Upon concluding her investigation, Hurd issued DSS's Final Agency Decision Addendum ("Addendum") setting forth Hurd's and DSS's bases for resulting and potential harm, including:

> **<u>Harm to the agency's provision of services</u>**
>
> The ability to perform the essential functions of the Social Work Supervisor III position has been irreparably harmed as a result of your conduct. Your unacceptable conduct caused a complete abrogation of your ability to fulfil operational and personnel responsibilities. These duties require supervisors to function autonomously with little

to no supervision. Engaging in this conduct altered your ability to perform independently in the work environment. Further, your ability to testify objectively before any tribunal has been called into question. That is a risk I cannot accept. Your ability to supervise any program or exercise sound judgement [sic] in any dynamic has been completely compromised.

You are unable to complete any job task in the agency without total supervision. This is a burden the agency cannot bear. Your conduct interrupted the normal duties of the Director and other supervisory personnel causing them to assume your workload, a disruption to the workflow of the agency with no other back-up position available. A bias was demonstrated by stereotyping a family[.] . . . Bias negatively affects every aspect on the continuum of social services programming, including child welfare reporting. During the time between the pre-disciplinary conference and the local appeals hearing you submitted contradictory information regarding your conduct. . . . This insubordination[1] caused harm to the agency, as such undermines the ability to trust your judgement [sic], or allow you to complete essential job duties autonomously as is required. Thus, I have no confidence in your ability to be forthcoming and honest in all aspects of your work. You cannot be permitted to perform work in any capacity within the agency with certitude you will not alter, suppress, or omit material facts. Moreover, your conduct has damaged my confidence in your ability to serve with integrity as Director's Designee and there was no back up to fulfil that role in your absence.

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1. The ALJ found,

   Hurd never charged Petitioner with being insubordinate in any disciplinary letter or advised Petitioner that she was being terminated from employment for being insubordinate. The first time [] Hurd determined that Petitioner was engaged in insubordination in November 2017, was in Hurd's [21 March 2022] Final Agency Decision Addendum. . . . [T]he evidence presented in these proceedings failed to show that Petitioner was insubordinate during the DSS local appeals hearing.

DSS challenges this finding but does not argue we should consider Ayers's alleged insubordination in our analysis of just cause.

Harm to morale

Your conduct offended a Currituck County employee, the Social Services Director. I consider your conduct to be highly offensive, vulgar, crude, and discriminatory. It further harmed the morale of the agency by creating an uncomfortable and untrusting team atmosphere among subordinates, colleagues, and your immediate supervisor. The authority given to you as a supervisor was undermined by your actions and the conduct destroyed the trust of your employer to rely upon you to make fair, objective decisions without concern for prejudice.

Harm to agency mission and work of the agency

The conduct violated the following policies: 1.) [DSS's] Civil Rights Action [*sic*] of 1964 Requirements policy, 2.) The Currituck County Personnel Policy, . . . and 3.) The . . . [DSS] Family Services manual . . . .

Violating policy constitutes harm to the agency because it frustrates the purpose of having a policy to follow at all. Between the investigatory leave period and the local appeals hearing, you failed to demonstrate introspection regarding your conduct. This negates any prospect of rehabilitation without unacceptable risk. The agency suffered yet more harm by having to post the position, recruit, and train a replacement. In the interim, the Director and another supervisor assumed your job duties which interfered with the daily business operations of the agency.

Harm to agency budget

. . . . As a result of the lack of cooperation and subsequent dismissal, the department was required to retain an attorney, incur legal expenses, hire and train a replacement for the position, and interrupt other personnel from their duties to be involved in the litigation process.

Detrimental to state service- social harm

[The Addendum cursorily characterizes Ayers's UPC as hate speech and offensive conduct detrimental to state services. DSS does not argue we should consider this 'social harm' in our just cause analysis.]

Potential harm

. . . . [T]he Director is accountable to the social services board, and is responsible and accountable for the actions, conduct and performance of departmental employees. . . . The [DSS] Board agrees with my decision to terminate your employment. Retaining your employment in any capacity within the department after using a racial epithet during the course of your governmental duties, would cause the board to doubt my ability to effectively administer our programming, personnel and distrust my decision making and judgement. This would adversely affect the relationship between the Director and the board and would damage the integrity they expect regarding the performance of my duties. . . .

As referenced, your conduct severely violated crucial polices [sic] and rules. An employee who cannot be trusted to follow rules when in the presence of the Social Services Director, cannot be trusted to follow rules when working independently. Your continued employment in any capacity would make the agency vulnerable to negligent retention and supervision which would subject the county to liability.[2] Additionally, your good faith and credibility could be of great concern, thereby damaging your testimony in the multiple cases in which you are required to testify. Continuing to entrust you with the oversight of child welfare cases, or any other matters within the agency knowing that you have demonstrated overt racism, bias and stereotyping in the course of your work, subjects the county to additional liability.

Your conduct violated the agency's compliance with the Civil Rights Act of 1964. The violation could potentially affect the agency's receipt of federal funding. Your actions would affect public trust, client confidence, and destroy the agency's credibility in the community if I simply ignored your remarks and returned you to any employment.

After conducting a thorough investigation and careful review of the totality of facts and circumstances, I affirm

2. We do not opine on Hurd's legal conclusions, except to the extent discussed in our analysis as necessary for our ultimate just cause conclusion.

> my decision to terminate your employment . . . for unacceptable personal conduct. I conclude you are unable to complete any of the above duties fairly or independently without total and continuous supervision. The need and frequency of total supervision required to continue your employment in a supervisory position or any other position within the department is an accommodation the department is unable to implement. There are no positions available within the department of social services that do not include interacting with and providing services to the public in a fair, non-biased manner. . . .

I. 31 January 2023 ALJ Decision

On 31 January 2023, the ALJ entered its *Amended Final Decision on Remand*, containing additional findings of fact and conclusions of law. The ALJ found the Addendum "unreasonable and [] most likely the result of [Hurd's] bias in favor of supporting and justifying her original action in dismissing Petitioner." She further found the Addendum's bases for actual harm "[were] all either descriptions of potential harm or resulted from [] Hurd's decision to dismiss Petitioner and were not caused by or the result of the incident itself" and that "Hurd's subjective opinion" "that Petitioner was not fit to be entrusted with her supervisory or other duties" was "unsubstantiated, speculative, [] unreasonable[,] not supported by a preponderance of the evidence[,] and [] contrary to other evidence in the record."

Determining "Petitioner's unacceptable conduct did not cause Respondent to experience any actual harm[,]" the ALJ concluded DSS lacked just cause to dismiss Ayers and retroactively reinstated Ayers with back pay and attorney fees, subject to a two-week suspension without pay and additional cultural diversity and racial sensitivity training.

DSS appeals, again arguing it had just cause to dismiss Ayers and challenging specific findings of fact and conclusions of law. On this appeal, DSS additionally requests we reverse the ALJ's award of attorneys' fees based on its view of the merits.

ANALYSIS

A. Standard of Review

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, 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 &*

Nat. Res. v. Carroll, 358 N.C. 649, 659 (2004); *see* N.C.G.S. § 150B-51(c) (2023). "Under the *de novo* standard of review, the [reviewing] court considers the matter anew and freely substitutes its own judgment for the agency's." *Wetherington II*, 270 N.C. App. at 172. In contrast, under the whole record test,

> [the reviewing court] may not substitute its judgment for the [ALJ's] as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the [ALJ's] findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the [ALJ's] decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.
>
> We undertake this review with a high degree of deference because it is well established that
>
> [i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, 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. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.

Harris, 252 N.C. App. at 100 (fifth, sixth, seventh, and eighth alterations in original) (marks and citation omitted); *see Carroll*, 358 N.C. at 674 ("[T]he 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.").

Thus, "we recognize the ALJ is the sole fact-finder, and the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility. As such, we defer to the ALJ's findings of fact, even if evidence was presented to support contrary findings." *Harris*, 252 N.C. App. at 108. We review the ALJ's findings of fact and conclusions of law based on their substance rather than their label. *See Watlington v. Dep't of Soc. Servs. of Rockingham Cnty.*, 261 N.C. App. 760, 768 (2018) (quoting *In re Simpson*, 211 N.C. App. 483, 487-88 (2011)) ("When this Court determines that findings of fact and conclusions of law have been

mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review."). "Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination made by logical reasoning from the evidentiary facts, however, is more properly classified a finding of fact." *Simpson*, 211 N.C. App. at 487 (marks and citation omitted).

The ALJ "need not recite all of the evidentiary facts but must find those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *See Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 350-51, *disc. rev. denied*, 370 N.C. 67 (2017); *see*, *e.g.*, *Ayers II*, 279 N.C. App. at 523-27 (remanding based on the lack of findings and evidence of the necessary resulting harm factor). An ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning. *In re G.C.*, 384 N.C. 62, 67 (2023). "A . . . finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the [tribunal's] ultimate finding." *State v. Fuller*, 376 N.C. 862, 864 (2021). Likewise, evidentiary facts are conclusive on appeal if supported by substantial evidence in the record or unchallenged by the parties. *In re Berman*, 245 N.C. 612, 616-17 (1957) ("The administrative findings of fact . . . if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope of its reviewing powers."); *Brewington*, 254 N.C. App. 1, 17 (2017), *disc. rev. denied*, 371 N.C. 343 (2018) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)) ("Where no exception is taken to a finding of fact . . ., the finding is presumed to be supported by competent evidence and is binding on appeal.").

We need not review every challenged finding of fact, only those necessary "to determine whether the ALJ properly ruled that [DSS] [failed to] establish[] by a preponderance of the evidence that [it] had just cause to terminate [Ayers's] employment[.]" *See Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 210, *disc. rev. denied*, 368 N.C. 919 (2016).

B. ALJ and Appellate Court Just Cause Review

State employees in North Carolina enjoy legislatively-enacted career protections. Among these is that no career State employee "shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35 (2023). "This Section establishes a condition precedent that must be fulfilled by the employer *before* disciplinary

actions are taken." *Brown v. Fayetteville State Univ.*, 269 N.C. App. 122, 130 (2020) (emphasis added) (marks omitted). This is true for every career State employee, and one's "position as a supervis[or] . . . does not lower the standard that must be met in order to justify his dismissal." *Whitehurst v. E. Carolina Univ.*, 257 N.C. App. 938, 948 (2018).

An employee who believes she was disciplined without just cause may pursue a grievance. Under the grievance procedure, she is entitled to an informal final agency decision that specifically sets forth the basis for her dismissal. N.C.G.S. § 126-34.01 (2023). She may appeal that decision to the OAH "as a contested case pursuant to the method provided in [N.C.G.S.] § 126-34.02" and N.C.G.S. § 150B-22 *et seq. Harris*, 252 N.C. App. at 98. On appeal to the OAH, the agency must show just cause by a preponderance of the evidence, N.C.G.S. § 150B-25.1(c) (2023),[3] and the "ALJ is free to substitute their judgment for that of the agency regarding the legal conclusion of whether just cause existed for the agency's action." *Harris*, 252 N.C. App. at 102. The ALJ enters a final decision, specifying findings of fact and conclusions of law, N.C.G.S. § 150B-34(a) (2023), and may reinstate the employee and award back pay and attorneys' fees as appropriate "without regard to the initial agency's determination." *Harris*, 252 N.C. App. at 102; *see* N.C.G.S. § 126-34.02(a), (e) (2023). A party may appeal the ALJ's final decision directly to this Court, N.C.G.S. §§ 7A-29(a), 126-34.02(a) (2023),[4] and we review the existence of just cause de novo. *Wetherington II*, 270 N.C. App. at 190.

Just cause may be based on either unsatisfactory job performance or UPC. 25 N.C.A.C. 1J.0604(b) (2023). DSS alleges Ayers's conduct met three grounds of UPC, as enumerated in the North Carolina Administrative Code:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .

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3. Specifically, the statute reads, "[t]he burden of showing by a preponderance of the evidence that a career State employee subject to Chapter 126 of the General Statutes was discharged, suspended, or demoted for just cause rests with the agency employer." N.C.G.S. § 150B-25.1(c) (2023). Despite the clarity of this language, DSS, at times, misapprehends the burden of proof, stating, "Respondent contends Petitioner failed to meet her burden of proving Respondent acted without 'just cause' in terminating her employment.

4. Previously appeal was to the Superior Court, as governed by N.C.G.S. § 150B-43. *See* N.C.G.S. § 126-37(b2) (2012). Hence, some cases refer to the reviewing court as the "trial court." *E.g.*, *Carroll*, 358 N.C. at 660 ("[T]he trial court applies the whole record test . . . .").

> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a [S]tate employee that is detrimental to [S]tate service . . . .

See 25 N.C.A.C. 1J.0614(8)(a), (d)-(e) (2023).

Whether an agency has just cause to discipline an employee based on UPC requires three inquiries:

> [t]he proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of [UPC] provided by the Administrative Code. [UPC] does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Warren I, 221 N.C. App. at 383. The ALJ concluded—and Ayers does not contest in this appeal—that Ayers's use of a racial epithet was UPC under all three of DSS's alleged examples under the North Carolina Administrative Code. *Ayers II*, 279 N.C. App. at 519. Accordingly, we consider the third inquiry: whether DSS has proven by the preponderance of the evidence that Ayers's UPC amounts to just cause to dismiss her. We conclude DSS did not meet its burden.

C. The Just Cause Framework

"Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*." *Warren I*, 221 N.C. App. at 378. "Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness[.]" *Carroll*, 358 N.C. at 669 (marks and citations omitted). "Inevitably, [the just cause] inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.* Rather, "public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct[.]" *Brewington*, 254 N.C. App. at 25 (characterizing this as the "primary holding" of *Wetherington I*, 368 N.C. at 593); *see also Warren I*, 221 N.C. App. at 382 ("[N]ot every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline.").

Accordingly, "[a] formulaic approach" "comparing the misconduct in this case to the misconduct in . . . cases in which our appellate courts have held just cause for dismissal existed . . . is unpersuasive, as just cause '. . . can only be determined upon an examination of the facts and circumstances of each individual case.' " *Watlington*, 261 N.C. App. at 770 (quoting *Carroll*, 358 N.C. at 669). However, we look to precedent to guide our application of the facts and circumstances of each individual case: consideration of "factors such as the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, [and] discipline imposed in other cases involving similar violations . . . is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct[,]" *Wetherington I*, 368 N.C. at 592, to "the extent there was any evidence to support them. [The disciplining agency] [can]not rely on one factor while ignoring the others." *Wetherington II*, 270 N.C. App. at 190. Where the agency ignores a required factor—or purports to consider it but actually applies a per se rule—we will not give the agency an additional "bite[] at the apple" to consider the factor, so long as the record permits our meaningful de novo review of the factor.[5] *Compare Wetherington II*, 270 N.C. App. at 191-201 (disallowing further discretionary factfinding despite the agency's failure to consider "severity of the violation," "resulting harm," and "discipline imposed in other cases involving similar violations" factors), *with Ayers II*, 279 N.C. App. at 523-27 (remanding based on our inability to meaningfully review the "resulting harm" factor).

In *Wetherington II*, we separately analyzed each of the five *Wetherington* factors. *Wetherington II*, 270 N.C. App. at 191-200. There, the petitioner,

> then a trooper with the North Carolina State Highway Patrol, misplaced his hat during a traffic stop; he then lied about how he lost his hat, which was later recovered, mostly intact. [The highway patrol] terminated [his] employment as a trooper based upon its "per se" rule that any untruthfulness by a state trooper is unacceptable personal conduct and just cause for dismissal.

Id. at 162. On the trooper's initial appeal, our Supreme Court held the patrol's "use of a rule requiring dismissal for all violations of the

5. In contrast, where an incomplete investigation frustrates our meaningful de novo review of a required factor, we remand for further investigation, as we did in DSS's prior appeal. *Ayers II*, 279 N.C. App. at 523-27.

[p]atrol's truthfulness policy was an error of law"[6] and remanded for the patrol to make a proper just cause analysis. *Wetherington I*, 368 N.C. at 593. On remand, the patrol affirmed its termination of the trooper. On appeal from that determination, we held the patrol's second consideration "was substantively no different" than its prior application of a per se rule and "conclude[d] as a matter of law, on *de novo* review, that [the trooper's] unacceptable personal conduct was not just cause for dismissal." *Wetherington II*, 270 N.C. App. at 163, 199.

Here, DSS likewise failed to undertake a proper just cause analysis initially. *Ayers II*, 279 N.C. App. at 523-25. On remand, DSS again considered the UNC School of Government twelve-factor test, *see id.* at 516-17, 524, but did so "along with the five *Wetherington* factors." Although *Wetherington I*'s recognition of the "flexible definition of just cause" and description of "factors *such as*" the five it explicitly addressed contemplates that additional factors may sometimes be relevant to just cause, *Wetherington I*, 368 N.C. at 591-92 (emphasis added) (marks omitted), DSS makes no argument that the twelve factors of the UNC School of Government were either appropriate or necessary to its analysis of just cause here. We believe the *Wetherington* factors are sufficient for us to analyze de novo whether Ayers's conduct constituted just cause for her termination, so we do not consider the twelve-factor test.

D. Analyzing the Just Cause Factors

Having discussed the just cause framework, we turn to whether DSS had just cause to dismiss Ayers. Before analyzing the appropriate and necessary factors, however, we address generally DSS's challenges to findings of fact. DSS purports[7] to challenge 39 of 139 findings of fact and 28 of 52 conclusions of law—several of which, in actuality, are findings of fact, *see Watlington*, 261 N.C. App. at 768—as unsupported by substantial evidence. These challenges, as well as DSS's discussion of resulting harm, frequently highlight how Hurd's version of the facts in DSS's Final Agency Decision Addendum differ from the ALJ's findings. This approach is unpersuasive because the ALJ "was not obligated to find facts based on" a party's "*own* view of the record," *Brewington*, 254

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6. Thus, the law is no longer—as DSS seeks to rely—that "[o]ne act of UPC presents 'just cause' for any discipline, up to and including dismissal." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597 (2005).

7. DSS does not specifically argue nine of these findings. *See Brewington*, 254 N.C. App. at 17 ("[B]ecause finding of fact 11 is the only finding that [the petitioner] challenges with a specific argument, issues concerning the remaining challenged findings have been abandoned.").

N.C. App. at 23, and because "we defer to the ALJ's findings of fact, *even if evidence was presented to support contrary findings*." *Harris*, 252 N.C. App. at 108 (emphasis added).

We turn to our just cause analysis and consider each of the "appropriate and necessary" factors in turn. *Wetherington I*, 368 N.C. at 592. In doing so, we address specific challenged findings of fact as necessary. *See Wetherington II*, 270 N.C. App. at 178 n. 8.

1. Severity of the Violation

We first address the severity of Ayers's UPC. Since our Administrative Code defines UPC flexibly such that "there is no bright line test to determine whether an employee's conduct establishes [UPC,]" *Carroll*, 358 N.C. at 675; *see* 25 N.C.A.C. 1J.0614(8) (2023), we cannot pragmatically assess Ayers's UPC against some baseline violation. *See Watlington*, 261 N.C. App. at 770 (marks omitted) ("[C]omparing the misconduct in this case to the misconduct in . . . cases in which our appellate courts have held just cause for dismissal existed . . . is unpersuasive, as just cause . . . can only be determined upon an examination of the facts and circumstances of each individual case."). Rather, for this factor, we examine the potential harmfulness and frequency of Ayers's UPC. *See id*. at 770-71 (considering potential harm and the frequency of the petitioner's misconduct, albeit without explicitly discussing the *Wetherington* factors); *accord Davis v. N.C. Dep't Health & Hum. Servs.*, 269 N.C. App. 109 (2019) (unpublished) ("[T]he potential for harm does speak to the severity of the violation.").

In *Wetherington II*, our severity analysis discussed the context and effects of the trooper's UPC in a manner that, at first, appears duplicative of the "subject matter involved" and "resulting harm" factors, but actually suggests a potential harm inquiry. We said that the trooper's "untruthful statement regarding losing his hat was not a severe violation of the truthfulness policy" because "[i]t did not occur in court and it did not affect any investigation, prosecution, or the function of the Highway Patrol"; rather, it "was about a matter . . . all parties concede was not very important." *Wetherington II*, 270 N.C. App. at 191. Thus, our discussion connected the lie's out-of-court context to its lack of effects on patrol's investigatory and prosecutorial functions. In this light, any apparent redundancy between this factor and "resulting harm" merely reflected that the particular circumstances created minimal, if any, potential harm.

In *Wetherington II*'s severity analysis, we further considered the isolated nature of the trooper's UPC. Specifically, the trooper's conduct was

not "an elaborate lie full of fabricated details" but rather contained only a singular fabricated detail: "the lie or 'untruth' lay only in the hat's location when [the trooper] misplaced it." *Wetherington II*, 270 N.C. App. at 191-92. Conversely, in *Watlington v. Department of Social Services of Rockingham County*, we considered that the frequency of the dismissed employee's UPC displayed a "repeated inclination" to engage in it. *Watlington*, 261 N.C. App. at 770-71 (considering the employee's five instances of exchanging gifts with social services clients).

Here, the ALJ concluded "[t]he preponderance of evidence proved there was only a minimal degree of potential risk that Petitioner's racial comment could or would have affected [] Respondent's integrity, employee morale, or provision of services." DSS points to several unavailing bases for potential harm. Primarily, it argues it has shown "widespread potential harm" in that its continued employment of Ayers would reflect poorly on Hurd's "credibility and trust" in the eyes of the county board of social services. *See* N.C.G.S. §§ 108A-1 to -11 (2023). DSS grounds this argument in the Addendum, but the ALJ made no findings of fact that reflect how Ayers's UPC could have affected Hurd's individual reputation in the eyes of the board. *See Harris*, 252 N.C. App. at 100. Regardless—as consistent with the ALJ's final decision—we do not see how an adverse reflection on Hurd's individual reputation, if any, based solely on Hurd's own assertions, created any potential to undermine the mission of DSS or is otherwise relevant to whether DSS had just cause to dismiss Ayers.

DSS further posits that "Petitioner's UPC exposed DSS to vulnerability for negligent retention and supervision liability" and "violated DSS's compliance with the Civil Rights Act of 1964[,]" *see* 42 U.S.C. § 2000d, *et seq.*, which "could jeopardize the receipt of federal funding." The ALJ found,

> 123. While [] Hurd and Respondent claim that Petitioner violated various policies that Respondent is required to follow, [] Hurd and Respondent failed to demonstrate how Petitioner violated any of these policies when she spontaneously uttered a racial slur in a vacant office to her supervisor. . . .

DSS argues this finding is contrary to several portions of the record: the policies themselves, Hurd's testimony, the Addendum, and Sutton's testimony. But none of this evidence demonstrates how DSS's usage of non-dismissal forms of discipline to address Ayers's UPC would have subjected the agency to tort liability or violated federal law.

Despite this lack of identifiable liability, Ayers's conduct carried a risk of significant potential harm, albeit a relatively low risk of that harm coming to pass. Ayers's use of a racial slur in an office, with the door open, created the possibility that her subordinate employees or a client in the building might have overheard the language. And the impact of such a slur having been heard was potentially great; Sutton testified that merely learning of Ayers's "inappropriate, disrespectful, and belittling" words *after-the-fact* adversely affected her professional relationship with Ayers, undermined Ayers's supervisory authority, and was inconsistent with DSS's core values. This conduct, if exposed to a subordinate or client, "would have affected [] Respondent's integrity, employee morale, [and the] provision of services," not only by virtue of the morale impact on any listeners who have been personally affected by the slur, but also by severely undermining confidence that DSS's employees were discharging their duties in a manner that upheld the dignitary equality of all persons, regardless of race.

However, our "severity of the violation" inquiry does not end there. While gravity of the harm, had it come to pass, speaks to the severity of the conduct, "that Petitioner's conduct . . . was an aberrant and unintended event" mitigates this severity. The ALJ found,

> 139. The preponderance of the evidence established that Petitioner's conduct on [3 November 2017] was an aberrant and unintended event. There was no evidence that Petitioner acted maliciously, with any racially-motivated reason or with any racially motivated intent to offend, harass, or belittle any given ethnicity, race, or anyone with whom she worked. Instead, the evidence proved that Petitioner's statement was a careless mistake and a "momentary lapse in judgment" by a highly effective and professional employee.

This finding is best characterized as an ultimate fact, and it is reasoned from ample evidentiary facts; in particular, those reflecting that Ayers has not otherwise made inappropriate remarks and expressed immediate and consistent embarrassment, regret, and remorse:

> 35. Petitioner immediately regretted her statement, told [] Hurd that she could not believe she had said that, and apologized to [] Hurd.
>
> . . . .
>
> 37. Shortly after Petitioner made the above-described statement, Petitioner and [] Hurd left the vacant office to

locate the file for the "F" family. On the way, Petitioner apologized to [] Hurd again and said something like, Please don't tell anyone about what I said, especially the first part. It's Friday." Petitioner made this request because she was embarrassed and surprised by what she had said.

. . . .

45. [After the 6 November 2017 pre-disciplinary conference], Petitioner apologized and told [] Hurd:

> It was [an] inappropriate comment . . . It was a guess. It was words [that] just came out of her mouth. I shocked myself. I apologize. I don't use these words in my personal life, my work life. I don't allow this in staffing. We were solving a 'word problem.' I apologize for me and to you. These comments were not to the family - I think not it means 'non-reported.' It was in a vacant office. It is inappropriate.

. . . .

60. At the 2018 Hearing, Petitioner admitted she "absolutely said something that's improper." "I'm still embarrassed by that." "I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional."

61. She "had never made an off-color remark like that before in her [[] Hurd's] presence or anyone else's presence, at work or even my personal life."

. . . .

114. . . . . The evidence at both the initial hearing and at the reconvened hearing showed without question that Petitioner was remorseful about making a racial comment during the [i]ncident, ... Respondent failed to present any credible evidence to rebut those facts.

. . . .

124. . . . A preponderance of the evidence showed that Petitioner demonstrated introspection regarding her conduct in the [i]ncident, both immediately following the [i]ncident, throughout the local administrative processes, during the 2018 Hearing, and during the 2022 Hearing.

. . . .

> 128. Despite the passage of over four and one-half years between the [i]ncident and the 2022 Hearing, Respondent presented no evidence of any form of unprofessional conduct by Petitioner in any setting other than during the [3 November 2017] [i]ncident.
>
> 129. Petitioner consistently expressed regret and embarrassment about the incident in her conversations with and written submissions to [] Hurd following the [i]ncident.
>
> 130. While testifying before the Undersigned on two separate occasions, several years apart, Petitioner has consistently demonstrated that she regrets and is embarrassed by her conduct from the [i]ncident.

In other words, although the harm itself *may* have been great under different circumstances, we cannot ignore the ALJ's findings that the circumstances themselves, including the time of day and volume of potential listeners in the building, created a low risk of such a harm actually coming to pass and were uncharacteristic of Ayers's past and future behavior relative to the incident.

DSS seeks to resist finding of fact 139 by challenging each of the above findings save for number 35. Specifically, DSS argues that Ayers has not been consistently remorseful. It acknowledges that several "findings imply Petitioner has in all ways been remorseful and taken responsibility for her egregious utterance" but adds that, "[n]otwithstanding the ALJ's discretion to [determine] matters of credibility, the record does not bear this out." However, several of the findings quoted above directly quote the evidence that "bears out" Ayers's remorse and acceptance of responsibility.

DSS also argues we cannot "ignore . . . DSS's repeated findings and conclusions made throughout DSS's investigation that Ayers showed no remorse and did not take responsibility." But it was the ALJ's prerogative to assess the credibility and weight of DSS's investigatory findings. *See Harris*, 252 N.C. App. at 100. Moreover, the ALJ found Ayers's statements during DSS's investigation were "reasonably attributable to Petitioner's concern that [] Hurd had already made her decision about the [i]ncident" and that, "if she provided any more testimony about the [i]ncident, [] Hurd would just 'pick it apart and . . . make a deal out of that too.' " We hold the ALJ's ultimate fact 139 is properly reasoned from evidentiary facts, which in turn are supported by substantial evidence in the record.

Accordingly, the ALJ's finding and conclusion that Ayers's UPC was "an aberrant and unintended event" rather than a pattern of misconduct mitigates the severity of Ayers's UPC. Nevertheless, we reiterate that Ayers's UPC carried a risk of significant potential harm.

2. Subject Matter Involved

Turning to the subject matter involved, DSS does not identify the subject matter, arguing only "[t]here is no dispute . . . that the subject matter is most serious." Ayers, meanwhile, identifies the subject matter as "improper language[.]" However, the subject matter is best identified as the meaning of "NR" in the race field on DSS's intake form.

In *Wetherington II*, we considered the subject matter to be, trivially, "the loss of the hat"; that is, the object of the trooper's lie and not dishonesty generally. *Wetherington II*, 270 N.C. App. at 192. Likewise, here, we consider the object of Ayers's racial slur. The ALJ found this was the meaning of "NR":

> 115. . . . Petitioner was only answering Hurd's question regarding what did the letters "NR" mean. Given those facts, there was no proof that Petitioner was referring to the specific family listed on the form when she blurted out her racial comment.

Again, pointing to the Addendum, DSS contends that Ayers intended her slur to describe the family listed on the DSS form. However, the ALJ credited Ayers's contrary testimony that she was not referencing the family but "trying to decipher the race code." Undeterred by this evidence, DSS makes a conclusory argument that, "Ayers'[s] own testimony on these issues does not and cannot amount to 'substantial evidence.' " But it is well established that "the probative value of particular testimony [is] for the [ALJ] to determine, and [the ALJ] may accept [or reject] . . . the testimony of any witness." *Harris*, 252 N.C. App. at 100 (second and third alterations in original).

Accepting finding of fact 115, this subject matter is not any person or family, mitigating its seriousness. However, we are also cognizant that, in light of the form's coding being used as a racial demarcation, the subject matter and decision to use the epithet carries an irretractable gravity, even when not referring to a particular person or family. Thus, the mitigation on this factor is, ultimately, only partial.

3. Resulting Harm

We proceed to "resulting harm." In *Ayers II*, we considered the factor as "harm to DSS" and held DSS had only considered "the *potential*

for harm to the reputation of, and workers at, DSS[.]" *Ayers II*, 279 N.C. App. at 525. Thus, we "remand[ed] to the ALJ with instructions to remand to DSS" to investigate resulting harm to DSS. *Id.* at 527. Unsurprisingly, on this appeal, the parties devote the bulk of their arguments to this factor and related factual issues.

DSS identifies several bases for resulting harm. Specifically, DSS points to the disruption caused by Ayers's mandated absence, legal fees incurred by DSS in defending Ayers's dismissal, harmful rumors of Ayers's UPC upon her absence, Ayers's frustration of policies, Hurd's diminished trust in Ayers, and Hurd's personal offense upon hearing Ayers's UPC. Although DSS contends that "[Hurd], within her discretion, determined that there was irreparable harm to DSS. . . . . [Her] determination that harm resulted was a sufficient exercise of that discretion[,]" an agency's discretion does not permit it to classify any and all harm as "resulting harm."[8] *See Wetherington II*, 270 N.C. App. at 194 (rejecting the highway patrol supervisor's discussion of potential harm as a basis for resulting harm). Thus, we do not defer to Hurd's determinations of harm but, rather, consider the ALJ's findings related to each of DSS's proposed bases of resulting harm.

The ALJ ultimately found each basis for resulting harm either resulted from the discipline itself or was not factually supported:

> 113. In the Final Agency Decision Addendum, [] Hurd characterized several matters as actual harm purportedly resulting from the [i]ncident. However, these matters are all either descriptions of potential harm or resulted from [] Hurd's decision to dismiss Petitioner and were not caused by or the result of the [i]ncident itself.
>
> . . . .
>
> 133. After conducting an investigation specifically to determine whether the agency suffered any actual harm resulting from the [i]ncident, [] Hurd was unable to show that the agency suffered any actual harm. However, [] Hurd tried to portray the potential for harm as actual harm even though much of the potential harm was speculative, based only on her subjective belief, or is contrary to or otherwise refuted by the passage of nearly five (5) years since [] Hurd dismissed Petitioner.

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8. In *Ayers II*, we rejected DSS's similar argument that its discretion permitted it to ignore the "resulting harm" factor entirely. *Ayers II*, 279 N.C. App. at 524-25.

We agree with the ALJ's legal conclusion that "potential harm [and matters] result[ing] from [] Hurd's decision to dismiss Petitioner" are not resulting harm. *See Wetherington I*, 368 N.C. at 592; *Wetherington II*, 270 N.C. App. at 194-95. Further, we consider the ALJ's findings and conclusions to the effect that DSS has not otherwise shown resulting harm are best classified as ultimate findings of fact. Thus, for each of DSS's bases, we inquire whether DSS may fairly characterize it as resulting harm; and, if so, we further consider whether the ALJ's ultimate finding that the basis lacks factual support was appropriately reasoned from evidentiary findings supported by substantial evidence.

a. Ayers's Absence and DSS's Legal Expenses

We have previously distinguished between resulting harm and mere potential harm. *E.g.*, *Wetherington II*, 270 N.C. App. at 194-95. This case requires us to further distinguish between the harm proximately resulting from the UPC and that resulting ipso facto from an agency's imposition of discipline. When an agency disciplines an employee for UPC, we inquire "whether *that misconduct* amounted to just cause for the disciplinary action taken." *Warren I*, 221 N.C. App. at 383 (emphasis added). Any harm resulting *from* the discipline had not yet resulted when the agency was required to determine whether just cause existed *for* the discipline.[9] *See Brown*, 269 N.C. App. at 128-32 (adopting the U.S. Supreme Court's reasoning that "after-acquired evidence . . . could not serve as a valid justification for upholding the employee's termination because the employer did not know [this evidence] until after she was discharged" and applying it to contested cases brought by career State employees).[10]

DSS's proposed bases for resulting harm illustrate this point. DSS argues Ayers's UPC "interrupted [Hurd's] normal duties and require[ed] others to pick up her workflow" and notes "[t]he [Final Agency Decision] Addendum also addressed the actual harm to DSS's budget[.]" However, it does not challenge that "any interruption of [] Hurd's duties, other staff's duties, or workflow at DSS was not due to the [i]ncident itself . . . [but rather] resulted from [] Hurd's decision to place Petitioner on leave and Petitioner's resulting absence from the agency after [] Hurd dismissed Petitioner."

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9. DSS argues that some harm—specifically employee resignations—might have resulted had it not terminated petitioner. We decline to speculate what harm would and would not have resulted had DSS opted for a non-dismissal form of discipline.

10. *Brown* further held "this type of evidence could be used to limit the employee's relief[,]" at least where the evidence creates an independent and lawful basis for the termination. *Brown*, 269 N.C. App. at 128. DSS does not ask us to limit Ayers's relief should we conclude it lacked just cause.

These bases seek to use of the fact of Ayers's dismissal to justify the dismissal, but "[f]airness and equity do not allow just cause for dismissal to be predicated upon" the dismissal itself. *Cf. Whitehurst*, 257 N.C. App. at 947 ("Fairness and equity do not allow just cause for dismissal to be predicated upon [the petitioner's] failure to respond appropriately to facts of which he had no knowledge."). Rather, this circularity "is functionally indistinguishable from [a rule of] 'per se' dismissal[.]" *Wetherington II*, 270 N.C. App. at 191. A contrary holding would place disciplined State employees in a Catch-22, as an exercise of their right to appeal, *see* N.C.G.S. §§ 126-34.01 to -.02 (2023), would subject the agency to legal expenses and potentially tip the scales in favor of just cause, even where none had existed prior.[11]

b. Rumors of Ayers's UPC

DSS also points to harm to Sutton upon learning of rumors of Ayers's UPC as a basis for resulting harm. Learning of Ayers's words "disappointed and shocked" Sutton, and she understandably considered them "inappropriate, disrespectful, and belittling." However, Sutton did not witness Ayers's UPC and only learned of it because of Ayers's absence from work after her dismissal. The dismissal itself required DSS have just cause. N.C.G.S. § 126-35 (2023). DSS could not have relied upon after-the-fact office gossip as potential harm—realized only *after* the dismissal—as "resulting harm" to show just cause *for* the dismissal. *Brown*, 269 N.C. App. at 128-32.[12]

c. Frustration of Policies

Another of DSS's bases for resulting harm is an even more naked application of a *per se* rule. DSS argues "[t]he Addendum addressed harm to the DSS's mission and work by frustrating the purpose of numerous policies[.]" Although Ayers's policy violation was certainly relevant

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11. Such a result could raise due process implications as well. *Brewington*, 254 N.C. App. at 27-28 ("It is well established that career State employees enjoy a property interest in continued employment. This property interest is created by state law, N.C.[G.S.] § 126-35(a), and is guaranteed by the Due Process Clauses of the Fifth and the Fourteenth Amendments to the United States Constitution.").

12. DSS fairly notes, "[r]egardless of when or how she learned of the conduct, Sutton was harmed." Consistent with the "flexible concept" of just cause, *Carroll*, 358 N.C. at 669, we do not ignore this but have more appropriately considered it as potential harm—not-yet realized when DSS imposed discipline.

DSS also notes, "[i]t is likely that in many situations, properly investigating the use of racial slurs to a supervisor, will necessarily result in harm to colleagues who learn of the slurs. As such, Ayers'[s] use of the slurs, even though it was a single incident and even though she had little prior discipline, [or, more accurately, no prior discipline,] constitutes

to whether Ayers's conduct constituted UPC, Ayers does not contest that prong of *Warren*. Rather, at this prong, we consider whether *this particular* "frustrati[on] of the purpose" of a policy "amounted to just cause for the disciplinary action taken." *Warren I*, 221 N.C. App. at 383. Restating the fact of the UPC does not advance this inquiry. Further, although Hurd testified that "a supervisor who disregards policy is harmful because supervisors are intended to be leaders" at DSS and it is "important that they demonstrate compliance with those policies personally[,]" Ayers's position as supervisor or leader "does not lower the standard that must be met in order to justify [her] dismissal." *See Whitehurst*, 257 N.C. App. at 948.

d. Hurd's Diminished Trust in Ayers

DSS's remaining bases for resulting harm lack factual support. DSS argues it showed harm to Hurd in that "Petitioner's UPC justifiably obliterated [Hurd's] trust in Petitioner's judgment, . . . [and] there was simply no way Petitioner could function autonomously without total supervision or eliminate the risk of another abhorrent racial outburst." Although this reads more like potential harm, it is relevant to just cause regardless (to the extent it is supported in fact) and we address it here.

In *Wetherington II*, we held a supervisor's unreasonable belief that an employee would repeat his UPC if permitted to remain in his position is not a proper basis for resulting harm. There, the trooper's supervisor claimed in his dismissal letter to the trooper that

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good cause for dismissal." DSS, elsewhere, argues, "[it] cannot possibly be the law of North Carolina" that "[Hurd] was required to ask other social workers whether they also heard the racial slurs" because such an investigation "would necessarily be causing additional harm to the agency by spreading the vile racist slurs throughout the agency[.]"

Whether DSS considers such a holding possible or not, we held DSS was required to conduct a complete investigation, sufficient for the ALJ to make findings of fact regarding resulting harm, including discerning "whether anyone else heard such statement[.]" *Ayers II*, 279 N.C. App. at 526 (emphasis omitted). To consider harm caused by or "spread" by an investigation as "resulting harm" would tie the level of resulting harm to the thoroughness of an agency's investigation therein. This would create tension between just cause's "notions of equity and fairness" and an agency's discretion over how to conduct its investigation. *See Brewington*, 254 N.C. App. at 14, 25.

We are mindful that, if mere knowledge of an employee's UPC would create harm, and if the very act of investigating UPC spreads knowledge of the UPC, it could be unavoidable for an agency to investigate just cause without spreading harm. If and when such cases arise, we trust agencies will exercise their discretion over their investigations in a manner to minimize that harm. We note, for example, that Hurd's transcribed interview of Sutton in this case utilized open-ended questioning that did not require Hurd to repeat Ayers's words, not even in redacted fashion.

> I have no confidence that you can be trusted to be truthful to your supervisors or even to testify truthfully in court or at administrative hearings. . . . [Y]our ability to perform the essential job functions of a Trooper is reparably limited due to the Highway Patrol's duty to disclose details of the internal investigation to prosecutors[.] . . . If you were to return to duty with the Highway Patrol I could not, in good conscience, assign you to any position . . . within the Highway Patrol . . ., any assignment would compromise the integrity of the Highway Patrol and the ability of the State to put on credible evidence to prosecute its cases.

Wetherington II, 270 N.C. App. at 165. But while "[i]t [was] easy to understand the resulting harm to the agency from a trooper's intentional lie about substantive facts in sworn testimony or in the course of his official duties[,]" the trooper had made no lie of that sort, and the highway patrol "ha[d] never been able to articulate how *this particular lie* was so harmful." *Id.* at 195 (emphasis added). Rather, the highway patrol's analysis was "substantively no different" than a per se rule because any "sort of untruthfulness, in any context" would have permitted dismissal under the highway patrol's reasoning. *Id.* at 195, 199.

Under *Wetherington II*, Hurd and DSS could not reasonably presume Ayers's one instance of UPC meant she would have a future "racial outburst" in the manner that the highway patrol assumed the trooper's single lie meant he would have perjured himself given the opportunity; they needed some reasonable ground for the belief. As DSS notes, Hurd was simultaneously the sole witness, "principal investigator," and administer of discipline, making this basis for harm wholly dependent on the reasonableness of her individual belief. However, the ALJ found this belief to be unreasonable:

> 114. [] Hurd subjectively believed that Petitioner was not fit to be entrusted with her supervisory or other duties for Currituck DSS and claimed this belief constituted "harm" resulting from the [i]ncident. However, Hurd's subjective belief was unsubstantiated, speculative, and unreasonable. [] Hurd's subjective opinion on these matters was not supported by a preponderance of the evidence and was contrary to other evidence in the record. The evidence at both the initial hearing and at the reconvened hearing showed without question that Petitioner was remorseful about making a racial comment during the [i]ncident, that Petitioner's comment was uncharacteristic of her, and

> that there was no reasonable expectation or likelihood that Petitioner would repeat such comment. Respondent failed to present any credible evidence to rebut those facts.

On the other hand, the ALJ expressly found, based on supporting evidence on the record, "Hurd's decision to dismiss Petitioner from employment was influenced by [] Hurd's past philosophical differences with Petitioner and their past history."

These findings were amply reasoned from unchallenged findings of fact that reflect the "friction[,]" and "difficult but professional relationship[,]" and "significant philosophical differences" between Hurd and Ayers. Indeed, DSS admits that Hurd relied, in part, on these "prior difficulties" to determine "there was irreparable harm to DSS[.]" Further, Romm—the former DSS director over both employees—"did not think [Ayers's] conduct on [3 November 2017] was typical or characteristic of [her] behavior" and had no "doubts or concerns about [her] fitness to be a supervisor at [] DSS[,]" despite her UPC.

DSS further challenges finding of fact 114 based on its opinions that Ayers was not remorseful and had a "racist upbringing[.]" But the ALJ's findings reflect neither of these, and any evidence in support of its opinions does not preclude the ALJ's findings to the contrary. *See Harris*, 252 N.C. App. at 108.

e. Hurd's Personal Offense

DSS's last basis of resulting harm is that "[h]earing the statement harmed [Hurd's] morale, who considered it highly offensive, vulgar, crude, and discriminatory." The ALJ found "Respondent presented no evidence . . . that Petitioner's comment during the [3 November 2017] [i]ncident affected . . . the morale of any DSS employees . . . . [T]he [i]ncident did not affect . . . the morale of any employee[.]" Citing a portion of Hurd's 2018 testimony, DSS argues "[i]t is not true there was no evidence of it negatively impacting the morale of any DSS employee . . . Hurd is an employee[] . . . [and] testified to the unsettling effect this had on her." However, "the probative value of particular testimony [is] for the [ALJ] to determine," *id.* at 100 (second alteration in original), and we have, in *Ayers II*, already considered the effect of this testimony and held Hurd's consideration that she "thought [Ayers's UPC] was extremely offensive and inflammatory" was not consideration of resulting harm. *Ayers II*, 279 N.C. App. at 525. We may not revisit our conclusion that Hurd's personal offense was not resulting harm to DSS. *Wetherington II*, 270 N.C. App. at 172-73 ("According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law

of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal.").

Having considered each of DSS's proposed bases for resulting harm, we hold the ALJ's ultimate findings that DSS has not shown resulting harm are properly reasoned from evidentiary facts supported by substantial evidence in the record. The facts, as the ALJ found based on substantial evidence, do not show that Ayers's UPC had caused any resulting harm to DSS, its reputation, its employees, or its ability to provide services to the public at the time DSS dismissed Ayers. This factor weighs against the existence of just cause to dismiss Ayers.

4. Ayers's Work History

Having discussed at length the "resulting harm" factor, we turn to Ayers's work history. Analyzing this factor in *Whitehurst v. East Carolina University*, we considered both the dismissed employee's performance reviews and her disciplinary history. *Whitehurst*, 257 N.C. App. at 938.

DSS does not challenge the ALJ's findings related to Ayers's work history:

> 10. From 2011 through 2017, [] Romm conducted the annual evaluations of Petitioner.[] Romm consistently rated Petitioner as "substantially exceeded" expectations in all areas and rated Petitioner's performance as "Excellent" in all areas. An "Excellent" rating was the highest possible evaluation rating an employee can receive in a performance evaluation.
>
> 11. [] Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance.
>
> 12. Until her dismissal, Petitioner had not received any prior disciplinary action during her employment with Respondent.
>
> . . . .
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> 132. In the [8 November 2017] termination letter and the [21 November 2017] Final Agency Decision, [] Hurd referenced a [21 July 2017] conversation with Petitioner to show she had placed Petitioner on prior notice that Petitioner's conduct towards [] Hurd was inappropriate and unprofessional. However, the preponderance of the evidence showed that [] Hurd actually relied upon

> the [21 July 2017] conversation to show support for, and further justify, her decision to dismiss Petitioner even though she never documented her [21 July 2017] conversation with Petitioner as a disciplinary action. . . . Hurd never issued any disciplinary action to Petitioner for prior job performance or conduct deficiencies. [] Hurd never documented the [21 July 2017] matter in writing or as a disciplinary action. There was no evidence [] Hurd documented "many discussions" with Petitioner about any prior unacceptable conduct.

DSS does not argue we should consider the 21 July 2017 conversation and concedes Ayers's work history is "mitigation[.]" As Ayers received consistently excellent performance reviews and had no prior disciplinary actions, "[t]his factor could only favor some disciplinary action short of termination." *Wetherington II*, 270 N.C. App. at 196.

5. Discipline Imposed in Other Cases Involving Similar Violations

We now turn to the final *Wetherington* factor. DSS argues "[t]he ALJ's reliance on the lack of prior DSS discipline for similar conduct is misleading as no employee had ever used a racial epithet at work before." To the extent the ALJ considered that DSS permitted employees to use non-racial profanity in the workplace, we agree with DSS that this was error. However, this does not end our inquiry into this factor.

Consistent with just cause's "notions of equity and fairness[,]" *Carroll*, 358 N.C. at 669, we have characterized this factor as whether "this dismissal was based upon disparate treatment[.]" *Wetherington II*, 270 N.C. App. at 198-99. "Similar violations" are not limited to factually similar UPC; rather, the similar violations only need "some relevant denominator . . . for comparison." *Id.* at 199. "Although there is no particular time period set for this factor, [there is] no legal basis for relying only upon disciplinary actions during a particular [director's] tenure." *Id.*

In *Warren*'s second trip to this Court, we considered a State employee's dismissal for a violation of his agency-employer's policy against unbecoming personal conduct by driving his patrol vehicle while off duty and with an open bottle of liquor in the trunk. *Warren v. N.C. Dep't of Crime Control & Pub. Safety* ("*Warren II*"), 267 N.C. App. 503, 506-10 (2019). Under the first two prongs, we held the employee violated the policy and that the violation was UPC. *Id.* at 506-08. But, at the third prong, we held there was no just cause for the employee's termination, in part because

> the disciplinary actions [the] respondent has taken for unbecoming conduct typically resulted in either: a temporary suspension without pay, a reduction in pay, or a demotion of title. In fact, where the conduct was equally or more egregious than that of petitioner (i.e., threats to kill another person, sexual harassment, assault), the employee was generally subjected to disciplinary measures other than termination.

Id. at 509.

Here, DSS does not challenge the ALJ's findings that

> 21. During Romm's nineteen years as Director of Currituck DSS, Romm dismissed three individuals for engaging in unacceptable personal conduct. Each of these employees had engaged in either a pattern or a series of unacceptable personal conduct repeatedly over a period of time. One employee lied to Romm for months regarding an unauthorized destruction of case records. A second employee refused to perform a core duty of her position. [] Romm fired that employee when the employee failed to perform a second core duty involving the safety of children and after the supervisor advised the employee of the serious consequences that could result from her continued refusal to perform her duties. A third employee falsely reported, written and verbally, the status of cases over several months.
>
> 22. [] Ro[m]m never terminated anyone for unacceptable personal conduct based solely on a one-time incident. She never terminated anyone for unacceptable personal conduct based on something the employee said in a private conversation.
>
> . . . .
>
> [Conclusion of law] 46. In this case, it was undisputed that neither [] Hurd nor [] Romm had encountered a similar conduct violation at Currituck DSS in the past. Neither [] Hurd nor [] Romm had dismissed any employee based on a single incident of misconduct in the past. In fact, prior disciplinary practices at Respondent demonstrated that dismissal was not ordinarily imposed for a single act of misconduct, and generally an employee would only be

> dismissed following a warning and repetition of some act of misconduct.

While we do not compare for all purposes the relative egregiousness of Ayers's use of a racial slur to previously dismissed DSS employees' dishonesty and dereliction of job duties, we conclude these prior instances of UPC establish the "relevant denominator[.]" *Wetherington II*, 270 N.C. App. at 199. DSS has not historically imposed dismissal as the discipline for an employee's first instance of UPC. Since Ayers's dismissal for a single instance of UPC is contrary to DSS historical practice, this factor weighs against the existence of just cause to dismiss Ayers.

E. Balancing the Equities

Having analyzed each of the *Wetherington* factors, we reach the "irreducible act of judgment[,]" *Carroll*, 358 N.C. at 669, of whether DSS had just cause to dismiss Ayers.

DSS implores us to accord deference to its determination of just cause. Specifically, it argues Hurd "was best positioned to determine the impact of Petitioner's misconduct" based on her education and training, as well as in that "[s]he is of long tenure in that DSS and was selected by her predecessor for her integrity and judgment[.]" It further argues, "[a]s the supervisor, witness to the slurs, and principal investigator, [Hurd] had to rely on her judgement [sic] and discretion in determining whether harm was caused. The ALJ failed to give her sufficient deference in the challenged Conclusions of Law." However, "[the ALJ] . . . owe[d] no deference to [Hurd's] conclusion of law that [] just cause existed" and was "free to substitute [her] judgment for that of [Hurd] regarding the legal conclusion of whether just cause existed for [DSS's] action." *Harris*, 252 N.C. App. at 102.

We likewise review the ALJ's legal conclusion de novo. *See*, *e.g.*, *Wetherington II*, 270 N.C. App. at 190. There is no "formulaic approach" for this determination. *See Watlington*, 261 N.C. at 770. Although not every *Wetherington* factor must favor the existence of just cause for it to exist,[13] *e.g.*, *id.* at 770-72 (determining just cause existed despite a lack of resulting harm), we may not ignore the absence of factors. *See Wetherington II*, 270 N.C. App. at 190 ("[The disciplining agency] could not rely on one factor while ignoring the others.").

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13. Thus, DSS is correct when it argues "actual harm is not necessary to support a decision to terminate under the law."

We hold DSS failed to meet and carry its burden of proving it had just cause to dismiss Ayers for her UPC. In doing so, we do not "compar[e] the misconduct in this case to the misconduct in . . . cases in which our appellate courts have held just cause for dismissal existed" or did not exist, *Watlington*, 261 N.C. at 770, but hold only "upon an examination of the facts and circumstances of [this] individual case[,]" as found by the ALJ and supported by substantial evidence. *Carroll*, 358 N.C. at 669. Ayers's use of a racial slur in the workplace, even when not directed at a particular person and seemingly without the intent to convey racial animosity, was a severely unprofessional and insensitive choice. But the ALJ did not, and we cannot, ignore the considerable circumstances in mitigation: Ayers immediately and consistently recognized and regretted the wrongfulness of her conduct, DSS has not shown any harm had resulted by the time it terminated Ayers, Ayers had an otherwise unblemished employment history, and DSS has not historically dismissed employes for a single instance of UPC. In other words, despite the severity and seriousness, DSS has not established why appropriately addressing Ayers's UPC required it to deviate from its historical disciplinary practices where Ayers's UPC was an aberrant incident for which she readily accepted responsibility and felt remorse, especially where no actual harm resulted.

To conclude our just cause analysis, we address one more argument from DSS. It argues that

> to suggest that an agency tasked with protecting minority children is not harmed when a State employee says the N-word to her supervisor when trying to determine the race [of] a family receiving critical services[] is disingenuous to the equal rights movement and jurisprudence. Discipline amounting to nothing more than a slap on the wrist is a slap in the face to that policy and to all people receiving services therefrom. This [C]ourt should not cosign such inexplicable leniency and should instead draw a judicial line in the sand about what is and what is not appropriate within our governmental agencies.

Reasonable people can disagree about whether "the equal rights movement and jurisprudence" is best served by DSS's desired zero-tolerance policy[14] or one that offers those who engage in UPC an opportunity to learn from their mistakes and earn a second chance. But any "judicial

14. DSS acknowledges that "Hurd, by her actions, was setting 'a very strong zero tolerance standard[.]' "

line in the sand" has already been drawn on the far side of DSS's preferred option: "the better practice, in keeping with the mandates of both Chapter 126 and our precedents, [is] to allow for *a range of disciplinary actions* in response to an individual act of [UPC], rather than the categorical approach" that DSS sought to employ. *Wetherington I*, 368 N.C. at 593 (emphasis added). Since DSS has not shown just cause to dismiss Ayers for this individual act of UPC, its disciplinary action must fall elsewhere on this range.

F. ALJ's Alternative Discipline

We briefly mention the ALJ's alternative discipline.

> Under [N.C.G.S. § 126-34.02(a)(3)], the ALJ has express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's *de novo* review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief."
>
> Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and "balanc[es] the equities," the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions.

Harris, 252 N.C. App. at 109 (second, third, and fourth alterations in original); *see* N.C.G.S. § 126-34.02(a)(3) (2023).

Here, the ALJ ordered DSS to "retroactively reinstate Petitioner to the same or similar position she held prior to her dismissal with full back pay, suspend Petitioner for two weeks without pay, and order Petitioner to attend additional cultural diversity and racial sensitivity . . . training." Ayers does not contest that DSS had just cause to impose this form of discipline, and DSS does not argue it had just cause for discipline less than dismissal but greater than this alternative. Thus, the adequacy of this discipline is not before us, and we express no opinion on it.

G. Attorney Fees

We do not reach DSS's attorney fees argument. Pursuant to its authority, the ALJ ordered DSS to reimburse Ayers the cost of reasonable attorney fees. *See* N.C.G.S. § 126-34.02(e) (2023) ("The Office of Administrative Hearings may award attorneys' fees to an employee where reinstatement or back pay is ordered[.]"); *see generally Rouse v. Forsyth Cnty. Dep't of Soc. Servs.*, 373 N.C. 400 (2020); *see also Hunt v. N.C. Dep't of Pub. Safety*, 266 N.C. App. 24, 32, *disc. rev. denied*, 373 N.C. 60 (2019) ("A[n] [ALJ's] decision to grant attorneys' fees is discretionary."). DSS argues only that we should reverse the ALJ's award of attorney fees based on the merits. Since we uphold the ALJ's decision that Ayers prevails on the merits, we do not reach this argument. *Id.*

CONCLUSION

Reviewing de novo, based on the individual facts and circumstances of this case as reflected in the ALJ's findings of fact supported by substantial evidence, we conclude DSS failed to meet and carry its burden of proving it acted with just cause to dismiss Ayers. We affirm the ALJ's final decision.

AFFIRMED.

Judge TYSON concurs in result only.

Judge COLLINS dissents by separate opinion.

COLLINS, Judge, dissenting.

Petitioner was the supervisor for the Child Protective Services Unit at the Currituck County Department of Social Services ("DSS"). When responding to an inquiry from her supervisor, the DSS Director, as to what the racial demarcation "NR" meant on an intake form that had been completed by a social worker, Petitioner responded either "nigra rican" or "nigger rican." Petitioner initially laughed about the comment but became apologetic and embarrassed soon afterward. The sole issue before this Court is whether Petitioner's unacceptable personal conduct amounted to just cause for her dismissal. Because I believe Petitioner's unacceptable personal conduct was just cause for dismissal, I dissent from the majority opinion.

This Court has articulated a three-part analytical approach to determine whether just cause exists to support a disciplinary action against a career State employee for alleged unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012).

Here, there is no question that Petitioner engaged in the misconduct DSS alleged and that Petitioner's misconduct falls within one of the categories of unacceptable personal conduct. The only issue is whether that unacceptable personal conduct amounted to just cause for her dismissal.

"Just cause must be determined based upon an examination of the facts and circumstances of each individual case." *Wetherington v. N.C. Dep't of Pub. Safety*, 270 N.C. App. 161, 193, 840 S.E.2d 812, 834 (2020) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)). In examining the facts and circumstances of each individual case, an "appropriate and necessary component" of a decision to impose discipline on a career State employee is the consideration of certain factors, including: "the severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

Taking the first two factors together, the violation is severe precisely because of the subject matter involved. "Far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African-Americans. 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' . . . ." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)); *see Granger*

v. Univ. of N.C. at Chapel Hill, 197 N.C. App. 699, 706, 678 S.E.2d 715, 719 (2009) (quoting *Spriggs)*.

Furthermore, the harm, both resulting[1] and potential, was significant. Petitioner's conduct eroded the Director's trust in Petitioner's motives and judgment. Petitioner's conduct also negatively affected her African-American co-worker's ability to trust Petitioner's judgment and accept guidance from Petitioner. Moreover, DSS has policies prohibiting individuals from using demeaning or inappropriate terms or epithets and telling off-color jokes concerning race. DSS has a duty to enforce these policies, and to further its stated goal of supporting parents by respecting each family's cultural, racial, ethnic, and religious heritage in their interactions with the family and the mutual establishment of goals. Finally, Petitioner's unacceptable personal conduct exposed DSS to vulnerability for negligent retention and supervision liability and violated DSS's compliance with the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000d, *et seq.*, which could jeopardize its receipt of federal funding.

There was no evidence in this case of discipline imposed in other cases involving similar violations in this or similar DSS offices. Thus, the fourth factor need not be considered. *See Wetherington*, 270 N.C. App. at 189-90, 840 S.E.2d at 831 (courts must consider "any factors for which evidence is presented"). Nonetheless, this case is similar to *Granger*, wherein an employee was dismissed for uttering a racial slur to a subordinate. 197 N.C. App. at 706-07, 678 S.E.2d at 719-20 ("By uttering this epithet in the workplace, where Petitioner was overheard by one of her subordinates, Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability.").

Although this appears to have been an isolated incident by Petitioner, a single act of unacceptable personal conduct can present just cause for any discipline, up to and including dismissal. *See Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17 ("One act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." (citations omitted)). When the facts and circumstances are considered together, I believe Petitioner's unacceptable personal conduct was just

1. "No showing of actual harm is required to satisfy definition (5) of [unacceptable personal conduct], only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (citing *Eury v. Emp't Sec. Comm'n*, 115 N.C. App. 590, 610-11, 446 S.E.2d 383, 395-96, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). The ALJ's conclusion in this case that Petitioner's unacceptable personal misconduct did not cause Respondent actual harm as a basis for concluding there was no just cause to dismiss Petitioner is thus erroneous.

cause for Petitioner's dismissal. I would thus reverse the ALJ's decision to award reinstatement and attorney's fees and affirm DSS's decision to terminate Petitioner.

DAN KING PLUMBING HEATING & AIR, LLC, PLAINTIFF
v.
AVONZO HARRISON, DEFENDANT

No. COA23-752

Filed 2 April 2024

1. Judges—trial judge—hearing on motion before judge's term ended—no written order—trial court's discretion to appoint new judge

In a legal dispute arising from the plumbing and HVAC installation services that plaintiff business provided for defendant customer, where the appellate court in a prior appeal remanded the case to the trial court for further fact-finding, and where the original trial judge subsequently held a hearing on plaintiff's motion to amend the judgment in the matter (filed after the appellate court entered its opinion but before the trial court reheard the case on remand) just before the judge's term ended, although the judge stated at the hearing how she would have ruled on plaintiff's motion, there was no evidence in the record that the judge had prepared a written order that was ready to be signed upon her term's expiration. Therefore, the trial court was entitled to exercise its discretion to appoint a new trial judge to hold a new hearing and enter a written ruling on the unresolved motion.

2. Courts—trial court—interpretation of instructions for remand—discretion to order new trial on specific issues

In a legal dispute arising from the plumbing and HVAC installation services that plaintiff business provided for defendant customer, where defendant counterclaimed that plaintiff engaged in unfair and deceptive trade practices (UDTP) by selling him duplicate warranties, and where the appellate court in a prior appeal remanded the matter for "further fact-finding" on defendant's UDTP claim (and, specifically, on the issue of whether defendant could have discovered the duplicate warranties through reasonable diligence), the trial court did not abuse its discretion on remand by ordering a new trial on the UDTP claim. The appellate court's instructions could not

have been a directive for the trial court to make new findings without a new trial, since the appellate court emphasized that there were no jury findings made and no evidence presented on the reasonable diligence issue in the first trial. Additionally, where defendant had also counterclaimed for breach of contract under three theories, and where the appellate court explicitly remanded for a new trial on defendant's breach of contract claim under one theory only (failure to perform in a workmanlike manner), the trial court did not abuse its discretion by complying with the appellate court's order because trial courts may in their discretion order a partial new trial on just one issue or part of a claim.

Appeal by plaintiff from an order entered 25 April 2023 by Judge Matt Newton in Mecklenburg County District Court. Heard in the Court of Appeals 24 January 2024.

Hull & Chandler, P.A., by Nathan M. Hull, for Plaintiff-appellant.

Devore, Acton, & Stafford, P.A., by Joseph R. Pellington, for Defendant-appellee.

WOOD, Judge.

On 18 January 2022, this Court rendered an opinion on issues arising from these parties' dispute pertaining to plumbing services rendered by Dan King ("Plaintiff") for Avonzo Harrison ("Defendant"). *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 281 N.C. App. 312, 869 S.E.2d 34 (2022) ("*Dan King Plumbing I*"). Plaintiff contends the trial court erred in its interpretation of this Court's remand orders in *Dan King Plumbing I*. For the reasons stated below, we affirm the trial court's order.

I. Factual and Procedural History

The source of the parties' dispute is Plaintiff's installation of an HVAC system in Defendant's home. Plaintiff began work in November 2017, and the plumbing work was completed and passed final inspection on 4 December 2017. *Dan King Plumbing I*, 281 N.C. App. at 314–15, 869 S.E.2d at 39–40. In August 2018, Plaintiff filed a small claims action against Defendant for monies owed for services Plaintiff rendered. *Id.* at 317, 869 S.E.2d at 41. A magistrate dismissed the action, and Plaintiff appealed to the district court. In November 2018, Defendant filed a counterclaim against Plaintiff, "alleging various misrepresentations and

contractual breaches." *Id.* at 318, 869 S.E.2d at 41. In an amended counterclaim, Defendant added claims for breach of contract, unfair and deceptive trade practices, fraud, and breach of the implied warranty of workmanship. Ultimately, the case proceeded to trial with Judge Paulina Havelka ("Judge Havelka") presiding, after which a "jury returned a verdict in favor of Defendant on all breach of contract claims and findings of fact concerning the UDTP [unfair and deceptive trade practices] claims. The jury awarded Defendant damages in the amount of $15,572 for the breach of contract and $15,000 for injuries associated with the UDTP claims." *Id.* at 318, 869 S.E.2d at 42.

After trial, in February 2020, Judge Havelka held an additional hearing "to determine whether the facts found by the jury amounted to UDTP as a matter of law." *Id.* On 11 March 2020, Judge Havelka entered a "written judgment in favor of Defendant, awarding him damages of $15,572 plus interest on the breach of contract claims . . . . The judgment noted that none of the jury's findings amounted to unfair or deceptive trade practices[ ] and dismissed all of the parties' remaining claims with prejudice." *Id.* at 319, 869 S.E.2d at 42. Both parties appealed.

In adjudicating the parties' appeal, this Court first determined whether the jury's findings amounted to UDTP, which Defendant argued Plaintiff committed "in three respects: (1) by superimposing Mr. Harrison's signature on the amended contract; (2) by selling him duplicate warranties [the "duplicate warranties claim"]; and (3) by misrepresenting the completeness of the work via the installation checklist." *Id.* at 319–21, 869 S.E.2d at 42–43. Specifically, this Court "examine[d] two corollary doctrines under our UDTP caselaw—the 'aggravating circumstances' doctrine, and the 'reliance' doctrine." *Id.* at 319–20, 869 S.E.2d at 42. This Court affirmed Judge Havelka's rulings as to the superimposition of Defendant's signature and the installation checklist—that neither allegation of misconduct constituted a UDTP claim. *Id.* at 324, 328, 869 S.E.2d at 45, 48. As for the sale of duplicate warranties, this Court first held "the aggravating circumstances doctrine is not triggered." *Id.* at 325, 869 S.E.2d at 46. Second, this Court applied the reliance doctrine to the claim, examining whether Defendant's reliance on Plaintiff's misrepresentation was reasonable. *Id.* This Court held:

> [*W*]*e are unable to determine based on the record* whether Defendant would have discovered the existence of the duplicate warranties through reasonable diligence at the time of the original contract, and *we do not have the benefit of any jury findings on this issue*. During trial, *no evidence* was presented regarding whether the existence

> of HVAC manufacturer warranties is considered "common knowledge" (especially to a layperson); *no evidence* was presented regarding how it was that Defendant ultimately came to discover the existence of the manufacturer warranties; and *no evidence* was presented regarding whether it was a common practice in the HVAC industry to sell parts warranties for products that were already covered by a manufacturer warranty.

Id. at 326, 869 S.E.2d at 47 (emphasis added). Ultimately, this Court held Judge Havelka erred in her determination that Defendant's duplicate warranties claim failed as a matter of law and therefore "remand[ed] for further fact-finding on the issue of Defendant's reasonable diligence in discovering the existence and coverage of the duplicate warranties." *Id.* at 327, 869 S.E.2d at 47.

In *Dan King Plumbing I*, this Court also addressed Plaintiff's argument "that the trial court erred in failing to grant a directed verdict on Defendant's breach of contract claims." *Id.* at 331, 869 S.E.2d at 50. This Court clarified Defendant's position that Plaintiff "committed a breach of contract in three main respects: (1) by installing different equipment than was originally called for (such as the water heaters); (2) by charging a higher price than was originally called for; and (3) by performing substandard work, such as on the re-piping and insulation projects" (the "workmanship claim"). *Id.* Plaintiff argued that "in order to bring a proper claim for failure to construct in a workmanlike manner, [Defendant] must put on expert testimony to establish the relevant standard of care." *Id.* at 332, 869 S.E.2d at 50. This Court agreed with Plaintiff, stating, "at least some expert evidence must be presented to sustain a claim such as this." *Id.* at 332, 869 S.E.2d at 51. This Court noted that at trial, "Defendant did not offer any expert testimony to demonstrate that the plumbing work was not performed in a workmanlike manner. Instead, Defendant offered his own lay-testimony" which this Court held was inadequate as a matter of law to prove Defendant's workmanship claim. *Id.* at 335, 869 S.E.2d at 52. Accordingly, this Court stated, "We reverse and remand for a new trial *on this claim*." *Id.* (Emphasis added). As for Defendant's two other breach of contract claims, this Court held, "sufficient evidence was presented to allow these claims to proceed to the jury," and therefore, "the trial court did not err in refusing to grant a directed verdict on Defendant's remaining breach of contract claims." *Id.* Specifically, this Court "remand[ed] for a new trial on Defendant's claim for failure to perform in a workmanlike manner under a construction or building contract." *Id.* at 331, 869 S.E.2d at 50.

Subsequent to the filing of this Court's opinion in *Dan King Plumbing I*, and with the trial court having taken no further action on remand, Plaintiff filed a "motion to amend judgment to conform to appealate [sic] opinion including motion for a new trial" on 21 October 2022. In it, Plaintiff requested:

> [F]urther findings of fact [to] be added to the Judgment in this matter in compliance with . . . the Opinion or other corrective action[,] . . . entry of directed verdict against Defendant's breach of contract claim as provided in . . . the Opinion and order a new trial on the breach of contract claim which was not divided out as separate an[d] independent from the breach relate to workmanship, or otherwise resolve outstanding issues in this case.

On 13 December 2022, Judge Havelka held a hearing on the motion. During that hearing, she discussed her interpretation of this Court's ruling in *Dan King Plumbing I*:

> I assure you, the only thing I need to redo on the unfair and deceptive is rewrite the facts that needed to be in there the first go-round[.]
>
> . . .
>
> My fault that I didn't have enough facts there for the unfair and deceptive. But I assure you, I have no – I'm so familiar with this case.
>
> . . .
>
> And yes, I agree that there is no other option but to try the workmanship claim on the breach of contract. I'm not changing my mind on the unfair and deceptive.
>
> I think what the Court of Appeals did is basically nudge me, and say, judge, you knew better than to sign that order. You needed more facts. And that's exactly what I intend on doing.

However, Judge Havelka did not prepare or file a written order on Plaintiff's "motion to amend judgment," and the matter was assigned to Judge Matt Newton (the "trial court"), who held a new hearing on 1 March 2023 on Plaintiff's motion. During that hearing, Plaintiff's counsel argued, "Regarding the issue of findings of fact [pertaining to the UDTP duplicate warranties claim], the Court of Appeals specifically stated add findings of fact, it did not state have a new trial." The trial

court disagreed with Plaintiff's counsel's interpretation of this Court's ruling in *Dan King Plumbing I*, stating:

> So I think that we patently disagree on our interpretation of the Court of Appeals' opinion inasmuch as the issue pertaining unfair and deceptive trade practices and more particularly the reliance element to establish an unfair and deceptive trade practice claim for duplicate warranty here. I don't understand why they would -- the Court of Appeals would ask so if not for a change in ruling, and to remand for findings or fact via a jury trial.
>
> I don't understand why it would be remanded in the way it was and why they would request -- specifically request more testimony. Inasmuch as the testimony that was requested, they referenced evidence needing to be presented pertaining to whether the existence of HVAC manufacturer warranties are considered common knowledge, regarding -- so evidence regarding how Defendant ultimately came to discover the existence of manufacturer's warranties; evidence of whether it was common practice in the HVAC industry to sell parts and warranties for products that were already covered by a manufacturer warranty. And also included other examples of relevant evidence such as warranty extending beyond a manufacturer's warranty.
>
> So whether that occurs in this instance, whether the Plaintiff provided a warranty as a member of the local community and its relevance and so forth. I am at a loss to understand why there would be that particular or those particular instances of the need for additional testimony if it was something that was to be pursued outside the context -- at least on that particular issue -- outside the context of a de novo trial.
>
> At the same time, inasmuch as the directed verdict is concerned, it's my understanding after reading the Court of Appeals' decision that the reversible error was because no expert testimony was provided. And I think that that was very clear. The desire for there to be expert testimony to be provided to make a more clearer or for the court to make a more clearer decision on whether a directed verdict is necessary or would be applicable here.

> And in the absence of that, this court isn't prepared to proceed forward.

Ultimately, in a written order filed 25 April 2023, the trial court denied Plaintiff's motion and ordered "(1) a new trial on the proximate cause/reliance issue with respect to the duplicate warranties under the Defendant's unfair and deceptive trade practices cause of action; [and] (2) a new trial on the Defendant's workmanship breach of contract cause of action." Plaintiff filed notice of appeal on 26 April 2023.

II. Analysis

A. Appellate Jurisdiction

Plaintiff appeals as of right pursuant to N.C. Gen. Stat. 7A-27(b)(3)(d), which states that "appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [g]rants or refuses a new trial." Here, the trial court entered an order on Plaintiff's "motion to amend judgment to conform to [appellate] opinion including motion for a new trial" in which it ordered a new trial. Accordingly, the trial court's order is appealable as of right under N.C. Gen. Stat. 7A-27(b)(3)(d).

B. Trial Court's Action in Prior Judge's Absence

[1] Plaintiff argues the trial court was not authorized to enter an order on his motion because Judge Havelka's term had ended, and the trial court did not follow the proper procedures to finish its work on the case.

First, Plaintiff argues Judge Havelka left an order waiting to be signed and should have been recalled and commissioned to complete her work on the case. N.C. Gen. Stat. § 7A-53 provides:

> No retired judge of the district or superior court may become an emergency judge except upon the judge's written application to the Governor certifying the judge's desire and ability to serve as an emergency judge. *If the Governor is satisfied that the applicant qualifies under G.S. 7A-52(a)* to become an emergency judge and the applicant is physically and mentally able to perform the official duties of an emergency judge, the Governor shall issue to the applicant a commission as an emergency judge of the court from which the applicant retired.

N.C. Gen. Stat. § 7A-53 (2023) (emphasis added). Second, Plaintiff argues the trial court should have followed the procedures outlined in N.C. R. Civ. P. 63, including tasking the chief judge of the district with handling the issues on remand. N.C. R. Civ. P. 63 provides:

> If by reason of . . . expiration of term, . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . .
>
> > (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

Here, Plaintiff provides no argument or evidence regarding whether Judge Havelka would have qualified pursuant to N.C. Gen. Stat. § 7A-52(a) to be appointed as an emergency judge or that the Governor would have appointed her. Most importantly, there is no evidence in the Record that Judge Havelka prepared an order that was ready to be signed. She held a hearing on Plaintiff's motion which requested that she act pursuant to this Court's opinion in *Dan King Plumbing I*. During that hearing, she said how she *would rule* on the motion, but she did not enter an order.

"A judgment is 'entered' when it is 'reduced to writing, signed by the judge, and filed with the clerk of court.' An announcement of judgment in open court constitutes the rendition of judgment, not its entry." *West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573–74 (1998) (quoting N.C. R. App. P. 58). "[A]n oral ruling announced in open court is 'not enforceable until it is entered.' " *In re Thompson*, 232 N.C. App. 224, 227, 754 S.E.2d 168, 171 (2014) (quoting *West*, 130 N.C. App. at 756, 504 S.E.2d at 574). There is no evidence Judge Havelka entered an order or that she drafted an order and left it for the chief district court judge to sign after her term ended. Thus, the trial court was entitled to exercise its discretion and hold a new hearing on the unresolved motion and enter its own ruling on the matter.

C. The Trial Court's Order on Plaintiff's Motion to Amend Judgment

[2] Plaintiff next argues the trial court erred in granting a new trial on the duplicate warranties claim because this Court in *Dan King Plumbing I* merely remanded the issue for "further fact-finding on the

issue of Defendant's reasonable diligence in discovering the existence and coverage of the duplicate warranties." *Dan King Plumbing I*, 281 N.C. App. at 327, 869 S.E.2d at 47. Plaintiff also argues the trial court erred in granting a new trial on Defendant's workmanship claim because Defendant's breach of contract claim was not separated into distinct verdicts or theories but rather combined as one question on the verdict sheet.

Regarding matters "left to the discretion of the trial court," our Supreme Court has stated:

> [A]ppellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

First, we address the trial court's grant of a new trial on the duplicate warranties claim. Plaintiff argues the trial court merely should have made or added findings of fact to support Judge Havelka's original determination that the jury's findings regarding Defendant's duplicate warranties claim did not amount to UDTP as a matter of law. Specifically, Plaintiff argues this Court's order on remand for "further fact-finding on the issue of Defendant's reasonable diligence" was a directive to the *trial court* to make further findings of fact.

"Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has on the marketplace. Based upon the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates this section." *United Lab'ys, Inc. v. Kuykendall*, 102 N.C. App. 484, 490-91, 403 S.E.2d 104, 109 (1991).

Here, the trial court did what is directed by *Kuykendall*. The jury reached its verdict, making findings of fact relevant to Defendant's UDTP claims. The trial court, equipped with the jury's resolution of the facts, found:

> It is decreed that the acts Plaintiff committed as enumerated in Verdict Issue #8, Issue #9, Issue #10, and Issue #11

> do not, as a matter of law, constitute unfair or deceptive trade practices or acts, and therefore no Judgment is entered in accordance with the Jury's Verdict for violations of N.C. Gen. Stat. § 75-1.1 by Plaintiff.

(Capitalization modified for ease of reading). In reviewing Judge Havelka's judgment, and specifically, the issue of whether Defendant's reliance on Plaintiff's misrepresentation was reasonable, this Court stated, "we do not have the benefit of any jury findings on this issue." *Dan King Plumbing I*, 281 N.C. App. at 326, 869 S.E.2d at 47. This Court then noted that "[d]uring trial, no evidence was presented regarding" various issues of fact relevant to whether Defendant's reliance was reasonable. *Id.* at 327, 869 S.E.2d at 47. Therefore, the trial court could not have made the factual findings which this Court deemed essential to Defendant's duplicate warranties claim. Accordingly, the trial court did not abuse its discretion in ordering a new trial on the "reliance issue with respect to the duplicate warranties" claim.

Second, we address the trial court's grant of a new trial on Defendant's workmanship claim. Plaintiff argues the "Court of Appeals made clear that [Plaintiff's] motion for directed verdict should have been granted regarding [Defendant's] workmanship claim."

Plaintiff's interpretation of this Court's opinion in *Dan King Plumbing I* is the opposite of what this Court held. This Court specifically stated, "We reverse and remand for a new trial *on this claim*," referring to "Defendant's claim for failure to perform in a workmanlike manner under a construction or building contract." *Id.* at 331, 335, 869 S.E.2d at 50, 52. Immediately thereafter, this Court stated:

> "As for Defendant's remaining breach of contract claims—failure to provide the correct water heater called for in the contract, and charging a higher price than called for—we conclude sufficient evidence was presented to allow these claims to proceed to the jury. . . . We accordingly hold that the trial court did not err in refusing to grant a directed verdict on Defendant's remaining breach of contract claims.

Id. at 335, 869 S.E.2d at 52.

"A court granting a new trial may in its discretion grant a partial new trial on one issue rather than a new trial on all issues." *Myers v. Catoe Const. Co.*, 80 N.C. App. 692, 696, 343 S.E.2d 281, 283 (1986). Accordingly, the trial court complied with this Court's order on remand

as to Defendant's breach of contract claim and did not abuse its discretion in ordering a new trial as to one particular issue or theory under the claim.

III. Conclusion

For the foregoing reasons, we conclude the trial court did not err by holding a new hearing and entering an order on Plaintiff's motion to amend judgment to conform to this Court's prior opinion in the absence of the original judge presiding over this matter. We further conclude the trial court did not abuse its discretion in granting a new trial on the proximate cause/reliance issue with respect to the duplicate warranties under the Defendant's UDTP cause of action and Defendant's workmanship breach of contract cause of action.

AFFIRMED.

Judges TYSON and ZACHARY concur.

FRANKLIN GARLAND, PLAINTIFF
v.
ORANGE COUNTY, ORANGE COUNTY BOARD OF COMMISSIONERS, DEFENDANTS
and
TERRA EQUITY, INC., DEFENDANT-INTERVENOR

No. COA23-588

Filed 2 April 2024

1. Appeal and Error—motion to partially dismiss defendant's appeal—motion to dismiss plaintiff's cross-appeal—plaintiff's petition for certiorari

In an action filed by plaintiff-landowner challenging a county board's rezoning of land located adjacent to plaintiff's property, where the trial court granted plaintiff's motion to enforce a settlement agreement he claimed to have entered into with defendant-company (the party who applied for the rezoning), plaintiff's motion to partially dismiss defendant's appeal was denied where, although defendant did not properly notice appeal from two interlocutory orders denying its motions to dismiss and for summary judgment, appellate review of those orders was permissible under N.C.G.S. § 1-278 because they involved the merits of the case and necessarily affected the trial court's final judgment. Further,

defendant's motion to dismiss plaintiff's cross-appeal was granted where plaintiff did not give timely notice of cross-appeal within the required ten-day period. Additionally, plaintiff's petition for a writ of certiorari to permit review of his cross-appeal was denied.

2. Contracts—settlement agreement—formation—statutory requirements—signature by party or designee—acceptance versus counter-offer

In an action filed by plaintiff-landowner challenging a county board's rezoning of land located adjacent to plaintiff's property, the trial court erred in granting plaintiff's motion to enforce a settlement agreement he claimed to have entered into with defendant-company (the party who applied for the rezoning). Although defendant's counsel sent an email memorializing the proposed settlement terms and promising to draft a settlement agreement for the parties to sign, this email reflected, at best, an agreement to agree. Even if the email had supported the formation of a contract, it did not comply with the statutory requirements for mediated settlement agreements because defendant did not sign it, there was no evidence that defendant's counsel was a designee for purposes of the statute, and, at any rate, defense counsel's name typed at the bottom of the email did not constitute an electronic signature. Further, plaintiff never accepted defendant's settlement offer given that he replied to the email with a counter-offer proposing revisions to the agreement.

3. Civil Procedure—Rule 41—relation back—lawsuits challenging rezoning decision—different causes of action asserted

In plaintiff-landowner's third lawsuit challenging a county board's rezoning of land located adjacent to plaintiff's property, the trial court erred in declining to dismiss the lawsuit as untimely where, under Civil Procedure Rule 41(a)(1), the suit did not relate back to plaintiff's previous lawsuit, which he filed within the applicable statute of limitations and then voluntarily dismissed. Although the complaints in both lawsuits requested injunctive relief and contained similar allegations, plaintiff's new complaint requested a declaratory judgment stating that the rezoning was arbitrary and capricious and that it violated his due process rights, whereas his prior complaint challenged the rezoning on completely different grounds (namely, that it violated the local zoning ordinance, the county's "Mission Statement," and the board of county commissioners' "Goal and Priorities").

Appeal by defendant-intervenor from order entered 13 September 2022 by Judge Allen Baddour in Superior Court, Orange County. Heard in the Court of Appeals 28 February 2024.

Davis Hartman Wright, LLP, by R. Daniel Gibson, for plaintiff-appellee.

James Bryan, Joseph Herrin, and John L. Roberts, for defendants-appellees Orange County and Orange County Board of Commissioners.

Fox Rothschild LLP, by Kip D. Nelson, Matthew Nis Leerberg, and Nathan Wilson, and Manning Fulton & Skinner P.A., by Judson A. Welborn, for intervenor-appellant Terra Equity, Inc.

ARROWOOD, Judge.

Terra Equity, Inc. ("defendant") appeals from order granting Franklin Garland's ("plaintiff") motion to enforce a settlement agreement. On appeal, defendant argues (1) the trial court erred by enforcing the settlement agreement, (2) plaintiff did not have standing to bring the underlying suit, and (3) the trial court erred by denying its motion to dismiss and motion for summary judgment. For the following reasons, we reverse the trial court and remand for dismissal of the action.

I. Background

This dispute involves the zoning of three parcels of land adjacent to plaintiff's property ("parcels 1, 2, and 3"), on which plaintiff operates a truffle tree nursery and orchard. In January 2018, the Orange County Board of Commissioners ("the Board") zoned approximately 195 acres of property, including parcels 1 and 2, as Master Plan Developmental Conditional Zoning ("MPD-CZ"); parcel 3 was zoned as Rural Residential. On 15 June 2020, defendant applied to rezone all three parcels as a new MPD-CZ district. On 15 and 22 September 2020, the Board held public hearings regarding the rezoning application and allowed public comment through 24 September 2020. The Board approved the application on 20 October 2020. In the decision, the Board approved a 50-foot reduction in the 100-foot required setback between plaintiff's property and the development, which defendant did not request until the public comment period had closed.

On 16 December 2020, plaintiff and other individuals filed a complaint challenging the Board's approval of the rezoning. On 4 March

2021, the Orange County Superior Court held that the plaintiffs in the initial lawsuit lacked standing and dismissed the suit with prejudice which was affirmed.

On 18 December 2020, plaintiff, acting pro se, filed a second complaint challenging the rezoning decision. In that complaint, plaintiff sought "to enjoin the Defendants from proceeding with the aforementioned project" and sought "injunctive relief because there is no other adequate remedy at law to preclude the violation[s]." Plaintiff alleged that the proposed development "is in violation of the UDO[,] . . . the Orange County Mission Statement[,] . . . [and] the Board of County Commissio[ners'] Goal and Priorities." The complaint also alleged that "Defendants have failed to perform environmental investigations and impact studies of Plaintiff's property." Plaintiff ultimately requested a permanent injunction "prohibiting Orange County from enforcing the Ordinance Amending the Orange County Zoning Atlas . . . and allowing development of the three parcels[.]" On 19 February 2021, plaintiff voluntarily dismissed his second lawsuit.

On 10 August 2021, Plaintiff filed a third complaint against Orange County and the Board. In this complaint, plaintiff sought to "challenge the rezoning of three parcels" and requested "a declaratory judgment that the Board of Commissioners' rezoning of the three parcels . . . was arbitrary and capricious, and . . . violated the Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, and the Law of the Land Clause of the North Carolina Constitution and is therefore, illegal, null, and void." The third complaint alleged that "the Board of Commissioners failed to address, discuss, and otherwise evaluate the compatibility and suitability of the proposed RTLP development" and "failed to comply with the requirements of its own zoning ordinance, the Orange County UDO" to support its claim of arbitrary and capricious zoning. Plaintiff further alleged that "[t]he Board . . . nor Orange County Staff made no investigation, findings, or recommendations regarding potential water quality impacts relating to the pond located on the Garland Property[,] . . . the increase in commercial vehicle traffic and related air pollution that would affect the pond and Orchard[,] . . . [or] the amount and flow of stormwater runoff to Plaintiff Garland's Property[.] Plaintiff also include facts regarding the alleged due process violation, such as the Board's decision to reduce the 100-foot, no-build setback between the parties' properties that occurred after the public comment period closed.

Defendant, as well as Orange County, filed a motion to dismiss the action, and the trial court denied the motions on 1 December 2021. Defendant then filed a motion for summary judgment on 31 January

2022, and the trial court granted the motion on all issues except the dispute regarding the 100-foot buffer on 3 May 2022.

The parties attended mediation in an attempt to reach settlement on the remaining setback issue. On 21 July 2022, defendant's counsel sent an email "to memorialize the terms of the parties' settlement reached at today's mediated settlement conference" and promising to draft a settlement agreement to circulate "for review and signature[.]" The following day, defendant's counsel sent plaintiff's attorney a proposed settlement agreement. On 29 July 2022, plaintiff's attorney sent an email with changes to the proposed settlement agreement. Defendant's counsel communicated that defendant required plaintiff to execute the agreement by 5:00 p.m. on 1 August 2022.

On 8 August 2022, defendant's attorney sent an email stating that defendant would proceed to trial unless plaintiff could agree to the "current settlement structure." On 11 August 2022, plaintiff's counsel sent additional changes to the proposed settlement agreement. Plaintiff's counsel sent another email on 16 August 2022 agreeing to the initial draft agreement defendant's counsel sent on 22 July 2022, and defendant refused to sign the agreement.

Plaintiff moved to enforce the settlement agreement, and the trial court granted the motion on 13 September 2022. Defendant appealed from the trial court's order on 7 October 2022. On 13 March 2023, plaintiff filed a notice of cross-appeal from the 3 May 2022 order granting partial summary judgment.

Plaintiff later filed a motion to partially dismiss defendant's appeal on 17 July 2023, and defendant filed a motion to dismiss plaintiff's cross-appeal on 19 July 2023. On 23 February 2024, five days prior to the date scheduled for oral argument, plaintiff filed a petition for writ of certiorari, and defendant timely responded.

II. Discussion

A. Motions

[1] Before reaching the merits of defendant's appeal, we address: (1) plaintiff's motion to partially dismiss defendant's appeal, (2) defendant's motion to dismiss plaintiff's cross-appeal, and (3) plaintiff's petition for writ of certiorari.

1. Plaintiff's Motion to Partially Dismiss Appeal

Plaintiff moved to partially dismiss defendant's appeal on the grounds that it did not properly notice appeal of the trial court's orders

denying defendant's motion to dismiss and partially denying defendant's motion for summary judgment.

Pursuant to North Carolina statute, "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C.G.S. § 1-278 (2023).

> This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to [N.C.G.S.] § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Tinajero v. Balfour Beatty Infrastructure, Inc., 233 N.C. App. 748, 758 (2014) (citation omitted).

Here, the trial court's denial of the motions to dismiss and for summary judgment were interlocutory, and defendant appropriately waited until final judgment to appeal those orders. Under N.C.G.S. § 1-278, the orders denying the motions involved the merits and necessarily affected the judgment because had they been granted, the trial court would not have ordered to enforce the settlement agreement. *See In re Ernst & Young, LLP*, 191 N.C. App. 668, 672–73, (2008), *aff'd in part, modified in part and remanded on other grounds*, 363 N.C. 612 (2009) ("The order denying intervenor's motion to dismiss was an intermediate order that involved the merits and affected the final judgment because if it had been granted, the trial court would not have issued the Order to Comply."). We therefore deny plaintiff's motion.

2. Defendant's Motion to Dismiss Cross-Appeal

Next, defendant argues that plaintiff's cross-appeal is untimely. On 7 October 2022, defendant appealed from the trial court's 13 September 2022 order enforcing the settlement agreement, which was a final judgment in the action below. Plaintiff did not file notice of cross-appeal until 13 March 2023. Plaintiff cites as a basis for the delayed filing his assertion that defendant failed to properly notice the appeals of the intermediate orders below. However, as discussed above, defendant's appeal encompassed the orders denying defendant's motion for summary judgment and motion to dismiss under N.C.G.S. § 1-278. Therefore, plaintiff had 10 days from defendant's appeal to file any notice of cross-appeal. N.C. R. App. P. 3(c)(3) ("If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within

ten days after the first notice of appeal was served on such party."). Because plaintiff filed his notice of cross-appeal after 17 October 2022, his cross-appeal was not timely, and we grant defendant's motion to dismiss the cross-appeal.

3. Plaintiff's Petition for Writ of Certiorari

Finally, plaintiff's petition for writ of certiorari argues that this Court should issue certiorari because (1) plaintiff was not on notice that defendant sought to appeal interlocutory orders, (2) plaintiff acted promptly when he was put on notice, (3) the Court will already be reviewing the summary judgment order, and (4) plaintiff's appeal presents meritorious issues. As plaintiff acknowledges, certiorari is "an extraordinary writ" this Court has discretion to issue. *Cryan v. Nat'l Council of Young Men's Christian Ass'ns*, 384 N.C. 569, 570 (2023). "When contemplating whether to issue a writ of certiorari, our state's appellate courts must consider a two-factor test. That test examines (1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ." *Id.* Extraordinary circumstances generally require "a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, (2020)). After review of plaintiff's petition, in our discretion, we deny plaintiff's petition and address defendant's remaining arguments.

B. Settlement Agreement

[2] Having disposed of the procedural issues, we now address the substantive issues raised by the appeal. Defendant first contends that the trial court erred in enforcing the settlement agreement because there was no settlement agreement. We agree.

For purposes of appellate review, "[a] motion to enforce a settlement agreement is treated as a motion for summary judgment[.]" *Williams v. Habul*, 219 N.C. App. 281, 288 (2012) (citations and internal quotation marks omitted). "A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Smith v. Young Moving and Storage, Inc.*, 167 N.C. App. 487, 492–93 (2004) (quoting *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829 (2000)) (internal quotation marks omitted). Matters of contract interpretation are questions of law this Court reviews de novo. *Powell v. City of Newton*, 200 N.C. App. 342, 344 (2009) (citations omitted).

Here, defendant's counsel sent an email on 21 July 2022 "to memorialize the terms of the parties' settlement reached at today's mediated settlement conference" and promising to draft a settlement agreement to circulate "for review and signature[.]" While plaintiff argues this email evidences an agreement, there are numerous reasons the email is insufficient to support the formation of a contract.

First, because the email contemplates a future agreement for signature, it is at best an agreement to agree. *See Boyce v. McMahan*, 285 N.C. 730, 734 (1974) (holding that a document "to enter into a preliminary agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date" was insufficient to create an enforceable contract).

Even assuming *arguendo* that this email would have been sufficient to support a contract formation, it does not comply with statutory requirements for mediated settlement agreements. North Carolina statute requires that "[n]o settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection . . . shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought or signed by their designees." N.C.G.S. § 7A-38.1(l). Thus, in order for the email in this case to be enforceable, the statute requires it to be signed by defendant or defendant's designees. Defendant's trial counsel included his name below the body of the email, a common practice in email correspondence. Plaintiff argues this constitutes a signature under the Uniform Electronic Transactions Act ("UETA"), which requires that the involved parties have agreed, based on the context and surrounding circumstances, to conduct a transaction by electronic means. N.C.G.S. § 66-315(b). Here, given defendant's counsel's provision within the email that he would send a future draft of the agreement for signature, it is clear that defendant did not intend to execute the settlement agreement via an email electronic signature. Thus, UETA does not apply.

Furthermore, N.C.G.S. § 7A-38.1(l) requires a signature on the mediated settlement agreement by defendant or defendant's designees, and here, defendant's counsel is the only name the email contains. Defendant itself did not sign the email correspondence, and nothing in the record supports plaintiff's contention that defendant's counsel was a designee for purposes of the statute. Therefore, the 21 July 2022 email fails to meet the statutory requirements to create an enforceable mediated settlement agreement.

Finally, plaintiff did not agree to the terms of defendant's proposed settlement agreement. The day after the 21 July email, defendant's

counsel sent plaintiff's attorney a proposed settlement agreement that required the parties' signatures. On 29 July 2022, plaintiff's attorney sent an email with changes to the proposed settlement agreement, effectively rejecting defendant's offer and proposing a new agreement. Defendant's counsel communicated that defendant required plaintiff to execute the agreement it drafted by 5 p.m. on 1 August 2022, and plaintiff did not accept the settlement offer by that date; thus, the offer was withdrawn.

On 8 August 2022, defendant's attorney renewed their initial offer, stating that defendant would proceed to trial unless plaintiff could agree to the "current settlement structure." On 11 August 2022, plaintiff's counsel sent additional changes to defendant's proposed settlement agreement, again rejecting defendant's offer and proposing a new agreement. Plaintiff's counsel later sent an email on 16 August 2022 agreeing to defendant's initial draft, but because plaintiff had rejected defendant's offer and counteroffered with revisions to the agreement, this action did not constitute an acceptance. *See Normile v. Miller*, 313 N.C. 98, 104 (1985) ("This qualified acceptance was in reality a rejection of the plaintiff-appellants original offer because it was coupled with certain modifications or changes that were not contained in the original offer. . . . Additionally, defendant-seller's conditional acceptance amounted to a counteroffer to plaintiff-appellants."). For each of the foregoing reasons, we find that the trial court erred in entering an order to enforce a settlement agreement.

C. Motion to Dismiss

[3] Defendant next argues that the trial court erred in denying its motion to dismiss. We agree.

Defendant contends that plaintiff lacked standing, and his third lawsuit fell outside the applicable statute of limitations. N.C.G.S. § 1-54.1 (limiting challenges to "any ordinance adopting or amending a zoning map or approving a conditional zoning district rezoning request" to 60 days). Even if we assume *arguendo* plaintiff had standing, his third lawsuit was not timely.

The Board approved defendant's application to rezone on 20 October 2020. While plaintiff filed his second lawsuit within the statute of limitations on 18 December 2020, he voluntarily dismissed his suit on 19 February 2021. Plaintiff then filed his third lawsuit on 10 August 2021, outside the statute of limitations.

Plaintiff argues that his third complaint was timely because his voluntary dismissal extended the statute of limitations under Rule of Civil

Procedure 41(a)(1), which states, in relevant part, that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]" N.C.G.S. § 1A-1, Rule 41(a)(1). However, the rule applies only when the new action "relates back" to the voluntarily dismissed action—when the new lawsuit is "based upon the same claim as the original action. . . . If the actions are fundamentally different, or not based on the same claims, the new action is not considered a continuation of the original action." *Brannock v. Brannock*, 135 N.C. App. 635, 639–40 (1999) (cleaned up); *see also Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 284 (2007) ("This Court has long held that the Rule 41(a) tolling of the applicable statute of limitations applies only to the claims in the original complaint, and not to other causes of action that may arise out of the same set of operative facts.").

Here, plaintiff's third lawsuit filed 10 August 2021 does not relate back to his second lawsuit dismissed on 19 February 2021. In the 10 August 2021 complaint, Plaintiff identified two causes of action: arbitrary and capricious rezoning and violation of his due process rights. In the original complaint, plaintiff simply stated that the proposed development "is in violation of the UDO[,] . . . the Orange County Mission Statement[,] . . . [and] the Board of County Commissio[ners'] Goal and Priorities." The new complaint alleged that "the Board of Commissioners failed to address, discuss, and otherwise evaluate the compatibility and suitability of the proposed RTLP development" and "failed to comply with the requirements of its own zoning ordinance, the Orange County UDO" to support its claim of arbitrary and capricious zoning.

The original complaint alleged that "Defendants have failed to perform environmental investigations and impact studies of Plaintiff's property[,]" and the new complaint similarly alleged that

> [t]he Board . . . nor Orange County Staff made no investigation, findings, or recommendations regarding potential water quality impacts relating to the pond located on the Garland Property[,] . . . the increase in commercial vehicle traffic and related air pollution that would affect the pond and Orchard[,] . . . [or] the amount and flow of stormwater runoff to Plaintiff Garland's Property[.]

Even if we read these allegations as broadly similar, plaintiff in the original complaint sought "to enjoin the Defendants from proceeding with the aforementioned project" and sought "injunctive relief because

there is no other adequate remedy at law to preclude the violation[s]." In the new complaint, plaintiff sought to "challenge the rezoning of three parcels" and requested "a declaratory judgment that the Board of Commissioners' rezoning of the three parcels . . . was arbitrary and capricious, and . . . violated the Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, and the Law of the Land Clause of the North Carolina Constitution and is therefore, illegal, null, and void." While the new complaint also requested a permanent injunction "prohibiting Orange County from enforcing the Ordinance Amending the Orange County Zoning Atlas . . . and allowing development of the three parcels[,]" plaintiff made no reference in his initial complaint to the causes of action alleged in the new complaint. Nowhere in the original complaint does plaintiff allege the Board acted in an arbitrary and capricious manner; plaintiff alleged the Board violated its own policies, but this allegation does not itself state a claim for arbitrary and capricious rezoning. Further, the original complaint contained no relevant factual or legal allegations supporting a due process violation.

The third complaint does not contain the same claims as the second complaint, thereby negating the ability to relate back to the timely complaint and meet the tolling requirements of Rule 41. Therefore, the complaint filed 10 August 2021 was untimely, and the trial court erred in denying the motion to dismiss.

III. Conclusion

For all the foregoing reasons, we hold the trial court erred in granting plaintiff's motion to enforce the settlement agreement and in denying defendant's motion to dismiss. Accordingly, we reverse and remand with instruction to dismiss plaintiff's third complaint with prejudice.

REVERSED AND REMANDED.

Judges COLLINS and STADING concur.

GRIFFING v. GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A.

[293 N.C. App. 243 (2024)]

JOHN GRIFFING, PLAINTIFF
v.
GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A., DEFENDANT/COUNTERCLAIMANT
v.
JOHN GRIFFING, COUNTERCLAIM DEFENDANT

No. COA23-710

Filed 2 April 2024

1. Appeal and Error—interlocutory order—denying motion to compel arbitration—substantial right—statutory right of appeal

In a legal dispute between a law firm and one of its former attorneys, the trial court's order denying the law firm's motion to compel arbitration was immediately appealable because: (1) such orders, though interlocutory, impact a substantial right that might be lost absent immediate appeal, and (2) the Arbitration Act specifically provides for an immediate right of appeal from orders denying motions to compel arbitration (N.C.G.S. § 1- 569.28(a)(1)).

2. Arbitration and Mediation—motion to compel arbitration—by nonparty to a contract—no claims arising from contract—no equitable estoppel

In a lawsuit where an attorney alleged that his former law firm had breached its duties under a series of contracts between them, the trial court properly denied the firm's motion to compel arbitration pursuant to an agreement memorializing plaintiff's purchase of a partnership interest in the company from which the firm leased office space. In certain circumstances, a signatory to a contract containing an arbitration clause may be equitably estopped from arguing against a nonsignatory's efforts to enforce the arbitration clause. Here, however, because none of the attorney's claims against the firm (a nonsignatory to the purchase agreement) asserted the breach of a duty created under the purchase agreement, the firm could not enforce the agreement's arbitration clause under an equitable estoppel theory.

3. Arbitration and Mediation—motion to compel arbitration—profit-sharing agreement—between law firm and two associates—"participating attorney" to agreement—neither an individual party nor third-party beneficiary

In a lawsuit where an attorney (plaintiff) alleged that his former law firm had breached its duties under a series of contracts between them, the trial court properly denied the firm's motion to

compel arbitration pursuant to an agreement detailing how the firm and two of its associates would share profits from a class action that the associates were working on. Plaintiff was not bound by the arbitration clause in that agreement because, although he had signed the agreement as a "participating attorney," the plain text of the agreement demonstrated that the true parties to it were the firm and the two associates; further, none of plaintiff's claims against the firm—including that the firm failed to reimburse him for expenses he advanced in the class action—arose from the agreement. Additionally, plaintiff was not obligated to arbitrate his claims as a third-party beneficiary to the agreement because any benefits he received from the profits made in the class action were incidental rather than directly intended under the agreement.

Appeal by defendant/counterclaimant from order entered 30 May 2023 by Judge Reginald E. McKnight in Gaston County Superior Court. Heard in the Court of Appeals 9 January 2024.

Pangia Law Group, by Amanda C. Dure, and Joseph L. Anderson, for plaintiff-appellee.

Bell, Davis & Pitt, P.A., by Edward B. Davis and Kevin J. Roak, for defendant-appellant.

ZACHARY, Judge.

This case returns to this Court upon the trial court's entry of a revised order following our vacatur and remand in *Griffing v. Gray, Layton, Kersh, Solomon, Furr & Smith, P.A.* ("*Griffing I*"), 287 N.C. App. 694, 883 S.E.2d 129, 2023 WL 2127574 (2023) (unpublished). Defendant Gray, Layton, Kersh, Solomon, Furr & Smith, P.A. ("Gray Layton"), a North Carolina law firm, appeals the trial court's order denying Gray Layton's motion to compel arbitration. After careful review, we affirm.

I. Background

This appeal concerns a series of four agreements between Gray Layton, Plaintiff John Griffing, and various third parties. The central issue before us is whether Plaintiff's claims against Gray Layton are subject to arbitration under the provisions of these agreements.

The first agreement ("the Shareholder Agreement") is between Plaintiff and Gray Layton. Plaintiff signed the Shareholder Agreement when he "joined Gray Layton as a shareholder on or about 6 March

2000." *Griffing I*, at *1. "The [S]hareholder [A]greement d[oes] not contain an arbitration clause." *Id.*

The second agreement ("the COBRA Properties Agreement") is between Plaintiff; COBRA Properties, L.L.P. ("COBRA Properties"); and its existing members. This agreement arose in conjunction with Gray Layton's offer to Plaintiff to join the firm:

> Together with its offer to join the firm, Gray Layton offered Plaintiff the option to buy into COBRA Properties, . . . the entity from which Gray Layton leased office space. On or about 20 April 2001, Plaintiff bought into COBRA Properties, and in August 2018, he purchased an additional interest in the partnership.

Id. Under the terms of the COBRA Properties Agreement, the members of COBRA Properties receive prorated shares of the net profits, including rental income. The COBRA Properties Agreement contains an arbitration clause; it provides that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled, if allowed by law, by arbitration[.]" By entering into the COBRA Properties Agreement, Plaintiff "agree[d] to be bound . . . as if he were an original signatory."

The third agreement ("the COBRA Lease") is the rental agreement pursuant to which Gray Layton leased office space from COBRA Properties. *Id.* Under the COBRA Lease, Gray Layton's office rent was scheduled to increase by three percent annually. *Id.* The COBRA Lease does not contain an arbitration clause. *Id.*

The fourth agreement ("the Class Action Agreement") is an intrafirm agreement between Gray Layton and two of its associate attorneys. Plaintiff signed the Class Action Agreement not as an individual party, but rather as a "participating attorney" within the terms of the contract:

> In 2012, the shareholders of Gray Layton "decided to accept a large class action case on a contingent fee basis." The Gray Layton shareholders entered into an agreement with two associates regarding the class action lawsuit, pursuant to which "[t]he individual shareholders in [Gray Layton] agreed to pay the expenses and overhead for the class action litigation." In addition, the associates agreed to "devote a substantial amount of time and attention" to the lawsuit in exchange for each receiving ten percent of the gross attorney's fees. Seventy percent of the gross fees were to be "divided in shares among the undersigned

> 'Participating Attorneys' "; Plaintiff signed the agreement as one such "participating attorney."

Id. (alterations in original). The Class Action Agreement contains an arbitration clause, which provides that "the parties agree to submit their dispute(s) to binding arbitration to be conducted in Gastonia, NC." *Id.*

As we detailed in *Griffing I*, the present case began once Plaintiff left Gray Layton:

> On 31 October 2019, Plaintiff left Gray Layton as a result of the financial burden of "carrying his overhead for his profit center" and "paying for firm overhead to the other shareholders." On 25 October 2021, Plaintiff filed a complaint in Gaston County Superior Court against Gray Layton, alleging breach of contract and failure to provide Plaintiff with a shareholder accounting or to allow Plaintiff to inspect Gray Layton's books and records.
>
> Concerning the breach of contract claim, Plaintiff asserted that Gray Layton "violated the shareholder agreements as well as other side agreements" by failing to: (1) buy back his stock in Gray Layton within sixty days of his departure from the firm; (2) buy back his stock "at the agreed upon price"; (3) "adequately compensate Plaintiff for the revenue stream he brought into the firm"; (4) "properly allocate overhead against the cost centers that used the services provided by the entire firm"; (5) pay the COBRA Properties partners "the 3% rent increases as required by the lease" between Gray Layton and COBRA Properties; and (6) reimburse Plaintiff for the expenses that he advanced for the class action lawsuit. Plaintiff attached to his complaint copies of the [Shareholder Agreement], the [COBRA Properties Agreement], the [COBRA Lease], and the [Class Action Agreement].

Id. (cleaned up).

Gray Layton filed an answer in which it generally denied Plaintiff's allegations, advanced several affirmative defenses, and asserted counterclaims for breach of contract and conversion. *Id.* at *2. Gray Layton also filed a motion to compel arbitration, *id.*, which included a motion to stay all proceedings pending arbitration. By order entered on 24 February 2022, the trial court denied Gray Layton's motion with prejudice, concluding that "this matter is not subject to arbitration[.]"

Following Gray Layton's appeal, this Court vacated and remanded the matter to the trial court because the "order contain[ed] no findings of fact evincing the rationale underlying the trial court's decision to deny Gray Layton's motion." *Id.* at *3 (cleaned up). As we explained:

> Plaintiff attached four agreements to his complaint, and he alleged with regard to the breach of contract claim that "Gray Layton has violated the [Shareholder Agreement] *as well as other side agreements*." Two of the four referenced agreements contained mandatory arbitration clauses. However, the court neglected to state which, if either, of the two it considered to be valid agreements to arbitrate between these parties or whether the disputes raised in this action fall within the scope of any such valid agreement.

Id. (cleaned up).

Post-remand, on 30 May 2023, the trial court entered a revised order containing additional findings of fact. The trial court found:

> 1. . . . Gray Layton moved to compel arbitration in the claim filed by Plaintiff . . . arising out of [Plaintiff]'s breach of contract action against Gray Layton seeking damages owed to [Plaintiff] as a result of expenses and overhead expended pursuant to the Shareholder Agreement between Gray [Layton] and [Plaintiff]. See Exhibit A, [the] Shareholder Agreement.
>
> 2. The basis of the breach of contract action arises out of the Shareholder Agreement entered into between Gray Layton and [Plaintiff] on March 6, 2000.
>
> 3. [Plaintiff] further alleged failures of Gray Layton to adequately compensate him for the revenue he brought into the firm; the failure to purchase [Plaintiff]'s stock in Gray Layton at the agreed upon price or time; the failure of Gray Layton to pay [COBRA] Properties, LLP partners rent increases required by the lease; and the failure to adequately compensate [Plaintiff] for his interest in the class action matter.
>
> 4. There is no arbitration clause in the Shareholder Agreement.
>
> 5. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. *See Hager*

> *v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 361, 526 S.E.2d 567, 575 (2019). Because the Shareholder Agreement between Gray Layton and [Plaintiff] lack[s] a binding arbitration agreement, it cannot serve as the basis to compel arbitration.
>
> 6. . . . Gray Layton also cited to three other agreements as grounds for its motion to compel arbitration: (1) the [COBRA Properties Agreement]; (2) the [COBRA Lease]; and (3) the Class Action [Agreement].
>
> 7. The [COBRA Properties Agreement] is entered into between [COBRA] Properties, LL[P] and [Plaintiff], individually. The Court finds that Cobra Properties, LL[P] is an entirely separate entity from the parties in this matter and no privity exists between the parties, nor does this dispute fall within the scope of the arbitration agreement contained in the Partnership Agreement. The Cobra Properties Partnership Agreement cannot compel arbitration in this matter.
>
> 8. The [COBRA Lease] contains no arbitration clause. Without a mutual agreement to arbitrate, arbitration may not be compelled. The [COBRA] Lease cannot compel arbitration.
>
> 9. The [Class Action Agreement] is entered into between Gray Layton and its [associate attorneys]. The court finds that the [Class Action Agreement] contains an arbitration clause, but it does not apply between firm partners; instead, detailing how the firm divides fees with the [associate attorneys]. Moreover, [Plaintiff] was not an individual party to the [Class Action Agreement]. The present dispute between [Plaintiff] and Gray Layton does not fall within the scope of the arbitration agreement within the [Class Action Agreement] and is not grounds to compel arbitration in this matter. *See Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 635, 610 S.E.2d 293, 296 (2005).

(Cleaned up).

Based on these findings of fact, the trial court again denied Gray Layton's motion to compel arbitration. Gray Layton timely filed notice of appeal.

II. Interlocutory Jurisdiction

[1] As was the case in *Griffing I*, the trial court's order denying Gray Layton's motion to compel arbitration is interlocutory "because it does not determine all of the issues between the parties and directs some further proceeding preliminary to a final judgment." *Jackson v. Home Depot, U.S.A., Inc.*, 276 N.C. App. 349, 354, 857 S.E.2d 321, 326 (2021) (citation omitted). "Ordinarily, interlocutory orders are not immediately appealable. However, this Court has previously determined that an appeal from an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Id.* (cleaned up).

In the "Statement of the Grounds for Appellate Review" section of its opening brief, Gray Layton has sufficiently demonstrated that the trial court's interlocutory order affects this substantial right. Additionally, Gray Layton correctly notes that the trial court's order is immediately appealable pursuant to N.C. Gen. Stat. § 1-569.28(a)(1) (2021) (providing an immediate right of appeal from "[a]n order denying a motion to compel arbitration"). Accordingly, this interlocutory order is properly before us.

III. Discussion

Gray Layton argues that the trial court erred by denying its motion to compel arbitration because this case "contains multiple valid arbitration clauses, and public policy favors arbitration." Specifically, Gray Layton argues that Plaintiff is bound to arbitrate his claims against Gray Layton by the arbitration clauses in the COBRA Properties Agreement and the Class Action Agreement. For the reasons that follow, we disagree.

A. Standard of Review

"North Carolina has a strong public policy favoring the settlement of disputes by arbitration." *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). "However, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. The party seeking arbitration bears the burden of proving the parties mutually agreed to the arbitration provision." *Jackson*, 276 N.C. App. at 356, 857 S.E.2d at 327 (cleaned up).

"The question of whether a dispute is subject to arbitration is an issue for judicial determination. A trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, which this Court reviews de novo." *Id.* (cleaned up). "On appeal, findings of

fact made by the trial court are binding upon the appellate court in the absence of a challenge to those findings." *Id.*

B. Analysis

"The determination of whether a particular dispute is subject to arbitration involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Id.* (cleaned up). The first step of this analysis—whether the parties had a valid agreement to arbitrate—is the dispositive issue in this case.

It is undisputed that neither the Shareholder Agreement nor the COBRA Lease contains an arbitration clause. Accordingly, Gray Layton seeks to enforce against Plaintiff one of the arbitration clauses appearing in either the COBRA Properties Agreement or the Class Action Agreement. Gray Layton's arguments are unpersuasive.

1. The COBRA Properties Agreement

[2] Gray Layton first argues that Plaintiff is bound to arbitrate his claims against Gray Layton by the arbitration clause in the COBRA Properties Agreement. In response, Plaintiff maintains that Gray Layton cannot enforce that arbitration clause against him because Gray Layton was not a party to that agreement. Gray Layton does not dispute that fact, but argues instead that the trial court erred by failing to consider whether Plaintiff is equitably estopped from denying his burdens under the COBRA Properties Agreement—including its arbitration agreement.

"A nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate." *Smith Jamison Constr. v. APAC-Atl., Inc.*, 257 N.C. App. 714, 717, 811 S.E.2d 635, 638 (2018) (cleaned up). "One such situation exists when the signatory is equitably estopped from arguing that a nonsignatory is not a party to the arbitration clause." *Id.* (citation omitted). "Estoppel is appropriate if in substance the signatory's underlying complaint is based on the nonsignatory's alleged breach of the obligations and duties assigned to it in the agreement." *Id.* (cleaned up).

Gray Layton focuses on Plaintiff's years of accepting the benefits of the COBRA Properties Agreement—namely, his share of the rent payments that Gray Layton has made to COBRA Properties. Yet in doing

so, Gray Layton overlooks the essential question of whether Plaintiff "asserted claims in the underlying suit that, either literally or obliquely, *assert a breach of a duty created by the contract containing the arbitration clause*." *Id.* at 718, 811 S.E.2d at 638 (citation omitted). Here, Gray Layton's argument fails.

In his complaint, Plaintiff primarily alleges that Gray Layton violated the Shareholder Agreement "as well as other side agreements[.]" The only allegation that plausibly concerns COBRA Properties is Plaintiff's assertion that Gray Layton "[f]ail[ed] to pay [the COBRA Properties] partners the 3% rent increases as required by the [COBRA L]ease." However, this is not an assertion of "a breach of a duty created by the contract containing the arbitration clause." *Id.* (emphasis omitted). The breach asserted is Gray Layton's alleged failure to pay the increased rent to COBRA Properties—a duty created by the COBRA Lease, which again, does not contain an arbitration provision—not Gray Layton's alleged failure to pay Plaintiff his share of rental income under the COBRA Properties Agreement. Neither does Plaintiff's complaint rely upon any alleged breach of duty created by the COBRA Properties Agreement.

Clearly, then, Plaintiff "is not attempting to assert claims against [Gray Layton] that are premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause." *Id.* at 720, 811 S.E.2d at 640. Accordingly, Gray Layton fails to show that Plaintiff should be equitably estopped from denying that his breach of contract claim is subject to the COBRA Properties Agreement's arbitration clause.

In sum: Gray Layton was not a party to the COBRA Properties Agreement, and Plaintiff is not attempting to assert claims against Gray Layton that are premised upon any duty created by the COBRA Properties Agreement. Therefore, Gray Layton cannot enforce the COBRA Properties Agreement's arbitration clause against Plaintiff.

2. The Class Action Agreement

[3] Gray Layton next argues that Plaintiff agreed to be bound as a signatory to the Class Action Agreement, which contains an arbitration clause. Gray Layton contends that the trial court "placed improper weight and stopped its analysis after finding that [Plaintiff] was not an 'individual party to the' Class Action Agreement." Unlike the COBRA Properties Agreement, it is undisputed that Gray Layton was a signatory to the Class Action Agreement.

Nonetheless, the plain text of the Class Action Agreement demonstrates that the parties to that intrafirm agreement were Gray Layton and the two associates who agreed to undertake the extensive class-action representation that was the subject of the contract. Moreover, the breach of contract alleged in Plaintiff's complaint that most closely falls within the ambit of the Class Action Agreement is the contention that Gray Layton "[f]ail[ed] to reimburse [Plaintiff] for the expenses he advanced in the class action matter." Although Plaintiff signed it as a participating attorney, the Class Action Agreement contains no provision that creates any right of reimbursement for a participating attorney's advanced expenses. It strains credulity to suggest that the arbitration provision contained in the agreement between Gray Layton and two of its associates regarding profit-sharing for the associates' class-action representation simultaneously manifests the agreement of one of Gray Layton's participating attorneys to arbitrate a claim that Gray Layton failed to reimburse him for advanced expenses.

Accordingly, as with the COBRA Properties Agreement, Plaintiff "is not attempting to assert claims against [Gray Layton] that are premised upon any contractual and fiduciary duties created by" the Class Action Agreement. *Id.* Plaintiff is therefore not bound, as a signatory to the Class Action Agreement, to arbitrate the claims he raises in the instant action, nor is he estopped from denying that he is bound by the arbitration clause in the Class Action Agreement.

In the alternative, Gray Layton argues that, as a third-party beneficiary to the Class Action Agreement, Plaintiff is bound to arbitrate the claims advanced in the case at bar.

"The third-party beneficiary doctrine usually applies to allow a third[ ]party to enforce a contract executed for [the third party's] direct benefit." *Jarman v. Twiddy & Co. of Duck, Inc.*, 289 N.C. App. 319, 326, 889 S.E.2d 488, 495 (2023). In order to assert rights under a contract as a third-party beneficiary, the third party "must show: (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the third party." *Michael v. Huffman Oil Co., Inc.*, 190 N.C. App. 256, 269, 661 S.E.2d 1, 10 (2008) (cleaned up), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 360 (2009). "When a party seeks enforcement of a contract as a third-party beneficiary, the contract must be construed strictly against the party seeking enforcement." *Id.*

Importantly, "our Courts have required [a third party] to show a direct—rather than incidental—benefit for purposes of invoking the

third-party beneficiary doctrine." *Jarman*, 289 N.C. App. at 327, 889 S.E.2d at 496. "A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person." *Id.* at 327–28, 889 S.E.2d at 496 (citation omitted). "[T]he determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." *Id.* at 328, 889 S.E.2d at 496 (cleaned up).

Here, as explained above, the direct beneficiaries of the Class Action Agreement are Gray Layton and the two associates with whom Gray Layton agreed to share profits. Further, despite Gray Layton's claim that Plaintiff "benefitted by sharing in any recovery stemming from the Class Action" Agreement, that benefit was not intended directly by the agreement between Gray Layton and its two associates. It is clear that Plaintiff cannot be considered a direct—rather than incidental—beneficiary of the Class Action Agreement.

Finally, the arbitration clause in the Class Action Agreement "do[es] not provide any direct benefit to Plaintiff[ ] or evidence any intent to provide a direct benefit to Plaintiff[.]" *Id.* at 328–29, 889 S.E.2d at 496. Construing the Class Action Agreement "strictly against the party seeking enforcement[,]" *Michael*, 190 N.C. App. at 269, 661 S.E.2d at 10 (cleaned up), we conclude that Gray Layton fails to show that Plaintiff is anything more than an incidental beneficiary. Plaintiff is therefore not bound by the Class Action Agreement's arbitration clause.

IV. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges STROUD and TYSON concur.

HUNTER HAVEN FARMS, LLC, PETITIONER
v.
THE CITY OF GREENVILLE BOARD OF ADJUSTMENT AND COASTAL PLAIN SHOOTING ACADEMY, LLC, RESPONDENTS

No. COA23-662

Filed 2 April 2024

Civil Procedure—dismissal for failure to join a necessary party — special use permit—failure to name city—waiver by participation

In a challenge to a city board of adjustment's decision to grant a special use permit for the construction of an indoor firearm range, although petitioner (the owner of an adjacent horse farm) failed to properly name The City of Greenville (City) as a respondent in its petition for writ of certiorari as required by N.C.G.S. § 160D-1402(d), the trial court erred by dismissing the petition for failure to name a necessary party. Here, the City was on notice of the petition, complied with the writ of certiorari, and appeared at the hearing on the motion to dismiss; therefore, the City's participation in the proceedings waived any defect in the petition.

Judge HAMPSON concurring by separate opinion.

Appeal by Petitioner from order entered 20 March 2023 by Judge Jeffrey B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 10 January 2024.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook, for Petitioner-Appellant.

Ward and Smith, P.A., by Paul A. Fanning and Clinton H. Cogburn, for Respondent-Appellee.

COLLINS, Judge.

Petitioner Hunter Haven Farms, LLC, appeals from a 20 March 2023 order dismissing its petition for writ of certiorari for failure to name The City of Greenville as a respondent as required by N.C. Gen. Stat. § 160D-1402(d). For the reasons stated herein, we reverse.

I. Background

Hunter Haven Farms, LLC ("Haven") owns and operates an educational horse riding and training farm in Greenville, North Carolina. Coastal Plain Shooting Academy, LLC ("Coastal") purchased property next to Haven to construct an indoor firearm range on the property. Coastal sought a Special Use Permit ("Permit") from the City of Greenville Board of Adjustment ("Board") to build the indoor firearm range. When the Permit application came on for a public hearing before the Board, Haven opposed Coastal's application. The Board approved Coastal's application and granted the Permit.

Haven filed a petition for writ of certiorari ("Original Petition") on 16 December 2022 in Pitt County Superior Court, asking the court to review the granting of the Permit. Haven's Original Petition named as respondents "The City of Greenville Board of Adjustment and Coastal Plain Shooting Academy, LLC." The Original Petition stated, "The Writ of Certiorari should direct the City to prepare and certify to this Court the complete records of the [Board's] hearing . . . regarding [Coastal's] request for approval of a [Permit] to operate an indoor firearm range." That same day, the Pitt County Clerk of Superior Court issued a Writ of Certiorari which named as respondents "The City of Greenville Board of Adjustment and Coastal Plain Shooting Academy, LLC." The writ ordered the City to do the following:

> Respondent City of Greenville, North Carolina shall prepare and certify to this Superior Court the complete record of all of the Board of Adjustment's proceedings relating in any way to its Order Granting a Special Use Permit . . . .
>
> Respondent City of Greenville, North Carolina shall cause a true copy of said records to be filed with the [Pitt] County Clerk of Superior Court within 60 days from and after service of a copy of this Writ of Certiorari and shall simultaneously serve a copy thereof on counsel for all parties and on any unrepresented parties.

The City was served with the Original Petition and the Writ of Certiorari on 5 January 2023.

On 25 January 2023, Coastal moved to dismiss the Original Petition under Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure, specifically arguing that the Original Petition "failed to name The City of Greenville . . . as a Respondent" as required by N.C. Gen. Stat. § 160D-1402(d) and that the "City is a necessary party and indispensable

party to this action." Haven filed an amended petition for writ of certiorari ("Amended Petition") on 10 February 2023 naming as respondents "The City of Greenville and Coastal Plain Shooting Academy, LLC."

The City complied with the Writ of Certiorari on 6 March 2023 by preparing, certifying, filing, and serving the record to the trial court and serving it on counsel for Haven and for the Board.[1] Coastal's motion to dismiss came on for hearing on 20 March 2023, and the trial court dismissed the Original Petition and Amended Petition with prejudice. Haven appealed to this Court.

II. Discussion

Haven argues that the trial court erred by dismissing their Original Petition and by dismissing their Amended Petition.

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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003) (italics omitted).

A. Original Petition

Haven concedes that the case caption of the Original Petition erroneously named "The City of Greenville Board of Adjustment" instead of "The City of Greenville" as respondent but argues that the trial court erred by granting Coastal's motion to dismiss the Original Petition because the City's participation in the proceedings waived any procedural defect in the case caption in the Original Petition.

Pursuant to N.C. Gen. Stat. § 160D-1402, quasi-judicial decisions by a city's board of adjustment are subject to review by a superior court by proceedings in the nature of certiorari. N.C. Gen. Stat. § 160D-1402(a) (2023). Subsection (d) provides that "[t]he respondent named in the petition [for writ of certiorari] shall be the local government whose decision-making board made the decision that is being appealed . . . ." N.C. Gen. Stat. § 160D-1402(d) (2023). The petition for writ of certiorari must be filed "with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy of it is given[.]" N.C. Gen. Stat. § 160D-1405(d) (2023). A petitioner's failure to name a necessary party in its petition for writ of certiorari is fatal unless the proper respondent participates in the proceeding. *See MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjustment for City of Asheville*, 238 N.C. App.

1. Donald K. Phillips was the assistant city attorney who represented both the City and the Board.

432, 767 S.E.2d 668 (2014); *see also Azar v. Town of Indian Trail Bd. of Adjustment*, 257 N.C. App. 1, 809 S.E.2d 17 (2017).

"Necessary parties must be joined in an action." *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 727-28, 620 S.E.2d 312, 316 (2005) (citation omitted). A necessary party is one "so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered . . . without his presence as a party." *Id.* at 728, 620 S.E.2d at 316 (citation omitted). North Carolina Rule of Civil Procedure 12(b)(7) sets forth the defense of failure to join all necessary parties in a proceeding. Dismissal of an action under Rule 12(b)(7) is "proper only when the defect cannot be cured[,]" such as when the statute of limitations has expired and "any attempt to add [the necessary] party would have been futile." *Id.*

In *MYC Klepper*, petitioner's failure to name the city as a respondent in its petition for certiorari was cured by the City of Asheville's notice of the action and participation in the defense of the local board's decision before the trial court. 238 N.C. App. at 436-37, 767 S.E.2d at 671. There, the petitioner filed a petition for writ of certiorari seeking review of a decision made by a local board of adjustment. *Id.* at 435, 767 S.E.2d at 671. The petitioner erroneously named as respondent the local board instead of the city. *Id.* at 436, 767 S.E.2d at 671. The local board moved to dismiss the petition for lack of subject matter jurisdiction. *Id.* The trial court granted the petition and held a hearing on the merits of the local board's decision and the local board's motion to dismiss; the city participated in the hearing on the merits. *Id.* at 435-36, 767 S.E.2d at 671. The superior court affirmed the local board's decision but denied its motion to dismiss, finding that the city "was on notice of this action and participated in the defense thereof." *Id.* at 435-37, 767 S.E.2d at 671.

Addressing the local board's appeal of the denial of its motion to dismiss, this Court clarified that "[t]he defect in the petition in this case amounts to a failure to join a necessary party" and that "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Id.* at 436, 767 S.E.2d at 671 (citations omitted). Accordingly, this Court held that the "petitioner's failure to name the City of Asheville as respondent in the petition did not deprive the trial court of subject matter jurisdiction over the proceedings." *Id.* at 436-37, 767 S.E.2d at 671. We further held that the trial court did not err by denying the local board's motion to dismiss "[b]ecause the City's participation in the proceedings cured the defect in the petition[.]" *Id.* at 437, 767 S.E.2d at 671.

On the other hand, in *Azar*, petitioner's failure to name the Town of Indian Trail as a respondent in its petition for writ of certiorari was

not cured because the Town did not participate "in the hearings of [the] action[.]" 257 N.C. App. at 6, 809 S.E.2d at 20-21. There, the petitioner filed a petition for writ of certiorari seeking review of the local board of adjustment's denial of petitioner's request for a special use permit. *Id.* at 3, 809 S.E.2d at 19. The petitioner named as respondent the local board of adjustment instead of naming the Town. *Id.* The local board of adjustment moved to dismiss the action for, *inter alia*, failure to join a necessary party. *Id.* The superior court granted the motion to dismiss, concluding that the petition failed to comply with the applicable statute. *Id.*

On appeal, this Court noted that there had not been a hearing in the superior court to review the Town's zoning decision, and that the Town did not participate in the hearing on the local board's motion to dismiss. *Id.* at 6, 809 S.E.2d at 20. Distinguishing *MYC Klepper*, we held that, "[u]nlike the City of Asheville in *MYC Klepper*, the Town has not participated in the hearings of this action to waive [the petitioner's] failure to join them as a necessary party." *Id.* (citation omitted).

The case before us falls in between *MYC Klepper* and *Azar*. As in *MYC Klepper*, the City here "was on notice of this action." 238 N.C. App. at 437, 767 S.E.2d at 671. The record shows that: (1) Donald K. Phillips, in his capacity as the City's attorney, filed the record of the Board's proceedings *on himself*, in his capacity as the Board's attorney; (2) the Writ of Certiorari directed the "Respondent City of Greenville . . . to prepare and certify" the record of the Board's proceedings; and (3) the City complied with the Writ of Certiorari.

Furthermore, while both *MYC Klepper* and *Azar* are silent as to whether the city or town, respectively, prepared, certified, filed, and served the record of the local board's proceedings on the parties, the City in this case received the Writ of Certiorari and complied with it by preparing, certifying, filing, and serving the record on the parties.

Additionally, while, as in *Azar*, there was no hearing in the superior court to review the merits of the Board's decision, as in *MYC Klepper*, the City did participate in the hearing before the trial court on Coastal's motion to dismiss. Attorney Emanuel McGirt initially introduced himself to the trial court as appearing "on behalf of the Greenville Board of Adjustment." However, later in the hearing when the trial court asked if anyone had any response to Haven's argument against Coastal's motion to dismiss, Mr. McGirt responded on the City's behalf:

> I'll just say briefly, Your Honor, again, as the [C]ity's attorney the [C]ity does not oppose Coastal's motion to dismiss. And I would say that the [C]ity did not participate in

> this matter besides complying with the petition in producing the record.

Because the City was on notice of this action; complied with the Writ of Certiorari by preparing, certifying, filing, and serving the record to the trial court and serving it on counsel for Haven, for Coastal, and for the Board (who was the same counsel as for the City); appeared at the hearing on the motion to dismiss; and participated in the hearing on the motion to dismiss, we hold that the City waived any procedural defect caused by Haven's failure to join the City as a necessary party, and the trial court erred by dismissing the Original Petition. As we determine that the City's participation in the proceedings waived any procedural defect in the case caption in the Original Petition, we need not address Haven's remaining arguments.

III. Conclusion

As the trial court erroneously determined that the City did not waive any procedural defect caused by Haven's failure to join the City as a necessary party, the trial court erred by granting Coastal's motion to dismiss under Rule 12(b)(7). The order of the trial court is reversed, and the case is remanded for further proceedings.

REVERSED.

Judge THOMPSON concurs.

Judge HAMPSON concurs by separate opinion.

HAMPSON, Judge, concurring.

I write separately to note that I do not believe a municipality's compliance with a Writ of Certiorari to conduct the ministerial task of compiling and submitting the record of proceedings before the Board of Adjustment to the trial court in compliance with the court's order, standing alone, would constitute participation in the proceedings sufficient to waive any defect in the pleading. Central to *MYC Klepper*, was the finding in that case the municipality was "on notice of this action and participated *in the defense thereof*." *MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjustment for City of Asheville*, 238 N.C. App. 432, 437, 767 S.E.2d 668, 671 (2014).

In this case, though, the City's attorney—despite trying their best to limit their involvement on behalf of the City rather than the Board of Adjustment—illustrated the problem with wearing both hats. Unwittingly, by advocating for the City's non-opposition to the motion to dismiss, the attorney participated on behalf of the City in the defense of the case. This underscores that in situations where, and to the extent, a municipality and its Board of Adjustment are separate parties, strong consideration should be given to retaining or employing a separate counsel for the Board of Adjustment. Indeed, there are times when a Board of Adjustment might make decisions adverse to the municipality and at variance with municipal ordinances and require advice independent of that from an attorney representing the interests of the municipality and its governing board.

JACKIE GREGG KNUCKLES, SR., Administrator of the Estate of Jackie Gregg Knuckles, Jr., Petitioner
v.
AMINTA DENIESE SIMPSON, Respondent

No. COA23-257

Filed 2 April 2024

Estates—petition for determination of abandonment by heir at law—lack of willfulness—sufficiency of evidence

The trial court properly denied a father's petition for determination of abandonment by heir at law—which he filed in order to prevent his son's mother (the respondent) from inheriting from the estate of their son (who died intestate)—where the court's conclusion that respondent had not willfully abandoned her son was supported by its findings of fact, in turn supported by competent evidence, including that: when their son was two years old, petitioner took him from respondent and did not return him to respondent's care; respondent initially sought legal assistance in an effort to have her son returned; respondent made several attempts over the years to contact her son and establish a relationship with him but was unsuccessful; petitioner moved away with the son and did not inform respondent of their whereabouts; and respondent was attacked and threatened by petitioner's girlfriend if she attempted to make contact again.

Appeal by Petitioner from Order entered 31 August 2022 by Judge John O. Craig, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2023.

Myers Law Firm, PLLC, by Matthew R. Myers, for Petitioner-Appellant.

Whitaker and Hamer, PLLC, by Aaron C. Low, for Respondent-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Jackie Gregg Knuckles, Sr. (Petitioner) appeals from an Order denying a Petition for Determination of Abandonment by Heir at Law pursuant to N.C. Gen. Stat. §§ 28A-18-2(a) and 31A-2. The Record before us tends to reflect the following:

Petitioner is the biological father of Jackie Gregg Knuckles, Jr. (Decedent). Aminta Deniese Simpson (Respondent) is Decedent's biological mother. Decedent was born on 16 May 1992 and passed away on 14 March 2018. Petitioner was appointed administrator of Decedent's estate. On 9 December 2020, Petitioner filed a Petition for Determination of Abandonment by an Heir at Law (Petition). The Petition alleged Respondent "engaged in behavior, both omissions and commissions, which demonstrates a 'willful abandonment of the care and maintenance' of Jackie Gregg Knuckles, Jr., her son, such that any interest she may have in the Estate, as a matter of Intestate Succession, is forfeited pursuant to N.C. Gen[.] Stat. [§] 31A-2[.]" Respondent filed a Response on 8 February 2021 denying the material allegations of the Petition.

Respondent also attached an Affidavit to the Response. The Affidavit averred after Decedent's birth, Decedent lived with Respondent and her other children. Petitioner never lived with Respondent or her children. Respondent alleged Petitioner did not provide support for Decedent during the time Decedent lived with her. Instead, she filed a child support action against Petitioner. Petitioner initially denied paternity, but his paternity was later established by blood testing. Subsequently, the parties entered into a consent child support order. After Petitioner's paternity was established, Petitioner began to visit Decedent at Respondent's house. On or around 3 July 1994, Petitioner's brother picked Decedent up to take him to a pool party with Petitioner's family. After Decedent was not returned to Respondent that evening, Respondent contacted the

police and, subsequently, DSS to help return her son. However, in the absence of a custody order Respondent was informed neither the police or DSS would intervene. Respondent further asserted she then attempted to draft a Complaint using a self-help center to regain her son, but it was not filed because it was not in the proper form. Respondent attempted to go to Petitioner's home when she could to try to see her son but was threatened by his fiancée and friends. Respondent further alleged she had been beaten and intimidated by Petitioner and his acquaintances.

Respondent's affidavit also identified instances where she had seen or made contact with her son. When her son was seven or eight, Respondent saw her son walk into a convenience store where Respondent was working. She observed him go to condominiums nearby and later located her son and was able to see him. However, Petitioner moved away and Respondent was told he had moved to South Carolina. On a later occasion, Respondent discovered where her son was attending high school and visited him in the school office. At another point, Decedent contacted Respondent via Facebook. Respondent was not able to see her son again prior to his death. She did attend his funeral.

The Petition came on for hearing on 11 July 2022 in Mecklenburg County Superior Court. Following an evidentiary hearing, the trial court entered its Order on 31 August 2022. The trial court—having considered testimony, exhibits, arguments of counsel, memoranda, pleadings, and affidavits on file—found as fact:

> 1. The Petitioner, Gregg Knuckles, Sr. (hereinafter "the Petitioner"), is the duly appointed administrator of the Estate of Gregg Knuckles, Jr. (hereinafter "the Decedent"), which is involved in a wrongful death lawsuit pending in Mecklenburg County. Petitioner is also the natural father of the Decedent.
>
> 2. The Respondent is the natural mother of the Decedent.
>
> 3. The Petitioner brought this Petition for Determination of Abandonment by Heir at Law on December 9, 2020. The Respondent filed a response on February 9, 2021, which was accompanied by an Affidavit by Mother attached thereto as Exhibit "A".
>
> 4. The Court heard the testimony of the Petitioner, Petitioner's father (James Knuckles), Respondent, Respondent's sister (Malicia Miles), Respondent's pastor and friend (Eleanor Priester), and Respondent's daughter

(Asia Maria Miles) and reviewed exhibits submitted in the trial.

5. The Court finds that Decedent was taken from Respondent in July of 1994 by Petitioner when Decedent was two years old.

6. Respondent was about 20 years-old in July of 1994, and at the time was the single mother of two other young children and she was working at First Union and IHOP and was going to school at a community college to try and get her degree.

7. The Court finds that in July of 1994, there was a Child Support proceeding pending in Mecklenburg County with Respondent as Plaintiff and Petitioner as Defendant, Mecklenburg Civil Filing 93-CVD-7175, wherein Petitioner, as Defendant, was ordered to pay $40.00 per week in child support beginning on August 1, 1994.

8. Prior to this child support obligation taking effect, on the weekend preceding July 4, 1994, Petitioner took Decedent to a cookout when he was two years old and refused to return the child to Respondent and, as there was no custody order in place for the Decedent, the police refused to return Decedent to Respondent.

9. Respondent attempted to call the police and, on several occasions, went to Petitioner's parents' home to try and see the Decedent, and attempted to get help from the Mecklenburg County Self-help center, but never filed any custody papers.

10. Respondent was attacked and threatened with bodily harm if she attempted to contact the Petitioner or the Decedent by acquaintances of Petitioner, including his girlfriend "FiFi," and Respondent filed a police report regarding an assault by "FiFi" in January of 1995.

11. Respondent made efforts to locate the Decedent during his childhood and found Decedent and Petitioner on one occasion in February of 2004 but was unable to establish a relationship with Decedent despite some effort to do so and Petitioner and Decedent moved away thereafter and did not tell Respondent where they were.

> 12. Respondent has four other children other than Decedent that she raised to adulthood as a single parent despite sometimes having to work multiple jobs and being homeless at times.
>
> 13. The Court finds that Petitioner has not met its burden of proof by the greater weight of the evidence or by clear, cogent and convincing evidence that Respondent willfully intended to abandon the Decedent following the Decedent being taken from Respondent in July of 1994. Specifically, pursuant to *In re Estate of Lunsford*, 359 N.C. 382, 387, 610 S.E.2d 366, 370 (2005), Petitioner has not shown through the greater weight of the evidence that there was willful or intentional conduct on the part of the Respondent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child and thus Petitioner's Petition should be denied.

Based on these Findings of Fact, the trial court denied the Petition. Petitioner timely filed Notice of Appeal on 28 September 2022.

Issues

The issues on appeal are whether: (I) there is competent evidence to support the trial court's Findings of Fact; and (II) the Findings of Fact support the trial court's Conclusion Respondent did not willfully abandon Decedent and, thus, Respondent was not barred from inheriting from Decedent's estate under the Intestate Succession Act.

Analysis

Petitioner argues the trial court erred in denying his Petition. Petitioner contends Respondent should not be permitted to "reap an undeserved bonanza" from the estate of the parties' son. While Petitioner expends a lot of briefing re-arguing and re-characterizing the facts of this case, ultimately his arguments challenge the sufficiency of the evidence to support the trial court's Findings and the adequacy of those Findings to support the trial court's Conclusion that Petitioner failed to meet his burden of proof to show Respondent had willfully abandoned Decedent. Petitioner's arguments are consistent with our standard of review.

A trial court's findings of fact following a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000). Appellate review of the trial court's conclusions of law is de novo. *Id.* "The labels 'findings of fact' and 'conclusions of law' employed

by the lower tribunal in a written order do not determine the nature of our standard of review. If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion de novo." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) (citing *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011)).

I. Challenged Findings of Fact

Petitioner challenges Findings 5, 8, 9, 10, 11, and 13 as unsupported by competent evidence. Ultimately, Petitioner's arguments with respect to the trial court's factual findings amount to disagreements with the trial court's characterization of facts in evidence or are simply meritless. Nevertheless, we address each challenged Finding of Fact in turn. We do agree with Petitioner that Finding of Fact 13 is more properly deemed a Conclusion of Law and review it as such.

In Finding 5, the trial court found: "Decedent was taken from Respondent in July of 1994 by Petitioner when Decedent was two years old." However, Respondent's own testimony supports this Finding. Respondent testified numerous times during trial her son was "taken." Petitioner contends Decedent could not have been "taken" from Respondent because there was not a custody order in place. As such, Petitioner contends the parties had "equal rights to the child" and, therefore, he could not have "taken" the child from Respondent. However, the trial court made no finding Petitioner *illegally took* the child. Indeed, Respondent does not challenge the fact Petitioner took Decedent to a cookout on the weekend before 4 July 1994, from which Decedent was never brought back to Respondent. Further, Petitioner points to no evidence to show he ever returned or offered to return Decedent to Respondent or otherwise attempted to share custody of Decedent consistent with her "equal rights to the child." Thus, there is competent evidence in the Record to support Finding 5.

Finding 8 provides:

> Prior to this child support obligation taking effect, on the weekend preceding July 4, 1994, Petitioner took Decedent to a cookout when he was two years old and refused to return the child to Respondent and, as there was no custody order in place for the Decedent, the police refused to return Decedent to Respondent.

Petitioner contends only that the evidence does not support the portion of the Finding that the police refused to return Decedent

because there was no custody order in place. This argument ignores his prior challenge to Finding 5 in which he expressly relied on the fact there was no custody order in place. Nevertheless, this portion of the trial court's finding is supported by Respondent's affidavit, which the trial court considered. Petitioner makes no argument on appeal that the affidavit should not have been considered by the trial court. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Moreover, Respondent testified at the hearing "I called the cops several times . . . . Most times they told me I had to – either me or him had to file custody and go from there." Finding 8 is, thus, quite clearly supported by evidence in the Record.

The same is true for Finding 9. Finding 9 provides "Respondent attempted to call the police and, on several occasions, went to Petitioner's parents' home to try and see the Decedent, and attempted to get help from the Mecklenburg County Self-help center, but never filed any custody papers." This Finding is amply supported by both Respondent's testimony and affidavit—including testimony she went to the home of Petitioner's father "quite a few times" to try and see her son but was denied access to him.

Petitioner's challenge to Finding 10 is likewise unavailing. Finding 10 states: "Respondent was attacked and threatened with bodily harm if she attempted to contact the Petitioner or the Decedent by acquaintances of Petitioner, including his girlfriend 'FiFi,' and Respondent filed a police report regarding an assault by 'FiFi' in January of 1995." This Finding is also supported by Respondent's affidavit and testimony that FiFi assaulted her and FiFi and Petitioner's sister had threatened her. It is also supported by the police report Respondent filed after the assault, which was admitted into evidence.

Finally, Petitioner also attempts to challenge Finding 11. In Finding 11, the trial court found: "Respondent made efforts to locate the Decedent during his childhood and found Decedent and Petitioner on one occasion in February of 2004 but was unable to establish a relationship with Decedent despite some effort to do so and Petitioner and Decedent moved away thereafter and did not tell Respondent where they were." Again, this Finding is more than sufficiently supported by evidence in the Record. Petitioner's own testimony detailed his frequent relocations without telling Respondent where he was moving. Both Respondent's affidavit and testimony detailed Respondent tracking down Decedent at the condominium complex and visiting with her son. Thereafter, Petitioner moved away and Respondent did not know where Petitioner was living. Respondent's testimony and affidavit also sets out

her attempts to locate and contact Decedent. Thus, the trial court's factual findings are supported by evidence in the Record.

II. The Trial Court's Conclusion of Law

In Finding of Fact 13, the trial court concluded:

> The Court finds that Petitioner has not met its burden of proof by the greater weight of the evidence or by clear, cogent and convincing evidence that Respondent willfully intended to abandon the Decedent following the Decedent being taken from Respondent in July of 1994. Specifically, pursuant to *In re Estate of Lunsford*, 359 N.C. 382, 387, 610 S.E.2d 366, 370 (2005), Petitioner has not shown through the greater weight of the evidence that there was willful or intentional conduct on the part of the Respondent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child and thus Petitioner's Petition should be denied.

"Under the Intestate Succession Act, a parent may inherit from a deceased child if the child dies without a surviving spouse or lineal descendants." *In re Estate of Lunsford*, 359 N.C. 382, 386, 610 S.E.2d 366, 369 (2005) (citing N.C. Gen. Stat. § 29–15(3) (2003)). "If both parents survive the child under such circumstances, the child's estate is divided equally between them." *Id.* "Under N.C.G.S. § 31A–2, however, a parent who has 'wilfully (sic) abandoned the care and maintenance of his or her child' is barred from inheriting any portion of the child's estate unless the parent meets one of two statutory exceptions." *Id.* (citing N.C. Gen. Stat. § 31A–2). "Our wrongful death statute mandates that wrongful death proceeds be distributed 'as provided in the Intestate Succession Act,' and they are therefore subject to N.C.G.S. § 31A–2." *Id.* at 387, 610 S.E.2d at 369.

> For purposes of the Intestate Succession Act, parental abandonment has been defined as " 'wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.' " *McKinney v. Richitelli*, 357 N.C. 483, 489, 586 S.E.2d 258, 263 (2003) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)) (alteration in original). If a parent " 'withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance,' " such parent is deemed to have relinquished all parental

> claims and to have abandoned the child. *Id.* at 489–90, 586 S.E.2d at 263 (alteration in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608).

Id. at 387, 610 S.E.2d at 370.

> Abandonment has also been defined as " 'wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support.' " [*McKinney*] at 489, 586 S.E.2d at 263 (alteration in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). "Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608.

Id.

In a bench trial, a trial court's "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted). "The trial judge becomes both judge and juror, and it is [the judge's] duty to consider and weigh all the competent evidence before him." *Id.* The trial court "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Id.* "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712–13, 268 S.E.2d 185, 189 (1980) (citing *Knutton*, 273 N.C. 355, 160 S.E.2d 29 (1968)). The weight or credibility to be given to the evidence is ultimately within the discretion of the trial court. *Phelps v. Phelps*, 337 N.C. 344, 357–58, 446 S.E.2d 17, 25 (1994).

In this case, the trial court—citing specifically to *Lunsford*—ultimately found: "Petitioner has not shown through the greater weight of the evidence that there was willful or intentional conduct on the part of the Respondent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child[.]" The trial court determined that given the weight of the evidence Petitioner simply had not met his evidentiary burden to show Respondent engaged in willful or intentional conduct with a settled purpose of foregoing her parental duties and claims to the child. The trial court was plainly acting within

its discretion in affording more credibility and weight to Respondent's evidence. *Id.*

Moreover, the trial court's determination is supported by its evidentiary Findings of Fact. The trial court's evidentiary Findings of Fact demonstrate Petitioner took custody of Decedent and withheld him from Respondent for the rest of Decedent's life. Respondent made multiple attempts to find and visit with her son but was assaulted and threatened to stay away. When Respondent did locate Decedent, Petitioner moved away without telling Respondent. At the same time, the trial court found Respondent was raising four other children to adulthood while working multiple jobs and on occasion experiencing homelessness. The trial court was well within its discretion to conclude these facts did not support a determination Respondent had willfully abandoned Decedent.

Thus, the trial court's Findings of Fact support its ultimate determination that Petitioner failed to meet his burden to show Respondent had engaged in willful or intentional conduct with the purpose of foregoing her parental duties or claims. Therefore, the trial court's findings support the Conclusion Respondent had not willfully abandoned Decedent. Consequently, the trial court did not err in denying the Petition.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order denying Petitioner's Petition for Determination of Abandonment by Heir at Law is affirmed.

AFFIRMED.

Judges TYSON and CARPENTER concur.

NORTH CAROLINA CEMETERY COMMISSION, PLAINTIFF
v.
SMOKY MOUNTAIN MEMORIAL PARKS, INC. AND
SHEILA DIANE GAHAGAN, DEFENDANTS

No. COA23-761

Filed 2 April 2024

1. Cemeteries—sale of cemetery property—North Carolina Cemetery Act—minimum acreage statute—not void for vagueness—"cemetery" defined

After a corporation transferred two cemeteries to its sole shareholder, who then subdivided the property into five tracts and recorded surveys asserting that three of those tracts were not part of the cemeteries, the trial court properly granted summary judgment to the North Carolina Cemetery Commission in its lawsuit seeking to void the conveyance pursuant to the minimum acreage statute of the North Carolina Cemetery Act. The statute was not unconstitutionally vague given that it clearly defined "cemetery" as land "used or to be used" for cemetery purposes, and therefore the statute provided a person of ordinary intelligence a reasonable opportunity to understand what it was prohibiting when it forbade transfers of cemetery property that would result in a cemetery having less than thirty acres.

2. Cemeteries—sale of cemetery property—North Carolina Cemetery Act—minimum acreage statute—applicability—land designated for cemetery purposes

After a corporation transferred two cemeteries to its sole shareholder, who then subdivided the property into five tracts and recorded surveys asserting that three of those tracts were not part of the cemeteries, the trial court properly granted summary judgment to the North Carolina Cemetery Commission in its lawsuit seeking to void the conveyance pursuant to the minimum acreage statute of the North Carolina Cemetery Act, which forbids transfers of cemetery property that would result in a cemetery having less than thirty acres. All five tracts were subject to the minimum acreage requirement because they were "designated for cemetery purposes" under the Act where, in seeking licensure to operate the two cemeteries, the corporation and its shareholder had sent annual reports to the Commission that included all five tracts in their acreage calculation.

3. Cemeteries—sale of cemetery property—North Carolina Cemetery Act—enforcement of minimum acreage requirement—no unconstitutional taking

In an action where the North Carolina Cemetery Commission sought to void a transfer of cemetery land by a corporation to its sole shareholder (together, defendants) that violated the minimum acreage statute of the North Carolina Cemetery Act, which forbids transfers of cemetery property that would result in a cemetery having less than thirty acres, the Commission's enforcement of the minimum acreage requirement did not constitute a taking under the state or federal constitutions, but was instead a valid exercise of the State's police power. Not only did preserving the serenity and sanctity of cemeteries fall within the scope of the State's police power, but also the minimum acreage requirement was a reasonably necessary means for accomplishing that goal, since its enforcement did not completely deprive defendants of all beneficial uses of their property (because the entirety of the land that defendants sought to transfer could still be used to operate a for-profit cemetery).

4. Appeal and Error—conveyance of cemetery land—swapping horses on appeal—argument not advanced at trial

In an action where the North Carolina Cemetery Commission sought to void a transfer of cemetery land by a corporation to its sole shareholder (together, defendants) that violated the minimum acreage statute of the North Carolina Cemetery Act, defendants could not argue on appeal that the trial court should have granted summary judgment in their favor under the Marketable Title Act, since defendants did not raise this argument before the trial court and could not "swap horses" to "get a better mount" on appeal.

Appeal by defendants from orders entered 9 February 2023 by Judge William Coward in Jackson County Superior Court. Heard in the Court of Appeals 6 February 2024.

Maynard Nexsen PC, by David P. Ferrell and George T. Smith, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Jonathan H. Dunlap and Esther Manheimer, for defendants-appellants.

THOMPSON, Judge.

Defendants Smoky Mountain Memorial Parks, Inc. and Sheila[1] Diane Gahagan appeal from the trial court's order granting plaintiff's motion for summary judgment and denying their motion for summary judgment. On appeal, defendants contend that the applicable statute is void for vagueness, that the property in question was never dedicated for use as a cemetery, and that the statute as applied constitutes an unconstitutional taking. After careful review, we affirm.

I. Factual Background and Procedural History

The North Carolina Cemetery Commission (plaintiff) initiated these actions by filing complaints and notices of lis pendens, and issuing summonses against Smoky Mountain Memorial Parks, Inc. and Sheila Diane Gahagan (defendants) on 18 August 2021 in Swain and Jackson County Superior Courts.

Defendant Sheila Gahagan (Gahagan) was appointed as a receiver in a separate action that involved the previous owners of the two cemeteries at issue in the present case. In the prior receivership action, defendant Gahagan was ordered to develop a liquidation plan that included the sale of the two cemeteries; however, the bids received for the properties were deemed "unrealistic compared to the court's perceived value of the properties and potential income from the operations of the [c]emeteries." Instead, the court ordered that Gahagan transfer the properties to herself as payment for her services rendered as the receiver in that action.

By receiver deed executed 22 May 2013, defendant Gahagan "assign[ed] and transfer[red] all of her right, title and interest . . . of said cemeteries to Smoky Mountain Memorial Parks, Inc., a North Carolina Corporation, of which said [Gahagan] is the sole shareholder." Those deeds included the transfer of "18.67 acres, as shown on a plat . . . recorded in . . . [the] Swain County Public Registry" and "9.35 acres . . . as shown on a plat . . . recorded in . . . the office of the Register of Deeds for Jackson County . . . ." In her individual and official capacities, defendant Gahagan's signature is affixed to both documents under seal. Respectively, those cemeteries have since been named "Swain Memorial Park" and "Fairview Memorial Park."

From 2013 to 2020, defendants filed "Annual Report[s]" with plaintiff, wherein defendants stated that the "[t]otal [a]creage of cemetery"

1. The orders from which appeal is taken identified defendant Gahagan as "Shelia" in their captions; however, this appears to be a scrivener's error, as defendant Gahagan is referred to as "Sheila" within the orders and throughout the record on appeal.

was "18.67" acres for Swain Memorial Park. Similarly, from 2014[2] to 2020,[3] defendants filed these same "Annual Report[s]" with plaintiff, wherein defendants stated that Fairview Memorial Park consisted of "9.35" acres. These Annual Reports filed with plaintiff, and affixed with defendant Gahagan's signature, contain a disclaimer which states that:

> I hereby certify that this report is correct. Also, in accordance with [N.C. Gen. Stat. §] 65-69, I understand that *cemeteries may not sell, encumber, transfer or dispose of land that results in the cemetery having less than* [thirty] *acres*. I understand that any transaction in violation of [N.C. Gen. Stat. §] 65-69 is void. *Not voidable, void*.

(emphases added).

In 2020, Gahagan expressed a desire to leave the cemetery business and sought from plaintiff "written verification that land adjoining Fairview Memorial Park and Swain Memorial Park can be sold without restriction under the Cemetery Act as long as the actual cemetery is not disposed of." However, plaintiff informed Gahagan that "any sale of acreage associated with Fairview and Swain as known and licensed by [plaintiff would] be prohibited and void by statute if executed. We recognize Fairview as 9.35 acres and Swain as 18.67 acres *as noted in your letter*." (emphasis added).

On 25 June 2021, defendant Gahagan filed Articles of Dissolution for Smoky Mountain Memorial Parks, Inc., which went into effect on 1 July 2021. On 7 July 2021, contrary to plaintiff's warning that doing so would be in violation of the minimum acreage statute of the North Carolina Cemetery Act (Cemetery Act), defendant Smoky Mountain Memorial Parks, Inc. transferred the properties back to defendant Gahagan by warranty deed and recorded surveys that subdivided the properties into five separate tracts. Defendant Gahagan stated that three of these tracts were "not part of the cemeter[ies]" because they did not "contain burial lots or lots sold to be used as burial lots, mausoleums or columbarium[s] . . . ."

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2. The "Annual Report[s]" filed in 2014 and 2015 indicate that Fairview Cemetery consisted of "9.34" acres, not 9.35. Assuming that these acreages are correct, they do not impact our analysis, as the Cemetery Act does not bar cemeteries consisting of less than thirty acres from *adding* land; it prohibits such cemeteries from "disposing of such lands." *See* N.C. Gen. Stat. § 65-69(d) (2023) (prohibiting cemeteries "which own or control a total of less than [thirty] acres" from "dispos[ing] of any of such lands").

3. Defendants' "Annual Report" for Fairview Memorial Park in 2019 is absent from the record.

On 18 August 2021, plaintiff filed complaints in Jackson County and Swain County Superior Court, seeking to void the conveyances of the subdivided properties pursuant to the minimum acreage statute of the Cemetery Act. On 26 and 27 October 2021, defendants filed motions to dismiss, answers, and counterclaims in Jackson County and Swain County Superior Courts, respectively. On 26 and 29 August 2022, defendants filed motions for summary judgment in Jackson County and Swain County Superior Courts, respectively. Plaintiff filed amended motions for summary judgment on 7 November 2022 in Jackson and Swain County Superior Courts.

While the cases were pending, on 26 February 2022, defendant Gahagan filed her "Annual Report" for the year 2021 with plaintiff; however, in this report, for the very first time, Gahagan asserted that Swain Memorial Park consisted of "5.32" acres, and that she "disagree[d] with [plaintiff's] interpretation of cemetery land."

The two complaints were consolidated for a hearing on 14 November 2022 in Jackson County Superior Court, and by order entered 9 February 2023, the court granted plaintiff's motions for summary judgment and denied defendants' motions for summary judgment. From this order, defendants filed timely written notice of appeal.

II. Analysis

Before this Court, defendants allege the following issues:

> 1. Whether the lower court erred in granting summary judgment in favor of [plaintiff] and denying [defendants]' summary judgment [motions][?]
>
> 2. Whether the lower court erred as a matter of law in permitting [plaintiff] to restrict the sale of [d]efendant[s'] private land which is proximate to [their] cemeteries where the property [plaintiff] seeks to restrict has never been used or dedicated for use as a cemetery[?]
>
> 3. Whether [plaintiff's] regulation of the property in question is a taking under the North Carolina and United States [C]onstitutions[?]
>
> 4. Whether the statute at issue is unconstitutionally void for vagueness as applied[?]
>
> 5. Whether [defendants] should be estopped from taking the position that the property in question is non-cemetery property[?]

> 6. Whether [defendants] should have been granted summary judgment under the Marketable Title Act[?]

We will address the dispositive issues, not necessarily in this order, in the analysis to follow.

A. Standard of review

"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 internal quotation marks omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation, internal quotation marks, and emphasis omitted).

B. Void for vagueness

[1] As a matter of first impression, this case requires our Court to interpret a statute, N.C. Gen. Stat. § 65-69, which defendants argue "is unconstitutionally void for vagueness as applied" because it "fail[s] to give a person of ordinary intelligence a reasonable opportunity to know how broadly th[e] term [cemetery] is to be applied." Therefore, we will address defendants' void for vagueness argument at the outset.

"A statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 186, 594 S.E.2d 1, 19 (2004) (citation, internal quotation marks, and brackets omitted). "The Constitution requires that the statute merely prescribe boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *Id.* (citation and internal quotation marks omitted).

N.C. Gen. Stat. § 65-69(d), which governs the "[m]inimum acreage; sale or disposition of cemetery lands[,]" provides that:

> The provisions of . . . this section relating to the requirement for minimum acreage shall not apply to those cemeteries licensed by [plaintiff] on or before [1 July 1967], which own or control a total of less than [thirty] acres of land; provided that such cemeteries shall not dispose

> of any of such lands. A nongovernment lien or other interest in land acquired in violation of this section is void.

N.C. Gen. Stat. § 65-69(d) (2023).

Here, defendants contend that " 'cemetery' is a defined term under the Act, meaning, in essence, property where human remains are interred or preserved." However, this is not the definition of "cemetery" pursuant to the statute, and it appears that defendants have adopted their own definition of "cemetery" contrary to the statutory definition set forth by our legislature in N.C. Gen. Stat. § 65-48(3). We do not articulate statutorily defined terms "in essence," nor do we condone defendants' misrepresentation of our legislature's statutory definition of "cemetery" in order to argue that the statute is void for vagueness because of the application of that term.

Defendants correctly identified the definition of "cemetery" earlier in their appellate brief, wherein they acknowledged that a cemetery "is defined in [N.C. Gen. Stat.] § 65-48(3)" as:

> 'Cemetery' means any one or a combination of more than one of the following in a place used or to be used and dedicated or designated for cemetery purposes:
>
> a. A burial park, for earth interment.
>
> b. A mausoleum.
>
> c. A columbarium.

N.C. Gen. Stat. § 65-48(3).

Defendants' argument on this point simply ignores the disjunctive "or" present in the statutory definition of "cemetery" and seems to misunderstand the nature of a cemetery, which, as plaintiff succinctly notes, includes plotted grave sites that are "used" and the remaining portion of the cemetery unplotted, "to be used." Indeed, just because there are not yet bodies in the ground does not mean that the property is not "a place used or *to be used* and dedicated or designated for cemetery purposes[.]" N.C. Gen. Stat. § 65-48(3) (emphasis added). Defendants' disingenuous attempt to construe the definition of the term "cemetery" to mean "in essence, property where human remains are interred or preserved" is contrary to the statutory definition *previously defined in defendants' appellate brief*, and does not pass muster.

We conclude that the minimum acreage statute in N.C. Gen. Stat. § 65-69(d) is not unconstitutionally vague because it provides "the person of ordinary intelligence a reasonable opportunity to know what is

prohibited" and "provide[s] explicit standards for those who apply the law" with "boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *Rhyme*, 358 N.C. at 186, 594 S.E.2d at 19 (citation, internal quotation marks, and brackets omitted). Those boundaries require that "a place used or to be used and dedicated or designated for cemetery purposes" that is "licensed by [plaintiff] on or before [1 July] 1967, which own[s] or control[s] a total of less than [thirty] acres of land . . . shall not dispose of *any such lands*." N.C. Gen. Stat. §§ 65-48(3), 65-69(d) (emphasis added). Having determined that the statute that governs this case is not unconstitutionally void for vagueness as applied, we will now address defendants' remaining arguments on appeal.

C. North Carolina Cemetery Act

[2] Alternatively, defendants contend that "[t]he [n]on-[c]emetery [p]roperty was never dedicated for use as a cemetery[,]" and that "[plaintiff] should be able to show when and how the property was dedicated for such use, and that both parties complied with the prevailing laws or statutes governing dedication." We disagree, as defendants have, again, ignored the definition of "cemetery" set forth by our legislature in making this argument.

"The best indicia of [legislative] intent [is] the language of the statute, the spirit of the act and what the act seeks to accomplish." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (citation and ellipsis omitted). "The process of construing a statutory provision must begin with an examination of the relevant statutory language." *Id.* "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Id.* (citation, internal quotation marks, and brackets omitted). "An unambiguous word has a definite and well[-]known sense in the law." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 148 (2017) (citation and internal quotation marks omitted). However, "[i]n the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000).

Defendants' assertion that the "[n]on-[c]emetery [p]roperty was never dedicated for use as a cemetery" and is therefore not subject to the minimum acreage statute simply ignores the "or" in N.C. Gen. Stat. § 65-48(3), which states that a cemetery is a "place used or to be used and dedicated *or designated* for cemetery purposes[.]" N.C. Gen. Stat. § 65-48(3) (emphasis added).

"[D]esignated" is not defined in the Cemetery Act, nor does "designated" have a "definite and well[-]known sense in the law." *Fid. Bank*, 370 N.C. at 19, 803 S.E.2d at 148 (citation omitted). However, Black's Law Dictionary defines "designate" as, "[t]o choose (someone or something) for a particular job or purpose." *Designate*, *Black's Law Dictionary* (11th ed. 2019). Therefore, the statute governs "a place used or to be used and dedicated or 'chose[n] for a particular job or purpose[,]' cemetery purposes."

Moreover, the Cemetery Act "established [plaintiff] with the power and duty to adopt rules and regulations to be followed in the enforcement of this Article." N.C. Gen. Stat. § 65-49. The Cemetery Act also provides that "[n]o legal entity shall engage in the business of operating a cemetery company . . . without first obtaining a license from [plaintiff]." *Id.* § 65-55. Finally, N.C. Gen. Stat. § 65-67 mandates that "[a]pplications for renewal license must be submitted . . . every year in the case of an existing cemetery company." *Id.* § 65-67.

Here, the record is replete with evidence that the entire 18.67 acres of Swain Memorial Park and 9.35 acres of Fairview Memorial Park were " 'chose[n] for a particular purpose[,]' cemetery purposes." Indeed, defendant Gahagan represented that Swain Memorial Park consisted of 18.67 acres, and Fairview Memorial Park consisted of 9.35 acres, when she became the owner of the cemeteries in 2013, and in defendants' Annual Reports to plaintiff, which allowed defendants to renew their licenses to operate the two for-profit cemeteries after Gahagan became the owner of the cemeteries in 2013.

Plaintiff is the entity that our legislature vested "with the power and duty to adopt rules and regulations to be followed in the enforcement of th[e Cemetery Act,]" and defendant was required to submit Annual Reports to plaintiff "every year" in order to "obtain[ ] a license" to "engage in the business of operating a cemetery company . . . ." *Id.* §§ 65-49, -55, -67. We conclude that defendants' representations to plaintiff in these Annual Reports constituted a "designat[ion]" for purposes of the Cemetery Act, as "the language of the statute, the spirit of the act and what the act seeks to accomplish[,]" are reconciled under this definition of "designated." *Wilkie*, 370 N.C. at 547, 809 S.E.2d at 858 (citation and ellipsis omitted).

For the aforementioned reasons, we hold that the entire 18.67 acres and 9.35 acres of the properties in question are "cemeter[ies,]" subject to the minimum acreage statute, because they were "*designated for cemetery purposes*[,]" N.C. Gen. Stat. § 65-48(3), through defendants' representations to plaintiff over the years that they sought licensure to operate the for-profit cemeteries.

D. Constitutional takings

[3] Defendants also contend that plaintiff's "application of [N.C. Gen. Stat.] § 65-69(d) to the [n]on-[c]emetery [p]roperty[4] constitutes a taking under the North Carolina [C]onstitution" or "a taking under the United States Constitution." Defendants argue that "[u]nder the 'ends' prong of *Responsible Citizens*, it is not within the State's police power to use [N.C. Gen. Stat.] § 65-69 to regulate property that is not voluntarily and intentionally dedicated[,]"[5] or in the alternative, that plaintiff's "application . . . constitutes a taking under the 'means' prong of *Responsible Citizens.*" *See, e.g.*, *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983) (establishing the "ends-means" analysis to determine whether an exercise of the police power is legitimate). We disagree, because plaintiff's enforcement of the Cemetery Act's minimum acreage requirement was a valid exercise of regulations pursuant to the police power of the State of North Carolina.

"A taking does not occur simply because government action deprives an owner of previously available property rights." *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989). "Determining if governmental action constitutes a taking depends upon whether a particular act is an exercise of the police power or of the power of eminent domain." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 854, 786 S.E.2d 919, 924 (2016) (citation and internal quotation marks omitted). "[T]he [S]tate must compensate for property rights taken by eminent domain; however, damages resulting from the proper exercise of the police power are noncompensable." *Id.* at 854, 786 S.E.2d at 925 (citation and brackets omitted).

"Under the police power, the government *regulates* property to prevent injury to the public." *Id.* at 854, 786 S.E.2d at 924 (emphasis in original). On the other hand, "[u]nder the power of eminent domain, the government *takes* property for public use because such action is advantageous or beneficial to the public." *Id.* (emphasis in original). However, "[p]olice power regulations must be enacted in good faith, and have appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." *Id.* (citation, internal quotation marks, and brackets omitted). "An exercise of

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4. Defendants incorrectly contend that there is "cemetery" and "non-cemetery" property in the present case. As established above, the entire 18.67 acres of Swain Memorial Park and the entire 9.35 acres of Fairview Memorial Park were designated as cemeteries, subjecting them to the minimum acreage requirement of the Cemetery Act.

5. As established above, defendants designated the properties as cemeteries pursuant to the Cemetery Act's licensure requirements.

police power outside these bounds may result in a taking." *See id.* (referencing *Responsible Citizens* for the proposition).

"Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power." *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted). "First, is the object of the legislation within the scope of the police power?" *Id.* (citation omitted). "Second, considering all the surrounding circumstances and particular facts of the case[,] is the means by which the governmental entity has chosen to regulate reasonable?" *Id.* (citation omitted). We will address each of these inquiries in the analysis to follow.

i. Police power

Here, "[t]he societal benefits envisioned by the [Cemetery Act] [are] designed primarily to prevent injury or protect the health, safety, and welfare of the public." *Kirby*, 368 N.C. at 855, 786 S.E.2d at 925. By placing limitations on the minimum acreage of cemeteries in order to preserve the serenity and sanctity of these lands, "the government *regulates* property to prevent injury to the public." *Id.* at 854, 786 S.E.2d at 924 (emphasis in original). The government is not "*tak*[*ing*] property for public use because such action is advantageous or beneficial to the public." *Id.* (emphasis in original). Therefore, we conclude that the challenged "governmental action . . . is an exercise of the police power" of the State of North Carolina, not an exercise of "the power of eminent domain." *Id.* (citation omitted).

Moreover, "[o]ur Courts have long held that preservation of the sanctity of grave sites is a proper exercise of police power by the State of North Carolina." *Massey v. Hoffman*, 184 N.C. App. 731, 735, 647 S.E.2d 457, 460–61 (2007). Indeed, "[t]he sentiment of all civilized peoples . . . has held in great reverence the resting places of the dead as hallowed ground" and "[i]t is a sound public policy to protect the bur[ial] place of the dead." *Id.* at 735–36, 647 S.E.2d at 461 (citation and brackets omitted).

We conclude that the "object[s] of the legislation[,]" cemeteries, are "within the scope of the police power" of the State of North Carolina. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted). However, our takings analysis does not end here, as "[a]n exercise of police power . . . may [still] result in a taking." *Kirby*, 368 N.C. at 854, 786 S.E.2d at 924. Therefore, we must determine whether, after "considering all the surrounding circumstances and particular facts of the case[,] is the means by which the governmental entity has chosen to

regulate reasonable?" *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted).

ii. Reasonable interference with owner's property rights

To determine whether the means by which the governmental entity has chosen to regulate are reasonable, we conduct a two-pronged test: (1) "[i]s the statute in its application reasonably necessary to promote the accomplishment of a public good[,]" and (2) "is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" *Id.* at 261–62, 302 S.E.2d at 208 (citation omitted). A land-use regulation's interference with the property owner's rights is unreasonable when its application "has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted . . . ." *See id.* at 263, 302 S.E.2d at 209–10 (citation and emphasis omitted) (extending takings analysis under "an analogous situation[,]" zoning ordinances, to land-use regulations).

However, "the mere fact that a[ ] [land-use regulation] results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not [a] sufficient reason to render the" regulation invalid. *Id.* at 265, 302 S.E.2d at 210 (citation omitted). "[I]f an act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." *Massey*, 184 N.C. App. at 735, 647 S.E.2d at 460 (citation and internal quotation marks omitted).

In the present case, after "considering all the surrounding circumstances and particular facts of the case[,]" we conclude that "the means by which the governmental entity has chosen to regulate" are reasonable. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted). That is, "the [minimum acreage requirement of the Cemetery Act] in its application [is] reasonably necessary to promote the accomplishment of a public good[,]" and "the interference with [defendants'] right to use [their] property as [t]he[y] deem[ ] appropriate [is] reasonable in degree." *Id.* at 261–62, 302 S.E.2d at 208 (citation omitted).

We reach this conclusion because the minimum acreage requirement of the Cemetery Act does not have "the effect of completely depriving [defendants] of the beneficial use of [their] property by precluding all practical uses or the only use to which it is reasonably adapted . . . ." *Id.* at 263, 302 S.E.2d at 209–10 (citation and emphasis omitted). Defendants are still entitled to utilize the entirety of the property as part of a for-profit cemetery, pursuant to the Cemetery Act.

Our legislature determined that a regulatory scheme governing the minimum acreage of burial sites was necessary to preserve the sanctity and serenity of grave sites, and plaintiff's enforcement of the minimum acreage requirement of the Cemetery Act is not an unconstitutional taking, but a proper exercise of the police power by the State of North Carolina. As a "proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." *Massey*, 184 N.C. App. at 735, 647 S.E.2d at 460 (citation and internal quotation marks omitted).

For the aforementioned reasons, we conclude that plaintiff's enforcement of the Cemetery Act does not constitute a taking under the North Carolina or United States Constitutions, but is a valid exercise of the police power of the State of North Carolina.

E. Marketable Title Act

[4] Finally, defendants contend that the court "should have granted summary judgment in favor of [d]efendants under the Marketable Title Act." We disagree, as defendants made no argument before the trial court that the Marketable Title Act warranted summary judgment in their favor.

It is well established that, "the law does not permit parties to swap horses between courts in order to get a better mount" before an appellate court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Here, our careful "examination of the record discloses that the cause was not tried upon th[e] [Marketable Title Act] theory," *id.*, and we decline to address defendants' arguments regarding the Marketable Title Act.

III. Conclusion

For the aforementioned reasons, we conclude that N.C. Gen. Stat. § 65-69(d) is not void for vagueness as applied; that defendants designated the entirety of the Swain and Fairview Memorial Cemeteries for cemetery purposes through their representations to plaintiff, thus subjecting them to the minimum acreage statute of the Cemetery Act; and that the minimum acreage statute is not an unconstitutional taking, but a proper exercise of the police power of the State of North Carolina.

AFFIRMED.

Judges STROUD and FLOOD concur.

STATE v. HERNANDEZ

[293 N.C. App. 283 (2024)]

STATE OF NORTH CAROLINA
v.
ROBERTO ANASTASIO HERNANDEZ, DEFENDANT

No. COA23-832

Filed 2 April 2024

1. Search and Seizure—search warrants—probable cause—supporting affidavits—nexus between items sought and alleged crimes

In a prosecution for kidnapping and sex offenses against minors, the trial court did not commit plain error in denying defendant's motion to suppress video evidence obtained from media storage devices seized from his home—the site of the alleged crimes—where two separate search warrants were issued upon a proper determination of probable cause. The supporting affidavits attached to the warrant applications were not purely conclusory, but rather contained facts showing a nexus between the list of items to be seized and the alleged offenses sufficient for the magistrate to reasonably infer that the requested searches would reveal incriminating evidence. Further, the description of the electronic categories listed in the affidavits were sufficient to encompass the specific media storage devices recovered from defendant's home.

2. Constitutional Law—effective assistance of counsel—failure to object to admissible evidence—no prejudice

In a prosecution for kidnapping and sex offenses against minors, defense counsel was not ineffective for failing to object to evidence seized pursuant to search warrants, which were properly issued upon probable cause, because any objection would have been overruled and, thus, defendant could not demonstrate that he was prejudiced by his counsel's performance.

3. Constitutional Law—double jeopardy—sentencing—first-degree kidnapping—underlying sexual offense

In a prosecution for kidnapping and sex offenses against minors, the trial court violated defendant's right to be free of double jeopardy by subjecting him to multiple punishments for the same offense when it entered judgment upon his convictions for both first-degree kidnapping and the sex offenses that served to elevate the kidnapping charge to one of the first degree; therefore, the sentencing order was vacated and the matter was remanded for resentencing.

STATE v. HERNANDEZ

[293 N.C. App. 283 (2024)]

Appeal by defendant from judgments entered 20 January 2023 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 6 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Sarah Holladay, for defendant-appellant.

FLOOD, Judge.

Roberto Anastasio Hernandez ("Defendant") appeals from convictions for three counts of statutory rape of a person who is fifteen years of age or younger, one count of statutory sex offense of a person who is fifteen years of age or younger, three counts of indecent liberties with a child, and one count of kidnapping. Defendant argues on appeal: (A) the trial court plainly erred in denying his motion to suppress the fruits of the two search warrants where the supporting affidavits failed to allege any nexus between the items sought and the crime being investigated; (B) Defendant alternatively received ineffective assistance of counsel ("IAC") where defense counsel failed to object at trial to the introduction of evidence related to Defendant's suppression motion; and (C) the trial court violated Defendant's right to be free of double jeopardy. After careful review, we conclude the affidavits supported a proper finding of probable cause, and as such the trial court did not plainly err, nor did Defendant receive IAC. Regarding Defendant's third argument, however, we conclude the trial court violated Defendant's right to be free of double jeopardy. We therefore vacate and remand the trial court's sentencing order for a resentencing hearing.

I. Factual and Procedural Background

In July 2020, J.G.[1]—a thirteen-year-old girl—reported to the police that Defendant, a family associate, took her from her family's home in the middle of the night and without her parents' permission, and drove her to his house. J.G. further reported that, at his residence, Defendant showed her a sex toy, asked her to wear a black dress, and vaginally raped her.

Based on J.G.'s report and after verifying Defendant's address, Officer Darrel Gray sought and obtained from a magistrate a search warrant

1. A pseudonym is used to protect the identity of the minor child in keeping with N.C. R. App. P. 42.

dated 29 July 2020 (the "July Warrant") for Defendant's address. Officer Gray's affidavit in support of the July Warrant (the "July Affidavit"), in the "Probable Cause" section, describes J.G.'s account of her alleged kidnapping from her parents' home by Defendant and her subsequent rape at Defendant's residence, as well as her account of what she saw at the residence. The July Affidavit further describes Officer Gray's six years of experience as a law enforcement officer with Dare County, and his seventeen years of law enforcement experience with the Coast Guard. Included under the "Items to be Seized" section of the July Affidavit are:

> a. Cellular telephones, tablets, gaming systems capable of recording and/or taking pictures and accessing or storing digital media files, and/or capable of internet access.
>
> b. Computers, and computer related storage media to include, but not limited to hard drives, CD disks, DVD disks, thumbdrives, memory sticks, iPods, personal digital assistant (PDA), flash media, diskettes, routers and other magnetic, electronic or optical media.
>
> c. Security cameras and any storage device associated with it.
>
> d. Any and all items that [J.G.] may have been in contact with to include but not limited to; bed sheets/ comforters, pillow cases, lamps, suspect clothing and vehicle seats for the purpose of obtaining fingerprints or DNA.
>
> e. Any and all items that [J.G.] described inside the residence that would show intimate knowledge [J.G.] was inside the residence and more specifically the suspect's bedroom, to include but not limited to; sexual toys as described the victim to be a penis shaped dildo, condoms, female clothing described as a black dress with shoulder straps, knives, long rifles and lamp.
>
> f. Any and all Records indicating the identity of the suspect and/or current residents or owners of the property being searched, including but not limited to: Utility bills or records, tax bills or records, mail bearing the address being searched, driver's license, passports and ID's issued by other countries.

Regarding these listed items, Officer Gray provided in the application for the search warrant that "[t]here is probable cause to believe that [the items to be seized] . . . constitute[] evidence of the crimes of second

degree kidnapping and statutory rape of a person who is thirteen, fourteen, or fifteen, and of the identity of a person participating in" said crimes. Officers executed the July Warrant and searched Defendant's residence, where they obtained, *inter alia*, a "hi-def recorder"—or DVR—connected to Defendant's home security cameras, a GoPro camera, and an SD card associated with the GoPro camera.

Officer Gray sought and obtained a second search warrant dated 4 August 2020 (the "August Warrant") to access the contents of the electronic items seized from Defendant's residence. The affidavit in support of the August warrant (the "August Affidavit") describes Officer Gray's experience as a law enforcement officer, and lists several items found in the residence that were to be searched, including cell phones, storage devices, and other electronic devices. The "Items to be Seized" section of the August Affidavit includes, among other digital items to be seized, "audio and video clips related to the above-described criminal activity and further described in this affidavit in support of the search warrant, for the above-described item(s)." Among the "above-described item(s)" are three SD cards, as well as two DVRs. The "Probable Cause" portion of the August Affidavit describes the reported kidnapping and rape of J.G., and states that Officer Gray "know[s] from [his] training and experience" that cellular phones are often used to record, discuss, or facilitate sex crimes.

Officers executed the August Warrant and searched the DVR as well as the SD card associated with the GoPro Camera. The DVR revealed a video of Defendant engaging in sexual acts with K.L.,[2] who, at the time, was a thirteen-year-old girl living with her mother in a rented room of Defendant's residence. On the SD card, officers found a video of Defendant having vaginal intercourse with W.R.,[3] who was an employee of Defendant's painting business and was, at the time of the recording, either fifteen or sixteen years of age.

Following the officers' execution of the August Warrant, Defendant was served with bills of indictment charging him with three counts of statutory rape of a child less than or equal to fifteen-years-old, one count of statutory sex offense with a child less than or equal to fifteen-years-old, three counts of indecent liberties with a child, and one count of first-degree kidnapping.

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2. A pseudonym is used to protect the identity of the minor child in keeping with N.C. R. App. P. 42.

3. A pseudonym is used to protect the identity of the alleged victim in keeping with N.C. R. App. P. 42.

Prior to trial, Defendant filed several motions to suppress the digital evidence obtained by law enforcement. As to the July Warrant, Defendant alleged that the warrant was overbroad because it authorized seizure of, *inter alia*, the relevant DVR and SD card, when nothing in the July Affidavit indicated that such items were related to the crime being investigated. As to the August Warrant, Defendant alleged that the contents of the DVR and SD card should be suppressed as fruit of the poisonous tree, and because the August Affidavit failed to allege these devices were likely to contain evidence of the crime being investigated. Defendant further moved to suppress statements obtained from K.L. and W.R., alleging these statements were obtained solely as a result of unlawful seizure and search of the DVR and SD card.

This matter came before the trial court on 17 January 2023. At trial, before the first witness—W.R.—testified, Defendant objected and asked the trial court that he be heard on the motions to suppress, but the trial court overruled the objection. W.R. then testified, without objection from Defendant, that Defendant pressured her into sex on multiple occasions starting when she was fifteen-years-old, and that she had sex with him so as to keep her job with his painting business. The video showing Defendant performing sexual acts with W.R. was admitted and shown to the jury. Defendant objected to the video on the grounds that it was not dated and therefore did not necessarily show evidence of a crime, but did not object on the basis of suppression. After W.R. testified, the trial court heard Defendant's suppression motions, whereupon Defendant and the State agreed there were no factual issues requiring an evidentiary hearing. The trial court did not rule on the motion to suppress until the third day of the trial.

Prior to the trial court ruling on the motions to suppress, J.G. and K.L. each testified. J.G. testified, without objection, that Defendant came to her house at night and told her to come with him, and explained that she went with him because she thought he might be armed, and she feared for her family's safety. K.L. testified, without objection, that Defendant gave her marijuana and had sexual intercourse with her, and that he also demanded she give him oral sex, which she provided once. The DVR video that showed Defendant performing sexual acts with K.L. was admitted and shown to the jury, without objection.

Following testimonies from J.G. and K.L., the trial court denied Defendant's motions to suppress. In support of its denial, the trial court found that, as the July and August Affidavits in respective support of application for the July and August Warrants contain "affirmation[s] that the property that is sought to be located, searched, or seized constitutes

evidence of a crime and identifications of a person," there was probable cause to believe that the items sought in the search were relevant to the crime being investigated. The trial court further found that, as the Affidavits specify the firsthand account of an alleged victim of sexual assault, and describe details of the incident and the location of the alleged sexual assault as the location for the search, there was a "strong nexus" between the location of the search and the place where the alleged crime occurred, and therefore probable cause to issue the Warrants. The trial court noted that, "while certain items may have been [omitted] such as a conclusory affirmation that from [Officer Gray's] training[] and experience there may be evidence[,]" it was "commonsensical or reasonable" for the magistrate to have determined this information, and the magistrate had a "substantial basis for concluding that probable cause existed."

The trial court found, in the alternative, that the search was incident to lawful arrest because Defendant had been arrested and taken into custody upon execution of the July Warrant. The trial court also found, in the further alternative, that the statutory good faith exception applied where Officer Gray was acting upon a magistrate's order.

Following denial of Defendant's motions to suppress, Defendant testified on his own behalf. Defendant admitted to picking up J.G. from her family's home at night and bringing her to his home, but denied any sexual acts with her. Defendant admitted that the video showing him and K.L. depicted him touching her and kissing her inner thigh. Defendant further admitted to a sexual relationship with W.R., but claimed he believed she was sixteen at the time of the video recording found on the SD card.

After the close of evidence, the trial court instructed the jury and provided in its instructions, *inter alia*, that Defendant could be found guilty of first-degree kidnapping only if he removed J.G. from her home to facilitate the crime of statutory rape or indecent liberties. On 20 January 2023, the jury returned verdicts finding Defendant guilty on all counts, and the trial court thereafter entered eight separate written judgments—where it made no written findings—sentencing Defendant within the presumptive range for each offense to several consecutive sentences totaling 1,081 to 1,627 months' imprisonment. One of the judgments for indecent liberties was later amended to reflect the correct sentence of sixteen to twenty-nine months' imprisonment, instead of 240 to 348 months' imprisonment. On 24 January 2023, Defendant provided written notice of appeal, in which he mistakenly listed the date of entry of the trial court's judgments as 21 January 2023, rather than the correct date of 20 January 2023.

II. Jurisdiction

As an initial matter, Defendant's written notice of appeal contains a defect in its listing of the date of the trial court's judgments, and Defendant therefore failed to properly take appeal to this Court. *See* N.C. R. App. P. 4(b) (a notice of appeal shall "designate the judgment or order from which appeal is taken"); *see also State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011) ("A default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court." (citations omitted) (cleaned up)). In addition to his appellate brief, Defendant has filed a concurrent petition for writ of certiorari ("PWC"), in which he asks this Court to issue this discretionary writ to consider his claims on the merits.

As this Court has consistently provided, though we may issue a writ of certiorari to review a trial court's order or judgment when the right to prosecute an appeal has been lost by failure to adhere to appellate procedure, under N.C. R. App. P. 21(a)(1) the defendant's petition must show "merit or that error was probably committed below[.]" *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) (citation and internal quotation marks omitted).

Here, as explained in further detail below, we conclude Defendant in his PWC has demonstrated merit or that error was probably committed by the trial court. We therefore allow this discretionary writ and proceed to the merits of Defendant's appeal. *See Ricks*, 378 N.C. at 741, 862 S.E.2d at 839; *see also* N.C. R. App. P. 21(a)(1).

III. Analysis

Defendant presents three arguments on appeal: (A) the trial court plainly erred in denying his motion to suppress the fruits of the Warrants that failed to allege any nexus between the items sought and the crime being investigated; (B) Defendant alternatively received IAC, where trial counsel failed to object at trial to the introduction of evidence related to Defendant's suppression motion; and (C) the trial court violated Defendant's right to be free of double jeopardy. We address each argument, in turn.

A. Motion to Suppress

[1] Defendant argues the trial court plainly erred in denying his motion to suppress the evidence obtained as a result of the Warrants, as the Affidavits failed to allege any nexus between the items sought and the crime being investigated. After careful consideration, we disagree.

1. Standard of Review

As Defendant concedes, he failed to renew his suppression objections when the State admitted the relevant evidence before the trial court, and Defendant therefore failed to preserve this issue for our review. *See State v. Powell*, 253 N.C. App. 590, 593, 800 S.E.2d 745, 748 (2017) ("[T]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial."). As we have consistently provided, however, "to the extent a defendant fails to preserve issues relating to his motion to suppress, we review for plain error if the defendant specifically and distinctly assigns plain error on appeal." *Id.* at 594, 800 S.E.2d at 748 (citation and internal quotation marks omitted) (cleaned up). Defendant here specifically and distinctly assigns plain error, and we therefore review the trial court's denial of Defendant's motion to suppress for plain error. *See id.* at 594, 800 S.E.2d at 748.

"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.* at 518, 723 S.E.2d at 334 (citation and internal quotation marks omitted). As plain error is to be "applied cautiously and only in the exceptional case, the error will often be one that seriously affects fairness, integrity or public reputation of judicial proceedings[.]" *Id.* at 518, 723 S.E.2d at 334 (citation and internal quotation marks omitted) (cleaned up). "In conducting plain error review, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress." *State v. Lenoir*, 259 N.C. App. 857, 860, 816 S.E.2d 880, 883 (2018) (citation omitted).

This Court reviews "an order denying a motion to suppress to determine whether the trial court's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the trial court's ultimate conclusions of law[,]" and "[w]e review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017) (citations and internal quotation marks omitted) (cleaned up).

"In determining whether probable cause exists to issue a search warrant, a magistrate must make a practical, common-sense decision

based on the totality of the circumstances, whether there is a fair probability that evidence will be found in the place to be searched[,]" and this Court accords "great deference" to a magistrate's determination of probable cause. *Id.* at 576, 803 S.E.2d at 416 (citation and internal quotation marks omitted) (cleaned up). This Court's role "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.* at 576, 803 S.E.2d at 416 (internal quotation marks omitted) (citation omitted).

2. Probable Cause for Issuance of a Search Warrant

Under the law of our State, for a search warrant to be properly issued to a police officer, "the facts set out in the supporting affidavit must show some connection or nexus linking" the items sought to alleged illegal activity. *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020). A supporting affidavit is sufficient and establishes probable cause where it gives the magistrate "reasonable cause to believe that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application[,]" and that those items "will aid in the apprehension or conviction of the offender." *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980); *see State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) ("A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched." (citation and internal quotation marks omitted)).

In determining whether an applying officer has demonstrated probable cause, a magistrate may "draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant[.]" *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991) (citation and internal quotation marks omitted). "To that end, it is well settled that whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation and internal quotation marks omitted) (cleaned up). While a magistrate may employ such reasonable inference in determining probable cause, he may not "lawfully issue a search warrant based on an affidavit that is 'purely conclusory' and that does not state the underlying circumstances allegedly giving rise to probable cause." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303–04 (2016) (quoting *Bright*, 301 N.C. at 249, 271 S.E.2d at 372).

Our Supreme Court's decision in *State v. Campbell* is illustrative of what may render an affidavit in support of a search warrant "purely conclusory." 282 N.C. 125, 127, 191 S.E.2d 752, 754 (1972). In *Campbell*,

the defendant appealed from the trial court's dismissal of his challenge to the competency of evidence, arguing that, as the affidavit in support of the search warrant application failed to demonstrate probable cause, the challenged evidence was impermissibly obtained. In holding that the affidavit did not provide a sufficient basis for a finding of probable cause, our Supreme Court concluded that the officer's affidavit in support of the warrant application was "purely conclusory[,]" as "[i]t detail[ed] no underlying facts and circumstances from which the issuing officer could find that probable cause existed [t]o search the premises described. The affidavit implicates those premises [s]olely as a conclusion of the affiant." *Id.* at 131, 191 S.E.2d at 756–57. In further support of this conclusion, our Supreme Court provided, "[n]owhere in the affidavit is there any statement that [the evidence sought was] ever possessed or sold in or about the dwelling to be searched[,]" *and* "[n]owhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of [the evidence sought] in the dwelling." *Id.* at 131, 191 S.E.2d at 757.

Although a search warrant may not properly issue where the supporting affidavit is purely conclusory, our Supreme Court's decision in *Allman* provides an apt illustration of how a supporting affidavit, while not *directly* establishing a connection between evidentiary items sought and illegal activity, may still be sufficient to establish the nexus necessary for a probable cause determination. 369 N.C. at 298, 794 S.E.2d at 305–06. In *Allman*, the defendant and two other individuals were pulled over while riding together in a car, and a subsequent search of the vehicle revealed a large quantity of marijuana and over $1,600 in cash. *Id.* at 292–93, 794 S.E.2d at 302. Following discovery of the marijuana and cash, an officer applied for a warrant to search the defendant's home for evidence of drug dealing, and provided in his supporting affidavit that, *inter alia*: (1) large quantities of drugs and cash were found in the vehicle; (2) two of the individuals occupying the vehicle had a history of drug-related criminal offenses; and (3) the occupants of the vehicle had lied to the arresting officers about where they lived. *Id.* at 295–96, 794 S.E.2d at 304–05. The affidavit also stated, "based on [the officer's] training and experience, that drug dealers typically keep evidence of drug dealing at their homes[.]" *Id.* at 295–96, 794 S.E.2d at 304. A magistrate issued the search warrant, a search of the defendant's residence revealed the presence of illegal drugs and drug paraphernalia, and the defendant was charged, tried, and convicted. *Id.* at 292–93, 296, 794 S.E.2d at 302, 305.

The defendant appealed from the trial court's denial of her motion to suppress evidence, arguing that the warrant was not supported by probable cause. *Id.* at 293, 794 S.E.2d at 302. This matter eventually came before our Supreme Court, and based on the facts contained in the affidavit when viewed in light of the officer's training and experience, the Court, while acknowledging that "nothing in [the officer's] affidavit directly linked [the] defendant's home with evidence of drug dealing[,]" provided that such "direct evidence" is not always necessary to establish probable cause. *Id.* at 297, 794 S.E.2d at 305. Our Supreme Court therefore concluded "it was reasonable for the magistrate to infer that there could be evidence of drug dealing" found at the defendant's residence, and found no error in the trial court's denial of the defendant's motion to suppress. *Id.* at 296–97, 794 S.E.2d at 305. Thus, an affidavit that is "purely conclusory" is insufficient to establish probable cause, *Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57, but one that draws a connection—even if indirectly—between an officer's training and experience and his belief that a search will yield incriminating evidence is sufficient to establish probable cause. *See Allman*, 369 N.C. at 295–96, 794 S.E.2d at 304–05.

In the instant case, Defendant challenges the trial court's oral finding that the Affidavits supported issuance of the Warrants for probable cause, and contends, more specifically, that the "trial court's findings of fact were not supported by competent evidence and its conclusions of law were neither supported by the evidence nor legally correct." We disagree with Defendant's contention.

The trial court in its eight written judgments made no written findings, but made extensive oral findings at the conclusion of trial. Defendant does not challenge on appeal the trial court's finding of a nexus between the location of the search—Defendant's residence and bedroom—and alleged criminal conduct. As such, relevant to this appeal is the trial court's finding that the State demonstrated probable cause to search and seize the Affidavits' "Items to be Seized," as the Affidavits contain "affirmation[s] that the property that is sought to be located, searched, or seized constitutes evidence of a crime and identifications of a person[.]"

The magistrate, in issuing the Warrants, relied on the information contained in each of the respective Affidavits, and we conduct our *de novo* review to determine whether, under the totality of the circumstances and per the content of the Affidavits, the magistrate "had a substantial basis for concluding that probable cause existed." *Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416 (citation and internal quotations

omitted); *see also Allman*, 369 N.C. at 293, 794 S.E.2d at 303. We consider the content of the July Affidavit and the August Affidavit, in turn.

a. *The July Affidavit*

Regarding issuance of the July Warrant, Defendant contends that, as the July Affidavit's "Probable Cause" section contains no mention of the electronic items listed in its "Items to be Seized" section, no explanation of why Officer Gray thought the listed items might be in the home and relevant to investigation, and no allegation that an electronic device was used in commission of the alleged crimes, the July Affidavit fails to establish any nexus between the alleged crime and the electronic items.

In support of the July Warrant application, the July Affidavit contains in its "Probable Cause" section a description of J.G.'s account of her alleged kidnapping from her parents' home by Defendant and subsequent rape at Defendant's residence, as well as of her account of what she saw at the residence. Further, the July Affidavit provides an attestation of Officer Gray's training and experience, and includes under its "Items to be Seized" section, in relevant part, the following electronic items:

> a. Cellular telephones, tablets, gaming systems *capable of recording and/or taking pictures* and accessing or storing digital media files, and/or capable of internet access.
>
> b. Computers, and computer related storage media to include, *but not limited to hard drives*, CD disks, DVD disks, thumbdrives, memory sticks, iPods, personal digital assistant (PDA), flash media, diskettes, routers and *other magnetic, electronic or optical media*.
>
> c. Security cameras and any *storage device associated with [them]*.

(Emphasis added). Regarding these electronic items, Officer Gray provided in the application for the July Warrant that there is probable cause to believe these items constitute evidence of the alleged crimes, as well as evidence of the perpetrator's identity. Upon executing the July Warrant, officers seized, *inter alia*, a DVR connected to Defendant's home security cameras, a GoPro camera, and an SD card associated with the GoPro camera.

As a threshold matter, while not fully developed in Defendant's brief on appeal, we address the sufficiency of the July Affidavit's description of the "Items to be Seized"—specifically, as it concerns the DVR and

relevant SD card. While the DVR and relevant SD card ultimately seized by officers were not listed by name in the July Affidavit as "Items to be Seized," our Supreme Court has provided that a "description of property is sufficient when it is as specific as the circumstances and nature of the activity that is under investigation permit." *State v. Kornegay*, 313 N.C. 1, 16, 326 S.E.2d 881, 894 (1985) (citation omitted). Given the "nature and circumstances" of this case, with the State's knowledge of Defendant's residence and the contents therein being derived solely from the account of J.G.—a minor and alleged sexual assault victim—the particularity of the July Affidavit's "Item to be Seized" descriptions "is all that can reasonably be expected" in a case of this nature, such that "security cameras and any storage device associated with [them]" sufficiently describes the DVR, and "storage media to include, but not limited to hard drives . . . and other magnetic, electronic or optical media" sufficiently describes the relevant SD card. *See id.* at 18, 326 S.E.2d at 895 ("The warrants and applications show the rough outline of [the] defendant's activities which is all that can be reasonably expected from the State in a case of this nature."). As the July Affidavit sufficiently describes the evidence seized, we now consider whether the State presented competent evidence of a nexus between said evidence and the criminal conduct alleged against Defendant. *See Bailey*, 374 N.C. at 335, 841 S.E.2d at 280.

Although the July affidavit, like the affidavit in *Allman*, does not *directly* establish a connection between the items sought and the alleged criminal activity, *see Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05, it is unlike the affidavit in *Campbell* because the July Affidavit is not so lacking in underlying facts and circumstances such that a reasonably prudent magistrate could not find the existence of probable cause. *See Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57; *see Bright*, 301 N.C. at 249, 271 S.E.2d at 372. With its "Probable Cause" description of J.G.'s account of the alleged crime committed by Defendant and at his residence, the July Affidavit presented the underlying circumstances upon which Officer Gray premised his belief that probable cause existed to search Defendant's residence, and seize therein, as evidence of the criminal conduct alleged to have occurred *at the residence*, the listed "Items to be Seized." As such, like the affidavit in *Allman* and unlike the affidavit in *Campbell*, the July Affidavit presented to the magistrate the underlying circumstances allegedly giving rise to, and necessary for a proper determination of, probable cause. *See Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05; *see Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57.

In *Allman*, our Supreme Court concluded the supporting affidavit properly established probable cause to search for narcotics in the

defendant's home where it: (1) contained the underlying circumstances giving rise to probable cause; *and* (2) provided, "based on [the officer's] training and experience[,] that drug dealers typically keep evidence of drug dealing at their homes[.]" 369 N.C. at 295–96, 794 S.E.2d at 305; *see also Bright*, 301 N.C. at 249, 271 S.E.2d at 372. The July Affidavit's training and experience attestation, by contrast, contains no explanation of how Officer Gray's training and experience informed his belief that a search of Defendant's residence would reveal the electronic items, or that said items would aid in the apprehension or conviction of Defendant. Though this lack of explanation could suggest a deficient basis for a finding of probable cause, we do not find that the July Affidavit is "purely conclusory" such that issuance of the July Warrant was improper. *See Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57. Under our standard of review, while according "great deference" to his decision to issue the July Warrant, we must determine whether the magistrate properly found the existence of probable cause. *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434.

For a supporting affidavit to establish probable cause, it must give a magistrate reasonable cause to believe, with fair probability, "that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application[,]" and that those items "will aid in the apprehension or conviction of the offender." *Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *see also McKinney*, 368 N.C. at 164, 775 S.E.2d at 824. A supporting affidavit establishes such reasonable cause where, from the contents of the affidavit, "it was reasonable for the magistrate to infer" that a search would reveal evidence of the alleged crime. *Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. In assessing a magistrate's reasonable inferences, we contemplate not the considerations upon which "legal technicians" act, but rather "factual and practical considerations of everyday life on which reasonable and prudent persons . . . act[,]" and the reasonable inferences such persons draw therein. *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66 (citation omitted); *see also Riggs*, 328 N.C. at 221, 400 S.E.2d at 434; *Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824.

As set forth above, the July Affidavit presented to the magistrate the following circumstances related to Defendant's—at the time alleged—criminal conduct and in support of probable cause: Defendant, by J.G.'s account, kidnapped her from her parents' home and against her will, and took her to his residence, where he raped her. The July Affidavit further contained a list of electronic items sought as "Items to be Seized[,]" and in his application for the July Warrant, Officer Gray plainly articulated that there is probable cause to believe these items constitute evidence of

Defendant kidnapping and raping J.G. In light of our standard of review, we conclude the July Affidavit was such that the magistrate could infer a search of Defendant's residence would reveal the relevant electronic items, because a reasonable and prudent person, employing the practical and factual considerations of everyday life, would expect to find such electronic items in a personal residence. *See Riggs*, 328 N.C. at 221, 400 S.E.2d at 434; *see Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66. As we conclude the magistrate could draw this reasonable inference, and as the July Affidavit contained the underlying circumstances giving rise to a belief in the incriminating nature of the electronic items sought, we further conclude the magistrate had reasonable cause to believe, with fair probability, that the electronic items seized from Defendant's residence would be of an incriminating nature, and therefore aid in the apprehension or conviction of Defendant. *See Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *see also McKinney*, 368 N.C. at 164, 775 S.E.2d at 824.

Despite its failure to establish an explicit connection between Officer Gray's training and experience and his belief in the existence of probable cause, as the July Affidavit gave the magistrate the necessary reasonable cause, the July Affidavit was not "purely conclusory[.]" *Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57. Rather, according great deference to the magistrate's determination of probable cause, we conclude under the totality of the circumstances that the July Affidavit sufficiently established a nexus linking the electronic items sought to the illegal activity, and that the magistrate therefore had a substantial basis for concluding probable cause existed. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *see also Bailey*, 374 N.C. at 335, 841 S.E.2d at 280; *Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05.

Accordingly, the trial court's finding of fact that the State met its evidentiary burden is supported by competent Record evidence, which in turn supports the trial court's conclusion of law that the July Warrant was properly issued. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416. The trial court's denial of Defendant's motion to suppress the fruits of the July Warrant was not error, and certainly not plain error. *See id.* at 576, 803 S.E.2d at 416; *see also Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

b. *The August Affidavit*

Regarding issuance of the August Warrant, Defendant contends that, while the "Probable Cause" section of the August Affidavit contains Officer Gray's attestation that, based on his training and experience, he knows cellular phones are often used to record, discuss, or facilitate sex crimes, the August Affidavit contains no similar allegation regarding

computers, tablets, GoPro cameras, home security systems, or their associated storage devices. As such, according to Defendant, the August Affidavit failed to establish a nexus between the alleged crime and the videos retrieved from the DVR and SD card.

The August Affidavit, though identical to the July Affidavit in most respects, contains an additional "Items to be Searched" section where it lists the electronic items seized from Defendant's residence, including the DVR and relevant SD card. Further, the August Affidavit contains an updated "Items to be Seized" section, which includes, among other digital items to be seized, "audio and video clips related to the above-described criminal activity and further described in this affidavit in support of the search warrant, for the above-described item(s)." Regarding these digital items, Officer Gray provided in the application for the August Warrant that there was probable cause to believe the digital items constituted evidence of the crimes alleged against Defendant, as well as evidence of the perpetrator's identity. Finally, the "Probable Cause" section of the August Affidavit describes, just as in the July Affidavit, J.G.'s account—at the time alleged—of Defendant's crimes. New to this "Probable Cause" section, however, is an attestation to training and experience, where it states that Officer Gray knows, based on training and experience, that cellular phones are often used to record, discuss, or facilitate sex crimes.

In consideration of this relevant information, we conclude the August Affidavit properly establishes a nexus between the digital items and the alleged crimes, and that it does so with less need for reasonable inference as required with the July Affidavit. *See Bailey*, 374 N.C. at 335, 841 S.E.2d at 280. The August Affidavit, like the July Affidavit, describes J.G.'s account of the incident. Given this description, we conclude the August Affidavit presented to the magistrate the underlying circumstances giving rise to, and necessary for a proper determination of, probable cause. *See Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. Additionally, the August Affidavit contains a particularized attestation of Officer Gray's training and experience which, like the training and experience attestation in *Allman*, provides an explanation of how Officer Gray's training and experience informed his belief that a search would reveal the evidence sought, and that said evidence would aid in the apprehension and conviction of the alleged criminal. *See id.* at 295–96, 794 S.E.2d at 305. Although containing a more particularized attestation of Officer Gray's training and experience, the August Affidavit still requires our consideration of one point of reasonable inference—specifically, whether the magistrate could reasonably infer, from Officer Gray's knowledge that *cellular phones* are often used to record, discuss,

or facilitate sex crimes, that a search of *other* electronic items would reveal such incriminating evidence.

As a magistrate's reasonable inferences are viewed in light of the "factual and practical considerations of everyday life on which reasonable and prudent persons . . . act[,]" and not those of a legal technician, we conclude the magistrate could draw the necessary reasonable inferences to support a probable cause determination. *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66; *see also Riggs*, 328 N.C. at 221, 400 S.E.2d at 434. Officer Gray's attestation supported a reasonable belief the search of a cell phone would reveal relevant, incriminating evidence. From this attestation, the magistrate could reasonably infer that, as cell phones are often used to record sex crimes, so too are other electronic devices capable of recording audio and video footage. *See Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66; *see also Riggs*, 328 N.C. at 221, 400 S.E.2d at 434. As such, the magistrate had reasonable cause to believe a search of the listed electronic data storage devices—namely, the DVR and relevant SD card—would, with fair probability, reveal evidence that aids in the apprehension or conviction of Defendant. *See Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *see also McKinney*, 368 N.C. at 164, 775 S.E.2d at 824.

The August Affidavit, like the affidavit in *Allman*, gave the magistrate reasonable cause to believe a search of the DVR and SD card would reveal evidence of Defendant's alleged crimes. *See Allman*, 369 N.C. at 295–96, 794 S.E.2d at 305. We therefore conclude, according great deference to the magistrate's determination of probable cause, that under the totality of the circumstances, the August Affidavit established a nexus linking the digital items sought to the illegal activity, and the magistrate therefore had a substantial basis to find probable cause. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *see also Bailey*, 374 N.C. at 335, 841 S.E.2d at 280; *see also Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. The trial court's finding of fact that the State met its evidentiary burden is supported by competent Record evidence, which in turn supports the trial court's conclusion of law that the August Warrant properly issued. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416. As such, we hold the trial court's denial of Defendant's motion to suppress the fruits of the August Warrant was not error, and certainly not plain error. *See id.* at 576, 803 S.E.2d at 416; *see also Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Ineffective Assistance of Counsel

[2] Defendant argues, "to the extent trial counsel's failure to lodge a proper objection negatively impacts this Court's determination of [the

motion to suppress issue], counsel rendered" IAC. We disagree and conclude Defendant did not receive IAC.

Under *Strickland v. Washington*, a defendant must satisfy a two-part test to show ineffective assistance of counsel: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[T]here is no reason for a court deciding an ineffective assistance of counsel claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citation omitted).

Here, as explained above, the July and August Affidavits supported the magistrate's finding of probable cause, such that issuance of the Warrants was proper. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *see also Bailey*, 374 N.C. at 335, 841 S.E.2d at 280; *Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. Had Defendant's trial counsel objected to the introduction of the challenged evidence, the result of the proceeding would have been the same. Thus, we can discern from the Record on appeal that Defendant was not prejudiced by his counsel's performance, and he did not receive IAC. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *see Fair*, 354 N.C. at 166, 557 S.E.2d at 524. Defendant's IAC claim is dismissed.

C. Double Jeopardy

[3] Defendant argues the trial court violated his right to be free of double jeopardy by entering judgment on both the first-degree kidnapping charge and the underlying sexual offense charges. After careful review, we agree.

A sentence that was "unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise

invalid as a matter of law" may be reviewed by this Court even where no objection or motion was made before the trial court. N.C. Gen. Stat. § 15A-1446(d)(18) (2023). This Court therefore reviews *de novo* Defendant's allegation that he was deprived of his right to be free of double jeopardy. *See State v. Wright*, 212 N.C. App. 640, 642, 711 S.E.2d 797, 799 (2011). "Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Resendiz-Merlos*, 268 N.C. App. 109, 114, 834 S.E.2d 442, 446 (2019) (citation and internal quotation marks omitted).

Under both the United States and North Carolina Constitutions, the "right against double jeopardy . . . protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against *multiple punishments for the same offense*." *State v. Tripp*, 286 N.C. App. 737, 740, 882 S.E.2d 75, 78 (2022) (emphasis added) (citation and internal quotation marks omitted). The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years of age or older and without such person's consent, or any person under sixteen years of age and without the consent of such person's parent or legal custodian; (3) if the act was for the purposes of facilitating the commission of a felony. *See State v. Pender*, 243 N.C. App. 142, 147, 776 S.E.2d 352, 357 (2015). "Kidnapping in the first-degree occurs when the defendant does not release the victim in a safe place or the victim is seriously injured or sexually assaulted." *State v. Martin*, 222 N.C. App. 213, 220, 729 S.E.2d 717, 723 (2012) (citation omitted). North Carolina courts have long held that where a sexual offense charge is the sole basis for elevating a kidnapping charge to one of the first-degree, judgment cannot be entered on both the sexual offense and first-degree kidnapping charges. *See State v. Freeland*, 316 N.C. 13, 23–24, 340 S.E.2d 35, 41 (1986); *see State v. Barksdale*, 237 N.C. App. 464, 473–74, 768 S.E.2d 126, 132 (2014).

Here, the trial court instructed the jury that, for Defendant to be convicted of first-degree kidnapping, it must find:

> First, that [D]efendant unlawfully removed a person from one place to another.
>
> Second, that the person had not reached her sixteenth birthday, and her parent or guardian did not consent to this removal.
>
> Third, that [D]efendant moved that person for the purpose of facilitating [D]efendant's commission of statutory rape or indecent liberties.

> [F]ourth, that this removal was a separate and complete act independent of and apart from the statutory rape and/or indecent liberty.
>
> And fifth, that the person had been sexually assaulted.

As in prior cases where we and our Supreme Court have held the trial court violated a defendant's right to be free from double jeopardy, the trial court's instructions here were such that Defendant could only have been convicted of first-degree kidnapping on the basis of one of the sexual offense charges for which he was also convicted and sentenced. *See Martin*, 222 N.C. App. at 220, 729 S.E.2d at 723; *see also Freeland*, 316 N.C. at 23–24, 340 S.E.2d at 41; *Barksdale*, 237 N.C. App. at 473–74, 768 S.E.2d at 132.

We therefore conclude the trial court violated Defendant's right to be free from double jeopardy, and accordingly vacate the trial court's sentencing order and remand for a resentencing hearing. *See Tripp*, 286 N.C. App. at 740, 882 S.E.2d at 78; *see also Freeland*, 316 N.C. at 23–24, 340 S.E.2d at 41; *Barksdale*, 237 N.C. App. at 473–74, 768 S.E.2d at 132. At the resentencing hearing, the trial court may either resentence Defendant for second-degree kidnapping, or it may arrest judgment on the indecent liberties and statutory rape charges. *See Freeland*, 316 N.C. at 23–24, 340 S.E.2d at 41; *see also Barksdale*, 237 N.C. App. at 473–74, 768 S.E.2d at 132.

IV. Conclusion

The State presented substantial evidence to support a finding of probable cause for the magistrate's issuance of the Warrants, and Defendant therefore was not prejudiced by his counsel's failure to object to the introduction of the relevant evidence. Accordingly, we hold the trial court did not plainly err in denying Defendant's motion to suppress evidence and conclude Defendant did not receive IAC. We further conclude, however, the trial court violated Defendant's right to be free from double jeopardy, and we therefore vacate the trial court's sentencing order and remand for resentencing hearing.

NO PLAIN ERROR in part, DISMISSED in part, and VACATED and REMANDED in part.

Judges STROUD and CARPENTER concur.

STATE v. TAYLOR

[293 N.C. App. 303 (2024)]

STATE OF NORTH CAROLINA
v.
JILL HARDIE TAYLOR

No. COA23-423

Filed 2 April 2024

1. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial—Fourth Amendment—blood sample

In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, her appellate argument that her blood sample was taken in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures was not preserved. Defendant did not object to the admission of the resulting blood test results on constitutional grounds at trial, and while defendant filed a pretrial motion to suppress the blood test results on statutory grounds, she did not advance that argument on appeal.

2. Constitutional Law—Confrontation Clause—blood test report—expert testimony

In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, defendant's Confrontation Clause rights were not violated by the trial court's admission of a lab report prepared by a forensic scientist who did not testify. Constitutional limits on the admission of testimonial statements from absent witnesses were inapplicable because another forensic scientist—who had personally participated in the testing and reviewed the raw data generated to form her expert opinion—did testify at trial. Although defendant argued on appeal that the lab report lacked sufficient foundation due to issues with the blood sample's chain of custody, defendant neither cross-examined the testifying forensic scientist regarding the chain of custody nor objected to the lab report or testimony on that basis.

3. Evidence—other crimes, wrongs, or acts—evidence of previous impaired driving charges and other bad driving—probative value not outweighed by prejudicial effect

In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, the trial court did not err or abuse its discretion in admitting evidence

of defendant's previous impaired driving charges and other incidents of bad driving. Those prior acts—including three incidents of impaired driving under the influence of the same substance as in the instant matter—were sufficiently similar in nature and close in time to fall into the inclusive scope of Rule of Evidence 404(b). Further, these incidents were highly relevant on the issue of malice—an element of second-degree murder—and did not involve shocking or emotional facts, such that their probative value was not substantially outweighed by any danger of unfair prejudice pursuant to Rule of Evidence 403.

Appeal by Defendant from judgment entered 31 October 2022 by Judge James G. Bell in Columbus County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery and Lacy A. Hanson, for Defendant.

WOOD, Judge.

Jill Taylor ("Defendant") was driving very slowly or was stopped in the right lane of Highway 74 when the driver of a tractor trailer swerved to avoid her vehicle, causing the tractor trailer to crash into a tree and explode, killing the driver in the ensuing fire. A jury found Defendant guilty of second-degree murder based upon driving while impaired and reckless driving. On appeal, Defendant argues that her Fourth and Sixth Amendment rights were violated and that the State introduced evidence of malice in violation of Rule of Evidence 403. After careful review of the Record and applicable law, we hold Defendant received a fair trial free from prejudicial error.

I. Factual and Procedural History

On 18 February 2018 at approximately 8:30 p.m., Defendant was driving a red sedan east along U.S. Highway 74 just outside of Whiteville. Ricky Crocker ("Crocker") was also driving east along the same portion of highway just moments behind Defendant in a tractor-trailer truck loaded with cement curbing blocks. Crocker came upon Defendant's vehicle, collided with her stopped vehicle, and died as a result of the crash and ensuing fire.

Just prior to the collision, witnesses observed Defendant's car on Highway 74. Channing Glover ("Glover") came upon Defendant and saw her vehicle in the right lane driving very slowly, approximately five to ten miles per hour, despite a posted speed limit of seventy miles per hour along that section of the highway. Glover narrowly avoided a collision with Defendant by swerving around the left-hand side of her vehicle. Jonathan Highfill ("Highfill") was also driving east along Highway 74 when he saw Defendant's vehicle suddenly and completely stopped in the road in front of him without any turn signal or emergency flashers operating. Highfill was forced to swerve around the left-hand side of Defendant's vehicle to avoid colliding into it. He too narrowly avoided a collision.

Craig Clarke ("Clarke") was traveling westbound on Highway 74 with Tony Oxford ("Oxford") when he witnessed the tractor trailer being driven by Crocker colliding into Defendant's vehicle. He saw the tractor trailer, which was traveling approximately the speed limit, swerve towards the median and saw its trailer swing towards the shoulder. The "tail end" of the trailer swung around as the driver attempted to swerve to avoid a collision, and it "clipped" the rear left quarter panel of Defendant's vehicle, breaking the rear bumper, crumpling the trunk, and tearing off the left rear tire. According to the witnesses, Crocker did not reduce his speed before the collision. The cab of his tractor trailer hit a tree and exploded upon impact, and Crocker ultimately died in the ensuing fire.

Oxford was traveling in the car with Clarke at the time of the collision. Oxford is a retired law enforcement officer with twenty years of experience as a patrol officer, narcotics officer, and investigator. He was asleep at the time of the collision, but Clarke woke him up and told him he had just witnessed the accident and that the truck exploded. Clarke turned around in the median so that they could check on what had happened. They pulled up to the cab of the tractor trailer, which was fully engulfed in flames, and ran toward it to see if they could do anything to help. Oxford could see Crocker slumped over in the cab of the tractor trailer, and other people had already gathered at the truck to try to render aid to him.

Oxford noticed Defendant's vehicle in the ditch next to the woods and ran over to it. He saw Defendant in the driver's seat and tried to open the door. He could not open the driver's door, so he helped her crawl out of the passenger side. Immediately, Oxford smelled a distinct odor emitting from Defendant's car while helping her. Defendant told Oxford she had to have her purse, and after retrieving it, she carried

it with her and "cuddled it like a baby." Oxford asked Defendant if she was fine. She responded yes and then repeated at least a dozen times that she needed to call somebody to come get her. Oxford noticed that Defendant's speech was slow and slurred. He told her there was a man in the tractor trailer burning to death, and she once again stated she needed to go home. Defendant was stumbling as Oxford helped her over to his truck. He allowed her to sit in the front passenger seat of his truck, and he noted she had very distinct signs of dilated pupils, was lethargic, and occasionally nodded off and woke up again. He asked her a few times if she was hurt. She never mentioned any type of injury but continually asked to be taken home. Oxford left the truck for approximately fifteen minutes to check on the progress of those attempting to render aid to Crocker in the tractor trailer. When he returned to his truck, he noticed the same odor in his truck that was in Defendant's vehicle.

When a trooper checked on Defendant, Oxford told him that something was not right with her actions. He reported she was lethargic and had a lack of concern for everything going on. Oxford believed Defendant was impaired on a drug, although he smelled no alcohol or marijuana. Emergency medical technicians ("EMTs") arrived about an hour later, and Oxford told them she had no observable injuries but that he believed she was impaired due to drugs.

Three different EMTs evaluated Defendant. Caitlyn Soles ("Soles") was the first medical personnel to examine Defendant, who was still in the passenger seat of the truck. Soles noted Defendant had "dazed off" and was securing her purse to her chest like she did not want it to go anywhere. Defendant told Soles she could not remember what happened except that a truck hit her. Soles asked Defendant if she wanted to go to the hospital, and she said no. Soles walked Defendant to the ambulance, where Defendant stated she did not want her vital signs checked. Soles observed Defendant place her head into her purse two or three times and lift her head back up. While discussing what she should do with her medic, Reggie Morrison ("Morrison"), they made eye contact and indicated a mutual understanding that Defendant was doing drugs. Morrison noted Defendant's eyes were dilated and that she acted drowsy and confused whenever she lifted up her head from her purse. He believed Defendant was possibly impaired based on her behavior, drowsiness, and confusion as to her surroundings. Defendant was adamant with Morrison that she was not going to be transported to the hospital, despite his advice.

Cherie Register ("Register"), another EMT, approached Defendant while she was still in the passenger seat of the truck and observed

Defendant holding a purse and what looked like a hairspray can or some other type of aerosol can that she would hold up to her face. Register asked Defendant if she was the one driving the vehicle that got hit and if she was okay. Register noted that Defendant was sluggish-acting, slow to respond, and had "constricted" pupils, and she believed Defendant was under the influence of drugs or alcohol. She did not observe Defendant having any injuries. Register was startled by Defendant's complete lack of emotion considering everything going on around them. When Register told Defendant that Crocker did not make it out of the tractor trailer, she just said, "okay." Later, after Register helped remove Crocker's body from the cab of the tractor trailer, she went to the ambulance where Defendant was. Register observed that she would stick her nose into her purse and saw the same aerosol can in it that she was holding earlier.

N.C. Highway Patrol Officer G.S. Hooks ("Trooper Hooks") was the first State Trooper to arrive at the scene. As lead investigator in the case, he was responsible for collecting information from other State Troopers conducting the collision investigation. He interacted with Defendant for approximately fifteen minutes in total that night and did not form an opinion as to whether Defendant was impaired. Before Trooper Hooks approached Defendant, Register told him Defendant seemed to be impaired. As Trooper Hooks introduced himself to Defendant and asked her what happened in the collision, he observed that she was slow to speak and slow in her movements, such as when she slowly retrieved her license from her wallet.

When N.C. Highway Patrol Officer Victor Lee ("Trooper Lee") arrived at the scene, he observed Defendant in the ambulance placing her head into her purse like she was speaking into it. Trooper Lee asked Defendant how she was doing and what happened, and as she responded, he observed that she was lethargic and slow as though she did not have her wits about her. Trooper Lee looked through Defendant's purse and saw two aerosol cans of Dust-Off. He formed an opinion that Defendant's mental and/or physical faculties were appreciably impaired, probably due to inhaling the Dust-Off, causing him to decide to take her to the hospital to have her blood tested. He did not place Defendant under arrest but did handcuff her before driving her to the hospital in the passenger seat of his patrol vehicle. When they arrived, they remained seated in the vehicle, and Trooper Lee read to Defendant her implied consent rights and provided her with a written copy. Defendant consented to a blood draw. A hospital phlebotomist drew her blood and gave a sample of Defendant's blood to Trooper Lee, which he preserved in a safe until it could be transported to a lab for analysis. He then took Defendant outside the hospital and left her with Trooper Hooks, who

told her she was free to go. Trooper Lee did not believe he could arrest Defendant that evening because they did not have enough information as the investigation was ongoing, and he wanted to confer with the district attorney before charging her.

On 11 April 2018, a grand jury indicted Defendant for second-degree murder under N.C. Gen. Stat. § 14-17(b). Defendant's case was tried before a jury at the 10 October 2022 session of Columbus County Superior Court. At trial, N.C. Highway Patrol Officer Jim Ballard ("Trooper Ballard") was tendered as an expert witness in drug recognition. Trooper Ballard testified that based on his review of the facts of the case, including Defendant having stopped her vehicle in the highway for no apparent reason, her lack of emotion despite Crocker's death, the odor in her vehicle being the same as what Oxford smelled in his truck, and the Dust-Off aerosol cans found in her purse, he formed an opinion that Defendant's mental and physical faculties were appreciably impaired due to central nervous system depressants and inhalants. N.C. Highway Patrol Officer J.H. Dixon ("Trooper Dixon") was tendered as an expert in collision reconstruction and crash investigation. He testified he formed an opinion that the collision occurred because Defendant was driving too slowly or was stopped in the right lane. He determined that Defendant violated several traffic statutes, namely reckless driving, going slower than forty-five miles per hour on a highway, and stopping or parking on a highway. Trooper Dixon further determined Crocker also violated a traffic statute by failing to reduce speed to avoid a collision.

On 31 October 2022, the jury convicted Defendant of second-degree murder based on theories that Defendant was driving while impaired and reckless driving, causing Crocker's death. The same day, the trial court sentenced Defendant to an active term of imprisonment of 120-156 months. On 2 November 2022, Defendant timely filed written notice of appeal pursuant to N.C. Gen. Stat. § 15A-1444. All other relevant facts are provided as necessary in our analysis.

II. Analysis

A. Defendant's Blood Sample

[1] Defendant argues her blood sample was seized in violation of the Fourth Amendment of the U.S. Constitution and that the trial court committed plain error in admitting the blood test results. Defendant filed a pretrial motion seeking suppression of the blood test results due to alleged violations of N.C. Gen. Stat. § 20-16.2, pertaining to drivers' implied consent to chemical analysis. On 13 October 2022, the trial court denied the motion because it concluded law enforcement committed

no violations of N.C. Gen. Stat. § 20-16.2. Defendant concedes she did not object to the admission of the blood test results on constitutional grounds at trial. We must, therefore, determine whether Defendant has preserved this issue for our review.

N.C. R. App. P. 10(a)(4) provides, "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." However, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (brackets omitted). In *Davis*, the trial court sentenced the defendant to terms of imprisonment for felony death by vehicle and felony serious injury by vehicle as well as second-degree murder and assault with a deadly weapon inflicting serious injury. *Id.* at 300, 698 S.E.2d at 67. The defendant did not object at the sentencing hearing. *Id.* On appeal before this Court, Defendant challenged his sentences, alleging unconstitutional violations of double jeopardy principles and of N.C. Gen. Stat. § 20-141.4(b) which, he argued, did not authorize both pairs of sentences. *Id.* This Court did not address the merits of the defendant's arguments because he did not preserve his objection to a purported double jeopardy violation at trial. *Id.* at 301, 698 S.E.2d at 67. The defendant appealed to our Supreme Court, which upheld this Court's dismissal of his double jeopardy claims but held that this Court erred in dismissing his statutory argument. *Id.* Thus, our Supreme Court differentiated between the preservation of a constitutional issue and a statutory issue on appeal.

We conclude that *Davis* is applicable to this case. Here, at trial, Defendant sought to suppress her blood test results solely on the basis of purported violations of N.C. Gen. Stat. § 20-16.2, but she does not renew that argument on appeal. Thus, we do not address her statutory argument. Because Defendant did not object at trial to admission of her blood test results on the basis of a purported Fourth Amendment violation, we hold she waived the argument. Therefore, we decline to address Defendant's constitutional argument here.

B. The Blood Analysis Report

[2] Defendant next argues the trial court erred in admitting the laboratory ("lab") report prepared and signed by Curtis Reinbold ("Reinbold"), a forensic scientist at the N.C. state crime lab in Raleigh, because he did not testify in violation of her Sixth Amendment right to confront witnesses against her. Specifically, Defendant argues that because Reinbold did not testify, it was impossible for her to cross-examine him

on subjects such as chain of custody of the blood sample and the reliability of his methods and results.

First, we determine whether Defendant preserved this purported constitutional error for review. We previously have noted that a constitutional objection must be raised before the trial court. *Davis*, 364 N.C. at 301, 698 S.E.2d at 67. Here, there were two lab reports admitted into evidence. State's Exhibit 24, a lab report prepared by Cierra Bell, a forensic scientist at the N.C. state crime lab, confirmed the presence of Difluoroethane, a highly impairing substance used in Dust-Off, in Defendant's blood. State's Exhibit 25, a lab report prepared by Reinbold, confirmed the presence of Alprazolam (commonly known as Xanax, which has the impairing effects of drowsiness and confusion), Amitriptyline, Bupropion, and Chlorcyclizine in Defendant's blood. When the State offered the exhibits as evidence, the trial court asked if Defendant had any objection, to which her counsel replied, "Yes, sir, Judge. Renew my objection under Sixth Amendment." The trial court noted the objection for the record and admitted the exhibits into evidence. Therefore, Defendant objected based on Sixth Amendment grounds at trial. Accordingly, this constitutional issue is preserved, and we will address the merits of her argument.

"We review an alleged violation of a defendant's constitutional right to confrontation *de novo*." *State v. Joyner*, 284 N.C. App. 681, 686, 877 S.E.2d 73, 79 (2022).

It is fundamental that the Sixth Amendment to the U.S. Constitution provides a defendant in "all criminal prosecutions" the right "to be confronted with the witnesses against him." U.S. Const. amend. VI (the "Confrontation Clause"). In a landmark Confrontation Clause case, *Crawford v. Washington*, the U.S. Supreme Court held that testimonial statements of a witness who is absent from trial may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004).

Confrontation Clause issues may arise in the application of the rules of evidence pertaining to expert witnesses. "The North Carolina Rules of Evidence allow for expert testimony 'in the form of an opinion, or otherwise,' if the expert's 'scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,' provided" that the witness is properly tendered as an expert in accordance with the rules of evidence. *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (quoting N.C. R. Evid. 702(a)). An

expert's opinion may be based on "facts or data . . . perceived by or made known to him at or before the hearing." N.C. R. Evid. 703. Significantly, if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, [they] need not be admissible in evidence." *Id.*

In *Ortiz-Zape*, our Supreme Court considered whether the Confrontation Clause was violated when a witness tendered as an expert in forensic science testified as to her opinion that a substance was cocaine based upon her independent analysis of testing performed by another analyst in her lab. 367 N.C. at 2, 743 S.E.2d at 157. In *Ortiz-Zape*, the court analyzed a U.S. Supreme Court case, *Bullcoming v. New Mexico*, which posed a similar question—whether a forensic lab report could be introduced for substantive purposes through the "testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 367 N.C. at 7, 743 S.E.2d at 160 (quoting *Bullcoming*, 564 U.S. 647, 652, 131 S. Ct. 2705, 2710, 180 L. Ed. 2d 610, 616 (2011)). The court in *Bullcoming* held "that surrogate testimony of that order does not meet the constitutional requirement." *Bullcoming*, 564 U.S. at 652, 131 S. Ct. at 2710, 180 L. Ed. 2d at 616. The court in *Ortiz-Zape* specifically noted that Justice Sotomayor, in her concurring opinion in *Bullcoming*, clarified that the case was *not* one in which the in-court witness was a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." 367 N.C. at 7, 743 S.E.2d at 160 (quoting *Bullcoming*, 564 U.S. at 672, 131 S. Ct. at 2722, 180 L. Ed. 2d at 629 (Sotomayor, J., concurring in part)).

Ultimately, the court concluded in *Ortiz-Zape* that "when an expert states her own opinion, without merely repeating out-of-court statements, the expert is the person whom the defendant has the right to cross-examine." 367 N.C. at 8, 743 S.E.2d at 161. The court found that conclusion is consistent with its holding in *State v. Fair* that "[i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence." 354 N.C. 131, 161–62, 557 S.E.2d 500, 521–22 (2001) (no Confrontation Clause violation where the in-court expert did not conduct the blood test herself but was able to determine the location on the victim's pants from which the DNA sample had been taken, an important foundation issue in the case). Therefore, the court in *Ortiz-Zape* specifically held that "[i]n such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible." 367 N.C. at 9, 743 S.E.2d at 161 (quotation marks omitted).

Here, this case is not one in which the expert witness testifying in court did not personally participate in the testing. Megan Keeler ("Keeler"), a forensic scientist at the N.C. state crime lab and also the State's expert witness, testified regarding State's Exhibit 25 that she "look[ed] at the raw data that was generated from the initial analysis by a coworker, and . . . review[ed] it like [she] would if [she] were the original viewer." Keeler explained:

> So there is an author of the report, which would be the analyst that samples and does the test, the process, and then there will be another analyst that's a peer reviewer, like I just spoke. They will check all of the paperwork and documentation and make sure that everything is in order, and then they will release the case if they agree. So two analysts have to agree with the results. The second analyst will be the reviewer and the final one to view the case and say it's good or it's not good, there is some things we need to review. And so I am trained as a reviewer and as an analyst. I will review the data just like I was the reviewer, and so I'm actually, like, looking at it as a third person in this case.

Keeler testified regarding lab protocols, "every test is done the same, providing [a] standardized result." She also testified that she "did some of the data processing in the drug case" and "performed the initial drug screening for the drug record," which means she prepared the blood sample for testing by conducting an "ELISA" analysis (enzyme-linked immunosorbent assay). She specified that Reinbold "wrote the report and made an opinion that I agreed with." Finally, Keeler testified there was an "issue" during the test with the barbiturate assay that required repeating the analysis which they successfully completed, thereby assuring correct data as a result. Specifically, she was the "coordinator" of the instrument, which meant that she assisted Reinbold in correcting the errant instrument by testing it, ensuring it was back in proper working order, and certifying it back into use.

Accordingly, Keeler did not merely repeat out-of-court statements. *Ortiz-Zape*, 367 N.C. at 8, 743 S.E.2d at 161. Although she did not sign the certification, she participated in preparing the blood sample for testing, was trained as a reviewer, reviewed the underlying data, and formed her own independent opinion as to the test results. *See Ortiz-Zape*, 367 N.C. at 7, 743 S.E.2d at 160; *Bullcoming*, 564 U.S. at 672, 131 S. Ct. at 2722, 180 L. Ed. 2d at 629. As an expert with personal knowledge of the processes involved and personal participation in the testing, she was the witness

whom Defendant had a right to cross-examine, and she was indeed subject to cross-examination at trial. Therefore, we hold that Defendant's constitutional right to confrontation was not violated in this case. Defendant argues that Reinbold's absence at trial leaves the lab report without adequate foundation because she could not cross-examine him regarding the blood sample's chain of custody. However, she neither attempted to cross-examine Keeler on this issue, nor objected for insufficient foundation based on a lack of chain of custody testimony. Thus, the trial court did not err in admitting State's Exhibit 25 into evidence.

C. Rule 404(b) Evidence

[3] Finally, Defendant argues the trial court erred in admitting evidence under Rule 404(b) of other crimes, wrongs, or acts, all involving suspected or actual charges of driving while under the influence, because such evidence failed the Rule 403 balancing test.

Our Supreme Court has specified the distinct standards of review when analyzing rulings applying Rule 404(b) and Rule 403:

> [W]e conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Rule 404(b) permits "[e]vidence of other crimes, wrongs or acts . . . . for purposes" other than proving a defendant acted in conformity with a given character trait, including "knowledge." N.C. R. Evid. 404(b). Although "Rule 404(b) is a clear general rule of *inclusion*[, it] . . . . is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 130–31, 726 S.E.2d at 159 (quotation marks omitted) (emphasis in original). Rule 403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." N.C. R. Evid. 403.

Here, Defendant made a pretrial motion seeking to prohibit or limit evidence of prior acts the State intended to introduce under Rule 404(b), arguing that their probative value was substantially outweighed by the danger of unfair prejudice because the jury inevitably would view

such evidence as propensity evidence, a risk that a limiting instruction would not resolve. The trial court orally denied the motion, stating it would "allow each of the DWI charges and other incidents of accidents and bad driving to be used by the [S]tate." On 13 October 2022, the trial court entered its written order in which it found that for each of the five prior acts:

> [T]here is sufficient evidence that the Defendant committed those acts, that the evidence is admitted for the proper purpose of malice, that the evidence is sufficiently similar and close in time and that upon conducting the Rule 403 balancing test, the probative value outweighs the prejudice to the Defendant and the Court finds that the evidence is admissible under Rule 404(b).

Defendant does not argue the trial court's findings are unsupported by the evidence, and we conclude sufficient evidence supported the trial court's written findings closely and accurately detailing the testimony regarding each of the five incidents. We further conclude the findings support the trial court's conclusion that the prior acts are sufficiently similar and close in time. As for similarity, all five prior acts involved suspected driving while under the influence. Four of the five incidents resulted in Defendant actually being charged for DWI.[1] Three of the five incidents specifically involved Dust-Off aerosol cans. It is hard to imagine evidence more probative of the required showing of malice for second-degree murder which is Defendant's deliberate disregard for human life as evidenced by her repeated instances of driving while impaired. *See* N.C. Gen. Stat. § 14-17(b). As for timing, the incidents occurred between 30 September 2017 and 18 February 2018. Defendant accrued these charges in a span of less than half a year, indicating that driving while impaired was not a one-time incident that occurred in the distant past and therefore not probative of Defendant's state of mind. Accordingly, we hold the trial court's findings supported its conclusions as to its Rule 404(b) ruling.

Finally, we hold the trial court did not abuse its discretion in its Rule 403 ruling. As noted, each of the five incidents were particularly probative of malice, an element the State must prove for a second-degree murder charge. Rule 404(b) specifically contemplates *including* evidence

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1. In one incident, an officer arrived at the scene of a Domino's after responding to a call that a woman was passed out in a vehicle. The officer tried to pull Defendant over, and although she was not driving very fast, she ran three stop signs, and he ultimately decided to abandon the pursuit.

to show knowledge, which here includes Defendant's knowledge that inhaling impairing substances and driving a vehicle is inherently dangerous, showing utter disregard for human life. None of the prior incidents related to any particularly shocking or emotional facts that would have inflamed the jurors to return a guilty verdict against Defendant based on passion; rather, they were regular traffic incidents and DWI investigations. Accordingly, the trial court did not abuse its discretion in denying Defendant's motion based on Rule 403.

III. Conclusion

Because Defendant's pretrial motion did not raise any constitutional challenges and because she failed to preserve her Fourth Amendment challenge for appellate review by entering a timely objection at trial, we decline to review it now. We hold the trial court did not violate Defendant's Sixth Amendment confrontation right by admitting a blood analysis report where the testifying expert witness participated in the lab work and was available for cross-examination. We further hold the trial court did not err in its Rule 404(b) and Rule 403 rulings denying Defendant's objection to evidence of prior acts that demonstrated malice. Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges COLLINS and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
BRAYDEN DAVID WALKER

No. COA23-319

Filed 2 April 2024

1. Sexual Offenses—sexual exploitation of a minor—acting in concert—video recording of sexual activity—inference of common plan

In a prosecution for two counts of first-degree sexual exploitation of a minor, the State presented sufficient evidence from which a jury could conclude that defendant acted for the "purpose of producing material" portraying sexual activity with a minor by acting in concert with others, including: testimony relating that, prior to attending a party, a number of defendant's friends discussed a plan to find a girl at the party, have sex with her, and film it; and three cell phone videos recorded later that evening showing defendant and others variously engaging in or watching sexual activity with a minor. Defendant's behavior in the videos, including laughing and looking toward the phone, demonstrates that he was aware the recordings were being made and was actively participating in their production.

2. Sexual Offenses—jury instructions—first-degree sexual exploitation of a minor—second-degree sexual exploitation is not a lesser-included offense

In defendant's trial for first-degree exploitation of a minor, the trial court did not commit plain error by failing to instruct the jury on the offense of second-degree sexual exploitation of a minor because the latter offense—which requires an actual recording or photograph of sexual activity—is not a lesser-included offense of first-degree exploitation—which can be committed by the use or coercion of a minor to engage in sexual activity for the purpose of producing a visual representation of the activity, whether or not an actual recording is made.

3. Evidence—officer testimony—sexual exploitation of a minor—legally incorrect statement of elements—plain error analysis

There was no plain error in defendant's trial for first-degree sexual exploitation of a minor by the admission of an officer's testimony that the offense did not require a plan to film the sexual activity of a minor, which, although an inaccurate statement of the law,

was made on redirect in the broader context of clarifying the officer's responses to defense counsel's cross-examination about the officer's motive for how he questioned defendant after his arrest. Defense counsel had an opportunity to conduct a recross examination, and the trial court properly instructed the jury on the elements of the charged crime.

4. Criminal Law—jury instructions—sexual exploitation of a minor—inadvertent reference by trial court to sexual assault

There was no plain error in defendant's trial for two counts of first-degree sexual exploitation of a minor where the trial court, while instructing the jury on acting in concert, inadvertently misstated the offense as sexual assault rather than exploitation. The trial court otherwise properly instructed the jury on the offense and its elements, including correctly naming the charged crime as "sexual exploitation" three times during the instruction as a whole.

Appeal by Defendant from judgment entered 15 September 2022 by Judge Thomas H. Lock in New Hanover County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.

Christopher J. Heaney, for Defendant.

WOOD, Judge.

I. Factual and Procedural History

On Halloween night, 31 October 2018, Brayden Walker ("Defendant") gathered with a group of friends, at least some of whom were recently graduated from the same high school, comprised of Patrick Wise ("Wise"), Riley Crouch ("Crouch"), Corey Webster ("Webster"), Austen Montouri ("Montouri"), and Nicholas Foutty ("Foutty"). Throughout the night, the group consumed some combination of alcohol, marijuana, Xanax, and LSD.

Prior to attending a Halloween party, the group gathered at Webster's house where, according to Crouch, they made a plan to find a girl, have sex with her, and film it. Crouch previously had testified the plan was Webster's idea, not Defendant's, and that nobody told Defendant about the plan. Montouri testified that there was no formal meeting or plan and that recording the sexual acts was impromptu.

At the Halloween party, Crouch made eye contact with a girl, N.P., [1] and started talking to her. After fifteen to twenty minutes, Crouch and N.P. agreed to leave the party to go have sex alone at Webster's house. As Crouch and N.P. were leaving the party, Webster joined them. At Webster's house, N.P. had sex with Crouch and perhaps Webster.

The three then left Webster's and traveled to Foutty's house, where Walker and the other friends were hanging out, "winding down," and even starting to fall asleep. When Crouch and Webster arrived, however, the music was turned up and the friends starting partying once again. N.P. was the only female present, and Crouch gave her Xanax.

At some point, Crouch noticed Webster and N.P. come out of the bathroom, and N.P. began walking around Foutty's house topless. Crouch, while Defendant was standing next to him, began filming a video on Snapchat and shouted, "all gang on that shit," which Crouch testified meant everybody was engaging in sexual activity. Afterward, everybody went to the back porch, and no one was engaging in sexual activity at that time.

Some time later, Crouch noticed Defendant and Foutty engaging in sexual activity with N.P. on a couch, and Crouch began recording once more, shouting phrases such as, "dog game" and "we lit." Finally, Crouch noticed once more that Defendant and Foutty were still engaging in sexual activity with N.P. on the couch, and he recorded a third video. Crouch did not know how long Defendant and Foutty had been engaging in sexual activity with N.P. when he started recording. Foutty testified at trial that he was aware he was being recorded while having sex with N.P. Other friends in the group also recorded the sexual activity with N.P. while standing within a few feet of her, including Wise and Montouri, who admitted at Defendant's trial to doing so. Each of the three videos was approximately a minute or less.

In January 2019, law enforcement officers discovered videos of the men having sex with N.P. after they pulled over Crouch for an unrelated traffic stop pertaining to a drug investigation and confiscated his phone. On 7 September 2021, Defendant was indicted for two counts of first-degree sexual exploitation of a minor in violation of N.C. Gen. Stat. § 14-190.16 (2022).

Defendant's trial was held during the 12 September 2022 criminal session of the New Hanover County Superior Court. The jury found

1. Initials are used to refer to the girl to protect her identity pursuant to N.C. R. App. P. 42(b).

Defendant guilty of both counts. The trial court sentenced Defendant to two concurrent sentences of 72-147 months' imprisonment. On 20 September 2022, Defendant filed written notice of appeal. All other relevant facts are provided as necessary in our analysis.

II. Analysis

On appeal, Defendant argues there was insufficient evidence that he had a "purpose of producing material" portraying sexual activity with a minor. He further argues the trial court plainly erred in failing to instruct the jury on second-degree exploitation, allowing an officer to testify about an element of first-degree sexual exploitation of a minor, and stating the charged offense as "sexual assault" instead of "sexual exploitation" one time in its instructions to the jury. We address each argument in turn.

A. Sufficiency of the Evidence as to Defendant's Purpose

[1] Defendant argues the trial court erred in denying his motion to dismiss both charged counts of first-degree sexual exploitation of a minor. Specifically, Defendant argues there was insufficient evidence demonstrating he acted for the "purpose of producing material" portraying sexual activity with a minor because the evidence merely demonstrated he engaged in sexual activity with a minor which happened to be recorded. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Our Supreme Court has detailed the standard of review for a motion to dismiss:

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

State v. Barnett, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "Circumstantial evidence may be utilized to overcome a motion to dismiss even when the evidence does not rule out every hypothesis

of innocence." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826 (2015) (quotation marks omitted).

State statute provides that a person commits first-degree sexual exploitation of a minor if he, "knowing the character or content of the material or performance, . . . [*u*]*ses*, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity . . . for the purpose of producing material that contains a visual representation depicting this activity." N.C. Gen. Stat. § 14-190.16(a)(1) (emphasis added).

A defendant may be guilty of a crime by acting in concert with another who commits a crime. As our Supreme Court has explained:

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Acting in concert "may be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *In re J.D.*, 376 N.C. 148, 156, 852 S.E.2d 36, 43 (2020) (quotation marks omitted). "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975). "However, the mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." *In re J.D.*, 376 N.C. at 156, 852 S.E.2d at 43 (quotation marks and brackets omitted).

In the case *sub judice*, the trial court correctly instructed the jury regarding the elements of the crime:

> First, that the defendant used a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity. Vaginal intercourse is sexual activity;
>
> Second, that that person was a minor. A minor is an individual who is less than 18 years old and who is not married or judicially emancipated. Mistake of age is not a defense;

> And third, that the defendant knew the character or content of the material.

Over Defendant's objection, the trial court also correctly instructed the jury on acting in concert using the following language:

> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit first-degree sexual assault of a minor, each of them is guilty of the crime; however, a defendant is not guilty of a crime merely because the defendant is present at the scene even if the defendant may secretly approve of the crime or secretly intend to assist in its commission.
>
> To be guilty, the defendant must aid or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.

Here, whether or not the plan was specifically communicated to Defendant, Crouch's testimony was that at least he and possibly other members of the group had a preconceived plan to find a girl, have sex with her, and film it. The purpose of recording would have been clear when Crouch pulled out his phone and, in the first recording, shouted "all gang on that shit," announcing an intent for all or some of the friends to engage in sexual activity with N.P. with the knowledge that Crouch was recording. Defendant himself was standing next to Crouch in the first video, which would have made him aware of the group's intent to have sex with N.P. while Crouch recorded. Defendant did not have to state expressly that he had a "purpose to produce material" and indeed, such direct evidence is rare and unnecessary to sustain a conviction. *Winkler*, 368 N.C. at 576, 780 S.E.2d at 826; *Sanders*, 288 N.C. at 291, 218 S.E.2d at 357.

In the second video, N.P. can be seen performing oral sex on Foutty, who is sitting on the couch, while Defendant is behind her engaging in, or attempting to engage in, vaginal intercourse. Wise can be seen standing only feet away from them with his phone out, recording them. In the second and third videos, Defendant can be seen laughing, smiling, and looking towards his friends who are recording him, demonstrating he was aware they were recording and was actively participating in the group's intent to film sexual acts with a minor.

It was not necessary for Defendant to have formed or to have been aware of a preconceived plan to have sex with N.P. and to film it. The jury was entitled to infer from the "circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto" that Defendant formed the necessary intent to engage in sexual activity with N.P. for the purpose of producing the Snapchat recordings while he was in the midst of doing so. *In re J.D.*, 376 N.C. at 156, 852 S.E.2d at 43. Defendant was friends with the other members of the group. *Sanders*, 288 N.C. at 291, 218 S.E.2d at 357 (a defendant's relation to the actual perpetrators is relevant in proving one acted in concert with the perpetrators). His active participation in the sexual activity which others recorded, as shown by his smiling, laughing, and looking towards his friends as they recorded, demonstrates that he was more than present or merely approving of what was happening. *In re J.D.*, 376 N.C. at 156, 852 S.E.2d at 43. His actions tend to show that he was "acting together with another" or others who recorded the acts and who also had the purpose of producing the Snapchat videos within the meaning of N.C. Gen. Stat. § 14-190.16(a)(1). *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

Therefore, even presuming Defendant himself was not the principal who committed the crime, substantial evidence demonstrates he acted in concert with his friends by engaging in the sexual activity which they recorded with the knowledge they were recording it. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

B. No Instruction on Second-Degree Exploitation of a Minor.

[2] Defendant argues the trial court plainly erred in failing to instruct the jury on second-degree exploitation of a minor because it is a lesser-included offense of first-degree sexual exploitation. Defendant argues in the alternative that even if second-degree sexual exploitation is not a lesser-included offense, because any purported evidence of first-degree sexual exploitation was conflicting, the trial court was required to instruct the jury on second-degree sexual exploitation.

We review unpreserved issues pertaining to potential errors in the trial court's instructions to the jury for plain error. N.C. R. App. P. 10(a)(4); *see also State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Our Supreme Court has held:

> [A] trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction, and that the failure to do so is reversible error which is not

> cured by a verdict finding the defendant guilty of the greater offense. Only when the evidence is clear and positive as to each element of the offense charged and there is no evidence supporting a lesser included offense may the judge refrain from submitting the lesser offense to the jury.

State v. Montgomery, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995) (citation and quotation marks omitted). This Court has explained that "[i]n determining whether one offense is a lesser included offense of another, we apply a definitional test as opposed to a case-by-case factual test. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *State v. Hedgepeth*, 165 N.C. App. 321, 324, 598 S.E.2d 202, 205 (2004) (citations and quotation marks omitted).

A person commits first-degree sexual exploitation of a minor if 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; or
>
> (2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

N.C. Gen. Stat. § 14-190.16(a) (emphasis added). A person commits second-degree sexual exploitation of a minor, however, if he "(1) [r]ecords, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or (2) [d]istributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17(a) (2022).

Here, Defendant's indictment stated he "did *use* and coerce and encourage a minor female" to engage in the sexual activity. (Emphasis added). Ultimately, the trial court instructed the jury on first-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.16(a)(1), specifically pertaining to the "use" of a minor for producing material. The trial court used North Carolina Pattern Jury Instruction ("NCPI Crim.") 238.21, titled "First Degree Sexual Exploitation of a Minor (Using or Employing a Minor to Engage in or Assist Others in Engaging in Sexual Activity)." NCPI Crim. 238.21. If the trial court had instructed the jury on second-degree exploitation of a minor, it would have used one of the two existing pattern jury instructions for the offense. One of the instructions pertains to producing material under N.C. Gen. Stat. § 14-190.17(a)(1), and the other pertains to circulating material under N.C. Gen. Stat. § 14-190.17(a)(2). *See* NCPI Crim. 238.22–22A. Of these, only the instruction pertaining to producing material would be relevant because there was no allegation that Defendant distributed, transported, exhibited, sold, purchased, exchanged, or solicited material under N.C. Gen. Stat. § 14-190.17(a)(2). Therefore, our analysis is limited to whether N.C. Gen. Stat. § 14-190.17(a)(1), regarding recording, photographing, filming, developing, or duplicating material, is a lesser-included offense of N.C. Gen. Stat. § 14-190.16(a)(1), regarding the use of a minor to produce material.

NCPI Crim. 238.21 lists, in pertinent part, the elements of first-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.16(a)(1) in the following manner: "First, that the defendant used a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity. . . . Second, that [the] person was a minor. And Third, that the defendant knew the character or content of the material." NCPI Crim. 238.21 (emphasis in original). In contrast, NCPI Crim. 238.22 lists the elements of second-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.17(a)(1) in the following manner: "First, that the defendant recorded, photographed, filmed, developed, or duplicated material that contains a visual representation of a minor engaged in sexual activity. And Second, that the defendant knew the character or content of the material." NCPI Crim. 238.22 (emphasis in original). Therefore, N.C. Gen. Stat. § 14-190.17(a)(1) requires that there be some type of recording, or in other words, that such illicit material actually was *in existence at some point*. Without an actual recording or photograph of the sexual activity, there would be nothing to prosecute and no violation of N.C. Gen. Stat. § 14-190.17(a)(1). In contrast, it is possible for one to violate N.C. Gen. Stat. § 14-190.16(a)(1) without successfully producing material. For example, if one used a

minor to engage in sexual activity for the purpose of producing material, and afterwards learned that the phone or camera failed to record (because, for example, the perpetrator forgot to press the "record" button or the device malfunctioned), he still would be in violation of N.C. Gen. Stat. § 14-190.16(a)(1) for using a minor to engage in sexual activity for the *purpose of producing material*, regardless of whether or not he successfully recorded it. As Defendant's counsel admitted to the trial court while objecting to an instruction on accomplice testimony:

> I also think that the crime can be committed without a recording actually taking place. If somebody, like I said, forg[o]t to turn the record button but you've engaged in this sexual activity for the purpose of creating a visual representation, I am not sure the recording is required. I think it goes more to the purpose of the sexual act.

The focus of first-degree sexual exploitation is the direct mistreatment of the minor or the production of material for sale or profit: *using*, *employing*, *inducing*, *coercing*, *encouraging*, *or facilitating* "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(a)(1). The focus of second-degree sexual exploitation, however, is the criminalization of the actions of one who is "merely" involved in the production or after-the-fact distribution of such material, without the requirement that the production of such material be for sale or pecuniary gain. Our Supreme Court made this point when it explained:

> Under the current statutory scheme, a defendant can be convicted of sexual exploitation of a minor in the event that he commits a variety of acts, with the defendant's conduct being subject to varying degrees of punishment depending upon the nature and extent of the defendant's involvement with the minor in question. . . . [T]he common thread running through the conduct statutorily defined as *second-degree sexual offense* [is] that the defendant had taken an active role in the production or distribution of child pornography without directly facilitating the involvement of the child victim in the activities depicted in the material in question. . . . [T]he acts necessary to establish the defendant's guilt of *first-degree sexual exploitation of a minor* can be categorized as involving either direct facilitation of the minor's involvement in sexual activity or the production of child pornography for sale or profit.

State v. Fletcher, 370 N.C. 313, 320–21, 807 S.E.2d 528, 534–35 (2017) (emphasis added).

Therefore, we hold that second-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.17(a)(1) is not a lesser-included offense of N.C. Gen. Stat. § 14-190.16(a)(1). Thus, the trial court did not plainly err in failing to instruct the jury on second-degree sexual exploitation of a minor.

C. Officer's Testimony Regarding an Element of the Charged Offense

[3] Defendant next argues the trial court plainly erred in allowing an officer to testify that N.C. Gen. Stat. § 14-190.16(a)(1) merely requires filming the sexual activity with a minor rather than a preexisting plan to film the activity. Specifically, Defendant argues the officer's testimony improperly and inaccurately instructed the jury that Defendant merely being filmed having sex with N.P. constituted a violation of N.C. Gen. Stat. § 14-190.16(a)(1) and misdirected the jury's attention from the statute's requirement that the defendant have the intent to produce material. We disagree.

Because Defendant did not object to the testimony at trial, we review this issue for plain error. N.C. R. App. P. 10(a)(4); *see also Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence. The purpose of such a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "The trial court, not witnesses, must define and explain the law to the jury." *State v. Harrell*, 96 N.C. App. 426, 430, 386 S.E.2d 103, 105 (1989).

Here, defense counsel cross-examined the lead detective in the case, Sam Smith ("Detective Smith"), about a conversation he had with Crouch after he arrested him in October 2019. On redirect, the State drew Detective Smith's attention to defense counsel's questions, stating:

> [Y]our answer was that Mr. Crouch said that there was -- everybody that night knew that there was an agreement that [N.P.] was going to have sex with anyone they wanted to?

Detective Smith answered, "correct," and the State asked him, "And you said it was inferred. So what do you mean by that? Help us understand what you mean by that. He didn't exactly -- he didn't specifically

use the word 'plan'?" The State asked, "Explain what you meant by 'inferred'?" Detective Smith answered, "That there were other ways to say that there's a plan without saying 'This is the plan.' " The State then asked, "And you also said on cross-examination that you did not ask Riley Crouch any questions about filming that night?" Detective Smith answered, "Correct," and finally, the State asked him, "Why did you not ask Riley Crouch any questions about the filming of the sexual activity?" Detective Smith answered, "Because a violation of the statute doesn't require like the -- one, as I mentioned earlier, *it was clearly all filmed and the statute doesn't require a plan to film it, just that it's filmed.*" (Emphasis added).

The State's questions on redirect and Detective Smith's responses were clearly aimed at developing clarifying testimony about his responses to defense counsel on cross-examination and his reasoning and motive for how he questioned Crouch after his arrest. Detective Smith simply answered why he did not feel compelled to question Crouch regarding the filming of the sexual activity, and he gave a logical, albeit legally incorrect, response. Defense counsel then had an opportunity for recross-examination, after which the trial proceeded. Therefore, Detective Smith's testimony made sense in context and did not constitute improper instructions to the jury. The trial court properly instructed the jury on the elements of the charged crime. Accordingly, the trial court did not plainly err when it permitted Detective Smith to testify as he did.

D. Trial Court's Accidental Reference to the Charged Crime as Sexual Assault

[4] Defendant next argues the trial court's reference to the charged crime of first-degree sexual exploitation of a minor as "sexual assault" during its instruction to the jury on acting in concert constituted prejudicial error because it shifted the jury's attention from the specific intent requirement and to the sexual activity itself. We disagree.

Defendant cites *State v. Lee* for the proposition that any objection to an instruction preserves any alleged error with that instruction for appellate review. 370 N.C. 671, 811 S.E.2d 563 (2018). The court in *Lee* specifically stated:

> When a trial court agrees to give a *requested* pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection. A *request* for an instruction at the charge conference is sufficient compliance with the rule to warrant

> our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

370 N.C. at 676, 811 S.E.2d at 567 (brackets omitted) (emphasis added). Here, however, Defendant did not request the instruction; rather, he objected to it. The trial court inadvertently referred to the charged crime as sexual assault during its instruction on acting in concert:

> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit first-degree *sexual assault* of a minor, each of them is guilty of the crime.

(Emphasis added). Defendant objected to the trial court's proposed instruction on acting in concert: "I mean, I don't think the acting in concert is appropriate." Defendant, however, never objected when the trial court referred to the charged crime as sexual assault. Therefore, the rule stated by the court in *Lee* that any alleged error regarding a *requested* jury instruction is preserved as long as a Defendant at some point during the trial objected to the instruction does not apply here to preserve the issue for full appellate review. Accordingly, we review the issue for plain error. N.C. R. App. P. 10(a)(4); *see also Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

Our Supreme Court has held:

> The charge of the court must be read as a whole[,] in the same connected way that the judge is supposed to have intended it and the jury to have considered it. It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Hooks, 353 N.C. 629, 634, 548 S.E.2d 501, 505 (2001) (citation, ellipses, and brackets omitted).

Although the trial court misstated the charged crime once in its jury instruction regarding acting in concert, the trial court properly instructed the jury on the elements of the first count of first-degree sexual exploitation of a minor. It also correctly stated the elements of the charged crime for the second count of first-degree sexual exploitation of a minor.

Moreover, during its second instruction to the jury on acting in concert, the trial court correctly named the charged crime as "first-degree sexual exploitation of a minor." The jury, therefore, would have been aware of the correctly charged crime. A one-time, inadvertent misnomer, otherwise correctly stated three times, would not have confused the jury and does not constitute plain error in a jury instruction. Accordingly, read as a whole, the trial court correctly instructed the jury regarding the charged crime, notwithstanding a single misnaming of the offense. *Hooks*, 353 N.C. at 634, 548 S.E.2d at 505.

III. Conclusion

In summary, we hold there was sufficient evidence for the jury to convict Defendant of first-degree sexual exploitation of a minor. The trial court did not plainly err in failing to instruct on second-degree sexual exploitation of a minor, allowing the officer's testimony explaining his actions based on what he believed was an element of the crime, or inadvertently misnaming the charged offense once in its jury instructions, when read as a whole, the trial court otherwise correctly instructed the jury. We hold Defendant received a fair trial free from error.

NO ERROR.

Judges FLOOD and STADING concur.

DOUG TURPIN AND NICOLE TURPIN, PLAINTIFFS
v.
CHARLOTTE LATIN SCHOOLS, INC., CHARLES D. BALDECCHI, TODD BALLABAN, DENNY S. O'LEARY, MICHAEL D. FRENO, R. MITCHELL WICKHAM, COURTNEY HYDER, IRM R. BELLAVIA, PHIL COLACO, JOHN D. COMLY, MARY KATHERINE DUBOSE, ADAORA A. ERUCHALU, DEBBIE S. FRAIL, DON S. GATELY, ISRAEL K. GORELICK, JOY M. KENEFICK, KARIM LOKAS, JOHN T. MCCOY, KRISTIN M. MIDDENDORF, A. COY MONK IV, UMA N. O'BRIEN, DAVID A. SHUFORD, MICHELLE A. THORNHILL, FLETCHER H. GREGORY III, TARA LEBDA, AND PAIGE FORD, DEFENDANTS.

No. COA23-252

Filed 2 April 2024

1. Contracts—breach—private school enrollment contract—termination by school—plain language

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' breach of contract claim was properly dismissed based on the plain and unambiguous language of the enrollment contract, which plaintiffs renewed each year, including the year after the school made the challenged changes. The contract established that the school "reserved the right" to discontinue enrollment if the school determined, in its sole discretion, that one of two conditions had been met: namely, that plaintiffs' actions rendered a positive, working relationship with the school impossible or seriously interfered with the school's mission.

2. Fraud—enrollment contract terminated by private school—curriculum challenge—alleged retaliation—elements not met

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim that the school committed fraud was properly dismissed where, although plaintiffs asserted that their child was expelled despite the school's assurances that plaintiffs' complaints would not lead to retaliation, school administrators did not make a false statement because the child's removal from school was an ancillary effect of the termination of the enrollment contract and was not a direct action taken against the child. Further, although plaintiffs asserted that they were misled about the purpose of an in-person meeting with school administrators, there was no

evidence that school personnel made a false representation or concealed a material fact.

3. Negligence—negligent misrepresentation—enrollment contract terminated by private school—curriculum challenge—assurances of non-retaliation

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent misrepresentation—based on plaintiffs' assertion that they justifiably relied on statements from school administrators that plaintiffs' complaints would not result in retaliation—was properly dismissed where plaintiffs failed to demonstrate that school officials owed them a duty of care, since such a duty is limited to situations involving a professional relationship in the context of a commercial transaction, which was not at issue in the instant case.

4. Unfair Trade Practices—enrollment contract terminated by private school—curriculum challenge—alleged retaliation—elements not met

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for unfair and deceptive trade practices (UDTP)—based on plaintiffs' assertion that school administrators were deceptive and unfair when they assured plaintiffs that their complaints would not lead to retaliation and instructed plaintiffs that they could raise future concerns—was properly dismissed where the claim could not be established through plaintiffs' related fraud claim, which the appellate court determined had no merit, and where the school's assurances pertained only to plaintiffs' initial presentation of their concerns to the school board and did not extend to plaintiffs' continued expression of the same concerns in perpetuity.

5. Emotional Distress—negligent infliction—enrollment contract terminated by private school—only intentional conduct alleged

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent infliction

of emotional distress was properly dismissed where plaintiffs based their claim on intentional conduct by a school administrator; only negligent conduct, not intentional conduct, may satisfy the negligence element of the claim.

6. Libel and Slander—defamation—private school curriculum dispute—school characterization of parents' concerns—accuracy

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' defamation claim—based on their assertion that school administrators mischaracterized plaintiffs' presentation to the school board as including racist accusations regarding the faculty and students—was properly dismissed where administrators accurately characterized the "gist or sting" of plaintiffs' allegations that the school was compromising its academic excellence by promoting diversity, equity, and inclusion among its faculty and student body; therefore, the administrators' statements did not constitute false statements.

7. Negligence—negligent retention or supervision—private school curriculum dispute—actions by school administrator—incompetency not shown

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent supervision of the head of school was properly dismissed where the claim could not be proven by plaintiffs' related claims for fraud, unfair and deceptive trade practices, or defamation, all of which the appellate court determined had no merit, and where plaintiffs' assertion that the head of school had exhibited "animus" or "hostility" toward them was insufficient to establish incompetency or inherent unfitness.

Judge ARROWOOD concurring by separate opinion.

Judge FLOOD dissenting.

Appeal by plaintiffs from order entered 13 October 2022 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2023.

Ward and Smith, P.A., by Christopher S. Edwards, Alex C. Dale, and Josey L. Newman; Vogel Law Firm PLLC, by Jonathan A. Vogel; and Dowling Defense Group, LLC, by John J. Dowling III, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William A. Robertson, Jim W. Phillips, Jr., Jennifer K. Van Zant, and Kimberly M. Marston, for defendant-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith, B. Davis Horne, Jr., David R. Ortiz, for amicus curiae North Carolina Association of Independent Schools and the Southern Association of Independent Schools.

Melinda R. Beres for amicus curiae Concerned Private School Parents of Charlotte.

Envisage Law, by James R. Lawrence III, for amicus curiae Moms for Liberty Union County, Mecklenburg County, Wake County, Iredell County, Chatham County, Forsyth County, Guilford County, Buncombe County, Stanly County, New Hanover County, Onslow County, Bladen County, and Transylvania County.

THOMPSON, Judge.

Appeal by plaintiffs from the trial court's order granting in part and denying in part defendants' motion to dismiss the nine claims plaintiffs asserted against defendants, including fraud; unfair and deceptive trade practices; negligent misrepresentation; negligent infliction of emotional distress; negligent supervision and retention; slander; libel; breach of contract; and breach of implied covenant of good faith and fair dealing. The trial court denied defendants' motion to dismiss as to plaintiffs' ninth claim, breach of implied covenant of good faith and fair dealing, which plaintiffs subsequently voluntarily dismissed without prejudice. Upon careful review of the matters discussed below, we affirm.

I. Factual Background and Procedural History

In April 2022, Doug and Nicole Turpin (plaintiffs) filed suit against defendants Charlotte Latin Schools, Inc. (Latin); the Head of School, Charles Baldecchi (Baldecchi); the Head of Middle School, Todd Ballaban (Ballaban); and the school's board members (Board). On

18 July 2022, defendants filed a motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. When defendants' motion came on for hearing at the 20 September 2022 session of Mecklenburg County Superior Court, the allegations taken in the light most favorable to the plaintiffs tended to show the following:

Plaintiffs' children, O.T. and L.T.,[1] attended Latin (graded K-12) from the time they were in kindergarten through 10 September 2021, when defendants Baldecchi and Ballaban, during a meeting with plaintiff Doug Turpin, terminated the enrollment contract between Latin and plaintiffs.

Plaintiffs allege that up until the 2020-2021 school year, Latin provided a traditional, apolitical education. However, in June 2020, following the death of George Floyd, a letter was sent to Latin parents, faculty, and staff that plaintiffs felt indicated the school "was moving toward a curriculum, culture, and focus associated with a political agenda." That same month, parents, faculty, staff, and alumni began receiving a video series distributed by Latin entitled "Conversations About Race." On 4 July 2020, Baldecchi sent Latin parents, faculty, and staff a letter titled "My Reflections on the Fourth of July and My Journey Through Life as We Live History," wherein he recounted his participation in a high school prank that, "was not racially motivated" at the time, but "in today's lens, it is horrific."

During the 2020-2021 school year, plaintiffs and other Latin parents began to discuss their concerns about the communications they had received from the school, as well as changes in curriculum, reading materials, and classroom policies that they felt "were indicative of the adoption of a political agenda." Ultimately, the group of parents, including plaintiffs, who had begun calling themselves "Refocus Latin[,]" requested a meeting with the Board to address their concerns.[2]

In February 2021, plaintiffs entered into enrollment contracts with Latin for the 2021-2022 school year. In bold typeface, the enrollment contracts stated

> I understand that in signing this [e]nrollment [c]ontract for the coming academic year, my family and I understand the mission, values, and expectations of the School

1. Initials are used to protect the identities of the minor children.

2. Refocus Latin stated that their mission was to "[c]onfirm the foundational principles supporting a Mission based upon the stated core values and beliefs. We must hold fast to what is true and double down on what made the school successful for five decades."

> as outlined in the *Charlotte Latin School Parent-School Partnership* and agree to accept all policies, rules, and regulations of Charlotte Latin Schools, Inc., including those as stated and as referred to above.

(emphasis in original).

The enrollment contracts also state that "[i]f this [e]nrollment [c]ontract is *acceptable to you*, please 'sign' as directed below . . . . This shall constitute your signature in acceptance of this [e]nrollment [c]ontract and certifies that you have read the [c]ontract and understand it." (emphasis added). Both enrollment contracts were signed by plaintiff Nicole Turpin. The enrollment contracts acknowledge that "[t]his instrument shall be interpreted in accordance with the laws of the State of North Carolina."

Finally, the enrollment contracts state that, "I agree to uphold the Parent-School Partnership." The Parent-School Partnership provides, in pertinent part, that a

> positive, collaborative working relationship between the School and a student's parent/guardians is essential to the fulfillment of the School's mission. Therefore, *the School reserves the right to discontinue enrollment* if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission."

(emphasis added).

Moreover, the Parent-School Partnership states that, "[t]he School will uphold and enforce rules and policies detailed in the Family Handbook in a fair, appropriate[,] and equitable manner."[3]

In July 2021, Refocus Latin was invited to present their concerns to the Executive Committee of the Board. Prior to the meeting with the Board, two Refocus Latin parents met with the Board's Chair, Denny O'Leary, to express the group's apprehension about retaliation from Latin for participating in the presentation. O'Leary assured the parents that they would not be subjected to any retaliation "for the parent[s'] exercise of the contractual right to communicate concerns to Latin" and

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3. According to plaintiffs' complaint, the Family Handbook for the 2021-2022 school year provided that "[t]he school will continue to review and update its programs in all areas."

asked the two Refocus Latin parents to communicate that message to the rest of the Refocus Latin parents, including plaintiffs.

On 24 August 2021, ten members of Refocus Latin,[4] including plaintiff Doug Turpin, brought their PowerPoint presentation to the Executive Committee of the Board, Baldecchi, and defendant Fletcher H. Gregory III. At the meeting, members of the Board, including O'Leary, again assured the group that there would be no retaliation against any parents for bringing their concerns about Latin before the Board. When the presentation concluded, O'Leary expressed her appreciation to the parents for their presentation, but advised the parents that neither the Board nor the administration of Latin would continue the dialogue about the concerns Refocus Latin had presented, that no response to the presentation would be provided, and that any future concerns the individual parents had should be taken to Latin's administrators.

On 25 August 2021, the day after the presentation, O'Leary sent an email to the ten participants, including plaintiff Doug Turpin, thanking them again for communicating their concerns to the Board and expressing her optimism about Latin and its future. On 29 August 2021, plaintiff Doug Turpin responded to O'Leary's email, thanking the Executive Committee of the Board for its time but also expressing his disappointment in the Board's decision not to continue the dialogue with Refocus Latin.

Following Refocus Latin's presentation to the Board, parents who had participated in the preparation of the presentation and had access to the PowerPoint emailed the PowerPoint presentation to other parents who had the same concerns as the parents of Refocus Latin. Between 1–2 September 2021, Baldecchi met with Latin faculty and staff via video calls and advised them that he was aware that the PowerPoint presentation had been obtained by other parents within the Latin community. He stated that the PowerPoint presentation was "just awful," "very hurtful," and that, "[o]ne reads it and cringes." He further stated that the parents' concerns about the curriculum and culture of Latin were a "lost cause," that Refocus Latin had met with the Board in "bad faith[,]" and that the presentation was "an attack on our community with the intention of ripping its fabric apart." Baldecchi advised faculty and staff not to engage with parents who communicated concerns with the curriculum and culture of Latin, but to "point them to me, please."

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4. The Board restricted the number of parents who could attend the presentation to no more than ten.

One week later, on 7 September 2021, plaintiffs emailed Ballaban with concerns they had about L.T.'s sixth-grade Humanities class. L.T. had shared with plaintiffs some of the comments made by his teacher, which plaintiffs felt were "indoctrination on progressive ideology[,]" and plaintiffs also claimed that the teacher would no longer allow L.T. to pull down "his mask for just long enough to drink water[,]" nor would she allow L.T. to go to the bathroom "when he asks to do so." Out of fear of retaliation against L.T., plaintiffs requested that Ballaban not "address this with the teacher [plaintiffs] a[re] referencing in this email" until plaintiffs had first had a chance to discuss the matter with Ballaban directly.

On 8 September 2021, Ballaban responded to plaintiffs' email and stated that he would investigate the "serious claims" plaintiffs had made about the teacher and report back to plaintiffs in "a day or two . . . ." In response to plaintiffs' concern that the teacher might retaliate against L.T., Ballaban further assured plaintiffs that "[o]ur teachers do not retaliate and there will be no blowback, I assure you." Ballaban emailed plaintiffs later that same day, advised plaintiffs that he had looked into the matter "in depth[,]" and notified plaintiffs that he and defendant Baldecchi "would like to meet with [plaintiffs] in person about it" on 10 September 2021.

At the 10 September 2021 meeting between Baldecchi, Ballaban, and plaintiff Doug Turpin, Ballaban reported that he had spoken with L.T.'s Humanities teacher and she had denied plaintiffs' allegations regarding the class curriculum as "political indoctrination." During the meeting, Baldecchi said that the parents of Refocus Latin, and by association, plaintiffs, "believed that the school 'accepts students and hires faculty because of their color' and that students and faculty of color 'are also not up to the merit of the school.' " Thereafter, Baldecchi produced the enrollment contracts plaintiffs had signed in February 2021 and terminated the contracts. O.T. and L.T. were required to leave Latin that same day.

On 14 September 2021, an email was sent from "The Board of Trustees, Charlotte Latin School" to Latin families, faculty, and staff, wherein the Board stated that it "categorically rejects the assertion that diverse students and faculty have not earned their positions and honors at Latin and that diversity comes at the expense of excellence."

On 25 April 2022, plaintiffs filed suit against defendants, alleging fraud, unfair and deceptive trade practices, negligent misrepresentation, negligent infliction of emotional distress, negligent retention and supervision, slander, libel, breach of contract, and breach of implied covenant

of good faith and fair dealing. On 18 July 2022, defendants filed a motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The matter came on for hearing at the 20 September 2022 session of Superior Court, Mecklenburg County. By order entered 12 October 2022, the court granted defendants' motion with respect to the first eight counts of plaintiffs' complaint—fraud, unfair and deceptive trade practices, negligent misrepresentation, negligent infliction of emotional distress, negligent retention and supervision, slander, libel, and breach of contract—and denied defendants' motion with respect to the ninth count of breach of implied covenant of good faith and fair dealing. On 17 October 2022, plaintiffs voluntarily dismissed the remaining count, breach of implied covenant of good faith and fair dealing, without prejudice. On 18 October 2022, plaintiffs filed timely written notice of appeal from the court's 12 October 2022 order.

II. Analysis

Before this Court, plaintiffs allege the following issues:

1. Did Latin commit fraud, when despite its administrators' promise that [plaintiffs'] complaints would not generate blowback, the [plaintiff]s' children were expelled from Latin?

2. Did Latin's administrators negligently misrepresent their purpose for requesting a meeting with the [plaintiffs], when the [plaintiffs] were otherwise unable to learn the true purpose of the meeting?

3. Was expelling the [plaintiffs'] children an unfair or deceptive practice, in violation of [N.C. Gen. Stat.] § 75-1.1, when, despite encouraging the [plaintiffs] to engage in a frank dialogue, Latin expelled the [plaintiff]s' children as a result of their views?

4. Did Latin negligently inflict severe emotional distress on [plaintiff Nicole Turpin], when it expelled her children in the middle of a pandemic, removing them from the only school they'd ever known and their friends?

5. Did Latin negligently supervise or retain . . . [Baldecchi], when, following repeated attacks on the [plaintiffs], Baldecchi expelled their children?

6. Did Latin defame the [plaintiffs] when it accused a small, identifiable group of parents, which included the [plaintiffs], of harboring racist views?

7. Did Latin breach its enrollment contracts with the [plaintiffs], when those contracts allowed Latin to terminate its relationship with the [plaintiffs] only if [plaintiffs] made the relationship "impossible"?

We will address each of these alleged issues, not necessarily in this order, in the analysis to follow.

A. Standard of review

"The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established[;] [a]ppellate courts review de novo an order granting a Rule 12(b)(6) motion to dismiss." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). "The appellate court, just like the trial court below, considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* (citation and internal quotation marks omitted).

B. Breach of contract

[1] On appeal, plaintiffs contend that they "sufficiently alleged a breach of contract, and the trial court was wrong to conclude otherwise" because "the court ignored the agreement's plain language and disregarded Latin's obligation to apply those agreements in good faith." We disagree, because the plain and unambiguous language of the enrollment contracts—and pursuant to the enrollment contracts, the Parent-School Partnership—allowed Latin to terminate plaintiffs' enrollment contracts at Latin's discretion.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015) (citation omitted). "The most fundamental principle of contract construction—is that the courts must give effect to the plain and unambiguous language of a contract." *Am. Nat'l Elec. Corp. v. Poythress Commer. Contractors, Inc.*, 167 N.C. App. 97, 100, 604 S.E.2d 315, 317 (2004) (citation and brackets omitted). "Whether or not the language of a contract is ambiguous . . . is a question for the court to determine." *Lynn v. Lynn*, 202 N.C. App. 423, 432, 689 S.E.2d 198, 205 (citation omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010). "In making this determination, words are to be given their usual and ordinary

meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.* (citation and internal quotation marks omitted). However, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, *must be enforced as written*." *Ricky Spoon Builders, Inc. v. EmGee LLC*, 286 N.C. App. 684, 691, 882 S.E.2d 110, 115 (2022) (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 385 N.C. 326, 891 S.E.2d 300 (2023) (emphasis added).

As discussed above, in the present case, the enrollment contracts provide that

> in signing this [e]nrollment [c]ontract . . . I understand the mission, values, and expectations of the School as outlined in the *Charlotte Latin School Parent-School Partnership* and agree to accept all policies, rules, and regulations of Charlotte Latin Schools, Inc., including those as stated and as referred to above.

(emphasis in original). The enrollment contracts go on to state that "[a]s the parent or legal guardian . . . I agree to uphold the Parent-School Partnership" which provides that a

> positive, collaborative working relationship between the School and a student's parent/guardians is essential to the fulfillment of the School's mission. Therefore, *the School reserves the right to discontinue enrollment* if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission.

(emphasis added).

Therefore, giving the words of the contract, "the School reserves the right to discontinue enrollment[,]" their "usual and ordinary meaning[,]" *Lynn*, 202 N.C. App. at 432, 689 S.E.2d at 205, whether Latin breached their contracts with plaintiffs by discontinuing enrollment turns on whether *Latin* "conclude[d] that the actions of [plaintiffs]" made a "positive, collaborative working relationship between the School" and plaintiffs "impossible[,]" or "seriously interfere[d] with the School's mission."

a. Impossibility of positive, collaborative working relationship

On appeal, plaintiffs contend that "[t]he trial court erred when it dismissed [plaintiff]s' breach of contract claim because plaintiffs "did

not make the required 'positive, collaborative working relationship' between themselves and Latin 'impossible.' " We disagree, because the plain language of the contract confers *Latin*, not plaintiffs, with the discretion to determine when such a relationship is impossible.

In their appellate brief, plaintiffs define "impossible" to mean "incapable of having existence or of occurring" or "not capable of being accomplished." (brackets omitted). Our Court has defined "[i]mpossible" as "not possible; that cannot be done, occur, or exist . . . ." *Morris v. E.A. Morris Charitable Found.*, 161 N.C. App. 673, 676, 589 S.E.2d 414, 416 (2003) (citation omitted), *disc. review denied*, 358 N.C. 235, 593 S.E.2d 592 (2004). However, we need not enter into such an unwieldy inquiry as to determine when a "positive, collaborative working relationship" between the parties became "impossible[,]" because the plain language of the contract establishes that *Latin* "reserved the right" to make such a determination. Again, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, *must be enforced as written*." *Ricky Spoon*, 286 N.C. App. at 691, 882 S.E.2d at 115 (citation, internal quotation marks, and brackets omitted) (emphasis added).

Here, the plain language of the contract establishes that Latin "reserved the right" to discontinue enrollment "if [Latin] conclude[d] that the actions of a parent/guardian ma[de] [a positive, collaborative working] relationship impossible or seriously interfere[d] with the School's mission." "[G]iv[ing] effect to the plain and unambiguous language of [the] contract[,]" *Am. Nat'l Elec. Corp.*, 167 N.C. App. at 100, 604 S.E.2d at 317 (citation omitted), a determination of whether a positive, collaborative working relationship with plaintiffs was impossible was left to the discretion of Latin—not to plaintiffs, not to this Court—but to *Latin*.

Moreover, as the amicus brief filed by the North Carolina Association of Independent Schools and the Southern Association of Independent Schools, a representative of "almost [ninety] independent schools across the State[,]" acknowledges, "[t]he private right of associations allows independent schools to define their values, mission[,] and culture as they see fit. Some schools may be conservative, others liberal, more in the middle."

We agree with amicus curiae; private schools provide alternatives to public education for parents who, for one reason or another, desire for their children to be educated outside of the public school system. Private schools' independence allows them to define their values,

missions, and cultures as they deem necessary. It allows private sectarian schools to engage in daily prayer and to teach classes on biblical issues. It also allows private military schools to prepare our youth for careers of service to our Nation's Armed Forces. This autonomy—to define their values, missions, and cultures—extends to private schools of all ideologies, religions, and perspectives, even those associated with "political agendas." Again, this is a benefit of private schools—indeed, the predominate *purpose* of private schools—not a detriment.

If this suit were allowed to proceed, speech at private schools would be chilled; there would be fewer educational opportunities for students—and fewer alternatives for parents. Private schools would avoid controversial subjects, such as the teaching of Creationism, simply to avoid protracted litigation such as the litigation in the instant case. After stripping away all of the heated arguments surrounding the school's curriculum, the dispositive issue in this case is straightforward; this is a simple matter of contract interpretation.

Plaintiffs renewed their enrollment contracts each school year, including the 2021-2022 school year, despite Latin indicating that, in plaintiffs' words, the school "was moving toward a curriculum, culture, and focus associated with a political agenda" beginning in June of 2020. For nearly a year prior to the termination of their enrollment contracts, plaintiffs made it clear that their worldview did not conform with that of Latin, and they were aware of this when they re-enrolled their children at Latin for the 2021-2022 school year in February 2021. As the aforementioned amicus brief notes, "the remedy if [plaintiffs] wish to associate with others [of their political views and preferences[5]] is to vote with their feet" and enroll their children in a different private school, one which more accurately reflects their worldview.

Today's dissent would undermine the aforementioned private right of associations, while simultaneously upending the "constitutionally guaranteed" freedom of contract. We note that absent from today's dissent is the plain language of the dispositive provision of the contract which, again, provides that, "*the School reserves the right* to discontinue enrollment *if it concludes* that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission." (emphases added).

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5. This phrase appears on page ten of the amicus curiae brief filed by the North Carolina Association of Independent Schools and the Southern Association of Independent Schools.

While the dissent is correct to acknowledge that "[a] complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that [the] plaintiff is entitled to no relief under any state of facts which could be presented in support of their claim[,]" it simply ignores that the allegations of the complaint, treated as true, in the light most favorable to the non-moving party, affirmatively established that plaintiffs are not entitled to relief under any state of facts. The plain language of the contract necessarily defeated plaintiffs' claim for breach of contract.

For this reason, the trial court was correct in dismissing plaintiffs' claim for breach of contract pursuant to "the plain and unambiguous language of [the] contract." *Id.* (citation omitted).

b. Seriously interfere with the school's mission

Alternatively, in their appellate brief, plaintiffs assert that "[n]othing in the complaint would allow this Court to infer that . . . [plaintiffs] violated [Latin's] mission." We disagree because, again, the plain language of the contract provided that Latin—not plaintiff, not this Court—reserved the right to make such a determination.

Again, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, must be enforced as written." *Ricky Spoon*, 286 N.C. App. at 691, 882 S.E.2d at 115 (citation, internal quotation marks, and brackets omitted). As discussed at length above, whether "the actions of" plaintiffs "seriously interfere[d] with the School's mission"[6] was left to the discretion of Latin, and for the aforementioned reasons, the trial court did not err when it dismissed plaintiffs' claim for breach of contract.

C. Fraud

[2] Alternatively, plaintiffs argue that the trial court "erred when it dismissed [plaintiff]s' fraud . . . claim[]" because "[r]eading the complaint most favorably to [plaintiffs], they have alleged both a false statement and a misleading omission." Again, we disagree.

In their complaint, plaintiffs alleged "fraud in connection with Ballaban's false representations on [8 September] 2021" that (1) "Latin would not retaliate against [plaintiffs'] children for expressing their

6. In their complaint, plaintiffs allege that Latin's mission is "to encourage individual development and civility in our students by inspiring them to learn, by encouraging them to serve others, and by offering them many growth-promoting opportunities."

concerns" and (2) "that a proposed [10 September] 2021 in-person meeting . . . would *solely* be an opportunity for Baldecchi and Ballaban – consistent with the Parent-School Partnership – to answer and/or address [plaintiffs'] concerns, as those concerns were set forth in [plaintiff Doug Turpin]'s [7 September] 2021 email to Ballaban." (emphasis added). We will address both of these allegedly false representations in turn.

a. False representations

In order to bring a claim for fraud, a plaintiff must establish a "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387 (2007). "Additionally, any reliance on the allegedly false representations must be reasonable." *Id.* at 527, 649 S.E.2d at 387. "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 26, 581 S.E.2d 452, 458, *disc. review denied*, 357 N.C. 511, 588 S.E.2d 473 (2003).

i. False representation re: retaliation

In their complaint, plaintiffs claimed that "Ballaban made false representations in his [8 September] 2021 emails that Latin would not retaliate – when he stated, 'there will be no blowback, I assure you' – against [plaintiffs'] children for expressing their concerns." In their appellate brief, plaintiffs claim that "[b]y promising [plaintiff Doug Turpin] that L.T. would face no blowback, only to expel him, Ballaban—and, through Ballaban, Latin—made a false statement." However, this reasoning is a misapprehension of cause and effect.

When considering plaintiffs' claim for fraud, the trial court explicitly noted that, "I've read the Complaint, and I . . . interpret expulsion to be referring to discipline for the children. And there's absolutely nothing in the Complaint that alleges any behavior on the part of the children that resulted in the termination of the enrollment agreement." The court observed that "[i]t was . . . alleged to be [plaintiff]s' behavior that resulted in the termination of th[e] enrollment agreement."

As the trial court suggested, there was no "blowback" from the teacher towards plaintiffs' child, L.T., as a result of plaintiffs' expression of concern about the school's culture and curriculum. L.T.'s removal from the school was an *ancillary effect* of the termination of the enrollment contract *between plaintiffs and defendants*, not a retaliatory action

taken against L.T. by his teacher. Indeed, our independent review of the record reveals that the "blowback" contemplated by plaintiffs and Ballaban in the 8 September 2021 email specifically related to blowback from "the teacher [plaintiffs] a[re] referencing in this email[,]" not from Ballaban or Baldecchi.

For this reason, the trial court was correct to conclude that Ballaban did not make a false representation when he stated that "[o]ur teachers do not retaliate and there will be no blowback, I assure you."

ii. False representation re: purpose of 10 September meeting

Moreover, our careful review of the record makes clear that defendants made no representation that the nature and purpose of the 10 September 2021 meeting was *solely* an opportunity to address plaintiffs' concerns. The email from Ballaban on 8 September 2021 states in its entirety: "I have had a chance to review your email and look into the matter in depth. Chuck Baldecchi and I would like to meet with [plaintiffs] in person about it. I have copied [Baldecchi] and his assistant Michelle Godfrey, who can assist in finding us some time. Thank you."

Despite plaintiffs' assertion in their complaint that the 10 September 2021 meeting would "*solely* be an opportunity for Baldecchi and Ballaban consistent with the Parent-School Partnership – to answer and/or address [plaintiffs'] concerns," (emphasis added) no such representation was made in the 8 September 2021 email from Ballaban. While the 10 September meeting was scheduled as a result of plaintiffs' unrelenting objections to Latin's culture and curriculum, it was not the *sole* purpose of the meeting, nor did Ballaban ever make any representation that it was. For the aforementioned reasons, we conclude that plaintiffs have failed to plead a false representation as is necessary to bring a claim for fraud.

b. Concealment of material fact

Next, plaintiffs argue in their appellate brief that "Ballaban and Baldecchi's silence [was] misleading" and that they "had to accurately inform [plaintiff Doug Turpin] about the meeting's purpose" because they "owed [plaintiff Doug Turpin] a duty to speak." We disagree, because Baldecchi and Ballaban did not owe plaintiffs a duty to disclose.

"A duty to disclose arises in three situations. The first instance is where a fiduciary relationship exists between the parties to the transaction." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). The next two situations where a duty to disclose arises exist outside of a fiduciary

relationship (1) "when a party has taken affirmative steps to conceal material facts from the other[,]" or (2) "where one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Id.* at 298, 344 S.E.2d at 119.

Plaintiffs contend that Ballaban "had a duty to speak because he made the misleading statement, telling [plaintiff Doug Turpin] that he and Baldecchi 'would like to meet . . . in person about' [plaintiffs'] concerns." However, Ballaban did not make a misleading statement; Ballaban never stated that the meeting was to address plaintiffs' "concerns[,]" nor, as discussed above, that the 10 September 2021 meeting was "*solely*" to address plaintiffs' concerns. (emphasis added).

What Ballaban did state, as noted above, was that, "I have had a chance to review your email and look into the matter in depth. Chuck Baldecchi and I would like to meet with [plaintiffs] in person about it." Absent from the email correspondence between plaintiff Doug Turpin and Ballaban is any hypothetical itinerary or "purpose" for the meeting.

Ballaban had no duty to disclose the purpose of the 10 September meeting because there was not "a fiduciary relationship . . . between the parties to the transaction[,]" he did not take "affirmative steps to conceal material facts" about the purpose of the meeting, nor was there any allegation of a "latent defect in the subject matter of the negotiations . . . ." *Id.* at 297–98, 344 S.E.2d at 119. For the aforementioned reasons, plaintiffs have failed to allege a false representation or concealment of a material fact as is necessary to bring a claim for fraud. The trial court was correct in dismissing plaintiffs' claim for fraud pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

D. Negligent misrepresentation

[3] Plaintiffs also argue that they "have alleged a viable negligent misrepresentation claim against Ballaban" because he "falsely assured [plaintiffs] that L.T. would face 'no blowback' for [plaintiffs'] complaints[,]" plaintiffs "relied on that statement[,]" and "Ballaban owed [plaintiffs] a duty of care." Again, we disagree.

"The tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care." *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (citation and brackets omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 18 (2001).

Our Supreme Court has defined a breach of the duty of care, the fourth element of a negligent misrepresentation claim as, "[o]ne who, *in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest*, supplies false information for the guidance of others in their business transactions," and is therefore "subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Id.* at 534, 537 S.E.2d at 241 (emphasis in original).

Despite plaintiffs' assertion that "Latin and Ballaban owed [plaintiffs] a duty of care[,]" because Ballaban "held all the cards," in that he "ha[d] or control[led] the information at issue[,]" plaintiffs' argument is based on an incorrect characterization of our Court's analysis in *Rountree v. Chowan County*. In that case, our Court recognized that a duty of care giving rise to a claim for negligent misrepresentation "commonly arises within *professional relationships*." *See Rountree*, 252 N.C. App. 155, 160, 796 S.E.2d 827, 831 (2017) (emphasis added) (recognizing the duty of care has also been extended to real estate appraisers, engineers, and architects).

We went on to note that North Carolina courts "have also recognized, albeit in a more limited context, that a separate duty of care may arise between adversaries in a *commercial* transaction[,]" where "the seller owed a duty to the buyer during the course of negotiations 'to provide accurate, or at least negligence-free financial information' about the company" because the seller "was the only party who had or controlled the information at issue" and the buyer "had no ability to perform any independent investigation." *Id.* at 161, 796 S.E.2d at 832 (citation, internal quotation marks, and emphasis omitted) (emphasis added).

As our Court recognized in *Rountree*, the duty of care giving rise to a claim for negligent misrepresentation "commonly arises within *professional relationships*[,]" and "in a more limited context . . . between adversaries in a *commercial* transaction." *Id.* at 160–61, 796 S.E.2d at 831–32 (emphases added). Neither of these circumstances are present here.

Despite plaintiffs' assertion that Ballaban owed plaintiffs a duty of care because he "held all the cards" regarding "the relevant information" and plaintiffs "had no way to verify th[e no blowback] statement's accuracy[,]" we decline to extend our State's case law regarding the duty of care that gives rise to a claim for negligent misrepresentation to a *non-professional, non-commercial* dispute. For this reason, the trial court did not err in dismissing plaintiffs' claim for negligent misrepresentation.

E. Unfair or deceptive trade practices

[4] Plaintiffs also assert on appeal that the trial court erred when it dismissed their UDTPA claim because defendants' conduct was "deceptive" or in the alternative, that their conduct was "unfair." We disagree.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* "The determination as to whether an act is unfair or deceptive is a question of law for the court." *Id.*

a. Fraudulent conduct

At the outset, we note that plaintiffs' first ground for their UDTPA claim in the complaint is based upon their allegations of fraud. In fact, the allegations made pursuant to plaintiffs' UDTPA claim mirror the allegations made pursuant to their claim of fraud. "[A] plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred." *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991). "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts." *Id.* (citation omitted). However, as discussed above, defendants did not commit a fraud upon plaintiffs through any "false representations" or "concealment of material fact[s]," *Forbis*, 361 N.C. at 526–27, 649 S.E.2d at 387, and for this reason, their UDTPA claim on the ground of fraud fails.

b. Deceptive conduct

Next, plaintiffs contend that "[e]ven if Latin's conduct w[as] not fraudulent, it was still deceptive." In their complaint, plaintiffs alleged that defendants "engaged in . . . deceptive acts or practices" by the "immoral, unethical, oppressive, and unscrupulous acts of providing repeated, express assurances from Board members that there would be no retaliation against [plaintiffs] for their participation in the presentation to the Board" which "had the tendency to deceive, and did deceive, [plaintiffs] into preparing the PowerPoint document and presenting to the Board."

However, raising concerns about the school's curriculum and culture and participating in the 24 August 2021 presentation were not the reasons for defendants' termination of plaintiffs' enrollment contracts. Indeed, there have been no allegations that any of the other parents who

raised concerns about Latin's curriculum and culture or participated in the PowerPoint presentation, standing alone, were subject to "retaliation" by Latin. This discrepancy in outcomes lays bare the conclusion that it was plaintiffs *continuing* to raise concerns about Latin's curriculum and culture that led to the termination of their enrollment contracts.

Despite plaintiffs' contention on appeal that they "had received no fewer than three assurances that their complaints would not lead to retaliation[,]" the Board made no such assurance about their complaints. In reality, according to plaintiffs' own complaint, what members of the Board assured the parents associated with Refocus Latin was that "no parent who raises concerns about Latin's curriculum and culture will be subjected to retaliation[,]" that "any parent who participates in the presentation would be even more protected from being subjected to retaliation[,]" and that "Latin would not retaliate against any of the parents for raising concerns about Latin's curriculum and culture."

What was not promised by the Board was that Latin would allow a subset of the Refocus Latin parents to *continuously* raise the same *previously raised* concerns about the curriculum and culture of the school in perpetuity. The Board assured the parents that there would be no retaliation against them for *participating in the presentation or raising concerns about Latin's curriculum or culture*. Plaintiffs were given an opportunity to raise their concerns about Latin's curriculum and culture, and by their own complaint, acknowledge that plaintiff Doug Turpin participated in the presentation to the Board, as he "gave the presentation in a professional and civil manner . . . ."

For this reason, plaintiffs cannot demonstrate that Latin acted deceptively, nor did its promises have the tendency to deceive, when Latin assured plaintiffs that they would not be subject to retaliation for raising concerns about the school's culture and curriculum or participating in the PowerPoint presentation.

c. Unfair conduct

Next, plaintiffs claim in their appellate brief that "[e]ven if Latin's conduct w[as] neither fraudulent nor deceptive, it was unfair[,]" in that "[t]he way Latin, Baldecchi, and Ballaban expelled the [plaintiff]s' children satisfies the definition of unfairness." We disagree.

Our Supreme Court has established that in the context of a claim for UDTPA, a "practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000).

In the present case, we conclude that defendants did not engage in unfair conduct by instructing the Refocus Latin parents to bring any *future concerns* to the school's administrators. This is not what plaintiffs did in their 7 September 2021 email to Ballaban, wherein they raised *the same concerns* addressed in Refocus Latin's PowerPoint presentation from a few weeks earlier. In their 7 September email, plaintiffs raised concerns about "a very left wing progressive viewpoint that we think i[s] improper for a teacher to be espousing to children[,]" that plaintiffs were "looking for the traditional classical education we were promised, not an indoctrination on progressive ideology[,]" and "that is not what we believe should be taught at Latin and not what we signed up for."

The concerns raised in the 7 September 2021 email from plaintiffs to Ballaban were not new concerns, they were *the same concerns* that the Refocus Latin parents had previously expressed, and defendants' termination of plaintiffs' enrollment contracts did not "offend[] established public policy" nor was the practice "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers" as is necessary to establish an unfair act giving rise to a claim for unfair and deceptive trade practices. *Id.* For these reasons, we affirm the trial court's dismissal of plaintiffs' claim for unfair and deceptive trade practices.

F. Negligent infliction of emotional distress

[5] Plaintiffs also allege that the trial court "prematurely judged [plaintiff]s' NIED claim" because Baldecchi "should have known that [plaintiff Nicole Turpin] could suffer severe emotional distress based on his decision to expel her children" or that he "should have known that his conduct would cause [plaintiff Nicole Turpin] severe mental anguish even though she did not attend the [10 September] meeting . . . ." They further contend that "the unintended effects from intentional acts may negligently cause harm." We disagree.

To bring a claim for negligent infliction of emotional distress, a plaintiff must allege that "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 582–83 (1998) (citation omitted). However, "[a]llegations of intentional conduct . . . even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 149, 746 S.E.2d 13, 19 (2013).

In their complaint, plaintiffs claimed that "Baldecchi's failure to follow a duty to use ordinary care to protect [plaintiff Nicole Turpin] from

injury or damage was a proximate cause of [plaintiff Nicole Turpin]'s severe emotional distress." On appeal, plaintiffs argue that "[w]hile Baldecchi may have intended to expel O.T. and L.T., [plaintiff]s' NIED claim focuses on the negligent effects of Baldecchi's conduct[,]" and "other courts have recognized the unintended effects from intentional acts may negligently cause harm." However, this argument is unavailing, and plaintiffs cite to non-binding authority from Kansas to support their proposition that "the unintended effects from intentional acts may negligently cause harm."

In this jurisdiction, the relevant inquiry when evaluating an NIED claim is not whether the actions of the defendant led to *negligent effects*, the relevant inquiry is whether the defendant engaged in *negligent conduct*, and "[a]llegations of intentional conduct, such as these, even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Id.* Baldecchi did not *negligently* terminate the enrollment contracts, he did so intentionally. For this reason, the trial court did not err in dismissing plaintiffs' claim for negligent infliction of emotional distress.

G. Defamation

[6] Next, plaintiffs argue that "the trial court should not have dismissed [plaintiff]s' defamation claims" because "Baldecchi and the Board falsely claimed that the Refocus Latin parents had made racist accusations about faculty and students." We disagree, because Baldecchi and the Board's characterizations of the PowerPoint presentation and its contents were not materially false.

"In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. L'Eggs Prods. Inc.*, 84 N.C. App. 1, 10–11, 351 S.E.2d 834, 840 (1987). "If a statement is substantially true it is not materially false." *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 68, 846 S.E.2d 647, 677 (2020). "It is not required that the statement was literally true in every respect." *Id.* "Slight inaccuracies of expression are immaterial provided that the statement was substantially true[,]" meaning that the "gist or sting of the statement must be true even if minor details are not." *Id.*

"The gist of a statement is the main point or heart of the matter in question." *Id.* "The sting of a statement is the hurtful effect or the element of the statement that wounds, pains, or irritates." *Id.* (emphasis omitted). "The gist or sting of a statement is true if it produces the same

effect on the mind of the recipient which the precise truth would have produced." *Id.* at 68–69, 846 S.E.2d at 677. (emphasis omitted).

Here, the first statement that plaintiffs contend was defamatory comes from the 10 September 2021 meeting between plaintiff Doug Turpin, Baldecchi, and Ballaban, wherein Baldecchi made a "known false statement" to plaintiff Doug Turpin, when he characterized the PowerPoint presentation by the Refocus Latin parents. Plaintiffs contend that Baldecchi's characterization of the PowerPoint presentation, that "the school accepts students and hires faculty because of their color" and that "those students and faculty of color" were "not up to the merit of the school[,]" "was false, and Baldecchi knew it was false when he uttered the statement because he had a copy of the PowerPoint document . . . ."

Alternatively, plaintiffs contend that a 14 September 2021 email from the Board to Latin families, faculty, and staff, wherein the Board stated that it "categorically rejects the assertion that diverse students and faculty have not earned their positions and honors at Latin and that diversity comes at the expense of excellence[,]" was "false, and the Board Defendants knew it was false when they published the statement because . . . they each had a copy of the PowerPoint document . . . ."

On appeal, plaintiffs contend that "[b]oth statements mischaracterize Refocus Latin's views on Latin's culture and curriculum and falsely accuse Refocus Latin—and with it, [plaintiffs]—of harboring negative views about Latin's *current* faculty and student body." In order to determine whether Baldecchi's and the Board's characterizations of Refocus Latin's position in the PowerPoint was "materially false" so as to give rise to a claim for defamation, *id.*, 375 N.C. at 68, 846 S.E.2d at 677, we must consider the assertions made in the 24 August 2021 PowerPoint presentation to the Board and whether the statements of Baldecchi and the Board capture the "gist or sting" of the PowerPoint presentation. *Id.*

In the PowerPoint presentation, Refocus Latin asserted their "[r]eal [c]oncerns" were that "[t]he weighting of DEI and Critical Theory on a 'culturally responsive education' eventually erodes the quality of student, quality of curriculum, quality of teacher and the academic rigor at the school[,]" and one reason "why [they] have [this concern]" is because "[a]dmissions is weighting diversity over academic excellence, particularly in [the] [Upper School]." Moreover, the PowerPoint expressed concerns that Latin was "moving away from education[al] meritocracy in line with progressive concepts of restorative justice and equity[,]" and that "DEI goals [were] superseding optimizing evaluations for admitting most qualified students and hiring most qualified faculty."

We need not exhaustively chronicle the claims made in the PowerPoint presentation, as the aforementioned statements from the PowerPoint presentation are sufficient to demonstrate that neither Baldecchi's statements to plaintiff Doug Turpin in the 10 September 2021 meeting, nor the contents of the 14 September 2021 email from the Board to the parents, faculty, and staff were "materially false[,]" as they accurately characterize the "gist or sting" of the Refocus Latin PowerPoint presentation. *Id.* As defendants succinctly note, defendants' "statements rejected a premise that Refocus Latin explicitly asserted in its PowerPoint — that Latin was compromising with respect to the academic excellence of its faculty and students by promoting DEI."

For this reason, we conclude that defendants did not make a false statement when characterizing the assertions of the Refocus Latin PowerPoint presentation, and the court did not err in dismissing plaintiffs' claims for defamation.

H. Negligent retention or supervision

[7] Finally, plaintiffs contend that "the trial court should have denied [defendants'] motion to dismiss the [plaintiff]s' negligent supervision claim" because Baldecchi "committed fraud[,]" "violated the UDTPA[,]" and "defamed the [plaintiffs]. Each of these claims satisfies the negligent supervision's first element."

To bring a claim for negligent retention or supervision, a plaintiff must prove

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in "oversight and supervision," . . . ; and (4) that the injury complained of resulted from the incompetency proved.

Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (citation and emphasis omitted). "[I]ncompetency, is not confined to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow-servant . . . ." *Walters v. Durham Lumber Co.*, 163 N.C. 536, 542, 80 S.E. 49, 52 (1913) (citation and internal quotation marks omitted).

As discussed at length in the analysis above, plaintiffs' contentions that Baldecchi "violated the UDTPA[,]" that he "defamed [plaintiffs][,]" and that "he committed fraud" are incorrect. Baldecchi did not commit fraud, violate the UDTPA, or defame plaintiffs and, therefore, plaintiffs have failed to establish the "specific negligent act on which the action is founded." *Medlin*, 327 N.C. at 591, 398 S.E.2d at 462 (citation omitted).

Moreover, plaintiffs argue that "their complaint alleges incompetency" because "Baldecchi expressed animus toward Refocus Latin and its goals and objectives" and in doing so "expressed hostility toward the Refocus Latin parents, including the [plaintiffs]." They contend that this "hostility should be sufficient to support the inference that he was incompetent." However, plaintiffs cite to no authority to support their proposition that "animus" or "hostility" necessarily entails incompetency.

Our courts have recognized incompetency where employment or retention of employment is *dangerous* to others, by previous specific acts of careless or negligent conduct, or by inherent unfitness; *Walters*, 163 N.C. at 541–42, 80 S.E. at 51–52, allegations of "animus" or "hostility" alone are insufficient to prove negligence by the employee, inherent unfitness, or that retention of the employee is dangerous to others.

Consequently, plaintiffs have failed to allege the necessary elements to bring a claim for negligent retention or supervision, that Baldecchi committed a "negligent act on which the action is founded[,]" or "incompetency" on his behalf. *Medlin*, 327 N.C. at 591, 398 S.E.2d at 462 (citation omitted). For this reason, the trial court did not err in dismissing plaintiffs' negligent retention or supervision claim.

III. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in dismissing plaintiffs' claims for breach of contract, fraud, negligent misrepresentation, unfair and deceptive trade practices, negligent infliction of emotional distress, defamation, or negligent retention or supervision pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The order of the trial court is affirmed.

AFFIRMED.

Judge ARROWOOD concurs by separate opinion.

Judge FLOOD dissents by separate opinion.

ARROWOOD, Judge, concurring.

I concur with the majority opinion. I agree that plaintiffs failed to sufficiently allege a breach of contract because the plain and unambiguous language in the enrollment contracts, which state that "the School reserves the right to discontinue enrollment if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission[,]" allowed the school to terminate plaintiffs' 2021 enrollment contracts at its discretion. Because I believe that allowing this case, in its current state, to advance further would severely undermine the fundamental right to freely contract in North Carolina, which is a bedrock principle of North Carolina law, I write separately to highlight those concerns.

With respect to contractual agreements, North Carolina "recognizes that, unless contrary to public policy or prohibited by statute, freedom of contract is a fundamental constitutional right." *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 243 (2000). Thus, absent such policies or prohibitive statutes, it is beyond question that parties can contract as they see fit and that courts must enforce those contracts as written to preserve that fundamental right. *See Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228 (1985); *see also Am. Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 350 (1986) ("Freedom of contract . . . is a fundamental right included in our constitutional guarantees." (citations omitted)). In my view, these enrollment contracts between a private school and those who wish to attend that school do not violate any public policy, statutory prohibitions, or protections.

Therefore, this is a case of basic contract interpretation. Plaintiffs entered into two enrollment contracts with the school for the 2021–2022 school year, one for each of plaintiffs' children. Those contracts—in plain and simple language—expressly *reserved the school the right to discontinue enrollment* if it concluded plaintiffs (1) made the working relationship between them and the school impossible or (2) seriously interfered with the school's mission. Thus, as the majority opinion explains, the school's determination of whether either condition occurred was left to the sole discretion of the school—not plaintiffs and not this Court. Accordingly, the trial court was correct in dismissing plaintiffs' claim for breach of contract.

I also echo the majority opinion in that recognizing plaintiffs' claims as legally sound under Rule 12(b)(6) would threaten longstanding precedents regarding the fundamental right of private parties to contract freely. Specifically, I believe such recognition would embolden parents

who disagree with their children's private schools on divisive social issues to file lawsuits that would otherwise be deemed meritless and disposed of via our basic contract principles. For example, parents opposed to the faith-based curriculum of a private Christian school could enroll their child with the intent to challenge the school's religious practices. Assuming the school took steps to defend its faith-based mission by discontinuing their enrollment, as in the present case, the parents could file a complaint that applied plaintiffs' legal theories as the footing for the suit. Consequently, such litigation would undercut fundamental contract freedoms relied upon by our State's approximately ninety (90) private schools—both secular and religious.

The dissent contends that plaintiffs' complaint sufficiently alleged breach of contract in part because the school violated the agreement to "uphold and enforce rules and policies . . . in a fair, appropriate and equitable manner." This contention is perhaps legally sensible under the claim for breach of implied covenant of good faith and fair dealing; however, I note that the trial court denied the defendants' motion on those grounds, but the plaintiffs voluntarily dismissed that claim on 17 October 2022 to pursue this appeal. Thus, under the present posture of this appeal, this theory cannot save plaintiffs from this result.

FLOOD, Judge, dissenting.

The line between the right to terminate a private contract and a contract breach is sometimes mercurial. While the majority would draw that line at the point at which Plaintiffs were accused of certain behaviors in violation of provisions of their private school enrollment contracts, I conclude that the mandates of a Rule 12(b)(6) review are such that we must decline to draw that line prematurely. I respectfully dissent.

When reviewing a Rule 12(b)(6) motion to dismiss, "this Court affirms or reverses the disposition of the trial court—the granting of the Rule 12(b)(6) motion to dismiss—based on [our] review of whether the allegations of the complaint are sufficient to state a claim." *Thomas v. Village of Bald Head Island*, 290 N.C. App. 670, 673, 892 S.E.2d 888, 891 (2023) (citation and internal quotation marks omitted). In conducting such review, the allegations of the complaint are "treated as true" and the facts are viewed in the light most favorable to the plaintiffs. *Rollings v. Shelton*, 286 N.C. App. 693, 696, 882 S.E.2d 70, 72 (2022); *see also Robertson v. City of High Point*, 129 N.C. App. 88, 90, 497 S.E.2d 300, 302, *disc. rev. denied*, 348 N.C. 500, 510 S.E.2d 654 (1998) ("[A] motion

to dismiss for failure to state a claim upon which relief may be granted is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory." (citation and internal quotation marks omitted) (cleaned up)).

"A complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that [the] plaintiff is entitled to no *relief under any state of facts which could be presented in support of the claim*." *Norton v. Scot. Mem'l Hosp., Inc.*, 250 N.C. App. 392, 399, 793 S.E.2d 703, 709 (2016) (citation and internal quotation marks omitted); *see also Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (providing that granting of a Rule 12(b)(6) motion is appropriate only "if it appears certain that [the] plaintiffs could prove no set of facts which would entitle them to relief under some legal theory[,]" or "no law exists to support the claim made . . . ." (citations omitted)). In *Norton*, applying our relevant scope of review to the trial court's dismissal under Rule 12(b)(6) of the plaintiffs' claim for intentional infliction of emotional distress ("IIED"), we reversed the trial court's order, and provided the

> [p]laintiffs' IIED claims may later be determined to be insufficient to go to the jury, but that issue is not before us. Based solely upon the allegations on the face of their complaint, [the p]laintiffs should be provided the opportunity, afforded by the Rules of Civil Procedure, to discover and "to disclose more precisely the basis of both the claim and defense and to define more narrowly the disputed facts and issues." The trial court's dismissal under Rule 12(b)(6) of [the p]laintiff's IIED allegation against [the defendant] was premature, and is reversed.

250 N.C. App. at 400, 793 S.E.2d at 709 (citing *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 443, 364 S.E.2d 380, 384 (1988)).

A plaintiff sufficiently states a claim for breach of contract when he alleges, "(1) the existence of a contract between [the] plaintiff and [the] defendant, (2) the specific provisions breached, (3) the facts constituting the breach, and (4) the amount of damages resulting to [the] plaintiff from such breach." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 108–09, 834 S.E.2d 404, 418 (2019) (citing *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977)).

Here, under the scope of our Rule 12(b)(6) review, it is our duty to determine only whether Plaintiffs' allegations, on the face of their Complaint, are sufficient to state a claim for breach of contract. *See*

Thomas, 892 S.E.2d at 891; *see Norton*, 250 N.C. App. at 400, 793 S.E.2d at 709. Treating the allegations in Plaintiffs' Complaint as true, and viewing the facts in the light most favorable to Plaintiffs, Plaintiffs made such allegations that they sufficiently stated a claim for breach of contract. *See Rollings*, 286 N.C. App. at 696, 882 S.E.2d at 72; *see Robertson*, 129 N.C. App. at 90, 497 S.E.2d at 302.

As to the existence of a contract, Plaintiffs' Complaint alleged that the "Enrollment Agreements were valid contracts" between Plaintiffs and Defendants, which "included the Parent-School Partnership." *See Intersal, Inc.*, 373 N.C. at 108–09, 834 S.E.2d at 418. As to the specific provisions breached and the facts constituting the breach, Plaintiffs' Complaint further alleged that Defendants violated the "binding promise to educate the children during the 2021–22 school year" and the agreement to uphold and enforce rules "in a fair, appropriate and equitable manner[,]" because Plaintiffs were punished for exercising their ability to "involve the appropriate administrator . . . when a question/concern arises . . . ." *See id.* at 108–09, 834 S.E.2d at 418. As to the damages incurred resulting from the breach, the Complaint alleged that Plaintiffs incurred compensatory damages, "including but not limited to actual damages equating to the loss of their payment and tuition and fees for the 2021–22 school year[,]" and consequential damages "incurred as a result of being compelled, without prior notice, to change their children's schools a few weeks into the new 2021–22 school year." *See id.* at 108–09, 834 S.E.2d at 418.

Treating these factual allegations as true, Plaintiffs sufficiently stated a claim for breach of contract, because they alleged: (1) the existence of a contract; (2) the particular provisions breached; (3) the facts constituting breach; and (4) the amount of damages resulting from such breach. *See Intersal, Inc.*, 373 N.C. at 108–09, 834 S.E.2d at 418. While Plaintiffs' Complaint did not address the provision of the contract governing the possibility of disenrollment, viewing the alleged facts as true and in a light most favorable to Plaintiffs, the allegations demonstrate specific contractual guarantees that Plaintiffs claim were violated by Defendants, which is all that is required to sufficiently state a claim for breach of contract. *See id.* at 108–09, 834 S.E.2d at 418.

As provided by the majority, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, must be enforced as written." *Ricky Spoon Builders, Inc. v. EmGee LLC*, 286 N.C. App. 684, 691, 882 S.E.2d 110, 115 (2022), *disc. rev. denied*, 385 N.C. 326, 891 S.E.2d 300 (2023) (citation and internal quotation marks

omitted) (cleaned up). Although the majority assesses Plaintiffs' conduct as making impossible a "positive, collaborative working relationship between the School[,]" or alternatively, as "seriously interfer[ing] with the School's mission[,]" such that Defendants were justified in their termination of Plaintiffs' enrollment contracts, I conclude that this determination is premature as it necessarily involves findings of fact. At this stage in the proceeding and under our scope of review of a trial court's Rule 12(b)(6) dismissal of a claim, treating the factual allegations *as true* and viewing them *in the light most favorable to Plaintiffs*, it is this Court's duty *only* to determine whether Plaintiffs presented allegations such that they sufficiently stated a claim for breach of contract. It is not within our appellate purview to determine at this stage in the proceeding whether Defendants were justified in their termination of Plaintiffs' enrollment contracts. *See Thomas*, 892 S.E.2d at 891; *see Rollings*, 286 N.C. App. at 696, 882 S.E.2d at 72; *see Robertson*, 129 N.C. App. at 90, 497 S.E.2d at 302.

As set forth above, I conclude Plaintiffs sufficiently stated a claim for breach of contract, and therefore conclude that the trial court's dismissal under Rule 12(b)(6) of Plaintiffs' breach of contract claim against Defendants was premature. *See Intersal, Inc.*, 373 N.C. at 108–09, 834 S.E.2d at 418; *see Norton*, 250 N.C. App. at 400, 793 S.E.2d at 709. Plaintiffs "should be provided the opportunity, afforded by the Rules of Civil Procedure, to discover and to disclose more precisely the basis of both [the] claim and defense and to define more narrowly the disputed facts and issues[,]" and I would thus reverse and remand the trial court's order as to Plaintiffs' breach of contract claim. *Norton*, 250 N.C. App. at 400, 793 S.E.2d at 709 (citation and internal quotation marks omitted). For these reasons, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2024)

603 GLENWOOD, INC. v. 616 GLENWOOD, LLC No. 22-943	Wake (20CVS5286)	Reversed and Remanded
BAXTER v. N.C. STATE HIGHWAY PATROL TROOP F DIST. V No. 23-605	N.C. Industrial Commission (TA-29211)	Affirmed
EDENS v. CITY OF HAMLET No. 23-773	Richmond (22CVS56)	Affirmed
GUARASCIO v. GUARASCIO No. 23-616	Pasquotank (22SP105)	Affirmed
HUNTER v. HUNTER No. 23-937	Madison (23CVD186)	Affirmed
IN RE A.J.C.R. No. 23-973	Mecklenburg (19JT313) (19JT314)	Affirmed
IN RE B.L. No. 23-861	Robeson (19JT238)	Affirmed
IN RE E.M. No. 23-884	Yancey (22JB51)	Vacated and Remanded
IN RE E.P. No. 23-709	Durham (20J136)	Dismissed
IN RE H.A.M. No. 23-852	Cumberland (21JT244)	Affirmed
IN RE J.F. No. 23-777	Mecklenburg (20JT434-437)	Affirmed
IN RE K.-G.L.S. No. 23-869	Pitt (22JT105)	Affirmed
IN RE K.D. No. 23-805	Durham (19J68)	Affirmed
IN RE K.P. No. 23-701	Cleveland (22JT15)	Reversed and Vacated

IN RE K.R. No. 23-532	Wake (22JA210) (22JA211) (22JA212)	Affirmed
IN RE M.C.L. No. 23-784	Wake (21JT133) (21JT47-48)	Affirmed
IN RE M.G.B. No. 23-877	Alamance (20JT155) (20JT156) (20JT46)	Affirmed
IN RE M.J.W. No. 23-717	Moore (22JT60) (22JT61)	Affirmed
IN RE M.M.D. No. 23-934	Cumberland (20JT390)	Dismissed
IN RE M.R.B. No. 23-825	Chatham (21JT45)	Affirmed
IN RE R.S.W. No. 23-482	Yadkin (20JT49)	Affirmed.
IN RE S.M.V. No. 23-958	Carteret (21JT41)	Affirmed
IN RE Z.A. No. 23-782	Orange (21JT3) (21JT4)	Affirmed
LAWING v. MILLER No. 23-858	Guilford (18CVD1024)	Dismissed in Part; Remanded in Part
RISUENO v. PURDUE PHARMA, INC. No. 23-842	Wilson (22CVS1641)	Reversed
STATE v. CORNWELL No. 23-36	Catawba (18CRS1848-49) (18CRS52417)	VACATED IN PART; APPEAL DISMISSED IN PART
STATE v. DAVIDSON No. 23-258	Cumberland (17CRS50999)	No Plain Error in Part; No Error in Part; Dismissed Without Prejudice in Part

STATE v. HARRELL No. 23-583	Wake (18CRS207555)	No Error
STATE v. JOHNSON No. 23-874	Robeson (20CRS52567-68) (20CRS52572)	Reversed and Remanded
STATE v. SWEAT No. 23-609	Montgomery (22CRS50009-10)	Appeal Dismissed; Certiorari Granted For Limited Purpose of Correcting Clerical Error.
STATE v. THOMPSON No. 23-643	Rutherford (20CRS52371)	No Error in part, No Plain Error in part, and Dismissed in part.
STATE v. WALKER No. 23-963	Dare (21CRS51368)	Dismissed
STATE v. WHITE No. 23-596	Guilford (19CRS67313-14) (19CRS69762) (21CRS28730)	No Error
TAKSA v. CRULL No. 23-753	Lincoln (22CVS327)	Affirmed

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