294 N.C. App.—No. 5 Pages 629-740

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 12, 2025

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COURT OF APPEALS

CASES REPORTED

FILED 16 JULY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

the amount of just compensation—was subject to immediate appellate review. As a general matter, orders from a condemnation hearing concerning title and area taken affect substantial rights. Further, the possible existence of a temporary negative easement on the property—the basis upon which the court ordered a jury trial on damages—was an issue affecting private property ownership, title, and exclusivity of use; therefore, plaintiffs' substantial rights were directly implicated. **Mata v. N.C. Dep't of Transp., 705.**

CREDITORS AND DEBTORS

Renewal of judgment—assigned to a co-debtor—not pursuant to contribution statute—extinguished—In a proceeding amongst four co-debtors on a commercial loan where the lender bank had assigned the right to enforce its judgment—entered against all four co-debtors, jointly and severally—to one of them (plaintiff) in exchange for plaintiff's payment of less than the entire amount of the judgment, the trial court erred in ruling against the other three co-debtors (defendants) and in favor of plaintiff in his action to renew the bank's judgment for collection because: (1) the legal effect of plaintiff's receipt of the bank's judgment by assignment amounted to satisfaction of the full debt owed, causing the judgment to cease to exist; and (2) the pleadings did not forecast that a notation was made under the contribution statute (N.C.G.S. § 1B-7) to otherwise keep the judgment alive. Further, defendants' position was not an impermissible collateral attack on the bank's judgment, but rather only a challenge to its enforceability after it ceased to exist. **Patel v. Patel, 714.**

EMINENT DOMAIN

Condemnation action—recordation of highway corridor map—police power—temporary taking—duration—measure of damages—In a direct condemnation case involving restrictions imposed upon plaintiffs' private property through the recordation of a highway corridor map pursuant to the Map Act, where the trial court held that the restrictions constituted a taking and ordered a jury trial to determine the amount of just compensation, the court's order improperly characterized the taking as an exercise of the state's police power rather than an exercise of eminent domain. However, the court properly held that the taking was temporary in nature because, although any restrictions imposed were deemed "indefinite" while they were in effect, the General Assembly had already rescinded all Map Act corridors before the Department of Transportation had filed this direct condemnation action and, therefore, the taking only lasted from the time the corridor map was recorded until the legislature's action. Finally, the court erred by imposing a measure of damages based on the property's rental value for the duration of the taking where the proper measure of damages was the diminution in value during the taking, giving consideration to all pertinent factors including the restriction on each plaintiff's fundamental rights as well as any effect of the reduced ad valorem taxes. **Mata v. N.C. Dep't of Transp., 705.**

ESTATES

Elective share—surviving spouse—equitable distribution memorandum of judgment—implicit waiver—In a proceeding arising from a petition for elective share filed by a wife (petitioner) following the death of her husband—about two and one-half years after the spouses separated and sixteen days following the entry,

ESTATES—Continued

with the spouses' consent, of a memorandum of judgment (MOJ) in their pending equitable distribution case, but before the formal judgment was entered—the trial court erred in granting summary judgment in favor of petitioner. While the MOJ contemplated the entry of additional orders (some required under federal law in connection with the husband's federal benefits), it nonetheless resolved all financial and property claims between the spouses, included a dismissal by petitioner of a pending claim she had made in connection with the parties' divorce, and waived any financial claims she had not yet asserted—language expansive enough to constitute an implicit waiver of her right to the elective share for surviving spouses provided in N.C.G.S. § 30-3.1(a). **In re Est. of Hayes, 686.**

LIENS

Subrogation rights—second-tier subcontractor—lien on real property—partial waivers by general contractor—effect—In a case involving a construction project, where a subcontractor failed to pay a second-tier subcontractor (plaintiff) for furnishing materials for the project, and where the general contractor periodically sent the property owner (together, defendants) invoices containing partial lien waivers in consideration for progress payments toward the project, the trial court properly granted summary judgment in plaintiff's favor on its subrogation claim of lien on real property. The general contractor's partial lien waivers did not extinguish plaintiff's subrogation rights but they did have the effect of capping the amount plaintiff could potentially claim as a lien to the amount remaining on the primary contract between defendants. That said, because the amount of plaintiff's claim was less than the amount still owed on the primary contract when plaintiff perfected its subrogation lien, plaintiff was entitled to lien rights for the entirety of its claim. **Atlantech Distrib., Inc. v. Land Coast Insulation, Inc., 629.**

STALKING

Felony—elements of harassment and substantial emotional distress—sufficiency of evidence—In a prosecution for felony stalking arising from defendant's multiple telephone calls (sometimes communicating sexually suggestive messages) every day for more than six months to a 75-year-old widow he met in church despite her repeated requests that he cease all contact with her—causing her, among other things, to lose sleep, experience anxiety attacks, limit activities outside her home, distrust people, and start seeing a psychiatrist—the trial court did not err in denying defendant's motion to dismiss the charge for insufficiency of the evidence of two disputed elements where the State presented substantial evidence of: (1) harassment, in that defendant's telephone calls constituted knowing conduct directed at the victim which tormented her and served no legitimate purpose; and (2) causing substantial emotional distress, in that defendant knew or should have known that a reasonable person in the victim's circumstances would experience significant mental suffering or distress as a result. **State v. Smith, 724.**

STATUTES OF LIMITATION AND REPOSE

Zoning ordinance—fee in lieu of affordable housing allocation—multiple causes of action—determination of accrual date—In a case filed by a homebuilder (plaintiff) on 24 October 2019—the date of its final installment payment of a fee in lieu of an affordable-housing allocation mandated in the land use manageable ordinance (LUMO) of a municipality—the trial court properly dismissed all seven

causes of action as time barred because their accrual was not postponed under the continuing wrong doctrine by the incremental nature of plaintiff's payments. Five causes of action—seeking declarations, damages, and attorneys' fees—did not require payment to accrue and, therefore, began to run upon plaintiff's purchase of real property covered by the LUMO (no later than 31 January 2015). Accordingly, those causes of action were untimely under the statutes of limitation in both N.C.G.S. § 1-52(2) (three years for "a liability created by statute") and N.C.G.S. § 160A-364.1(b) (one year for challenges to zoning or unified development ordinances). The two remaining causes of action (seeking return of the fee) accrued upon plaintiff's first installment payment on 5 July 2017, and thus, were time barred under the more specific limit in N.C.G.S. § 160A-364.1(b), which controlled over the more general provision in N.C.G.S. § 1-52(2). **Epcon Homestead, LLC v. Town of Chapel Hill, 653.**

TAXATION

Property valuation—choice to use income approach—application of approach—not arbitrary or capricious—A final decision containing the Property Tax Commission's valuation of a furniture company's real property (used for manufacturing, warehousing, and distribution purposes) was affirmed because the Commission's choice to value the property under the income approach was neither arbitrary nor capricious. The Commission thoroughly analyzed and based its decision on all of the evidence submitted by the parties, and it clearly articulated its rationale for using the income approach instead of the sales approach, which included the fact that both parties' appraisers considered properties that were not truly comparable to the property at issue when applying the sales approach. When applying the income approach, the Commission was not required to account for any functional or economic obsolescence—a step that is required under the cost approach. Further, competent, material, and substantial evidence supported the Commission's choice to use a single capitalization rate to valuate the entire property rather than apply different capitalization rates for each individual facility on the property. **In re Appeal of Ashley Furniture Indus., Inc., 667.**

Property valuation—finding improperly applying cost approach—income approach properly applied—no prejudice—A final decision containing the Property Tax Commission's valuation of a furniture company's real property (used for manufacturing, warehousing, and distribution purposes) was affirmed where, even though the Commission's valuation under the cost approach was erroneous (because the Commission failed to deduct for depreciation), the Commission's ultimate reliance on the income approach was supported by competent, material, and substantial evidence in view of the whole record; therefore, the finding of fact containing the erroneous valuation did not prejudice the furniture company's substantial rights and did not require remand. **In re Appeal of Ashley Furniture Indus., Inc., 667.**

VENUE

Motion to change—suit against public officer—plaintiff's county of residence—county where cause arose—In a proceeding arising from the efforts of the state auditor (defendant) to conduct an investigation of the office of the Cumberland County sheriff (plaintiff), the trial court did not err in denying defendant's Civil Procedure Rule 12 motion for change of venue—from Cumberland County to Wake County—in plaintiff's action seeking declaratory and injunctive relief because Cumberland County was a proper venue regardless of whether

VENUE—Continued

N.C.G.S. § 1-82 or N.C.G.S. § 1-77 was applicable. Under section 1-82 (addressing venue generally), venue in Cumberland County was proper because plaintiff resided there at the commencement of the action. Venue was also proper in Cumberland County under section 1-77 (addressing venue in actions brought against a public officer in the execution of her duties) because that statute provides that a case "must be tried in the county where the cause, or some part thereof, arose" and plaintiff's complaint alleged that (1) defendant's agents traveled to Cumberland County to request documents from plaintiff that he contends were not subject to disclosure and (2) defendant served plaintiff with an unlawful subpoena there. **Wright v. Wood, 731.**

N.C. COURT OF APPEALS
2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

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

ATLANTECH DISTRIBUTION INC., PLAINTIFF
v.
LAND COAST INSULATION, INC., MATRIX SERVICE, INC.; DUKE ENERGY BUSINESS SERVICES, LLC; PIEDMONT NATURAL GAS COMPANY, INC. AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, DEFENDANTS

No. COA23-751

Filed 16 July 2024

Liens—subrogation rights—second-tier subcontractor—lien on real property—partial waivers by general contractor—effect

In a case involving a construction project, where a subcontractor failed to pay a second-tier subcontractor (plaintiff) for furnishing materials for the project, and where the general contractor periodically sent the property owner (together, defendants) invoices containing partial lien waivers in consideration for progress payments toward the project, the trial court properly granted summary judgment in plaintiff's favor on its subrogation claim of lien on real property. The general contractor's partial lien waivers did not extinguish plaintiff's subrogation rights but they did have the effect of capping the amount plaintiff could potentially claim as a lien to the amount remaining on the primary contract between defendants. That said, because the amount of plaintiff's claim was less than the amount still owed on the primary contract when plaintiff perfected its subrogation lien, plaintiff was entitled to lien rights for the entirety of its claim.

Appeal by Defendants from Order entered 9 March 2023 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2024.

Johnston, Allison & Hord, P.A., by B. David Carson, David E. Stevens and Grace E. Ketron, for Plaintiff-Appellee.

Lewis Brisbois Bisgaard & Smith LLP, by Eric G. Sauls and Jonathan M. Preziosi, admitted pro hac vice, for Defendants-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

Matrix Service, Inc. (Matrix), Duke Energy Business Services, LLC (Duke Energy), Piedmont Natural Gas Company, Inc. (PNG), and

Fidelity and Deposit Company of Maryland (Fidelity) (collectively, Defendants) appeal from an Order granting Summary Judgment in favor of Plaintiff-Appellee Atlantech Distribution Inc. (Atlantech). The Record before us tends to reflect the following:

On or about 30 April 2019, Matrix entered into a contract with PNG (the Primary Contract), a subsidiary of Duke Energy, to perform certain engineering, procurement, and construction services for PNG's Robeson County LNG Peak-Shaving Facility (the Project). The value of the Primary Contract was nearly $200 million. On or about 9 August 2019, Matrix obtained its first building permit for the Project. On 3 July 2019, Matrix filed a Notice of Contract with the Robeson County Clerk of Court. However, Matrix has never provided any evidence a Notice of Contract was posted at the Project site at any time.

On or about 5 February 2021, Matrix entered into an Equipment Piping Insulation Subcontract with LandCoast Insulation, Inc. (LandCoast) for LandCoast to perform certain insulation work for the Project for $1,506,826. On 13 April 2021, LandCoast entered into a Purchase Order Agreement with Atlantech. Under the Agreement, Atlantech, serving as a second-tier subcontractor, agreed to furnish insulation and other related materials to the Project. Pursuant to the Purchase Order Agreement, as LandCoast purchased materials on account for the Project, Atlantech was to deliver the purchased materials to the Project. On or about 1 February 2021, Atlantech provided a Notice to Lien Agent for its furnishing of materials on the Project.

Pursuant to the Purchase Order Agreement, between March and July 2021, LandCoast ordered and purchased a total of $762,724.74 in insulation and related materials from Atlantech for use on the Project. For each of LandCoast's material orders, Atlantech issued an invoice and sales order showing delivery of the materials to the Project. As of 28 July 2021, Atlantech had delivered the full amount of $762,724.74 in materials to the Project and had not received any payment from LandCoast. Due to LandCoast's failure to make payment, Atlantech served a Notice of Claim of Lien Upon Funds by Subcontractor to Matrix, LandCoast, and Duke Energy on 29 July 2021. Following LandCoast's termination from the Project, Atlantech agreed to continue providing insulation materials for Matrix's work on the Project and began directly assisting Matrix.

During the course of Matrix's work on the Project, it submitted periodic invoices to PNG for the labor and materials it had furnished in a given period. With each invoice, Matrix also provided a Contractor's Partial Lien Waiver and Release. The partial lien waivers stated: "[Matrix], in consideration of payment in the amount of $ [invoice amount] waives

and releases its lien of any right which it now has or in the future may have to claim a lien for Equipment provided or Services performed prior to or during the period for which the Payment Invoice to which this Lien Waiver and Release relates[.]" Matrix submitted the relevant invoices and partial lien waivers on 19 July 2021, 16 September 2021, and 14 October 2021.[1]

On or about 14 October 2021, Matrix posted a Release of Lien Bond with Fidelity as surety in the amount of $953,408.43 to discharge Atlantech's 29 July Lien Upon Funds. Under the terms of the Bond, Fidelity agreed to ensure payment by Matrix for the amount determined to be due in satisfaction of the 29 July Lien Upon Funds, as well as any subsequent lien filed on the Project.

On 15 November 2021, Atlantech served a Notice of Claim of Lien Upon Funds by Second-Tier Contractor–Supplement on LandCoast, Matrix, Duke Energy, and PNG in the amount of $762,724.74 plus interest. The same day, Atlantech served a Subrogation Claim of Lien on Real Property by Second-Tier Subcontractor (Subrogation Lien on Real Property) on LandCoast, Matrix, Duke Energy, and PNG, and it filed a copy with the Robeson County Clerk of Court. The Subrogation Lien on Real Property was recorded with the Robeson County Clerk on 18 November 2021.

At the time Atlantech filed its Subrogation Lien on Real Property, Matrix was continuing to send invoices and partial lien waivers to PNG for work performed on the Project. On 14 October 2021, Matrix issued invoices to PNG for $822,110.83 and $3,714,056.58. PNG paid both invoices on or around 2 December and 13 December 2021, respectively—after Atlantech had perfected its Subrogation Lien on Real Property. On 23 November 2021, Matrix submitted an invoice to PNG for $1,857,028.29, which PNG paid on 22 December 2021. On 14 January 2022, Matrix submitted another invoice to PNG in the amount of $844,239.37, which PNG paid on 16 February 2022.

On 14 January 2022, Atlantech filed a Complaint against Defendants asserting a lien on real property, a claim of lien upon funds, and a claim against the Fidelity bond Matrix had posted on 14 October 2021. On 9 March 2022, Fidelity and PNG filed their respective Answers to the Complaint. On 25 March 2022, Matrix filed its Answer, as well as a

1. During its tenure on the Project, LandCoast likewise issued partial lien waivers with its invoices. However, LandCoast is not a party to this action, and Matrix's partial lien waivers are the basis for Defendants' claim.

Counterclaim and Crossclaim. On 23 November 2022, Atlantech filed a Motion for Summary Judgment on its claim for a lien against real property. The same day, Defendants filed a Motion for Partial Summary Judgment seeking dismissal of Atlantech's claim for a lien against real property. The trial court heard arguments on 14 December 2022.

On 9 March 2023, the trial court entered an Order granting Atlantech's Motion for Summary Judgment on its claim for a lien against real property and denying Defendants' Motion for Partial Summary Judgment with respect to Atlantech's claim for a lien against real property. On 10 April 2023, Defendants timely filed Notice of Appeal. On 15 June 2023, the trial court granted Defendants' Motion to Stay Judgment Pending Appeal and Set an Amount of Undertaking pursuant to N.C. Gen. Stat. § 1-289. Defendants filed a supersedeas bond in the amount of $950,000 on 28 July 2023 to secure the stay.

Issue

The dispositive issue on appeal is whether the trial court erred by granting Summary Judgment for Atlantech.[2]

Analysis

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted); *see also Rawls & Assocs. v. Hurst*, 144 N.C. App. 286, 289, 550 S.E.2d 219, 222 (2001) ("A summary judgment motion should be granted when, based upon the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are to be decided." (citation omitted)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

Our Supreme Court considered the subrogation lien rights of second-tier subcontractors in *Electric Supply Company of Durham, Inc. v. Swain Electric Company, Inc.*, 328 N.C. 651, 403 S.E.2d 291

2. Defendants additionally contend the trial court erred by denying their Motion for Partial Summary Judgment seeking dismissal of Atlantech's claim for subrogation of lien on real property. Because we conclude the trial court did not err by granting Atlantech's Motion for Summary Judgment, we do not reach this issue.

(1991). In *Swain*, our Supreme Court held a second-tier subcontractor may enforce its subrogation claim of lien on real property when a first-tier subcontractor fails to pay it for works or materials supplied on a construction project. *Id.* at 661-62, 403 S.E.2d at 297-98. In such cases, the second-tier subcontractor may step into the general contractor's shoes to enforce lien rights against the owner to the extent the general contractor has any such lien rights. *Id.* at 661, 403 S.E.2d at 297. When a second-tier subcontractor asserts its subrogation lien rights, the property owner is exposed to pay the second-tier subcontractor—even if the owner has already paid the general contractor for the same work or materials. *Id.* Thus, a second-tier subcontractor's right to claim a lien on real property exposes a property owner to a risk of double payment to its first- and second-tier subcontractors. *Id.*

Following *Swain*, our General Assembly enacted N.C. Gen. Stat. § 44A-23(b), which established a statutory mechanism by which general contractors may protect themselves from this risk of double payment. The statute provides, in pertinent part, a subcontractor may not enforce a claim of lien on real property when

> [t]he owner or contractor, within 30 days following the date the permit is issued for the improvement of the real property involved or within 30 days following the date the contractor is awarded the contract for the improvement of the real property involved, whichever is later, posts on the property in a visible location adjacent to the posted permit, if a permit is required, and files in the office of the clerk of superior court in each county wherein the real property to be improved is located, a completed and signed notice of contract form . . . .

N.C. Gen. Stat. § 44A-23(b)(1)(a) (2021).

As an initial matter, Matrix could have filed and posted a Notice of Contract at the job site to eliminate the risk of double payment pursuant to N.C. Gen. Stat. § 44A-23(b). Although Matrix filed a Notice of Contract with the Robeson County Clerk of Court on 3 July 2019, Matrix admitted it did not post a Notice of Contract at the Project at any time. Having failed to utilize the Notice of Contract method, Matrix could have extinguished Atlantech's subrogation lien rights by issuing a lien waiver.

> A lien waiver signed by the contractor before the occurrence of all of the actions specified in subsection (a1) [first-tier subcontractor's perfection of its claim of lien on real property] and subdivision (5) of subsection (b) of this

> section [second- or third-tier subcontractor's perfection of its claim of lien on real property] waives the subcontractor's right to enforce the contractor's claim of lien on real property[.]

N.C. Gen. Stat. § 44A-23(c) (2021).

Instead, Matrix provided conditional, partial lien waivers to PNG with its invoices for consideration of the payments to be made by PNG on the Project. While a lien waiver releases a claimant's right to file a claim of lien on real property in consideration for final payment upon completion of all work on a project, *see Waiver (3)*, BLACK'S LAW DICTIONARY (11th ed. 2019), a partial lien waiver, by its plain language, releases a claimant's right to file a claim of lien on real property in consideration for progress payments made during the course of a construction project.[3] *See Wachovia Bank Nat'l Ass'n v. Superior Const. Corp.*, 213 N.C. App. 341, 351, 718 S.E.2d 160, 166 (2011) ("In essence, the partial lien waivers at issue in this case function as an acknowledgement that a payment for labor and materials expended through a certain date has been made and that Defendant Superior has no further lien rights in the furnishing of labor and materials reimbursed by those payments."). Thus, when a party issues a partial lien waiver, that party may then file a claim of lien only for services or materials furnished after the date of that partial lien waiver.

Although the use of partial lien waivers may be commonplace, our statutory provisions governing subrogation rights only contemplate "lien waivers." *See* N.C. Gen. Stat. § 44A-23(c) (2021). "Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted." *Lafayette Transp. Serv., Inc. v. Robeson Cnty.*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (citations omitted). Moreover, "[c]ourts should 'give effect to the words actually used in a statute' and should neither 'delete words used' nor 'insert words not used' in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations omitted)). Accordingly,

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3. Here, the partial lien waivers at issue read: "[Matrix], in consideration of payment in the amount of $ [invoice amount] waives and releases its lien and any right which it now has or in the future may have to claim a lien for Equipment provided or Services performed *prior to or during the period for which the Payment Invoice to which this Lien Waiver and Release relates*[.]"

we decline to read N.C. Gen. Stat. § 44A-23(c) as referring to partial lien waivers in the absence of evidence clearly establishing that intent.

In *Swain*, our Supreme Court expressly held "N.C.G.S. § 44A-23 provides first-, second-, and third-tier subcontractors a separate right of subrogation to the lien of the contractor who deals with the owner[.]" 328 N.C. at 660, 403 S.E.2d at 297. The Court clarified that "in light of the policy behind the passage of N.C.G.S. § 44A-23, the subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project." *Id.* at 661, 403 S.E.2d at 297 (citation omitted). This right could, however, be abrogated before the subcontractor began an action "through waiver of the lien or acceptance of payment." *Id.* at 661, 403 S.E.2d at 298 (citations omitted).

Following *Swain*, this Court determined a subcontractor's subrogation right is "limited . . . by the lien rights the contractor has in the property." *Vulcan Materials Co. v. Fowler Contracting Corp.*, 111 N.C. App. 919, 921, 433 S.E.2d 462, 463 (1993). Further, "[b]ecause [subcontractors] are subrogated to the rights of the general contractor, they may assert only the lien rights which the general contractor has in the project." *Id.* at 922, 433 S.E.2d at 464 (citing *Swain*, 328 N.C. at 661, 403 S.E.2d at 297). Thus, this Court in *Vulcan* held a subcontractor may only enforce a lien for up to the amount due on the primary contract, even if the amount the subcontractor is owed exceeds that amount. *Id.* Further, under our statutes, "a contractor's lien for all labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site." *Wachovia*, 213 N.C. App. at 346-47, 718 S.E.2d at 163-64 (quoting *Frank H. Connor Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 667, 242 S.E.2d 785, 789 (1978) (citations omitted)). Thus, when a lien is perfected and enforced by bringing an action within the statutory period, "the lien will be held to relate back and become effective from the date of the first furnishing of labor or materials under the contract, and will be deemed perfected as of that time." *Id.* at 347, 718 S.E.2d at 164 (quoting *Connor Co.*, 294 N.C. at 667, 242 S.E.2d at 789).

The consistent teaching of these cases is that partial lien waivers do not extinguish a subcontractor's subrogation rights; however, a partial lien waiver may limit the amount of a subcontractor's claim to the amount remaining on the primary contract following the latest partial lien waiver if that amount is less than the amount owed to the subcontractor. *Vulcan*, 111 N.C. App. at 922, 433 S.E.2d at 464 (citing *Swain*, 328 N.C. App. at 661, 403 S.E.2d at 297). Consistent with this precedent,

Atlantech's lien rights relate back to the date it first furnished labor or materials. Atlantech retains lien rights to the extent of their claim amount for the services and materials it furnished. *Wachovia*, 213 N.C. App. at 347, 718 S.E.2d at 164 (citation omitted). The effect of the partial lien waivers, then, was to cap the amount Atlantech could potentially claim as a lien to the amount remaining on the Primary Contract.

In this case, Atlantech served a Notice of Claim of Lien Upon Funds by Second-Tier Contractor on 15 November 2021. At that time, Matrix had two outstanding invoices that had been submitted but not yet paid by Duke Energy and PNG—one for $822,110.83 and the other for $3,714,056.58. Matrix later submitted additional invoices to Duke Energy and PNG for $1,857,028.29 and $844,239.37 respectively after Atlantech had perfected its Subrogation Lien on Real Property. As such, at the time Atlantech perfected its Subrogation Lien, the amount outstanding on the Primary Contract far exceeded the amount of its claim for $762,724.74 plus interest. *See Wachovia*, 213 N.C. App. at 347, 718 S.E.2d at 164.

Thus, because the amount of Atlantech's claim was less than the amount outstanding on the Primary Contract when Atlantech perfected its Subrogation Lien, Atlantech was entitled to lien rights for the entirety of its claim. Therefore, based on the pleadings and materials in the Record, we conclude Atlantech was entitled to judgment as a matter of law for the full amount of its lien. Consequently, the trial court did not err by granting Summary Judgment for Atlantech.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's grant of Summary Judgment for Atlantech.

AFFIRMED.

Judges COLLINS and THOMPSON concur.

BRADLEY HOME, CARING FOR WAKE COMMUNITY AND THE CAROLINAS, INC. D/B/A/ BRADLEY HOME (MHL #092-319) AND D/B/A BRADLEY HOME EXTENSION – KIMBERLY HOUSE (MHL #092-412), PETITIONER

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, MENTAL HEALTH LICENSURE AND CERTIFICATION SECTION, RESPONDENT

No. COA24-107

Filed 16 July 2024

Administrative Law—contested case petition—timeliness—Mailbox Rule inapplicable—lack of subject matter jurisdiction

The Office of Administrative Hearings did not have subject matter jurisdiction to hear a contested case petition that was filed one day outside the sixty-day timeframe set forth in N.C.G.S. § 150B-23(f) by petitioner, who sought to challenge an agency decision revoking its licenses to operate mental health care facilities. The trial court erred by applying the Mailbox Rule (Civil Procedure Rule 6(e)) to extend the deadline for filing a contested case petition by an additional three days where the plain language of section 150B-23(f) provides that the sixty-day timeframe applies regardless of the method by which notice of a final agency decision is delivered.

Judge TYSON dissenting.

Appeal by Respondent from order entered 5 October 2023 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 11 June 2024.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC., by Matthew W. Wolfe and E. Bahati Mutisya, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Kerry M. Boehm, for Respondent-Appellant.

GRIFFIN, Judge.

Respondent North Carolina Department of Health and Human Services appeals from the Superior Court's order reversing and remanding an order of an Administrative Law Judge dismissing Petitioner Bradley Home's section 150B-23 petition for lack of subject-matter

jurisdiction. DHHS argues North Carolina Rule of Civil Procedure 6(e), the Mailbox Rule, does not apply to extend the statutorily mandated sixty-day deadline for a party aggrieved by a State agency decision to file a petition contesting that decision. We agree.

I. Factual and Procedural Background

DHHS is a State agency tasked with the licensing and oversight of mental health care facilities operating within the State. Petitioner is licensed by DHHS to operate two mental health care facilities: (1) Bradley Home at Kelly Road in Garner, NC (Bradley Home) and (2) Bradley Home Extension - Kimberly House in Raleigh, NC (Kimberly House). In June 2021, after Petitioner submitted License Renewal Applications for both the Bradley Home and Kimberly House facilities, DHHS, pursuant to its authority under Chapter 122C of the North Carolina General Statutes, conducted surveys of both facilities. The surveys identified numerous violations of the North Carolina Administrative Code at both of Petitioner's facilities.

On 21 June 2021, DHHS notified Petitioner by certified mail that it was citing both facilities for these violations and imposed monetary penalties totaling $7,000. In each of the letters, DHHS notified Petitioner it had the right to contest the penalties by filing a petition for a contested case hearing with the Office of Administrative Hearings within thirty days from the date the letter was mailed. Accordingly, the deadline to contest the penalties was 21 July 2021.

On the same day that DHHS imposed the penalties, it also notified Petitioner via certified mail that it would be suspending admissions from both of Petitioner's facilities (collectively, the "SOA Letters"). For each SOA Letter, Petitioner had the right to contest the suspensions by filing a petition for a contested case hearing with the OAH within twenty days from the date the letter was placed in the mail. Accordingly, the deadline to contest the SOA Letters was 11 July 2021.

Finally, and at issue here, on 3 August 2021, DHHS notified Petitioner by certified mail that it was revoking its licenses to operate its facilities. In each of the letters, DHHS notified Petitioner that under N.C. Gen. Stat. § 150B-23(f), it had the right to file petitions contesting the revocations within sixty days from the date the letter was mailed. Accordingly, the deadline to file the petitions was 4 October 2021.[1] On 5 October

1. The initial deadline for filing the petition was 2 October 2021. However, as 2 October 2021 was a Saturday, the ALJ acknowledged Petitioner had until Monday, 4 October 2021, to file its petition. Regardless of this, Petitioner did not file its petition until 5 October 2021.

2021, Petitioner filed a petition appealing the revocations and the other administrative actions.

Eight months later, on 3 June 2022, Petitioner—with DHHS's consent—filed a Consent Notice of Voluntary Dismissal Without Prejudice, allowing Petitioner "to re-file its contested case petition to include claims concerning the Revocation Notices, Suspension Notices, and Penalty Notices, and associated surveys." On 5 July 2022, Petitioner re-filed its petition with the OAH, challenging: (1) the 21 June 2021 penalties; (2) the 21 June 2021 suspensions of admission; and (3) the 3 August 2021 revocation of Petitioner's licenses to operate its facilities. DHHS moved to dismiss arguing that, because the petition was filed outside the respective specified time-periods for filing with regard to all three notices, the OAH lacked subject matter jurisdiction to hear the merits of the case. The ALJ agreed with DHHS and dismissed the petition regarding all three notices. Petitioner timely appealed to Wake County Superior Court, arguing that, under the Mailbox Rule, it had an extra three days to file the initial petition for a contested case hearing with the OAH.

The Superior Court held that Petitioner's initial petition, filed on 5 October 2021, was untimely as to the suspension of admissions and administrative penalties because the deadlines were 11 July 2021 and 21 July 2021, respectively. However, applying the Mailbox Rule, the Superior Court held that the petition contesting the license revocations was timely even though it was filed past the sixty-day deadline. The trial court concluded that the OAH had subject matter jurisdiction to hear the merits regarding the license revocations and reversed and remanded the decision to the OAH. DHHS timely appealed.

II. Analysis

A. Standard of Review

Chapter 150B of the North Carolina General Statutes, the North Carolina Administrative Procedure Act, " 'governs trial and appellate court review of administrative agency decisions.' " *Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div., Dep't of State Treasurer*, 291 N.C. App. 14, 19, 894 S.E.2d 275, 279 (2023) (quoting *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994)). Pursuant to the APA, an aggrieved party may seek review of an ALJ's final decision by a superior court. *Id.*; *see also* N.C. Gen. Stat. § 150B-43 (2023). In this context, the superior court sits in an appellate capacity and reviews errors of law de novo. *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 297-298, 683 S.E.2d 428, 430 (2009) (citations and internal marks

omitted); *see also* N.C. Gen. Stat. § 150B-51(b)–(c) (2023). Following an appeal of an ALJ's decision to a superior court, the APA affords litigants the right to "appeal from the superior court's final judgment to the appellate division." *EnvironmentaLEE v. N.C. Dep't of Env't and Nat'l Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018); *see also* N.C. Gen. Stat. § 150B-52 (2023).

On review, we examine "the trial court's order for errors of law; this 'twofold task' involves: '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328 (2004) (citation and internal marks omitted).

DHHS asks this Court to reverse the Superior Court's decision and affirm the ALJ's initial decision dismissing Petitioner's petition for lack of subject matter jurisdiction. Both the ALJ and Superior Court's decisions turn on whether the Mailbox Rule applies to extend the sixty-day filing deadline provided in section 150B-23(f). As the parties agree about when the pertinent filings were made, we address whether the Superior Court erred in reaching the conclusion of law that the Mailbox Rule applies.

B. Superior Court Standard of Review

The Superior Court reviewed the ALJ's order de novo. As the ALJ engaged in the statutory construction of section 150B-23(f) to determine the petition was untimely, de novo review was appropriate. *See Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) ("[W]hen a trial court's determination relies on statutory interpretation, [appellate] review is de novo because those matters of statutory interpretation necessarily present questions of law.") (citation omitted). Having determined the Superior Court applied the correct standard of review, we now address whether its conclusions of law were proper.

C. Conclusions of Law

The dispositive issue here is whether the Mailbox Rule applies to extend the section 150B-23(f) sixty-day period during which an aggrieved party may file a petition to contest a decision of an administrative agency. If it does not apply, then the petition was untimely and deprived the ALJ from having the necessary subject matter jurisdiction to adjudicate the case. *See Gray v. N.C. Dep't of Env't, Health & Hum. Res.*, 149 N.C. App. 374, 378, 560 S.E.2d 394, 397 (2002) ("[W]e agree that timely filing of a petition is necessary to confer subject matter jurisdiction on the agencies as well as the courts[.]") (citation omitted).

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310, 873 S.E.2d 486, 489 (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). When interpreting the language of a statute, "[w]e presume that the Legislature chose its words with due care and comprehension of their ordinary meaning." *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 10, 881 S.E.2d 270, 278 (2022) (citation omitted). To this point, "it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *State v. Washington*, 386 N.C. 265, 268, 900 S.E.2d 657, 659 (2024) (quoting *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007)) (internal marks omitted). Moreover, where the language of a statute is clear, we do not "delete words used or [] insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations and internal marks omitted).

Section 150B-23 of the APA codifies the process by which a party aggrieved by a State Agency decision may contest said decision. *See* N.C. Gen. Stat. § 150B-23(a) (2023). That process includes filing a petition with the Office of Administrative Hearings which specifies the grounds for the party's grievance. *Id*. Section 150B-23(f) provides the time limitation for filing a petition:

> Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, *the general limitation for the filing of a petition in a contested case is 60 days*. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, *commences* when notice is given of the agency decision to all persons aggrieved that are known to the agency by personal delivery, electronic delivery, *or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency*. The notice shall be in writing, shall set forth the agency action, and shall inform the persons of the right, the procedure, and *the time limit to file a contested case petition.*

N.C. Gen. Stat. § 150B-23(f) (emphasis added). In construing the applicability of the section 150B-23(f) time limitation, we have held that "a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several

days for the petitioner to receive it." *Krishnan v. N.C. Dep't of Health & Hum. Servs.*, 274 N.C. App. 170, 173, 851 S.E.2d 431, 433 (2020) (citation omitted).

North Carolina Rule of Civil Procedure 6, on the other hand, provides the rules governing the computation of time limits in civil cases. *See* N.C. R. Civ. P. 6 (2023). Relevant here, Rule 6(e) provides that "[w]henever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period." N.C. R. Civ. P. 6(e) (2023). Rule 1 qualifies the applicability of the Rules to apply "in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute*." N.C. R. Civ. P. 1 (2023) (emphasis added).

Here, in reversing the Administrative Order, the Superior Court misapplied both the Mailbox Rule and our holding in *Smith v. Daniels Int'l*, 64 N.C. App. 381, 307 S.E.2d 434 (1983). The order also misconstrues the plain and unambiguous language of section 150B-23(f). Specifically, in its Conclusions of Law, the court concluded:

> 22. Section 150B-23(f) does not provide for how the time period is to be calculated for purposes of the 60-day deadline.
>
> 23. Section 150B-23(f) also does not indicate whether or not the computation of time differs depending on whether the Agency provides notice via personal delivery, electronic delivery, or by mail.
>
> 24. The OAH Rules governing contested cases provide that "[u]nless otherwise provided in the rules of the Office of Administrative Hearings or in a specific statute, *time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6.*" 26 NCAC 03.0116.
>
> . . .
>
> 27. "Rule 6(e) was designed to 'alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right.' " *Precision Fabrics Grp., Inc. v. Transformer Sales & Serv., Inc.*, 344 N.C. 713, 721, 477 S.E.2d 166, 170 (1996).

28. The facts of this case illustrate the very reason the mailbox rule exists and must apply. The Agency mailed the Revocation Notices on August 3, 2021 but [Petitioner] received the Revocation Notices on August 10, 2021. Thus, the disparity of Petitioner's constructive and active notice exists here.

29. N.C.G.S. § 150B-23(f) does not clarify whether the 60-day time period to appeal the mailed notice would commence on August 3, 2021 or August 10, 2021. Rule 6(e) provides the needed clarification by instructing the Agency and [Petitioner] to start the clock when the notice is placed in the mail and to add three days to the time period to accommodate the inherent delay in receipt due to the mailing of the notice. Thus, when calculating the 60-day deadline to appeal the Revocation Notices, three days must be added, making the deadline October 5, 2021, the date Petitioner filed its Petition.

. . .

31. The Rules of Civil Procedure apply in "all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.G.S. § 1A-1, 1. In *Smith v. Daniels International*, the Court of Appeals analyzed whether Rule 6(e) applied to the statutory 10-day time period in N.C.G.S. § 96-15(b)(2) for the complainant to appeal a notice of benefits disqualification. 64 N.C. App. 381, 383, 307 S.E.2d 434, 435 (1983). The claimant argued he had thirteen days under Rule 6(e) because the benefits disqualification notice was mailed to him. *Id.*, 307 S.E.2d at 435. However, N.C.G.S. § 96-15(b)(2), which prescribes the ten days, expressly stated that an appeal was untimely unless the claimant files the appeal "within [ten] days after notification of the conclusion of the adjudicator, *whether the conclusion be delivered manually or mailed*." *Id.* (emphasis in original). The Court relied on this italicized language to conclude that the complainant would have had thirteen days to appeal but for the language in the statute, which "clearly indicates legislative intent to establish 'a differing procedure' from that prescribed by G.S. 1A–1, Rule 6(e)." *Id.* Thus, the Court could not apply Rule 6(e) in that particular instance based solely on that specific language in the statute.

> 32. There is no such language in N.C.G.S. § 150B-23(f) that would provide a differing procedure from Rule 6(e). Therefore, the default Mailbox Rule in Rule 6(e) applies, which gave Petitioner until October 5, 2021 to timely appeal the Revocation Notices.

As to Conclusions of Law 22 and 23, section 150B-23(f) states, in precise language, that the "general limitation for the filing of a petition in a contested case is 60 days." N.C. Gen. Stat. § 150B-23(f). The section clarifies that the sixty-day period "commences when notice is given of the agency decision to all persons aggrieved that are known to the agency by personal delivery, electronic delivery, or by the placing of the notice in an official depository of the United States Postal Service[.]" *Id.* When read in harmony, it is apparent from the plain language that to calculate the sixty-day period, you begin counting from the day the notice is either personally or electronically delivered or when the notice is placed in the mail. The Superior Court's order unnecessarily reads ambiguity into the statute where there is none.

Conclusion of Law 23 does the same. Section 150B-23(f) specifies the time limitation "commences *when notice is given of the agency decision*[.]" *Id.* (emphasis added). Directly thereafter, the statute specifies three methods of permissible notification: personal delivery, electronic delivery, or by placing the notice in the care of the United States Postal Service. *Id.* As we "presume that the Legislature chose its words with due care[,]" *C Invs. 2*, 383 N.C. at 10, 881 S.E.2d at 278 (citation omitted), the choice to not make the time calculation contingent upon the method of notification reflects that the time calculation is the same regardless of the method used. Thus, as the statute plainly states, the sixty-day time limitation commences regardless of the method of delivery and is contrary to the assertion that it does not indicate a difference. Rather, it indicates there is no difference in time computation.

Conclusion of Law 24, while stating the law correctly, misconstrues the meaning of section 150B-23(f) as well as the applicability of 26 NCAC 03 .0116. 26 NCAC 03 .0116 provides that "time computations *in contested cases before* the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6." 26 NCAC 03 .0116 (2024) (emphasis added). Section 150B-23(a) provides the method for initiating a contested case. It states that "[a] contested case *shall be commenced* by paying a fee in an amount established in G.S. 150B-23.2 and *by filing a petition with the Office of Administrative Hearings*[.]" N.C. Gen. Stat. § 150B-23(a) (2023). The plain meaning of the foregoing language indicates a contested case does not start until the filing of a petition.

Because the "timely filing of a petition is necessary to confer subject matter jurisdiction on the agenc[y][,]" *Gray*, 149 N.C. App. at 378, 560 S.E.2d at 397, Rule 6 is inapplicable to time limitations effective prior to the commencement of the proceeding.

Conclusions of Law 27 and 28 disregard our precedent construing section 150B-23(f). In *Krishnan v. N.C. Department of Health & Human Services*, we interpreted the language of section 150B-23(f) to mean "a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it." *Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433. Thus, the difference in a petitioner's actual and constructive notice of an agency's decision is immaterial for the purposes of filing a contested case petition under section 150B-23(f).

Conclusion of Law 29 also misapprehends section 150B-23(f). The conclusion that "N.C.G.S. § 150B-23(f) does not clarify whether the 60-day time period to appeal the mailed notice would commence on August 3, 2021 or August 10, 2021," is erroneous. The plain language of section 150B-23(f) states that the general sixty-day limitation "*commences when* notice is given of the agency decision to all persons aggrieved . . . *by the placing of the notice in an official depository of the United States Postal Service* wrapped in a wrapper addressed to the person at the latest address given by the person to the agency." N.C. Gen. Stat. § 150B-23(f) (emphasis added). The time limitation commences when the agency places its notice in the mail. DHHS did so on 3 August 2021. Thus, the sixty-day time limit commenced on 3 August 2021. If Petitioner sought further clarification of the time limit, they need have referred only to the text of the revocation notice, as it stated below the 3 August 2021 mailing date that:

> You have the right to contest the above action by filing a petition for a contested case hearing with the Office of Administrative Hearings within sixty (60) days of mailing of this letter.
>
> . . .
>
> If you do not file a petition within the sixty (60) day period, you lose your right to appeal and the action explained in this letter will become effective as described above.

Finally, Conclusion of Law 31 misconstrues our holding in *Smith v. Daniels International*. Initially, *Smith* addressed whether Rule 6 applies to section 96-15(b)(2), a statute providing the appeals process

from the denial of unemployment benefits, not section 150B. *See Smith*, 64 N.C. App. at 434–35, 307 S.E.2d at 382; *see* N.C. Gen. Stat. § 96-15(b)(2) (2023). Nonetheless, as section 96-15(b)(2) and section 150B-23(f) govern the appeals of administrative decisions, we conclude *Smith* is persuasive here. There, we held the language "[u]nless the claimant . . . within 10 days after notification of the conclusion of the adjudicator, *whether the conclusion be delivered manually or mailed*, files an appeal to such conclusion, the conclusion shall be final and benefits paid or denied in accordance therewith[,]" to indicate a "legislative intent to establish 'a differing procedure' from that prescribed by G.S. 1A-1, Rule 6(e)." *Id.* at 383, 307 S.E.2d at 435. In fulfilling this intent, we held Rule 6(e) inapplicable to the section 96-15(b)(2) ten-day time limitation for filing an appeal. *Id.* at 382, 307 S.E.2d at 434–35.

As stated above, the Legislature did not provide for different time periods to apply depending on the method of delivery in section 150B-23(f). Rather, they listed the permissible methods of delivery immediately after stating the time limitation would commence upon the completion of any of them. This language is analogous to the dispositive language in *Smith* because neither statute provides for different time limitations contingent upon the method of delivery. Thus, utilizing the same reasoning we used in *Smith*, the language in section 150B-23(f) "indicates [a] legislative intent to establish 'a differing procedure' from that prescribed by G.S. 1A–1, Rule 6(e)." *Id.* at 383, 307 S.E.2d at 435.

Ultimately, the Superior Court utilized the correct standard of review when addressing the ALJ's order. However, as both our interpretation of section 150B-23(f) and our precedent counsel against applying Rule 6(e) to the sixty-day time limit, we hold the Superior Court erred in reversing the ALJ's order. Accordingly, we reverse the Superior Court's order and remand to the Superior Court for further remand to the ALJ for entry of dismissal.

III. Conclusion

For the aforementioned reasons, we reverse the Superior Court's decision and remand for dismissal.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The Superior Court properly applied the Mailbox Rule and held the petition contesting the license revocation was timely filed when adding the statutorily mandated three additional days to the date the agency purportedly placed the notice in the mail. N.C. R. Civ. P. 6(e) (2023). The Superior Court properly concluded, due to Petitioner's timely notice, the Office of Administrative Hearings ("OAH") possessed subject matter jurisdiction to hear the merits regarding the license revocations, reversed the OAH's decision, and remanded the matter to the OAH. I vote to affirm the Superior Court's decision and respectfully dissent.

I. N.C. R. Civ. P. 6(e)

Rule 6 of the North Carolina Rules of Civil Procedure is the default rule of general applicability regarding the computation of time limits in civil proceedings. *See* N.C. R. Civ. P. 6(e). "Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him *and the notice or paper is served upon him by mail*, *three days shall be added to the prescribed period*." *Id.* (emphasis supplied). "Rule 6(e) was designed to 'alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right.' " *Precision Fabrics Grp. v. Transformer Sales & Serv.*, 344 N.C. 713, 721, 477 S.E.2d 166, 170 (1996) (citation omitted).

Rule 1 qualifies the applicability of the Rules of Civil Procedure and explains the Rules apply "in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute*." N.C. R. Civ. P. 1 (2023) (emphasis supplied).

II. N.C. Gen. Stat. § 150B-23(f)

N.C. Gen. Stat. § 150B-23(f) provides the time limitation for filing a petition:

> Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, *the general limitation for the filing of a petition in a contested case is 60 days*. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, *commences* when notice is given of the agency decision to all persons aggrieved that are known to the agency by personal delivery, electronic delivery, *or by the placing*

> *of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency*. The notice shall be in writing, shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition.

N.C. Gen. Stat. § 150B-23(f) (2023) (emphasis supplied).

III. *In Pari Materia*

"Statutes *in pari materia* are to be construed together, and it is a general rule that courts must harmonize such statutes, if possible, and give effect to each[.]" *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956). "[I]t is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). This Court presumes the General Assembly "chose its words with due care and comprehension of their ordinary meaning." *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 10, 881 S.E.2d 270, 278 (2022) (citation omitted). A provision of a statute cannot be read "in a way that renders another provision of the same statute meaningless." *State v. Daw*, 277 N.C. App. 240, 254, 860 S.E.2d 1, 12 (2021).

N.C. Gen. Stat. § 150B-23(f) establishes the "general [time] limitation" to file a petition at sixty days, unless superseded by another statute or regulation. It then notes "the time limitation" commences when the notice is placed in the mail. *Id.*

Contrary to the majority's assertion, this statute is not incompatible with Rule 6(e), and the two statutes are simultaneously applied. The word "general" implies exceptions exist to any sixty-day, absolute deadline established by § 150B-23(f). Interpreting the sixty-day limitation as a hard deadline fails to give effect to the word "general" in the statute. Rather, the section of the statute only clarifies the time limitation commences on the date the notice was mailed. It does not apply the general sixty-day limitation to mailed petitions, because Rule 6(e) applies to notices delivered by mail to extend the time limitation for up to three additional days. N.C. R. Civ. P. 6(e).

The majority's opinion references *Smith v. Daniels Int'l*, which held Rule 6(e) did not apply to the statutory time limitation for appeals from the Employment Security Commission. 64 N.C. App. 381, 383, 307 S.E.2d 434, 435 (1983). This case and facts are inapposite and distinguishable

from those in *Smith*, in which the applicable statute imposed a hard ten-day time limitation regardless of "whether the conclusion [was] delivered manually *or* mailed." *Id.* The use of the disjunctive "or" precluded the Mailbox Rule in Rule 6(e). *See id.* The language in *Smith* clearly demonstrated a legislative intent separate and distinct to create a uniform time limitation, regardless of delivery method the agency used, and established a different procedure from that set out in the North Carolina Administrative Procedure Act ("NCAPA"), N.C. Gen. Stat. §§ 150B-1 to 52 (2023), and Rule 6(e).

Here, the relevant NCAPA statute sets out a "general" time limitation and sets the commencement, but it does not assert the "general" time limitation is to be applied in all cases. *See* N.C. Gen. Stat. § 150B-23(f). As the Superior Court properly concluded, nothing "clearly indicates legislative intent to establish 'a differing procedure' from that prescribed by G.S. 1A-1, Rule 6(e)." *Smith*, 64 N.C. App. at 383, 307 S.E.2d at 435. The two statutes are properly read *in pari materia*, and Rule 6(e) applies to notices delivered by mail. N.C. R. Civ. P. 6(e).

IV. Contested Case

In addition, 26 NCAC 03 .0116 provides "time computations in contested cases before the Office of Administrative Hearings *shall be governed by G.S. 1A-1, Rule 6.*" 26 NCAC 03 .0116 (emphasis supplied). N.C. Gen. Stat. § 150B-23(a), provides the method for initiating a "contested case."

The majority's opinion cites N.C. Gen. Stat. § 150B-23(a), which states "[a] contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings[.]" The majority's opinion then asserts the plain meaning of N.C. Gen. Stat. § 150B-23(a) "indicates a contested case does not start until the filing of a petition."

Another section of the same NCAPA chapter, however, defines a "contested case" as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." N.C. Gen. Stat. § 150B-2(2) (2023). Our Supreme Court held a "contested case" has two main elements: "(1) an agency proceeding, (2) that determines the rights of a party or parties." *Lloyd v. Babb*, 296 N.C. 416, 424-25, 251 S.E.2d 843, 850 (1979).

This Court, citing *Lloyd*, held "the pivotal question in determining whether [a matter] is a 'contested case,' is whether the [agency's actions]

and investigation constitute[d] 'an agency proceeding.' " *Charlotte Truck Driver Training School, Inc. v. N.C. DMV*, 95 N.C. App. 209, 212, 381 S.E.2d 861, 863 (1989) (citing *id.*).

In *Charlotte Truck Driver*, the petitioner's license was revoked following an interview and investigation by the Department of Motor Vehicles. *Id.* at 212, 381 S.E.2d at 862-63. This Court held the investigative actions conducted by the Department of Motor Vehicles, a government agency, and the subsequent revocation of a license constituted an "agency proceeding" and the matter was a "contested case." *Id.*

The North Carolina Department of Health and Human Services ("NC DHHS") aggressively suspended admissions to petitioner's facilities, imposed a $7,000 fine, and revoked the petitioner's licenses, following a survey of petitioner's facilities. As occurred in *Charlotte Truck Driver*, NC DHHS conducted an investigation into petitioner's facilities and initiated an "agency proceeding." *Id.* ("As the in-person interview and the investigation were conducted by a hearing officer of the North Carolina Division of Motor Vehicles, a State agency, we conclude that they constitute 'an agency proceeding.' ").

The revocation of petitioner's license following their agency investigatory action also determined the rights of petitioner. *See id.* NC DHHS conducted an investigation, after which the petitioner's rights were determined, meeting the definition of a "contested case" as outlined in *Lloyd*. *Id.* (citing *Lloyd*, 296 N.C. at 424-25, 251 S.E.2d at 850).

NC DHHS' actions taken against petitioner constitute a "contested case" and 26 NCAC 03 .0116 applies. Because 26 NCAC 03 .0116 applies, the three-day extension was properly "added to the prescribed period" of time for petitioner to timely file his appeal to the OAH. N.C. R. Civ. P. 6(e).

The matter before us can be fairly categorized as a "contested case," and is governed by N.C. Gen. Stat. § 1A-1, Rule 6. 26 NCAC 03 .0116 (providing "time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6."). The Superior Court correctly held the petition contesting the license revocation was timely filed by adding the statutory three additional days to the sixty days after the agency placed the notice in the mail. *See id.*; N.C. R. Civ. P. 6(e); *Charlotte Truck Driver*, 95 N.C. App. at 212, 381 S.E.2d at 862-63; *Lloyd*, 296 N.C. at 424-25, 251 S.E.2d at 850.

V. Trial Court's Conclusions of Law

The trial court's Conclusions of Law correctly state, in part:

22. Section 150B-23(f) does not provide for how the time period is to be calculated for purposes of the 60-day deadline.

23. Section 150B-23(f) also does not indicate whether or not the computation of time differs depending on whether the Agency provides notice via personal delivery, electronic delivery, or by mail.

24. The OAH Rules governing contested cases provide that "[u]nless otherwise provided in the rules of the Office of Administrative Hearings or in a specific statute, *time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6."* 26 NCAC 03 .0116.

. . .

27. "Rule 6(e) was designed to 'alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right.' " *Precision Fabrics Grp., Inc. v. Transformer Sales & Serv., Inc.*, 344 N.C. 713, 721, 477 S.E.2d 166, 170 (1996).

28. The facts of this case illustrate the very reason the mailbox rule exists and must apply. The Agency mailed the Revocation Notices on August 10, 2021. Thus, the disparity of Petitioner's constructive and actual notice exists here.

29. N.C.G.S. § 150B-23(f) does not clarify whether the 60-day time period to appeal the mailed notice would commence on August 3, 2021[,] or August 10, 2021. Rule 6(e) provides the needed clarification by instructing the Agency and Bradley Home to start the clock when the notice is placed in the mail and to add three days to the time period to accommodate the inherent delay in receipt due to the mailing of the notice. Thus, when calculating the 60-day deadline to appeal the Revocation Notices, three days must be added, making the deadline October 5, 2021, the date Petitioner filed its Petition.

. . .

31. The Rules of Civil Procedure apply in "all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.G.S. § 1A-1, 1.

> In *Smith v. Daniels International*, the Court of Appeals analyzed whether Rule 6(e) applied to the statutory 10-day time period in N.C.G.S. § 96-15(b)(2) for the complainant to appeal a notice of benefits disqualification. 64 N.C. App. 381, 383, 307 S.E.2d 434, 435 (1983). The claimant argued he had thirteen days under Rule 6(e) because the benefits disqualification notice was mailed to him. *Id.*, 307 S.E.2d at 435. However, N.C.G.S. § 96-15(b)(2), which prescribes the ten days, expressly stated that an appeal was untimely unless the claimant files the appeal "within [ten] days after notification of the conclusion of the adjudicator, *whether the conclusion be delivered manually or mailed*." *Id.* (emphasis in original). The Court relied on this italicized language to conclude that the complainant would have had thirteen days to appeal but for the language in the statute, which "clearly indicates legislative intent to establish 'a differing procedure' from that prescribed by G.S. 1A–1, Rule 6(e)." *Id.* Thus, the Court could not apply Rule 6(e) in that particular instance based solely on that specific language in the statute.
>
> 32. There is no such language in N.C.G.S. § 150B-23(f) that would provide a differing procedure from Rule 6(e). Therefore, the default Mailbox Rule in Rule 6(e) applies, which gave [Bradley Home] until October 5, 2021[,] to timely appeal the Revocation Notices.

NC DHHS has shown nothing inconsistent or ambiguous about either statute or error in reading both *in pari materia*. *See Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998) ("When multiple statutes address a single subject, this Court construes them *in pari materia* to determine and effectuate the legislative intent."). Consistent with both statutes and applying both equally, the OAH Rules governing contested cases provide: ". . . time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6." 26 NCAC 03 .0116.

VI. Conclusion

NC DHHS has shown nothing inconsistent or ambiguous about either statute, both have equal dignity, and are properly read *in pari materia*. Both are applicable where the agency chose to provide required notice by mail. NC DHHS has also shown no reversible error or prejudice in the Superior Court's order.

We all agree the Superior Court utilized the correct standard of review when addressing the ALJ's order. Petitioner's timely notice under the statutes and Rules invoked OAH's subject matter jurisdiction to hear the merits challenging Petitioner's license revocations. The trial court's order is properly affirmed. I respectfully dissent.

EPCON HOMESTEAD, LLC, PLAINTIFF
v.
TOWN OF CHAPEL HILL, DEFENDANT

No. COA23-1048

Filed 16 July 2024

Statutes of Limitation and Repose—zoning ordinance—fee in lieu of affordable housing allocation—multiple causes of action—determination of accrual date

In a case filed by a homebuilder (plaintiff) on 24 October 2019—the date of its final installment payment of a fee in lieu of an affordable-housing allocation mandated in the land use manageable ordinance (LUMO) of a municipality—the trial court properly dismissed all seven causes of action as time barred because their accrual was not postponed under the continuing wrong doctrine by the incremental nature of plaintiff's payments. Five causes of action—seeking declarations, damages, and attorneys' fees—did not require payment to accrue and, therefore, began to run upon plaintiff's purchase of real property covered by the LUMO (no later than 31 January 2015). Accordingly, those causes of action were untimely under the statutes of limitation in both N.C.G.S. § 1-52(2) (three years for "a liability created by statute") and N.C.G.S. § 160A-364.1(b) (one year for challenges to zoning or unified development ordinances). The two remaining causes of action (seeking return of the fee) accrued upon plaintiff's first installment payment on 5 July 2017, and thus, were time barred under the more specific limit in N.C.G.S. § 160A-364.1(b), which controlled over the more general provision in N.C.G.S. § 1-52(2).

Appeal by Plaintiff from order entered 25 July 2023 by Judge R. Allen Baddour Jr. in Orange County Superior Court. Heard in the Court of Appeals 1 May 2024.

Morningstar Law Group, by Jeffrey L. Roether & William J. Brian, Jr., for Plaintiff-Appellant.

Hartzog Law Group, by Dan M. Hartzog, Jr., Katherine Barber-Jones & Rachel G. Posey, for Defendant-Appellee.

CARPENTER, Judge.

Epcon Homestead, LLC ("Plaintiff") appeals from the trial court's order granting the Town of Chapel Hill's (the "Town's") motion to dismiss. On appeal, Plaintiff argues the trial court incorrectly concluded that Plaintiff's complaint was time barred. After careful review, we disagree with Plaintiff. Accordingly, we affirm the trial court's order.

I. Factual & Procedural Background

This case involves real property, zoning, and statutes of limitation.[1] On 24 October 2019, Plaintiff, a homebuilder, sued the Town. The Town removed the case to the United States District Court for the Middle District of North Carolina. After concluding that Plaintiff's federal causes of action were time barred, the Middle District declined to exercise jurisdiction over Plaintiff's case. On 26 May 2021, the Middle District dismissed Plaintiff's complaint without prejudice, allowing Plaintiff to refile in state court. On 20 March 2023, the United States Court of Appeals for the Fourth Circuit affirmed.

Plaintiff refiled its complaint in Orange County Superior Court, and the Town moved to dismiss under Rule 12(b)(6). Again, the Town argued that Plaintiff's complaint was time barred. Plaintiff's complaint and its attachments show the following.

The disputed real property (the "Property") is an eighteen-acre piece of land located in Chapel Hill, North Carolina. Plaintiff began purchasing the Property piecemeal in 2015. As required by section 3.10 of the Town's Land Use Management Ordinance ("LUMO"), Plaintiff applied for a special use permit (the "SUP") from the Town in order to develop the Property into sixty-three residential units. On 27 October 2014, before Plaintiff began purchasing the Property, the Town approved the SUP.

The Town adopted section 3.10 of LUMO "to create and preserve affordable housing opportunities" and "to provide a structure for

1. "Although the singular phrase is *statute of limitations*, the plural tends to be *statutes of limitation*—that is, the -s gets dropped from *limitations*." Bryan A. Garner, Garner's Dictionary of Legal Usage 843 (3d ed. 2011).

cooperative participation by the public and private sectors in the production of affordable housing." Chapel Hill, N.C., Land Use Management Ordinance § 3.10 (2003). Section 3.10 applies to development projects that construct five or more single-family residential units within the Town's jurisdiction. *Id.* § 3.10.1(a). Section 3.10 requires developers to dedicate fifteen percent of their proposed construction to "affordable housing" units. *Id.* § 3.10.2(a). As an alternative to the affordable-housing allocation, however, developers may pay an approved fee. *Id.* § 3.10.3(d)(4).

Rather than dedicating fifteen percent of the Property to "affordable housing," Plaintiff offered to pay a $803,250 fee (the "Fee") to the Town. Through the SUP, the Town approved the Fee. Plaintiff decided to pay the Fee periodically. Plaintiff made its first Fee payment on 5 July 2017 and its final Fee payment on 20 March 2019.

Plaintiff's complaint lists several causes of action. In its first cause of action, Plaintiff requests a declaration that the Fee is ultra vires and therefore unlawful. In its second and third causes of action, Plaintiff requests a declaration that the Fee is unconstitutional. In its fourth cause of action, Plaintiff seeks a refund of the Fee, alleging that it is statutorily entitled to a return of Fee payments because the Fee is unlawful. In its fifth cause of action, Plaintiff seeks a refund of the Fee, alleging a common-law entitlement to a return of Fee payments because the Fee is unlawful. In its sixth cause of action, to the extent there is no other remedy, Plaintiff requests damages through a *Corum* action.[2] In its final cause of action, Plaintiff requests attorneys' fees.

On 25 July 2023, the trial court concluded that Plaintiff's complaint was time barred and granted the Town's motion to dismiss. On 17 August 2023, Plaintiff timely filed notice of appeal.

II. Jurisdiction

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

III. Issue

The issue on appeal is whether the trial court erred by dismissing Plaintiff's complaint.

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2. "A *Corum* claim allows a plaintiff to recover compensation for a violation of a state constitutional right for which there is either no common law or statutory remedy, or when the common law or statutory remedy that would be available is inaccessible to the plaintiff." *Taylor v. Wake Cty.*, 258 N.C. App. 178, 183, 811 S.E.2d 648, 652 (2018).

IV. Analysis

A. Standard of Review

We review the grant of a motion to dismiss under Rule 12(b)(6) de novo. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

A trial court must dismiss a complaint if it fails to "state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2023). "Dismissal is proper 'when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428–29 (2007) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). At the 12(b)(6) stage, we must treat the plaintiff's allegations as true and read the complaint liberally in the plaintiff's favor. *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991).

B. Statutes of Limitation

Here, the trial court dismissed Plaintiff's complaint under Rule 12(b)(6) because Plaintiff filed its complaint outside of the applicable statute of limitations. Statutes of limitation "bar claims filed outside their temporal boundaries regardless of whether the claims have merit." *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023). Statutes of limitation "represent the legislature's determination of the point at which the right of a party to pursue a claim must yield to competing interests, such as the unfairness of requiring the opposing party to defend against stale allegations." *Id.* at 409, 895 S.E.2d at 331 (citing *Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792–93 (1944)).

1. When North Carolina Statutes of Limitation Begin to Run

A statute of limitations begins to run on the "accrual date." *See id.* at 409, 895 S.E.2d at 331. The accrual date is the date when the injured party can sue. *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 183, 230 S.E.2d 405, 407 (1976). A party can sue when it sustains an injury to a "legally protected interest." *See Arendas v. N.C. High Sch. Athletic Ass'n*, 217 N.C. App. 172, 174, 718 S.E.2d 198, 199 (2011).

But we have competing language concerning *what* accrues: The North Carolina Supreme Court has said that a statute of limitations begins to run when a *cause of action* accrues, and it has said a statute of limitations begins to run when a *claim* accrues. *Compare Raftery*, 291 N.C. at 183–84, 230 S.E.2d at 407 (stating that a statute of limitations begins to run when a "cause of action" accrues) *with Morris*, 385 N.C. at 409, 895 S.E.2d at 331 (stating that a statute of limitations begins to run when a "claim" accrues).

Although seemingly synonymous, claims and causes of action are distinct. A cause of action is a legal theory; a claim is not. *See Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 162–63 (1993). A claim may support a cause of action. Indeed, a claim may support multiple causes of action. But a cause of action, a legal theory, is not a claim: A cause of action "is the vehicle for pursuing a claim." *St. Augustine School v. Underly*, 78 F.4th 349, 352 (7th Cir. 2023). Recently, the United States Court of Appeals for the Seventh Circuit precisely explained the difference between a claim and a cause of action:

> [There is a] distinction between a legal claim and a theory supporting relief (what the common law used to call a cause of action). A claim is the set of operative facts that produce an assertable right in court and create an entitlement to a remedy. A theory of relief is the vehicle for pursuing the claim; it may be based on any type of legal source, whether a constitution, statute, precedent, or administrative law. The specific theory dictates what the plaintiff needs to prove to prevail on a claim and what relief may be available. One lawsuit may raise multiple claims, and each claim may be supported by multiple theories.

Id. In other words, a claim is a pattern of allegations that may, or may not, support a cause of action. *See id.*

Our res judicata caselaw illustrates the distinction between a claim and a cause of action. We often refer to res judicata as "claim preclusion." *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). Res judicata prevents relitigation of a claim. *Id.* at 15, 591 S.E.2d at 880 (citing *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). When a party asserts a previously adjudicated claim in a later lawsuit, it is "clear that subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*." *Bockweg*, 333 N.C. at 494, 428 S.E.2d at 163.

This case provides a good example of how res judicata works. Plaintiff's complaint asserts seven legal theories. Plaintiff could not get a judgment concerning one theory, then file a subsequent complaint pursuing its other theories. *See id.* at 494, 428 S.E.2d at 163. That is because all of Plaintiff's theories are supported by one claim: Plaintiff was injured by an application of section 3.10, and section 3.10 is unlawful.

True, Plaintiff's causes of action are based on different legal authorities. Plaintiff's first, fourth, and seventh causes of action are based on statutory authority; Plaintiff's second, third, and sixth causes of action are based on constitutional authority; and Plaintiff's fifth cause of action is based on common-law authority. It is also true that Plaintiff's different theories could provide different remedies. Some could provide monetary relief; some could provide injunctive or declaratory relief. But compounding multiple theories and potential remedies does not create multiple claims. *See St. Augustine School*, 78 F.4th at 352.

The distinction between a claim and a cause of action may seem trivial. Often it will be, as a claim and its corresponding causes of action will typically accrue at the same time: A claim must support a cause of action in order to provide a remedy, *see id.* at 352, and the accrual date is generally the date of the alleged injury, *see Arendas*, 217 N.C. App. at 174, 718 S.E.2d at 199. So if the timing of the aggregate injury alleged in the claim aligns with the timing of the injury supporting the cause of action, the question of whether the accrual date concerns the claim or the cause of action is immaterial. But there are cases in which the portion of the injury that is necessary to support a cause of action occurred later in time than the beginning of the claim's aggregate injury.

This is such a case. Plaintiff's claim is this: Section 3.10 and its corresponding conditions are unlawful, and Plaintiff was injured because section 3.10, and the corresponding SUP and Fee, hindered Plaintiff's ability to develop the Property. On 27 October 2014, through the SUP, Plaintiff agreed to abide by section 3.10 by paying the Fee instead of building "affordable housing." We recognize, however, that on 27 October 2014 Plaintiff had yet to pay any of the Fee and could have discontinued development. Indeed, Plaintiff did not begin purchasing the Property until 2015.

The complaint is vague about when Plaintiff began purchasing the Property: "[Plaintiff] acquired the real property on which the Courtyards of Homestead Project was developed through several transactions occurring in 2015 and 2016." Because we must construe the complaint liberally in Plaintiff's favor, we will assume that Plaintiff first began

purchasing the Property on 31 December 2015, the last day of 2015. *See Lynn*, 328 N.C. at 692, 403 S.E.2d at 471.

At the latest, Plaintiff was fully aware of section 3.10's requirements after the Town issued the SUP. And Plaintiff became regulated by section 3.10 when Plaintiff began purchasing the Property: The Property was controlled by the SUP, which under section 3.10, conditioned the Property's development on paying the Fee. So if section 3.10 and the Fee are unlawful, Plaintiff was injured when it began purchasing the Property. *See Arendas*, 217 N.C. App. at 174, 718 S.E.2d at 199. Therefore, Plaintiff could have brought its suit on 31 December 2015; thus its claim began to accrue on 31 December 2015, at the latest. *See Raftery*, 291 N.C. at 183, 230 S.E.2d at 407.

But the injury supporting some of Plaintiff's *causes of action* is more precise: specifically, Plaintiff's fourth and fifth causes of action. Plaintiff's fourth cause of action cites statutory authority and demands payment of the Fee; Plaintiff's fifth cause of action cites common-law authority and demands repayment of the Fee.

A successful cause of action for a return of unlawful fees requires Plaintiff to actually pay the Fee; otherwise, the Town has nothing to return. *See Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 56, 698 S.E.2d 404, 417–18 (2010), *aff'd by an equally divided court*, 365 N.C. 305, 712 S.E.2d 849 (2011). In other words, Plaintiff was not sufficiently "injured" to support a cause of action for repayment until Plaintiff paid the Town. *See Arendas*, 217 N.C. App. at 174, 718 S.E.2d at 199. It follows, therefore, that a cause of action seeking repayment accrues when Plaintiff paid the Town. *See Amward Homes*, 206 N.C. App. at 56, 698 S.E.2d at 417–18 (stating that where plaintiffs paid several allegedly unlawful fees, the "cause of action accrued the first time an application was made for a building permit *and the fee was paid* to the Town" (emphasis added)).

Here, Plaintiff made its first Fee payment on 5 July 2017. So Plaintiff's fourth and fifth causes of action began to accrue on 5 July 2017. *See id.* at 56, 698 S.E.2d at 417–18. But as detailed above, Plaintiff's *claim* accrued, at the latest, on 31 December 2015. Therefore, this case creates a scenario where the claim and certain causes of action have different accrual dates. Although there is normally no harm in using "claim" and "cause of action" interchangeably, this case requires us to honor the distinction.

Here, to apply the law precisely, we must determine exactly when applicable statutes of limitation begin to run: when the claim accrues,

or when the cause of action accrues? Because our caselaw gives contradicting language on this question, and because statutes of limitation are legislative determinations, we will examine the relevant statutes to answer the question.

2. Statutes of Limitation Applicable to this Case

Here, Plaintiff argues that a three-year statute of limitations applies and cites subsection 1-52(2). *See* N.C. Gen. Stat. § 1-52(2) (2019) (stating that a three-year statute of limitations applies to "a liability created by statute"). The Town, however, argues that a one-year statute of limitations applies and cites subsection 160A-364.1(b). *See* N.C. Gen. Stat. § 160A-364.1(b) (2019) (stating that "an action challenging the validity of any zoning or unified development ordinance . . . under this Article or other applicable law shall be brought within one year of the accrual of the action").[3]

We start with subsection 1-52(2). Like most North Carolina statutes of limitation, subsection 1-52(2) is in Chapter 1. *See, e.g.*, N.C. Gen. Stat. §§ 1-46 to -55. Chapter 1 states that "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*, except where in special cases a different limitation is prescribed by statute." *Id.* § 1-15(a) (emphasis added). Therefore, if subsection 1-52(2) applies, the statute of limitations begins to run when the cause of action accrues. *See id.*

Subsection 160A-364.1(b), however, is less clear:

> Except as otherwise provided in subsection (a) of this section, an action challenging the validity of any zoning or unified development ordinance or any provision thereof adopted under this Article or other applicable law shall be brought within one year of the accrual of such action. Such an action accrues when the party bringing such action first has standing to challenge the ordinance.

N.C. Gen. Stat. § 160A-364.1(b).

This statute of limitations begins to run when the "action" accrues. *Id.* We read "action" to mean cause of action because in the immediately

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3. "Effective 19 June 2020, the General Assembly consolidated the provisions governing planning and development regulations by local governments into a new Chapter 160D of the General Statutes." *85' & Sunny, LLC v. Currituck Cty.*, 279 N.C. App. 1, 9 n.3, 864 S.E.2d 742, 747 n.3 (2021). Because the former Chapter 160A was in effect at all times relevant to this appeal, we cite that chapter in this opinion.

preceding subsection, the "cause of action" is what accrues, and the General Assembly seems to have used "action" as shorthand for cause of action. *See id.* § 160A-364.1(a). We also read subsection 160A-364.1(b) against the backdrop of Chapter 1, which houses most of our statutes of limitation, and in which the General Assembly clearly stated that accrual applies to causes of action, not claims. *See* N.C. Gen. Stat. § 1-15.

Accordingly, the proposed statutes of limitation[4] begin to run when the applicable cause of action accrues. *See* N.C. Gen. Stat. §§ 1-52(2), 160A-364.1(b). This requires us to parse through each of Plaintiff's causes of action and discern accrual dates for each, rather than discerning one accrual date for the underlying claim. Although this approach could complicate certain cases, such policy considerations are for the General Assembly, not the courts. *See Loftin v. Sowers*, 65 N.C. 251, 255 (1871) ("Our duty is, to administer the law as it is, and not according to our notion as to how it ought to be."); *see also Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 250–51, 628 S.E.2d 427, 430 (2006) (recognizing that, within the same case, different statutes of limitation may apply to different legal theories, and referring any proposed changes to this paradigm to the General Assembly).

To summarize: Claims and causes of action are distinct, and the statutes of limitation proposed in this case begin to run when the applicable causes of action accrue. To simplify our forthcoming analysis, we will split it into two parts. First, we will address Plaintiff's first, second, third, sixth, and seventh causes of action: These theories all require the same analysis, as none of them necessarily require a payment to accrue. We will refer to these theories as the "Declaratory Causes."[5] Then we will separately address Plaintiff's fourth and fifth causes of action because these theories necessarily involve payment of the Fee, and as detailed above, they accrue later than the Declaratory Causes. We will refer to Plaintiff's fourth and fifth causes of action as the "Payment Causes."

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4. Our accrual conclusion is limited to the statutes of limitation found in subsections 1-52(2) and 160A-364.1(b). Statutes of limitation are legislative decisions, and we recognize that the General Assembly may have decided that other statutes of limitation begin to run when the underlying claim accrues. Although it appears that the General Assembly prefers causes of action to be the starting line for most statutes of limitation, *see* N.C. Gen. Stat. § 1-15, confirming that appearance is beyond the calling of this case.

5. We recognize that Plaintiff's sixth and seventh causes of action do not technically request a "declaration." Nonetheless, for accrual purposes, these causes of action fit well with the other Declaratory Causes because they require a court to "declare" that the Fee is unlawful without necessarily requiring payment of a fee to accrue.

Under this rubric, we will discern whether Plaintiff's causes of action are time barred. If Plaintiff's causes of action are time barred, its claim is therefore not one "upon which relief can be granted," *see* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and the trial court did not err by dismissing Plaintiff's complaint, *see Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428–29.

C. Declaratory Causes

1. Accrual Date

As detailed above, accrual occurs when the injured party can sue, *Raftery*, 291 N.C. at 183, 230 S.E.2d at 407, and a party can sue when it sustains an injury to a "legally protected interest," *Arendas*, 217 N.C. App. at 174, 718 S.E.2d at 199.

Plaintiff's Declaratory Causes accrued on 31 December 2015, the same time as its underlying claim. At the latest, Plaintiff was fully aware of section 3.10's requirements after the Town issued the SUP. And Plaintiff became regulated by section 3.10 when Plaintiff began purchasing the Property: The Property was controlled by the SUP, which under section 3.10, conditioned the Property's development on paying the Fee. So if section 3.10 and the Fee are unlawful, Plaintiff was injured when it began purchasing the Property. *See id.* at 174, 718 S.E.2d at 199. Therefore, on 31 December 2015, Plaintiff was "at liberty to sue" and have a court render a declaratory judgment concerning the lawfulness of section 3.10 and the Fee. Accordingly, its Declaratory Causes began to accrue on 31 December 2015. *See Raftery*, 291 N.C. at 183, 230 S.E.2d at 407.

Plaintiff, however, argues that the continuing-wrong doctrine postponed accrual. According to Plaintiff, the Fee was unlawful, and the Fee was a continuing wrong because Plaintiff paid the Fee incrementally. And thus, Plaintiff's causes of action did not accrue until its final payment of the Fee. We disagree.

The continuing-wrong doctrine "provide[s] that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated." *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 70, 813 S.E.2d 218, 226 (2018). "When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (citing *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989)). "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Id.* at 179, 581 S.E.2d at 423 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)).

The *Quality Built* Court gave a "classic example" of a continuing wrong: repeated trespass. 371 N.C. at 70, 813 S.E.2d at 226. When there are multiple trespasses, each trespass is an independent "violative act." *See id.* at 70–71, 813 S.E.2d at 226. So under the continuing-wrong doctrine, the limitations period restarts after each trespass. *See id.* at 70–71, 813 S.E.2d at 226.

But *Quality Built* was not about trespass; it was about a town's collection of impact fees. *Id.* at 61–62, 813 S.E.2d at 221. There, the North Carolina Supreme Court considered whether the town of Carthage had authority to collect water and sewer impact fees. *Id.* at 61–62, 813 S.E.2d at 221. "The essence of plaintiffs' claim against the Town [was] that the Town ha[d] exacted unlawful impact fee payments from them." *Id.* at 71, 813 S.E.2d at 227.

The *Quality Built* plaintiffs "knew at the moment the Ordinances were passed, that they would be subject to the Ordinances' requirement of the payment of water and sewer impact fees." *Id.* at 62, 813 S.E.2d at 222. Accordingly, the town of Carthage argued that the continuing-wrong doctrine did not apply, but the Court rejected the town's argument. *Id.* at 71–72, 813 S.E.2d at 227. Rather, the continuing-wrong doctrine applied because the plaintiffs were injured each time they "were required to make impact fee payments in order to obtain approval for their development proposals." *Id.* at 72, 813 S.E.2d at 227. Therefore, the claim accrued each time plaintiffs paid an impact fee. *Id.* at 72, 813 S.E.2d at 227.

This case is distinguishable from *Quality Built*. There, the town of Carthage required multiple distinct fees, and the Court held that the continuing-wrong doctrine applied because the builder was "required to make impact fee payments in order to obtain approval for their development proposals." *Id.* at 72, 813 S.E.2d at 227. But here, the Town did not require multiple fees; it only required one, with an installment option to accommodate Plaintiff. And here, development approval did not hinge on separate payments; the Town approved development when it approved the SUP.

In other words, the continuing-wrong doctrine does not apply here because Plaintiff's payments were merely a "continual ill effect[] from an original violation"—application of section 3.10 via the Fee. *See Williams*, 357 N.C. at 179, 581 S.E.2d at 423. Although separately paid, Plaintiff's Fee payments were not distinct fees required by section 3.10. The payments were partial, but the Fee was a fixed total that Plaintiff chose "in lieu of" building "affordable housing." The payments were not "continual unlawful acts" like the multiple fees assessed in *Quality Built*. *See* 371 N.C. at 72, 813 S.E.2d at 227. Rather, they were a

"continual ill effect[] from an original violation." *See Williams*, 357 N.C. at 179, 581 S.E.2d at 423.

Compare the Fee in this case to repeated trespass, the "classic example" of a continuing wrong. *See Quality Built*, 371 N.C. at 70, 813 S.E.2d at 226. When there are multiple trespasses, there are multiple "violative acts." So under the continuing-wrong doctrine, the limitations period restarts after each trespass. *See id.* at 70–71, 813 S.E.2d at 226.

On the other hand, one extended trespass is just one "violative act"—even if the duration of the trespass is quite long. The extension of the trespass may increase the harm, but an increase in harm does not create multiple "unlawful acts." *See Williams*, 357 N.C. at 179, 581 S.E.2d at 423. Instead, the increase in harm is a "continual ill effect[] from an original violation." *See id.* at 179, 581 S.E.2d at 423.

Section 3.10 and its conditions are one extended "trespass"—not several repeated ones. The Town began "trespassing" on Plaintiff when it conditioned the development of the Property. And to be sure, this "trespass" would have continued even if Plaintiff chose to build affordable housing instead of paying the Fee. That is because there is just one allegedly unlawful act: the conditions established by the SUP and section 3.10. As stated above, any additional harm from subsequent Fee payments is not a distinct unlawful act; subsequent Fee payments are just the "continual ill effect" of the SUP and section 3.10. *See id.* at 179, 581 S.E.2d at 423.

Therefore, the continuing-wrong doctrine does not apply to Plaintiff's Declaratory Causes. *See id.* at 179, 581 S.E.2d at 423. Because the continuing-wrong doctrine does not apply, Plaintiff's Declaratory Causes accrued on 31 December 2015, as detailed above. *See Raftery*, 291 N.C. at 183, 230 S.E.2d at 407.

2. Applicable Statute of Limitations

Now that we know when Plaintiff's Declaratory Causes accrued, we must discern whether Plaintiff filed its complaint within the applicable statute of limitations. Plaintiff argues that a three-year statute of limitations applies, *see* N.C. Gen. Stat. § 1-52(2); the Town, however, argues that a one-year statute of limitations applies, *see* N.C. Gen. Stat. § 160A-364.1.

Plaintiff filed the complaint on 24 October 2019, and Plaintiff's Declaratory Causes accrued on 31 December 2015, at the latest. *See Raftery*, 291 N.C. at 183, 230 S.E.2d at 407. So even taking the allegations in Plaintiff's complaint as true, Plaintiff's Declaratory Causes are time

barred, regardless of whether the one-year or three-year statute of limitations applies. *See* N.C. Gen. Stat. §§ 1-52(2), 160A-364.1(b). In other words, regardless of which statute of limitations applies, Plaintiff's complaint "discloses [a] fact that necessarily defeats" its Declaratory Causes. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428–29.

D. Payment Causes

1. Accrual Date

Now we address the Payment Causes. As detailed above, Plaintiff made its first Fee payment on 5 July 2017, so the Payment Causes accrued on 5 July 2017. *See Amward Homes*, 206 N.C. App. at 56, 698 S.E.2d at 417–18. But again, the crux of the accrual questions is whether the continuing-wrong doctrine applies. If the continuing-wrong doctrine applies, then the Payment Causes are not barred under either the one-year or the three-year statute of limitations, as Plaintiff made the final Fee payment on 20 March 2019, within one year of filing the complaint. If the continuing-wrong doctrine does not apply, however, we must determine whether the one-year or the three-year statute of limitations applies because Plaintiff made the initial payment more than one year before filing the complaint, but within three years of filing the complaint.

Like the Declaratory Causes, the continuing-wrong doctrine does not apply to the Payment Causes. The Fee payments are not distinct fees simply because they were separately paid: Although the payments were partial, the Fee was fixed. Therefore, the Payment Causes accrued after the initial payment, but the subsequent payments were not "continual unlawful acts"; they were simply a "continual ill effect[] from an original violation." *See Williams*, 357 N.C. at 179, 581 S.E.2d at 423.

2. Applicable Statute of Limitations

Because the continuing-wrong doctrine does not apply to the Payment Causes, we must now determine which statute of limitations applies to the Payment Causes. Plaintiff argues that a three-year statute of limitations applies, citing subsection 1-52(2), and the Town argues that a one-year statute of limitations applies, citing subsection 160A-364.1(b).

"Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). The "situation" is "not determined by what either

party calls it, but by the issues arising on the pleadings and by the relief sought." *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E.2d 540, 545–46 (1956).

Subsection 1-52(2) states that a three-year statute of limitations applies to "a liability created by statute." *See* N.C. Gen. Stat. § 1-52(2). On the other hand, subsection 160A-364.1(b) states that a one-year statute of limitations applies to "an action challenging the validity of any zoning or unified development ordinance." *See* N.C. Gen. Stat. § 160A-364.1(b).

Here, regardless of how Plaintiff labels its causes of action, the "situation" of this case is clear: Plaintiff is challenging the validity of section 3.10—a "development ordinance"—which allowed the Town to issue the SUP and demand the Fee. *See id.* In pleading its Payment Causes, Plaintiff explicitly requests a return of the Fee by asserting that the Fee is "unlawful." Indeed, throughout its complaint, Plaintiff alleges that section 3.10 and its conditions are unlawful.

Plaintiff argues that subsection 1-52(2) applies because it seeks "a liability created by statute," *see* N.C. Gen. Stat. § 1-52(2), but subsection 160A-364.1(b) "deals more directly and specifically with" Plaintiff's Payment Causes, *see* N.C. Gen. Stat. § 160A-364.1(b). Therefore, subsection 160A-364.1(b) "controls over the statute of more general applicability," *see Trs. of Rowan Tech.*, 313 N.C. at 238, 328 S.E.2d at 279, and Plaintiff's Payment Causes are subject to a one-year statute of limitations. *See* N.C. Gen. Stat. § 160A-364.1(b).

Plaintiff filed its complaint on 24 October 2019, and Plaintiff's Payment Causes accrued on 5 July 2017. *See Amward*, 206 N.C. App. at 56, 698 S.E.2d at 417–18. So even taking all allegations in Plaintiff's complaint as true, Plaintiff's Payment Causes are time barred. *See* N.C. Gen. Stat. § 160A-364.1(b).

In other words, Plaintiff's complaint "discloses [a] fact that necessarily defeats" its Payment Causes. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428–29. Thus, all of Plaintiff's legal theories are time barred. Accordingly, the trial court did not err by dismissing Plaintiff's complaint under Rule 12(b)(6). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

V. Conclusion

We conclude that the trial court properly dismissed Plaintiff's complaint because all of Plaintiff's causes of action are time barred.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

IN RE APPEAL OF ASHLEY FURNITURE INDUS., INC.

[294 N.C. App. 667 (2024)]

IN THE MATTER OF THE APPEAL OF ASHLEY FURNITURE INDUSTRIES, INC, APPELLANT

FROM THE DECISION OF THE DAVIE COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN PROPERTY FOR TAX YEARS 2018 AND 2019

No. COA23-969

Filed 16 July 2024

1. Taxation—property valuation—choice to use income approach—application of approach—not arbitrary or capricious

A final decision containing the Property Tax Commission's valuation of a furniture company's real property (used for manufacturing, warehousing, and distribution purposes) was affirmed because the Commission's choice to value the property under the income approach was neither arbitrary nor capricious. The Commission thoroughly analyzed and based its decision on all of the evidence submitted by the parties, and it clearly articulated its rationale for using the income approach instead of the sales approach, which included the fact that both parties' appraisers considered properties that were not truly comparable to the property at issue when applying the sales approach. When applying the income approach, the Commission was not required to account for any functional or economic obsolescence—a step that is required under the cost approach. Further, competent, material, and substantial evidence supported the Commission's choice to use a single capitalization rate to valuate the entire property rather than apply different capitalization rates for each individual facility on the property.

2. Taxation—property valuation—finding improperly applying cost approach—income approach properly applied—no prejudice

A final decision containing the Property Tax Commission's valuation of a furniture company's real property (used for manufacturing, warehousing, and distribution purposes) was affirmed where, even though the Commission's valuation under the cost approach was erroneous (because the Commission failed to deduct for depreciation), the Commission's ultimate reliance on the income approach was supported by competent, material, and substantial evidence in view of the whole record; therefore, the finding of fact containing the erroneous valuation did not prejudice the furniture company's substantial rights and did not require remand.

Appeal by Ashley Furniture Industries, Inc., from final decision entered 24 March 2023 by the North Carolina Property Tax Commission

sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 30 April 2024.

Maynard Nexsen PC, by David P. Ferrell, Janet L. Shires, and George T. Smith, for Appellant Ashley Furniture Industries, Inc.

Parker Poe Adams & Bernstein LLP, by Collier R. Marsh and Charles C. Meeker, for Appellee Davie County.

COLLINS, Judge.

Ashley Furniture Industries, Inc., ("Ashley") appeals from a final decision of the North Carolina Property Tax Commission ("Commission") valuing certain property for tax years 2018 and 2019. Ashley argues that the Commission erred by using the income approach to value the property or, in the alternative, erroneously applied the income approach. Ashley also argues that the Commission erroneously applied the cost approach. We affirm the Commission's final decision.

I. Background

Ashley purchased an approximately 310-acre parcel of land in Davie County ("Subject Property") in 2012. At the time of the purchase, the Subject Property contained: (1) an approximately 435,000 square-foot primary building; (2) an approximately 81,000 square-foot bedding facility; (3) an approximately 17,000 square-foot truck facility; (4) 32 detached sheds, each approximately 37,000 square feet; (5) an approximately 1,180 square-foot welcome center; and (6) two pump houses, totaling approximately 2,800 square feet. Ashley expanded the primary building by approximately 1,120,000 square feet and renovated two sheds between 2012 and 2017. In 2018, Ashley expanded the truck facility by approximately 5,100 square feet.

In 2017, Davie County reassessed the Subject Property as part of its general reassessment. At that time, the assessment increased from $70,851,550 to $87,836,890. Ashley did not appeal the 2017 assessment. The Subject Property was again assessed at $87,836,890 in 2018. By letter dated 21 May 2018, Ashley appealed the 2018 assessment to the Davie County Board of Equalization and Review ("Board") and requested that the County reduce the Subject Property's value to $59,981,700. In support of its request, Ashley stated, among other things, that "[a]s of January 2017, the proeprty (sic) only underwent new construction and renovations at a total cost of $51,328,890 post a $10M acquisition." The Subject Property was again assessed at $87,836,890 in 2019, and Ashley

appealed. The matter was heard by the Board on 30 July 2019, at which point the assessments for both 2018 and 2019 were considered.

The Board issued a decision valuing the Subject Property at $69,454,448 for 2018 and a separate decision valuing the Subject Property at $69,550,441 for 2019 to account for the truck facility expansion. Ashley appealed those decisions to the North Carolina Property Tax Commission ("Commission"). In its notices of appeal, Ashley valued the Subject Property at $29,500,000 for 2018 and $30,000,000 for 2019 and alleged that the Board "employed an arbitrary and/or illegal method of appraisal in reaching the assessed value that the [Board] assigned to the subject property for the year[s] at issue" and "assigned a value to the subject property that substantially exceeded its true value in money as of January 1 for the year[s] at issue[.]"

The matter came on for hearing before the Commission on 13 December 2022. Ashley submitted an appraisal report prepared by Richard Marchitelli, a certified general real estate appraiser for Cushman & Wakefield and a Member of the Appraisal Institute, Counselor of Real Estate, and Fellow of the Royal Institution of Chartered Surveyors. For his appraisal, Marchitelli divided the property into two sub-elements: Unit B comprised the 30 unrenovated sheds, and Unit A comprised the remainder of the Subject Property. Marchitelli concluded that "the sales comparison approach is the only applicable approach in developing a credible value opinion for Economic Unit A" and, using this approach, appraised Unit A at $30,530,000 in 2018 and $30,620,000 in 2019. Marchitelli appraised Unit B at $3,760,000 in 2018 and 2019 using the cost approach. Accordingly, Marchitelli opined that the true value of the Subject Property was $34,290,000 for 2018 and $34,380,000 for 2019.

The County submitted an appraisal report prepared by Richard Brant, a certified general real estate appraiser for the Loftis Appraisal Company and a Member of the Appraisal Institute. Brant divided the Subject Property into the following sub-elements: (1) primary building; (2) bedding facility; (3) truck facility; (4) sheds; (5) welcome center; and (6) pump houses. Brant appraised each sub-element using all three methods of valuation: the income approach, the cost approach, and the sales comparison approach. He then combined the appraised value of the sub-elements to derive an appraisal for the Subject Property for each method of valuation. Brant opined that the true value of the Subject Property for 2018 was: (1) $69,449,949 using the income approach; (2) $69,476,426 using the cost approach; and (3) $74,237,952 using the sales comparison approach. Placing "only limited weight" on the income approach, "very little weight" on the cost approach, and "[c]onsiderable

weight" on the sales comparison approach, Brant reconciled the three values for a final opinion of value of $72,000,000 for 2018. Brant opined that the true value of the Subject Property for 2019 was: (1) $70,907,906 using the income approach; (2) $70,848,069 using the cost approach; and (3) $75,313,272 using the sales comparison approach. Placing the "greatest weight" on the sales comparison approach, Brant reconciled the three values for a final opinion of value of $73,200,000 for 2019.

The Commission entered a final decision on 24 March 2023 valuing the Subject Property at $60,000,000 for 2018 and $60,100,000 for 2019. Ashley appealed.

II. Discussion

Ashley argues that the Commission erred by using the income approach to value the Subject Property (excluding the sheds) or, in the alternative, erroneously applied the income approach. Ashley also argues that the Commission erroneously applied the cost approach to value the Subject Property, excluding the sheds. Ashley does not argue that the Commission erred by using the cost approach to value the sheds, nor does it argue that the Commission erred in its application of the cost approach to the sheds.

When reviewing decisions of the Commission, this Court

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

N.C. Gen. Stat. § 105-345.2(b) (2023).

Our Supreme Court has noted that "[a]n act is arbitrary when it is done without adequate determining principle[.]" *In re Hous. Auth. of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). Moreover, "[a]n act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *Id.* (citations omitted). "In short, when these terms are applied to discretionary acts, such as the determinations of the Commission, they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith." *In re Parkdale Mills*, 225 N.C. App. 713, 715, 741 S.E.2d 416, 419 (2013) (quotation marks and citations omitted). "Determination of whether conduct is arbitrary and capricious or an abuse of discretion is a conclusion of law." *Id.* (quotation marks and citations omitted).

We review a decision of the Commission under the whole record test to determine whether the decision has a rational basis in the evidence. *In re Parkdale Am.*, 212 N.C. App. 192, 194, 710 S.E.2d 449, 450 (2011). The whole record test "does not allow the reviewing court to replace the Commission's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *In re Parkdale Mills*, 225 N.C. App. at 716, 741 S.E.2d at 419 (brackets omitted). Rather, the whole record test "requires the court, in determining the substantiality of evidence supporting the Commission's decision, to take into account whatever in the record fairly detracts from the weight of the Commission's evidence." *Id.* (brackets omitted). "If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (citations omitted).

"It is presumed that *ad valorem* tax assessments are correct and that the tax assessors acted in good faith in reaching a valid decision." *In re Owens*, 144 N.C. App. 349, 352, 547 S.E.2d 827, 829 (2001) (citation omitted). "This presumption may be rebutted by material, substantial, and competent evidence that an arbitrary or illegal method of valuation was used and the assessment substantially exceeded the true value in money of the property." *In re Philip Morris U.S.A.*, 130 N.C. App. at 533, 503 S.E.2d at 682 (citations omitted). "Once a taxpayer produces sufficient competent, material and substantial evidence to rebut the presumption of correctness, the burden of proof then shifts to the taxing authority and the taxing authority must demonstrate its methods produce true value." *In re Blue Ridge Mall LLC*, 214 N.C. App. 263, 267, 713 S.E.2d 779, 782 (2011) (citation omitted). "To determine the appropriate appraisal

methodology under the given circumstances, the Commission must hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden." *In re Parkdale Mills*, 225 N.C. App. at 717, 741 S.E.2d at 420 (quotation marks and citations omitted).

"All property, real and personal, shall as far as practicable be appraised or valued at its true value in money." N.C. Gen. Stat. § 105-283 (2023). When used in this context, true value

> shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id.

N.C. Gen. Stat. § 105-317 governs appraisals of real property and provides that persons making appraisals have the following duties:

> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value . . . .
>
> (2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

Id. § 105-317(a)(1), (2) (2023). "An important factor in determining the property's market value is its highest and best use." *In re Belk-Broome Co.*, 119 N.C. App. 470, 473, 458 S.E.2d 921, 923 (1995) (citations omitted), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996).

N.C. Gen. Stat. § 105-317 has been interpreted as authorizing three property valuation methods: (1) the income approach, (2) the cost approach, and (3) the sales comparison approach. *In re Owens*, 144 N.C. App. at 353, 547 S.E.2d at 829. "However, the general statutes nowhere mandate that any particular method of valuation be used at all times and in all places." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 648, 576 S.E.2d 316, 320 (2003). "In light of the innumerable possible situations that may arise, authorities that have the obligation of assigning a value to land sensibly are given discretion to apply the method that most accurately captures the 'true value' of the property in question." *Id.*

"It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property." *In re Belk-Broome Co.*, 119 N.C. App. at 474, 458 S.E.2d at 924 (citations omitted). "Under the income approach, an appraiser calculates the economic rent the property earns and deducts normal operating expenses to arrive at net operating income." *Dep't of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993). The net operating income is then divided by a capitalization rate to determine the fair market value of the property. *Id.* The capitalization rate is the "interest rate used in calculating the present value of future periodic payments." *Capitalization Rate*, *Black's Law Dictionary* (11th ed. 2019).

Generally, "[t]he cost approach is better suited for valuing specialty property or newly developed property" and is "used most often when no other method will yield a realistic value." *In re Belk-Broome Co.*, 119 N.C. App. at 474, 458 S.E.2d at 924. "Part of the cost approach is deducting for depreciation, which is a loss of utility and, hence, value from any cause . . . [representing] the difference between cost new on the date of appraisal and present market value." *In re Stroh Brewery Co.*, 116 N.C. App. 178, 186, 447 S.E.2d 803, 807 (1994) (quotation marks and citation omitted). "Depreciation may be caused by deterioration, which is a physical impairment such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *Id.* (quotation marks and citations omitted).

"The sales comparison approach compares the subject property with market data based upon an appropriate unit of comparison." *See In re Lane Co.-Hickory Chair Div.*, 153 N.C. App. 119, 122, 571 S.E.2d 224, 226 (2002). Under the sales comparison approach, "[t]he prices achieved from the recent sales of comparable properties are analyzed and adjusted for differences in location, size, age, condition, date of sale,

special suitability or any other appropriate factor, and then the adjusted price is applied to arrive at a value for the property under consideration." Damien Abbott, *Encyclopedia of Real Est. Terms* 1036 (Delta Alpha Publishing, 2d ed. 2000) (quotation marks omitted). "This method is limited by the availability of data on recent and directly comparable property, but it is the most reliable and accepted method of appraising real estate." *Id.*

A. Income Approach

[1] Ashley argues that the Commission's decision to use the income approach rather than the sales comparison approach was arbitrary because it was "not only contrary to both appraisers' methodologies, but also contrary to how willing buyers would determine a value for the Subject Property." In the alternative, Ashley argues that the Commission erred by "failing to properly conduct its income approach valuation for the Subject Property." (capitalization altered).

Here, the Commission made the following findings of fact relevant to its decision to use the income approach and its valuation using this approach:

> 5. The opinion expressed by the Appellant's expert appraisal witness, Mr. Richard Marchitelli, is that "the highest and best use of the subject property is as a manufacturing, warehousing, and distribution facility as it is currently improved." The opinion expressed by the County's expert appraisal witness, Mr. Richard Brant, is notably less succinct, but nonetheless indicates a substantially similar highest and best use: as to the original building, the addition, and the truck facility, the highest and best use is continued use as improved; as to the bedding facility, originally used by the Appellant in the manufacture of bedding materials but recently used primarily for storage, the highest and best use is as manufacturing space; and as to the unrenovated sheds, used in part by the Appellant for storage, the highest and best use is continued use as storage. While we note that the original bedding facility was perhaps built for a purpose other than manufacturing, and we note that the original purpose of the unrenovated sheds may have been for something other than storage, we find it reasonable that the highest and best use of these facilities is manufacturing and storage, respectively. Accordingly, we find that the highest and best use of the

subject property as a whole is for manufacturing, warehousing, and distribution, as currently improved.

. . . .

7. Mr. Marchitelli, the appellant's expert appraisal witness, explained that he had approached the appraisal of the subject property as a whole by appraising two subelements, one of which consisted of the 31 unrenovated sheds (adjusting this figure to 30 to reflect the 2017 renovation of Shed #11 for his opinion of value as of 2018). Mr. Marchitelli designated the unrenovated sheds as "Unit B," and designated the remainder of the property, including all land and all remaining improvements, as "Unit A." Furthermore, Mr. Marchitelli's appraisal began with an opinion of value as of January 1, 2017 (which year is not a part of this appeal), with adjustments made to the 2018 and 2019 values to reflect changes made to the property during 2017 and 2018, respectively.

. . . .

11. Mr. Marchitelli appraised Unit A by relying on the sales comparison approach. We recall that his designation of Unit A included the land and all improvements on the subject property other than the unrenovated sheds . . . . At the hearing, Mr. Marchitelli testified as to his opinion that there was no sale of a property that is perfectly comparable to Unit A of the subject property, and that he had therefore considered the sale of five properties that he determined to be most comparable to Unit A . . . .

12. Whereas Mr. Marchitelli determined Unit A to have approximately 1,700,000 square feet of building area, only Comparable 3 has a similar amount (approximately 1,900,000 square feet) of building area. Comparable 2, at 750,000 square feet, is nearly 1 million square feet smaller than Unit A, and the remaining properties offered as comparable are less than 529,000 square feet in size. Similarly, the land area of Unit A is approximately 310 acres, but the land area of the properties offered as comparable ranges from approximately 183 acres for the largest, down to approximately 42 acres for the smallest. Mr. Marchitelli further lists comparisons between Unit A and the comparable sales for the number of truck doors (219 for Unit A

and 27 to 114 for the comparables); for the ceiling height (the ceiling height in the 1,120,000 square foot addition portion of Unit A is 46 feet, with the remainder of Unit A ranging down to 21.3 feet, as compared to a range of 16 to 32 feet of ceiling height for four of the comparable properties—only Comparable 5 has a ceiling height of up to 48 feet); for the percentage of total building area dedicated to office space (5.2% for Unit A and 1.31% to 7.57% for the comparables); and for the number of parking spaces (2,729 for Unit A and 116 to 1,600 for the comparables).

13. Mr. Marchitelli testified that he applied time adjustments to the sale prices of the comparable properties in order to account for differences in market conditions between the time of the sales and the appraisal date of January 1, 2017, and relied on published regional rental data for industrial buildings in order to estimate the changes in market conditions . . . . For the differences in the physical characteristics of building size; ratio of land size to building size; ratio of building size to number of truck doors; ratio of building size to parking spaces; percentage of building size dedicated to office space; and ceiling height, Mr. Marchitelli made positive or negative adjustments to account for difference between the comparable properties and Unit A, where warranted according to his judgment . . . . Mr. Marchitelli determined that no adjustments were warranted for the differences in the age and condition of the sale properties, as compared to Unit A, but applied positive and negative adjustments of either 5% or 10% to all other differences that he deemed appropriate . . . .

. . . .

18. With the exception of the time adjustments for market conditions, we find these adjustments somewhat puzzling overall. As described above, there are significant quantitative differences in several of the physical characteristics that have been identified in the appraisal report as relevant to the value of Unit A, but every adjustment made to the comparable property sale prices is simply a 5% or 10% change, in a positive or negative direction. There is little discussion in the appraisal report of the rationale behind the choice to limit these adjustments to

5% or 10% and, unlike with the time adjustments for market conditions, there is little discussion of actual market evidence in support of the adjustments for differences in physical characteristics.

. . . .

20. . . . . Mr. Marchitelli explained that, as to Unit A, he had considered both the income approach and the cost approach, but had not developed either approach for his appraisal, opting instead to rely solely on the sales comparison approach. . . .

. . . .

27. The County's appraisal witness, Mr. Rick Brant, also approached the appraisal of the subject property by considering its subelements separately, and did so in a more granular way, developing individual values for the land, site improvements, the primary building (for which he considered separately the original building and the addition), the bedding facility, the truck facility, the 32 sheds (Mr. Brant considered Shed #43 to be partially finished, and did not distinguish it from the other sheds), the welcome center, and two separate pump houses. Mr. Brant explained his approach as one that relied on readily available market information for the subelements as an alternative to extracting less reliable information from sales of dissimilar properties that required substantial adjustments due to the divergent uses found on the subject property. Although he testified that he placed the greatest emphasis on the sales comparison approach, Mr. Brant testified that he had developed all three approaches to value for the subject as a test of the reasonableness of his conclusions.

. . . .

34. Mr. Brant explained that, in reviewing the sales of properties that he considered comparable to the various subelements of the subject property, he allocated a portion of the sale price to the land conveyed in the sale, and allocated the remainder of the sale price to the improvements conveyed in the sale, in order to isolate the improvement value from the underlying land value, and thereby eliminate the effects of land-related factors, such as location

and land size, from the sale prices. Mr. Brant testified that this approach also enabled him to select properties of similar utility that were as close in proximity as possible to the subject property.

35. Mr. Brant's appraisal report proceeds as generally expected. Four sales are offered as comparable for each of the subject property's subelements, and there are four such subelements (the primary building, the bedding facility, the truck facility, and the sheds) remaining for consideration, for a total of sixteen sales. Mr. Brant allocates a portion of the sale prices to land value, and makes various adjustments to account for differences between the sale properties and the respective subelements being considered . . . . We do not address these sales in detail here, in part because we see some of the same issues raised by the earlier report—for example, the lack of explanation for the positive and negative adjustments made to the sale prices, in addition to the broader range (negative 15% to positive 15%) of adjustments that are applied. Most puzzling, however, is the lack of explanation for the amount of the sale price allocated to land value. For example, the land value allocations listed on page 59 of the report indicate that values ranging from $26,000 per acre to $46,000 per acre have been attributed to the land for the respective sales, but without any explanation of the basis for those allocations. Without evidence enabling us to understand and appreciate the validity of the land allocation, we have no context for evaluating the reliability of the remaining value allocated to the improvements. Accordingly, we have ultimately placed little emphasis on the sales comparison approach offered by the County. . . .

36. Mr. Brant next developed an income approach to appraising the subject property by estimating the net operating income ("NOI") for each of the four subelements (the primary building, the bedding facility, the truck facility, and the sheds), and then directly capitalizing each NOI at a rate he believed appropriate to each subelement. For the primary building, Mr. Brant considered triple net leases in place for four other properties that he described as large warehouse/manufacturing facilities, and that he considered comparable to the primary building. These properties

reported lease rates ranging from $2.13 to $5.50 per square foot, which Mr. Brant modified to a range of $2.56 to $4.13 per square foot, after applying various adjustments without further explanation. From these figures, Mr. Brant determined that an appropriate rental rate for the primary building was $3.00 per square foot, resulting in an estimated potential gross income of $4,659,409 for the subject property. Although no market data is shown in in (sic) the appraisal report to support the reductions, Mr. Brant estimated a 5% vacancy rate for the primary building, and further reduced the estimated effective gross income for the primary building with estimates of management (3%) and replacement reserves (2%), ultimately arriving at an NOI of $4,171,731 for the primary building . . . . We note here that, although the leased properties are offered as comparable to the primary building, the largest of the properties (at 526,320 square feet) is only about one-third the size of the primary building (1,553,103 square foot). Furthermore, gross adjustments to the leased properties range from 30% to 60%, which we find to be significant adjustments for properties that are offered as comparable.

. . . .

50. Overall, we find that the income approach developed here for the subject property contains both too much and too little information. . . . [A]lthough the subelements are all considered by Mr. Brant to be part of an industrial warehouse and distribution facility, differences are assumed for rental, vacancy and capitalization rates, without further explanation for the recharacterization of the subelements or for the choice of these rates, all of which have significant impact on the value of each subelement and, therefore, the subject property as a whole. While we understand that an appraisal report represents the writer's professional opinion, there is insufficient evidence before us to enable us, as the report's readers, to evaluate the reasonableness of the opinion. Accordingly, we place little weight on the income approach conclusions.

. . . .

52. We find that neither of the appraisal reports discussed provides a compelling conclusion of value. We do note,

however, that the appraisal prepared for the County provides a greater number of options in support of its opinion, since all three approaches to value have been developed for each subelement of the subject property, whereas the appraisal prepared for the Appellant relies on a single approach to value for the subelements it considers. Our determination of value is therefore based upon all information received from the parties, rather than from a single party's opinion.

53. We find that the primary building, and especially the newly-constructed addition, represents the greatest single element of value for the subject property, and therefore the greatest influence on the overall value of the subject property. We have previously found that the highest and best use of the subject property is for manufacturing, warehousing, and distribution, as currently improved. Our preference would therefore be to consider the sales of properties comparable to the subject property, but the sale properties offered by the parties as comparable to the subject are not truly comparable, and cannot be made so without such adjustments and assumptions as to render them unreliable.

. . . .

55. We approach the determination of value for the remainder of the property by initially considering the income approach. By applying a rate of $3.00 per square foot to the approximately 1,700,000 square feet of the facility (excluding the sheds), we derive a potential gross income of $5,100,000 for the subject property. Reducing this figure by a 10% net adjustment for vacancy, management, and replacement reserves yields a NOI of $4,590,000. Capitalizing the NOI by 8% (a figure near the average of the reported 4.49% to 12.09% range for the subject property type, and excluding the local property tax burden that would be carried by the tenant) yields an estimated value of $57,000,000 (rounded) for the remainder of the subject property. Under this approach, the combined value of the subject property would be $60,000,000 ($3,000,000 for the sheds and $57,000,000 for the remainder).

. . . .

> 57. We find, therefore, that the true value of the subject property was $60,000,000 as of January 1, 2018. The parties have separately determined that the value added to the subject property for 2019 was either $90,000 (according to the County) or $100,000 (according to the Appellant). From these estimates, we find that the true value of the subject property as of January 1, 2019 was $60,100,000.

(footnotes omitted).

Ashley submitted an appraisal report prepared by Richard Marchitelli. Marchitelli divided the Subject Property into two sub-elements: Unit B comprised the 30 unrenovated sheds, and Unit A comprised the remainder of the Subject Property. Marchitelli concluded that "the sales comparison approach is the only applicable approach in developing a credible value opinion for Economic Unit A." Marchitelli did not consider the income approach because "properties like Unit A are most often purchased by owner-users" and "hypothetical investors of Unit A would be deterred from purchasing it as an investment rental property because of the diversity of its physical features and functionality and depreciation issues and resulting lack of appeal to tenants." Marchitelli did not consider the cost approach because Unit A "is an older, non-specialized facility with significant depreciation[,]" and the cost approach is "particularly applicable when the property being appraised involves relatively new improvements which represent the highest and best use of the land or suffer only minor depreciation; or when relatively unique or specialized improvements are located on the site for which there are few improved sales of comparable properties."

The Commission extensively analyzed the five properties offered by Marchitelli as comparable properties to Unit A. The Commission found that only one of the properties–which had 200,000 more square feet of building area than Unit A's 1,700,000 square feet of building area–had a "similar amount" of square footage of building area to that of Unit A. Another property was "nearly 1 million square feet smaller than Unit A," and the remaining properties were "less than 529,000 square feet in size." The Commission also found that while the land area of Unit A was approximately 310 acres, the land area of the offered properties ranged from "approximately 183 acres for the largest, down to approximately 42 acres for the smallest." The Commission found further physical differences in the number of truck doors, ceiling heights, percentage of total building area dedicated to office space, and parking spaces between Unit A and the properties offered as comparable properties.

Despite the "significant quantitative differences in several of the physical characteristics that have been identified in the appraisal report as relevant to the value of Unit A, . . . every adjustment [Marchitelli] made to the comparable property sale prices is simply a 5% or 10% change, in a positive or negative direction." Furthermore, the Commission found that there was "little discussion of actual market evidence in support of the adjustments for differences in physical characteristics."

The County submitted an appraisal report prepared by Richard Brant. Brant divided the Subject Property into the following sub-elements: (1) primary building; (2) bedding facility; (3) truck facility; (4) sheds; (5) welcome center; and (6) pump houses. Brant appraised each sub-element using all three methods of valuation and reconciled the three values to state his final opinion of value, placing "only limited weight" on the income approach, "very little weight" on the cost approach, and "[c]onsiderable weight" on the sales comparison approach. The Commission found that "the appraisal report prepared for the County provides a greater number of options in support of its opinion, since all three approaches to value have been developed for each subelement of the subject property, whereas the appraisal prepared for the Appellant relies on a single approach to value for the subelements it considers."

The Commission found that Brant "relied on readily available market information for the subelements as an alternative to extracting less reliable information from sales of dissimilar properties that required substantial adjustments[,]" and that although Brant "placed the greatest emphasis on the sales comparison approach," he "developed all three approaches to value for the subject as a test of the reasonableness of his conclusions." Brant offered four comparable properties for each of the Subject Property's subelements: the primary building, the bedding facility, the truck facility, and the sheds. The Commission did not address in detail the properties offered as comparable properties "because [it saw] some of the same issues raised by [Marchitelli's] report—for example, the lack of explanation for the positive and negative adjustments made to the sale prices, in addition to the broader range (negative 15% to positive 15%) of adjustments that are applied." What the Commission found "[m]ost puzzling, however, [was] the lack of explanation for the amount of the sale price allocated to land value." Due to the lack of evidence, the Commission "ultimately placed little emphasis on the sales comparison approach offered by the County."

The Commission next analyzed in depth Brant's appraisal developed using the income approach. The Commission ultimately concluded, "[T]here is insufficient evidence before us to enable us, as the report's

readers, to evaluate the reasonableness of the opinion." Accordingly, the Commission "place[d] little weight on the income approach conclusions."

As a result of its in-depth analysis of both parties' experts' reports, the Commission found that "neither of the appraisal reports discussed provides a compelling conclusion of value." The Commission, therefore, based its determination of value "upon all information received from the parties, rather than from a single party's opinion." Noting that its preference would be "to consider the sales of properties comparable to the subject property," the Commission specifically found that "the sale properties offered by the parties as comparable to the subject are not truly comparable, and cannot be made so without such adjustments and assumptions as to render them unreliable." The Commission thus "approach[ed] the determination of value for the remainder of the property by initially considering the income approach."

Brant testified before the Commission that the income approach was an appropriate method to value the Subject Property, "especially when you look at who the buyers and sellers are of these large modern distribution facilities[,]" and that there was adequate data to support his income approach valuation. Ronald Loftis, principal owner and appraiser of the Loftis Appraisal Company, also testified during the hearing. Loftis is a Member of the Appraisal Institute, Counselor of Real Estate, and licensed real estate broker. Loftis testified that appraisers are "given the opportunity to develop opinions of value based upon three approaches, and those approaches tend to triangulate. So if we look at those approaches, somewhere that value is going to fall within that triangle, you know, where cost, sales, and income are all going to bracket that triangle." He further testified that he would consider the income approach "even if it's an owner-occupied property," and that there was sufficient data to support a reliable valuation using the income approach.

There is no requirement that "any particular method of valuation be used at all times and in all places[,]" *In re Greens of Pine Glen Ltd.*, 356 N.C. at 648, 576 S.E.2d at 320, and the Commission was therefore not required as a matter of law to use any particular approach. The Commission thoroughly analyzed the evidence before it, clearly articulated its reasoning for not using the sales comparison approach and for using the income approach, and made its "determination of value . . . based upon all information received from the parties." The Commission's decision to use the income approach rather than the sales comparison approach to value the Subject Property was not arbitrary and is supported by competent, material, and substantial evidence in view of the whole record. Ashley's argument is overruled.

1. Expenses and Obsolescence

Ashley argues that the Commission erred by failing "to account for any expenses, functional or external obsolescence for the Subject Property." (capitalization altered).

The income approach does not require the appraiser to account for functional or economic obsolescence. Under the income approach, the appraiser "calculates the economic rent the property earns and deducts normal operating expenses" to derive the net operating income, which is then divided by a capitalization rate to "determine the fair market value of the property." *Fleming*, 112 N.C. App. at 583, 436 S.E.2d at 409 (citation omitted). It is the cost approach that requires the appraiser to deduct for depreciation, which may be caused "by obsolescence, which is an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *In re Stroh Brewery Co.*, 116 N.C. App. at 186, 447 S.E.2d at 807 (quotation marks and citations omitted). Because the Commission used the income approach, rather than the cost approach, to value the Subject Property, it was not required to account for functional or economic obsolescence.

2. Capitalization Rate

Ashley argues that "the Commission's utilization of an 8% capitalization rate is not supported by competent, material or substantial evidence." (capitalization altered).

In his appraisal report, Brant calculated a 6.5389% capitalization rate for the primary building and an 8.5584% capitalization rate for the bedding facility and truck facility. To calculate the capitalization rate for the primary building, Brant extracted implied capitalization rates from the sales of four similar properties, ranging from 6% to 7.1%. Brant relied on a Realty Rates Investor Survey to calculate the capitalization rate for the bedding facility and truck facility, which indicated that the capitalization rates for industrial warehouses and distribution centers ranged from 4.39% to 12.09%, with an average capitalization rate of 8.69%.

Given the Commission's duty to exercise judgment and discretion, the Commission was free to use a single capitalization rate for the entire Subject Property and make adjustments based on its finding that Brant did not adequately explain the discrepancies between the capitalization rates for the primary building and the bedding and truck facilities. *See In re Blue Ridge Mall LLC*, 214 N.C. App. at 276, 713 S.E.2d at 787-88 (holding that the Commission did not err by adjusting the capitalization

rate offered by the taxpayer's appraiser); *see also Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 408, 192 S.E.2d 811, 815 (1972) ("We find nothing in the record which indicates that the Board departed from the 'zone of reason' or acted arbitrarily in adopting the 6% capitalization rate.").

Accordingly, there is competent, material, and substantial evidence in view of the whole record to support the Commission's decision to use an 8% capitalization rate.

B. Cost Approach

[2] Ashley argues that the Commission erred by "failing to make required reductions under its cost approach for the Subject Property." (capitalization altered).

Here, the Commission made the following finding of fact:

> 56. Alternatively, the evidence indicates that the property was purchased by the Appellant for approximately $10,500,000 and then underwent renovations and new construction that were completed just prior to the appraisal date and cost at least $45,000,000 according to the Appellant's witness (a figure that may not include all costs), but $50,000,000 or more, according to the County's cost estimates. Accordingly, we find a value of $60,000,000 for 2018 to be supported by the cost approach, as well.

The Commission did not deduct for depreciation, as required by the cost approach. However, because the Commission's decision to use the income approach was not arbitrary and is supported by competent, material, and substantial evidence in view of the whole record, and the Commission correctly applied the income approach, the substantial rights of Ashley have not been prejudiced by the Commission's finding. *See* N.C. Gen. Stat. § 105-345.2(b). Accordingly, any error in this finding does not require remand.

III. Conclusion

For the foregoing reasons, we affirm the Commission's final decision.

AFFIRMED.

Judges STROUD and WOOD concur.

IN THE MATTER OF THE ESTATE OF ROBERT LEE HAYES, III

No. COA22-1058

Filed 16 July 2024

Estates—elective share—surviving spouse—equitable distribution memorandum of judgment—implicit waiver

In a proceeding arising from a petition for elective share filed by a wife (petitioner) following the death of her husband—about two and one-half years after the spouses separated and sixteen days following the entry, with the spouses' consent, of a memorandum of judgment (MOJ) in their pending equitable distribution case, but before the formal judgment was entered—the trial court erred in granting summary judgment in favor of petitioner. While the MOJ contemplated the entry of additional orders (some required under federal law in connection with the husband's federal benefits), it nonetheless resolved all financial and property claims between the spouses, included a dismissal by petitioner of a pending claim she had made in connection with the parties' divorce, and waived any financial claims she had not yet asserted—language expansive enough to constitute an implicit waiver of her right to the elective share for surviving spouses provided in N.C.G.S. § 30-3.1(a).

Appeal by respondent from order entered 13 September 2022 by Judge Clinton Rowe in Superior Court, Onslow County. Heard in the Court of Appeals 19 September 2023.

Harvell and Collins, P.A., by Wesley A. Collins, for petitioner-appellee.

Connell & Gelb PLLC, by Michelle D. Connell, for respondent-appellant.

STROUD, Judge.

Respondent, executrix of the estate of Robert Lee Hayes, III, appeals from an order granting summary judgment in favor of Petitioner, Susan Ruth Hayes. Petitioner and her husband, Robert Lee Hayes, III, entered a Memorandum of Judgment as a court order in their pending equitable distribution case, and husband died a few days later. As the Memorandum of Judgment set out a complete division of their property and debts, including benefits to be paid after death of the husband, and a

provision that "all claims of the parties or either of them for the division of property, spousal support or costs, including counsel fees, are hereby waived and dismissed[,]" the Memorandum of Judgment implicitly waived Petitioner's right to an elective share, and the trial court erred by granting summary judgment in favor of Petitioner. We therefore reverse the order granting summary judgment in favor of Petitioner.

I. Background

Robert Hayes ("Decedent") and Susan Hayes ("Petitioner") were married in North Carolina in April 1986. Decedent and Petitioner separated "on or around September 1, 2017." On or about 25 September 2017, Decedent executed a "Last Will and Testament" which gave Petitioner "the smallest portion of [Decedent's] estate, if any, required to be given . . . under applicable law." (Capitalization altered.) On 12 April 2019, Petitioner filed a complaint asking the court to order "the parties' mar[it]al property and debts be equitably distributed between the parties as provided by N.C.G.S. §§ 50-20 and 50-21." Decedent filed an Answer on 13 May 2019, admitting Decedent and Petitioner own a home in Swansboro, North Carolina and "that all or part of the funds used in the acquisition of said home were marital funds."

On 3 March 2020, the District Court in Onslow County entered a Memorandum of Judgment/Order ("MOJ") by consent of Petitioner and Decedent in their pending equitable distribution case. The MOJ set out a detailed listing of their marital and separate property, including specific retirement plans and accounts and a provision that "all claims of the parties or either of them for the division of property, spousal support or costs, including counsel fees, are hereby waived and dismissed." The MOJ also stated "[a] formal judgment/order reflecting the above terms will be prepared by and submitted no later than 04/14/2020[.]" However, Decedent died on or about 19 March 2020, before the formal judgment was submitted.

On 12 May 2020, Petitioner filed a "Verified Petition for Elective Share[,]" alleging she is entitled to an elective share of Decedent's estate "pursuant to N.C. Gen. Stat. 30-3.1 *et seq*." (Capitalization altered.) On 19 August 2020, Ashley Livingston ("Executrix") filed an Answer to the petition denying Petitioner was entitled to an elective share as Petitioner abandoned the marriage, and on 17 November 2020, Executrix filed an Amended Answer asserting Petitioner waived her right to an elective share under the MOJ and requested that "the Court find that the Mediated Equitable Distribution Agreement and Order resolved all matters between the decedent and Susan Ruth Hayes including waiving the right to file for an elective share subsequent to the death of the decedent."

Based upon the issues raised by Executrix's Amended Answer, on 14 December 2020, Petitioner filed a "Notice of Transfer to Superior Court" pursuant to North Carolina General Statute Section 28A-2-4.[1] (Capitalization altered.) That same day the Clerk of Superior Court filed a "Clerk's Order Transferring to Superior Court" finding "the Superior Court is the proper division for the trial of this action" pursuant to North Carolina General Statute Sections 28A-2-4 and 28A-2-6(h). (Capitalization altered.) On 1 April 2022, Executrix filed a motion for summary judgment alleging "there is no genuine issue as to any material fact" as Petitioner waived her right to an elective share under the MOJ. The trial court heard the summary judgment motion on 22 August 2022, and on 13 September 2022, entered an order granting summary judgment in favor of Petitioner. The trial court's order stated there was "no genuine issue of material fact" and

> [t]he only issue before this Court is whether the "Mediated Equitable Distribution Agreement" attached to the Motion for Summary Judgment operates as a waiver of claims by Petitioner against the Estate of Robert Lee Hayes, III, including, but not limited to, the pending claim for elective share.

The trial court concluded that "the 'Mediated Equitable Distribution Agreement' does not operate to waive claims of Petitioner against the Estate of Robert Lee Hayes, III" and remanded the case "back to the Clerk of Superior Court for Onslow County for proper calculation of the pending elective share claim and any other proper claims relating to the Estate of Robert Lee Hayes, III." Executrix filed written notice of appeal on 29 September 2022.

II. Standard of Review

"The determination of a party's entitlement to an elective share, as a decision that requires the exercise of judgment and the application of legal principles, is a conclusion of law. The interpretation of a contract is also a conclusion of law. We review conclusions of law de novo." *In*

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1. North Carolina General Statute Section 28A-2-6(h) provides that "[a] notice to transfer an estate proceeding brought pursuant to G.S. 28A-2-4(a)(4) must be served within 30 days after the moving party is served with a copy of the pleading requesting relief pursuant to G.S. 28A-2-4(a)(4), or in the case of the clerk of superior court, prior to or at the first hearing duly noticed in the estate proceeding and prior to the presentation of evidence by the parties, including a hearing at which an order of continuance is entered. Failure to timely serve a notice of transfer of an estate proceeding is a waiver of any objection to the clerk of superior court's exercise of jurisdiction over the estate proceeding then pending before the clerk. When a notice of transfer is duly served and filed, the clerk shall transfer the proceeding to the appropriate court." N.C. Gen. Stat. § 28A-2-6(h) (2023).

re Estate of Cracker, 273 N.C. App. 534, 538, 850 S.E.2d 506, 509 (2020) (citations, quotation marks, and brackets omitted). Further,

> [o]ur standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted). Under a *de novo* review, an appellate court "considers the matter anew and freely substitutes its own judgment in place of the court below." *Joyner v. N.C. Dep't of Health and Human Servs.*, 214 N.C. App. 278, 282, 715 S.E.2d 498, 502 (2011) (citation and quotation marks omitted).

III. Waiver of Elective Share of Decedent's Estate

Executrix contends Petitioner waived her right to an elective share of Decedent's estate by executing the MOJ. Petitioner contends the MOJ did not operate as a waiver of the right to an elective share, based upon the language of the MOJ.

Under North Carolina General Statute Section 30-3.1(a),

> The surviving spouse of a decedent who dies domiciled in this State has a right to claim an "elective share", which means an amount equal to (i) the applicable share of the Total Net Assets, as defined in G.S. 30-3.2(4), less (ii) the value of Net Property Passing to Surviving Spouse, as defined in G.S. 30-3.2(2c).

N.C. Gen. Stat. § 30-3.1(a) (2023). Further, under North Carolina General Statute Section 30-3.6(a), "The right of a surviving spouse to claim an elective share may be waived, wholly or partially, before or after marriage, with or without consideration, by a written waiver signed by the surviving spouse[.]" N.C. Gen. Stat. § 30-3.6(a) (2023).

As the MOJ is a contract between the parties, "[t]he object of all interpretation is to arrive at the intent and purpose expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose unless at variance with some rule of law or contrary to public policy." *In re Estate of Sharpe*, 258 N.C. App. 601, 607, 814 S.E.2d 595, 599 (2018) (citation and quotation marks omitted). Further,

> [i]f the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court. It must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.

Id. (citation and quotation marks omitted). Where a contract is clear and unambiguous, the court is not permitted to rely on extrinsic evidence to determine the parties' intent. *Contrast Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000) (concluding where the term "joint custody" in a separation agreement is ambiguous, "the trial court may consider extrinsic evidence to determine the intent of the parties at the time of the execution of the separation agreement" (citation omitted)).

Here, the MOJ is a court order and states "[t]he parties to this lawsuit have reached an agreement to settle certain matters as set forth specifically in this memorandum[.]" The MOJ had an attached and incorporated spreadsheet setting out the agreed-upon division of 60 items of property and debts, including two pieces of real estate and respective mortgages, bank accounts, credit card debts, 401K, pensions, and personal property. The spreadsheet also indicated which items of property or debt were marital property distributed to Petitioner, marital property distributed to Decedent, property that is being equally divided between the parties, and separate property of either party. In addition to the spreadsheet, the MOJ lists 11 provisions clarifying specific details about the assets and the intentions of the parties:

> a. The parties have divided their marital personal property as shown on the spreadsheet attached hereto.
>
> b. The parties shall list their marital real property located at [redacted] with [Realtor] at a price to be agreed upon by the parties. [Realtor] shall make binding recommendations regarding repairs and upgrades deemed necessary to enhance the sale and the parties shall each pay one-half of any such repairs and upgrades, unless both parties agree that any such repair or upgrade should not be done. Payments made for such repairs and upgrades shall be reimbursed to the parties from the proceeds of the sale. The proceeds of sale shall be applied to commissions and costs of sale, reimbursement of the parties or either of them as set out above and, thereafter, the remaining proceeds shall be divided equally between the parties. Lawnmower is included in sale.

c. [Decedent] shall vacate the marital real property by April 14 2020[.] [Petitioner] shall thereafter have exclusive possession of said property as the property is made ready for sale and marketed and supervise the completion of necessary repairs and upgrades. [Decedent] shall be allowed to visit or inspect said property at any time accompanied by [Realtor] or her successor.

d. [Decedent] shall pay to [Petitioner] the sum of $31,000.00 on or before Monday, March 9[,] 2020, in lieu of any other distributive award.

e. [Petitioner] shall be entitled to 31% of [Decedent's] United States Marine Corps retirement beginning in April 2020. [Petitioner] and [Decedent] were married for more than 10 years while [Decedent] served on active duty. Therefore [Petitioner] is entitled to direct payment of her share of [Decedent's] retirement from DFAS. The parties will cooperate in the execution and entry of a formal pension division order as may be necessary to implement or clarify this provision.

f. [Decedent] has elected and shall leave in place the election to provide Survivor Benefit Protection for the benefit of [Petitioner]. The premium for said benefit shall be paid from [Decedent's] gross retirement pay and borne pro rata by each party.

g. [Petitioner] shall be entitled to 50% of [Decedent's] FERS retirement. Said sum shall be payable directly to [Petitioner] if regulations so allow. In the event that [Decedent] is required to pay said sum directly to [Petitioner], then [Petitioner] shall be ultimately responsible for the payment of any and all income taxes on any such sum. The parties will cooperate in the execution and entry of a formal pension division order as may be necessary to implement or clarify this provision.

h. Until such time as [Petitioner] is able to receive her share of [Decedent's] USMC and FERS retirement directly from DFAS or FERS, [Decedent] shall pay directly to [Petitioner] 31% of his gross military retirement and 50% of his gross FERS retirement by electronic transfer to [Petitioner's bank] account . . . . [Petitioner] shall be

> responsible for all applicable income taxes on such sums paid directly to her.
>
> i. Each party shall make copies of photos in his or her possession and provide such copies to the other party. Each party shall make copies of any personal document or item of memorabilia that is specific to the other party and provide the original to the other party.
>
> j. Except as set out herein, all claims of the parties or either of them for the division of property, spousal support or costs, including counsel fees, are hereby waived and dismissed.
>
> k. That upon any action filed for divorce [Decedent] shall deem [Petitioner] the former spouse and elect her to receive the survivor benefit plan. This will be clarified in the formal order.

Executrix relies on three North Carolina cases to support her contention that "[l]egal precedent makes clear that the right to claim an elective share can be waived implicitly by mediated settlement agreement, consent judgment, premarital agreement, or separation agreement" and to conclude "[b]y executing the MOJ, Petitioner in this case implicitly waived her right to claim an elective share." First, in *Lane v. Scarborough*, our Supreme Court set out the law as to the doctrine of implication of a term of a contract:

> A contract, however, encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended to stipulation in question. The doctrine of implication of unexpressed terms has been succinctly stated as follows:
>
> Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the

> obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made. However, no meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions.

284 N.C. 407, 410-11, 200 S.E.2d 622, 624-25 (1973) (citations, quotation marks, and brackets omitted).

In *Lane*, the petitioner and her husband had entered into a separation agreement which included provisions that they

> would live wholly separate and apart from each other in the same manner and to the same extent as though they had never been married; (2) that no children were born of their marriage; and (3) that they would divide their household furnishings. The remaining paragraphs of the agreement are quoted verbatim:
>
> 4. That from and after the date of this Agreement the said party of the second part [the wife] does hereby agree that she will make no demands upon the said party of the first part [the husband] for support and further will incur no obligations, debts or otherwise which will be or become the responsibility of the said party of the first part.
>
> 5. It is agreed that each of the parties may from this date, and at all times hereafter purchase, acquire, own, hold, possess, dispose of, and convey any and all classes and kinds of property, both real and personal, as though free and unmarried, without the consent or joinder of the other party, and each party does hereby release the right to administer upon the estate of the other.
>
> 6. Both parties hereunto agree that henceforth neither of them, in any manner will molest or interfere with the personal rights, liberties, privileges or affairs of the other, and each shall henceforth live his and her own personal life as though unmarried, and unrestricted in any manner by the marriage that has heretofore existed.

Id. at 408-09, 200 S.E.2d at 623-24 (quotation marks omitted). After their separation but before they were divorced, the husband died. *Id.* at 408, 200 S.E.2d at 623. The husband's parents claimed they were entitled to inherit his entire estate; the wife also claimed she should inherit his entire estate, as they had no children. *Id.*

By order in a declaratory judgment action to resolve the issue "whether [the wife] by executing the separation agreement, released her distributive share as surviving spouse in the estate of [the husband]," the trial court ruled that

> by their separation agreement [the husband] and [the wife] did not "mutually release their right of intestate's succession" as provided by G.S. § 29-13 and G.S. § 29-14; that [the wife] is an heir of [the husband] and has the right to inherit from his estate as a surviving spouse.

Id. at 409, 200 S.E.2d at 624. The Supreme Court reversed based upon an implicit waiver of the right to inherit, as the surviving spouse had "released her right to share in [the decedent's] estate by the execution of the settlement agreement[.]" *Id.* at 412, 200 S.E.2d at 625. The Court, in coming to its decision, explained the parties

> declared that they could no longer live together without endangering their health and well-being. They agreed that henceforth they would live wholly separate and apart from each other as though they had never been married and that neither would molest the other or interfere in his affairs. She agreed to make no demands upon him for support and to impose no obligation or responsibility upon him. Each agreed that the other would thereafter hold, acquire, and dispose of "all classes and kinds of property; both real and personal *as though free and unmarried*, without the consent or joinder of the other party" and each released "*the right to administer upon the estate of the other.*" . . . Further, they agreed to divide their house-hold furnishings between them.

Id. at 411, 200 S.E.2d at 625 (emphasis in original).

The Court in *Lane* noted the title of the agreement, "separation and property settlement agreement[,]" "in the absence of clear language or impelling implications connotes not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character." *Id.* (citation and quotation marks

omitted). Further, the Court stated "[t]he provisions that each would thereafter acquire, hold, and dispose of property as though unmarried and that each renounced the right to administer upon the estate of the other refute the contention that [the wife] intended to retain any rights in her husband's estate." *Id.* The Court concluded:

> In this case the intention of each party to release his or her share in the estate of the other is implicit in the express provisions of their separation agreement, their situation and purpose at the time the instrument was executed. The law will, therefore, imply the release and specifically enforce it. We hold that [the wife], the surviving spouse of [the husband], deceased, released her right to share in his estate by the execution of the separation agreement of 19 June 1970.

Id. at 412, 200 S.E.2d at 625.

Second, in *In re Sharpe*, the petitioner-wife and her husband entered into a pre-marital agreement with

> two schedules attached, Schedule A and Schedule B. Schedule A lists all the separate property belonging to Thomas S. Sharpe and Schedule B lists all the separate property belonging to Alma G. Seward. The pre-marital agreement states that "each party agrees that the separate property shall include, but not be limited to, the property described hereafter, and that the separate property of the party shall remain the separate property of the other party."

258 N.C. App. at 602, 814 S.E.2d at 597.

The trial court ruled that because the premarital agreement did not include a "clause waiving her right to claim an elective share of his estate," the wife was entitled to the elective share. *Id.* at 604, 814 S.E.2d at 598. This Court reversed the trial court, holding that "[f]ollowing *Lane*, and well-settled principles of contract construction, the express language of the pre-marital agreement shows Alma G. Seward voluntarily waived any right to claim a spousal elective share of the decedent Thomas S. Sharpe's separate property." *Id.* at 610, 814 S.E.2d at 601.

The *Sharpe* court examined the language of the entire premarital agreement to determine if the wife had implicitly waived her right to an elective share. They had agreed that "[e]xcept as provided below, each party agrees that the separate property of the other party shall include,

but not be limited to, the property described hereafter, and that the separate property of the party shall remain the separate property of the other party." *Id.* at 605, 814 S.E.2d at 598 (brackets omitted). They also agreed each would have the "sole and exclusive right at all times to manage and control their respective separate property *to the same extent as if each were unmarried*" and each "specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state." *Id.* at 606, 814 S.E.2d at 598-99 (emphasis in original). They agreed they lived in a home owned by the husband and this home would "be the sole and separate property of Husband subject to a right to possession by Wife so long as she maintains the house as her principal residence." *Id.* at 606, 814 S.E.2d at 599. They also agreed:

> 12. Miscellaneous Provisions. To clarify certain aspects of this document's execution and effectiveness, the parties agree as follows:
>
> . . . .
>
> b. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, personal representatives, successors, and assigns.
>
> 13. Entire Agreement. This represents the entire Agreement of the parties with regard to the subject matter hereof. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter hereof are waived, merged herein, and superseded hereby.

Id. at 606-07, 814 S.E.2d at 599 (ellipsis omitted).

After analyzing the language of the premarital agreement as instructed by *Lane*, this Court concluded

> the unambiguous language of the uncontested and valid pre-marital agreement plainly establishes the parties['] intention, prior to their marriage, that Alma G. Seward waived any rights in Thomas S. Sharpe's separate property and that Thomas S. Sharpe waived any rights in Alma G. Seward's separate property. The pre-marital agreement also clearly and unambiguously states "each party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried," and "each party specifically

> waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state."

Id. at 608, 814 S.E.2d at 600 (brackets omitted). This Court held the premarital agreement implicitly waived the wife's rights to the husband's estate. *Id.* at 610, 814 S.E.2d at 601.

Finally, *In re Cracker* presents the type of agreement most similar to the MOJ in this case, as *Lane* addressed a separation agreement and *Sharpe* addressed a premarital agreement. *See Lane*, 284 N.C. at 408-09, 200 S.E.2d at 623-24; *see also Sharpe*, 258 N.C. App. at 602, 814 S.E.2d at 597; *Cracker*, 273 N.C. App. at 535-36, 850 S.E.2d at 507-08. In *Cracker*, the petitioner and the decedent "executed a Mediated Settlement Agreement and Consent Judgment ("MSA")" resolving pending claims for post-separation support, alimony, equitable distribution, and attorney fees. 273 N.C. App. at 535, 850 S.E.2d at 507. This Court summarized the MSA, stating:

> The trial court found that the parties had "agreed to resolve all pending issues"; the MSA was "calculated to finally resolve their financial claims against one another"; and that "the parties waived further findings of fact." The MSA ordered [the d]ecedent to deed certain real property to [the p]etitioner in exchange for [the p]etitioner's assumption and payment of all debts associated with the property. It also provided that [the p]etitioner and [the d]ecedent would have as their "sole and separate property all household furniture and other personal property" at the time in their possession. Additionally, each party "acknowledged sole ownership in the other" of certain personal belongings owned prior to the marriage, inherited during the marriage, or given or loaned to the party by a relative. [The p]etitioner and [the d]ecedent each received a vehicle as "sole and separate property." Each party would be responsible for the debts associated with the assets distributed to him or her and for the debts in his or her individual name. [The p]etitioner and [the d]ecedent retained bank accounts in their respective names as "sole and separate property," and identified retirement accounts and joint bank accounts were distributed to either [the p]etitioner or [the d]ecedent. The MSA specified that the parties had divided all intangible property such as stocks and bonds

> to their satisfaction, and provided that "neither party shall make any claim against the other for any intangible personal property in the name, possession or control of the other."
>
> [The p]etitioner also "dismissed with prejudice any claim for post-separation support, alimony and attorneys fees associated with said claims." [The d]ecedent was required to make payments of $6,900 to [the p]etitioner in September and October of 2015. The MSA required [the d]ecedent to maintain a supplemental health insurance policy covering [the p]etitioner at her cost. At the conclusion of the MSA, the parties agreed that it "contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein."

Id. at 535-36, 850 S.E.2d at 507-08.

After entry of the MSA but while they were still married, the husband died. *Id.* at 536, 850 S.E.2d at 508. The petitioner filed for an elective share of the decedent's estate, which the trial court denied. *Id.* at 538, 850 S.E.2d at 509. This Court affirmed the denial of the petitioner's claim for an elective share. *Id.* at 535, 850 S.E.2d at 507. Although the MSA did not explicitly address rights of inheritance or elective share, this Court held that the MSA implicitly waived the right to an elective share:

> As in *Lane* and *Sharpe*, the specific terms of the MSA are totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other if he or she were to become the surviving spouse. The MSA resolved all financial claims between the parties by exhaustively identifying the particular property that each spouse would hold as his or her "sole and separate property." *See id.* at 411, 200 S.E.2d at 625 (spouses divided the household furnishings which they jointly owned); *Sharpe*, 258 N.C. App. at 609, 814 S.E.2d at 600 (premarital agreement identified separate property of the spouses). The MSA also completely dismissed [the p]etitioner's claims for post-separation support, alimony, and attorneys' fees. *See Lane*, 284 N.C. at 411, 200 S.E.2d at 625 (wife "agreed to make no demands upon husband for support and to impose no obligation or responsibility upon him"); *Sloop v. Sloop*, 24 N.C. App. 295, 297, 210 S.E.2d 262, 264 (1974) (finding waiver where, inter alia, wife

> waived "any and all right to alimony and support for herself"). Although the MSA does not expressly refer to the parties' rights to claim upon each other's estate, "the plain and unambiguous language does not permit us to read the agreement to mean the parties intended to waive rights to each other's separate property while they were alive, but not after one of them had pre-deceased the other." *Sharpe*, 258 N.C. App. at 610, 814 S.E.2d at 601. *See also Sloop*, 24 N.C. App. at 298, 210 S.E.2d at 264 ("It seems inconceivable that either surviving party to this deed of separation could claim upon the death of the other that which manifestly he or she could not claim while both parties were living.").

Id. at 540-41, 850 S.E.2d at 510-11 (quotation marks, ellipsis, and brackets omitted).

Petitioner argues the MSA in *Cracker* differs from the MOJ in this case in several relevant and controlling ways. First, she contends that

> [t]he Cracker MSA provides that the parties, "agreed to resolve all pending issues", that the MSA was "calculated to finally resolve their financial claims against one another", and that "[t]he parties waive[d] further findings of fact." *In re Estate of Cracker*, 273 N.C. App. at 535, 850 S.E.2d at 507. The MOJ in the present case does not contain any language indicating that all pending issues are resolved, that the MOJ is calculated to finally resolve the financial claims against one another, or that the parties waive further findings of fact.

Here, Executrix argues that as in *Cracker*, the MOJ "resolved all financial claims between the parties by exhaustively identifying the particular property that each spouse would hold as his or her sole and separate property." The MOJ in this case included spreadsheets identifying, classifying, and distributing the marital and separate property and debts. Also like *Cracker*, the MOJ "completely dismissed Petitioner's claims for post-separation support, alimony, and attorneys' fees," as the final provision stated "all claims of the parties or either of them for the division of property, spousal support or costs, including counsel fees, are hereby waived and dismissed." *Id.* at 541, 850 S.E.2d at 511. Petitioner notes that the *Cracker* Court noted that the MSA did not "expressly refer to the parties' rights to claim upon the other's estate," but still determined that "the plain and unambiguous language does not permit us to read the agreement to mean the parties intended to waive

rights to each other's separate property while they were alive, but not after one of them had pre-deceased the other." *Id.* Here, the MOJ goes beyond *Cracker* in addressing property rights upon the death of a party, since it does address post-death benefits to be paid to Petitioner from Decedent's military and retirement benefits.

In comparing the documents here and in *Cracker*, we hold *Cracker* is controlling. Here, the MOJ used different wording than the *Cracker* MSA, but that is to be expected since this was a memorandum of an order specifically contemplating the execution of additional orders to accomplish all the terms of the agreement. In *Cracker*, the MSA was the final, formal court order; no further order was to be entered. *Id.* at 535-36, 850 S.E.2d at 507-08. This MOJ still clearly "dismissed and waived" "all claims" including all financial claims the parties had or may have against each other, and it was a fully enforceable order when it was entered by the District Court. The MOJ did anticipate the entry of additional orders but that does not mean it did not resolve all claims. This MOJ, unlike *Cracker*, addresses federal retirement benefits and survivor benefits which under federal law require the entry of additional orders. It provides that "[Petitioner] shall be entitled to 31% of [Decedent's] United States Marine Corp retirement beginning in April 2020;" "[Petitioner] is entitled to direct payment of her share of [Decedent's] retirement from DFAS;" and "[t]he parties will cooperate in the execution and entry of a formal pension division order as may be necessary to implement or clarify this provision." In addition, Petitioner was

> entitled to 50% of [Decedent's] FERS retirement. Said sum shall be payable directly to [Petitioner] if regulations so allow. In the event that [Decedent] is required to pay said sum directly to [Petitioner], then [Petitioner] shall be ultimately responsible for the payment of any and all income taxes on any such sum. The parties will cooperate in the execution and entry of a formal pension division order as may be necessary to implement or clarify this provision.

The fact that the MOJ provided for the entry of an additional "formal pension division order" does not mean the parties did not agree to resolve all aspects of their claims as to the division of the benefits; the additional orders were required by applicable state and federal law to accomplish the division of the plans. *See generally* N.C. Gen. Stat. § 50-20(b)(1) (2023) ("Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act."); 10 U.S.C.

§ 1408(d)(1) (2023) ("After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order."); *see also* N.C. Gen. Stat. § 50-20.1(h)-(j) (2023) (addressing entry of orders required to accomplish the distribution of pension, retirement, or deferred compensation benefits.).

Petitioner also seeks to distinguish *Cracker* by arguing that

> the Cracker MSA provides that the agreement "contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein", whereas the current MOJ does not contain any language indicating that the MOJ represents the entire understanding of the parties.

Again, although this MOJ does not use these same words, it does provide that "*Except as set out herein*, ***all*** *claims of the parties or either of them for the division of property*, *spousal support or costs*, *including counsel fees*, *are hereby waived and dismissed.*" (Emphasis added.) The MOJ had comprehensively addressed the division of all parties' assets and debts, both marital and separate, and addressed the payment of benefits from Decedent's Survivor Benefit Protection ("SBP") and retirement plans upon and after his death. Petitioner agreed to "dismiss" the pending claim she had already asserted, equitable distribution, and to "waive" *all* other claims related to the parties' property or spousal support. "Waive" is defined by Black's Law Dictionary as "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily." Waive, Black's Law Dictionary (11th ed. 2019). Likewise, "waiver" is defined as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." Waiver, Black's Law Dictionary (11th ed. 2019). Thus, Petitioner agreed

to dismiss the pending claim she had already asserted and to "waive" all claims she may have but had not yet asserted related to the parties' property or spousal support. This language is sufficient to show that the MOJ represented the "entire understanding of the parties" as to their property or spousal support rights arising out of their marriage, and those rights logically include the elective share under North Carolina General Statute Section 30-3.1(a). N.C. Gen. Stat. § 30-3.1(a).

Petitioner next seeks to distinguish the MOJ from the *Cracker* MSA by arguing the MSA provided

> that both parties waive any future claims against the other for any intangible personal property in the name, possession or control of the other. *In re Estate of Cracker*, 273 N.C. App. 534, 537, 850 S.E.2d 506, 509 (2020). However, the current MOJ only provides that the parties make three waivers: (1) claims for the division of property; (2) claims for spousal support or costs; and (3) counsel fees. The waiver in the MOJ does not reference a general waiver of all financial claims, nor does it reference a waiver of the right to elective share or any estate rights at all.

This too is a distinction without a difference.

Here, the parties waived *all* claims for division of property and spousal support.

> "All" is often used in writing intended to have legal effect as a preface to flexible or imprecise words, as in "all other property," "all the rest and residue," "all and every," "all speed," "all respect." Its purpose is to underscore that intended breadth is not to be narrowed. "All" means the whole of that which it defines – not less than the entirety[.] "All" means all and not substantially all.

Nat'l Steel & Shipbuilding Co. v. United States, 419 F.2d 863, 875 (Ct. Cl. 1969) (footnotes omitted). A claim for "any intangible personal property in the name, possession or control of the other" is a more specific wording of a type of claim that falls under the broader language used here, "*all claims*" for division of property. *Cracker*, 273 N.C. App. at 536, 850 S.E.2d at 507-08. The MOJ need not identify each conceivable type of claim or property a spouse may possibly have. Again, we view this provision in the context of a comprehensive and detailed MOJ which addressed property of all sorts: tangible and intangible, real and personal, as well as existing and future rights, as the SBP benefits would

not take effect unless and until Decedent predeceased Petitioner and payment of her share of his retirement benefits to Petitioner would also continue after his death.

Next, Petitioner seeks to distinguish the *Cracker* MSA because it consistently refers to the property allocated to each spouse as "sole and separate property" instead of just "separate" property, indicating that each spouse intended to have sole and complete possession of their separate property. *See id.* However, Petitioner stresses that the MOJ at hand does not once refer to "sole and separate property." Although the wording of the MSA in *Cracker* was different in that it referred to "sole and separate" property, the MOJ here accomplished the same effect with different words. The MOJ specifically identified various items of property as the separate property of each party, distributed the marital property to the parties, and then "dismissed and waived" *all* claims as to property or spousal support. Here, the spreadsheet described the agreed-upon classification of each item of property by a numerical code: "Wife's separate" is designated by "4" and "Husband's separate" is designated by "5." Property to be distributed "half to each" is designated by "3," to Wife as "1," and to Husband as "2." Thus, although the MOJ provides the information as to the "separate property" in a more succinct manner on a spreadsheet, the same detailed information regarding the identification of "separate property" is shown on the MOJ here as the MSA in *Cracker*.

We have been unable to discern any legal or practical difference between the use of the word "separate" as it is used in the MOJ along with the distribution of all property and dismissal or waiver of all claims and the use of the words "sole and separate property" in the *Cracker* MSA, given North Carolina law as it stands currently. As best we can tell, the phrase "sole and separate" instead of simply "separate" in the context of a resolution of property rights arising from a marriage could be based upon language used in outdated cases addressing the limited rights of women to own or dispose of property. *See*, *e.g.*, *Goodrum v. Goodrum*, 43 N.C. 313, 314 (1852) ("The words 'sole and separate use' are those most appropriate to create a separate estate in a married woman independent of her husband. Indeed each of those terms 'separate' and 'sole,' has by itself been deemed sufficient for that purpose, and, especially, when coupled with that of 'disposition' by the wife." (citations omitted)). Or the use of the phrase "sole and separate" may have originated in the language of Article X, Sec. 4 of the North Carolina Constitution. *See* N.C. Const. art. X, § 4 ("The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become

in any manner entitled, shall be and remain the *sole and separate* estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, subject to such regulations and limitations as the General Assembly may prescribe." (emphasis added)). But at this time, the North Carolina statutes as adopted by the General Assembly no longer place different "regulations and limitations" on a married woman's right to "devise, bequeath, or convey property" from those applicable to married men. And Petitioner has not identified any statutory basis for us to give a different legal interpretation to the words "sole and separate" in *Cracker* as opposed to "separate" in this MOJ.

Just as in *Lane* and *Cracker*,

> [T]he intention of each party to release his or her share in the estate of the other is implicit in the express provisions of their separation agreement, their situation[,] and purpose at the time the instrument was executed. *Lane*, 284 N.C. at 412, 200 S.E.2d at 625. "The law will, therefore, imply the release and specifically enforce it." *Id.* at 412, 200 S.E.2d at 625.

Cracker, 273 N.C. App. at 541, 850 S.E.2d at 511.

Upon *de novo* review of the language of the MOJ, we hold Petitioner implicitly waived her right to claim an elective share in Decedent's estate by execution of the MOJ.

Finally, Executrix contends Decedent's Last Will and Testament, executed two years prior to the MOJ, should be admitted to show Decedent's intent. Petitioner also seeks to admit a letter from Executrix's trial counsel indicating his opinion the MOJ did not waive inheritance rights. But as we conclude the MOJ is not ambiguous and it implicitly waived any rights to an elective share, we will not consider the will or letter from Executrix's counsel as both are extrinsic evidence and can be considered only where a contract is ambiguous. *See Bicket v. McLean Sec., Inc.*, 124 N.C. App. 548, 552-53, 478 S.E.2d 518, 521 (1996) ("[W]here an ambiguity exists, the court may step in and consider parol evidence of the parties' intent in forming the contract. An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. The trial court's determination of whether the language of a contract is ambiguous is a question of law; accordingly, our review of that determination is de novo." (citations and quotation marks omitted)).

IV. Conclusion

The provisions of the MOJ impliedly waived Petitioner's right to claim an elective share of Decedent's estate. Therefore, the trial court erred in denying Executrix's motion for summary judgment and instead granting summary judgment in favor of Petitioner. We remand for the trial court to enter summary judgment in favor of Executrix.

REVERSED AND REMANDED.

Judges MURPHY and FLOOD concur.

ELIZABETH A. MATA AND THE MATA FAMILY, LLC, PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND
NORTH CAROLINA TURNPIKE AUTHORITY, DEFENDANTS

No. COA23-1140

Filed 16 July 2024

1. Appeal and Error—interlocutory order—substantial right—condemnation hearing—issues relating to title and private property ownership

In a direct condemnation case involving restrictions imposed upon plaintiffs' private property through the recordation of a highway corridor map pursuant to the Map Act, an interlocutory order—in which the trial court held that the restrictions constituted a taking for which plaintiffs were entitled to just compensation and ordered a jury trial to determine the amount of just compensation—was subject to immediate appellate review. As a general matter, orders from a condemnation hearing concerning title and area taken affect substantial rights. Further, the possible existence of a temporary negative easement on the property—the basis upon which the court ordered a jury trial on damages—was an issue affecting private property ownership, title, and exclusivity of use; therefore, plaintiffs' substantial rights were directly implicated.

2. Eminent Domain—condemnation action—recordation of highway corridor map—police power—temporary taking—duration—measure of damages

In a direct condemnation case involving restrictions imposed upon plaintiffs' private property through the recordation of a highway

corridor map pursuant to the Map Act, where the trial court held that the restrictions constituted a taking and ordered a jury trial to determine the amount of just compensation, the court's order improperly characterized the taking as an exercise of the state's police power rather than an exercise of eminent domain. However, the court properly held that the taking was temporary in nature because, although any restrictions imposed were deemed "indefinite" while they were in effect, the General Assembly had already rescinded all Map Act corridors before the Department of Transportation had filed this direct condemnation action and, therefore, the taking only lasted from the time the corridor map was recorded until the legislature's action. Finally, the court erred by imposing a measure of damages based on the property's rental value for the duration of the taking where the proper measure of damages was the diminution in value during the taking, giving consideration to all pertinent factors including the restriction on each plaintiff's fundamental rights as well as any effect of the reduced ad valorem taxes.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendants from judgment entered 6 June 2023 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 May 2024.

Cranfill Sumner LLP, by George B. Autry, Jr., Stephanie H. Autry, and Jeremy P. Hopkins, for the plaintiffs-appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General, Jeanne Washburn, for the defendants-appellants.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by William H. Moss, and The Banks Law Firm, PA, by Howard B. Rhodes for the defendants-appellants.

TYSON, Judge.

The North Carolina Department of Transportation ("DOT") and the North Carolina Turnpike Authority ("TA") (collectively "Defendants") appeal from an order entered concluding: (1) Elizabeth A. Mata and The Mata Family, LLC (collectively "Plaintiffs") were entitled to seek just compensation for a temporary taking of their property; (2) stating the measure of just compensation to be the difference between the rental

value of the property immediately before the temporary taking and the rental value immediately after; and, (3) ordering a jury trial to determine just compensation. We affirm in part, reverse in part, and remand.

I. Background

Mata acquired a fee simple interest in approximately 94 acres of real property (the "Property") by deed recorded 1 June 1973 in the Wake County Registry at Book 2226, Page 548. The Property is located at 4300 Sunset Lake Road in Apex. Mata deeded a fee simple interest in the Property to the LLC on 20 November 2012, which is recorded in the Wake County Registry in Book 15025, Page 109.

DOT recorded projected outer loop corridor route maps in the Wake County Registry on 6 August 1996 pursuant to N.C. Gen. Stat. §§ 136-44.50–44.54 (2015) (the "Map Act"). The Supreme Court of North Carolina and this Court held the restrictions imposed upon affected property owners under the Map Act were not an exercise of the states' police power and constituted a taking by eminent domain for which just compensation was due. *Kirby v. N.C. Dep't of Transp.*, 239 N.C. App. 345, 769 S.E.2d 218 (2015), *aff'd*, 368 N.C. 847, 786 S.E.2d 919 (2016). In response to our Supreme Court's holding in *Kirby*, the North Carolina General Assembly rescinded all Map Act corridors on 11 July 2016. *See* Sess. Law 2016-90. The General Assembly later repealed the entire Map Act statutory scheme. *See* Sess. Laws 2019-35, s.1.

Plaintiffs initiated this inverse condemnation action pursuant to N.C. Gen. Stat. § 136-111 (2023) on 25 February 2019, asserting the Map Act restrictions encumbered their property from 6 August 1996 until 11 July 2016 and seeking compensation. DOT answered the complaint on 1 May 2019.

DOT filed a complaint for direct condemnation of a part of the Property to complete the southern I-540 loop project in Wake County on 7 April 2020. Defendants moved the superior court to hold a hearing pursuant to N.C. Gen. Stat. §§ 136-108 and 136-111 (2023) to determine all issues other than just compensation due.

Following this hearing, the trial court found and concluded, *inter alia*:

> The Plaintiff is entitled to just compensation, in such amount as may be established at the trial of this action, for the Defendants' taking of Plaintiff's property which restricted Plaintiff's rights to subdivide, develop, or improve Plaintiff's property.

> The duration of the taking of Plaintiff's property was from August 6, 1996[,] until July 11, 2016.
>
> The measure of just compensation shall be the difference in the value of the property immediately before and immediately after the taking, and the appraisers may use rental value to measure the value of the property during the duration of the taking so long as the appraisers ultimately employ the before and after value as appraisers do in cases involving temporary takings;

Defendants appeal.

II. Jurisdiction

A. Interlocutory Appeal

[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).

B. Review Proper

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. [Rule 54(b) certification]

> 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).

Our Supreme Court has also "recognized that orders from a condemnation hearing concerning title and area taken are 'vital preliminary issues' that must be immediately appealed pursuant to N.C.G.S. § 1-277, which permits interlocutory appeal of determinations affecting substantial rights." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999) (citation omitted).

"An easement is an interest in land[.]" *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 542 (1953). The possible existence of a temporary negative easement, the basis upon which the trial court ordered a jury trial on damages, is a question affecting private property ownership, title, exclusivity and right of use, and the right to exclude others through trespass action.

"A title is not a piece of paper. It is an abstract concept which represents the legal system's conclusions as to how the interests in a parcel of realty are arranged and who owns them." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (quoting William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 10.12 (3d ed. 2000)). The trial court's order is subject to immediate review. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709.

III. Issues

[2] Defendants argue the trial court erred by: (1) holding the restrictions on the parcel by recording a map under the Map Act is a temporary taking of a negative easement; (2) concluding the measure of damages was the rental value of the parcel; and, (3) finding the recording of a map under the Map Act constituted a temporary regulatory taking.

IV. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent [] evidence support[s] the trial court's findings of fact and whether the conclusions of law were proper in light of such facts." *Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 267-68, 598 S.E.2d 393, 395 (2004) (citation omitted). Unchallenged findings of fact are binding upon appeal. *See Lab. Corp. of Am. Holdings*

v. Caccuro, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011). "The trial court's conclusions of law are reviewed *de novo*[.]" *Strikeleather Realty & Invs. Co. v. Broadway*, 241 N.C. App. 152, 160, 772 S.E.2d 107, 113 (2015) (citation omitted).

V. Negative Easement

A. Map Act

Under the Map Act's statutory plan:

> once NCDOT files a highway corridor map with the county register of deeds, the [Map] Act imposes certain restrictions upon property located within the corridor for an indefinite period of time. After a map corridor is filed, no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor.

Kirby v. N.C. Dep't of Transp., 368 N.C. 847, 849, 786 S.E.2d 919, 921 (2016) (internal citation and quotation marks omitted).

Prior to the decisions in *Kirby*, the General Assembly had recognized the burden the Map Act had placed upon landowners, classified the properties subject to the corridor as a "special class" for *ad valorem* taxes, and to be "assessed at reduced rates of twenty percent (20%) of the appraised value for unimproved property and fifty percent (50%) of the appraised value for improved property." *Id.* (citations and quotation marks omitted). The DOT "is not obligated to build or complete the highway project" on the affected property. *Id.*

The General Assembly also provided a mechanism for property owners subject to corridors under the Map Act to seek relief:

> Owners whose properties are located within the highway corridor may seek administrative relief from these restrictions by applying for a building permit or subdivision plat approval, a variance, or an advanced acquisition of the property due to an imposed hardship. In the first instance, if after three years a property owner's application for a building permit or subdivision plat has not been approved, the entity that adopted the transportation corridor official map must either approve the application or initiate acquisition proceedings, or else the applicant may treat the real

> property as unencumbered. In the second instance, [a] variance may be granted upon a showing that: (1) Even with the tax benefits authorized by this Article, no reasonable return may be earned from the land; and (2) The requirements of G.S. 136-44.51 result in practical difficulties or unnecessary hardships. In the third instance, an advanced acquisition may be made upon establishing an undue hardship on the affected property owner. Property approved under the hardship category must be acquired within three years or the restrictions of the map shall be removed from the property. In all instances, however, the restrictions imposed upon the property remain indefinitely, absent affirmative action by the owner and either approval from the State or a certain lapse of time.

Id. at 849-50, 786 S.E.2d at 921-22 (citations and quotation marks omitted).

B. Police Power

Defendants argue the trial court erred concluding the Map Act inverse condemnation was a temporary regulatory taking under the police power. Defendants assert the power granted to them under the Map Act was pursuant to the power of eminent domain.

Our Supreme Court long ago explained the distinction between the two in *Barnes v. N.C. State Highway Comm'n*:

> The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable.

Barnes v. N.C. State Highway Comm'n, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (citations and quotation marks omitted).

In examining the Map Act, our Supreme Court held in *Kirby* "[t]he language of the Map Act plainly points to future condemnation of land in the development of corridor highway projects, thus requiring NCDOT to invoke eminent domain" and rests "squarely outside the scope of the police power." *Kirby*, 368 N.C. at 854-55, 786 S.E.2d at 925. Defendants'

argument on this issue is well settled. Plaintiffs' claims arise under eminent domain. *Id.*

C. Temporary Taking

Defendants argue the trial court erred in holding the Map Act taking was temporary in nature. Defendants cite to *Kirby* to support their proposition the takings were indefinite. Defendants correctly assert a central tenet of our Supreme Court's holding in *Kirby* to be the negative restraints placed upon properties subject to the Map Act, which limited the owners' ability to "improve, develop and subdivide" the property "coupled with their indefinite nature, constitute a taking" by eminent domain. *Id.* at 848, 786 S.E.2d at 921. The "indefinite period of time" referenced in *Kirby* continued until the DOT either released the property under the statute or filed a direct condemnation action to take title to the fee and complete the highway project. *Id.*

In response to our Supreme Court's decision in *Kirby*, the North Carolina General Assembly rescinded all Map Act corridors on 11 July 2016. *See* Sess. Law 2016-90. The termination of all Map Act corridors removed the negative restrictions as of 11 July 2016. At the time of Plaintiffs' inverse condemnation filing in 2019 and DOT's direct condemnation filing in 2020, there were no corridor restrictions on the property.

The Map Act restrictions dates in effect were properly defined from DOT's recording the highway corridors on 6 August 1996 until the corridors were rescinded as of 11 July 2016. The taking was no longer "indefinite." The trial court correctly defined and concluded the dates above are the operative dates of Plaintiffs' alleged temporary taking. Defendants' argument is overruled.

D. Measure of Damages

Defendants argue the trial court erred by imposing a measure of damages based on the rental value for the duration of the taking on 6 August 1996 until 11 July 2016. We agree.

Our Supreme Court has held: "The value of the loss of those rights is to be measured by calculating the value of the land before the corridor map was recorded and the value of the land afterward, *taking into account all pertinent factors*, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes." *Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 284, 841 S.E.2d 513, 522 (2020) (citation and quotation marks omitted) (emphasis supplied).

The damages are calculated based upon the diminution in value of Plaintiffs' property during said period. *Id.* The trial court erred in ordering a calculation based on "rental value," as the proper measure is any proven diminution in value during the relevant period "taking into account all pertinent factors" to include the reduction in accessed *ad valorem* taxes Plaintiffs benefited from during the relevant temporary taking. *Id.*

VI. Conclusion

The trial court correctly found the duration of the temporary taking occurred between 6 August 1996 until 11 July 2016. The order of the trial court concluding the duration of the temporary taking is affirmed.

The Map Act was a temporary taking under the power of eminent domain. *Kirby*, 368 N.C. at 854-56, 786 S.E.2d at 925. The proper measure of the damages to be proven by Plaintiff is the diminution in value on the date of the filing of the highway corridor on 6 August 1996 until 11 July 2016, "taking into account all pertinent factors" to include the reduction in assessed *ad valorem* taxes Plaintiffs benefitted from during the period of the relevant temporary taking. *Chappell*, 374 N.C. at 284, 841 S.E.2d at 522. The order of the trial court is reversed on the measure of damages Plaintiff must prove. The order is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge CARPENTER concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

MURPHY, Judge, concurring in part and dissenting in part.

I concur in the Majority's opinion except with respect to Section V-D. For the reasons stated in Section D of the analysis in *Sanders v. N.C. Dep't of Transp.*, 2024 WL 442213, *10-11 (N.C. Ct. App. 2024) (unpublished), I would hold that the rental value of the property was the proper measure of damages, as our precedent requires in the case of a temporary taking.

PATEL v. PATEL

[294 N.C. App. 714 (2024)]

DHIRAJLAL C. PATEL, PLAINTIFF
v.
KIRAN S. PATEL, SANDIP PATEL, AND SHIV INVESTMENTS, INC., DEFENDANTS

No. COA23-924

Filed 16 July 2024

Creditors and Debtors—renewal of judgment—assigned to a co-debtor—not pursuant to contribution statute—extinguished

In a proceeding amongst four co-debtors on a commercial loan where the lender bank had assigned the right to enforce its judgment—entered against all four co-debtors, jointly and severally—to one of them (plaintiff) in exchange for plaintiff's payment of less than the entire amount of the judgment, the trial court erred in ruling against the other three co-debtors (defendants) and in favor of plaintiff in his action to renew the bank's judgment for collection because: (1) the legal effect of plaintiff's receipt of the bank's judgment by assignment amounted to satisfaction of the full debt owed, causing the judgment to cease to exist; and (2) the pleadings did not forecast that a notation was made under the contribution statute (N.C.G.S. § 1B-7) to otherwise keep the judgment alive. Further, defendants' position was not an impermissible collateral attack on the bank's judgment, but rather only a challenge to its enforceability after it ceased to exist.

Appeal by Defendants from order entered 11 May 2023 by Judge Eric Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 20 February 2024.

James, McElroy & Diehl, P.A., by Alexandra B. Bachman, Preston O. Odom, III, and J. Alexander Heroy, for the Plaintiff-Appellee.

Bennett Guthrie PLLC, by Joshua H. Bennett and Mitchell H. Blankenship, for the Defendants-Appellants.

GRIFFIN, Judge.

Defendants Kiran S. Patel, Sandip Patel, and Shiv Investments, Inc., appeal from the trial court's order granting judgment on the pleadings to Plaintiff Dhirajlal C. Patel in his action to renew a prior judgment for collection of debts owed by Plaintiff and Defendants on a commercial loan. Defendants contend the trial court erred because Plaintiff was a

co-debtor who owed the same judgment he was seeking to collect and was therefore barred from collecting on the judgment. We hold the facts undisputably show Plaintiff is equitably barred from enforcing the judgment, and therefore reverse the trial court's order.

I. Factual and Procedural Background

In 2011, Bank of the Carolinas (the "Bank") filed a complaint against Plaintiff and Defendants alleging that they had all committed breach of contract, as obligors or guarantors, with respect to defaulted payments owed for two commercial loans. On 18 September 2012, the trial court granted summary judgment in favor of the Bank and against both Plaintiff and Defendants (the "2012 Bank Judgment").

On 22 July 2013, the Bank assigned its right to enforce the 2012 Bank Judgment to Plaintiff in exchange for consideration less than the total value of the judgment, even though he was a debtor to the debt owed therein, and expressed at that time that "no part of the [2012 Bank Judgment] has been previously paid, assigned, or transferred." Between July 2013 and November 2021, Plaintiff acted on his position as assignee and owner of the 2012 Bank Judgment and collected varying payments on it from Defendants.

On 9 November 2021, Plaintiff filed a complaint initiating the present action against Defendants, seeking to renew and enforce the 2012 Bank Judgment. All Defendants filed answers to Plaintiff's complaint. On 23 February 2023, Plaintiff filed a motion for judgment on the pleadings or, alternatively, summary judgment. On 27 March 2023, Defendants also filed a motion for judgment on the pleadings, as well as a motion to compel.

On 10 April 2023, the trial court held a virtual hearing on Plaintiff and Defendant's motions over WebEx. On 11 May 2023, the trial court entered a written order granting Plaintiff's motion for judgment on the pleadings. Defendants timely appeal.

II. Analysis

Defendants contend the trial court erred by granting Plaintiff's motion for judgment on the pleadings in his action to renew the 2012 Bank Judgment, and by denying their motion for the same, because its decision turns on an error of law. Defendants argue judgment on the pleadings for Plaintiff was improper because Plaintiff is a co-debtor under the judgment, rendering it unenforceable. Plaintiff refutes Defendants' contention, and also asserts that Defendants wage an untimely collateral attack on the 2012 Bank Judgment's enforceability.

"We review de novo the trial court's order granting judgment on the pleadings." *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507, 797 S.E.2d 264, 269 (2017) (citation omitted). "In deciding whether to grant or deny a motion for judgment on the pleadings, the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party, with all well pleaded factual allegations in the nonmoving party's pleadings being taken as true and all contravening assertions in the movant's pleadings being taken as false." *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 12, 876 S.E.2d 476 (cleaned up), 485, *reh'g denied*, 382 N.C. 719, 878 S.E.2d 145 (2022). "A party seeking judgment on the pleadings must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 70, 852 S.E.2d 146, 151 (2020) (cleaned up).

To renew the enforceability of a prior judgment, the owner of the judgment may bring an independent action alleging "[1] the existence of a prior judgment against the defendant; [2] the fact that full payment on the judgment has not been made; and [3] an accounting of the unpaid balance due and any applicable interest." *Unifund CCR Partners v. Young*, 282 N.C. App. 381, 386, 871 S.E.2d 347, 351 (2022). Defendants do not challenge Plaintiff's assertions that the 2012 Bank Judgment was never fully paid, or the amount of the alleged unpaid balance. Defendants argue only that, even considering the pleadings in the light most favorable to Plaintiff, Plaintiff cannot successfully show the existence of a prior judgment.

In their efforts to guide our resolution of this issue, Plaintiff and Defendants each assert that one of two cases of North Carolina precedent should control: *Hoft v. Mohn*, 215 N.C. 397, 2 S.E.2d 23 (1939), and *Unifund CCR Partners v. Hoke*, 273 N.C. App. 401, 848 S.E.2d 508 (2020).

Plaintiff relies on *Unifund CCR Partners v. Hoke*. The trial court specifically cited *Hoke* in its order granting Plaintiff's motion for judgment on the pleadings. In *Hoke*, the plaintiff purchased a credit account including debts owed by the defendant, then obtained a judgment against the defendant to collect those debts. Ten years later, the plaintiff sought to renew its judgment against the defendant. *Hoke*, 273 N.C. App. at 402, 848 S.E.2d at 509. The defendant argued that the plaintiff, in bringing its renewal action, failed to satisfy heightened pleading requirements associated with its status as a "debt buyer." *Id.* at 403, 848 S.E.2d at 509. The court disagreed with the defendant's argument and otherwise held

no genuine issues of material fact existed because the defendant did "not challenge the existence or validity of the judgment, nor the validity of the underlying debt." *Id.* at 406, 848 S.E.2d at 511. In reaching its holding that the plaintiff was not a "debt buyer," the court clarified that, "[b]ecause a claim was already filed and a judgment was rendered, the action [then] before this Court involve[d] that judgment and not the underlying debt claim." *Id.* at 405, 848 S.E.2d at 511. Therefore, the only evidence of the defendant's debt, which was material to the renewal action, was the judgment being renewed. *Id.* at 405, 848 S.E.2d at 511.

We hold *Hoke* to have limited application to the present case. Here, Defendants do challenge the existence of the 2012 Bank Judgment and do not make any assertions that Plaintiff failed to comply with statutorily heightened pleading requirements. However, *Hoke* is instructive as to what evidence is material in an action to renew a judgment: the existence of that judgment, notwithstanding any issues of fact or law corresponding to the underlying debt claims. *Id.* at 406, 848 S.E.2d at 511. Defendants do not contest the legal foundations of the 2012 Bank Judgment or seek to present evidence concerning the legality or accuracy of the debts supporting it. Rather, they contend that Plaintiff's possession of the judgment is what renders an otherwise valid judgment unenforceable.

Defendants direct this Court to *Hoft v. Mohn*, a 1939 case where the North Carolina Supreme Court affirmed the lower court's refusal to enforce a judgment because the plaintiff stood in the position of one of the judgment co-debtors. *Hoft*, 215 N.C. at 400, 2 S.E.2d at 26. Though the plaintiff was not an original debtor on the judgment, his possession of the judgment was the result of a series of transfers from an original judgment co-debtor. *Id.* at 398, 2 S.E.2d at 24. The plaintiff sought to recover the remaining balance of the judgment from the other judgment co-debtors because the full value of the judgment had never been paid. *Id.* Our Supreme Court explained that, "[s]ince remote days of the common law, it has been held that payment by one or more of those jointly and severally liable on a judgment is an extinguishment of the judgment, and that an assignment of the judgment to such person or persons will not serve to keep it alive against the others." *Id.* (citations omitted). The Court in *Hoft* held that the judgment could not be enforced by the plaintiff because he "must be held to represent the [judgment co-debtor] to whose rights and privileges he has succeeded and which he exercises," and law and equity prevented the judgment co-debtor from recovering the balance of the judgment from the non-paying co-debtors. *Id.* at 400, 2 S.E.2d at 25–26.

Though the facts of *Hoft* appear to involve a judgment co-debtor's attempt to enforce the remaining debt owed on a judgment following its partial satisfaction, the rules of law cited and followed by the *Hoft* Court arose from well-established jurisprudence, which traditionally applies when one judgment co-debtor pays off the *entirety* of the judgment and attempts to receive an assignment of the judgment in exchange. In such case, the paying judgment debtor has no right to subrogation of the whole debt from their fellow co-debtors:

> The Court is not aware of any principle, on which, after the satisfaction of a judgment for a partnership debt by one of the partners sued, equity ought to extend or preserve the vitality of the legal security, under the guise of an assignment, so as to charge the bail of the other partner.
>
> . . .
>
> Upon the whole, the Court is of opinion, clearly, that the doctrine of subrogation cannot be applied between partners and joint principals, so as, after payment to the creditor, to affect the bail of one of them for the benefit of the other. It is against conscience to enforce the judgment for that purpose.

Hinton v. Odenheimer, 57 N.C. 406, 407–08 (1859). Rather, the judgment creditor's right to payment from each co-debtor is extinguished upon the full payment of the debt, and the paying judgment co-debtor cannot be assigned what no longer exists. The judgment ceases to exist, and the judgment co-debtor who paid the judgment instead has both a common law and a statutory right of contribution from his fellow co-debtors. *Norris v. Johnson*, 246 N.C. 179, 182, 97 S.E.2d 773, 775 (1957).

Because a fully satisfied judgment would otherwise cease to exist, North Carolina has enacted statutory methods by which a co-debtor may keep the judgment alive to assist in obtaining contribution from his co-debtors. *See Jones v. Rhea*, 198 N.C. 190, 192, 151 S.E. 255, 256 (1930) (discussing the statutory procedure for preservation of a judgment to allow contribution by assigning the satisfied judgment to a third-party trustee, under then-C.S. § 618); *Hoft*, 215 N.C. at 399, 2 S.E.2d at 25 (holding circumstances did not show compliance with C.S. § 618). North Carolina has more recently codified a statute to simplify obtaining contribution payments from non-paying co-debtors, requiring only that a notation be made on the judgment docket to preserve the judgment as a lien against non-paying co-debtors. N.C. Gen. Stat. § 1B-7 (2023); *see Holcomb v. Holcomb*, 70 N.C. App. 471, 472, 320 S.E.2d 12, 13 (1984)

(recognizing the statutory right to keep a judgment alive to enforce contribution in N.C. Gen. Stat. § 1B-7 as a successor to C.S. § 618).

Our Supreme Court has also held that a judgment may only be purchased by and assigned to a stranger to the judgment. Put simply, "[a]n assignment of a security to one of the parties to it, is a satisfaction--if it is intended to keep it on foot, the assignment should be to a stranger." *Sherwood v. Collier*, 14 N.C. 380, 382 (1832). If a payment is made to the judgment creditor by a party to the judgment with the intent to purchase the judgment, the actual legal effect of the payment is a satisfaction of the debt owed:

> [P]ayment discharges a judgment, as effectually as entering satisfaction of record. Here there was full payment. It was intended as such by Hooks, and so received by the creditor. A payment by any one of two or more, jointly, or jointly and severally bound for the same debt, is payment by all; and any of the parties may take advantage of it and plead it to an action brought by a satisfied creditor, or in his name by the sureties. It is true, that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that, one upon which all the parties are jointly liable. This is upon the score of intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention; because an assignment to one, of his own debt, is an absurdity.

Id. at 381; *see Towe v. Felton*, 52 N.C. 216, 218 (1859) ("We [ ] hold that a payment, made by one who is a principal obligor, or by one copartner of a partnership debt, as simply a payment."); *Liverman v. Cahoon*, 156 N.C. 187, 189, 72 S.E. 327, 328 (1911); *Bunker v. Llewellyn*, 221 N.C. 1, 3–4, 18 S.E.2d 717, 718 (1942) ("[I]f [the] plaintiffs be the owners of the note, the allegations are tantamount to saying that [the] plaintiffs paid the bank and took up the note. If so, [the] plaintiffs and [the] defendants being coprincipals and all equally liable on the note, such payment constitutes extinguishment of the note . . . [and] their remedy against the defendants, their coprincipals, would be in equitable contribution.").

Applying these principles to the present case, we are left only with the question of the practical effect of a payment of less than the entire

amount of a judgment by a party to the judgment, purporting to purchase the entire debt. We find guidance from our Supreme Court's decision in *Scales v. Scales*, 218 N.C. 553, 554–55, 11 S.E.2d 569, 570 (1940). In *Scales*, three judgment co-debtors were jointly and severally liable for the entirety of a $3,250 judgment. *Id.* at 553, 11 S.E.2d at 569. One of the judgment co-debtors reached a deal with the judgment creditor whereby he paid a total of $225 as full payment for the debt owed under the judgment, and the judgment creditor then assigned the judgment to a third-party trustee (keeping the judgment alive in compliance with C.S. § 618). *Id.* By preserving the judgment under C.S. § 618, the judgment remained as a lien on property owned by one of the non-paying co-debtors. *Id.* The paying co-debtor requested the court consider the judgment satisfied, and then sought contribution from the non-paying co-debtors for his payment to the judgment creditor. *Id.* at 554, 11 S.E.2d at 570.

A non-paying co-debtor filed an action against the paying co-debtor to have the lien removed from his land, arguing that the paying co-debtor could not seek contribution because he satisfied the judgment by paying an amount less than the entire debt owed. *Id.* at 556, 11 S.E.2d at 571. This Court disagreed and explained that the paying co-debtor "not only paid his proportionate part, but the entire judgment of $3,250 and the 'entire debt' which was reduced to judgment." *Id.* The Court then clarified that the right of contribution applies to the amount actually paid to satisfy the judgment, notwithstanding the amount of the original debt owed:

> The basis for ascertainment of the excess paid is not necessarily the amount of the original common obligation; if the claimant has satisfied the entire debt or demand or relieved the whole burden by payment of a less amount, he is entitled to contribution only on the basis of the amount actually paid. In the case of a compromise made by the claimant, the sum recoverable must be ascertained on the basis of the amount paid in compromise, each contractor being entitled to the benefit of the compromise[.]

Id. The Court ultimately held that the paying co-debtor was entitled to receive $75 from each non-paying co-debtor, the non-paying co-debtor's one-third share of the $225 that the paying co-debtor paid to satisfy the judgment. *Id.*

Scales presented a case where the paying co-debtor voluntarily categorized his payment as a satisfaction of the judgment; had the creditor

assign the judgment to a third-party trustee in compliance with C.S. § 618, the relevant contribution statute at the time; and the Court then issued its holding on whether the paying co-debtor's actions qualified for contribution under the statute. Here, Plaintiff asserts a different reason for his payment to the Bank, and the requisite notations were not made to keep the judgment alive pursuant to N.C. Gen. Stat. § 1B-7, our current contribution statute. Nonetheless, common law principles of equitable contribution still apply absent compliance with a statutory right to contribution, *see Holcomb*, 70 N.C. App. at 473, 320 S.E.2d at 14, and we do not find these differences material to the holding of *Scales*. The present case presents a substantially similar circumstance as *Scales*, and we reach the same result.

When we read *Hoft*, *Sherwood*, *Scales*, and the remainder of our jurisprudence as a cohesive body of law, the following principles emerge: (1) A judgment on a debt extinguishes, unless it is preserved by statutory process, when the amount owed under the judgment is satisfied. (2) If a debt is transferred to its debtor, the amount owed as a liability merges into the debtor's assets, the debt no longer exists, and there is no longer any amount owed on any judgment for that debt; the judgment ceases to exist. (3) If a co-debtor pays any amount to his judgment creditor and causes the judgment to extinguish, it may only function as a payment in full satisfaction of the debt, and he is entitled not to subrogation of the entire amount of the debt or the entire amount paid, but to a ratable contribution from his co-debtors.

Though Plaintiff, here, intended his payment to the Bank to be a purchase of the 2012 Bank Judgment for his sole benefit, a judgment cannot be effectually assigned to its own debtor. *See Sherwood*, 14 N.C. at 381 ("[N]otwithstanding the intention; . . . an assignment to one, of his own debt, is an absurdity[.]"). Plaintiff instead obtained a satisfaction of the judgment. *Scales*, 218 N.C. at 556, 11 S.E.2d at 571. By agreeing to pay the Bank a lesser amount than the full amount owed under the judgment in exchange for a purported assignment of the judgment, Plaintiff has effectually negotiated a release of the debt owed for a lesser sum, paid in lump sum, on behalf of himself *and* his co-debtors. Plaintiff first entered into the two commercial loan agreements with the benefit of having the burden of paying those loans split across multiple parties, providing the Bank with a greater incentive to enter into the agreement. Equity must not now allow Plaintiff to have the burden of repayment relieved without spreading that benefit across the same parties. Plaintiff has "relieved the whole burden by payment of a less amount, he is entitled to contribution only on the basis of the amount actually paid." *Id.* Plaintiff may

not renew and enforce the 2012 Bank Judgment; rather, he should have brought an action for ratable contributions from his co-debtors of the amount he paid to have the 2012 Bank Judgment purportedly assigned to him. *Id.* at 555–56, 11 S.E.2d at 570–71.

Because the legal effect of Plaintiff's receipt of the 2012 Bank Judgment amounts to a payment satisfying the full debt, the judgment ceased to exist. The pleadings forecast no evidence that a notation was made under N.C. Gen. Stat. § 1B-7 to keep the judgment alive. Plaintiff cannot show an existing judgment. We therefore hold that the pleadings show undisputed facts which defeat Plaintiff's claim for renewal.

Notwithstanding the substantive merits of Defendants' claims, Plaintiff also asserts Defendants' argument should fail because it should be construed as an untimely collateral attack on the judgment under Rule 60(b). Rule 60(b) of the North Carolina Rules of Civil Procedure allows a party to request the court relieve that party from a final judgment for reasons including, among others, that "[t]he judgment has been satisfied . . . or it is no longer equitable that the judgment should have prospective application;" or "any [ ] reason justifying relief from the operation of the judgment." N.C. R. Civ. P. 60(b)(5), (6) (2023); *see Carter v. Clowers*, 102 N.C. App. 247, 254, 401 S.E.2d 662, 666 (1991) ("The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments."). Though "[t]he broad language of [Rule 60(b)](6) 'gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice[,]' " "[m]otions under Rule 60(b) must be made 'within a reasonable time.' " *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (citations omitted).

Plaintiff is correct that when the legal legitimacy of an underlying judgment is brought before the court in a renewal action, the argument can be understood as a collateral attack on the judgment being renewed. In *Unifund CCR Partners v. Young*, the defendants objected to the plaintiff's renewal of a judgment by claiming that the underlying judgment was the product of fraud. *Young*, 282 N.C. App. at 386, 871 S.E.2d at 351–52. The Court interpreted that this fraud claim was really an attack on the legality of the underlying judgment which was best construed as a Rule 60(b) motion for relief from judgment and was time-barred. *Id.*

However, despite Defendants' ten-year delay in challenging Plaintiff's possession of the 2012 Bank Judgment, this case does not present a collateral attack on the 2012 Bank Judgment that we must construe as a Rule 60(b) motion. It is important to distinguish the order

in which the underlying judgment was obtained and the right to collect the debt owed under the judgment was transferred. In *Young*, the plaintiff acquired the defendants' debt first, then obtained a judgment on those debts. The appeal then presented challenges to the original judgment holders' allegedly unjust acquisition of the judgment being renewed. In *Hoft*, the original judgment holder acquired a judgment on debts owed by the defendant. Thereafter, the judgment was transferred into the hands of another party—notably, a co-debtor on the judgment—and the defendant challenged the enforceability in that party's hands. The *Hoft* defendant's argument was not a collateral attack because he took no issue with the judgment, only challenging its enforceability after it ceased to exist as the result of an assignment to a judgment debtor. Here, the facts mirror the material notes of *Hoft*, and are likewise not a collateral attack.

III. Conclusion

We hold that the undisputed facts presented in the pleadings show that Plaintiff cannot present evidence of an existing judgment because the legal effect of Plaintiff's acquisition of the 2012 Bank Judgment must be considered a payment satisfying the full debt owed; the judgment ceased to exist upon its assignment. The trial court therefore erred in granting judgment on the pleadings for Plaintiff and in denying judgment on the pleadings for Defendants.

REVERSED.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
ROGER B. SMITH

No. COA23-997

Filed 16 July 2024

Stalking—felony—elements of harassment and substantial emotional distress—sufficiency of evidence

In a prosecution for felony stalking arising from defendant's multiple telephone calls (sometimes communicating sexually suggestive messages) every day for more than six months to a 75-year-old widow he met in church despite her repeated requests that he cease all contact with her—causing her, among other things, to lose sleep, experience anxiety attacks, limit activities outside her home, distrust people, and start seeing a psychiatrist—the trial court did not err in denying defendant's motion to dismiss the charge for insufficiency of the evidence of two disputed elements where the State presented substantial evidence of: (1) harassment, in that defendant's telephone calls constituted knowing conduct directed at the victim which tormented her and served no legitimate purpose; and (2) causing substantial emotional distress, in that defendant knew or should have known that a reasonable person in the victim's circumstances would experience significant mental suffering or distress as a result.

Appeal by Defendant from judgment entered 26 January 2023 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 11 June 2024.

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

Appellate Defender Glenn Gerding, by Assistant Public Defender Max E. Ashworth, III, for Defendant-Appellant.

COLLINS, Judge.

Defendant Roger B. Smith appeals from judgment entered upon a guilty verdict of felony stalking. Defendant argues that the trial court erred by denying his motion to dismiss the charge of felony stalking

because the State did not submit sufficient evidence that he harassed the alleged victim or, in the alternative, that there was insufficient evidence that Defendant knew or should have known that a reasonable person would have suffered substantial emotional distress after receiving unsolicited phone calls. We find no error.

I. Background

Defendant was indicted in Pitt County Superior Court on 7 February 2022 for two counts of felony stalking. Prior to the start of trial, the State dismissed one count of felony stalking and Defendant proceeded to trial on the remaining count of felony stalking. Defendant admitted at trial that he had been previously convicted of misdemeanor stalking. The State's evidence presented at trial tended to show the following:

Iris McIntire[1] was a 75-year-old widow who lived alone in Greenville, North Carolina. McIntire was enrolled in classes at a local community college, and she was also an active member of her local church who consistently participated in weekday church services, Bible study, Sunday morning services, and Sunday night services. McIntire also participated in the church's daily prayer line which met over the phone each weekday morning from 6:00 a.m. to 7:30 a.m. Defendant was also a member of the same church and participated in the church's daily prayer line each weekday morning.

In the summer of 2021, Defendant approached McIntire after a weekday morning church service and asked for her phone number; McIntire shared her number with Defendant, thinking that he wanted to speak with her about her community college classes. When McIntire arrived back at her home following the church service, she discovered that Defendant had called multiple times and left seven voicemails on her answering machine stating that he liked her and asking her to have coffee with him and go out with him. McIntire deleted the voicemails. Later that evening, Defendant again called McIntire multiple times. The very next morning, after McIntire finished participating in the church's daily prayer line at 7:30 a.m., Defendant again began calling her repeatedly. McIntire would answer the phone, hear Defendant say her name and start talking to her, and hang up the phone. Defendant kept calling and, during one of the calls, Defendant asked McIntire out. McIntire told Defendant that she was not interested in him and to stop calling her. During one of the phone calls, Defendant told McIntire that he wanted to have sex with her and stated that God told him to ask her

1. We use a pseudonym to protect the identity of the victim.

out and to take care of her. McIntire reiterated that she was not interested in Defendant and became so scared that she "didn't go to sleep all night long."

Defendant continued to call McIntire multiple times a day for a period of at least six months, and McIntire repeatedly told Defendant to stop contacting her and to leave her alone. During this six-month period, Defendant also began approaching McIntire in person while at church. McIntire went to her church's pastor and asked him to speak with Defendant and tell Defendant to stop calling her. McIntire also went to the local police and reported Defendant's conduct. Defendant continued to call her every day, "five or six times" a day, until the local police became involved and Defendant's phone calls stopped.

Following the close of the State's evidence, Defendant moved to dismiss the charge of felony stalking, arguing that the State had failed to present substantial evidence that Defendant's conduct would cause "a reasonable person to suffer substantial emotional distress." On 26 January 2023, the jury found Defendant guilty of one count of felony stalking, and Defendant was sentenced to a term of 19 to 32 months' imprisonment. Defendant filed proper notice of appeal on the same day.

II. Discussion

Defendant argues that "the trial court erred by denying [his] motion to dismiss the stalking count because the State did not submit substantial evidence of each element." Defendant specifically argues that there was insufficient evidence that (1) he harassed McIntire or (2) he knew or should have known a reasonable person would have suffered substantial emotional distress "after receiving unsolicited phone calls."

A. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "In ruling upon a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation omitted). "[T]he trial court must determine whether there is substantial evidence of each essential element of the crime." *Id.* (quotation marks and citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citation omitted). If substantial evidence exists that the charged offense was committed and that the defendant was the perpetrator of said offense, "the case is for

the jury [to decide] and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (citation omitted).

B. Stalking

N.C. Gen. Stat. § 14-277.3A governs the crime of stalking and specifically sets forth the legislative intent of the statute, explaining that stalking

> involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.
>
> The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable *for a wide range of acts, communications, and conduct*. . . .

N.C. Gen. Stat. § 14-277.3A(a) (2023) (emphasis added). The statute provides that a defendant is guilty of stalking if the defendant

> willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Id. § 14-277.3A(c) (2023). A person "who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony." *Id.* § 14-277.3A(d) (2023). Thus, the elements of the

offense of felony stalking are that a defendant: (1) acted willfully; (2) harassed another person or engaged in a course of conduct; (3) without legal purpose on more than one occasion; (4) knew or should have known that the course of conduct would cause a reasonable person to fear for his or her safety or "suffer substantial emotional distress by placing that person in fear of . . . continued harassment"; and (5) was previously convicted of a stalking offense. *Id.* § 14-277.3A(c), (d).

Here, it is undisputed that the first, third, and fifth elements have been met: Defendant willfully telephoned McIntire and approached her at church, such that the first element is met; Defendant willfully contacted McIntire on more than one occasion, such that the third element is met; and Defendant admitted that he had a prior conviction for a separate stalking offense, such that the fifth element is met. Defendant argues only that the second and fourth elements are not supported by substantial evidence.

Element Two – Harassment

The stalking statute defines "course of conduct" as "[t]wo or more acts . . . in which the stalker . . . by any action, method, device, or means, . . . communicates to or about a person[.]" *Id.* § 14-277.3A(b)(1) (2023). It defines "harasses or harassment" as "[k]nowing conduct, including . . . telephone, cellular, or other wireless telephonic communication, . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.* § 14-277.3A(b)(2) (2023). Our Court has further explained that the term torment, as applied to the stalking statute, is defined as conduct that "annoy[s], pester[s], or harass[es]." *State v. Wooten*, 206 N.C. App. 494, 498, 696 S.E.2d 570, 573 (2010) (citation omitted).

Here, the State presented substantial evidence that Defendant's conduct constituted harassment: Defendant telephoned McIntire multiple times a day, every day, for more than six months, despite McIntire's repeated demands that Defendant stop calling her and cease all communication. Defendant called McIntire and told her that "he wanted to have sex with [her,]" "really wanted [her] to be with [him,]" and "really needed [her]." Defendant further told McIntire that she "had to do something for him because he was dripping, leaking" and McIntire hung up on Defendant. McIntire told Defendant to stop calling her, that she was not interested in him, and that she did not want to have sex with him. She testified that Defendant "just didn't let up" and instead started calling her from other numbers, including blocked numbers. All of McIntire's communications with Defendant were solely limited to her demanding that Defendant stop contacting her and asking Defendant to leave

her alone. Defendant then repeatedly approached McIntire in person at church, despite her demands that he stop and her refusal to engage with him, resulting in McIntire asking her godson, her church's pastor, and the local police to intervene on her behalf to stop Defendant. This testimony is substantial evidence that Defendant's conduct constituted harassment that tormented and terrorized McIntire and served no legitimate purpose. *See* N.C. Gen. Stat. § 14-277.3A(b)(2).

Element Four – Substantial Emotional Distress

The stalking statute requires that a defendant "knows or should know that the harassment or the course of conduct would cause a reasonable person" to "[f]ear for the person's safety . . . " or "[s]uffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment." *Id.* § 14-277.3A(c)(1), (2). The statute defines a reasonable person as a "reasonable person *in the victim's circumstances*" and it defines substantial emotional distress as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." *Id.* § 14-277.3A(b)(3), (4) (emphasis added). Our Court has held that evidence that the victim significantly altered their lifestyle in response to the harassing conduct is evidence of substantial emotional distress. *See Bunting v. Bunting*, 266 N.C. App. 243, 253, 832 S.E.2d 183, 190 (2019) ("Plaintiff's testimony that Defendant's repeated contact caused her to feel terror, to change her housing arrangements, and to alter her daily routine is sufficient evidence of substantial emotional distress." (citation omitted)).

Here, the State presented substantial evidence that Defendant's conduct resulted in McIntire suffering substantial emotional distress. McIntire testified that Defendant's repeated phone calls and in-person approaches caused her to break down and that she "started going to a psychiatrist because [she does not] go outside anymore." McIntire testified:

> It has affected me bad. I don't go to church like I used to. I don't go to school no more. . . . It affects me to this day. I just – I'm scared to go out. I don't know where he is. And I don't want to get close to him. I don't know what he's going to do to me. . . . I couldn't take it no more. I wasn't sleeping at night. And when I get to school I would have an anxiety attack. I went to the doctor the same day and I broke down in Dr. Milton's office. And she asked me could she get me a psychiatrist? . . . I'm still seeking that help. . . . I don't go out at night. I only -- I haven't been on the prayer line, the morning prayer, or Tuesday night Bible Study on

> the phone. I just go to Bible Study Wednesday morning and it turns out at 11 and I'm home before 11:30. . . . I don't feel safe outside of my home no more. . . . I don't know where this man is going to be at. I really don't. And I don't trust him. I don't even trust people like I use to. I'm sorry. Every day by 4 o'clock I've got my alarm on, my blinds are closed, and everything that I'm going to drink or snack on that night is in my bedroom, and I don't come up front no more until the next morning.

This testimony is substantial evidence that Defendant's conduct caused McIntire to feel terror, to suffer emotional torment that prompted her to seek out medical and psychiatric care, and to change her daily habits and routine due to her fear of continued harassment. This evidence supports that McIntire suffered substantial emotional distress due to Defendant's harassment. *See* N.C. Gen. Stat. § 14-277.3A(c)(2); *see also Bunting*, 266 N.C. App. at 253, 832 S.E.2d at 190.

III. Conclusion

Because the State presented substantial evidence of each element of the charge of felony stalking, the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges STROUD and STADING concur.

WRIGHT v. WOOD

[294 N.C. App. 731 (2024)]

ENNIS W. WRIGHT, IN HIS OFFICIAL CAPACITY AS SHERIFF OF CUMBERLAND COUNTY, PLAINTIFF
v.
BETH A. WOOD, IN HER OFFICIAL CAPACITY AS NORTH CAROLINA STATE AUDITOR AND IN HER INDIVIDUAL CAPACITY, DEFENDANT

No. COA24-7

Filed 16 July 2024

Venue—motion to change—suit against public officer—plaintiff's county of residence—county where cause arose

In a proceeding arising from the efforts of the state auditor (defendant) to conduct an investigation of the office of the Cumberland County sheriff (plaintiff), the trial court did not err in denying defendant's Civil Procedure Rule 12 motion for change of venue—from Cumberland County to Wake County—in plaintiff's action seeking declaratory and injunctive relief because Cumberland County was a proper venue regardless of whether N.C.G.S. § 1-82 or N.C.G.S. § 1-77 was applicable. Under section 1-82 (addressing venue generally), venue in Cumberland County was proper because plaintiff resided there at the commencement of the action. Venue was also proper in Cumberland County under section 1-77 (addressing venue in actions brought against a public officer in the execution of her duties) because that statute provides that a case "must be tried in the county where the cause, or some part thereof, arose" and plaintiff's complaint alleged that (1) defendant's agents traveled to Cumberland County to request documents from plaintiff that he contends were not subject to disclosure and (2) defendant served plaintiff with an unlawful subpoena there.

Appeal by Defendant from Order entered 29 August 2023 by Judge Andrew Hanford in Cumberland County Superior Court. Heard in the Court of Appeals 29 May 2024.

Ronnie M. Mitchell and R. Andrew Porter for Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Brooke Schmidly, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Beth A. Wood (Defendant) appeals from an Order denying her Motion to Dismiss for Improper Venue and Alternative Motion for Change of Venue. The Record before us tends to reflect the following:

In October 2022, employees of Defendant, then Auditor of the State of North Carolina, contacted the office of Ennis W. Wright (Plaintiff) to make an appointment to meet with Plaintiff. Plaintiff, the Sheriff of Cumberland County, agreed to meet with Defendant's agents at the Cumberland County Law Enforcement Center. At the meeting, Defendant's agents informed Plaintiff that the Office of State Auditor intended to conduct an investigation of the Cumberland County Sheriff's Office (CCSO). As part of this investigation, Defendant's agents requested documents and information, including the CCSO's policy and procedure manual, a complete vehicle listing including whether the vehicle was assigned to a specific employee, and a complete payroll report from 1 January 2020. CCSO agreed to provide those documents that were public records subject to disclosure, but it stated CCSO is not a state agency and an investigation or audit of CCSO could only be performed by "appropriate agencies or officials[,]" of which the State Auditor was not one.

After communications with Plaintiff's counsel and requests by Plaintiff to provide information about the nature of the investigation, Defendant's agents requested on-site review of several documents, including a specific payroll report, a human resources file for a CCSO employee, and documentation related to CCSO purchases and contracts. On 9 December 2022, Plaintiff directed copies of the requested public records be made available to Defendant, but he again asked for an explanation of the matter being investigated. Defendant's agents again requested documents and information from CCSO in February 2023. At that time, Plaintiff believed these requests exceeded Defendant's authority as State Auditor and were unlawful. Plaintiff determined to treat Defendant's requests as public records requests and directed responsive public records be provided to Defendant.

On 8 March 2023, Defendant issued a subpoena to Plaintiff, ordering him to appear and produce to her at the Office of the State Auditor original copies of documents related to Defendant's investigation of CCSO. The subpoena was prepared in Wake County and signed by Defendant in her official capacity as State Auditor. On 17 March 2023, Plaintiff's counsel sent a letter to Defendant informing her Plaintiff was unable to appear on the date requested in the subpoena, again requesting

information about the nature of the investigation, and articulating Plaintiff's position regarding the legality of Defendant's actions. On 5 May 2023, Defendant responded by letter, stating the "State [A]uditor has the authority to audit and investigate State agencies, and entities supported, partially or entirely, by public funds . . . [and] [t]his authority extends to auditing and investigating the Sheriff's Office."

On 26 May 2023, Plaintiff initiated this action by filing a Complaint in Cumberland County Superior Court seeking declaratory and injunctive relief. In the Complaint, Plaintiff alleged venue is proper in Cumberland County because "the events[,] transactions[,] and occurrences giving rise to this action arose primarily in Cumberland County, and those events occurring outside Cumberland County related directly to the events occurring in Cumberland County." The Complaint alleged Defendant had exceeded her lawful authority as State Auditor by requesting private documents and information to which she was not entitled and issuing an unlawful subpoena, and asserted Defendant "will seek to use the power and authority of the Court to compel Plaintiff to act according to Defendant's unlawful subpoena and unlawful demands."

On 30 June 2023, Defendant filed Motions to Dismiss for Improper Venue and Insufficiency of Service of Process; Alternative Motion for Change of Venue. The trial court heard arguments on these Motions on 1 August 2023. At the hearing, counsel for Defendant withdrew the Motion to Dismiss for Insufficiency of Service of Process. As to the issue of venue, Defendant argued N.C. Gen. Stat. § 1-77 applies in this case rather than the general venue statute under N.C. Gen. Stat. § 1-82. Section 1-77 provides actions against a public officer "for an act done by him by virtue of his office" must be tried "in the county where the cause, or some part thereof, arose[.]" N.C. Gen. Stat. § 1-77 (2021).

On 29 August 2023, the trial court entered an Order Denying the Defendant's Rule 12 Motions. In its Order, the trial court stated: "The [c]ourt fully considered the Defendant's motion to dismiss for improper venue, pursuant to Rule 12(b)(3) and N.C. Gen. Stat. §§ 1-77 and 1-82, finds and concludes that dismissal is not warranted, and that motion is denied." Additionally, the trial court stated: "Considering, alternatively, the Defendant's motion to change venue, pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83, the [c]ourt finds and concludes that venue is proper under N.C. Gen. Stat. § 1-82, and that in its discretion the [c]ourt should not order the transfer of this action to another county, and the transfer of venue is denied." On 26 September 2023, Defendant timely filed Notice of Appeal to this Court.

Appellate Jurisdiction

The trial court's Order denying Defendant's Motion to Dismiss for Improper Venue and Alternative Motion for Change of Venue is an interlocutory order. "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." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an appeal is permitted "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Harris & Hilton, P.A. v. Rassette*, 252 N.C. App. 280, 282, 798 S.E.2d 154, 156 (2017) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)). This Court has previously held "[t]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper." *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citations omitted). *See also Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005) ("Motions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable." (citations omitted)); *Odom v. Clark*, 192 N.C. App. 190, 195, 668 S.E.2d 33, 36 (2008) ("[B]ecause the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable." (citation omitted)).

Issue

The dispositive issue on appeal is whether venue is proper in Cumberland County under application of N.C. Gen. Stat. § 1-82 and/or N.C. Gen. Stat. § 1-77.

Analysis

Defendant filed a Motion for Change of Venue under N.C. Gen. Stat. § 1-83(1), which states:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties, or by order of the court.

> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83(1) (2021).

"Despite the use of the word 'may,' it is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)). "A determination of venue under N.C. Gen. Stat. § 1-83(1) is, therefore, a question of law that we review *de novo*." *Id.* (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

The parties dispute whether N.C. Gen. Stat. § 1-82 or N.C. Gen. Stat. § 1-77 applies in this case. N.C. Gen. Stat. § 1-82 is the general venue statute which governs in cases where no other specific statutory venue provision applies. That statute provides: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement[.]" N.C. Gen. Stat. § 1-82 (2021). In contrast, under N.C. Gen. Stat. § 1-77, a case "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial" where the action is "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office[.]" N.C. Gen. Stat. § 1-77 (2021). We, however, conclude the trial court did not err regardless of which venue provision applies.

On the one hand, if N.C. Gen. Stat. § 1-82 applies, then venue is clearly proper in Cumberland County because Plaintiff resided in Cumberland County at the commencement of the action. Venue would also be proper in Wake County under this provision because Defendant resided there at the outset of the action. Under N.C. Gen. Stat. § 1-82, so long as any plaintiff or defendant resides in a county at the outset of an action, venue is proper in that county. N.C. Gen. Stat. § 1-82 (2021). Here, it is uncontested that Plaintiff resided in Cumberland County when he filed the Complaint in Cumberland County Superior Court.

Defendant, however, points to two cases in support of her position N.C. Gen. Stat. § 1-77 applies in this case—at least to the extent the action is against Defendant in her official capacity—because the statute does not apply to actions against the State. In *Smith v. State*, our Supreme Court considered a suit brought by the former superintendent of a state-owned hospital against the State and various State officials. 289 N.C. 303, 222 S.E.2d 412 (1976). There, the plaintiff brought suit in Burke County, where he had been dismissed, and the trial court denied the defendants' motion to change venue to Wake County. *Id.* at 333, 222 S.E.2d at 431. On appeal, although the defendants conceded they were public officers, the Court expressly held "G.S. [§] 1-77, however, does not apply to actions against the State. . . This case, therefore, is governed by G.S. [§] 1-82[.]" *Id.* at 334, 222 S.E.2d at 432. As such, contrary to Defendant's contention, the Court in *Smith* actually applied Section 1-82 rather than Section 1-77 in that action against State officials. *Id.*

Defendant also points to *King v. Buck*, 21 N.C. App. 221, 203 S.E.2d 643 (1974)—an action brought against the State Adjutant General in Mecklenburg County—in support of her position. There, this Court held § 1-77 applied and upheld the transfer of venue to Wake County. *Id.* at 222, 203 S.E.2d at 643.[1] In contrast to this case, the plaintiff there conceded both that the defendant was a public officer and that "this action arises from acts done or to be done by him in Wake County by virtue of his office." *Id.* Plaintiff here makes no such concessions.

Ultimately, however, we need not resolve the question of the applicability of Section 1-77 or 1-82 to this case. Even if the more specific venue statute N.C. Gen. Stat. § 1-77 applies, we conclude venue is still proper in Cumberland County. Under that provision, in an action against a public officer for an act done by her by virtue of her office, the case "must be tried in the county where the cause, *or some part thereof*, arose, subject to the power of the court to change the place of trial[.]" N.C. Gen. Stat. § 1-77 (2021) (emphasis added). "A cause of action may be said to accrue, within the meaning of a statute fixing venue actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested." *Morris v. Rockingham Cnty.*, 170 N.C. App. 417, 420, 612 S.E.2d 660, 663 (2005) (quoting *Smith*, 289 N.C. at 333, 222 S.E.2d at 432 (citation omitted)). Acts or omissions giving rise to a

1. Additionally, Defendant cites *Orbitz, LLC v. Hoyle*, No. 11 CVS 1857, 2013 NCBC LEXIS 29 (2013). That opinion was a decision of the North Carolina Business Court, which "is a special Superior Court, the decisions of which have no precedential value in North Carolina." *Estate of Browne v. Thompson*, 219 N.C. App. 637, 640, 727 S.E.2d 573, 576 (2012), *disc. review denied*, 366 N.C. 426, 736 S.E.2d 495 (2013).

cause of action may occur in multiple counties, and venue is proper in any of them. *See Frink v. Batten*, 184 N.C. App. 725, 730, 646 S.E.2d 809, 812 (2007) (noting N.C. Gen. Stat. § 1-77, by its plain language, "acknowledges that those acts and omissions may arise in multiple counties.").

Our Supreme Court considered the application of N.C. Gen. Stat. § 1-77 in *Coats v. Sampson County Memorial Hospital, Inc.*, 264 N.C. 332, 141 S.E.2d 490 (1965). The plaintiff in that case, a resident of Harnett County, brought a claim against the defendant in Harnett County, but upon the defendant's motion, the trial court found venue was proper in Sampson County—the location of the defendant hospital—and transferred the case there. *Id.* at 332-33, 141 S.E.2d at 491. The Court concluded "Sampson County has delegated to defendant its authority to exercise these functions" for which it was responsible by statute. *Id.* at 334, 141 S.E.2d at 492. Therefore, the defendant was an "agency" of Sampson County and, because the cause of action arose in Sampson County, the defendant was entitled to have the case tried there. *Id.* at 334-35, 141 S.E.2d at 492.

Similarly, this Court considered the application of N.C. Gen. Stat. § 1-77 in *Morris*. 170 N.C. App. at 418-21, 612 S.E.2d at 662-64. There, the defendants included Rockingham County, two paramedics, and Rockingham County Emergency Medical Services. *Id.* at 418, 612 S.E.2d at 661-62. The plaintiff filed a negligence suit against the defendants following an injury he sustained when the defendant paramedics transported him from Rockingham County to a hospital in Forsyth County and dropped the stretcher carrying him on the ground. *Id.* The defendants argued venue was only proper in Rockingham County because at the time of the incident, the paramedics were acting in their official capacity for an agency of Rockingham County, and thus, all parties were citizens or entities residing solely in Rockingham County. *Id.* at 418-19, 612 S.E.2d at 662. The Court rejected this argument and concluded venue was proper in Forsyth County, where the injury had occurred. *Id.* at 420-21, 612 S.E.2d at 663-64. In finding venue was proper in Forsyth County, the Court noted defendants were fulfilling a statutory duty and stated: "[t]he paramedics, as *officers* of Rockingham County, were carrying out *official duties*, and were *acting on behalf of Rockingham County*. The paramedics' official duties brought them to Forsyth County, and their acts or omissions gave rise to a cause of action in Forsyth County." *Id.* at 420, 612 S.E.2d at 663 (emphasis added).

Under our precedent, then, we must consider whether an agent of Defendant, exercising some part of her statutory authority, committed acts or omissions in Cumberland County which gave rise to the present

action for the purposes of determining proper venue. Here, based on the pleadings, Defendant's agents went to Cumberland County, met with Plaintiff, and requested documents Plaintiff believed were not subject to disclosure. Plaintiff was served with the subpoena in Cumberland County. Plaintiff's Complaint alleges Defendant "seeks to exceed the authority conferred to the Auditor . . . by the State Auditor attempting to conduct an investigation of the Plaintiff or the Plaintiff's Office . . . ." Further, the Complaint alleges Defendant issued an unlawful subpoena that "appears to require disclosure of privileged or other protected matter, but no exception or waiver applies to the privilege or protection." Consistent with *Coats* and *Morris*, the actions of Defendant's agents in Cumberland County requesting CCSO records constitute relevant acts or omissions underlying an action against Defendant. Just as in *Morris*, although Defendant's agents were based in Wake County, their official duties caused them to undertake certain actions in Cumberland County. Even if most of the relevant acts occurred in Wake County, under N.C. Gen. Stat. § 1-77(2), so long as "*some part*" of the cause of action arose in Cumberland County, Cumberland County is a proper venue. Cumberland County is, therefore, a proper venue for this case.

Thus, at least some part of the cause of action arose in Cumberland County where Plaintiff is a resident. Therefore, under either N.C. Gen. Stat. § 1-82 or § 1-77, venue is proper in Cumberland County. Consequently, the trial court did not err in denying Defendant's Motion to Dismiss for Improper Venue and Alternative Motion for Change of Venue.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order denying Defendant's Motion to Dismiss for Improper Venue and Alternative Motion for Change of Venue.

AFFIRMED.

Chief Judge DILLON and Judge ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JULY 2024)

CLAYTON v. WIRTH No. 23-1117	Mecklenburg (22CVS8597)	AFFIRMED IN PART; REVERSED AND REMANDED IN PART.
COLGATE v. GLOBAL GROWTH PARTNERS, INC. No. 23-527	Mecklenburg (18CVS13955)	Affirmed
DeBERRY v. N.C. DEP'T OF PUB. SAFETY No. 24-115	N.C. Industrial Commission (TA-30238)	Affirmed
IN RE A.D. No. 24-13	Guilford (21JT491)	Affirmed
IN RE J.N.B. No. 23-690	Wake (22JA174-177-910)	Affirmed in part; vacated in part; and remanded in part.
IN RE K.R.H. No. 23-791	Guilford (19JT118)	Affirmed
IN RE L.D. No. 24-21	Pitt (11JA62) (22JA217)	Affirmed
IN RE N.V. No. 23-1081	Forsyth (12JT175)	Affirmed
N.C. FARM BUREAU MUT. INS. CO., INC. v. MEBANE No. 22-708-2	Wake (21CVS7683)	Reversed
STATE v. BARNES No. 23-998	Wilson (22CRS51089)	No Error
STATE v. BELL No. 24-110	New Hanover (20CRS57284) (21CRS235) (21CRS50486)	No Error
STATE v. CLARK No. 23-798	Moore (19CRS278) (19CRS504-507) (19CRS50508-09)	Affirmed

STATE v. COLQUITT No. 23-921	Chatham (19CRS51482) (22CRS50446)	Affirmed
STATE v. METCALF No. 23-1119	Buncombe (21CRS712052)	No Error
STATE v. WHITE No. 24-25	Guilford (18CRS91029)	No Error
STATE v. WINTERS No. 23-970	Yadkin (22CRS102) (22CRS50371)	Affirmed in Part, Remanded in Part.
WONDER DAY P'SHIP v. N.C. DEP'T OF TRANSP. No. 23-1141	Wake (19CVS3464-910)	Affirmed in Part, Reversed in Part, and Remanded

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