293 N.C. App.—No. 3 Pages 363-473

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 20, 2024

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1] Died 9 April 2024.

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COURT OF APPEALS

CASES REPORTED

FILED 16 APRIL 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

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CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication of neglect—sufficiency of findings—no findings of impairment or risk of impairment—In a child neglect matter, although a couple of findings of fact challenged by respondent-mother concerned post-petition matters and, thus, were irrelevant for adjudication purposes, the remaining challenged findings were supported by evidence and relevant to the adjudication determination. However, the trial court's order adjudicating the child neglected was vacated because it lacked findings that respondent-mother's substance abuse, mental or emotional impairment,

of animals allowed by the covenants as opposed to livestock or other animals kept for commercial purposes—the trial court erred by denying plaintiffs' motion for directed verdict and judgment notwithstanding the verdict and by entering judgment requiring plaintiffs to pay $31,500 in fines. In interpreting the covenants as a whole and viewing the evidence in the light most favorable to the nonmovants, plaintiffs' chickens, despite being "poultry" (disallowed by the covenants), were kept primarily for plaintiffs' personal enjoyment and not for commercial purposes. Therefore, the case should not have been sent to the jury, and the matter was remanded for entry of judgment notwithstanding the verdict in favor of plaintiffs. **Schroeder v. Oak Grove Farm Homeowners Ass'n, 428.**

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N.C. COURT OF APPEALS
2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

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

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

BOST v. BROWN

[293 N.C. App. 363 (2024)]

TANICA BOST, Executrix of the Estate of Robert E. Bates, Plaintiff
v.
ROGERS BROWN, JR., BRITTANY SAMONNE BROWN, and RANDY L. BROWN, as co-executors and heirs of the Estate of Reverend Doctor Veronica Sutton Bates, and MAX REMODELING SERVICES, INC., Defendants.

ROGERS BROWN, JR., and RANDY L. BROWN, as co-executors, individually and as heirs of the Estate of Reverend Doctor Veronica Sutton Bates &
BRITTANY SAMONNE BROWN, Defendants/Third-Party Plaintiffs
v.
PATRICIA E. KING, Third-Party Defendant

No. COA23-855

Filed 16 April 2024

Deeds—conveyance between spouses—inconsistent clauses—rules of construction—tenancy by the entirety created

Where a deed purporting to convey a property from a husband (identified in the deed as the sole grantor) to his wife (identified as the sole grantee) contained inconsistent terms regarding whether the conveyance was in fee simple or created a tenancy by the entirety, although extrinsic evidence consisting of the deed drafter's affidavit was not admissible to assist with the interpretation of the couple's intent, the appellate court used rules of construction to determine that the language of the deed—including three instances of the phrase "tenancy by the entirety" and reference to the couple's marital status—evinced the couple's intent to create a tenancy by the entirety. The property thus passed automatically to the husband upon his wife's death and not to her sons (defendants) who inherited by will, and when the husband died intestate just over a month later, his two heirs (in their individual capacities) automatically took the property by operation of law. Since title never vested in the husband's estate (plaintiff), in plaintiff's action to declare defendants' sale of the property to a third party void, the trial court properly granted summary judgment in favor of defendants and properly denied plaintiff estate's motion for summary judgment.

Appeal by plaintiff from order entered 26 May 2023 by Judge Donald R. Cureton, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 February 2024.

Fitzgerald Hanna & Sullivan, PLLC, by Stuart Punger, Jr. and Andrew L. Fitzgerald, for plaintiff-appellant.

Devore, Acton & Stafford, P.A., by Derek P. Adler and Shelby Lynn Gilmer, for defendants-appellees.

FLOOD, Judge.

Tanica Bost, in her capacity as the Administratrix[1] of the Estate of Robert E. Bates ("Plaintiff Estate"), appeals from the trial court's order granting summary judgment for Rogers Brown, Jr. ("Defendant Rogers"), Brittany Samonne Brown, and Randy L. Brown ("Defendant Randy") (collectively, "Defendants"), and denying summary judgment for Plaintiff Estate. Plaintiff Estate argues on appeal that the trial court erred in issuing its order because, first, at a minimum, an issue of fact exists as to the effect of the Deed, and second, Plaintiff Estate may recover the proceeds of the sale of the Property under any one of the following theories of relief: conversion, reformation, and declaratory relief. After review, we conclude as a matter of law that the Deed created a tenancy by the entirety. We affirm the trial court's summary judgment order, however, as the Property passed by intestacy to Plaintiffs Tanica Bost ("Tanica") and Robert E. Bates, Jr. ("Robert, Jr.") in their *individual* capacities, neither of whom has appealed, and Plaintiff Estate has no claim of interest in the Property.

I. Facts and Procedural Background

Robert E. Bates, Sr. ("Mr. Bates") and his former wife, Deborah Parsons Bates ("Deborah"), during their marriage obtained the property located at 4207 Briarhill Drive, Charlotte, North Carolina 28215 (the "Property"). Mr. Bates acquired the Property in full as part of his divorce settlement with Deborah in 1994. On 25 October 1997, Mr. Bates married Rev. Dr. Veronica Sutton Bates ("Dr. Bates").

On 3 August 2018, Mr. Bates conveyed the Property to Dr. Bates by executing a North Carolina General Warranty Deed recorded on 6 August 2018 in the Mecklenburg County Public Registry (the "Deed"). The Deed identifies Mr. Bates as the sole Grantor and Dr. Bates as the sole Grantee, and provides, in pertinent part:

> THIS DEED, made the 3rd day of 2018, by and between Robert E. Bates (Grantors) [sic], and Veronica Sutton Bates (Grantee).

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1. Although Tanica Bost has named herself "Executrix" of the Estate of Robert E. Bates, as the Estate is one of intestacy, for the sake of titular propriety we refer to her as "Administratrix."

> This designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns . . . .
>
> **WITNESSETH**, that the Grantor, for a valuable consideration by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell, and convey unto the Grantee as a tenancy in entirety, the [Property] . . . .
>
> . . . .
>
> **TO HAVE AND TO HOLD** the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantees as tenants by the entirety.
>
> And the Grantor convent [sic] with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey and joins his wife with a tenancy in entirety, title is marketable and fee [sic] and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomever except for the exceptions hereinafter stated. . . .
>
> . . . .
>
> IN WITNESS WHEREOF, the Grantor has duly execute [sic] the foregoing as of the day and year first above written.

On 19 August 2021, Dr. Bates died testate, at which point Dr. Bates' Will (the "Will") was offered for probate in Mecklenburg County. Article II of the Will nominated Dr. Bates' sons, Defendant Rogers and Defendant Randy—neither of whom are biological sons of Mr. Bates—as co-executors of her estate. Article III of the Will provides, in pertinent part: "I will all my Real Property (4207 Briarhill Drive Charlotte, NC 28215) . . . to my above stated sons to share and share alike."

On 5 October 2021, Mr. Bates died intestate, at which point Letters of Administration were issued to Tanica in Mecklenburg County, empowering her to administer Mr. Bates' Estate. At his death, Mr. Bates had not remarried and was survived by two lineal descendants: Tanica and Robert, Jr. Neither Tanica nor Robert, Jr. are biological children of Dr. Bates.

On 20 December 2021, Defendants, as Grantors, conveyed the Property to Max Remodeling Services, Inc. ("Max Remodeling"), as

Grantee, by executing and delivering a North Carolina General Warranty Deed recorded on 20 December 2021 in the Mecklenburg County Public Registry.

On 18 April 2022, Plaintiff Estate, Tanica—in both her administratrix and individual capacities—and Robert Jr. (collectively, "Plaintiffs") filed a First Amended Verified Complaint (the "Complaint") against Defendants and Max Remodeling, seeking a declaration as to the title of the Property, and a declaration that the sale be voided as to Max Remodeling. The "First Cause of Action" of the Complaint was for declaratory relief, and item 24 under the First Cause of Action provides:

> Plaintiffs give notice that it [sic] is filing a lis pendens at the same time as this cause of action and is making known that a claim is being made against [Defendants] to declare any title to the Property or any subsequent sale of the Property be subject to a full and complete lien an[d] encumbrance by Plaintiffs and in favor of the Plaintiffs for the full amount and value of the Property.

On 23 May 2022, Defendants, as co-executors of Dr. Bates' estate, filed a motion to dismiss the Complaint, and around that time, Max Remodeling also filed a motion to dismiss. On 15 September 2022, the trial court denied both motions to dismiss.

Thereafter, Defendants filed a summons and third-party complaint against the drafter of the Deed, Patricia King ("Ms. King"). Plaintiffs later settled with Max Remodeling, and on 30 March 2023, a Notice of Voluntary Dismissal was entered as to Max Remodeling. As part of the settlement, Max Remodeling agreed to pay Plaintiffs the "Purchase Price" of the Property, and Plaintiffs conveyed by quitclaim deed to Max Remodeling "any and all interest they have or claim to have in the Property[.]"

On 25 January 2023, "Plaintiff"[2] filed a Motion for Summary Judgment against Defendants, in support of which Plaintiff relied on the

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2. The original complaint and its caption identified Plaintiff Estate as the sole plaintiff. The Amended Complaint and its caption, however, list three plaintiffs, being Plaintiff Estate *and* Tanica and Robert, Jr. in their individual capacities. Plaintiff Estate's motion for summary judgment and Defendants' cross motion for summary judgment refer to "Plaintiff" in the singular and use the caption from the original complaint showing only one plaintiff—namely, Plaintiff Estate. Even if the motions were intended to be only with respect to Plaintiff Estate's claims (and not the claims of Tanica and Robert, Jr.), we construe the trial court's order to be dispositive of the claims of all three Plaintiffs. Indeed, at the hearing, Plaintiffs' counsel represented to the trial court that they were appearing

Amended Complaint, as well as an affidavit of Ms. King. Plaintiff in the motion contended that the two items, particularly the affidavit of Ms. King, leave no issues of material fact regarding the intentions of Mr. and Dr. Bates in the Deed and demonstrate Mr. and Dr. Bates intended to create a tenancy by the entirety.

On 14 February 2023, Defendants filed their own Motion for Summary Judgment against "Plaintiff." On 14 February 2023, Defendants filed a Motion for Entry of Default as to Ms. King, and on 16 February 2023, that default was entered. On 23 April 2023, Ms. King moved to set aside the default against her.

On 26 April 2023, the competing motions for summary judgment came on for hearing, and on 26 May 2023, the trial court entered an order (the "Order") denying "Plaintiffs' " motion for summary judgment, granting Defendants' motion for summary judgment, and thereby dismissing the Amended Complaint in its entirety. On 14 June 2023, the trial court set aside the entry of default against Ms. King, and Defendants' case against her remains pending. On 16 June 2023, Plaintiff Estate filed a notice of appeal from the trial court's Order. Tanica and Robert, Jr. have not noticed an appeal from the order in their individual capacities.

II. Jurisdiction

Plaintiff Estate asserts that, as Defendants' complaint against Ms. King remains pending, its appeal is interlocutory, and that this Court should consider the merits of its appeal as the trial court's Order affects a substantial right. We need not address the interlocutory nature of this appeal nor the implication of a substantial right, however, as, in our discretion, to the extent we lack appellate jurisdiction we grant *certiorari* "in aid of [our] own jurisdiction" to consider the merits raised in this appeal. N.C. Gen. Stat. § 7A-32(c) (2023).

III. Standard of Review

This Court reviews an appeal from a trial court's denial or granting of a motion for summary judgment *de novo*. *See In re Will of Jones*, 362

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on behalf of all three Plaintiffs. During arguments, counsel for Defendants expressly requested that the Amended Complaint be dismissed in its entirety. Further, in the trial court's Order that is the subject of this appeal, the trial court denies "Plaintiffs' " (in the plural) motion and grants Defendants' motion. Most importantly, in that order, the trial court in granting Defendants' motion dismisses the Amended Complaint in its entirety, rather than dismissing only Plaintiff Estate's claims. At no time did Plaintiffs' counsel object or otherwise appeal the order as it relates to the claims of Tanica and Robert, Jr. in their individual capacities.

N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch 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." *Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc.*, 233 N.C. App. 652, 654, 758 S.E.2d 27, 30 (2014) (citation and internal quotation marks omitted). Where an appeal is bereft of disputed issues of material fact, "[o]ur only inquiry is whether [a party is] entitled to judgment as a matter of law." *McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572 (1990) (citation omitted).

IV. Analysis

Plaintiff Estate argues on appeal that the Order was in error where, at a minimum, an issue of fact exists as to the effect of the Deed. Plaintiff Estate further contends it may recover the proceeds of the sale of the Property under any one of the following theories of relief: declaratory relief, conversion, or reformation. We address Plaintiff Estate's first argument and, as explained in further detail below, do not reach its argument on theories of relief.

Plaintiff Estate argues that because the Deed contains contradictory provisions as to its nature and is therefore ambiguous, it was the job of the trial court to give effect to the parties' intention, relying on all words in the Deed and, if necessary, extrinsic evidence. Plaintiff Estate specifically contends that Ms. King's affidavit makes clear that Mr. and Dr. Bates intended to create a tenancy by the entirety, and that summary judgment for Defendants and against Plaintiff Estate was therefore improper. After review we conclude that, although Ms. King's affidavit was inadmissible to determine Mr. and Dr. Bates' intent, the provisions of the Deed allow us to ascertain the parties' intent and the effect of the instrument as a matter of law—namely, the creation of a tenancy by the entirety.

Under North Carolina law, "[i]n construing a conveyance executed after [1 January 1968], in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument." N.C. Gen. Stat. § 39-1.1(a) (2023); *see also Robertson v. Hunsinger*, 132 N.C. App. 495, 499, 512 S.E.2d 480, 483 (1999) ("The intention of the parties is to be given effect whenever that can be done consistently with rational construction." (citation omitted)). Regarding the trial court's role of interpreting the meaning of deeds under N.C. Gen. Stat. § 39-1.1(a), this Court has provided, "ambiguous deeds traditionally have been construed by the courts according to rules of construction, rather

than by having juries determine factual questions of intent. The meaning of the terms of the deed is a question of law, not of fact." *Mason-Reel v. Simpson*, 100 N.C. App. 651, 653–54, 397 S.E.2d 755, 756 (1990) (citations and internal quotation marks omitted) (cleaned up); *see also Robinson v. King*, 68 N.C. App. 86, 89, 314 S.E.2d 768, 771 (1984) ("Ambiguous deeds traditionally have been construed by the court according to rules of construction, rather than by having juries determine factual questions of intent."). Although under N.C. Gen. Stat. § 39-1.1(a) "[i]t is the trial judge's role to determine the intent of the parties[,]" *Robertson*, 132 N.C. App. at 499, 512 S.E.2d at 483 (citation omitted), in a case concerning a deed of conveyance where we reviewed *de novo* the trial court's denial of summary judgment, this Court employed the rules of construction to determine the effect of the deed. *See Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 634–39, 684 S.E.2d 709, 720–23 (2009) (employing the general rules of deed construction to interpret the effect of a deed, and upon our legal construction of the deed, finding summary judgment was improper for the plaintiffs and should have been granted in favor of the defendants).

One effect of a deed of a conveyance is the creation of a tenancy by the entirety, where,

> the entire estate is vested in both the husband and wife simultaneously. Each spouse is deemed to be seized of the whole. The husband and wife are two natural persons, but they are treated by the law as one person. Upon the death of either spouse, the survivor automatically takes the entire estate.

In re Foreclosure of Deed of Trust Rec. in Book 911, at Page 512, Catawba Cnty. Registry, 50 N.C. App. 69, 72–73, 272 S.E.2d 893, 895 (1980). N.C. Gen. Stat. § 41-56 provides the contractual language by which a tenancy by the entirety may be created:

> (a) Unless a contrary intention is expressed in the conveyance, a conveyance of real property, or any interest in real property, to spouses vests title in them as tenants by the entirety when the conveyance is to one of the following:
>
> (1) A named man "and wife."
>
> (2) A named woman "and husband."
>
> (3) A named individual "and wife."
>
> (4) A named individual "and husband."

> (5) A named individual "and spouse."
>
> (6) Two named individuals, married to each other at the time of the conveyance, whether or not identified in the conveyance as being (i) husband and wife, (ii) spouses, or (iii) married to each other.
>
> (b) A conveyance by a grantor of real property, or any interest in real property, to the grantor and his or her spouse vests the property in them as tenants by the entirety, unless a contrary intention is expressed in the conveyance.

N.C. Gen. Stat. § 41-56(a)–(b) (2023).

Here, as set forth above, the Deed plainly defines Mr. Bates as the sole Grantor and Dr. Bates as the sole Grantee. This would indicate a conveyance of the Property in fee simple absolute. *See* N.C. Gen. Stat. § 39-13.3(a) (2023) ("A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee."). The Deed also provides, however, in pertinent part:

> Grantor, for a valuable consideration by the Grantee, . . . has and by these presents does grant, bargain, sell, and convey unto the Grantee as a tenancy in the entirety, [the Property,] . . . . [t]o have and to hold the aforesaid lot or parcel of land and appurtenances thereunto belonging to the Grantees as tenants by the entirety[.]

Further, the Deed states that "the Grantor covenant[s] with the Grantee, that Grantor is seized of the premises in fee simple, [and] has the right to convey and joins with his wife with a tenancy in entirety[.]" This language would suggest the creation of a tenancy by the entirety, and the Deed therefore contains inconsistent language as to its effect. *See In re Foreclosure of Deed of Trust*, 50 N.C. App. at 72–73, 272 S.E.2d at 895; *see also* N.C. Gen. Stat. § 41-56(a)–(b).

On appeal, Plaintiff Estate concedes that the Deed contains inconsistent clauses, but argues that this Court should consider extrinsic evidence to resolve the effect of the Deed—specifically, the affidavit of Ms. King where she provided that Mr. and Dr. Bates intended the Deed create a tenancy by the entirety, and that she included the relevant language at Mr. and Dr. Bates' wishes. Ms. King's affidavit, however, is not admissible to aid in our interpretation of the Deed's legal effect, as our Supreme Court has provided that the drafting attorney's testimony regarding the

intent of the testator is not admissible to "alter or affect the construction" of a will or deed. *Britt v. Upchurch*, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990) (citation and internal quotation marks omitted). Even though this extrinsic evidence is inadmissible to determine the effect of the Deed, as the Deed contains inconsistent clauses, this Court may employ the rules of construction to determine the effect of this instrument. *See Metcalf*, 200 N.C. App. at 634–39, 684 S.E.2d at 720–23.

Here, the Deed was executed and recorded by 6 August 2018—well after the statutory date of 1 January 1968—and we therefore determine the effect of the Deed "on the basis of the intent of the parties as it appears from all of the provisions of the instrument." N.C. Gen. Stat. § 39-1.1(a). As aforesaid, the Deed identifies Mr. Bates as the sole Grantor and Dr. Bates as the sole Grantee, which is inconsistent with a deed that creates a tenancy by the entirety. *See* N.C. Gen. Stat. § 39-13.3(a). In our review of all the provisions of the Deed, however, employing rules of deed construction under N.C. Gen. Stat. § 39-1.1(a), it appears that Mr. and Dr. Bates, in their execution of the Deed, intended to create a tenancy by the entirety. The Deed sets forth three times—in a space encompassing barely more than one page of text—that the Property is to be conveyed to Dr. Bates as a "tenancy in entirety[.]" The Deed further sets forth Mr. and Dr. Bates' marital status in accordance with N.C. Gen. Stat. § 41-56(a)–(b), by providing that Mr. Bates "has the right to convey *and joins his wife* with a tenancy in entirety[.]" (Emphasis added). These provisions of the Deed evince Mr. and Dr. Bates' intent to create a tenancy by the entirety, and we conclude as a matter of law that the Deed created a tenancy by the entirety. *See* N.C. Gen. Stat. § 39-1.1(a); *see Mason-Reel*, 100 N.C. App. at 653–54, 397 S.E.2d at 756; *see Metcalf*, 200 N.C. App. at 634–39, 684 S.E.2d at 720–23; *see Robertson*, 132 N.C. App. at 499, 512 S.E.2d at 483.

The trial court granted summary judgment for Defendants, presumably based on the conclusion that the Deed conveyed all of Mr. Bates' interest in the Property to Dr. Bates, and that upon her death Defendants became the owners of the Property. As the Deed created a tenancy by the entirety, however, when Dr. Bates died, Mr. Bates automatically took the entire Property. *See In re Foreclosure of Deed of Trust*, 50 N.C. App. at 72–73, 272 S.E.2d at 895. Following Dr. Bates' death, Mr. Bates died intestate, meaning Mr. Bates' biological children—Tanica and Robert, Jr.—automatically took the Property by operation of law. *See* N.C. Gen. Stat. §§ 28A-15-2(b), 29-16 (2023). As such, presuming the trial court's Order was dictated by a conclusion that Defendants were owners of the Property by operation of the Deed, such conclusion was in error. *See Integon Nat'l Ins. Co.*, 233 N.C. App. at 654, 758 S.E.2d at 30.

Notwithstanding any error on part of the trial court, we conclude the trial court did not err by granting summary judgment against Plaintiff Estate as to its claims against Defendants. As set forth above, upon Mr. Bates' death, title to the Property vested in Tanica and Robert, Jr. in their *individual* capacities as Mr. Bates' heirs. *See In re Estate of Harper*, 269 N.C. App. 213, 218, 837 S.E.2d 602, 605 (2020) ("It is well settled that "[t]he title to [non-survivorship] real property of a decedent is vested in the decedent's *heirs* as of the time of the decedent's death[.]" (quoting N.C. Gen. Stat. § 28A-15-2(b))). Neither Tanica, in her individual capacity, nor Robert, Jr. is a party to this appeal, however, as only Plaintiff Estate appealed from the trial court's Order. Title to the Property never vested in Plaintiff Estate, and as such, Plaintiff Estate has no inherent claim of interest in the Property. *See id.* at 218, 837 S.E.2d at 605. We therefore affirm the trial court's Order denying Plaintiff Estate's motion for summary judgment and granting Defendants' motion for summary judgment.

V. Conclusion

This appeal contains no genuine issue of material fact, and we conclude that, while the Deed created a tenancy by the entirety, and Tanica and Robert, Jr. took the Property as intestate heirs of Mr. Bates, Plaintiff Estate has no interest in the Property. As such, we affirm the trial court's Order denying Plaintiff Estate's motion for summary judgment and granting Defendants' motion for summary judgment as to the claims for relief sought by Plaintiff Estate. We need not express any opinion as to the portion of the summary judgment relating to the claims of Tanica and Robert, Jr. in their individual capacities, as neither appealed.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

HERNANDEZ v. HAJOCA CORP.

[293 N.C. App. 373 (2024)]

ADAN RENDON HERNANDEZ, Plaintiff
v.
HAJOCA CORPORATION, et al., Defendants, and HAJOCA CORPORATION and ANDREW WEYMOUTH, Third-Party Plaintiffs
v.
ROBERT CRAWFORD, Individually, and ROBERT CRAWFORD d/b/a ROBERT CRAWFORD MASONRY, Third-Party Defendants

No. COA23-1001

Filed 16 April 2024

1. Appeal and Error—interlocutory order—substantial right—denial of motion to dismiss—Workers' Compensation Act—exclusive jurisdiction provision

The trial court's order denying a motion to dismiss a third-party complaint in a common law negligence action was immediately appealable as affecting a substantial right, where the third-party defendants asserted that the trial court lacked subject matter jurisdiction over the claims made against them because those claims fell under the N.C. Industrial Commission's exclusive jurisdiction pursuant to the Workers' Compensation Act.

2. Workers' Compensation—Industrial Commission—exclusive jurisdiction—exceptions—inapplicable—civil negligence suit—third-party complaint against plaintiff's employer

In a common law negligence action filed against a corporation and other involved parties (defendants), where a crewmember (plaintiff) employed by a masonry business sustained serious injuries while working on a damaged retaining wall that the corporation had hired the masonry business to repair, the trial court erred in denying a motion filed by the masonry business and its owner (third-party defendants) seeking to dismiss defendants' third-party complaint against them for indemnity and contribution. The trial court lacked subject matter jurisdiction over the claims against third-party defendants, which fell under the N.C. Industrial Commission's exclusive jurisdiction pursuant to the Workers' Compensation Act and did not meet either of the recognized exceptions to the Act's exclusivity provision. Further, because plaintiff could not have brought a civil suit against third-party defendants under the Act, defendants could not bring them in as third-party defendants under Civil Procedure Rule 14.

Appeal by third-party defendants from order entered 5 June 2023 by Judge Steve Warren in Henderson County Superior Court. Heard in the Court of Appeals 20 March 2024.

Martineau King PLLC, by Elizabeth A. Martineau, and Geoffrey A. Marcus, for the appellee.

McAngus, Goudelock & Courie, PLLC, by Jeffrey Kuykendall, for the appellant.

TYSON, Judge.

Robert Crawford, Individually and Robert Crawford d/b/a Robert Crawford Masonry (collectively "Third-Party Defendants") appeal from order entered denying their motion to dismiss. We reverse and remand with instructions to dismiss the third-party complaint.

I. Background

W.D. Building Rentals, LLC owns property located at 1027 Spartanburg Highway in Hendersonville. W.D. Building Rentals leased this property to Hajoca Corporation. The adjoining property, 1005 Spartanburg Highway, is owned by Tina Ward Foster. The property located at 1005 is situated at a higher elevation than 1027, with 1005 being at street level and 1027 being located below the street level grade.

A concrete and cinderblock retaining wall delineated the property line of these properties. The retaining wall is approximately nine feet eight inches high and one hundred and fifty feet long.

The effects of a strong storm knocked down a portion of the retaining wall in the fall of 2020. During and after rainfall, mud and dirt would erode down the slope into the parking lot of 1027. This debris disrupted Hajoca's business operations.

W.D. Building Rentals and Foster were jointly responsible for maintaining and repairing the retaining wall, but they could not agree upon the steps necessary to repair the wall's damaged portions. Mud and dirt continued to erode onto the 1027 property when it rained.

Foster conveyed her ownership interest in the property containing the retaining wall to W.D. Building Rentals at no cost. This deed was executed on 17 December 2020 and filed in the Henderson County Registry in Book 3620, Pages 397-399. Hajoca was responsible for all maintenance of and repairs to the retaining wall under its lease.

Robert Crawford Masonry was hired by Hajoca to complete the wall's masonry repairs. Pinnacle Grading Company, Inc. was hired by Hajoca to complete the grading. Robert Crawford Masonry was

instructed to: (1) rebuild only the damaged portions of the wall; (2) not remove or repair any undamaged portions of the wall; (3) use the still-existing footings; and, (4) build the new section on top of and tied into the existing footing.

Robert Crawford Masonry began masonry work on 23 December 2020 using prefabricated cinderblocks and steel rebar and completed masonry work on 30 December 2020. A concrete subcontractor "cored the wall" by pouring concrete and filling the voids in the retaining wall's newly-installed cinderblocks later that day.

On 4 January 2021, Pinnacle Grading backfilled the retaining wall with 210 tons of dirt. No further work was performed on the site from 5 January 2021 through 12 January 2021. A labor crew, including Magno Alberto Valedez Sanchez, Adan Rendon Hernandez ("Plaintiff"), Marcelino Godofredo Rendon Hernandez, and owner Robert Crawford, arrived on-site 13 January 2021 to complete minor finishing work on the parking lot near the retaining wall.

While on-site, the entire section of newly-installed retaining wall snapped from the old footing and collapsed in one piece onto crew-members of Robert Crawford Masonry. The collapsing wall fell onto and killed Marcelino Godofredo Rendon Hernandez. The collapse also caused serious injuries to Plaintiff and Magno Alberto Valdez Sanchez.

Plaintiff filed a complaint against Hajoca; its manager, Andrew Weymouth, W.D. Building Rentals; and Pinnacle Grading Company, Inc. on 5 October 2022. Pinnacle Grading answered on 12 December 2022 and asserted the affirmative defense of employer negligence. W.D. Building Rentals answered on 14 December 2022 and also asserted the affirmative defense of employer negligence. Hajoca and Weymouth filed an answer and asserted a third-party complaint for equitable indemnity and contribution against Third-Party Defendants.

Third-Party Defendants filed a motion to dismiss the third-party complaint pursuant to North Carolina Rules of Civil Procedure Rules 12(b)(1) and 12(b)(6), arguing the North Carolina Industrial Commission possesses exclusive jurisdiction and failure to state a claim. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) (2023). The trial court denied the motions by order entered 5 June 2023. Third-Party Defendants appealed.

II. Jurisdiction

[1] An "appeal lies of right directly to the Court of Appeals . . . from any final judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2023). "A final judgment is one which disposes of the cause[s of action] as to

all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citation omitted).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "This general prohibition against immediate appeal exists because there is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007) (citations and internal quotation marks omitted).

Our Supreme Court has held two circumstances exist where a party is permitted to appeal an interlocutory order:

> First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (internal citations and quotation marks omitted).

"This Court has appellate jurisdiction because the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 737, 797 S.E.2d 59, 532 (2017) (citing *Blue Mountaire Farms, Inc.*, 247 N.C. App. 489, 495, 786 S.E.2d 393, 398 (2016)). This appeal is properly before us. *Id.*

III. Issues

[2] Third-Party Defendants argue the trial court erred by denying their Rule 12(b)(1) and (6) motions to dismiss.

IV. Standard of Review

"Whether a trial court has subject matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

V. Analysis

Third-Party Defendants argue the trial court lacks subject matter jurisdiction and assert the Workers' Compensation Act vests exclusive jurisdiction over the claims against them in the Industrial Commission. *See* N.C. Gen. Stat. § 97-1 (2023) (the "Act").

The Act provides:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9 (2023).

The Act further provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representatives as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2023).

The Act represents a legislative policy and statutory compromise between employers and employees, as a "sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). "In return the Act limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damages awards in civil actions." *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citation omitted).

Subject to two exceptions recognized by our Supreme Court, the exclusivity provision of the Act precludes common law negligence actions from being asserted against employers and co-employees, whose negligence caused the injury. *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985).

First, an employee may pursue a civil action against their employer when the employer "intentionally engages in misconduct knowing it is substantially certain to cause injury or death to employees and an employee is injured or killed by that misconduct[.]" *Woodson v. Rowland*, 329 N.C. at 340, 407 S.E.2d at 228 (explaining an employee can bring a suit at common law for employer forcing employee to work in a trench not properly sloped nor reinforced with a trench box, which caved in and killed the employee).

Second, an employee may pursue a civil action against a *co-employee* for their willful, wanton, and reckless negligence. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250 (allegations of "willful, wanton and reckless negligence" against a co-employee allows a suit at common law).

Rule 14 of the North Carolina Rules of Civil Procedure governs impleading and "permits a defendant in the State courts to sue a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329, 293 S.E.2d 182, 185 (1982); *see* N.C. Gen. Stat. § 1A-1, Rule 14 (2023). "At the heart of Rule 14 is the notion that the third-party complaint must be derivative of the original claim." *Ascot Corp., LLC v. I&R Waterproofing, Inc.*, 286 N.C. App. 470, 483, 881 S.E.2d 353, 364 (2022); *see* N.C. Gen. Stat. § 1A-1, Rule 14.

"If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant." *Jones v. Collins*, 58 N.C. App. 753, 756, 294 S.E.2d 384, 385 (1982). "The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against defendant by the original plaintiff." 6 Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1446 (3d ed. 2010); *see* N.C. Gen. Stat. § 1A-1, Rule 14 (2023).

Third-Party Defendants can only be hailed into superior court as third-party defendants, by Hajoca and Weymouth, if Plaintiff can maintain a civil suit against them. However, Plaintiff cannot meet either exception created in *Woodson* or *Pleasant* to maintain a suit. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228 (employee can bring a suit at common law for employer forcing an employee to work in a trench not properly

sloped nor reinforced with a trench box, which caved in and killed the employee); *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247 (no allegations of "willful, wanton and reckless negligence" against a co-employee trigger the *Pleasant* exception).

The allegations of omission by not securing the rebar deeply enough, not hiring a civil engineer to review the project, and not getting a building permit, taken as true, do not establish Third-Party Defendants had intentionally engaged in misconduct knowing that such conduct was substantially certain to, and, in fact, caused Plaintiff's injuries.

Hajoca and Weymouth's allegations are not sufficient to state a legally cognizable claim under either *Woodson* or *Pleasant*. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228; *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247. The trial court erred in denying Third-Party Defendants' motion to dismiss.

VI. Conclusion

Third-Party Defendants' liability to Plaintiff is properly before the Industrial Commission, as the allegations, taken as true, do not trigger either of the limited exceptions to the exclusivity provisions of the Act. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228; *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247.

The order is reversed, and the cause is remanded for order of dismissal of Third-Party Plaintiffs' complaint. *It is so ordered*.

REVERSED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

IN THE MATTER OF L.C.

No. COA23-759

Filed 16 April 2024

1. Jurisdiction—adjudication of child neglect—standing—caretaker—no statutory basis to appeal

In an appeal by a mother and her live-in female partner ("caretaker") challenging the trial court's order adjudicating a minor child neglected, the appellate court dismissed the caretaker's appeal for lack of standing because she was not a proper party for appeal pursuant to N.C.G.S. § 7B-1002. The caretaker did not meet the statutory definition of "parent" or "mother," and, although she was listed on the child's birth certificate as the child's "father," she was not a male for whom that term could apply; thus, the birth certificate listing did not create a rebuttable presumption of paternity.

2. Child Abuse, Dependency, and Neglect—adjudication of neglect—sufficiency of findings—no findings of impairment or risk of impairment

In a child neglect matter, although a couple of findings of fact challenged by respondent-mother concerned post-petition matters and, thus, were irrelevant for adjudication purposes, the remaining challenged findings were supported by evidence and relevant to the adjudication determination. However, the trial court's order adjudicating the child neglected was vacated because it lacked findings that respondent-mother's substance abuse, mental or emotional impairment, violation of a safety plan, or threatening behavior caused harm to the child or put her at a substantial risk of impairment. Where there was evidence in the record from which the court could make such findings, the matter was remanded for additional findings and entry of new orders.

Appeal by respondents from Order entered 5 January 2023 by Judge Donna F. Forga and Order entered 18 April 2023 by Judge Tessa Sellers in Swain County District Court. Heard in the Court of Appeals 21 March 2024.

Kristy L. Parton for petitioner-appellee Swain County Department of Social Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Sam J. Ervin, IV, for the guardian ad litem.

Jeffrey William Gillette for respondent-appellant caretaker.

Parent Defender Wendy C. Sotolongo and Deputy Parent Defender Annick Lenoir-Peek for respondent-appellant mother.

FLOOD, Judge.

Respondent-Mother and Respondent-Caretaker appeal from the trial court's 5 January 2023 Order adjudicating L.C. ("Layla")[1] a neglected juvenile. Upon review, we dismiss Respondent-Caretaker's appeal. As to Respondent-Mother's appeal, we vacate the trial court's Adjudication and Disposition Orders and remand to the trial court for entry of new orders.

I. Factual and Procedural Background

On 16 November 2021, Swain County Department of Social Services ("DSS") obtained nonsecure custody of Layla upon filing a petition alleging she was a neglected and dependent juvenile. The petition documented a history of substance abuse concerns, alleging there had been three prior Child Protective Services ("CPS") assessments based on reports of substance abuse. First, the petition alleged DSS received a CPS report in August 2019 after Respondent-Mother and Layla both tested positive for illegal substances, including methamphetamine and THC, at the time of Layla's birth. The petition alleged DSS's assessment resulted in a determination of "Services Not Recommended" since Respondent-Mother and her live-in girlfriend, Respondent-Caretaker, refused to submit to drug screens, and Layla was healthy and well cared for in a home where Respondent-Caretaker's mother served as a sober caregiver.

The petition further alleged DSS received additional reports of substance abuse by Respondent-Mother and Respondent-Caretaker in Layla's presence on 19 December 2019, 28 December 2020, and 9 February 2021. The petition provided DSS closed its second assessment based on the December 2019 report with a determination of "Services Not Recommended" because the substance abuse allegations could not be proven. DSS's third assessment focused on reports from December 2020 and February 2021 that Respondent-Mother was "shooting up" in the home, Layla had grabbed a needle, Layla had stepped on Respondent-Mother's "meth pipe," and Layla had "mimicked shooting up drugs by holding a Children's Tylenol syringe to her arm." The petition

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

alleged DSS's third assessment resulted in a decision of "Services Recommended" for substance abuse treatment for Respondent-Mother, but services were declined.

The petition provided DSS most recently received a CPS report on 30 October 2021 after Respondent-Mother gave birth to twins prematurely at thirty-one weeks and tested positive for fentanyl, methamphetamine, amphetamine, benzodiazepines, and THC when she was admitted.[2] DSS reported that it initiated a case with Respondent-Mother and Respondent-Caretaker on 31 October 2021 at the hospital in Buncombe County, North Carolina. The petition alleged Respondent-Mother and Respondent-Caretaker denied use of any illegal substances besides marijuana, and Respondent-Mother was "agitated and irate" at DSS's initiation of the case and refused drug screens for herself and the children. DSS reported Layla was found to be safe in the care of Respondent-Caretaker's mother.

The petition also detailed DSS's follow up visit with Respondent-Mother on 12 November 2021. The social worker reported Respondent-Mother "was clearly impaired on some type of substance[] and was hostile and exhibited bizarre behavior." The social worker further reported that Respondent-Mother refused a request to drug screen Layla as part of DSS's assessment, informing the social worker there was no need to screen Layla because she would test positive for methamphetamine and marijuana due to "spore to spore" contact with Respondent-Mother.

Based on Respondent-Mother's disclosure, DSS provided Respondent-Mother and Respondent-Caretaker a safety plan providing a Temporary Safety Provider ("TSP") for Layla to ensure she had a sober caregiver and was not exposed to substance abuse. The petition alleged Respondent-Mother initially "refused the [TSP] and ejected the [social workers] from her home," but the social worker was then able to speak with Respondent-Caretaker, who agreed to the safety plan and convinced Respondent-Mother to agree to Layla's placement with Respondent-Caretaker's mother as a TSP. Respondent-Mother signed a safety plan on 12 November 2021 that provided for a TSP and prohibited Respondent-Mother's and Respondent-Caretaker's unsupervised contact with Layla.

The petition alleged just days later, on 15 November 2021, that Respondent-Caretaker's mother informed DSS she was unable to continue

2. Respondent-Mother relinquished her rights to Layla's twin siblings, and they are not subjects of this appeal.

as the TSP for Layla, that she had already told Respondent-Mother and Respondent-Caretaker she was unable to continue as the TSP before contacting DSS, and that Respondent-Mother and Respondent-Caretaker had taken Layla from the TSP in violation of the safety plan without indicating where they were going. Social workers searched for Layla and eventually found Respondent-Mother and Respondent-Caretaker downtown in Bryson City, North Carolina, pushing Layla in a stroller. DSS assumed twelve-hour custody of Layla, filed the petition, and obtained nonsecure custody of Layla the following day.

The petition came on for an adjudication hearing on 7 December 2022.[3] On 5 January 2023, the trial court entered an Adjudication Order that adjudicated Layla to be a neglected juvenile. The trial court did not adjudicate Layla dependent. The initial disposition hearing was continued until 8 February 2023, after which the trial court entered a Disposition Order on 18 April 2023 that continued Layla's custody with DSS. Respondent-Mother and Respondent-Caretaker timely appealed from the Adjudication and Disposition Orders.

II. Jurisdiction

"Any initial order of disposition and the adjudication order upon which it is based" may be appealed directly to this Court. N.C. Gen. Stat. § 7B-1001(a)(3) (2023).

III. Analysis

A. Respondent-Caretaker's Standing to Appeal

[1] Although not addressed in briefing, we are compelled to first address the issue of Respondent-Caretaker's standing to appeal the Adjudication and Disposition Orders. *See In re T.B.*, 200 N.C. App. 739, 741–42, 685 S.E.2d 529, 531–32 (2009) ("Although [the r]espondent's brief does not address the issue of standing, we are compelled to address this issue."). "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re M.S.*, 247 N.C. App. 89, 92, 785 S.E.2d 590, 592 (2016) (internal quotation marks, citation, and brackets omitted). Respondent-Caretaker has the burden of establishing

3. The parties indicate the trial court had previously conducted an adjudication and disposition hearing on the petition and had entered orders from which Respondent-Mother had appealed. It was discovered during the preparation of the appeal, however, that the recording equipment had malfunctioned, and the proceedings could not be transcribed. The parties and the trial court agreed to set aside the initial adjudication and disposition.

standing as the appealing party invoking this Court's jurisdiction. *See id.* at 92, 785 S.E.2d at 592.

"The right to appeal in juvenile actions arising under Chapter 7B is governed by N.C. Gen. Stat. § 7B-1001(a)." *In re P.S.*, 242 N.C. App. 430, 432, 775 S.E.2d 370, 371, *cert. denied*, 368 N.C. 431, 778 S.E.2d 277 (2015). Under that section, "[a]ny initial order of disposition and the adjudication order upon which it is based" may be appealed directly to this Court. N.C. Gen. Stat. § 7B-1001(a)(3). But the right to appeal an order under section 7B-1001 is afforded only to the following:

> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under [N.C. Gen. Stat. §] 7B-601 [2023].
>
> (2) A juvenile for whom no guardian ad litem has been appointed under [N.C. Gen. Stat. §] 7B-601 . . . .
>
> (3) A county department of social services.
>
> (4) A *parent*, a guardian appointed under [N.C. Gen. Stat. §] 7B-600 [2023] or Chapter 35A of the General Statutes, or a custodian as defined in [N.C. Gen. Stat. §] 7B-101 [2023] who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

N.C. Gen. Stat. § 7B-1002 (2023) (emphasis added).

As an initial matter, we note Respondent-Caretaker would not have been able to become Layla's parent by adoption in North Carolina unless Respondent-Mother's—and any potential biological father's—parental rights were terminated. In *Boseman v. Jarrell*, the biological mother and her female partner were able to obtain a decree of adoption by the female partner as sharing in parentage with the biological mother based upon an erroneous interpretation of North Carolina's adoption law recognized at that time in Durham County. 364 N.C. 537, 541, 704 S.E.2d 494, 497 (2010). Our Supreme Court held the adoption decree was void *ab initio* because the petitioner was "seeking relief unavailable under our General Statutes[,]" and "the adoption proceeding at issue in this case was not 'commenced under' Chapter 48 of our General Statutes." *Id.* at 546, 704 S.E.2d at 501.

This case presents a similar situation to the extent the trial court simply accepted without question Respondent-Mother's and Respondent-Caretaker's declaration of Respondent-Caretaker's legal

status as "father." Like the Supreme Court in *Boseman* in addressing adoption, as to paternity here,

> we recognize that many policy arguments have been made to this Court that the [claim of paternity] in this case ought to be allowed. However, adoption is a statutory creation. Accordingly, those arguments are appropriately addressed to our General Assembly. Until the legislature changes the provisions of Chapter 48, we must recognize the statutory limitations on the adoption decrees that may be entered. Because the adoption decree is void, [the] plaintiff is not legally recognized as the minor child's parent.

Id. at 548–49, 704 S.E.2d at 502 (citation omitted). Likewise, here, the trial court had no authority to create a new method of establishing paternity or Respondent-Caretaker's status as a parent, without compliance with North Carolina's statutes.

It is clear in this case that Respondent-Caretaker is not the juvenile, a court-appointed guardian ad litem ("GAL"), a county department of social services, a parent, a guardian appointed under any statute, a custodian as defined in section 7B-101, or a party who unsuccessfully sought termination of parental rights. Respondent-Caretaker is a "caretaker" as defined by section 7B-101(3):

> (3) Caretaker.–Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent; foster parent; an adult member of the juvenile's household; an adult entrusted with the juvenile's care; a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a department; any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility; or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

N.C. Gen. Stat. § 7B-101(3) (2023).

Early in this case, the trial court began referring to Respondent-Caretaker as "Respondent/father" and as a "parent" and treating her as Layla's legal father. Although the Petition identified

Respondent-Caretaker as "the female live-in girlfriend of . . . Respondent[-] Mother[,]" it also alleged she was identified as the child's *father* on her birth certificate. The trial court apparently relied upon the report of the birth certificate to treat Respondent-Caretaker as "father."[4] Although Respondent-Caretaker's role in *acting* as a parent to Layla is not in dispute, it is also undisputed that Respondent-Caretaker is a woman, and she is not the father of the child either legally or biologically.

The terms "father" and "parent" are not defined in Chapter 7B. But as this Court recently held in *Green v. Carter*, No. COA22-494, 2024 WL 1171919, at *1 (N.C. Ct. App. 19 Mar. 2024), the term "father" is a gender-specific term, and a man's status as "father" of a child is based either upon his biological participation in the child's creation and birth or upon an adjudication of paternity or parental status based upon specific methods as defined by statute. "[A] 'father' is the male parent of a child, whether as a biological parent, by adoption, by legitimation, or by adjudication of paternity." *Id.* at *1. The terms "father" and "parent" as used in Chapter 7B of the North Carolina General Statutes are indistinguishable from the same terms as used in Chapter 50. Although we recognize that some other states may define parentage differently, there is no indication that the law of any state other than North Carolina may be relevant to Respondent-Caretaker's alleged status as a "father." The Affidavits of Status of Minor Child as required by N.C. Gen. Stat. § 50A-209, and DSS records in evidence here, indicate that Layla was born in Buncombe County. The first report to DSS regarding Layla was upon her birth in August of 2019, when "Swain DSS received a CPS report with allegations that [Respondent-Mother] had no prenatal care and tested positive for Methamphetamine, Amphetamine, and THC at [Layla's] birth." Layla was born in North Carolina and has resided in North Carolina her entire life.

We also recognize that a birth certificate can create a rebuttable presumption of paternity. Respondent-Mother was not married when Layla was born and at the time of the hearing was still unmarried. Layla's birth certificate would be governed by N.C. Gen. Stat. § 130A-101:

> (f) If the mother was unmarried at all times from date of conception through date of birth, the name of the father shall not be entered on the certificate unless the child's mother and father complete an affidavit acknowledging paternity which contains the following:

4. There is no birth certificate for Layla in our Record on appeal, and it was not presented as evidence at the hearings relevant to the orders on appeal.

> (1) *A sworn statement by the mother consenting to the assertion of paternity by the father and declaring that the father is the child's natural father* and that the mother was unmarried at all times from the date of conception through the date of birth;
>
> (2) *A sworn statement by the father declaring that he believes he is the natural father of the child;*
>
> (3) Information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgment of the receipt of this information; and
>
> (4) The social security numbers of both parents.
>
> The State Registrar, in consultation with the Child Support Enforcement Section of the Division of Social Services, shall develop and disseminate a form affidavit for use in compliance with this section, together with an information sheet that contains all the information required to be disclosed by subdivision (3) of this subsection.
>
> Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth certificate, subject to the declaring father's right to rescind under [N.C. Gen. Stat. §] 110-132. The executed affidavit shall be filed with the registrar along with the birth certificate. In the event paternity is properly placed at issue, a certified copy of the affidavit shall be admissible in any action to establish paternity. The surname of the child shall be determined by the mother, except if the father's name is entered on the certificate, the mother and father shall agree upon the child's surname. If there is no agreement, the child's surname shall be the same as that of the mother.

N.C. Gen. Stat. § 130A-101 (2023) (emphasis added).

If Respondent-Caretaker were a man, the name listed on the birth certificate as "father" could be used to establish at least a rebuttable presumption of paternity. *See In re J.K.C.*, 218 N.C. App. 22, 37, 721 S.E.2d 264, 274 (2012) ("If a child born to a marriage is presumed to be legitimate, we see no reason why a similar presumption should not arise where a child's birth certificate identifies its father, as our statutory scheme requires a determination of paternity by affidavit or judicially before the father's name can be shown on the birth certificate. Of

course, this presumption can be rebutted, but in this case, there is no evidence to rebut the presumption raised by the birth certificates."). But there can be no presumption, rebuttable or otherwise, of paternity for a woman. *Paternity* as defined by North Carolina law is simply not possible for a woman; only maternity is possible for a woman. *See Carter*, at *6 ("While North Carolina statutes do address legitimation and adjudication of paternity in North Carolina General Statutes Chapter 49, Articles 2 and 3, these statutes address male parents—fathers—and they do not address maternity." (citations omitted)).

Thus, as used in N.C. Gen. Stat. § 50-13.4 "mother" is the female parent of a child and "father" is the male parent of a child, either biologically or by adoption or other legal process to establish paternity. N.C. Gen. Stat. § 50-13.4. The mother and father are also referred to as "parents." The definition of "parent" for purposes of N.C. Gen. Stat. § 50-13.4 is the same for purposes of N.C. Gen. Stat. Chapter 7B, including N.C. Gen. Stat. § 7B-1001(a). A woman cannot become a "father" as defined by the law of North Carolina merely by having her name listed on a birth certificate, even with the collusion of the birth mother. Even if we assume both Respondent-Mother and Respondent-Caretaker filed affidavits as required by N.C. Gen. Stat. §130A-101(f), falsely declaring that Respondent-Caretaker is Layla's "natural father," Respondent-Mother testified at the adjudication hearing in December 2022 in this action that Respondent-Caretaker "is not the biological father of [Layla]" and "she's not the sperm donor." Respondent-Mother also identified by name a man she believed was "a possibility maybe" as the biological father but she had not had contact with him "in a few years."[5]

The Record, therefore, does not show that Respondent-Caretaker has any legal status or rights as a father or as a parent under Chapter 7B. Notwithstanding this lack of legal status or rights, the trial court appointed counsel for Respondent-Caretaker, apparently based upon the idea that she was a "parent." Under N.C. Gen. Stat. § 7B-1101.1, only a "parent" has a right to court-appointed counsel: "(a) The *parent* has the right to counsel, and to appointed counsel in cases of indigency, unless *the parent* waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services." N.C. Gen. Stat. § 7B-1101.1(a). Since the General Assembly has established a right to appointed counsel for parents only, providing that the Office

5. In the DSS Court Summary for the disposition hearing, filed 8 February 2023, DSS noted regarding paternity that "Paternity for [Layla] has not been identified. Respondent-Mother states the possibilities of paternity are 'endless.' " DSS also noted Respondent-Caretaker was listed on the birth certificate as "father."

of Indigent Defense Services, and ultimately the taxpayers of North Carolina, pay for the representation of indigent *parents*, there is no statutory authority for the trial court to appoint counsel for any parties other than the parents. Lastly, there is no indication in the Record that Respondent-Caretaker was ever appointed as Layla's legal guardian or custodian. Respondent-Caretaker is therefore not one of the parties with a right to appeal under N.C. Gen. Stat. § 7B-1002.

As an "adult member of the juvenile's household[,]" "other than a parent, guardian, or custodian[,]" Respondent-Caretaker is properly classified as a "caretaker" under N.C. Gen. Stat. § 7B-101(3). Since a caretaker does not have standing to appeal under N.C. Gen. Stat. § 7B-1002, we dismiss Respondent-Caretaker's appeal.

B. Respondent-Mother's Appeal

[2] On appeal, Respondent-Mother challenges specific findings of fact and the trial court's adjudication of Layla as a neglected juvenile. She does not challenge the trial court's Disposition Order. Nevertheless, if we vacate the Adjudication Order, the Disposition Order based thereon must also necessarily be vacated.

1. Standard of Review

"We review an adjudication under N.C. Gen. Stat. § 7B-807 [2023] to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings support its conclusions of law." *In re M.H.*, 272 N.C. App. 283, 286, 845 S.E.2d 908, 911 (2020) (internal quotation marks and citation omitted). "Clear and convincing evidence is evidence which should fully convince." *In re D.S.*, 286 N.C. App. 1, 11, 879 S.E.2d 335, 343 (2022) (citation and internal quotation marks omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "Unchallenged findings of fact are binding on appeal." *In re K.W.*, 272 N.C. App. 487, 490, 846 S.E.2d 584, 588 (2020). "[W]e review a trial court's conclusions of law de novo." *In re N.K.*, 274 N.C. App. 5, 8, 851 S.E.2d 389, 392 (2020) (quoting *In re M.H.*, 272 N.C. App. at 286, 845 S.E.2d at 911). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citation and internal quotation marks omitted). "The determination that a child is 'neglected' is a conclusion of law we review de novo." *In re J.C.M.J.C.*, 268 N.C. App. 47, 51, 834 S.E.2d 670, 674 (2019).

2. Findings of Fact

Respondent-Mother challenges findings of fact 5, 8, 9, 18, 19, 20, 23, and 24. Many of her arguments do not contest the sufficiency of the evidence to support the findings. She instead challenges the findings as irrelevant to the adjudication of neglect. We address each of the challenged findings.

The trial court found in Finding of Fact 5 "there was a prior report in 2019, when [Layla] was born, that she was born with methamphetamine and THC in her system." Respondent relies on *In re S.D.A.*, 170 N.C. App. 354, 612 S.E.2d 362 (2005), to argue the finding should be struck because "[a]n unsubstantiated report cannot form the basis of an adjudication." Notably, Respondent-Mother does not argue the finding is not supported by evidence, and for good reason. Respondent-Mother testified DSS became involved at Layla's birth on 8 August 2019 because she and Layla tested positive for methamphetamine and THC. Finding of Fact 5 is thus supported by the evidence. Furthermore, while this Court held in *In re S.D.A.*, 170 N.C. App. at 361, 612 S.E.2d at 366 that a trial court lacks jurisdiction to proceed to adjudication based on an unsubstantiated report, that is not what happened in this case, and *In re S.D.A.* in inapplicable. DSS did not file the petition and the trial court did not proceed to adjudication based on the January 2019 report. DSS filed the petition based on its assessment following its receipt of a CPS report in October 2021 and its investigation in October and November 2021. The fact that DSS received a report upon Layla's birth in 2019 is relevant to establish the history of DSS's involvement, but Respondent-Mother is correct that the prior report alone is insufficient to support the adjudication. *See In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019) (considering the historical facts of the case in combination with factors indicating a present risk to the child and holding "the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile"). Moreover, we note the trial court did not address in Finding of Fact 5 the veracity of the prior report, and our consideration of the finding is therefore limited to the fact that "there was a prior report in 2019, when [Layla] was born, that she was born with methamphetamine and THC in her system."

Challenged Findings of Fact 8 and 9 address Respondent-Mother's response to a social worker's request to drug screen Layla. The findings relate to unchallenged Finding of Fact 7, in which the trial court found a social worker went to Respondent-Mother's home on 12 November 2021 to follow up on a report, at which time Respondent-Mother "reported that substance abuse had been an issue for her" and "admitted she was

a prior heroin addict and admitted to using multiple drugs, including crystal meth, marijuana, benzos and other medications."

In Finding of Fact 8, the trial court found, "when asked if the [R]espondent[-M]other would allow [Layla] to be screened for drugs, [Respondent-Mother] stated, 'no' and that . . . DSS was only good for breaking up families." Respondent-Mother contends this finding fails to account for evidence that she offered to have Layla tested by her own provider. Respondent-Mother, however, does not dispute she refused to allow DSS to drug screen Layla, and the social worker's testimony about the encounter supports the finding, which is therefore binding.

In Finding of Fact 9, the trial court found "[R]espondent [-M]other relayed that [Layla] may test positive for controlled substances due to 'spore to spore' contact, but the court has no information or knowledge of what that term means." The trial court's finding that Respondent-Mother asserted Layla "may test positive" is directly supported by testimony from both Respondent-Mother and the social worker. Respondent-Mother does not challenge the first portion of the finding but takes issue with the trial court's finding that it had no knowledge of what "spore to spore" meant. A review of the testimony shows that both Respondent-Mother and the social worker testified about "spore to spore"—Respondent-Mother stating she meant touch, and the social worker testifying that she understood Respondent-Mother to mean skin-to-skin. Because there was an explanation of "spore to spore," the trial court's finding that it "has no information or knowledge of what that term means" is not supported by the evidence. We cannot disregard the trial court's uncertainty about Respondent-Mother's disclosure, however, which is evident in the finding.

Respondent-Mother also challenges Finding of Fact 18, in which the trial court found "[R]espondent[-]Mother testified that she could not remember much after [Layla] was taken from her because she drank a lot of fireballs to the point that she was blacking out and found herself in the bathtub without knowledge of how she got there." The finding is based on Respondent-Mother's testimony about her actions during the week following the filing of the petition and Layla's placement in nonsecure custody. Although Respondent-Mother eventually objected to the GAL's questioning on the basis that her actions were post-petition and irrelevant, and although the trial court sustained the objection, Respondent-Mother did not move to strike the testimony that supported the finding. Respondent-Mother is nevertheless correct that the finding concerns post-petition evidence and is irrelevant for adjudication purposes.

"The adjudicatory hearing [is] a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." *In re L.N.H.*, 382 N.C. 536, 543, 879 S.E.2d 138, 144 (2022) (quoting N.C. Gen. Stat. § 7B-802 (2023)). "This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party." *Id.* at 543, 879 S.E.2d at 144. Thus, "post-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect or dependency." *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 869 (2015) (citing *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006)). While the prohibition on post-petition evidence is not absolute, the limited instances in which this Court has upheld the admission of post-petition evidence have involved "fixed and ongoing circumstance[s]" relevant to the existence or nonexistence of conditions alleged in a juvenile petition, such as mental illness or paternity. *In re G.W.*, 286 N.C. App. 587, 594, 882 S.E.2d 81, 88 (2022) (citation omitted). Since Finding of Fact 18 concerns specific actions by Respondent-Mother following the filing of the petition, the finding is irrelevant to prove the allegations in the petition, and we will disregard it in our review of the adjudication of neglect. *See, e.g.*, *id.* at 596, 882 S.E.2d at 89 (holding evidence of post-petition drug use and drug screens were irrelevant for purposes of adjudication).

The trial court found in challenged Finding of Fact 19 that "during at least one interaction with the social worker,[] [R]espondent[-M]other was irate, threatened [a relative of Respondent-Caretaker], and admitted to a willingness to threaten [the relative]." We first note the finding is directly supported by Respondent-Mother's testimony that she threatened Respondent-Caretaker's cousin when the cousin inquired about the social worker's visit. Respondent-Mother does not dispute she made the threat but instead argues the finding is improperly considered for adjudication purposes because the threat was not alleged in the petition, and there was no evidence Layla was present for the threat. We are not fully persuaded the finding does not relate to conditions alleged in the petition. Although there was no allegation of the specific threat, the petition included allegations that Respondent-Mother was "agitated and irate" with DSS's involvement. The finding that she was irate and threatened a relative during an interaction with a social worker is illustrative of Respondent-Mother's interactions with DSS and her mental state prior to DSS's filing of the petition, which is relevant to the adjudication.

In Finding of Fact 20, the trial court found Respondent-Mother "refused to supply to the court information regarding where she had obtained the valium that she took." Again, Respondent-Mother does

not argue the finding is not supported by the evidence, and the Record supports the finding and shows Respondent-Mother was ultimately held in contempt for her refusal to answer. We nevertheless agree with Respondent-Mother that the finding is irrelevant for an adjudication of the existence or nonexistence of the conditions alleged in the petition since her refusal occurred at the adjudication hearing and was not a basis for DSS filing the petition. *See In re L.N.H.*, 382 N.C. at 543, 879 S.E.2d at 144; *see also* N.C. Gen. Stat. § 7B-802. Consequently, we will not consider the finding in reviewing the adjudication of neglect.

Respondent-Mother also challenges the portion of Finding of Fact 23 that she "could not convey to the court any clear timeline as to how long [Layla's] siblings were in the NICU after their birth." This finding is a direct reflection of Respondent-Mother's testimony at the adjudication hearing and is therefore supported by the evidence. Respondent-Mother argues, however, this portion should be struck or disregarded because it concerns Layla's siblings, who were not subjects of the adjudication. While this portion addresses Respondent-Mother's knowledge of the siblings' hospitalization, more generally this portion is relevant to Respondent-Mother's mental state and ability to care for a child during the period DSS was investigating the case in October and November 2021, just prior to the filing of the petition. This portion of Finding of Fact 23 is thus relevant to Layla's adjudication.

Lastly, Respondent-Mother challenges Finding of Fact 24—"it is contrary to the best interests of the juvenile to return to the home of the respondent parents [sic] at this time"—as a dispositional finding that was not appropriate for adjudication. Respondent-Mother asserts Conclusion of Law 4, which similarly addresses Layla's best interests, should also be struck. While protecting the best interests of a child is a goal in all stages of an abuse, neglect, and dependency proceeding, it is the dispositional stage where the trial court designs a plan to ensure the wellbeing of the child based on a determination of the child's best interests. *See* N.C. Gen. Stat. §§ 7B-900–901(a) (2023); *see also In re K.W.*, 272 N.C. App. at 491, 846 S.E.2d at 589 (explaining that the trial court determines a child's placement based on the best interests of the child at the dispositional stage). Since Finding of Fact 24 is clearly made for purposes of disposition and not adjudication, we will disregard it in reviewing the adjudication of neglect. We note, however, the trial court's inclusion of Finding of Fact 24 and Conclusion of Law 4 in the Adjudication Order was not error since the initial dispositional hearing required by N.C. Gen. Stat. § 7B-901 was continued, and the finding supported the court's interim dispositional ruling.

3. Neglect

Respondent-Mother next challenges the trial court's conclusion Layla was a "neglected juvenile in that she resides in an environment injurious to her welfare and she does not receive appropriate care, supervision or discipline from her parent, guardian, custodian or caretaker." Respondent-Mother argues the conclusion is not supported by the trial court's findings of fact because there were no findings showing Layla suffered any physical, mental, or emotional impairment, or that there was a substantial risk of impairment to Layla. We agree the trial court's findings were insufficient to support the adjudication of neglect.

Relevant to this case, a "neglected juvenile" is defined in the Juvenile Code to include "[a]ny juvenile less than [eighteen] years of age . . . whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15). To adjudicate a child neglected, "[t]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780 (2009) (citation and internal quotation marks omitted). "Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (citation omitted).

"It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re D.B.J.*, 197 N.C. App. at 755, 678 S.E.2d at 780–81 (quoting *In re T.S.*, *III*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006), *aff'd per curiam on other ground*, 361 N.C. 231, 641 S.E.2d 302 (2007)). "[T]he trial court [has] some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (citation and internal quotation marks omitted). Our Supreme Court has also directed that although "there is no requirement of a specific written finding of a substantial risk of impairment . . . the trial court must make written findings of fact sufficient to support its conclusion of law of neglect." *In re G.C.*, 384 N.C. 62, 69, 884 S.E.2d 658, 663 (2023).

It is this additional required element of findings sufficient to support a conclusion of physical, mental, or emotional impairment, or a

substantial risk of such impairment, that Respondent-Mother argues is lacking in Layla's adjudication. Respondent-Mother does not deny that the evidence and findings establish she "has struggled with substance abuse during [Layla's] entire lifetime[.]" She nonetheless contends her substance abuse alone is insufficient to support the adjudication of neglect where there were no findings to support a determination that her substance abuse resulted in Layla's physical, mental, or emotional impairment or a substantial risk of impairment. *See In re Phifer*, 67 N.C. App. 16, 25, 312 S.E.2d 684, 689 (1984) (holding "[a] finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect"); *see In re K.J.B.*, 248 N.C. App. at 356–57, 797 S.E.2d at 519 (reversing an adjudication of neglect where there was no evidence a child suffered impairment or substantial risk of impairment as a result of the mother's alcohol abuse while the child was in the care of another adult).

DSS and the GAL maintain that, even though the trial court did not make an explicit determination that Layla suffered impairment or was at substantial risk of impairment, the totality of the evidence on the conditions in the home clearly supported such a determination. They argue the substance abuse in the instant case was more substantial than the abuse in *In re Phifer* and *In re K.J.B.*, on which Respondent-Mother relies. They additionally argue the condition of the home, Respondent-Mother's erratic and threatening behavior when dealing with DSS, and Respondent-Mother's and Respondent-Caretaker's violation of a safety agreement with DSS all support a determination that Layla suffered a substantial risk of impairment.

Because the trial court did not make a specific finding of impairment or substantial risk of impairment, we must review the trial court's findings to see if the evidence supports the ultimate finding. *See In re B.P.*, 257 N.C. App. at 433, 809 S.E.2d at 919. DSS and the GAL are correct that this Court "is required to consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that [Layla] is a neglected juvenile." *In re F.S.*, 268 N.C. App. 34, 43, 835 S.E.2d 465, 471 (2019). But this Court cannot assume findings of fact the trial court did not make, even if there is evidence to support such findings. Only the trial court has the duty to evaluate the weight and credibility of the evidence and based upon that evaluation, to make findings of fact. *See In re A.H.D.*, 287 N.C. App. 548, 564, 883 S.E.2d 492, 504 (2023) ("The trial court has the duty of determining the credibility and weight of all the evidence, and only the trial court can make the findings of fact resolving any conflicts in the evidence."); *see*,

e.g., *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) ("[I]t is the duty of the trial judge to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. The trial judge's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence are not subject to appellate review." (citations and internal quotation marks omitted) (cleaned up)).

Upon review of the evidence and Order in this case, however, we agree with Respondent-Mother that the trial court's findings are inadequate to support a determination Layla suffered physical, mental, or emotional impairment, or that she was at substantial risk of impairment.

We first note that many of the trial court's findings of fact are essentially recitations of evidence. For example, six of the findings of fact state that Respondent-Mother "testified," "reported," or "offered evidence" of various things. Even considering all of the findings in the context of the adjudication order, it is not clear if the trial court actually found these "facts" to be true or if the findings are simply findings that Respondent-Mother testified about these things. Although "[t]here is nothing impermissible about describing testimony" the trial court must "ultimately make[ ] its own findings, resolving any material disputes." *In re C.L.C.*, 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2005), *aff'd in part*, *rev. dismissed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). Here, some of the findings "describe testimony" but do not make the trial court's actual determination about that testimony clear.

The trial court's findings do clearly establish that substance abuse was the predominant issue in this case. The trial court found DSS had multiple prior encounters with the family involving Layla based on reports of substance abuse. The trial court found the prior reports included a 2019 report that Layla was born with methamphetamine and THC in her system, and a 2020 report that Layla had grabbed a needle and that Respondent-Mother was selling drugs out of the house. The trial court also found Respondent-Mother admitted to more recent drug use prior to the birth of Layla's twin siblings, including taking half a valium and smoking marijuana regularly. The trial court found Respondent-Mother "could not convey to the court any clear timeline as to how long [Layla's] siblings were in the NICU after their birth[,]"and when DSS followed up on a report of substance abuse on 12 November 2021, just days before filing the petition, "[R]espondent[-M]other reported that substance abuse had been an issue for her" and "admitted that she was a prior heroin addict and admitted to using multiple drugs, including crystal meth, marijuana, benzos, and other medications."

The trial court's findings also reflect Respondent-Mother's unwillingness to work with DSS. The trial court found Respondent-Mother refused DSS's request to drug screen Layla and "relayed that [Layla] may test positive for controlled substances[.]" The trial court also found Respondent-Mother and Respondent-Caretaker initially refused to sign a safety plan with DSS, eventually agreed to the safety plan, and then violated the safety plan days later by removing Layla from the TSP. The trial court found DSS located Layla with Respondent-Mother and Respondent-Caretaker and without a suitable supervisor.

These findings are the extent of the trial court's findings concerning substance abuse in the home and Respondent-Mother's unwillingness to work with DSS. The findings do not address the impact on Layla as required to support an adjudication of neglect. *See In re K.J.B.*, 248 N.C. App. at 355, 797 S.E.2d at 518–19 (citing *In re E.P.*, 183 N.C. App. 301, 304–05, 645 S.E.2d 772, 774, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007) ("[A] parent's substance abuse problem alone [does] not support an adjudication of neglect.")).

Notably, the trial court did not find the prior reports of substance abuse involving Layla were true and did not make any findings about the results of DSS's assessments to show whether Layla was harmed or at a substantial risk of harm. It is also notable that the petition filed by DSS alleged DSS closed the case on the 2019 report that Layla was born with substances in her system with a decision of "Services Not Recommended" because Layla was healthy, well cared for, and resided in a home where Respondent-Caretaker's mother was a sober caregiver, indicating Layla was not harmed or at risk of substantial harm at the time. Evidence at the adjudication hearing showed Layla was often in the care of Respondent-Caretaker's mother, who was a sober caregiver. There were no findings that drug use occurred in Layla's presence, Layla was exposed to controlled substances, or Layla was ever without a sober caregiver.

DSS asserts the trial court appropriately inferred Layla was exposed to drug use based on Respondent-Mother's assertion that Layla "may test positive for controlled substances due to 'spore to spore' contact," as found in Finding of Fact 9. While the trial court determines the inferences to be drawn from the evidence, *see In re T.H.T.*, 185 N.C. App. at 343, 648 S.E.2d at 523, here the trial court made no findings in the Adjudication Order that Layla was exposed to drug use, although the evidence would allow that inference. Finding of Fact 9, itself, is not a finding Layla was exposed to drug use. The trial court furthermore cast doubt on Respondent-Mother's assertion that Layla "may test positive"

by finding the court was uncertain what Respondent-Mother meant by "spore to spore contact[.]"

Similarly, while the trial court found Respondent-Mother and Respondent-Caretaker violated the safety plan, and Layla was found in their care without a suitable supervisor, the trial court did not make findings as to the impact on Layla. No evidence was presented that Layla was harmed or at a substantial risk of harm due to the violation of the safety plan. The evidence at the adjudication hearing was that the TSP informed Respondent-Mother and Respondent-Caretaker that she could no longer care for Layla, before the TSP informed DSS of the same, and that Respondent-Mother and Respondent-Caretaker picked Layla up to go to a doctor's appointment. There is no evidence or findings that Layla was adversely affected by the safety plan violation.

DSS and the GAL also argue evidence the home was a safety concern and Respondent-Mother had exhibited threatening behavior supported a determination that Layla was impaired or at a substantial risk of impairment. The trial court addressed in Findings of Fact 11 and 19 the condition of the home and Respondent-Mother's threat.

To place Finding of Fact 11 in context, we note some additional findings:

> 10. The social worker returned to the home on November 12, 2021 for a second visit. At that time . . . [R]espondent[-] Mother and [Respondent-C]aretaker were offered a safety plan which was admitted into evidence as DSS 1.
>
> 11. That there was discussion about rats in the building and holes in the walls of [Respondent-Mother's] home. [R]espondent[-M]other believed the rats would come out of the holes in the walls and cabinets and try to bite her.
>
> 12. That a DSS worker was present in the home on the 1st occasion for 1.5 hrs. and the second occasion for 45 minutes.

In Finding of Fact 11, the trial court found "there was discussion about rats in the building and holes in the walls[.]" The court further found Respondent-Mother "believed the rats would come out of the holes in the walls and cabinets and try to bite her." While the finding shows there was a *discussion* about "rats in the building and holes in the walls" between Respondent-Mother and the social worker, the trial court did not find the home was unsuitable or unsafe for Layla, and no evidence was presented showing the condition of the home put Layla at risk. In

fact, based on the evidence it seems this finding regarding rats indicates some sort of hallucination by Respondent-Mother that rats would come out of the walls and bite her, not that the home was actually so infested by rats that it would pose a physical threat to anyone in the home. Either possibility could indicate a risk of substantial harm to the child; a parent who is suffering from hallucinations from drug impairment or mental illness may be unable to care for a child due to her mental impairment, while a parent who allows such an extensive rat infestation that rats pose a physical threat to a child presents an entirely different type of risk. From the trial court's findings, we cannot ascertain if it determined that these facts indicated either type of risk of harm, or some other sort of risk, to Layla.

The Safety Assessment by DSS on 12 November 2021 indicates the only two "safety indicators" DSS considered on that date as exposing Layla to physical harm or a "plausible threat to cause serious physical harm" were (1) being a "drug-exposed infant/child" and (2) "a current, ongoing pattern of substance abuse that leads directly to neglect and/or abuse of the child." As to this latter factor, the social worker noted, "substance use has been identified as a pattern, but [Respondent-Caretaker's mother] is the sober caregiver of the household." Notably, the Safety Assessment found no safety indicators related to "physical living conditions" as "hazardous and immediately threatening to the health and/or safety of the child." The Safety Plan presented by DSS on 12 November 2021 addressed only substance abuse issues and did not include any requirements for remediation of any conditions at Respondent-Mother's home.

The testimony as to Respondent-Mother's comments about the rats was conflicting. Respondent-Mother testified that she told the social worker about rats coming in the house and holes in the floor:

> Q. Okay. You said that you were showing her rats and holes in the walls?
>
> A. Yes.
>
> Q. Where are the rats in relation to -- where were the rats?
>
> A. Outside of our home. We had had an issue with very large, large rats coming from the brewery across the street and had been to social services three or four times trying to get help with the landlord.
>
> Q. Okay. And where were the holes in the walls that you were showing?
>
> A. They were in the flooring where I fell through when I was pregnant.

In contrast, the social worker characterized Respondent-Mother's comments about rats that day as indicating she may be impaired by substances:

> A. She was speaking very erratically. She was moving her arms a lot. She wasn't -- she couldn't stay focused like on the topic.
>
> Q. Did she appear to be in any kind of distress?
>
> A. It depends on what you call distress.
>
> Q. What -- how would you characterize it?
>
> A. I wouldn't say she's in distress. I thought that she might be using substances at the time.
>
> Q. Okay. Did she mention to you anything about rats in [the] building or holes in the wall?
>
> A. Yes, she did.
>
> Q. Under -- how did that -- how did those -- subject come up?
>
> A. We were doing the home check of the home and she had mentioned that there was a rat problem and that rats would come out the cabinets and the holes and try to bite her.

The evidence, therefore, would allow the trial court to make findings regarding the type of risk posed by Respondent-Mother's erratic behavior and claims about rats in the house, but the findings do not clarify the nature of any potential risk to Layla.

Regarding Respondent-Mother's threatening behavior, the trial court found in Finding of Fact 19 that, "during at least one interaction with the social worker, [R]espondent[-M]other was irate, threatened [Respondent-Caretaker's cousin], and admitted to a willingness to threaten [the cousin]." Again, there is no indication Respondent-Mother's behavior affected Layla. The evidence at the hearing was that Layla was in the care of Respondent-Caretaker's mother and not present at the time of the interaction. Although there was evidence that would allow the trial court to make clearer findings about Respondent-Mother's threatening behavior, the findings about the condition of the home and Respondent-Mother's threatening behavior do not support a determination that Layla suffered impairment or was at substantial risk of impairment.

In short, the Adjudication Order lacks specific findings regarding the impact on Layla of the substance abuse, the violation of the safety plan, the condition of the home, or Respondent-Mother's erratic or threatening behavior. DSS largely relies on testimony from the adjudication hearing

to argue the evidence supported a determination Layla was impaired or at substantial risk of impairment. The trial court, however, failed to make findings based on much of the evidence presented in support of the conditions alleged in the petition. While this Court has held there is no error when "there is no finding that the juvenile had been impaired or is at a substantial risk of impairment . . . if all the evidence supports such a finding[,]" *In re B.P.*, 257 N.C. App. at 433, 809 S.E.2d at 919 (quoting *In re Padgett*, 156 N.C. App. at 648, 577 S.E.2d at 340), we have consistently reviewed the trial court's evidentiary findings, as opposed to reweighing the evidence, to determine whether the findings show impairment or a substantial risk of impairment.

Because the trial court's findings of fact do not support its conclusion Layla is neglected due to the lack of findings addressing impairment of the juvenile or substantial risk of impairment, we vacate the adjudication of neglect and remand for the trial court to make additional findings of fact to address whether and how Respondent-Mother's drug abuse, mental or emotional impairment, or threatening behavior have harmed Layla or have placed her at a substantial risk of harm. Although the findings of fact are not sufficient to indicate that Layla suffered physical, mental, or emotional impairment, or that there is a substantial risk of such impairment, the evidence in the Record could potentially support such findings. We therefore must vacate the trial court's adjudication order and remand for the trial court to make appropriate findings of fact regarding any impairment of Layla or substantial risk of impairment. *See In re J.C.*, 380 N.C. 738, 747, 869 S.E.2d 682, 688 ("Without commenting on the amount, strength, or persuasiveness of the evidence contained in the record, we merely conclude that we cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper 'clear, cogent, convincing' standard of proof would be 'futile,' so as to compel us to conclude that 'the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination.' " (citation and internal quotation marks omitted)).

IV. Conclusion

Having vacated the Adjudication Order and remanded for entry of a new order, we must also vacate and remand the Disposition Order based thereon. *See In re K.J.B.*, 248 N.C. App. at 357, 797 S.E.2d at 519 (citing *In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011)).

VACATED and REMANDED.

Judges STROUD and STADING concur.

NORTH CAROLINA BAR AND TAVERN ASSOCIATION; ET AL., PLAINTIFFS
v.
ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA, DEFENDANT

No. COA22-725

Filed 16 April 2024

1. Civil Procedure—motion to dismiss—converted to motion for summary judgment—matters outside pleadings considered

In a declaratory judgment action filed by an association of private bar owners (plaintiffs), in which plaintiffs raised six claims challenging defendant governor's issuance of executive orders during a pandemic closing bars for public health reasons, where defendant moved to dismiss all claims and plaintiffs moved for partial summary judgment on four of their claims, and where the trial court addressed plaintiffs' constitutional claims together—including plaintiffs' equal protection claim, upon which plaintiffs did not move for summary judgment—the trial court's ruling on the equal protection claim was converted to a summary judgment ruling because the court considered material outside of the pleadings (including news reports and scientific data submitted by defendant).

2. Governor—Emergency Management Act—business closures during pandemic—eligibility for compensation

In a declaratory judgment action filed by an association of private bar owners (plaintiffs) challenging the governor's issuance of executive orders during a pandemic closing bars for public health reasons, the trial court properly dismissed plaintiffs' claim seeking compensation under the Emergency Management Act (EMA). Although plaintiffs asserted that the closures constituted a regulatory taking pursuant to the EMA, plaintiffs' properties were not physically possessed by the government and thus were not "taken" according the ordinary use of the word and the plain language of the statute, and the properties were not otherwise used to cope with an emergency; thus, the closures did not trigger eligibility for compensation.

3. Constitutional Law—executive orders issued during pandemic—business closures—taking alleged

In a declaratory judgment action filed by an association of private bar owners (plaintiffs) challenging the governor's issuance of executive orders during a pandemic closing bars for public health

reasons, the trial court properly dismissed plaintitiffs' claim that the governor's action resulted in a taking of their property without just compensation. First, the mandated closures did not constitute an unconstitutional taking through the power of eminent domain where plaintiffs' properties were not taken for public use. Further, where plaintiffs' properties were not permanently deprived of all value, the closures did not constitute a categorical regulatory taking.

4. Constitutional Law—North Carolina—Fruits of Labor Clause—executive orders issued during pandemic—business closures

In a declaratory judgment action filed by an association of private bar owners (plaintiffs) challenging the governor's issuance of executive orders during a pandemic closing bars for public health reasons, plaintiffs' constitutional right to the fruit of their labor was violated where the government's decision to allow certain eating and drink establishments to reopen but kept plaintiffs' bars closed was arbitrary and capricious because it was not rationally related to the stated objective of slowing the spread of COVID-19. There was no evidence forecast that supported a determination that plaintiffs' businesses posed a heightened risk of spreading the illness or that differentiating between different types of bars was based on valid scientific data. Therefore, the trial court's order denying plaintiffs' motion for summary judgment on this issue was vacated, and the matter was remanded for reconsideration.

5. Public Records—public records request—noncompliance with statutory enforcement procedure—lack of jurisdiction

In a declaratory judgment action filed by an association of private bar owners (plaintiffs) challenging the governor's issuance of executive orders during a pandemic closing bars for public health reasons, in which plaintiffs sought attorney fees for an alleged violation of the Public Records Act, where plaintiffs failed to comply with the requirements of N.C.G.S. § 7A-38.3(E)(a)—although plaintiffs requested mediation in their complaint, they did not take steps to initiate or participate in mediation—the trial court lacked jurisdiction to compel disclosure of records sought by plaintiffs and, therefore, had no jurisdiction to rule on plaintiffs' claim for attorney fees pursuant to N.C.G.S. § 132-9(a).

6. Constitutional Law—North Carolina—equal protection—executive orders issued during pandemic—business closures—different reopening standards

In a declaratory judgment action filed by an association of private bar owners (plaintiffs) challenging the governor's issuance of executive orders during a pandemic closing bars for public health reasons, plaintiffs' right to equal protection was violated because the executive orders allowed restaurants to reopen under certain conditions while requiring bars to remain closed, even though there was no evidence forecast that plaintiffs' businesses would not be able to comply with the same reopening conditions. Therefore, the trial court erred by denying plaintiffs' partial motion for summary judgment on their equal protection claim.

Appeal by Plaintiffs from an order entered 29 March 2022 by Judge James L. Gale in the Wake County Superior Court. Heard in the Court of Appeals 9 May 2023.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych and K. Matthew Vaughn; and Robert F. Orr, for Plaintiffs.

Attorney General Joshua H. Stein, by Senior Deputy Attorney Generals Amar Majmundar and Matthew Tulchin, for Defendant.

WOOD, Judge.

Plaintiffs appeal from the trial court's order granting summary judgment for Defendant and dismissing all their claims arising out of Defendant's Executive Order No. 141 issued in response to the COVID-19 pandemic. On 17 March 2020, Defendant issued Executive Order No. 118 closing all bars including those in restaurants. On 20 May 2020, Defendant issued Executive Order No. 141 letting some types of bars reopen with specific safety precautions but requiring private bars, including those owned by Plaintiffs, to remain closed. Defendant relied on "science and data" he claimed created a reasonable basis to distinguish between types of bars, thus letting some reopen while keeping others closed. We have considered the information Defendant provided to the trial court to justify this distinction in the light most favorable to Defendant. Defendant's "science and data" tends to show that bars in general did present a heightened risk of COVID-19 transmission, as people normally gather, drink, and talk in bars of all sorts. We have considered the "science and data" presented by Defendant to justify the distinction between closing some types of bars and not others, but this information does not support Defendant's position, even if we consider all such information to be true. Some of the information did not exist at

the time of Executive Order No. 141, so Defendant could not have relied on it. Most of the information is news articles, at best anecdotal reports of various incidents in different places around the world. None of the information addresses any differences in risk of COVID-19 transmission between Plaintiffs' bars and the other types of bars allowed to reopen. For the reasons explained below, we have determined the trial court erred when it denied Plaintiffs' summary judgment motion and dismissed Plaintiffs' claims under N.C. Const. art. I, § 1, the "fruits of labor clause," and for denial of equal protection under N.C. Const. art. I, § 19. The trial court properly dismissed Plaintiffs' other claims, and we have also determined the trial court lacked jurisdiction to award attorneys' fees on Plaintiffs' Public Records Act claim. We therefore affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. Background

On 10 March 2020, in response to the COVID-19 pandemic, Governor Roy Cooper ("Defendant") declared a state of emergency in North Carolina as authorized by the Emergency Management Act ("EMA"). Defendant subsequently issued executive orders for the stated purpose of mitigating the damage caused by the pandemic. Several of these orders affected certain owners and operators of bars ("Plaintiffs"), including the 17 March 2020 order which mandated the closure of *all* bars selling "alcoholic beverages for onsite consumption" (Executive Order No. 118).

On 20 May 2020, Defendant signed an executive order titled, "EASING RESTRICTION ON TRAVEL, BUSINESS OPERATIONS, AND MASS GATHERINGS: PHASE 2" (Executive Order No. 141). This order allowed restaurants to open for on-premises service under certain conditions. Section Eight of the order specifically kept bars closed: "This Executive Order solely directs that bars are not to serve alcoholic beverages for onsite consumption[.]" The order defined "bars" as "establishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat. §§ 18B-1000(2) and 18B-1000(6) that have a permit to sell alcoholic beverages for onsite consumption . . . and that are principally engaged in the business of selling alcoholic beverages for onsite consumption."

In Section Five of the order, Defendant stated his reasoning in support of keeping bars closed:

> [B]y their very nature, [bars] present greater risks of the spread of COVID-19. These greater risks are due to factors such as people traditionally interacting in that space in a

> way that would spread COVID-19 . . . or a business model that involves customers or attendees remaining in a confined indoor space over a sustained period.

The order specifically allowed "retail beverage venues" to sell "beer, wine, and liquor for off-site consumption only." The order also specifically exempted "production operations at breweries, wineries, and distilleries" from closures.

North Carolina Bar and Tavern Association submitted a public records request to Defendant on 29 May 2020, requesting the disclosure of records related to a statement made by Defendant in a 28 May 2020 press conference that he made the decision to keep bars closed based on "data and science" and "daily briefings from doctors and healthcare experts." Defendant eventually provided the records on 18 September 2020, following the commencement of this action.

Plaintiffs filed suit against Defendant on 4 June 2020 seeking, among other things, a temporary restraining order and/or preliminary injunction preventing Defendant from enforcing Executive Order No. 141. Chief Justice Cheri Beasley of the North Carolina Supreme Court designated the matter as a Rule 2.1 Exceptional Case on 9 June 2020. Plaintiffs filed an amended complaint on 11 June 2020 and subsequently filed a renewed motion for a temporary restraining order and/or preliminary injunction on 15 June 2020. The trial court denied the motion on 26 June 2020.

Defendant filed a motion to dismiss the complaint on 8 July 2020. On 26 October 2021, Plaintiffs filed a Second Amended Complaint bringing forth six causes of action seeking: (1) declaratory relief regarding Plaintiffs' right to earn a living under N.C. Const. art. I, § 1; (2) declaratory relief regarding Plaintiffs' right to equal protection pursuant to N.C. Const. art. I, § 19 and N.C. Gen. Stat. § 166A-19.74; (3) declaratory relief for Defendant's alleged taking of Plaintiffs' property in violation of N.C. Const. art. I, § 19; (4) declaratory relief regarding Defendant's alleged violation of the monopolies clause of N.C. Const. art. I, § 34; (5) compensation under N.C. Gen. Stat. § 166A-19.73 for Defendant's alleged taking or use of Plaintiffs' property under that statute; and (6) a fee award under N.C. Gen. Stat. § 132-9(c) for Defendant's alleged violation of the Public Records Act.

On 9 November 2021, Defendant filed a motion to dismiss all claims of the Second Amended Complaint. On 23 November 2021, Plaintiffs filed a motion for partial summary judgment as to their first, third, fifth, and sixth causes of action. The trial court denied Plaintiffs' motion

for partial summary judgment and granted Defendant's motion to dismiss, thereby dismissing Plaintiffs' Second Amended Complaint on 29 March 2022.

On 27 April 2022, Plaintiffs filed a written notice of appeal pursuant to N.C. Gen. Stat. § 7A-27(b). All other relevant facts are provided as necessary in our analysis.

II. Procedural Posture and Standard of Review

[1] As an initial matter, we must provide clarification on the procedural posture of this case and reasoning for how we address the trial court's order, which operates as a combined order on Defendant's motion to dismiss all six claims as well as Plaintiffs' motion for partial summary judgment on four out of six claims. Plaintiffs' cause of action pertaining to equal protection is the sole issue upon which Plaintiffs did not move for summary judgment or abandon on appeal. It is not immediately apparent which causes of action the trial court addressed under the standard for a motion to dismiss versus a motion for summary judgment.

For example, although Plaintiffs filed a motion for summary judgment as to their cause of action for compensation pursuant to N.C. Gen. Stat. § 166A-19.73, the trial court dispensed with the cause of action by stating it "should be DISMISSED." The same is true for Plaintiffs' constitutional claims. However, on the final page of the order, the trial court specifically stated, "Plaintiffs' Motion for Partial Summary Judgment should be DENIED, Defendant's Motion to Dismiss should be GRANTED, and Plaintiffs' Second Amended Complaint is HEREBY DISMISSED WITH PREJUDICE."

The parties appear to presume the trial court addressed Plaintiffs' causes of action according to whether Plaintiffs moved for summary judgment on a particular cause of action. For example, both Plaintiffs and Defendant present the relevant standards of review for both a motion to dismiss and a motion for summary judgment in their respective briefs, therefore presuming that the trial court addressed each cause of action under the appropriate standard. *See* Plaintiffs' Opening Brief, pp. 6–7; Defendant's Brief, pp. 10–11.

However, we must determine whether the trial court's ruling on Plaintiffs' equal protection claim, upon which they did not move for summary judgment,[1] was converted to a summary judgment ruling because of the trial court's consideration of material beyond the pleadings. The

1. Plaintiffs abandon their monopolies clause claim on appeal.

trial court did not directly address Plaintiffs' equal protection claim. Rather, it appeared to address all their constitutional claims together. After determining that Plaintiffs were not entitled to compensation pursuant to the EMA, the trial court stated, "Plaintiffs' right to compensation, if any, must then rest on a constitutional claim."

This Court has stated regarding the conversion of a Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment:

> [T]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. As a general proposition, therefore, matters outside the complaint are not germane to a Rule 12(b)(6) motion. Indeed, as N.C. R. Civ. P. 12(b) makes clear, a Rule 12(b)(6) motion is converted to one for summary judgment if "matters outside the pleading are presented to and not excluded by the court":
>
> > If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56*, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Weaver v. Saint Joseph of the Pines, Inc., 187 N.C. App. 198, 203–04, 652 S.E.2d 701, 707 (2007) (citation omitted) (emphasis in original) (quoting N.C. R. Civ. P. 12(b)).

Here, Defendant sought a dismissal of Plaintiffs' claims pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. The trial court did not address its subject matter or personal jurisdiction over Defendant regarding their constitutional claims. Rather, the trial court clearly considered Plaintiffs' claims on the basis of a motion for summary judgment, including the equal protection claim, as demonstrated by the trial court's words in its order:

> Plaintiffs' claim[s] pit[ ] their asserted right to continue to operate private bars at a profit against *Defendant's asserted need to protect the general public from a heightened risk presented by the continued operation of private bars in the COVID environment*. Plaintiffs claim that the unreasonable nature of the regulation is evident

> by the fact that *the Executive Orders allowed other businesses that serve alcohol and present the same risks to continue to operate.* Defendant counters that *private bars by their nature present a higher risk than those other businesses to which Plaintiffs' invite comparison.*
>
> . . .
>
> Where the *potential for public harm is clear*, *the Responsible Citizens* [308 N.C. 255, 302 S.E.2d 204 (1983)] standard imposes a high burden on Plaintiffs to demonstrate that Defendant's response to it was excessive and therefore unreasonable. As in the case of its *equal protection inquiry*, this Court is not free to simply to substitute its own judgment *based on the same evidentiary record the Defendant considered.*
>
> . . .
>
> The Court has again not simply deferred to Defendant *without inquiry into the underlying evidence upon which Defendant exercised his police power.*
>
> . . .
>
> *Defendant has produced scientific studies and learned professional commentary* asserting that they do and that there was then a need for greater regulation of private bars than other businesses which, in part, serve alcohol and allow public gathering. The record is clear that Defendant and the professional staff on which he relied actually considered these matters when implementing his Executive Orders.

(Emphasis added). Therefore, we hold the trial court addressed all Plaintiffs' constitutional claims, including their equal protection claim, together as a ruling on a motion for summary judgment. The trial court also considered matters beyond the pleadings, including the news reports and scientific data submitted by Defendant. Both parties cited to these documents in their briefs to this Court. Moreover, neither party has asserted that the exhibits filed with this Court were not considered by the trial court or challenged the propriety of the trial court's review of these documents. Nor have any of the parties challenged the inclusion of these materials in the Record on appeal. Accordingly, we conclude that Defendant's motion to dismiss was converted into a motion for summary judgment.

This Court has stated the following regarding the standard of review of a motion for summary judgment:

> The standard of review for summary judgment is de novo. Summary judgment is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law. Rule 56(c) of the North Carolina Rules of Civil Procedure states that summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file[, together with the affidavits,] show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." A "genuine issue" is one that can be maintained by substantial evidence. In review of the motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party.

Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 385 N.C. 250, 267, 891 S.E.2d 100, 114 (2023) (citations, quotation marks, and ellipsis omitted) (quoting N.C. R. Civ. P. 56(c)).

III. Analysis

Plaintiffs argue the trial court erred in denying their partial motion for summary judgment on their first, third, fifth, and sixth causes of action and erred in granting Defendant's motion to dismiss. We address each claim in turn.

A. Taking Under the Emergency Management Act

[2] Plaintiffs argue that Defendant's closure of their businesses entitles them to compensation pursuant to N.C. Gen. Stat. § 166A-19.73, which provides for compensation if the State has "commandeered, seized, taken, condemned, or otherwise used [their property] in coping with an emergency and this action was ordered by the Governor." N.C. Gen. Stat. § 166A-19.73(b) (2023). We note that this Court has not previously considered the compensation section of the EMA.

First, we consider how we are to review the portion of the trial court's order on summary judgment which addressed Plaintiffs' claim for compensation under the EMA. "[W]hen a trial court's determination relies on statutory interpretation, our review is de novo because those matters of statutory interpretation necessarily present questions of law." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012). Here, the trial court stated in its written order:

> [N]o matter how great their financial harm, Plaintiffs' statutory claims can succeed only if their claims fall within the EMA's scope. . . . The Court must then apply the statute based on its plain language as there is no court decision or legislative history providing further guidance. The Court must determine whether Plaintiffs have presented a viable claim that their property interest, however defined, was "commandeered, seized, taken, condemned, or otherwise used in coping with an emergency and this action was ordered by the Governor."

Because this language demonstrates that the trial court's determination relied on statutory interpretation, we review its interpretation *de novo*.

The EMA is codified in Chapter 166A of our General Statutes. It grants our governor the authority to declare a state of emergency. N.C. Gen. Stat. § 166A-19.20(a) (2012). N.C. Gen. Stat. § 166A-19.31(b)(2) (2019) enables municipalities and counties, during a declared state of emergency, to enact ordinances prohibiting or restricting "the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate." N.C. Gen. Stat. § 166A-19.30(c)(1) (2014) enables the governor to do the same during a gubernatorially declared state of emergency if he determines "local control of the emergency is insufficient to assure adequate protection for lives and property[.]" Defendant cites to his statutorily granted authorities in, for example, Executive Order No. 118 which closed bars across our state.

Plaintiffs raise their claim pursuant to N.C. Gen. Stat. § 166A-19.73, which provides, in pertinent part, "Compensation for property shall be only if the property was commandeered, seized, *taken*, condemned, *or otherwise used* in coping with an emergency and this action was ordered by the Governor." N.C. Gen. Stat. § 166A-19.73(b) (emphasis added). The trial court presumed Plaintiffs had a legally protected property interest and found that there was no evidentiary or legal basis to conclude their interests were "commandeered, seized, taken, condemned, or otherwise used in coping with an emergency" under N.C. Gen. Stat. § 166A-19.73(b). From a plain reading of the statute, we are constrained to agree.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). If the words of a statute "are clear and unambiguous, they are to be given their plain and ordinary meaning." *Savage*

v. Zelent, 243 N.C. App. 535, 538, 777 S.E.2d 801, 804 (2015). "In the construction of any statute, . . . words must be given their common and ordinary meaning, nothing else appearing." *Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). However, if the statute itself contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. *See Johnston v. Gill*, 224 N.C. 638, 642, 32 S.E.2d 30, 32 (1944).

Here, because the statute does not define "taken" or "otherwise used," it is appropriate to consider, as Defendant invites us to do, the dictionary definition of *take* to determine the plain meaning of the statute. *Webster's* defines *take* as "to get by conquering; capture; seize," "to trap, snare, or catch," "to get hold of; grasp or catch," or "to get into one's hand or hold; transfer to oneself." *Take*, *Webster's New World College Dictionary* (2010). Considering these definitions, Defendant could not have *taken* Plaintiffs' properties where Defendant, or those operating on his behalf, did not exercise physical *possession* over the land or property. Instead, Defendant prohibited Plaintiffs' use of the land, at least for the purposes of operating private bars. Therefore, we cannot conclude the operation of Executive Order No. 141 constituted a seizure or taking under the statute.

As for whether Defendant "otherwise used" Plaintiffs' property by ordering their businesses to remain closed, *Webster's* defines *use* as, "to put or bring into action or service; employ for or apply to a given purpose." *Use*, *Webster's New World College Dictionary* (2010). The dictionary definition, as well as the common sense notion of using something, refers to an affirmative act of employing something for a given purpose rather than an *absence* of action, such as requiring businesses to remain closed.

Moreover, we do not believe N.C. Gen. Stat. § 166A-19.73(b) indicates an intent by our legislature to define the basis for compensation under the statute as broadly as "takings" are defined for constitutional purposes. N.C. Gen. Stat. § 166A-19.73(b) is a specific statutory provision contained within a unique portion of a State statute, the EMA. If the General Assembly had wished to include government-imposed closures as a trigger for one's right to be compensated, it could have said so by including such language within N.C. Gen. Stat. § 166A-19.73(b)—but such language does not appear in the statute, and it is not this Court's job to make it so. *C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 422, 860 S.E.2d 295, 297–98 (2021). Notably, the General Assembly chose to create a statutory right to compensation for some types of government action under the EMA but not others. First, the EMA authorizes the Governor,

during a gubernatorially declared state of emergency and with the concurrence of the Council of State, to "procure, by . . . condemnation[or] seizure . . . materials and facilities for emergency management." N.C. Gen. Stat. § 166A-19.30(b)(7). N.C. Gen. Stat. § 166A-19.73(b) specifically singles out condemnation and seizure as triggering one's statutory right to compensation when such action is ordered by the Governor. Second, and in contrast, some disasters may compel the Governor to order mandatory evacuations, which, by their very nature, require the *closure* of private businesses impacted by such an order. *See* N.C. Gen. Stat. § 166A-19.30(b)(7) (authorizing the Governor, during a gubernatorially declared state of emergency, to "direct and compel" evacuation). Yet, the General Assembly chose not to provide a statutory right to compensation for such closures. Third, and finally, the EMA also specifically authorizes prohibitions and restrictions on the operation of businesses during a state of emergency, without specifically identifying business closures as triggering a statutory right of compensation. *See* N.C. Gen. Stat. § 166A-19.31(b)(2).

Clearly, the General Assembly considered which governmental actions would trigger a statutory right to compensation and employed language which encompassed certain specific actions while excluding others. Ordering mandatory business closures is not one of those actions which triggers a statutory right of compensation under the statute as it is currently written.

Certainly, the North Carolina appellate courts have written robust "takings" jurisprudence addressing the right to just compensation for governmental takings of property. Specifically, our jurisprudence has defined "takings" in the context of the Takings Clause of the Fifth Amendment broadly to include "regulatory takings." *See, e.g.*, *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 382 N.C. 1, 876 S.E.2d 476 (2022). However, the doctrine of regulatory takings is inapposite here where the word "take" is derived from statute and where a violation of the Fifth Amendment is not alleged in this particular cause of action. For the foregoing reasons, we do not believe the same analysis employed for constitutional takings issues is appropriate in the context of the unique provisions of the EMA. Because Defendant did not *take* or *otherwise use* Plaintiffs' land during a declared state of emergency, Plaintiffs are not entitled to compensation under the EMA. Therefore, the trial court properly dismissed this cause of action.

B. Constitutional Taking

[3] Having addressed Plaintiffs' "takings" claim under the EMA, we turn next to their claim for declaratory relief, alleging Defendant took

their property in violation of N.C. Const. art. I, § 19. In Plaintiffs' Second Amended Complaint, their third cause of action alleges: "By their irrational exclusion from the reopening provisions of [Defendant's] executive orders, [P]laintiffs' revenues from their operations were completely negated, resulting in a taking of [P]laintiffs' property . . . without compensation or other remuneration."

Plaintiffs argue Defendant committed a taking of their property by shutting down their bars without just compensation. Specifically, Plaintiffs argue *Kirby v. N.C. DOT* "is the most recent and most on point case discussing the issues before this Court in the context of whether the Defendant's actions constitute a compensable taking." 368 N.C. 847, 786 S.E.2d 919 (2016). In *Kirby*, the plaintiffs sued the NCDOT, asserting "constitutional claims related to takings without just compensation" because, "[u]nder the Map Act, once NCDOT file[d] a highway corridor map with the county register of deeds, the Act impose[d] certain restrictions upon property located within the corridor for an indefinite period of time." *Id.* at 849–50, 786 S.E.2d at 921–22.

As an initial matter, the court in *Kirby* noted:

> Though our state constitution does not contain an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, we have long recognized the existence of a constitutional protection against an uncompensated taking and the fundamental right to just compensation as so grounded in natural law and justice that it is considered an integral part of "the law of the land" within the meaning of Article 1, Section 19 of our North Carolina Constitution.

Id. at 853, 786 S.E.2d at 924 (quotation marks and brackets omitted).

The court in *Kirby* next determined whether NCDOT acted appropriately pursuant to its police power or whether its actions constituted a taking of land without just compensation. Specifically, at issue in *Kirby* was whether the NCDOT's actions under the Map Act constituted a "valid, regulatory exercise of the police power, not the power of eminent domain[.]" *Id.* at 852, 786 S.E.2d at 923. "Determining if governmental action constitutes a taking" for constitutional purposes "depends upon whether a particular act is an exercise of the police power or of the power of eminent domain." *Id.* at 854, 786 S.E.2d at 924 (quotation marks omitted). In exercising police power, "the government *regulates* property to prevent injury to the public." *Id.* (emphasis in original). "Police 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.* (brackets omitted). As for the power of eminent domain, "the government *takes* property for public use because such action is advantageous or beneficial to the public. . . . [T]he state must compensate for property rights taken by eminent domain." *Id.* at 854, 786 S.E.2d at 924–25 (emphasis in original).

The court in *Kirby* held that by "recording the corridor maps at issue here . . . NCDOT effectuated a taking of fundamental property rights" because:

> [t]he Map Act's indefinite restraint on fundamental property rights is squarely *outside the scope of the police power*. . . . Though the reduction in acquisition costs for highway development properties is a laudable public policy, economic savings are a far cry from the protections from injury contemplated under the police power. The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights.

Kirby, 368 N.C. at 855–56, 786 S.E.2d at 925–26 (emphasis added) (citation omitted).

In the present case, while Defendant's actions may be more accurately characterized as a total *prohibition* of conducting business than as a *regulation* of the operation of Plaintiffs' businesses, we cannot conclude Plaintiffs' properties were taken for *public use*. Defendant states he believed the executive orders were needed to protect the public health and to combat the spread of COVID-19, and in that way the closure of Plaintiffs' businesses was purportedly for the public benefit.[2] However, Plaintiffs' properties were never commandeered for public benefit in any manner. For example, Plaintiffs' properties were not used as COVID test sites by state or local authorities. Defendant's executive orders cannot be characterized as an exercise of the power of eminent domain. Accordingly, Defendant did not commit an unconstitutional taking through the use of eminent domain.

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2. Plaintiffs specifically state in their partial motion for summary judgment: "Plaintiffs have not and do not challenge Defendant's authority to act pursuant to North Carolina's Emergency Act but rather, challenge the *constitutionality* of Defendant's actions as applied to Plaintiffs and those similarly situated." (Emphasis added).

We turn now to address whether Defendant's executive orders constituted an unconstitutional regulatory taking. Regulatory takings may be either categorical or partial takings. Specifically, as for categorical takings, there are:

> two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992). Categorical takings are "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.*

Not all takings which deprive owners of the beneficial or productive use of their land are categorical takings, however. "[T]he categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332, 122 S. Ct. 1465, 1484 (2002).

The fact specific inquiry is based on the factors delineated in *Penn Cent. Transp. Co. v. City of New York*:

> [(1)] The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and (2)] the character of the governmental action [, i.e.,] . . . physical invasion [versus] when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978). Finally, we note even temporary takings are compensable. *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 318, 107 S. Ct. 2378, 2388 (1987).

In the present case, Plaintiffs do not argue Defendant's executive orders constituted a physical invasion of Plaintiffs' properties. As for a taking by means of depriving Plaintiffs of all economically beneficial or productive use of their property, Defendant's executive orders do not constitute a categorical taking under the criteria set forth in *Lucas* where there is no evidence Plaintiffs suffered the complete elimination of all value. In other words, their property still had value even if Plaintiffs did not generate profit, or revenue at all, during the COVID-19 closure. Because Defendant did not completely deprive Plaintiffs of the total value of their property, we cannot say Defendant committed a categorical regulatory taking.

Finally, we must address the factors set forth in *Penn Central* as discussed above. First, regarding the economic impact of the regulation and its interference with investment-backed expectations, it is manifestly clear COVID-19-era regulations devastated far too many business owners. There is no remedy that could truly compensate an owner for the labor and passion devoted to his or her business. The executive orders, however, were all explicitly limited in duration, and our legislature attempted to mitigate the impact of COVID-19 regulations "through the implementation of grant and loan programs, and mortgage and utility relief for these impacted businesses." The second factor weighs against Plaintiffs in that Defendant's actions did not constitute a physical invasion of their property but rather were part of a "public program" directed toward the "common good," notwithstanding what we have learned, in hindsight, about the effectiveness of the governmental response to COVID-19. *Penn Cent. Transp. Co.*, 438 U.S. at 124, 98 S. Ct. at 2659.

For the foregoing reasons, the trial court did not err by denying Plaintiffs' claim for compensation under the theory of an unconstitutional taking pursuant to N.C. Const. art. I, § 19.

C. Fruits of Labor

[4] Next, we address Plaintiffs' claim that Defendant violated their right to earn a living under N.C. Const. art. I, § 1 (the "fruits of labor clause") by shutting down their businesses. The fruits of labor clause states: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness." N.C. Const. art. I, § 1 (emphasis added). "This provision creates a right to conduct a lawful business or to earn a livelihood that is 'fundamental' for purposes of state constitutional analysis."

Treants Enterprises, Inc. v. Onslow Cnty., 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986).

The fruits of labor clause often has applied in cases involving licensing requirements. For example, in *Treants Enterprises, Inc.*, this Court held that a county ordinance requiring businesses "providing or selling male or female companionship" to obtain a license violated the fruits of labor clause because it "lack[ed] any rational, real, and substantial relation to any valid objective" of the county. 83 N.C. App. at 346–47, 357, 350 S.E.2d at 366–67, 373. In *State v. Harris*, our Supreme Court held licensing requirements in the dry cleaning industry violated the fruits of labor clause because of their "invasion of personal liberty and the freedom to choose and pursue one of the ordinary harmless callings of life[.]" 216 N.C. 746, 748, 751, 753, 6 S.E.2d 854, 856, 858–59 (1940). Likewise, in *State v. Ballance*, our Supreme Court held statutory licensing requirements for the practice of photography violated the fruits of labor clause as an invalid "exercise of the police power" because it "unreasonably obstruct[ed] the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood, and [bore] no rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare." 229 N.C. 764, 766, 772, 51 S.E.2d 731, 732, 736 (1949).

The context of licensing requirements is not the only application of the fruits of labor clause, however. Most recently, our Supreme Court held "Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees." *Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018). Our Supreme Court also has held a town council's fee schedule for vehicle towing services "implicates the fundamental right to earn a livelihood" under the fruits of labor clause. *King v. Town of Chapel Hill*, 367 N.C. 400, 408–09, 758 S.E.2d 364, 371 (2014) (quotation marks omitted). In *King*, the court held there was "*no rational relationship* between regulating fees and protecting health, safety, or welfare." *Id.* at 408, 758 S.E.2d at 371 (emphasis added). The court further stated, "This Court's duty to protect fundamental rights includes preventing *arbitrary* government actions that interfere with the right to the fruits of one's own labor." *Id.* at 408, 758 S.E.2d at 371 (emphasis added).

Accordingly, the fruits of labor clause of N.C. Const. art. I, § 1 may apply when a government actor shuts down an entire industry, here the bar industry, if the restrictions imposed by the government actor bear "no rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare," or in other words, if the

restrictions are arbitrary and unreasonable. *Ballance*, 229 N.C. at 772, 51 S.E.2d at 736; *King*, 367 N.C. at 408, 758 S.E.2d at 371. Plaintiffs here are not challenging the initial closures of all bars in Executive Order No. 118; they are challenging the provisions of Executive Order No. 141 allowing some types of bars to operate but requiring their bars to remain closed. In other words, the restrictions on Plaintiffs in particular must be supported by the "data and science" cited by Defendant as justification to shut down Plaintiffs' bars, while allowing other bars located in restaurants, breweries, or other establishments to resume operations.

There is no dispute that Defendant's public interest as stated in Executive Order No. 141 was: "[F]or the purpose of protecting the health, safety, and welfare of the people of North Carolina . . . [S]lowing and controlling community spread of COVID-19 . . . [T]o lower the risk of contracting and transmitting COVID-19[.]" Rather, the dispute arises from continuing restrictions on some types of bars while allowing others to reopen. Our Constitution, and specifically the fruits of labor clause, applies even when a government official acts with the best stated purposes.

"Traditionally our courts . . . have not hesitated to strike down regulatory legislation as repugnant to the state constitution when it is *irrational and arbitrary.*" *Treants Enterprises, Inc.*, 83 N.C. App. at 354, 350 S.E.2d at 371 (emphasis added). Accordingly, we must determine whether Defendant's actions were irrational and arbitrary. Exercises of State police power are constitutionally invalid when they are overbroad, unequally applied, or otherwise not carefully targeted at achieving the stated purpose. *Id.*; *Ballance*, 229 N.C. at 770–72, 51 S.E.2d at 735–36; *Harris*, 216 N.C. at 753, 758–61, 765, 6 S.E.2d at 859, 863–64, 866.

Here, Executive Order No. 118 shut down all bars selling "alcoholic beverages for onsite consumption." Plaintiffs concede in their Second Amended Complaint that "some period of closure may have been reasonable and necessary[.]" Plaintiffs argue, however, that the reasonableness and necessity ended when the State singled out Plaintiffs to remain closed in Executive Order No. 141 despite allowing restaurants to open for on-premises service under certain conditions. We agree.

Defendant's Executive Order No. 141 allowed "eating establishments" and "restaurants," as defined in N.C. Gen. Stat. § 18B-1000(2) and (6), to reopen with certain restrictions, such as: limiting the number of customers in the restaurant, limiting the number of people sitting at a table to ten, following signage, screening, and sanitation requirements, and marking six feet of spacing in lines at high-traffic areas. However,

bars having "a permit to sell alcoholic beverages for onsite consumption . . . and that are principally engaged in the business of selling alcoholic beverages for onsite consumption"—in other words, regular bars—had to remain closed. In Section Five of the order, Defendant provided the following reasoning in support of keeping bars closed:

> [B]y their very nature, [bars] present greater risks of the spread of COVID-19. These greater risks are due to factors such as people traditionally interacting in that space in a way that would spread COVID-19 . . . or a business model that involves customers or attendees remaining in a confined indoor space over a sustained period.

The order specifically allowed "retail beverage venues" to sell "beer, wine, and liquor for off-site consumption only" and specifically exempted "production operations at breweries, wineries, and distilleries" from closures.

Plaintiffs, however, specifically allege that they were as "equally capable . . . of complying with the reduced capacity, distancing, increased sanitation, and other requirements set forth" as other establishments that were permitted to reopen. We therefore must determine whether the forecast of evidence presented to the trial court presented a genuine issue of material fact that would preclude summary judgment, or if that forecast of evidence failed to present a genuine issue of material fact and Plaintiffs should prevail on summary judgment in their favor. *See Value Health Sols., Inc.*, 385 N.C. at 267, 891 S.E.2d at 114.

We must consider the "science and data" submitted by Defendant to the trial court as justification for the differentiation in restrictions placed on Plaintiffs' bars as opposed to the other types of bars allowed to resume operation "in the light most favorable" to Defendant to determine if there is a genuine issue of material fact as to whether Defendant acted irrationally and arbitrarily when he allowed restaurants and eating establishments to reopen but kept Plaintiffs' bars closed. *Id.*; *Treants Enterprises, Inc.*, 83 N.C. App. at 354, 350 S.E.2d at 371. In other words, we must attempt to square Defendant's reasoning for precluding Plaintiffs' bars from the opportunity to reopen under the specified guidelines that, for example, restaurants had, with their stated ability to follow the same guidelines as restaurants. Although we view the evidence in the light most favorable to Defendant for purposes of summary judgment, we must also review the scientific evidence that was before the trial court, which acts in its capacity as the gatekeeper of expert testimony, to determine whether it is sufficiently reliable. *See Taylor v. Abernethy*, 149 N.C. App. 263, 272–73, 560 S.E.2d 233, 239 (2002).

The trial court noted that Defendant relies upon his contention that "private bars by their nature present a higher risk than those other businesses to which Plaintiffs' invite comparison." The trial court further stated that it has "not simply deferred to Defendant without inquiry into the underlying evidence upon which Defendant exercised his police power." It concluded that, concerning the purported heightened risk of COVID-19 infections in private bars compared "to other businesses which allowed alcohol consumption and public gathering[,] Defendant has produced scientific studies and learned professional commentary asserting that they do and that there was then a need for greater regulation of private bars than other businesses which, in part, serve alcohol and allow public gathering."

We are unable to arrive at the same conclusion. Our careful review of the Record does not reveal the existence of any scientific evidence demonstrating Plaintiffs' bars, as opposed to the bars located in other establishments serving alcohol, posed a heightened risk at the time Executive Order No. 141 was issued. Even if we assume the materials submitted by Defendant address higher risks of COVID-19 infections in locations where alcohol is served and people gather, these materials do not include any distinctions between different types of bars. Defendant points us to Executive Order No. 188 in which he states that "studies have shown that people are significantly more likely to be infected with COVID-19 if they have visited a bar or nightclub for on-site consumption." First, we note that Executive Order No. 188 was issued 6 January 2021, and Executive Order No. 141 was issued 20 May 2020, meaning that this purported scientific rationale for closing private bars but no other types of bars was over seven months delayed. Second, Defendant cannot reasonably rely on his own assertion within an executive order as though it were itself a scientific study. Next, Defendant references a Washington Post article dated 14 September 2020 which states that there is a "statistically significant national relationship between foot traffic to bars one week after they reopened and an increase in cases three weeks later" compared to reopening restaurants which, according to cellphone data, is not as strongly correlated with a rise in cases. A news article, however, is not a scientific study nor is it apparent that it was based on a scientific study. Defendant presented to the trial court two other news articles. One is a National Public Radio article titled "How Bars Are Fueling COVID-19 Outbreaks," which is an interesting opinion piece but does not link to a scientific study (or, pursuant to our review, even refer to a study). The other is an article titled "Over 100 COVID-19 cases linked to outbreak at Tigerland Bars in Baton Rouge," which reports on a COVID-19 outbreak at a Louisiana bar, but the article

says nothing about the heightened risk bars purportedly pose compared to other establishments serving alcohol. "Research" such as these news articles could be conducted by private citizens utilizing Internet search engines. In fact, many of the documents in the Record were gathered from Internet searches as evidenced by the tags and links at the bottom of the printed pages. Excepting one, none of the documents purport to be scientific studies.[3]

Defendant does point to one scientific study that is in the Record, a study dated 28 September 2020 which states the following:

> [P]ost-opening surges seemed to be strongly correlated with the opening of bars. Regardless of the timing or sequence of other relaxations, opening bars was followed 11-12 days later by surging infection rates.
>
> . . .
>
> Bars: The effect of closing and opening bars became evident in those states that opened their economies in stages[.] Although most states closed bars and restaurants simultaneously during their early shutdowns, some opened them at different times during the re-openings. We found that, regardless of other relaxations, new infections surged beginning 11-12 days after bars were opened, and fell once again about 8 days after bars were re-shuttered. This suggests that closing (and re-opening) settings that might not be conducive to social distancing has more impact on new infection rates than would opening other types of businesses (dog groomers, markets, hardware stores; even restaurants).

Again, this study does not differentiate between various types of bars; it would apply equally to the bars Defendant allowed to resume operations as to Plaintiffs' bars. Moreover, another significant problem with Defendant's reliance on this study is that Executive Order No. 141, which closed private bars but allowed restaurants to reopen, was issued 20 May 2020, and this study was not posted until 28 September 2020. Defendant could not have relied upon this study and, therefore, at the time the

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3. Some studies and articles regarding COVID-19 in general are included, but these simply address what COVID-19 is, how it affects people generally, and other basic information about the disease. We do not discount this information and we consider it accurate, at least for purposes of review on summary judgment, but this information does not address bars of any sort or how COVID-19 may be spread in various types of establishments.

executive order was issued, could only speculate that bars might pose a greater risk than restaurants where alcohol is also consumed.

Overall, the articles and data submitted by Defendant entirely fail to address any differences in the risk of spread of COVID-19 between the bars he allowed to reopen and Plaintiffs' bars which remained closed. Defendant has not demonstrated any logic in the complete closure of bars for on-premises service when the same measures that allowed other types of bars, such as hotel and restaurant bars, to open could have been applied to the operation of those businesses. Plaintiffs assert that they were as "equally capable . . . of complying with the reduced capacity, distancing, increased sanitation, and other requirements set forth for those" other establishments allowed to reopen. Allowing restaurants and some types of bars to reopen with restricted capacity while simultaneously prohibiting Plaintiffs' bars from reopening in like manner was arbitrary and capricious. Defendant has not produced any forecast of evidence demonstrating Plaintiffs' bars would be unable to comply with the same restrictions placed upon other types of bars allowed to reopen. We conclude, then, Defendant failed to present any "data and science" tending to show a rational basis for allowing some types of bars to resume operations while keeping other bars closed. The continued closure of Plaintiffs' bars while permitting other similar establishments to reopen under certain conditions violated Plaintiffs' right to enjoy the fruits of their own labor from the operation of their respective businesses. Therefore, the unequal treatment of Plaintiffs compared to other similar establishments was illogical and not rationally related to Defendant's stated objective of slowing the spread of COVID-19. Accordingly, we vacate the trial court's denial of summary judgment of Plaintiffs' claim under the fruits of labor clause of N.C. Const. art. I, § 1, and we remand this cause of action to the trial court for reconsideration in light of our above analysis.

Regarding Plaintiffs' claim for relief for a violation of the fruits of labor clause, our Supreme Court has stated of a defendant's violation of constitutional rights:

> [T]he common law provides a remedy for the violation of plaintiff's constitutionally protected right of free speech. What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to attempt to establish the

> redress recoverable in the event plaintiff is successful . . . . Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case. When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong.

Corum v. UNC Through Bd. of Governors, 330 N.C. 761, 784, 413 S.E.2d 276, 290–91 (1992) (citation omitted).

D. Attorneys' Fees

[5] Plaintiffs next argue the trial court erred in dismissing their claim for attorneys' fees associated with the delay in producing public records. Under N.C. Gen. Stat. § 132-9, a "party seeking disclosure of public records who substantially prevails [shall] recover its reasonable attorneys' fees if attributed to those public records." N.C. Gen. Stat. § 132-9(c) (2023).

N.C. Gen. Stat. § 132-9(a) provides:

> Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders *if the person has complied with* [N.C. Gen. Stat. §] 7A-38.3E.

(Emphasis added).

N.C. Gen. Stat. § 7A-38.3E (2023), in turn, provides: "Subsequent to filing a civil action under Chapter 132 of the General Statutes, a person shall initiate mediation pursuant to this section. Such mediation shall be initiated no later than 30 days from the filing of responsive pleadings with the clerk in the county where the action is filed." N.C. Gen. Stat.

§ 7A-38.3E(b). Specifically addressing the initiation of mediation, N.C. Gen. Stat. § 7A-38.3E(c) provides: "[t]he party filing the request for mediation shall mail a copy of the request [for mediation form] by certified mail, return receipt requested, to each party to the dispute." The statute further prescribes the method for selecting the mediator and provides for the mediation procedure. N.C. Gen. Stat. § 7A-38.3E(c), (d).

Here, the trial court found it had jurisdiction because "Plaintiffs requested initiation of mediation pursuant to [N.C. Gen. Stat.] § 7A-38.3E when presenting their claim," and the trial court referenced paragraph 12 of Plaintiffs' Second Amended Complaint ("Plaintiffs respectfully request the initiation of mediation of this dispute pursuant to N.C. Gen. Stat. § 7A-38.3E . . . or, alternatively, for the mediation requirement to be dispensed with pursuant to N.C. Gen. Stat. § 7A-38.3E(d)").

Defendant argues the trial court lacked jurisdiction because although Plaintiffs requested mediation in their complaint, they did not initiate or participate in mediation, and the requirement to mediate was never waived. We agree.

N.C. Gen. Stat. § 132-9(a) focuses on granting a court jurisdiction to issue orders compelling disclosure ("the court shall have jurisdiction to issue such orders *if the person has complied with* [N.C. Gen. Stat. §] 7A-38.3E") (emphasis added). Here, Plaintiffs requested documents from Defendant and then requested initiation of mediation in their Second Amended Complaint. However, neither party took any action to initiate mediation. Merely requesting mediation in a complaint does not constitute initiating mediation. Otherwise, parties could bypass the statutory scheme, which specifically states a party "shall initiate" mediation, by merely requesting mediation in a complaint and then applying to a court for an order compelling disclosure, rendering any mediation requirement meaningless. A party must do more than merely request mediation in a complaint in light of the specific requirements contained in N.C. Gen. Stat. § 7A-38.3E(c), which requires the appointment of a mediator whether by parties' agreement or by appointment of the senior resident superior court judge if the parties do not agree. N.C. Gen. Stat. § 7A-38.3E(e) permits waiver of mediation, but it assumes a mediator has been chosen because it requires the parties to inform the mediator of their waiver in writing. N.C. Gen. Stat. § 7A-38.3E(e). Here, there is no Record evidence that a mediator was ever appointed or that the parties waived mediation.

For these reasons, we hold Plaintiffs did not "initiate mediation" within the meaning of N.C. Gen. Stat. § 7A-38.3E(a) which would have

granted the trial court jurisdiction under N.C. Gen. Stat. § 132-9(a) (requiring a party to comply with N.C. Gen. Stat. § 7A-38.3E). Therefore, the trial court lacked jurisdiction to issue an order compelling disclosure of the records. N.C. Gen. Stat. § 132-9(a). Accordingly, the trial court erred in concluding it had jurisdiction to consider and rule on Plaintiffs' Public Records Act claim.

E. Equal Protection

[6] Plaintiffs contend Defendant violated their right to equal protection under N.C. Const. art. I, § 19, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Specifically, Plaintiffs allege a violation of their right to equal protection in their second cause of action: "Plaintiffs' discriminatory exclusion from [Defendant's] executive orders allowing similar businesses to operate while disallowing the Plaintiffs' businesses have denied the Plaintiffs equal protection afforded by . . . Art. I, sec. 19 [of the] North Carolina Constitution. . . . Plaintiffs have been deprived of their right to equal protection under the law."

We note courts generally determine a level of scrutiny at the outset of an equal protection analysis. "Before embarking upon an equal protection analysis, we must first determine the level of scrutiny to apply." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002). If the government action "affects the exercise of a fundamental right" or disadvantages a suspect class, strict scrutiny applies; conversely, if the classification does neither of those things, a rational basis test is appropriate. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).

Here, Defendant's executive orders affected Plaintiffs' right to earn a living, as discussed in Section C of our analysis, and therefore implicated a fundamental right under the North Carolina Constitution. Plaintiffs allege a violation of equal protection by asserting Defendant blocked their ability to earn a living by prohibiting the reopening of their businesses under the exact same standards and opportunity given to other businesses. N.C. Const. art. I, § 19. This is especially true where Plaintiffs specifically assert their ability and willingness to have complied with all

of the same protocols implemented by other businesses but were denied that opportunity.

It is illogical and arbitrary to attempt to achieve Defendant's stated health outcomes by applying different reopening standards to similarly situated businesses that could have complied with those standards. In other words, if restaurants serving alcohol could operate at fifty percent capacity and keep groups six feet apart with both food and alcohol at the customers' tables, Defendant has failed to present any forecast of evidence of any reason bars would not be able to do the same with alcohol service. Therefore, Executive Order No. 141 was underinclusive for not allowing bars to participate in the same phased reopening as restaurants that serve alcohol. The unequal treatment of Plaintiffs had the effect of denying their fundamental right to earn a living by the continued operation of their businesses.

Accordingly, we conclude Defendant violated Plaintiffs' right to "the equal protection of the laws" under N.C. Const. art. I, § 19.

IV. Conclusion

Because Defendant did not "take" Plaintiffs' property within the statutory meaning in N.C. Gen. Stat. § 166A-19.73, Plaintiffs are not entitled to compensation under that statute. Defendant did not commit a "taking" of Plaintiffs' property under our constitution which would have entitled them to recovery for an unconstitutional taking. However, we hold the trial court erred in denying Plaintiffs' partial motion for summary judgment for liability as to the fruits of their labor and equal protection claims. We affirm the trial court's determination that Plaintiffs were not entitled to an award of attorneys' fees under the Public Records Act.

We remand this matter to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and GRIFFIN concur.

CRAIG SCHROEDER AND MARY SCHROEDER, PLAINTIFFS
v.
THE OAK GROVE FARM HOMEOWNERS ASSOCIATION A/K/A THE OAK GROVE FARM HOMEOWNERS ASSOCIATION, INC., DEFENDANT

No. COA22-919

Filed 16 April 2024

Real Property—restrictive covenants—interpretation as a matter of law—"household pets"—chickens—directed verdict analysis

In plaintiffs' declaratory judgment action to determine whether keeping chickens on their property violated their homeowner's association restrictive covenants, where there was no evidence showing that plaintiffs' chickens did not qualify as "household pets" as a matter of law—a category of animals allowed by the covenants as opposed to livestock or other animals kept for commercial purposes—the trial court erred by denying plaintiffs' motion for directed verdict and judgment notwithstanding the verdict and by entering judgment requiring plaintiffs to pay $31,500 in fines. In interpreting the covenants as a whole and viewing the evidence in the light most favorable to the nonmovants, plaintiffs' chickens, despite being "poultry" (disallowed by the covenants), were kept primarily for plaintiffs' personal enjoyment and not for commercial purposes. Therefore, the case should not have been sent to the jury, and the matter was remanded for entry of judgment notwithstanding the verdict in favor of plaintiffs.

Appeal by plaintiffs from judgment entered 18 March 2022 and order entered 3 May 2022 by Judge Jonathan W. Perry in Superior Court, Union County. Heard in the Court of Appeals 9 May 2023.

Higgins Benjamin, PLLC, by John F. Bloss and Margaret M. Chase, for plaintiffs-appellants.

McAngus Goudelock & Courie, PLLC, by Colin E. Scott, for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal from the trial court's judgment ordering them to pay $31,500.00 in homeowners association fines for violation of restrictive covenants, specifically, keeping chickens on their lot based on the jury's

verdict that the Plaintiffs' chickens were not "household pets." Because the trial court did not interpret the language of the restrictive covenants correctly, and made rulings based on a misapprehension of the law regarding the restrictive covenants, we reverse the judgment and remand for entry of judgment notwithstanding the verdict in favor of Plaintiffs.

I. Background

Plaintiffs owned land and a home in a housing development known as Oak Grove Farm. Defendant Oak Grove Farm Homeowners Association ("Defendant HOA") is the homeowners association for the Oak Grove Farm development. Plaintiffs' lot is subject to restrictive covenants, including Section 13, entitled "LIVESTOCK":

> A maximum of three horses may be kept and stabled on any lot or combination of adjoining lots under common ownership. . . . *No other animals, livestock, or poultry of any kind shall be raised, bred, or kept on any lot, except that dogs, cats, or other household pets, may be kept provided that they (including horses) are not kept, bred, or maintained for any commercial purpose.* No dog kennels of any type shall be kept or maintained on the property.

(Emphasis added.)

After Defendant instituted an enforcement action against Plaintiffs and imposed fines for violation of Section 13 of the restrictive covenants, on 31 August 2020, Plaintiffs filed a verified complaint requesting a declaratory judgment that "their flock of pet chickens do not violat[e]" the restrictive covenants, an injunction against enforcement of the covenants against them, and alleging a claim for "breach of fiduciary duty/selective enforcement[.]" (Capitalization altered.) On or about 13 November 2020, Defendant filed a motion to strike and/or dismiss, an answer denying most of the substantive allegations, and counterclaims for "declaratory judgment and permanent injunction."

A jury trial on all claims began on 15 February 2022. At trial, Plaintiffs presented evidence which tended to show that before moving into Oak Grove Farm, Plaintiffs made inquiries through their realtor and learned other residents were keeping chickens on their properties in Oak Grove Farm as "household pets," despite the restrictive covenant prohibiting "poultry." In 2017, Plaintiffs bought a home on a 17-acre lot in Oak Grove Farm, built a chicken coop, and bought their first hens.

On 11 March 2020, the Defendant HOA's property manager sent a letter demanding Plaintiffs remove "the poultry" and chicken coop from

the property. Sometime in April 2020, Plaintiffs found a new home for all their chickens. On 16 April 2020, Defendant HOA requested an inspection of the property, and Plaintiff Mrs. Schroeder declined. Plaintiffs then consulted with an attorney and returned some of their chickens to the lot, keeping them in the barn. At some point, Plaintiffs kept as many as 60 chickens. After receiving another violation letter, Plaintiffs appeared at a hearing before Defendant HOA's Board – which consisted of two people, one of them being the property manager who had sent the initial violation letter – on or about 16 July 2020, and Defendant determined they were in violation of the "livestock" provision of the restrictive covenants and imposed a fine of $100 per day for keeping chickens in their barn.

Plaintiffs' flock included ornamental and fancy breeds of chickens. Mrs. Schroeder testified the chickens liked to be held and carried, and she spent an hour and a half to two hours with her chickens each day, took care of their medical needs, and bathed and blow-dried them in the house. Plaintiffs testified every chicken knew its name and would come when called. Plaintiffs testified the chickens were not bred for meat, and they never ate any of them. Mrs. Schroeder admitted that in April of 2019, she wrote in a social media post she sold "farm fresh eggs" and was looking for a place to donate extra eggs; however, she testified she never sold the eggs, but she did give extra eggs to neighbors. Neighbors familiar with Plaintiffs and their chickens testified they saw Mrs. Schroeder holding the chickens and spending a lot of time with them.

In response to Defendant's imposition of fines, on 4 December 2021, Plaintiffs moved the chickens to a friend's property near Lake Norman, and Mrs. Schroeder commuted once or twice a week, an hour and twenty minutes each way, to visit the chickens. Mrs. Schroeder testified that the reason for moving the chickens was "[b]ecause the fines were just getting too much[,]" and "[w]e couldn't justify it anymore." Despite moving the chickens, Mrs. Schroeder stated when she visited them they would still recognize her and know their names.

At the close of Plaintiffs' evidence, Plaintiffs moved for a directed verdict, which the trial court denied. Before the case was submitted to the jury, Plaintiffs also requested specific jury instructions based primarily upon *Steiner v. Windrow Estates Home Owners Ass'n*, 213 N.C. App. 454, 713 S.E.2d 518 (2011), but their request was denied. Ultimately, the jury was asked to answer two questions; the first was: (1) "Were/Are the chickens that were raised bred or kept on the Plaintiffs' property household pets?" Because the jury answered "No[,]" to that question they were not required to answer the second question, (2) "Were[/]are

the Plaintiffs' chickens kept, bred or maintained for a commercial purpose?" After the jury was excused, the parties acknowledged that they had mutually agreed, "If jury rules in favor of Defendant, and they did, accrued fines of $31,500 would be included in the judgment aris[ing] from [the] phase 1 verdict." The parties further agreed to "release any claims for sanctions, attorney fees[,]" and Plaintiffs "dismiss[ed] count 3 [breach of fiduciary duty/selective enforcement] of complaint with prejudice[.]"

On 18 March 2022, the trial court entered a judgment declaring Plaintiffs in violation of the livestock provision and required them to pay $31,500.00. On 28 March 2022, Plaintiffs filed a motion for judgment notwithstanding the verdict ("JNOV"). The trial court denied the JNOV. Plaintiffs appeal from both the judgment and the trial court's denial of the motion for JNOV.

II. Directed Verdict and JNOV

Plaintiffs contend the trial court should have granted their motions for directed verdict and JNOV, or at the very least, a new trial should be ordered.

A. Standard of Review

> A motion for JNOV is simply a renewal of a party's earlier motion for directed verdict. Thus, when ruling on this motion, the trial court must consider the evidence in the light most favorable to the non-movant, taking the evidence supporting the non-movant's claims as true with all contradictions, conflicts, and inconsistencies resolved in the non-movant's favor so as to give the non-movant the benefit of every reasonable inference. Likewise, on appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's *prima facie* case.

Ellis v. Whitaker, 156 N.C. App. 192, 194-95, 576 S.E.2d 138, 140 (2003) (citations, quotation marks, ellipsis, and brackets omitted).

Thus, to prevail on a motion for directed verdict, Plaintiffs must first show as a matter of law that their chickens were their "household pets." If Plaintiffs establish that the chickens were household pets, they must also demonstrate as a matter of law they were not using their household pets for commercial purposes. Put simply, Plaintiffs must establish that

the two questions the trial court presented to the jury should have never been given to the jury as the finder of fact based on the correct legal interpretation of the covenants. *Coletrane v. Lamb*, 42 N.C. App. 654, 657, 257 S.E.2d 445, 447 (1979) ("It is the province of the jury to weigh the evidence and determine questions of fact." (citation omitted)).

B. Interpretation of Restrictive Covenants Generally

All the arguments on appeal require interpretation of the restrictive covenants, so we first address the legal standards for interpretation of the covenants. "Interpretation of the language of a restrictive covenant is a question of law reviewed *de novo*." *Erthal v. May*, 223 N.C. App. 373, 378, 736 S.E.2d 514, 517 (2012). Thus, "[i]nterpretation of the language of a restrictive covenant" is not a jury question, as the jury is the finder of fact, not law. *Coletrane*, 42 N.C. App. at 657, 257 S.E.2d at 447. Further, "restrictive covenants are contractual in nature." *Erthal*, 223 N.C. App. at 378, 736 S.E.2d at 517.

Restrictive covenants are a special form of contract, and they are strictly construed to favor *unrestrained* use of real property:

> We also note that . . . while the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the *free and unrestricted* use and enjoyment of land be encouraged to its fullest extent.
>
> The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.
>
> Covenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous. This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court.

Id. at 379-80, 736 S.E.2d at 518-19 (emphasis added) (citation and brackets omitted).

Further, restrictive covenants should be interpreted in accord with the intent of the parties and all covenants should be read together:

> Restrictive covenants are strictly construed, but they should not be construed in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant. The fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions. Covenants that restrict the free use of property are to be strictly construed against limitations upon such use.
>
> In interpreting restrictive covenants, doubt and ambiguity are resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.

Danaher v. Joffe, 184 N.C. App. 642, 645, 646 S.E.2d 783, 785-86 (2007) (emphasis in original) (citations, quotation marks, and brackets omitted). With these principles in mind, we must consider the relevant provisions of the restrictive covenants at issue here.

C. Restrictive Covenants regarding Animals

The primary relevant provisions are:

> 12. PETS. Any person or entity having a possessory property right in an animal as defined by the Union County Animal Control Ordinance shall keep said animal within the bounds of the subdivision herein restricted and shall be kept leashed when off the owner's premises.
>
> 13. LIVESTOCK. A maximum of three horses may be kept and stabled on any lot or combination of adjoining lots under common ownership. In the event of ownership of multiple lots, the owner shall be entitled to increase the number stabled by the number of contiguous lots owned. (For example: The owner of two contiguous lots may

> stable six horses.) *No other animals, livestock, or poultry of any kind, shall be raised, bred, or kept on any lot, except that dogs, cats, or other household pets, may be kept provided that they (including horses) are not kept, bred, or maintained for any commercial purpose.* No dog kennels of any type shall be kept or maintained on the property.

(Emphasis added.)

We also note that Section 30 of the covenants, while not speaking directly about pets or animals, provides that the "captions preceding the various Articles of these Restrictions are for the convenience of reference only, and *shall not* be used as an aid in interpretation or construction of these restrictions[.]" (Emphasis added.) This covenant is consistent with general contract law, as

> *headings do not supplant actual contract language and are not to be read to the exclusion of the provisions they precede.* Moreover, a contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible.

Canadian Am. Ass'n of Pro. Baseball, Ltd. v. Ottawa Rapidz, 213 N.C. App. 15, 20, 711 S.E.2d 834, 838 (2011) (emphasis added). But we also remain mindful we must "study and consider[ ] . . . *all* the covenants contained in the instrument or instruments creating the restrictions." *Danaher*, 184 N.C. App. at 645, 646 S.E.2d at 786. Section 12 specifically defines "said animal" based on the Union County Animal Control Ordinance ("Ordinance"): "an animal *as defined* by the Union County Animal Control Ordinance shall keep said animal[.]" (Emphasis added). Thus, without using the heading "Pets" to supply a definition of "pets," in accord with Section 30, we must still give full effect to the substance of Sections 12 and 13.

Thus, considering both Sections 12 and 13, these sections use six terms which may apply to animals other than horses, dogs, or cats. These terms are "pets," "animals," "an animal as defined by the Union County Animal Control Ordinance," "livestock," "poultry," and "household pets." Although the trial court focused only on Section 13, entitled "LIVESTOCK[,]" in interpretation of the restrictive covenants, "we are required instead to examine and interpret the covenants in their entirety." *See Erthal*, 223 N.C. App. at 381, 736 S.E.2d at 519 ("Plaintiffs ask that we look only to the word 'pasturing' to determine the meaning of the covenants, as they attempt to extrapolate a prohibition on

'commercial' pasturing (as opposed to 'private' pasturing) from the word 'pasturing', but we are required instead to examine and interpret the covenants in their entirety." (citation omitted)). As we are required to read the covenants "in their entirety[,]" *id.*, we cannot ignore Section 12 as the trial court did.

Section 12, entitled "PETS[,]" refers to "an animal as defined by the" Ordinance. Section 13 also uses the term "animal," and the definition of "animal" as defined by the Ordinance used in Section 12 would logically apply to the word "animal" in Section 13. In other words, the definition of the word "animal" in both Sections 12 and 13 is provided by reference to the definition in the Ordinance.

Turning to the Ordinance, "animal" is defined as "any live, vertebrate creature, wild or domestic, other than human beings, endowed with the power of voluntary motion." Certainly, chickens are "animals" as defined by the Ordinance. Thus, Section 12 provides that "any live, vertebrate creature, wild or domestic, other than human beings, endowed with the power of voluntary motion" should be kept within the subdivision bounds and leashed "when off the owner's premises."[1] Essentially, Section 12 provides that pets – which may include any sort of "animal" as defined by the Ordinance – must be leashed when not on the owner's premises.

Section 13 provides more detailed requirements as to animals. This section refers to three specific types of animals – horses, dogs, and cats – and more generally to "*other animals*, livestock, or poultry of any kind." (Emphasis added.) Section 13 does not include any language which explains what a "household pet" is, and the primary language relevant here is:

> No other animals, livestock, or poultry of any kind, shall be raised, bred, or kept on any lot, except that dogs, cats, or other household pets, may be kept provided that they (including horses) are not kept, bred, or maintained for any commercial purpose.

In context, "no *other* animals" refers back to horses, as the first two sentences of Section 13 specifically provide that up to three horses can

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1. We pause to note this provision technically provides that an owner's pet must be kept *within the bounds of the subdivision*. The reference to the subdivision bounds instead of a lot is likely a typographical error in the covenants, but fortunately there is no issue on appeal regarding this particular provision. Plaintiffs did not argue they were prohibited from removing the chickens from the subdivision based upon this provision of Section 12.

be kept per lot in the development. (Emphasis added.) From the first two sentences, it is clear homeowners may keep up to three horses per lot. There is no limitation on the number of other types of animals allowed to be kept, including "dogs, cats, or other household pets." Further, horses must not be "kept, bred, or maintained for any commercial purpose" and dog kennels are prohibited, although other provisions of the restrictive covenants allow "a maximum of one accessory building" per lot. Thus, for purposes of this case, effectively the covenant reads, "[Other than horses, no] livestock or poultry of any kind, shall be raised, bred, or kept on any lot, except that dogs, cats or other household pets, may be kept provided that they . . . are not kept, bred, or maintained for any commercial purpose."

Further, since the word "household" is an adjective modifying the noun "pet," an animal must first fall within the definition of "pet" before it can be classified as a "household pet." *See Steiner v. Windrow Estates Home Owners Ass'n, Inc.*, 213 N.C. App. 454, 462, 713 S.E.2d 518, 524 (2011) ("We first note that the word 'household' may be either a noun or an adjective; here it is used as an adjective, modifying the word 'pet.' While Merriam-Webster's Collegiate Dictionary does not define 'household pet,' it does define 'household' as an adjective in pertinent part as 'of or relating to a household: DOMESTIC[.]' Thus, the adjective definition of 'household' requires that one consider the noun definition of 'household.' 'Household' as a noun is defined as 'those who dwell under the same roof and compose a family; *also*: a social unit composed of those living together in the same dwelling[.]' " (emphasis in original) (citations omitted)).

Thus, in summary, and as relevant to this case, the restrictive covenants provide pets, which may include "any live, vertebrate creature, wild or domestic, other than human beings, endowed with the power of voluntary motion" should not be kept on an owner's property *unless* it is a horse, dog, cat, or "household pet," and none of these animals may be kept for commercial purposes. Even if Plaintiffs' chickens are considered "poultry" under the covenants, they still may be kept on the property so long as they meet the definition of "household pets." *See Bryan v. Kittinger*, 282 N.C. App. 435, 438, 871 S.E.2d 560, 562 (2022) ("While the first clause forbids the keeping of any 'animals,' the second clause clearly allows the keeping of animals, so long as they are 'household pets' and otherwise not used for a commercial purpose. In the same way, where the first clause forbids the keeping of 'poultry,' the second clause could be reasonably read to allow poultry—which, we note, are animals—kept as 'household pets' and otherwise not kept for any commercial purpose.").

D. Evidence regarding "Household Pets"

We will now consider the trial court's ruling on Plaintiffs' motion for JNOV. As discussed above,

> A motion for JNOV is simply a renewal of a party's earlier motion for directed verdict. Thus, when ruling on this motion, the trial court must consider the evidence in the light most favorable to the non-movant, taking the evidence supporting the non-movant's claims as true with all contradictions, conflicts, and inconsistencies resolved in the non-movant's favor so as to give the non-movant the benefit of every reasonable inference. Likewise, on appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's *prima facie* case.

Ellis, 156 N.C. App. at 194-95, 576 S.E.2d at 140 (citations, quotation marks, ellipsis, and brackets omitted).

As to the first question, whether Plaintiffs' chickens were household pets, Plaintiffs contend they were entitled to judgment as a matter of law because "[a]ll witnesses, including Defendant's designated Board representative and its only fact witness, admitted without reservation that . . . [Plaintiffs] share the same love and bond with their chickens that others have with more traditional pets." Defendant argues there was more than enough evidence to take the case to the jury.

1. Plaintiffs' Evidence regarding "Household Pets"

We have provided much of Plaintiffs' relevant evidence in the background section, but we again note, Plaintiffs' evidence included the chickens liked to be held and carried, and Mrs. Schroeder spent an hour and a half to two hours with her chickens each day, took care of their medical needs, and bathed and blow-dried them in the house. Plaintiffs testified every chicken knew its name and would come when called. Plaintiffs testified the chickens were not bred for meat, and they never ate any of them. Mrs. Schroeder admitted that in April of 2019, she wrote in a social media post she sold "farm fresh eggs" and was looking for a place to donate extra eggs; however, she testified she never sold the eggs, but she did give extra eggs to neighbors. After having the chickens removed, Mrs. Schroeder drove over an hour each way once to twice a

week to visit the chickens. Neighbors familiar with Plaintiffs and their chickens testified they saw Mrs. Schroeder holding the chickens and spending a lot of time with them.

2. Defendant's Evidence regarding "Household Pets"

Defendant did not dispute Plaintiffs' evidence regarding how they cared for or treated their chickens. Instead, Defendant presented evidence from its two Board members, Mr. Frye and Ms. Tucker, of their own personal interpretations of the covenants and sought to use these interpretations as the controlling law. Mr. Frye and Ms. Tucker interpreted the covenants as saying chickens are "poultry" and incapable of being household pets. Mr. Frye testified that he and Ms. Tucker determined Plaintiffs were in violation of Section 13 because it entirely prohibits "poultry" from being a "household pet[.]" Mr. Frye testified "there is no way that chickens can be household pets[,]" and the Board determined Plaintiffs were in violation

> [b]ecause it says no poultry of any kind. So I consider chickens poultry. I do not believe that they qualify as household pets. We've talked about this definition before and I -- my interpretation or the association's interpretation is that household pets are those that are maintained inside the house.

Mr. Frye acknowledged the Board had considered various animals other than cats and dogs as "household pets" and specifically considered dogs and cats as "household pets" even if they lived outside of the house. According to Mr. Frye, guinea pigs, hamsters, parrots and rabbits are "household pets[,]" but a goat cannot be a "household pet" because it is "livestock" and not "typically kept as [a] household pet[]." Mr. Frye further acknowledged another resident of Oak Grove Farms once had a "pig as a pet," which he did not consider a "traditional pet" but it "seemed to be their household pet[,]" and he was not on the Board at that time. Mr. Frye also testified the number of chickens on Plaintiffs' lot was not an issue to the Board and agreed that "[o]ne chicken is a violation, 25 chickens are a violation, according to the association." But the meaning of a restrictive covenant cannot be based on the subjective beliefs of the Defendant's Board members at a particular moment; the restrictive covenant must first be interpreted as a matter of law by the court. *See generally Erthal*, 223 N.C. App. at 378, 736 S.E.2d at 517 ("Interpretation of the language of a restrictive covenant is a question of law reviewed *de novo*.").

Plaintiffs' counsel then asked Mr. Frye about the definition of "pet" as an "animal" as defined in the Ordinance. Defendant's counsel then raised an objection to Plaintiffs' use of the Ordinance definition of "animal." Defendant cited no rule of evidence to support the objection to the very definition supplied by the restrictive covenants but instead argued Mr. Frye was "not an expert. He's being treated as an expert" although Mr. Frye himself had testified he and Ms. Tucker were the sole interpreters of the restrictive covenants. Defendant also argued that "Number 12, [the 'PETS' provision,] isn't an issue. Number 13, the livestock provision, actually says household pets, which is a different term than pets."

After an extensive discussion with counsel, the trial court ultimately sustained Defendant's objection to Plaintiffs' use of the definition of "animal" in the Ordinance and questioning Mr. Frye on this definition, ruling that

> [a]s I'm looking at it the question related for [Plaintiffs' counsel] to provision Number 12 of the covenants and restrictions, which was labeled pets, I mean that looks to me like it's just a leash law, to put it in simple terms. That contains a reference to the Union County Animal Control Ordinance. The Union County Animal Control Ordinance has been handed up, and there is a definition of animals. So I mean under 401 given the broad definition of relevance I do think it's relevant, but at the same time under 403 I think it's got the tendency to mislead the jury with the simple definition of animals and that only reference in Section 12, which seems pretty clear to me just relates to control of animals. I'm going to find in the sense of misleading it's more prejudicial than probative so I'm not going to let it in.[2]

3. Definition of "Household Pets"

As the trial court failed to interpret the covenants as a matter of law to provide guidance as to the meaning of "household pets[,]" and Plaintiffs' argument on appeal is that the chickens are "household pets" as a matter of law, we must now determine what "household pets" means. *See generally Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App.

2. Although we will not address Plaintiffs' issue on appeal as to the exclusion of this evidence, the trial court's ruling tends to illustrate the fundamental problem of the lack of an interpretation of the covenants by the trial court before considering whether any issues of fact remained for submission to the jury.

168, 178, 506 S.E.2d 267, 273-74 (1998) (wherein this Court determined the matters of law in a JNOV and did not remand back to the trial court for such determinations). We have already noted that under Section 12 a pet is an "animal" that includes "any live, vertebrate creature, wild or domestic, other than human beings, endowed with the power of voluntary motion" and household is an adjective modifying "pet." *See Steiner*, 213 N.C. App. at 462, 713 S.E.2d at 524-25.

During the trial, Plaintiffs requested jury instructions based on the language defining the term "pet" from *Steiner*: "6. Merriam-Webster's Dictionary defines a 'pet' as 'a domesticated animal kept for pleasure rather than utility.' " *Id.*

In *Steiner*, the question was if goats were prohibited as "livestock" or allowed as "household pets" per the restrictive covenants. *Id.* at 458-59, 713 S.E.2d at 522-23. The plaintiffs owned two dwarf Nigerian goats they considered as household pets, while the defendant HOA claimed the goats were "livestock" and therefore prohibited. *Id.* at 455, 713 S.E.2d at 520. Windrow Estates was also an equestrian community where the covenants specifically allowed horses. *Id.* In *Steiner*, this Court considered the interpretation of a restrictive covenant very similar to the covenant in this case:

> 18. Restrictive Covenant 9 states: "No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot except that horses, dogs, cats or other pets may be kept provided they are not kept, bred, or maintained for any commercial purposes, unless allowed by Windrow Estates Property Owners' Association, and provided that such household pets do not attack horses or horsemen."

Id. at 455-56, 713 S.E.2d at 521.

In *Steiner*, the covenants did not provide any definition for "household pet" or "pet[,]" and thus this Court used the dictionary definition for "pet." *See id.* at 459, 713 S.E.2d at 522-23. This Court ultimately affirmed the trial court's order granting summary judgment in favor of the Steiners because the goats were "household pets" based on the plain language of the covenant:

> Defendant next contends that because "the goats are not kept in the house, but instead outside with the horses they are not household pets. . . .
>
> Despite defendant's argument, we do not find the fact that the goats do not literally live *inside* the house to be

> dispositive of the issue. First, the "ordinary meaning" of the adjective "household" requires that something be "of or relating to" the household, not actually inside of the house. This definition is consistent with a practical and commonsense understanding of the term "household pet." Many pet owners keep their dogs in a pen in the backyard and do not permit them into the house; many pet owners have a cat which lives outside and may more often than not be found wandering in a neighbor's yard rather than its own, yet these animals are most certainly considered "household pets" by their respective owners. Fred and Barney "walk on a leash in the Steiners' yard;" "follow the Steiners around in their enclosure and in the yard; and sleep in an Igloo Dog House of medium size that is placed within the stable of the Property." Again, defendants do not challenge the facts as to Fred and Barney's living conditions and relationship to the plaintiffs. We conclude that there is no issue of material fact that Fred and Barney are "household pets" within the meaning of paragraph 9 of the Restrictive Covenants. Had the drafters of the Restrictive Covenants wished to limit the definition of "household pets" to animals more traditionally considered as pets, such as dogs and cats, they certainly may have done so; instead the Restrictive Covenants expands the variety of animals which may be considered as pets by allowing for other pets, which in this instance includes the goats Fred and Barney.

Id. at 462-63, 713 S.E.2d at 524-25 (emphasis in original) (citations, ellipses, brackets, and footnote omitted).

While here, a definition of "animal" is provided to aid in interpreting "pet," this definition does not limit the range of animals which may be considered as pets, as the definition from the Ordinance includes all vertebrate moving creatures other than humans. There is some difference between the broad definition of "animal" in Section 12 and the types of animals covered by the dictionary definition of "pet" as the Ordinance would include wild animals while the definition used in *Steiner* includes only domesticated animals, *see id.* at 462, 713 S.E.2d at 524-25, but that difference is not relevant in this case. Defendant did not claim the chickens were wild; all the evidence showed these chickens were domesticated animals.

As all the evidence showed the chickens were "pets" under the definition from *Steiner*, we must then consider the issue of whether they

were "household pets." Defendant's own evidence included testimony that Plaintiffs had the same connection and relationship with their chickens as other people have with more traditional pets. Mr. Frye testified:

> Q: . . . . Does the Board have any evidence that Mary Schroeder lacks a personal connection with her chickens?
>
> A: Based on the pictures presented, no.
>
> Q: And so does the Board have any indication that Mary has - - lacks a relationship with the chickens that other people have with more traditional pets?
>
> A: Based on the pictures, no.
>
> Q: Well, based on anything?
>
> A: No, sir.

At trial, Defendant did not dispute the *facts* of Plaintiffs' relationship with their chickens but instead took the position that Section 13 was an absolute prohibition on chickens, as "poultry." On appeal, Defendant contends the number of chickens alone creates a jury question as to whether the chickens were "household pets." Defendant notes that at the highest point, Plaintiffs had about 60 chickens, although they later reduced the number to about 25 by the time of the HOA complaint and hearing. Defendant correctly notes that in *Bryan*, the defendants had only four chickens. *See Bryan*, 282 N.C. App. at 436, 871 S.E.2d at 561. But the facts of the *Bryan* case as to the number of chickens is not a controlling legal principle. As we noted previously, restrictive covenants must be strictly construed and here, the covenants do not limit the number of dogs, cats, or other "household pets" a homeowner may have. *See Danaher*, 184 N.C. App. at 645, 646 S.E.2d at 785 (explaining restrictive covenants are to be strictly construed). The evidence of the relationship between Plaintiffs and the chickens is not in dispute, despite the number of chickens. Although Defendant considers the number of chickens "excessive," this is the subjective personal belief of the Board members and is not based upon the restrictive covenants. And Mr. Frye testified the number of chickens was irrelevant to the Board; they considered even one chicken a violation of the covenants, as they believed poultry was banned entirely. We also note Defendant here did not raise any claim of other violations of the covenants or any concerns as to noise, odors, or other disturbances caused by the chickens, perhaps because the Plaintiffs lived on a 17-acre lot.

The only substantive differences between S*teiner* and this case are the type of animals and the details of how the goats and chickens were

treated by their owners. *See generally Steiner*, 213 N.C. App. at 455, 713 S.E.2d at 520. Goats can be "livestock" in some circumstances, but they can also be "household pets" in other circumstances. *Id.* at 463, 713 S.E.2d at 525. Accordingly, the same interpretation of the covenant and definitions as used in *Steiner* applies here. A "pet" under these covenants is "a domesticated animal kept for pleasure rather than utility." *Id.* at 459, 713 S.E.2d at 522. Further, as in *Steiner*, a "household pet" is "a domesticated animal kept for pleasure of or relating to a family or social unit who live together in the same dwelling." *Id.* at 462, 713 S.E.2d at 524-25.

Defendant's Board members' interpretation of the covenants as a total prohibition on "poultry" as a "household pet" is simply not supported by the text of the covenants or the caselaw. *See Bryan*, 282 N.C. App. at 442, 871 S.E.2d at 565. In *Bryan v. Kittinger*, this Court interpreted a restrictive covenant substantially identical to Section 13 and its application to chickens. 282 N.C. App. at 437, 871 S.E.2d at 562. The *Bryan* case involved "the fate of four chickens and whether their presence in a residential planned community violates the private restrictive covenants governing that community." *Id.* at 436, 871 S.E.2d at 561. The operative language of the covenant in *Bryan* was: "No animals, livestock or poultry of any kind shall be raised, bred or kept on the building site, except that dogs, cats or other household pets may be kept, provided that they are not bred or maintained for any commercial purpose." *Id.* at 437, 871 S.E.2d at 562.

This Court held the trial court had erred by granting summary judgment to the plaintiff homeowners who sought to "enjoin Defendants from keeping the hens, claiming that their presence violated Sleepy Hollow's restrictive covenants prohibiting the keeping of 'poultry[.]' " *Id.* at 436, 871 S.E.2d at 561. The *Bryan* court stated:

> Because the first clause states that no "poultry of any kind" is allowed, the trial court concluded that Defendants' hens were in violation. But the court did not consider whether the fowl fell under the "household pets" language in the second clause.
>
> As we evaluate this 1998 covenant, we are cognizant of the following principles from our Supreme Court regarding the interpretation of private restrictive covenants:
>
> We are to give effect to the original intent of the parties. But if there is ambiguity in the language, the covenant is to be strictly construed in favor of the free use of land. This

> rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. However, as parties have the freedom to agree on restrictions in their neighborhood, the canon favoring the free use of land should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.
>
> Turning to the 1998 covenant, we conclude that the keeping of poultry is clearly forbidden by the covenant's first clause, as chickens are "poultry." However, we must determine whether the covenant's second clause could reasonably be construed to allow poultry if kept as "household pets." We conclude that it does: While the first clause forbids the keeping of any "animals," the second clause clearly allows the keeping of animals, so long as they are "household pets" and otherwise not used for a commercial purpose. In the same way, where the first clause forbids the keeping of "poultry," the second clause could be reasonably read to allow poultry—which, we note, are animals—kept as "household pets" and otherwise not kept for any commercial purpose.

Id. at 437-38, 871 S.E.2d at 562 (citations, quotation marks, and brackets omitted).

In *Bryan*, the trial court granted the plaintiffs' motion for summary judgment based on its determination that "chickens violated the covenants as a matter of law." *Id.* at 436, 871 S.E.2d at 561. This Court reversed because the forecast of evidence raised a genuine issue of fact as to whether the defendants "indeed keep their hens as household pets and not otherwise for any commercial purpose." *Id.* at 438, 871 S.E.2d at 563. In *Bryan*, the plaintiffs claimed the Kittingers' chickens were not treated as pets and were kept for the commercial purpose of selling eggs. *See id.* The *Bryan* court noted that the prohibition on "poultry" was not absolute but held the parties had raised genuine issues of material fact regarding whether the defendants kept the chickens for a commercial purpose. *Id.* In addition, the parties in *Bryan* presented other claims and factual issues not present in this case regarding allegations of violations of other covenants and a private nuisance claim alleging "that [the d]efendants' owning of chickens prevents and interferes in the [p]laintiffs' lawful use and peaceful enjoyment of their property, and that said chickens create such noise as to interfere with the [p]laintiffs'

sleep and rest . . . and as a result thereof the [p]laintiffs have incurred damages[.]" *Id.* at 442, n. 7, 871 S.E.2d 565, n. 7 (citation and quotation marks omitted).

Although we view the evidence "in the light most favorable to" Defendant and resolve any "contradictions, conflicts, and inconsistencies" in Defendant's favor, much of Defendant's evidence consisted of the opinions of the Board members that chickens are categorically "poultry" and not even one chicken is allowed to be kept on a lot under the covenants. *Ellis*, 156 N.C. App. at 194-95, 576 S.E.2d at 140 (citations, quotation marks, and brackets omitted). The evidence as to the facts in this case simply showed that Plaintiffs' chickens were "household pets" under the proper interpretation of the covenants. All the evidence showed the chickens were "a domesticated animal kept for pleasure of or relating to a family or social unit who live together in the same dwelling." *Steiner*, 213 N.C. App. at 462, 713 S.E.2d at 524-25 (citations, quotation marks, ellipses, and brackets omitted). Further, the number of chickens Plaintiffs had on the property cannot be used to show they are not household pets under the covenant, as the covenants made no such distinction. *See generally Erthal*, 223 N.C. App. at 380, 736 S.E.2d at 518. Based on a proper interpretation of the covenants as a matter of law, the trial court should have granted Plaintiffs' motion for judgment notwithstanding the verdict on the issue of whether their chickens were "household pets." We now must consider whether the evidence presented any factual issue as to the question of whether the chickens were kept for commercial purposes.

E. Evidence regarding Commercial Purposes

Although the jury did not reach the question of whether the Plaintiffs maintained their chickens for a commercial purpose based on their answer to the first issue on the verdict sheet, Plaintiffs argue that the trial court should have directed a verdict in their favor on this issue as well. The only evidence Defendant argued that could be construed as tending to show a commercial purpose is evidence Plaintiffs may have sold some eggs. The entire presentation of evidence consisted of a 2019 social media post by Mrs. Schroeder stating that she "sells farm fresh eggs" and wanted to find a place to donate surplus eggs. Defendant's own witnesses acknowledged they were not aware of any evidence Plaintiffs actually sold any eggs. Further, Mrs. Schroeder denied ever selling any eggs.

But even if we assume Mrs. Schroeder actually sold eggs, as indicated in her social media post, this evidence would not be sufficient to

demonstrate a "commercial purpose" as a matter of law. *See generally J. T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 74-75, 274 S.E.2d 174, 181 (1981). The cases regarding interpretation of restrictive covenants addressing a prohibition of a "commercial purpose" for use of property show merely receiving income from the use of the property is not sufficient to show a "commercial purpose" where the restrictive covenants give no further guidance on the meaning of this term. *See, e.g., id.*

In *J. T. Hobby & Son*, our Supreme Court addressed the interpretation and application of a restrictive covenant stating that "no lot may be used 'except for residential purposes.' " *Id.* at 75, 274 S.E.2d at 181. The defendant was a non-profit corporation which owned and operated a family care home where four handicapped adults lived with a "married couple who serve as resident managers of the facility." *Id.* at 72, 274 S.E.2d at 179-80. The plaintiff contended the defendant's family care home was an "institutional use" of the home which generated income as a business and argued it was "analogous to a boarding house, such usage having been widely held to violate restrictive covenants requiring that real property be utilized for residential purposes only." *Id.* at 71, 274 S.E.2d at 179. The Supreme Court rejected this argument and held that the Court of Appeals erred "in concluding that the restrictive covenant was violated by the 'institutional' use of the property by defendant[.]" *Id.* at 70, 274 S.E.2d at 179.

The *Hobby* Court first noted

> a fundamental premise of the law of real property. While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.

Id. at 70-71, 274 S.E.2d at 179.

The Supreme Court recognized the defendant was a non-profit corporation and its "services at the family care home are not rendered gratuitously." *Id.* at 72, 274 S.E.2d at 180. The family care home received operating funds from "government grants and receipts from the residents themselves" and the "resident managers are compensated for

their services." *Id.* But the Supreme Court stated the "on-going economic exchange" required for the operation of the family care home was "an insubstantial consideration." *Id.* Although the family care home did

> not comport in all respects with the traditional understanding of the scope of the term "residential purposes", its essential purpose, when coupled with the manner in which defendant seeks to achieve its stated goals, clearly brings it within the parameters of residential usage as contemplated by the framers of the restrictive covenant which is at issue in this case.

Id. at 71-72, 274 S.E.2d at 179. The essential purpose of the family care home was to provide a home for its disabled residents so they would be able to live in a home where the "day-to-day activities" of its residents were not "significantly different from that of neighboring houses except for the fact that" most of its residents were disabled. *Id.* at 72, 274 S.E.2d at 180.

The *Hobby* Court specifically noted the defendant's receipt of compensation for the family care home's services did not "render its activities at the home commercial in nature."

> While it is obvious that the home would not exist if it were not for monetary support being provided from some source, that support clearly is not the objective behind the operation of this facility. That defendant is paid for its efforts does not detract from the essential character of its program of non-institutional living for [those with special needs]. Clearly, the receipt of money to support the care of more or less permanent residents is incidental to the scope of defendant's efforts. In no way can it be argued that a significant motivation behind the opening of the group home by defendant was its expectation of monetary benefits.

Id. at 73, 274 S.E.2d at 180.

Here, even if we assume Plaintiffs sold eggs, there is no evidence that "a significant motivation behind" Plaintiffs acquiring and keeping chickens on their lot was their "expectation of monetary benefits." *Id.* The evidence was undisputed that the "objective" behind the "operation of" Plaintiffs keeping chickens was their own personal enjoyment of keeping chickens as pets. *Id.*

In *Russell v. Donaldson*, this Court addressed an issue of first impression: whether use of the defendants' home for short-term vacation

rentals violated a restrictive covenant that "[n]o lots shall be used for business or commercial purposes." 222 N.C. App. 702, 703, 731 S.E.2d 535, 537 (2012). This Court affirmed the trial court's grant of summary judgment for the defendants. *Id.* at 706-07, 731 S.E.2d at 539. The *Russell* court noted that,

> [t]he covenant at issue states, "No lots shall be used for business or commercial purposes[.]" We must determine if defendants' rental activity qualifies as a business or commercial purpose in violation of the covenant. We look to the natural meaning of "business or commercial purposes[.]" In the instant case, the restrictive covenant and the surrounding context fail to define "business or commercial purpose." Plaintiff suggests looking at other North Carolina statutes to provide definitions of ambiguous words in the covenant. Plaintiff does not cite any authority in support of this proposition. Rather, when covenants are ambiguous, as in the instant case, all ambiguities will be resolved in favor of the unrestrained use of the land.
>
> . . . .
>
> Our prior cases in North Carolina have dealt with "affirmative" covenants requiring the use of land for residential purposes. Plaintiff cites us to *Walton v. Carignan*, 103 N.C. App. 364, 407 S.E.2d 241 (1991). However, the instant case deals with a "negative" covenant, prohibiting the use of land for business or commercial purposes. We hold that the cases cited by plaintiff are not sufficiently similar to the instant case to be binding authority. In the absence of persuasive and binding North Carolina cases, we examine the law of other states.

Id. at 705-06, 731 S.E.2d at 538 (citations and quotation marks omitted). After examining several cases from other states, the *Russell* court held that

> [u]nder North Carolina case law, restrictions upon real property are not favored. Ambiguities in restrictive covenants will be resolved in favor of the unrestricted use of the land. A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals.

Id. at 706-07, 731 S.E.2d at 539.

The covenant here is also a negative covenant, allowing landowners to keep animals including horses, dogs, cats, and other household pets if they "are *not* kept, bred, or maintained for any commercial purpose." (Emphasis added.) Here, as in *Russell*, "the restrictive covenant and the surrounding context fail to define" the term "commercial purpose." *Id.* at 705, 731 S.E.2d at 538. *Russell* again stresses that restrictive covenants must be construed strictly, and any ambiguity must be "resolved in favor of the unrestrained use of land." *Id.* Although short-term vacation rentals generated rental income for the owners of the property, this receipt of income did not transform the landowner's use of their home to a prohibited "commercial purpose." *Id.* at 707, 731 S.E.2d at 539. Here, even assuming Plaintiffs sold eggs, evidence of their sale of eggs alone is not sufficient to create a jury question as to a "commercial purpose" for their keeping and maintaining chickens on the lot. Based upon the proper interpretation of the covenants as a matter of law and the absence of evidence of a commercial purpose for the keeping of the chickens, the trial court should also have allowed Plaintiffs' motion for JNOV on this issue as well.

F. Summary

The trial court did not interpret the covenants as a matter of law but instead presented the issues to the jury as issues of fact with no instructions of law on the proper legal interpretation of the covenants or the definitions to be used. But since there was not even a scintilla of evidence that Plaintiffs' chickens were not household pets or that Plaintiffs had any commercial purpose for keeping the chickens, we conclude Plaintiffs directed verdict and JNOV should have been allowed. Plaintiffs make other arguments on appeal regarding issues such as exclusion of evidence and jury instructions, and the arguments of both Plaintiffs and Defendant illustrate the basic legal error in the trial court's failure to interpret the covenants as a matter of law. But as we have determined the case should have never reached a jury on the issues presented, we need not address those arguments further.

III. Conclusion

For the reasons discussed above, the restrictive covenants did not prohibit Plaintiffs from having chickens kept as household pets on their property and based upon a proper interpretation of the covenants, the trial court should have allowed Plaintiffs' directed verdict and JNOV. We reverse the judgment and remand for entry of judgment in favor of Plaintiffs.

REVERSED and REMANDED.

Judges WOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
TYRON LAMONT DOBSON

No. COA23-568

Filed 16 April 2024

Search and Seizure—probable cause—warrantless vehicle search—odor of marijuana—additional circumstances

In a prosecution for drug possession and weapons offenses, where officers had searched a car during a traffic stop after detecting an odor of marijuana and a cover scent, the trial court did not err in denying defendant's motion to suppress evidence seized during the warrantless search. The appellate court did not need to determine whether the odor of marijuana alone provides probable cause for a warrantless search because, here, that odor was accompanied by a cover scent of the sort known by law enforcement officers to be used to mask the odor of marijuana. The totality of these circumstances provided the officers probable cause to search. Moreover, any errors in the suppression order's findings of fact were not dispositive of its conclusions of law or its proper determination of probable cause.

Appeal by defendant from judgment entered 12 December 2022 by Judge Craig Croom in Guilford County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

BJK Legal, by Benjamin J. Kull, for defendant-appellant.

EMANCIPATE NC, by Elizabeth Simpson, amicus curiae.

ZACHARY, Judge.

Defendant Tyron Lamont Dobson appeals from the judgment entered upon his guilty plea to possession of a firearm by a felon and misdemeanor carrying a concealed firearm. After careful review, we affirm.

I. Background

On the evening of 23 January 2021, members of the Greensboro Police Department Street Crimes Unit received a report of a handgun in plain view in the driver's-door pocket of a black Dodge Charger parked in a lot near several nightclubs and bars in downtown Greensboro. At 10:10 p.m., law enforcement officers observed four individuals enter the Charger and quickly exit the parking lot. The officers followed the Charger and observed it traveling 55 miles per hour in a 45-mile-per-hour zone, after which the officers conducted a traffic stop.

Multiple law enforcement officers approached the Charger, and several smelled what they believed to be the odor of marijuana. Two officers also smelled "a strong odor of cologne" or "a strong fruity odor" about the Charger. The driver of the Charger identified herself as a probation and parole officer and placed her handgun on the dashboard. After the driver exited the vehicle, officers inquired about the odor of marijuana, and the driver explained that she and the passengers had just been in a club and that people had been smoking outside. Based on this information, officers informed the driver that they were going to conduct a probable-cause search of the vehicle for narcotics.

Meanwhile, other officers at the scene collected the identification information of the Charger's remaining occupants and cross-referenced the information through various law enforcement databases. One of the occupants, Defendant, was a convicted felon; another occupant—also a convicted felon—had a criminal history of possessing controlled substances. Officers asked the occupants to exit the vehicle, and as Defendant stepped out, one of the officers noticed what he described as "a retail package of marijuana" where Defendant had been sitting. Upon searching the vehicle, officers found what they identified as multiple marijuana cigarettes; a cigar with its tobacco "innards" removed and refilled with marijuana; and a still-burning "blunt" next to Defendant's seat. Based on the discovery of this contraband, the odor of marijuana and "the cover scent,"[1] as well as "the odd behavior [that Defendant] was exhibiting," an officer decided to conduct a *Terry* frisk[2] of Defendant's

1. A "cover scent" is "a fragrance or air freshener typically sprayed or released in a vehicle to mask or cover the smell of drugs like marijuana." *State v. Cottrell*, 234 N.C. App. 736, 745, 760 S.E.2d 274, 280 (2014).

2. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968) (holding that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," and when other safeguards are met, the

person. The pat-down yielded a firearm lodged in Defendant's waistband, and the officer placed Defendant under arrest.

On 1 March 2021, a Guilford County grand jury returned true bills of indictment charging Defendant with possession of a firearm by a felon; misdemeanor carrying a concealed firearm; and misdemeanor possession of marijuana (up to one-half ounce).

On 21 February 2022, Defendant filed a motion to suppress evidence, which he alleged was unlawfully obtained "based on a vehicle stop conducted without reasonable articulable suspicion." On 8 November 2022, Defendant filed an amended motion to suppress "unlawfully obtained evidence based on a vehicle stop conducted without reasonable articulable suspicion and [the] subsequent search of Defendant that was unlawful and not supported by probable cause."

On 8 and 9 November 2022, Defendant's amended motion to suppress came on for hearing. At the conclusion of the hearing, the trial court denied Defendant's motion, making extensive findings of fact in open court. Defendant conferred with his attorney after the trial court's ruling, and approximately one hour later, agreed to enter a plea arrangement. Prior to the plea colloquy, defense counsel declared in open court that Defendant intended to plead guilty while reserving his right to appeal the denial of his motion to suppress.

The trial court conducted a plea colloquy with Defendant, and pursuant to the terms of the plea arrangement, the State dismissed the charge of possession of marijuana. The trial court sentenced Defendant to a term of 14–26 months in the custody of the North Carolina Division of Adult Correction, which the trial court suspended for a 24-month term of supervised probation. Following sentencing, Defendant gave notice of appeal in open court.

II. Discussion

Defendant asserts that the trial court erred by denying his motion to suppress. Defendant raises several arguments concerning prior opinions of our appellate courts regarding law enforcement officers' identification

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officer may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him"). Defendant does not specifically challenge the lawfulness of the *Terry* frisk, which uncovered the firearm that precipitated his convictions in this case; rather, Defendant's appeal concerns only whether probable cause existed to search the Charger.

of marijuana by odor alone. *See, e.g.*, *State v. Mitchell*, 224 N.C. App. 171, 175, 735 S.E.2d 438, 442 (2012) ("We have held that the mere odor of marijuana or [the] presence of clearly identified paraphernalia constitutes probable cause to search a vehicle."), *appeal dismissed and disc. review denied*, 366 N.C. 578, 740 S.E.2d 466 (2013); *State v. Greenwood*, 47 N.C. App. 731, 741–42, 268 S.E.2d 835, 841 (1980) (affirming denial of motion to suppress where "the officer, trained in the identification of marijuana by its odor, detected the distinct odor of marijuana emanating from [the] defendant's automobile" because "it was reasonable for the officer to assume that the odor originated from [the] defendant's vehicle and that the vehicle contained marijuana"), *rev'd on other grounds*, 301 N.C. 705, 273 S.E.2d 438 (1981).

Like a number of similarly situated appellants before him, Defendant raises questions about the effect of the recent legalization of industrial hemp on those precedents. *See State v. Parker*, 277 N.C. App. 531, 541, 860 S.E.2d 21, 29 ("If the scent of marijuana no longer conclusively indicates the presence of an illegal drug (given that legal hemp and illegal marijuana apparently smell the same), then the scent of marijuana may be insufficient to show probable cause to perform a search."), *appeal dismissed and disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021). *But see State v. Teague*, 286 N.C. App. 160, 179, 879 S.E.2d 881, 896 (2022) ("The passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings."), *disc. review denied*, 385 N.C. 311, 891 S.E.2d 281 (2023).

However, in this case, law enforcement officers detected the odor of marijuana *plus* a cover scent. Accordingly, "we need not determine whether the scent . . . of marijuana *alone* remains sufficient to grant an officer probable cause to search a vehicle." *State v. Springs*, 292 N.C. App. 207, 215, 897 S.E.2d 30, 37 (2024) (emphasis added) (citation omitted).

Indeed, in his reply brief, Defendant notes that the "ultimate disagreement" between the parties is simply whether the totality of the circumstances supports the trial court's conclusion that probable cause existed to search the car. Therefore, we need only review the trial court's findings of fact and conclusions of law in its order denying Defendant's motion to suppress.

A. Standard of Review

"In evaluating the denial of a motion to suppress, the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the

conclusions of law." *Teague*, 286 N.C. App. at 167, 879 S.E.2d at 889 (citation omitted). "The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. Findings of fact that are not challenged on appeal are deemed to be supported by competent evidence and are binding upon this Court." *Id.* (cleaned up). "Conclusions of law are reviewed de novo and are fully reviewable on appeal." *Id.* (citation omitted).

B. Analysis

"Generally, a warrant is required for every search and seizure. However, it is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public vehicular area may take place." *Springs*, 292 N.C. App. at 214, 897 S.E.2d at 36–37 (cleaned up). "Thus, an officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband." *Id.* at 214, 897 S.E.2d at 37 (cleaned up).

Defendant first challenges those portions of the trial court's findings of fact concerning whether "any officer ever smelled the odor of marijuana" because "in light of the advent of legal hemp, it is now impossible for any law enforcement officer—whether human or canine—to identify 'the odor of marijuana' with only her nose." "At most," Defendant contends, "a properly trained officer is now only capable of detecting an odor that *may* be marijuana—but that may also be legal hemp."

Yet, contrary to Defendant's arguments, the legalization of industrial hemp did not eliminate the significance of detecting "the odor of marijuana" for the purposes of a motion to suppress. The legalization of industrial hemp "has not changed the State's burden of proof to overcome a motion to suppress." *Teague*, 286 N.C. App. at 179 n.6, 879 S.E.2d at 896 n.6.

Indeed, to the extent that Defendant challenges these portions of the trial court's findings of fact because of their potential to suggest, by implication, that the officers *actually smelled marijuana*, any such concern is irrelevant to the dispositive issue. Ultimately, the significance of these findings is that the officers *smelled the odor of marijuana*, an odor that we have previously concluded continues to implicate the probable cause determination despite the legalization of industrial hemp. *See id.* at 178–79, 879 S.E.2d at 895–96. Defendant's argument is overruled.

Defendant also challenges the portion of the trial court's conclusion of law 12 in which the trial court recounts "the driver's statement that she and the occupants of the Charger were in a club where marijuana

was smoked[.]"[3] Defendant alleges that this phrase is an inaccurate recitation of the driver's statement because "[t]he driver only mentioned that people were smoking outside of the club—not inside of it." Similarly, Defendant challenges the final sentence of finding of fact 10, which states: "The driver was asked to step out of the car. The officers informed the driver of the smell of marijuana. *She stated the smell may have come from the club they visited*." (Emphasis added). In that this challenged sentence substantially reflects the same issue regarding the driver's statement, our analysis is the same.

Defendant correctly notes that the trial court did not precisely quote the driver. Our careful review of the video evidence in the record shows that when an officer asked the driver about the presence of marijuana, she answered that the group had been in a club outside of which people were smoking, but she did not specifically mention marijuana. Even assuming, *arguendo*, that there was error in the trial court's findings of fact regarding the driver's statement, any such error does not undermine the trial court's conclusion that sufficient probable cause existed to search the vehicle, because the driver's statement was not dispositive to that conclusion.

As stated above, the odor of marijuana was not the sole basis providing the officers with probable cause to search the vehicle. In this case, law enforcement officers detected the odor of marijuana *plus* a cover scent.

On this point, Defendant challenges the portions of findings of fact 11 and 13 that refer to a strong odor detected by law enforcement officers at the same time that they smelled the odor of marijuana. In finding of fact 11, the trial court found that a detective "noticed a strong odor of cologne and a faint odor of marijuana" and that, "[b]ased on [the detective]'s training and experience, he has experienced cologne as a cover scent for marijuana." In finding of fact 13, the trial court found that a sergeant "also smelled a strong fruity odor and burnt marijuana once he arrived on the scene."

Defendant cites *State v. Cottrell*, in which this Court concluded that "a strong incense-like fragrance, which the officer believe[d] to be a 'cover scent,' and [the defendant's] known felony and drug history [we]

3. To the extent that this conclusion of law is more accurately deemed a finding of fact, we shall review it as such. *See State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.").

re not, without more, sufficient to support a finding of reasonable suspicion of criminal activity." 234 N.C. App. at 745, 760 S.E.2d at 280–81. Citing *Cottrell*, Defendant contends that these findings of fact cannot support the trial court's conclusion of probable cause. But his reliance is inapposite. *Cottrell* and the cases upon which it relied concerned investigations in which the "cover scent" *alone* was detected—i.e., *absent* any odor of marijuana or other illegal substances. *See id.* at 745–46, 760 S.E.2d at 281 (collecting cases).

By contrast, the findings of fact that Defendant challenges here explicitly reference both the "cover scent" as well as the odor of marijuana. The detection—by several officers—of the cover scent provides a basis "*in addition to the odor of marijuana* to support probable cause to search the vehicle[.]" *Springs*, 292 N.C. App. at 215, 897 S.E.2d at 37 (emphasis added); *see also Teague*, 286 N.C. App. at 179 n.6, 879 S.E.2d at 896 n.6. Accordingly, this challenge also fails.

III. Conclusion

For the foregoing reasons, the trial court did not err by denying Defendant's motion to suppress. Accordingly, the judgment is affirmed.

AFFIRMED.

Judges MURPHY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
ROBERT LEE GRANT, III

No. COA23-656

Filed 16 April 2024

Criminal Law—prosecutor's closing argument—defendant's failure to testify—curative instruction sufficient

In a trial on weapon and assault charges, while the prosecutor's two closing-argument references to defendant's failure to testify violated defendant's statutory and constitutional rights against self-incrimination, any prejudice therefrom was cured by the trial court's explanation to the jurors that the prosecutor's remarks were improper, instruction not to consider the failure of the accused to testify in their deliberations, and poll of the individual jurors to ensure they understood the instruction.

Appeal by Defendant from judgment entered 28 November 2022 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashton H. Roberts, for the State-Appellee.

Stephen G. Driggers for Defendant-Appellant.

COLLINS, Judge.

Defendant Robert Lee Grant, III, appeals from judgment entered upon a jury verdict of guilty of assault on a female. Defendant argues that the trial court prejudicially erred by overruling his objection to the State's improper comment made during closing argument on Defendant's decision not to testify and by failing to promptly instruct the jury to disregard the comment. After careful consideration, we find no prejudicial error.

I. Procedural Background

Defendant was indicted in Mecklenburg County Superior Court on 17 May 2021 for misdemeanor assault on a female, possession of firearm by felon, assault by pointing a gun, and assault by strangulation. Defendant's case came on for trial on 24 October 2022. During the trial,

the State dismissed the charge of assault by pointing a gun. The jury found Defendant guilty of misdemeanor assault on a female and not guilty of possession of firearm by a felon and assault by strangulation. The trial court continued the judgment until 28 November 2022, when Defendant was sentenced to 150 days of imprisonment. Defendant gave proper notice of appeal in open court.

II. Discussion

Defendant argues that the trial court violated his federal and state constitutional rights against self-incrimination by overruling his objection to the State's improper comment made during closing argument on Defendant's decision not to testify and by failing to promptly instruct the jury to disregard the comment.

This Court reviews de novo a claim of constitutional error by the trial court. *State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790, 793 (2005). Under de novo review, "th[is] court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citations omitted).

A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's right under the Fifth Amendment of the United States Constitution to remain silent. *Griffin v. California*, 380 U.S. 609, 615 (1965) ("We . . . hold that the Fifth Amendment, in its . . . bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence[.]"). Likewise, the North Carolina Constitution states that a defendant in a criminal prosecution cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Similarly, our North Carolina General Statutes provide that no person charged with commission of a crime shall be compelled to testify or "answer any question tending to criminate himself." N.C. Gen. Stat. § 8-54 (2023).

"[A] prosecution's argument which clearly suggests that a defendant has failed to testify is error." *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993) (citation omitted). "That the prosecution's reference to defendant's failure to testify parroted the pattern jury instructions is of no relevance since [N.C. Gen. Stat.] § 8-54 prohibits the State 'from making *any* reference to or comment on defendant's failure to testify.' " *Id.* (quoting *State v. McCall*, 286 N.C. 472, 486, 212 S.E.2d 132, 141 (1975) (emphasis added in *Reid*)).

"When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the

jury charge of an instruction on a defendant's right not to testify." *Id.* at 556, 434 S.E.2d at 197 (citations omitted). However, "the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *Id.* (quoting *McCall*, 286 N.C. at 487, 212 S.E.2d at 141).

Here, the following exchange occurred during the State's closing argument:

> [STATE]: Now, the defendant of course, it is his right not to testify, and you are not to hold that against him. But I also want you to think about the fact that the defendant chose to put on evidence. He didn't have to do that. He could have sat there and said the State hasn't proven their case and I don't need to do anything. But what did he choose to put up? More distractions, pictures of officers pointing at the defendant.
>
> [DEFENDANT]: Objection, Your Honor. This is unfair --
>
> THE COURT: What's the objection?
>
> [DEFENDANT]: -- unfairly going into whether he chose to take the stand, not take the stand, and put on evidence.
>
> THE COURT: Overruled, overruled.
>
> [STATE]: You can consider the evidence that the defendant put on. You cannot hold it against him, the fact that he did not testify. We do consider what they chose to put on. And it was just one distraction after another.

After the completion of the State's closing argument, the trial court dismissed the jury for lunch.

Upon return from lunch, but before the jury was brought back into the courtroom, Defendant moved for a mistrial, citing *Reid* and the trial court's failure to give a curative instruction following the State's improper comment. The State responded,

> I was very specific in my closing argument that the jury was not to hold it against the defendant, his decision not to testify. I believe I reiterated it twice. The State is allowed to comment on the defendant's evidence that they put forward. And I was very specific and very direct, that the defendant explicitly has the right not to testify. I said it twice. I ask that you deny defense's motion.

The trial court denied Defendant's motion but explained as follows:

> To the extent that the district attorney referenced in closing arguments anything related to the defendant not testifying, that in hindsight it would have been proper for me to sustain the objection and indicate to the jury at that time that no reference should be made t[o] the defendant's silence and that they're not to consider it in any way adversely and that it creates no presumption against the defendant. And I'll be giv[ing] them that instruction. The DA goes on after that and makes a comment about it -- it's not to be held against him, et cetera. But it is a comment in closing argument on the defendant's not testifying. Initially, when I overruled the objection, I was thinking that it was a passing bridge to what the DA was going to talk about in terms of what the defendant's counsel did present by way of evidence on his behalf. But in the moment, I overruled the objection. And in hindsight, it would've been proper for me to sustain the objection. It is a direct comment -- or it is a comment on the defendant[']s not testifying. . . . So the motion for a mistrial is denied. I'll be adjust[ing] my instruction to the jury.

The jury returned to the courtroom, and the trial court gave the following curative instruction:

> So, ladies and gentlemen, the defendant in this particular matter has not testified. The law gives the defendant this privilege. This same law also assures the defendant that this decision not to testify creates no presumption against the defendant; therefore, the silence of the defendant is not to influence your decision in any way. I will tell you furthermore that during the closing argument, the district attorney made some reference to the defendant not testifying and some reference to it. It is not proper, ladies and gentlemen, for a lawyer to comment on the defendant's not testifying. And I will tell you in hindsight that it would have been proper for me to sustain the objection at the time and indicate at that time that the jury should not utilize that in any way against the defendant because it creates no presumption against the defendant. We discussed this during jury selection as well, be mindful that the defendant's privilege not to testify, he is shrouded with an assurance that the jurors will not utilize that against

> him during their later deliberations. Does this make sense to everyone, and if you understand my instruction, please raise your hand and let me know. Okay. The jurors have indicated so.

The State's very specific and very direct statement, reiterated twice, made during closing argument that the jury was not to hold Defendant's decision not to testify against Defendant, violated Defendant's federal constitutional, state constitutional, and state statutory rights. *Reid*, 334 N.C. at 555, 434 S.E.2d at 196. Furthermore, as the trial court admitted, the trial court erred by initially overruling Defendant's objection. However, unlike in *Reid*, the trial court here gave a robust curative instruction immediately after the jury returned from lunch. The trial court explained that the State's comment was improper, instructed the jury not to consider Defendant's decision not to testify, and polled the jury to ensure that each juror understood the trial court's instruction. The trial court's curative instruction was sufficient to cure the State's improper comment and the trial court's failure to sustain Defendant's objection.

III. Conclusion

The State's comments during closing argument on Defendant's decision not to testify violated Defendant's federal constitutional, state constitutional, and state statutory rights, and the trial court erred by initially overruling Defendant's objection. However, the trial court's curative instruction to the jury cured the errors and any prejudice that may have resulted therefrom.

NO PREJUDICIAL ERROR.

Judges WOOD and GORE concur.

T.H., PLAINTIFF
v.
SHL HEALTH TWO, INC., D/B/A MASSAGE ENVY-ARBORETUM, TORSTEN A. SCHERMER, AND STEPHEN JACOB OXENDINE, DEFENDANTS

No. COA23-665

Filed 16 April 2024

1. Civil Procedure—Rule 60 motion—mistake and inadvertence —voluntary dismissal—willful act

The trial court did not abuse its discretion in denying plaintiff's motion for relief under Rule of Civil Procedure 60(b)(1) following a voluntary dismissal with prejudice where plaintiff and her counsel did not intend to end the litigation such that res judicata would apply to her claims. The action of voluntary dismissal correctly reflected plaintiff's counsel's procedural intention—to dismiss the matter with prejudice—and any misunderstanding of the consequences of that action—an end of the litigation and the application of res judicata—was immaterial. Thus, the trial court correctly applied the law regarding Rule 60—and properly assessed counsel's credibility—in denying plaintiff's motion.

2. Civil Procedure—Rule 60 motion—relief "for any other reason" —more properly considered as mistake and inadvertence

Rule of Civil Procedure 60(b)(6) is not a catch-all provision and thus could not provide a basis for plaintiff's motion for relief from her dismissal with prejudice because that motion asserted mistake and inadvertence and thus fell within the scope of Rule 60(b)(1). Even had Rule 60(b)(6) applied, the trial court would not have abused its discretion in denying the motion under that subsection where plaintiff's counsel made material untruthful statements to the court in connection with the motion for relief.

Appeal by Plaintiff from order entered 13 February 2023 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2024.

Edwards Beightol, LLC, by J. Bryan Boyd, for Plaintiff-Appellant.

Thurman, Wilson, Boutwell & Galvin, P.A, by John D. Boutwell, Van Hoy, Reutlinger, Adams & Pierce, PLLC, by C. Grainger Pierce, Jr., & Arnold & Smith, PLLC, by Ronnie D. Crisco, Jr. for Defendants-Appellees.

CARPENTER, Judge.

T.H. ("Plaintiff") appeals from the trial court's order denying her motion for relief under Rule 60(b). On appeal, Plaintiff argues the trial court abused its discretion by denying her Rule 60(b) motion. After careful review, we disagree with Plaintiff and affirm the trial court's order.

I. Factual & Procedural Background

On 10 October 2020, Plaintiff and others filed a complaint, under case number 20 CVS 5678, against SHL Health Two, Inc. and others ("Defendants") in Mecklenburg County Superior Court. On 12 July 2021, the trial court severed the matter, separating "each individual plaintiff's cause of action." More specifically, the trial court ordered Plaintiff to file, within thirty days, "a Second Amended Complaint based on the same exact factual allegations and same exact causes of action." The trial court continued: "The clerk of court shall then create a new civil action with a separate case number for these claims . . . ."

On 12 August 2021, Plaintiff filed a new complaint under a new case number, 21 CVS 13458. But as ordered by the trial court, Plaintiff should have filed the complaint under the original case number—20 CVS 5678. Recognizing his mistake, Plaintiff's counsel[1] contacted Defendants' counsel, who consented to a voluntary dismissal of the incorrectly filed claims docketed at 21 CVS 13458.

On 8 September 2021, Plaintiff refiled her complaint under the original case number, 20 CVS 5678. On 4 October 2021, Plaintiff filed a notice of dismissal, styled "Notice of Voluntary Dismissal with Prejudice," concerning the action docketed at 21 CVS 13458. On 17 November 2021, Defendants filed a motion to dismiss the complaint filed in case number 20 CVS 5678 because of Plaintiff's dismissal with prejudice of the same claims in case number 21 CVS 13458.

On 18 January 2022, Plaintiff filed a Rule 60(b) motion, seeking relief from her dismissal with prejudice. In support of the motion, Plaintiff's counsel submitted his own affidavit. In his affidavit, Plaintiff's counsel averred that "[a]t no time did I express any opinion or legal reasoning that these incorrectly filed matters must have been dismissed with prejudice." On the other hand, Defendants' counsel filed an affidavit, averring that Plaintiff's counsel believed he had "no choice" but to dismiss with

1. Plaintiff is not represented by her trial-court counsel on appeal. Appellate counsel is not associated with trial counsel or trial counsel's law firm.

prejudice. Defendants' counsel further asserted that Plaintiff's counsel explained his legal reasoning for filing dismissals with prejudice, as opposed to without prejudice.

On 13 February 2023, the trial court denied Plaintiff's Rule 60(b) motion. The trial court reasoned that the "filing of the Voluntary Dismissal With Prejudice, including without limitation the taking of such dismissal 'with prejudice,' was an intentional, deliberate, volitional, and willful decision of the Plaintiff's counsel at the time . . . ." The trial court also found that, "[m]ore likely than not, Plaintiff's counsel did not appreciate the res judicata impact of the filing of the Voluntary Dismissal With Prejudice."

Concerning the competing affidavits, the trial court found Plaintiff's counsel "made material untruthful statements to the Court in connection with the Motion, in an attempt to obtain relief sought under Rule 60, and in an attempt to salvage the claims from res judicata concerns." The trial court found Defendants' counsel's affidavit, however, to be "accurate, and the Court accept[ed] the content thereof as true." On 8 March 2023, Plaintiff filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issue

Generally, a plaintiff may refile a claim after voluntarily dismissing the claim without prejudice. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2023). But a plaintiff cannot refile a claim after voluntarily dismissing the claim with prejudice. *See id.* Indeed, a voluntary dismissal with prejudice "operates as an adjudication upon the merits." *See id.*; *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974) ("A dismissal 'with prejudice' is the converse of a dismissal 'without prejudice' and indicates a disposition on the merits.").

The parties here do not dispute whether Plaintiff voluntarily dismissed her claims with prejudice: Her voluntarily submitted dismissal is styled "Notice of Voluntary Dismissal with Prejudice," and "with prejudice" is reiterated and underlined in the body of the notice. So without relief, Plaintiff cannot refile her claims. *See Barnes*, 21 N.C. App. at 289, 204 S.E.2d at 205. Therefore, the issue is whether the trial court abused its discretion by denying Plaintiff relief under Rule 60(b).

IV. Analysis

"[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631

S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Our Supreme Court has indicated that this Court cannot substitute 'what it consider[s] to be its own better judgment' for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it 'probably amounted to a substantial miscarriage of justice.' " *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 25, 351 S.E.2d 779, 785 (1987) (quoting *Worthington v. Bynum*, 305 N.C. 478, 486–87, 290 S.E. 2d 599, 604–05 (1982)).

A mistake of the law, however, is an abuse of discretion. *State v. Rhodes*, 366 N.C. 532, 535–36, 743 S.E.2d 37, 39 (2013) (citing *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392, 414 (1996)). The "abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error of law." *Koon*, 518 U.S. at 100, 116 S. Ct. at 2047, 135 L. Ed. 2d at 414 (citations omitted).

A. Rule 60(b)(1)

[1] Plaintiff first argues that the trial court erred by not granting her relief under Rule 60(b)(1). After careful review, we disagree.

Under Rule 60(b)(1), a trial "court may relieve a party or his legal representative from a final judgment" if the judgment stems from "[m]istake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2023).

We analyzed Rule 60(b)(1) in *Carter v. Clowers*. 102 N.C. App. 247, 252, 401 S.E.2d 662, 665 (1991) (citing N.C. Gen. Stat. § 1A-1, Rule 60(b)(1)). There were two defendants in *Carter*: Clowers and Deeney. The plaintiff eventually dismissed his claims against both Clowers and Deeney with prejudice. *Id.* at 254, 401 S.E.2d at 666. But while "the parties agreed to dismiss Clowers . . . a dismissal with prejudice of Deeney was never contemplated by either party." *Id.* at 254, 401 S.E.2d at 666. "[Deeney's] dismissal was not entered with the consent of the minor plaintiff, and neither was it based on any agreement between the parties." *Id.* at 254, 401 S.E.2d at 666. The plaintiff did not file a Rule 60(b) motion; instead, the trial court allowed the plaintiff to amend his notice of dismissal. *See id.* at 250, 401 S.E.2d at 664.

On appeal, however, "we construe[d] the motion to amend the dismissal as a Rule 60(b) motion and grant[ed] plaintiff the relief he sought

from the original dismissal." *Id.* at 254, 401 S.E.2d at 666. We reasoned that "[t]he purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments." *Id.* at 254, 401 S.E.2d at 666. Further, we explained that "[p]rocedural actions that prevent litigants from having the opportunity to dispose of their case on the merits are not favored." *Id.* at 254, 401 S.E.2d at 666 (citing *Howard v. Williams*, 40 N.C. App. 575, 253 S.E.2d 571 (1979)). Therefore, we affirmed the trial court on Rule 60(b) grounds. *Id.* at 254, 401 S.E.2d at 666.

In *Couch v. Private Diagnostic Clinic*, however, we reversed a grant of relief under Rule 60(b)(1). 133 N.C. App. 93, 103–04, 515 S.E.2d 30, 38, *aff'd without precedential value*, 351 N.C. 92, 520 S.E.2d 785 (1999) (per curiam).[2] There, the voluntarily dismissal with prejudice "was a carefully considered decision, a trial strategy, and thus constitute[d] a deliberate willful act precluding relief under Rule 60(b)(1)." *Id.* at 103, 515 S.E.2d at 38. We said that a misunderstanding of "legal consequences" was immaterial. *Id.* at 103, 515 S.E.2d at 38.

We went on to distinguish *Carter*. *Id.* at 104 n.3, 515 S.E.2d at 38 n.3. We said: "In effect, the [*Carter*] attorney never intended to dismiss the action against Deeney with prejudice. The trial court found that the attorney had entered the Deeney dismissal by 'mistake and inadvertence' and allowed an amendment of the notice of dismissal." *Id.* at 104 n.3, 515 S.E.2d at 38 n.3 (citations omitted). Intention distinguished *Couch* from *Carter*. *See id.* at 104 n.3, 515 S.E.2d at 38 n.3 ("By contrast, in the case *sub judice*, Ms. Couch's attorney *intended* to dismiss the claim against the [defendant] and made that decision after some deliberation.") (emphasis added).

Read together, *Couch* and *Carter*[3] draw a thin line. Relief under Rule 60(b)(1) hinges on the intention of the party seeking relief. The

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2. On appeal, our state Supreme Court was equally divided on a separate issue: the prejudicial nature of the plaintiff's jury argument. *Couch*, 351 N.C. at 92, 520 S.E.2d at 785. Accordingly, the Court held that "[t]he decision of the Court of Appeals is affirmed without precedential value." *Id.* at 92, 520 S.E.2d at 785. Although our decision is not binding, it remains highly persuasive, as the Supreme Court ultimately affirmed our decision and took no issue with our Rule 60(b) holding. *Id.* at 92, 520 S.E.2d at 785.

3. Defendants failed to mention *Carter* in their brief. *Carter* is clearly relevant caselaw, and Plaintiff briefed it thoroughly and persuasively. Although we side with Defendants, they violated their duty of candor by not briefing us on *Carter*. *See Est. of Joyner v. Joyner*, 231 N.C. App. 554, 557–58, 753 S.E.2d 192, 194 (2014) (reminding "counsel of the duty of candor toward the tribunal, which requires disclosure of known, controlling, and directly adverse authority").

relevant intention, however, is not the intended outcome of an action; the relevant intention is the intended *action*. *See Couch*, 133 N.C. App. at 103, 515 S.E.2d at 38. A misunderstanding of "legal consequences" is immaterial. *See id.* at 103, 515 S.E.2d at 38. To get Rule 60(b)(1) relief, the material question is whether Plaintiff deliberately took the action for which Plaintiff requests relief. *See id.* at 103, 515 S.E.2d at 38.

In *Carter*, the plaintiff's counsel only intended to dismiss claims against one defendant with prejudice, but counsel accidentally dismissed claims against both defendants with prejudice. *See Carter*, 102 N.C. App. at 254, 401 S.E.2d at 666. Accordingly, we granted the plaintiff relief under Rule 60(b)(1) because the plaintiff did not intend to dismiss all of her claims with prejudice. *See id.* at 254, 401 S.E.2d at 666; *Couch*, 133 N.C. App. 104 n.3, 515 S.E.2d at 38 n.3 (explaining the unintentional nature of the *Carter* dismissal). But in *Couch*, we denied the plaintiff relief under Rule 60(b)(1) because her attorney intended to dismiss certain claims with prejudice; her attorney simply did not appreciate the consequences of the dismissal. *See Couch*, 133 N.C. App. at 104 n.3, 515 S.E.2d at 38 n.3.

Here, Plaintiff contends she intended to continue this litigation, and that ultimate intention should be dispositive, rather than her counsel's procedural intention to file a notice to dismiss with prejudice. Accordingly, Plaintiff argues that the trial court abused its discretion by analyzing her counsel's procedural intention—to dismiss with prejudice—rather than her ultimate intention, to continue her litigation.

We sympathize with Plaintiff's position, but her proposed framework turns Rule 60(b)(1) on its head. Plaintiff's intention to continue her litigation can be said in another way: She did not intend to give Defendants a res-judicata defense to her claims. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citing *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996)) ("Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies.").

Saying that Plaintiff and her counsel did not intend to end this litigation is no different than saying that they did not intend for res judicata to apply—which is no different than saying that they misunderstood the legal consequences of dismissing with prejudice. But under Rule 60(b)(1), a misunderstanding of legal consequences, like res judicata, is immaterial. *See Couch*, 133 N.C. App. at 103, 515 S.E.2d at 38.

So, the key question is whether Plaintiff's counsel misunderstood his action, or whether he misunderstood the consequences of his action.

In other words, the question is whether Plaintiff's counsel misunderstood that he was dismissing case number 21 CVS 13458 with prejudice, or whether he misunderstood the legal consequences, the res-judicata effect, of dismissing case number 21 CVS 13458 with prejudice.

First, the trial court correctly applied the law in this case. *See id.* at 103, 515 S.E.2d at 38. The trial court denied Plaintiff's Rule 60(b)(1) motion because the "filing of the Voluntary Dismissal With Prejudice, including without limitation the taking of such dismissal 'with prejudice,' was an intentional, deliberate, volitional, and willful decision of the Plaintiff's counsel at the time . . . ." Indeed, the trial court found that, "[m]ore likely than not, Plaintiff's counsel did not appreciate the res judicata impact of the filing of the Voluntary Dismissal With Prejudice."

The trial court correctly considered whether Plaintiff's counsel understood his actions, rather than whether he understood the consequences of his actions. *See id.* at 103, 515 S.E.2d at 38. Therefore, the trial court's denial of Plaintiff's Rule 60(b)(1) motion was "a reasoned decision" and therefore not an abuse of discretion, *see Hennis*, 323 N.C. at 285, 372 S.E.2d at 527, because the denial was not based on a mistake of law, *see Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39.

Second, the trial court did not abuse its discretion by finding Defendants' counsel more credible than Plaintiff's counsel because such a determination "is the province of the trial court." *See State v. Booker*, 309 N.C. 446, 450, 306 S.E.2d 771, 774 (1983) (citing *State v. Biggs*, 289 N.C. 522, 530, 223 S.E. 2d 371, 376 (1976)) ("[When] conflicts exist in the evidence, their resolution is for the trial court."). And Plaintiff failed to show that it was "manifestly unsupported by reason" for the trial court to find Defendants' counsel to be more credible than her counsel. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. The trial court is better suited than us to discern credibility, and we "cannot substitute 'what [we] consider to be [our] own better judgment' for a discretionary ruling of a trial court." *See Huggins*, 84 N.C. App. at 25, 351 S.E.2d at 785 (quoting *Worthington*, 305 N.C. at 486–87, 290 S.E. 2d at 604–05).

Accordingly, the trial court did not abuse its discretion by denying Plaintiff's motion for relief under Rule 60(b)(1) because it correctly applied the law, and it correctly applied its authority to assess credibility. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1); *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

B. Rule 60(b)(6)

[2] Next, Plaintiff argues that if she is not entitled to relief under Rule 60(b)(1), she is entitled to relief under Rule 60(b)(6). We disagree.

Under Rule 60(b)(6), a trial "court may relieve a party or his legal representative from a final judgment" if there is "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). "The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987).

But Rule 60(b)(6) is not a "catch-all" provision. *See N.C. Dep't of Transp. v. Laxmi Hotels of Spring Lake, Inc.*, 259 N.C. App. 610, 621, 817 S.E.2d 62, 71 (2018). "Rule 60(b)(6) cannot be the basis for a motion to set aside judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses." *Bruton v. Sea Captain Props., Inc.*, 96 N.C. App. 485, 488, 386 S.E.2d 58, 59–60 (1989).

In *Akzona, Inc. v. American Credit Indemnity Co.*, we denied Rule 60(b)(6) relief because the motion "was expressly based on newly discovered evidence, which brings it within the scope of Rule 60(b)(2), and not within the scope of Rule 60(b)(6), which speaks of any *other* reason, *i.e.*, any reason other than those contained in Rule 60(b)(1)–(5)." 71 N.C. App. 498, 505, 322 S.E.2d 623, 629 (1984).

Here, as in *Akzona*, the facts are more appropriately analyzed under Rule 60(b)(1), rather than 60(b)(6). Indeed, in Plaintiff's motion for relief, Plaintiff's counsel quoted from (b)(1), using language like "inadvertently, unintentionally, and mistakenly." Plaintiff's motion was expressly based on inadvertence and mistake—"which brings it within the scope of Rule 60(b)([1]), and not within the scope of Rule 60(b)(6)." *See id.* at 505, 322 S.E.2d at 629; *see also* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (expressly applying to "mistakes" and "inadvertence"). Accordingly, the trial court did not err by denying Plaintiff's motion for relief under Rule 60(b)(6) because "the facts supporting it are facts which more appropriately would support one of the five preceding clauses." *See Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59–60.

But even if this case did fit within Rule 60(b)(6), we cannot say that the trial court abused its discretion in denying Plaintiff's motion. Here, the trial court found Plaintiff's counsel "made material untruthful statements to the Court in connection with the Motion, in an attempt to obtain relief sought under Rule 60, and in an attempt to salvage the claims from res judicata concerns." Plaintiff does not directly challenge this finding of fact, and unchallenged findings are binding on appeal. *See Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156

(2009). Even if Plaintiff directly challenged this finding, it remains binding because it was supported by competent evidence, an affidavit from Defendants' counsel. *See Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001).

Plaintiff's counsel made material misrepresentations to the trial court, so the trial court's denial of Plaintiff's request for extraordinary relief was supported by reason. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Howell*, 321 N.C. at 91, 361 S.E.2d at 588. This is especially true because we "cannot substitute 'what [we] consider to be [our] own better judgment' for a discretionary ruling of a trial court." *See Huggins*, 84 N.C. App. at 25, 351 S.E.2d at 785 (quoting *Worthington*, 305 N.C. at 486–87, 290 S.E.2d at 604–05). So even if Rule 60(b)(6) applied, the trial court did not abuse its discretion by denying relief to Plaintiff.

V. Conclusion

We conclude that the trial court did not err by denying Plaintiff's Rule 60(b) motion. We therefore affirm the trial court's order.

AFFIRMED.

Chief Judge DILLON and Judge MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 APRIL 2024)

ADAMS v. HAJOCA CORP. No. 23-1006	Henderson (22CVS1620)	Reversed and Remanded
D.D. v. SHL HEALTH FOUR, INC. No. 23-666	Mecklenburg (21CVS13457)	Affirmed
IN RE A.R.D. No. 23-658	Cabarrus (22JA214-215) (23CVD1079)	22-JA-214 Remanded with instructions; Affirmed 22-JA-215 Reversed in part; vacated in part 23-CVD-1079 Affirmed in part; dismissed in part
IN RE A.Z.R. No. 23-908	Nash (22JT68)	Affirmed
IN RE K.F.C. No. 23-971	Guilford (20JT63)	Affirmed
IN RE L.D.R. No. 23-705	Jones (18JA1) (22JA5) (22JA6)	Reversed and Remanded.
IN RE M.J.M. No. 23-732	Guilford (21JT608) (21JT609)	Reversed and Remanded
IN RE M.M. No. 23-623	McDowell (22JA22)	Affirmed
IN RE N.F.P-C. No. 23-851	Lincoln (20JT100) (20JT101)	Reversed
IN RE P.H. No. 23-39	Wake (22JA73) (22JA74) (22JA75) (22JA76) (22JA77) (22JA78) (22JA79)	Affirmed in Part and Reversed in Part
IN RE P.N.F. No. 23-912	Mecklenburg (21JT16)	Affirmed

IN RE P.R. No. 23-763	Columbus (21JA14) (21JA15) (21JA16) (21JA17) (21JA92)	Affirmed.
JONES v. N.C. DEP'T OF TRANSP. No. 23-757	N.C. Industrial Commission (TA-27225)	Affirmed
LUXEYARD, INC. v. KLINEK No. 23-555	Forsyth (21CVS6163)	Reversed
NEWELL v. NEWELL No. 23-669	Mecklenburg (20CVD6366)	Affirmed in Part, Reversed in Part, and Remanded
SANCHEZ v. HAJOCA CORP. No. 23-1003	Henderson (22CVS1624)	Reversed and Remanded
SINGLETON v. McNABB No. 23-309	Vance (19CVS1102)	Affirmed
STATE EX REL. HORNER v. BUCHANAN No. 23-762	Ashe (17CVS374)	Affirmed
STATE v. AVERY No. 23-750	Burke (18CRS579-581)	Affirmed; Remanded For Correction of Clerical Error.
STATE v. BLOUNT No. 23-1016	Pitt (21CRS56150-51)	Affirmed
STATE v. CHANDLER No. 23-634	Buncombe (20CRS90410-11)	No Error
STATE v. COZART No. 23-1022	Durham (23CRS373) (23CRS374)	Reversed
STATE v. EARNELL No. 23-498	Mecklenburg (19CRS247338) (19CRS247340)	NO PREJUDICIAL ERROR
STATE v. GREEN No. 23-900	Cabarrus (21CRS54377)	Affirmed
STATE v. HAWTHORNE No. 23-906	Lee (22CR316313-520)	Dismissed

STATE v. JOHNSON-BRYANT No. 23-887	Mecklenburg (20CRS232324)	No Error
STATE v. LONG No. 23-462	Craven (20CRS53071) (22CRS637)	NO PREJUDICIAL ERROR IN PART AND AFFIRMED IN PART.
STATE v. MURDOCK No. 23-948	Iredell (20CRS52617) (20CRS52885)	Affirm and remand for correction
STATE v. RUDISILL No. 23-334	Iredell (14CRS52571-79)	No Error
STATE v. TAMBA No. 23-813	Union (20CRS52006)	Affirmed
STATE v. YOUNG No. 23-722	Johnston (18CRS54143-46) (18CRS54148-55)	No Error
THOMAS v. THOMAS No. 23-859	Durham (22CVD1123)	Dismissed

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