295 N.C. App.—No. 2 Pages 283-439

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 15, 2025

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

FILED 20 AUGUST 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

AIDING AND ABETTING

Action against attorney—aiding conduct involving champerty and maintenance—sufficiency of pleading—The trial court erred by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against an attorney for aiding and abetting another defendant's conduct involving champerty and maintenance with regard to plaintiff's property. The other defendant had contacted multiple parties about potential claims they had to plaintiff's property, promised to bring a suit on their behalf in exchange for 25% of any money recovered from the prosecution of those claims, and then hired defendant attorney. Plaintiff sufficiently stated a claim upon which relief could be granted by alleging that defendant attorney engaged in legal work in pursuit of the claims put forth by the other defendant, including by preparing a non-warranty deed, with no title examination, purporting to grant rights to plaintiff's property without plaintiff's involvement. **Hill v. Ewing, 345.**

Action against attorney—aiding slander of title—failure to allege special damages—The trial court properly dismissed, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against an attorney for aiding and abetting another defendant in his alleged slander of title because plaintiff failed to allege the essential element of slander of title that she suffered special damages as a result of false statements contained in a deed that was recorded by defendant attorney and that purported to transfer title to plaintiff's property. Generalized assertions that plaintiff suffered damages, including that she incurred expenses in hiring an attorney to defend title, were insufficient to demonstrate special damages. **Hill v. Ewing, 345.**

the amount of $10,000) as a condition of petitioner's reinstatement as being within the Board's statutory authority pursuant to N.C.G.S. § 90-157.4(d). Further, petitioner failed to carry her burden on appeal of demonstrating that the award of costs was in error or unreasonable. **Federowicz v. N.C. Bd. of Chiropractic Exam'rs, 331.**

Disciplinary proceeding—conditions after reinstatement of license—informed-consent requirement for pregnant patients—In a disciplinary matter in which the Board of Chiropractic Examiners suspended petitioner's Doctor of Chiropractic license for six months and required conditions of probation upon reinstatement for a further two years, including an informed-consent requirement before petitioner could treat a patient known to be pregnant, the trial court properly upheld the conditions as being within the Board's discretion. Further, the informed-consent requirement was directly related to the grounds for discipline, which included petitioner having committed unethical conduct by publicly claiming a specialization in maternal and pediatric care without having the necessary qualifications, and did not place an improper burden on petitioner or violate a patient's freedom of choice in selecting a provider of chiropractic care. **Federowicz v. N.C. Bd. of Chiropractic Exam'rs, 331.**

Disciplinary proceeding—treatment of pregnant patient—suspension of license—evidentiary support—The trial court properly affirmed the decision of the Board of Chiropractic Examiners to suspend petitioner's Doctor of Chiropractic license for six months and to place her on two years of probation with conditions upon reinstatement, where the Board's unchallenged findings of fact and record evidence supported its conclusions that petitioner was negligent and failed to render acceptable chiropractic care in her treatment of a pregnant patient, who was under the impression that petitioner was her primary care doctor and who was encouraged by petitioner to have a home birth and not to go to the hospital when she began experiencing problems in delivering the baby. Petitioner's argument that the Board exceeded its jurisdiction and regulatory authority by disciplining petitioner for failure to render medical prenatal care was without merit where the Board's decision to discipline petitioner was based on the scope of acceptable chiropractic care. **Federowicz v. N.C. Bd. of Chiropractic Exam'rs, 331.**

CONSTITUTIONAL LAW

Due process—out-of-court identification—not raised in trial court—Appellate Rule 2 not invoked—In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, the Court of Appeals declined to invoke Appellate Rule 2 to reach defendant's argument—raised for the first time on appeal—that her constitutional due process rights were violated by the admission of testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks were taken and to whom the forged checks had been made payable. Defendant could not show that the identification was so suggestive as to create a substantial likelihood of irreparable misidentification; thus, she failed to demonstrate the need for discretionary review to prevent a manifest injustice. **State v. Simpson, 425.**

Effective assistance of counsel—failure to move to suppress out-of-court identification—no error shown—In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care

worker from the residence of a client, defendant did not receive ineffective assistance as a result of her counsel's failure to move to suppress—as either a violation of the Eyewitness Identification Reform Act (EIRA) or her constitutional due process rights—testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks were taken and to whom the forged checks had been made payable. The identification did not fall under the EIRA and was not so suggestive as to create a substantial likelihood of irreparable misidentification; accordingly, a motion to suppress on either basis would have been denied as meritless. **State v. Simpson, 425.**

Effective assistance of counsel—failure to renew motion to dismiss—prejudice not shown—In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile could not demonstrate the prejudice necessary to show he received ineffective assistance when his counsel failed to renew a motion to dismiss petitions for second-degree forcible rape and sexual battery for insufficiency of evidence that juvenile used physical force beyond that inherent in the sexual contact. The evidence—including testimony from the victim that juvenile grabbed her and would not let her leave the room after she said no to his advances and told him to stop—taken in the light most favorable to the State, showed juvenile's use of force, however slight, to compel the victim's submission. Accordingly, even had juvenile's counsel renewed the motion to dismiss, it would have been properly dismissed. **In re D.R.J., 352.**

Effective assistance of counsel—failure to request limiting instructions and object to jury charge—prejudice not shown—The appellate court rejected defendant's arguments that he received ineffective assistance when his trial counsel failed to (1) request limiting instructions directing the jury to consider only the conduct alleged in the charging instrument (communicating slurs spelled out on milk jugs displayed toward his neighbor's home) and regarding Evidence Rule 404(b) testimony of other harassing behavior directed at the neighbor; and (2) object to the jury instruction on stalking listing fear of death and bodily injury—in addition to fear of continued harassment—as a type of emotional distress defendant knowingly caused his neighbor. Defendant could not demonstrate prejudice in light of his admitted placement in his driveway of milk jugs he had had marked with letters spelling out slurs and the absence of evidence that the victim experienced any emotional distress other than a fear of continued harassment; accordingly, there was no reasonable probability that, but for defense counsel's alleged errors, the jury's verdict would have been different. **State v. Plotz, 404.**

DISCOVERY

Sanctions—dismissal with prejudice—consideration of lesser sanctions—In plaintiff's suit against defendant for battery and assault, the trial court properly exercised its discretion when imposing sanctions on plaintiff for discovery violations, pursuant to Civil Procedure Rule 37(d), by dismissing plaintiff's claims with prejudice and ordering her to pay defendant's attorney fees. Although the trial court did not include explicit language in its order stating that it considered lesser sanctions before imposing more severe sanctions, such consideration could be inferred from the record, including statements by the court warning that plaintiff's pattern of noncompliance and willfulness could lead to dismissal and the court's initial attempt to induce compliance by giving plaintiff an additional thirty days to comply, to no avail. **Ajayi v. Seaman, 283.**

the victim after being assaulted by him. Because the evidence spoke to the reasonableness of defendant's fear, it was essential to his claim of self-defense, and therefore its exclusion was prejudicial to defendant. The court's error further prejudiced defendant where it lead to the exclusion of other evidence regarding defendant's state of mind, and the exclusion of that evidence likely misled and confused the jury. **State v. Hague, 380.**

Other crimes, wrongs, or acts—limiting instruction not requested—no error—In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor by means of epithets written on milk jugs, the trial court did not err in failing to give a limiting instruction regarding evidence of additional, uncharged harassing acts by defendant—including making a profane gesture and racist remarks, revving his truck and flashing its headlights at the neighbor's residence in the middle of the night, and banging on a shared wall of the duplex—admitted pursuant to Evidence Rule 404(b) where defendant did not request such an instruction, either when the evidence was admitted or during the charge conference. **State v. Plotz, 404.**

HOMICIDE

First-degree murder—jury instructions—self-defense—omission of stand-your-ground doctrine—private property—In a prosecution for first-degree murder arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm, the trial court did not err by omitting the stand-your-ground doctrine from its jury instructions on self-defense, where there was no evidence that defendant was lawfully on the cornfield, which was located on privately owned property. Even if the court's omission had been erroneous, it was not prejudicial where the court properly instructed the jury that the degree of force used in self-defense must be proportional to the surrounding circumstances—a rule that applies even in instances where defendants are entitled to stand their ground—and, therefore, the jury implicitly decided that defendant used excessive force when it found that defendant did not act in self-defense. **State v. Hague, 380.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—new trial—Defendant was entitled to a new trial on a first-degree murder charge—arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm—where the trial court erroneously denied his motion to dismiss the charge for insufficient evidence. Specifically, the evidence did not show that defendant acted with premeditation and deliberation where: defendant, a disabled seventy-two-year-old man, shot the victim, a forty-six-year-old man, after the victim had pushed him to the ground; the altercation was brief, the shooting was sudden, and defendant fired only one shot; and, as a war veteran, defendant had a habit of carrying a gun whenever he left his house. Additionally, defendant's conduct after the shooting did not show planning or forethought where: he drove home and immediately called law enforcement; left his gun on a picnic table outside of his house and directed police to it upon their arrival; and was forthcoming with law enforcement about the shooting. **State v. Hague, 380.**

IDENTIFICATION OF DEFENDANTS

Out-of-court identification—photograph—Eyewitness Identification Reform Act—not applicable—In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker

NEGLIGENCE—Continued

Wrongful death suit—summary judgment—proximate cause—foreseeability of injury—mobile chiller—unexpected pressurization—In a wrongful death case, where maintenance workers (defendants) at a university campus failed to put antifreeze into a mobile chiller when shutting it down for winter, after which the chiller became pressurized because residual water inside the chiller's pipes expanded and burst the pipes, and where a pipefitter (decedent)—who helped to move the chiller as part of a construction project—suffered fatal injuries upon removing a heavy metal cap securing the pipes, which flew off from the pressure and struck him, the trial court properly granted summary judgment to defendants because no genuine issue of material fact existed as to proximate cause. Specifically, the evidence showed that, even without antifreeze, "it should have been impossible" for the chiller to pressurize because it was "deenergized" (meaning not connected to electricity or water) for many weeks, and therefore decedent's injury was not a reasonably foreseeable consequence of defendants' conduct. Further, the chiller's manual and warning labels only warned of damage to the chiller itself if it became pressurized, not of danger to those working on it; thus, even if defendants had read the manual, they would not have known that failing to add antifreeze to the chiller could potentially cause bodily harm to somebody working on it. **Est. of Long v. Fowler, 307.**

STALKING

Jury instruction—conduct alleged in charging instrument—plain error not shown—In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor, the trial court did not plainly err by failing to instruct the jury that it could only convict defendant if it believed he harassed his neighbor specifically "by placing milk jugs outside [the neighbor's] home spelling" racial and homophobic slurs, as alleged in the statement of charges. While defense counsel acquiesced and failed to object to the pattern jury instruction for the offense as requested by the State, the course of conduct alleged in the charging instrument was not discussed in the charge conference, and thus defendant's appellate argument was not waived by invited error. However, although at least eight other examples of defendant's harassing conduct were before the jury, he could not show prejudice given the overwhelming evidence regarding his use of the milk jugs to harass his neighbor—including defendant's admission that he wrote letters on the jugs that would spell the epithets and placed them in his driveway (although he denied arranging them to be read by his neighbor). **State v. Plotz, 404.**

Jury instruction—fear of death and bodily injury—invited error—In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor, the trial court did not plainly err by instructing the jury on all three statutory forms of emotional distress that can support a stalking conviction—being placed in fear of death, bodily injury, or continued harassment—where the charging instrument only alleged that defendant knew his course of conduct would cause his neighbor to fear continued harassment. This portion of the pattern jury instruction was explicitly discussed in the charge conference, and defense counsel agreed to it; accordingly, any error was invited and could not be heard on appeal. Even if the argument had been before the appellate court, all of the evidence concerned the neighbor's fear of continued harassment, and therefore, defendant would not have been able to demonstrate prejudice. **State v. Plotz, 404.**

Motion to dismiss—insufficiency of evidence—course of conduct—properly denied—In a prosecution for misdemeanor stalking arising from defendant's placement of jugs bearing letters that were arranged to communicate slurs toward a duplex neighbor, the trial court properly denied defendant's motion to dismiss for insufficiency of evidence of his alleged course of conduct where, in the light most favorable to the State, the evidence of defendant's use of the jugs and the intent behind that use—including other harassing behavior by defendant such as calling the neighbor a racial slur, banging on their shared wall, revving his vehicle, and otherwise disturbing the neighbor at night—would permit the jury to determine that defendant engaged in harassing behavior that he knew or should have known would cause a reasonable person substantial emotional distress. **State v. Plotz, 404.**

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.

AMINAT O. AJAYI, PLAINTIFF
v.
THEODORE MICHAEL SEAMAN, DEFENDANT

No. COA23-1084

Filed 20 August 2024

1. Discovery—sanctions—dismissal with prejudice—consideration of lesser sanctions

In plaintiff's suit against defendant for battery and assault, the trial court properly exercised its discretion when imposing sanctions on plaintiff for discovery violations, pursuant to Civil Procedure Rule 37(d), by dismissing plaintiff's claims with prejudice and ordering her to pay defendant's attorney fees. Although the trial court did not include explicit language in its order stating that it considered lesser sanctions before imposing more severe sanctions, such consideration could be inferred from the record, including statements by the court warning that plaintiff's pattern of noncompliance and willfulness could lead to dismissal and the court's initial attempt to induce compliance by giving plaintiff an additional thirty days to comply, to no avail.

2. Attorney Fees—discovery violations—award proper—lack of comparable fee information—remand for re-determination of amount

In plaintiff's suit against defendant for battery and assault, the trial court did not err by, after determining that plaintiff repeatedly failed to comply with defendant's discovery and deposition requests and the court's order compelling discovery, ordering plaintiff to pay defendant's attorney fees associated with obtaining the discovery order. However, where the record evidence did not support the amount awarded, because it did not contain specific comparable rates from similarly skilled attorneys, the matter was remanded for a re-determination of the amount to be paid by plaintiff.

3. Judges—duty of impartiality—questioning of pro se litigant—no abuse of discretion

In plaintiff's suit against defendant for battery and assault, where the trial court served as the fact finder in a discovery hearing in which plaintiff appeared pro se on a motion to show cause regarding her noncompliance with a prior order to compel, the trial court did not abuse its discretion by interrupting plaintiff and questioning her about her level of understanding of the legal proceedings. The

court acted in pursuit of its duty to supervise and control the proceedings and, particularly in light of plaintiff's repeated failure to follow court rules and lack of focus in presenting her evidence and arguments, the court's actions were appropriate attempts to expediently resolve the ultimate question of why plaintiff had not complied with ordered discovery.

Appeal by Plaintiff from order entered 9 June 2023 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2024.

Arnold & Smith, PLLC, by Ashley A. Crowder, for the Plaintiff-Appellant.

McAngus, Goudelock & Courie, PLLC, by Meredith Cushing and Jeffrey B. Kuykendal, for the Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Aminat O. Ajayi appeals from the trial court's order granting Defendant Theodore Michael Seaman's motions for sanctions of dismissal with prejudice and award of attorney's fees due to Plaintiff's failure to comply with discovery requests. Plaintiff argues the court erred by failing to consider sanctions less severe than dismissal, by awarding attorney's fees, and by interrupting her presentation of evidence. We affirm the trial court's dismissal of Plaintiff's case and award of attorney's fees to Defendant, but remand for re-determination of the amount of attorney's fees awarded.

I. Factual and Procedural Background

Plaintiff filed this lawsuit against Defendant for alleged battery and assault on 21 June 2022. On 16 August 2022, Defendant served interrogatories and requests for production of documents ("Written Discovery") on Plaintiff with an incorrect case number. On 26 August 2022, Plaintiff's counsel moved to withdraw from further representation due to Plaintiff's lack of communication. The court found Plaintiff had not responded to counsel's communications for approximately three months and granted the motion. Plaintiff proceeded *pro se* throughout the remainder of the case.

In October 2022, Defendant's counsel attempted to schedule Plaintiff's deposition date in December 2022. Plaintiff responded that she was unavailable in December. This prompted Defendant's counsel to offer

potential dates in November. Plaintiff did not respond. On 10 November 2022, Defendant filed and served Notice of Video Deposition on Plaintiff to occur on 23 November 2022.

Plaintiff objected to Notice of Video Deposition, noting she was unavailable for the rest of the year and requested that the deposition be scheduled in 2023. Plaintiff did not appear at the 23 November deposition. Defendant provided four dates in January 2023 and Plaintiff responded that she was unavailable until 17 January 2023. Defendant then set the deposition for 18 January 2023.

On 7 November 2022, Defendant filed a Motion to Compel Plaintiff to provide responses to the Written Discovery, requesting sanctions in the forms of costs, including attorney's fees, for Plaintiff's failure to respond.

On 2 December 2022, Plaintiff filed a Motion to Dismiss Defendant's request for Written Discovery because the caption was incorrect. On 12 December 2022, the court heard Defendant's Motion to Compel responses to the Written Discovery. The court told Defendant to reissue the Written Discovery request with the correct case number and instructed Plaintiff to respond. That same day, Defendant re-issued the Written Discovery request with the correct case number. The Written Discovery requested information regarding the assault/battery incident, injuries that arose from it, Plaintiff's medical and provider history, medical expenses, and insurance information.

On 12 January 2023, Plaintiff served Defendant with incomplete responses to the Written Discovery requested. Plaintiff then failed to appear at the 18 January 2023 deposition date. On 20 January 2023, Defendant filed a Motion to Show Cause and to Compel Deposition. On 24 January 2023, Defendant's counsel provided Plaintiff a letter detailing deficiencies in her responses to the Written Discovery she had served on 12 January 2023. On 28 February 2023, Plaintiff responded to Defendant's letter with medical records, but no further responses or documents.

On 6 March 2023, the parties appeared before the trial court, who ordered that Plaintiff's deposition would be conducted on 27 March 2023. The trial court also ordered that Plaintiff should provide full responses to the Written Discovery request by 10 March 2023 and pay $97.00 in costs of Defendant's counsel fees for her failure to appear at the 18 January 2023 deposition. Plaintiff failed to produce the documents by 10 March 2023, as ordered.

On 23 March 2023, Defendant filed a Motion to Show Cause, Motion to Dismiss, and Motion for Additional Sanctions. That same day, Defendant's counsel emailed Plaintiff the Notice of Hearing for the

Motion to Show Cause scheduled for 12 April 2023. Plaintiff responded she would be unavailable. On 24 March 2023, Plaintiff filed a Motion to Reschedule Hearing on Order to Show Cause. This Motion was denied.

Plaintiff appeared at the 27 March 2023 deposition, but refused to answer questions about her current employer, how long she worked for her current employer, whether she reported to anyone at work when she missed work due to the alleged assault, and how many days she missed from work following the alleged assault. Plaintiff claimed these factual inquiries were immaterial to the case.

On 10 April 2023, Defendant submitted supporting documents for his Motion to Show Cause including the deposition transcript and an affidavit noting legal fees incurred due to the Plaintiff's alleged discovery violations.

On 12 April 2023, the trial court heard Defendant's Motion to Show Cause. Defendant's counsel asked the court to dismiss Plaintiff's complaint due to her discovery violations. The court noted the repeated violations and decided to take the Motion to Show Cause under advisement, explicitly warning Plaintiff that if there was not full compliance by a re-hearing date of 12 May 2023, the case would be dismissed, and Defendant's motion for attorney's fees would be granted.

On 12 May 2023, Defendant's Motion to Show Cause was reheard. The trial court entered a written order on 9 June 2023 granting Defendant's Motion to Show Cause, Motion to Dismiss, and Motion for Additional Sanctions (the "Dismissal Order"). In the Dismissal Order, the trial court found that Plaintiff's responses to the Written Discovery were incomplete. Additionally, the court found Plaintiff had refused to answer numerous questions in her ordered deposition and had willfully violated the court's Order to Compel twice. The court entered an award of sanctions in the amount of $6,081.00 for attorney's fees incurred by Defendant. Additionally, the court dismissed Plaintiff's complaint with prejudice. On 16 June 2023, Plaintiff appealed the Dismissal Order.

II. Analysis

Plaintiff raises three arguments on appeal. First, Plaintiff argues the trial court should not have granted Defendant's Motion to Dismiss with prejudice because the court did not consider lesser sanctions first. Second, Plaintiff argues the trial court erred in awarding Defendant's attorney's fees. Lastly, Plaintiff argues the trial court erred by interrupting and questioning Plaintiff during the 12 May 2023 rehearing.

This Court reviews a trial court's award of sanctions and attorney's fees, as well as a trial court's broad discretionary power to control

the trial and question witnesses, for an abuse of discretion. *See Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564 (1996); *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996); *see also State v. Rios*, 169 N.C. App. 270, 281, 610 S.E.2d 764, 772 (2005) (citing *State v. Mack*, 161 N.C. App. 595, 598, 602, 589 S.E.2d 168, 171, 173 (2003)). A trial court abuses its discretion when "its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603, 821 S.E.2d 711, 728 (2018) (citations omitted) (internal quotations omitted).

A. Awarding Sanctions

Trial courts have broad discretion over sanctions. *See Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995). Trial courts do not abuse their discretion by imposing severe sanctions if the sanction is enumerated "and there is no specific evidence of injustice." *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citations omitted) (internal quotations omitted).

When a party fails to comply with a properly noticed deposition or interrogatory, the trial court can make orders "in regard to the failure as are just," and require the failing party to pay reasonable expenses caused by the failure, including attorney's fees. N.C. R. Civ. P. 37(d). Dismissal of an action and awarding attorney's fees are listed sanctions for failures to comply with orders compelling discovery. N.C. R. Civ. P. 37(b)(2)(c).

1. Sanction of Dismissal

[1] Plaintiff asserts dismissing her case as a sanction for noncompliance with discovery requests was an abuse of discretion by the trial court because the court did not consider lesser sanctions prior to dismissing with prejudice. Sanctions that determine the outcome of a case, such as dismissals, are reviewed for an abuse of discretion. *American Imports, Inc. v. G.E. Emps. W. Region Fed. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978). But dismissals are also "examined in the light of the general purpose of the rules to encourage trial on the merits." *Id.* We thereby review Plaintiff's argument "utilizing an abuse of discretion standard while remaining sensitive to the general preference for dispositions on the merits that lies at the base of our rules of civil procedure." *See Batlle*, 198 N.C. App. at 419, 681 S.E.2d at 797.

Before dismissing an action with prejudice, a trial court must first consider less severe sanctions. *See Goss v. Battle*, 111 N.C. App. 173, 176–77, 432 S.E.2d 156, 158–59 (1993). When the record supports that the trial court considered less severe sanctions, the decision will not be

overturned unless it is "so arbitrary that it could not be the result of a reasoned decision." *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911 (citing *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 506 (1995)). Trial courts are not required to list and reject every possible lesser sanction. *Id.* at 735, 629 S.E.2d at 911.

A sanction of dismissal is warranted for noncompliance with a court order. *See Ray v. Greer*, 212 N.C. App. 358, 363, 713 S.E.2d 93, 96–97 (2011). "The power of the trial court to sanction parties for failure to comply with court orders is essential to the prompt and efficient administration of justice." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) (citing N.C. R. Civ. P. 41(b)). In *Daniels*, the plaintiff's case was dismissed due to the "plaintiff's previous refusal to comply with a lesser sanction." *Id.* at 681, 360 S.E.2d at 780. In *Baker v. Charlotte Motor Speedway, Inc.*, the plaintiff's case was dismissed with prejudice due to noncompliance with discovery, specifically the failure to produce medical records relating to injuries alleged in the claim. 180 N.C. App. 296, 298, 636 S.E.2d 829, 831 (2006). The plaintiff appealed and this Court upheld the decision, finding that the trial court's sanction of dismissal was supported by valid findings of fact and that the noncompliance " 'frustrated the purpose of discovery[,] . . . denied [the] defendants the opportunity to prepare properly for trial[,] . . . [and] unfairly prejudiced [the d]efendants in their defense of his claims,' and caused [the] defendants to incur additional costs." *Id.* at 300–01, 636 S.E.2d at 832.

The clearest way a trial court can show that it considered lesser sanctions is through explicit language in its order imposing sanctions. *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828–29 (2005). For example, the order in *In re Pedestrian Walkway Failure* stated:

> [T]he court has carefully considered each of [the plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct[.]

Id.

While such written language in orders is sufficient for a finding, it is not necessary to show that a trial court considered lesser sanctions before dismissing the case. *See Hursey*, 121 N.C. App. at 179, 464 S.E.2d

at 507. "[T]his Court will affirm an order for sanctions where 'it may be inferred from the record that the trial court considered all available sanctions.' " *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828 (citing *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507).

Here, Plaintiff argues the trial court abused its discretion and did not consider lesser sanctions because its Dismissal Order did not contain explicit language like the language present in *In re Pedestrian Walkway Failure*. While explicit language is not present in the Dismissal Order, the record in this case demonstrates the trial court considered lesser sanctions. The Dismissal Order's findings implicitly show the trial court considered—and initially employed—less severe methods. The Dismissal Order includes incidents of Plaintiff's noncompliance and their cumulative effect on the proceedings:

> 5. On January 13, 2023 Plaintiff served Defendant with drastically incomplete responses to Defendant's First Set of Interrogatories and Requests for Production of Documents wherein she objected to responding to a majority of the requests and failed to provide any medical records or bills in support of her allegations.
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> . . .
>
> 7. Plaintiff failed to contact the undersigned and failed to serve supplemental responses.
>
> 8. A hearing on Defendant's Motion to Compel was held on March 6, 2023 and the Honorable Judge Reginald McKnight ordered Plaintiff "shall fully and completely supplement..." the responses and "Plaintiff's supplemental written responses shall be delivered to defense counsel by 5:00pm on March 10, 2023." Judge McKnight also ordered Plaintiff to sit for her deposition, at which she refused to answer numerous questions.
>
> 9. Plaintiff failed to produce the complete supplemental discovery responses to Defense Counsel by March 10, 2023.
>
> 10. Thereafter, Plaintiff counsel served some incomplete responses to the Interrogatories and provided some medical records.
>
> . . .
>
> 13. As of the date of the instant hearing, Plaintiff still had not provided complete Responses pursuant to the Order

> to Compel and it was determined Plaintiff willfully violated the Court's Order.
>
> 14. At the hearing on April 12, 2023, Judge Eady-Williams provided Plaintiff with an additional thirty (30) days to provide complete responses and set a follow-up hearing for May 12, 2023.
>
> 15. On May 12, 2023, the follow-up hearing on Defendant's Motion to Show Cause was heard by the Honorable Judge Eady-Williams.
>
> 16. As of the date of the hearing, Plaintiff still had not complied with the [c]ourt's Order to Compel and it was determined Plaintiff willfully violated the [c]ourt's Orders.
>
> . . .
>
> 20. Pursuant to Rule 37(b)(2) of the North Carolina Rules of Civil Procedure, if a party fails to obey an order entered pursuant to Rule 37(a) of the North Carolina Rules of Civil Procedure, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to, dismissing the action, and/or requiring the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure to comply.

The Dismissal Order acknowledges the court had previously provided an additional thirty days for compliance and set a rehearing date. Instead of ruling at the outset on Defendant's Motion to Show Cause, the court provided Plaintiff an additional thirty days to comply. Finding of fact 20 also shows the trial court was, at a minimum, aware dismissal was but one of the sanctions that Rule 37(b)(2) allowed it to impose; the trial court nonetheless chose dismissal.

The remainder of the record further shows the trial court considered lesser sanctions. During the 12 April 2023 hearing on Defendant's Motion to Show Cause, the trial court noted Plaintiff's "pattern of noncompliance" and issued a warning that, if Plaintiff did not comply by the rehearing date within thirty days, the sanctions of fees and dismissal would be imposed. The judge stated:

> What [defense counsel] has requested is, in my estimation, an extreme yet valid request. *Extreme to the extent that it's rare that [c]ourts will dismiss cases, disposit*

> – *matters*, *just dispose it*, *get rid of it for discovery issues*. . . . But what [defense counsel] has also presented is what she deems a pattern of noncompliance, a pattern of behavior, and she's also provided cases where it's not unheard of for a [c]ourt to dismiss a case when there's, A, a pattern; or B, willful non-compliance."
>
> . . .
>
> I'm taking the motion for contempt under advisement for a period of 30 days. At the end of 30 days, I want this matter to come back on to see if there's been compliance – full compliance. If not, I'm dismissing the case, period. I'm granting the sanctions [defense counsel] requested and I'm granting the attorney's fees she's requested.
>
> . . .
>
> And so, [Plaintiff], I think I'm bending over backwards, and [defense counsel] knows that, and so I'm giving you 30 days, otherwise, I'm dismissing the case. I want to know in 30 days whether that information has been received, and if not, it will be dismissed with prejudice, which means you cannot refile the claim.

(Emphasis added).

The judge noted her understanding that while dismissing a case is rare, the evidence presented by Defendant supported her doing so. But instead of dismissing the case at the initial hearing on Defendant's Motion to Show Cause, the judge provided Plaintiff another chance to comply with the discovery requests. The judge declined to require that interim attorney's fees be paid in the thirty-day period, and instead wanted to wait to see if there had been compliance to grant attorney's fees.

Plaintiff also argues that, under Rule 26, she was entitled to respond to discovery by objections. However, Rule 37(d) provides "the failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c)." N.C. R. Civ. P. 37(d). The record does not reflect Plaintiff ever applied for a protective order. The court found in its Dismissal Order the record did not show Plaintiff was substantially justified in her failure to comply with discovery requests, and Plaintiff was without justification for the failure to comply with the Order to Compel. Thus, Plaintiff's argument that she was entitled to respond to discovery by objections is unfounded.

2. Sanction of Awarding Attorney's Fees

[2] Plaintiff asserts that the trial court (1) erred in awarding attorney's fees as a sanction and (2) that the trial court awarded an unreasonable amount of attorney's fees. We disagree that awarding attorney's fees was error, but we agree that the amount awarded is unsupported.

When there is no justification for a non-moving party's failure to comply with an order to compel discovery, the court is required to award attorney's fees to the moving party. *Kent v. Humphries*, 50 N.C. App. 580, 590, 275 S.E.2d 176, 183 (1981) (citing N.C. R. Civ. P. 37(a)(4)). An award of expenses should be a reimbursement to the successful movant and not a punishment to the non-complying party. *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988) (citing 4A J. Moore, J. Lucas & D. Epstein, *Moore's Federal Practice* Par. 37.02 [10-1] at 37–47 (2d ed. 1987)). To determine the reasonableness of attorney's fees, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) (citation omitted). An affidavit may attest fees incurred, but an affidavit that contains only a conclusory statement and does "not state a comparable rate by other attorneys in the area with similar skills for like work" is insufficient evidence to establish the awarded amount was reasonable. *Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 105, 855 S.E.2d 819, 828 (2021).

Here, Plaintiff repeatedly failed to comply with Defendant's discovery and deposition requests, and the trial court properly awarded attorney fees to Defendant for expenses incurred in obtaining the Order to Compel. *See Kent*, 50 N.C. App. at 590, 275 S.E.2d at 183. However, the record evidence is insufficient to support the amount of attorney's fees awarded to Defendant. The record is not completely void of findings the fees were reasonable; it contains defense counsel's affidavit, a bill for the video deposition, and a bill for the transcript report. These materials were part of the record, and proper for the trial court to rely upon them to determine the amount of attorney's fees to award. *See Benfield*, 89 N.C. App. at 422, 366 S.E.2d at 504.

Nonetheless, the record is insufficient to support the amount of attorney's fees awarded. Defense counsel's affidavit attests:

> 9. Accordingly, the total amount of attorneys' fees sought to be recovered in defense of this lawsuit is $4,675.00 and the total amount of paralegal fees to be recovered is $1,136.00.

> 10. I believe that these hourly rate amounts are reasonable based on my experience and training during the relevant time period handling this type of case, the location where the matter is pending and the work necessary based on Plaintiff's failure to prosecute her claim. It is my opinion that the total fee of $4,675.00 representing 27.5 hours of attorney time and 14.2 hours of paralegal time spent on the matter is reasonable.
>
> 11. The time and tasks taken in defense of the claim were reasonable and necessary for the defense of the action on behalf of Defendants.
>
> 12. The total sum of legal fees incurred in this matter is $5,811.00.

The affidavit includes the attorney's billable rate and the number of hours expended. However, the affidavit does not contain any specific comparable rates from other similarly skilled attorneys. The record lacks evidence from which the trial court could make a finding of fact regarding comparable fees. Without such comparisons, we may not uphold the amount awarded. *See Porters Neck*, 276 N.C. App. at 105, 855 S.E.2d at 828.

We affirm the trial court's award of attorney's fees for Defendant, but remand the Dismissal Order for the trial court to reconsider the amount of attorney's fees. The court should consider the reasonableness of defense counsel's fees as compared to similarly situated attorneys in the area.

B. Exercising and Controlling Trials

[3] Plaintiff argues that the trial court abused its discretion by questioning her during her evidentiary presentation and argument. Plaintiff further contends that the court abused its discretion by making comments and inferences on the record regarding her education and level of understanding of the legal process.

"The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. R. Evid. 611(a). A trial court's questions should be viewed "in the light of all the facts and attendant circumstances disclosed by the record." *Andrews v. Andrews*, 243 N.C. 779, 781, 92 S.E.2d 180, 181 (1956). Trial judges are

not prohibited from expressing their opinions and making comments in trials where they serve as the fact finder. *See Hancock v. Hancock*, 122 N.C. App. 518, 528, 471 S.E.2d 415, 421 (1996).

Trial judges have "the duty to supervise and control [proceedings], including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999) (citing *State v. Agnew*, 249 N.C. 382, 395, 241 S.E.2d 684, 692 (1978)). Trial judges also have a duty to question witnesses "to clarify testimony or to elicit overlooked pertinent facts." *Id.* (citation and quotation marks omitted); *see State v. Quick*, 329 N.C. 1, 25, 405 S.E.2d 179, 193 (1991) (holding court properly used its questioning authority to "to clarify ambiguous testimony and to enable the court to rule on the admissibility of certain evidence").

In *Angarita v. Edwards*, this Court held that a trial court did not abuse its discretion when questioning and interrupting a defendant. 278 N.C. App. 621, 628, 863 S.E.2d 796, 802 (2021). Considering the trial judge's interruptions, the Court found "it [was] apparent that the trial judge interrupted only in the interests of expediency and to bring a pro se [d]efendant into compliance with the rules of evidence." *Id.* Additionally, in the absence of evidence of the trial judge's personal bias, the Court found the judge's apparent bias against or attitude toward the defendant arose "from a disapproval of [the d]efendant's disorganized arguments and mode of presenting evidence." *Id.* at 629, 863 S.E.2d at 803. Further, the Court in *Angarita* held the trial court's interruption of defendant was, if anything, helpful to the defendant's ability to express their case. *Id.* at 629, 863 S.E.2d at 802.

Here, the trial court acted as fact finder and asked Plaintiff questions, made comments, and expressed inferences in pursuit of that duty. The purpose of the 12 May rehearing was to assess Plaintiff's compliance with the prior Order to Compel. Similar to the facts in *Angarita*, the record and hearing transcript in this case tend to show the trial court's efforts to expediently reach the important matters before the court, particularly in light of Plaintiff's repeat failure to adhere to court rules and unfocused presentation of evidence. The trial court steered Plaintiff toward the legal matter that needed discussion—why she had not complied with ordered discovery. The judge also interrupted Defendant's attorney to focus the proceeding.

Plaintiff contends the trial judge's conduct prevented her ability to properly present her case *pro se*. Plaintiff's choice to represent herself does not alter the court's duties and abilities during trial. *See Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 364 N.C. 76, 84, 692 S.E.2d 87, 92

(2010) (explaining that the rules apply equally to all parties, notwithstanding representation status); *Bledsoe v. Cnty. of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). Further, the court allowed Plaintiff ample opportunity to explain why she had failed to comply with the Order to Compel, which the court considered pivotal to its ultimate decision. The record here does not support Plaintiff's contention that the trial abused its discretion.

III. Conclusion

We hold the trial court did not abuse its discretion when presiding over the 12 May 2023 hearing. The trial court also did not err in sanctioning Plaintiff by dismissing her case and by awarding Defendant attorney's fees. However, we hold the trial court's determination of the amount awarded was based on insufficient evidence. We affirm the trial court's Dismissal Order, but remand to the trial court for a redetermination of the amount of attorney's fees to be awarded. The court is free to hear additional evidence as needed to reach its determination.

AFFIRMED AND REMANDED.

Judges TYSON and ZACHARY concur.

JOSEPH ASKEW; CHARLIE GORDON WADE III; AND CURTIS WASHINGTON, PLAINTIFFS
v.
CITY OF KINSTON, a Municipal Corporation, DEFENDANT

No. COA22-407-2

Filed 20 August 2024

Eminent Domain—condemnation—Corum claims—adequate state law remedy available—dismissal proper

In a case brought by property owners (plaintiffs) alleging that a municipality (defendant) violated plaintiffs' substantive due process and equal protection rights under the North Carolina Constitution by condemning three properties as dangerous and marking them for demolition, on remand from the North Carolina Supreme Court for de novo review of the trial court's dismissal of plaintiffs' claims on summary judgment, the Court of Appeals affirmed the trial court after holding that an adequate state law remedy existed for each of plaintiffs' *Corum* claims pursuant to Chapter 160A (since repealed) of the North Carolina General Statutes. Chapter 160A

provided remedies—such as rights of appeal and to petition for certiorari review—that meaningfully addressed plaintiffs' claims of violation of their constitutional rights due to defendant's allegedly arbitrary actions.

On remand by opinion of the Supreme Court of North Carolina in *Askew v. City of Kinston*, No. 55A23 (N.C. June 28, 2024), vacating and remanding a 29 December 2022 opinion of this Court vacating and remanding an order entered 29 September 2021 by Judge Joshua Willey in Lenoir County Superior Court. Originally heard in the Court of Appeals 30 November 2022.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for Plaintiffs-Appellants.

Hartzog Law Group LLP, by Dan M. Hartzog, Jr., and Katherine Barber-Jones, for Defendant-Appellee.

COLLINS, Judge.

Direct claims against the State arising under the North Carolina Constitution are permitted only "in the absence of an adequate state remedy," and where an adequate state remedy exists, those direct constitutional claims must be dismissed. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Here, Plaintiffs filed direct claims alleging that Defendant violated their State constitutional rights to substantive due process and equal protection by condemning and marking for demolition three properties in Kinston, North Carolina: 110 North Trianon Street and 607 East Gordon Street, owned by Joseph Askew,[1] and 610 North Independence Street, owned by Curtis Washington.

The trial court dismissed those claims on summary judgment.[2] This Court vacated the summary judgment order for lack of subject-matter jurisdiction. *See Askew v. City of Kinston*, 287 N.C. App. 222, 883 S.E.2d 85 (2022). The North Carolina Supreme Court vacated this Court's opinion, opining that "[t]he prospect of agency relief goes to an element

1. Askew's son was the record owner of these properties when they were first condemned. Ownership was transferred to Askew by deed recorded 24 January 2019.

2. Plaintiff Charlie Gordon Wade III voluntarily dismissed his complaint without prejudice prior to the order granting summary judgment to Defendant and did not participate in this appeal.

of a *Corum* cause of action" rather than the court's jurisdiction, and remanded the case for "a standard de novo review of the merits of the trial court's summary judgment order." *Askew*, No. 55A23, slip op. at 2, 30. On remand, we hold that an adequate state law remedy exists for each of Plaintiffs' distinct *Corum* claims, and we therefore affirm the trial court's summary judgment order dismissing the claims.

I. The Statutory Condemnation Process and Administrative Relief

At the time Plaintiffs initiated this action, Chapter 160A of the North Carolina General Statutes provided a comprehensive scheme governing the procedures by which a town may condemn buildings and outlining the administrative relief available to individuals whose properties have been condemned.[3]

Under N.C. Gen. Stat. § 160A-426, a building inspector has the authority to declare a building unsafe upon determining that the building is "especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes." N.C. Gen. Stat. § 160A-426(a). If the owner of a building that has been condemned as unsafe fails to take prompt corrective action, the inspector must notify the owner:

> (1) That the building or structure is in a condition that appears to meet one or more of the following conditions:
>
> a. Constitutes a fire or safety hazard.
>
> b. Is dangerous to life, health, or other property.
>
> c. Is likely to cause or contribute to blight, disease, vagrancy, or danger to children.
>
> d. Has a tendency to attract persons intent on criminal activities or other activities which would constitute a public nuisance.

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3. Citing the need for "a coherent organization of statutes that authorize local government planning and development regulation," the General Assembly repealed Article 19 of Chapter 160A of the General Statutes and added Chapter 160D in 2019. An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, §§ 2.1.(a), 2.3, 2019 N.C. Sess. Laws 424, 439 (effective 1 Jan 2021). Chapter 160D "collect[s] and organize[s] existing statutes," and is not intended to "eliminate, diminish, enlarge, [or] expand the authority of local governments . . . ." *Id.* § 2.1.(e)-(f). Article 19 of Chapter 160A remained in effect at all relevant times in this case. *Id.* at 547, § 3.2.

> (2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner shall be entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and
>
> (3) That following the hearing, the inspector may issue such order to repair, close, vacate, or demolish the building or structure as appears appropriate.

Id. § 160A-428.

> If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or demolishing the building or structure or taking other necessary steps [within a time period] as the inspector may prescribe.

Id. § 160A-429.

"Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order." *Id.* § 160A-430. "The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order." *Id.* "In the absence of an appeal, the order of the inspector shall be final." *Id.*

N.C. Gen. Stat. § 160A-393, provides for review in the nature of certiorari by the superior court of the quasi-judicial decisions of decision-making boards under Chapter 160A, Article 19, which includes the condemnation process and the city council's consideration of orders issued pursuant to N.C. Gen. Stat. § 160A-429. *See id.* § 160A-393(a)-(b).

On certiorari review, "the court shall ensure that the rights of petitioners have not been prejudiced" because the decision being appealed was, inter alia, "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." *Id.* § 160A-393(k)(1). The court decides "all issues raised by the petition by reviewing the record," which may be "supplemented with affidavits, testimony of

witnesses, or documentary or other evidence if, and to the extent that, the [statutorily prescribed] record is not adequate to allow an appropriate determination" of these issues. *Id.* § 160A-393(j).

If the court concludes that the decision was "based upon an error of law" then it may "remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3). The court may also "issue an injunctive order requiring any other party to th[e] proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal." *Id.* § 160A-393(m).

II. Factual Background

In 2017, Defendant's city inspectors generated a list of over 150 properties that were unoccupied and would be subject to condemnation under North Carolina law. Inspectors then narrowed the list to 50 properties to prioritize for the condemnation and demolition process based on the following criteria:

a. Dilapidated, blighted, and/or burned properties;

b. Residential (noncommercial) properties;

c. Vacant/unoccupied properties;

d. Properties in proximity to a public use, such as a school or a park;

e. Properties fronting on or in close proximity to a heavily travelled road;

f. Properties in proximity to other qualifying properties (ie, forming part of a "cluster" of dilapidated properties); and

g. Properties in an area of police concern.

In September 2017, the city council reviewed and approved the inspectors' criteria and finalized the list of properties to prioritize for condemnation, which included Askew's properties, 110 North Trianon Street and 607 East Gordon Street. Washington's property, 610 North Independence Street, was not included on the original list of 50 properties but was later prioritized for condemnation when inspectors noticed the building was near collapse. The condemnation process advanced for each property as detailed below.

A. 110 North Trianon Street

110 North Trianon Street was condemned as dangerous to life on 28 November 2017 because of liability to fire, bad condition of the walls, decay, and unsafe wiring. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

The building inspector re-inspected 110 North Trianon Street on 6 November 2018 and recommended "[m]oving forward with the condemnation process," noting that "[t]here has not been an observable improvement to the condition of the property." On 20 November 2018, Askew requested to be heard by the city council. The city council treated Askew's request as an appeal and, after hearing from Askew at the city council meeting on 7 January 2019, the city council decided to proceed with the condemnation process. Askew announced that he intended to appeal and that he would sue in federal court. There is no evidence in the record that Askew petitioned the superior court for certiorari.

B. 607 East Gordon Street

607 East Gordon Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, unsafe wiring, and house damage from fire on 28 November 2017. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions [in three phases] within 60 days from the date of this Order, for the first phase, 120 days for the second phase and 120 days for the third phase by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

The building inspector re-inspected 607 East Gordon Street on 16 July and 20 November 2018 and noted that "[p]lans have been provided for the repair," that "[p]ermits have been issued for the repair or demolition," and that "[t]here has been an observable improvement to the condition of the property." On both occasions, the building inspector recommended "[g]ranting the owner [additional time] to obtain the necessary permits and begin repair or demolition." On 5 April 2019, the building inspector re-inspected 607 East Gordon Street and concluded

that "Askew has failed to stabilize the structure or protect the building from water damage that continues to cause rot and decay [and] the dangerous conditions listed on the original condemnation order still exist."

C. 610 North Independence Street

610 North Independence Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, and roof collapsing on 15 November 2018. After a hearing on 21 June 2019, the building inspector issued an order to abate, directing Washington to "remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Washington of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Washington did not appeal this order.

The condemnation process is now complete with respect to all three properties.

III. Procedural History

Plaintiffs initially filed a complaint against Defendant in federal court in January 2019, alleging "violations of their [Fourteenth] amendment, substantial due process, equal protection rights, discrimination, disparity and condemnation of a historical home." *Askew v. City of Kinston*, No. 4:19-CV-13-D, 2019 WL 2126690, at *1 (E.D.N.C. May 15, 2019). Plaintiffs' federal complaint was dismissed in May 2019 for lack of subject-matter jurisdiction. *Id.* at *4.

Plaintiffs then commenced this action by filing a complaint in Lenoir County Superior Court in June 2019, alleging violations of their rights to equal protection and due process under the North Carolina Constitution and seeking a declaratory judgment, injunctive relief, and damages in excess of $25,000. Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the rules of civil procedure, which the trial court denied. Defendant then filed an answer to the complaint, generally denying the material allegations and asserting twelve affirmative defenses, including that "Plaintiffs' claims under the North Carolina Constitution are barred because an adequate state remedy is available" to compensate Plaintiffs for their alleged injuries. Defendant moved for summary judgment in July 2021, reiterating that "Plaintiffs have failed to establish any evidence that . . . [they] have no adequate alternative remedies." After a hearing, the trial court entered a written order on 29 September 2021 finding "that there is no genuine issue as to any material fact" and

granting Defendant judgment as a matter of law on all claims. Plaintiffs timely appealed to this Court.

By opinion filed 29 December 2022, this Court vacated the summary judgment order and remanded the case to the trial court with instructions to dismiss Plaintiffs' claims without prejudice for lack of subject-matter jurisdiction. *Askew*, 287 N.C. App. at 230, 883 S.E.2d at 91. Plaintiffs appealed to the North Carolina Supreme Court, which vacated this Court's opinion and remanded for this Court to "first ask whether the administrative process provides an adequate state law remedy for plaintiffs' discrete constitutional challenges," and, if not, to "examine whether a genuine factual dispute exists on the merits of the surviving *Corum* claims." *Askew*, No. 55A23, slip op. at 30.

IV. Discussion

Plaintiffs argue that the trial court erred by granting summary judgment to Defendants and dismissing their direct constitutional claims.

A. Standard of Review

We review a trial court's order granting summary judgment de novo. *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 203 (2017). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower [court]." *Blackmon v. Tri-Arc Food Sys., Inc.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 743 (2016) (citations omitted).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). The party moving for summary judgment "bears the burden of showing that no triable issue of fact exists." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008) (citation omitted). "This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the [non-moving party's] claim." *Id.* (citation omitted). "Once the moving party has met its burden, the non-moving party must forecast evidence demonstrating the existence of a prima facie case." *Id.* (italics and citation omitted).

B. *Corum* Claims

The North Carolina Constitution guarantees that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18. To protect this guarantee, North Carolina courts recognize that, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. However, courts must "bow to established claims and remedies" where those vehicles are adequate. *Id.* at 784, 413 S.E.2d at 291. Thus, an essential element of a *Corum* claim is that "there must be no adequate state remedy." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 413, 858 S.E.2d 788, 794 (2021) (quotation marks and citation omitted).

An adequate remedy need not necessarily provide the relief that a plaintiff seeks. *Washington v. Cline*, 385 N.C. 824, 829, 898 S.E.2d 667, 671 (2024) (citation omitted). Rather, "an adequate remedy is one that meaningfully addresses the constitutional violation[.]" *Id.* (citation omitted). "[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009). Additionally, "an adequate remedy must provide the possibility of relief under the circumstances." *Id.* at 340, 678 S.E.2d at 355.

C. Plaintiffs' Claims

Plaintiffs argue that Defendant's condemnation practices violated their State constitutional rights to substantive due process and equal protection. Each of these rights is granted by Article I, Section 19 of the North Carolina Constitution, which states:

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

N.C. Const., art. I, § 19. "Despite their shared constitutional origins, plaintiffs' *Corum* claims assert different rights, raise different injuries, and envision different modes of relief." *Askew*, No. 55A23, slip op. at 14. Accordingly, we address each claim independently.

1. Substantive due process

Plaintiffs assert that Defendant's actions in condemning and scheduling for demolition their properties were arbitrary and therefore violated their right to substantive due process.

"Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary[,] or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975) (citations omitted).

In their complaint, Plaintiffs allege:

> 94. The City of Kinston has acted arbitrarily with regards to, but not limited to: the decision to condemn each plaintiff's property, the decision to place on the list for demolition each plaintiff's property, the decision to order the demolition of each plaintiff's property, the decision to not remove plaintiff's property from the list for demolition, the decision to not rescind the order of demolition, and the decision to schedule plaintiff's property for imminent demolition.
>
> . . . .
>
> 97. Each plaintiff has been injured by the City of Kinston's action of condemning their property, and/or placing their property on the list for demolition, and/or ordering the demolition of their property, and/or placing their property on a schedule for imminent demolition, because of their race and/or because their property is located in a predominately African American community.

The administrative process articulated by Chapter 160A provides Plaintiffs "the opportunity to enter the courthouse doors and present [their] claim[s]" and "the possibility of relief under the circumstances." *Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. A party may appeal a condemnation decision to the city council. N.C. Gen. Stat. § 160A-430. If that appeal is unsuccessful, the party may challenge the council's decision by petitioning the superior court for writ of certiorari. *Id.* § 160A-393(f). On certiorari review, the superior court examines whether the challenged order is "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." *Id.* § 160A-393(k)(1). If the court concludes that the city council's decision was "based upon an error of law," it may "remand the case with an order that directs the decision-making board to take whatever action should have been taken

had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3). The court may also "issue an injunctive order requiring any other party to th[e] proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal." *Id.* § 160A-393(m).

Here, neither plaintiff appealed the orders to abate issued for 607 East Gordon Street or 610 North Independence Street to the city council. Askew appealed the order to abate issued for 110 North Trianon Street to the city council. That appeal was unsuccessful, and there is no record evidence that he petitioned the superior court for writ of certiorari. Had Plaintiffs petitioned the superior court for writ of certiorari and presented sufficient evidence to demonstrate that Defendant's actions were arbitrary, the superior court could have enjoined Defendant from demolishing Plaintiffs' properties and remanded the case to the city council with instructions to remove Plaintiffs' properties from the list for demolition. *See id.* § 160A-393(l)(3), (m). Thus, the administrative process provides Plaintiffs the possibility of relief under their circumstances and is therefore adequate. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

Because the administrative process provides an adequate remedy for Plaintiffs' substantive due process claim, Plaintiffs cannot establish an essential element of their corresponding *Corum* claim. *See Deminski*, 377 N.C. at 413, 858 S.E.2d at 794. Accordingly, the trial court properly granted summary judgment to Defendant on Plaintiffs' substantive due process claim.

2. Equal protection

Plaintiffs assert that Defendant selected their properties for demolition based on race and therefore violated their right to equal protection of the laws.

The Equal Protection Clause "guarantees equal treatment of those who are similarly situated." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 447, 358 S.E.2d 372, 377 (1987) (quotation marks and citation omitted). "When the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment." *Askew*, No. 55A23, slip op. at 15-16 (quotation marks, emphasis, and citations omitted).

The administrative process articulated by Chapter 160A provides Plaintiffs "the opportunity to enter the courthouse doors and present [their] claim[s]" and "the possibility of relief under the circumstances." *Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. A party may appeal a condemnation decision to the city council. N.C. Gen. Stat. § 160A-430. If that

appeal is unsuccessful, the party may challenge the council's decision by petitioning the superior court for writ of certiorari. *Id.* § 160A-393(f). On certiorari review, the superior court examines whether the challenged order is "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." *Id.* § 160A-393(k)(1). If the court concludes that the city council's decision was "based upon an error of law," it may "remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3).

Here, neither plaintiff appealed the orders to abate issued for 607 East Gordon Street or 610 North Independence Street to the city council. Askew appealed the order to abate issued for 110 North Trianon Street to the city council. That appeal was unsuccessful, and there is no record evidence that he petitioned the superior court for writ of certiorari. Had Plaintiffs petitioned the superior court for writ of certiorari and presented sufficient evidence to demonstrate that Defendant's decisions were impermissibly discriminatory, the superior court could have remanded the case with an order to direct the council to implement a nondiscriminatory process for selecting properties for condemnation. *See id*. Thus, the administrative process provides Plaintiffs the possibility of relief under their circumstances and is therefore adequate. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

Because the administrative process provides an adequate remedy for Plaintiffs' equal protection claim, Plaintiffs cannot establish an essential element of their corresponding *Corum* claim. *See Deminski*, 377 N.C. at 413, 858 S.E.2d at 794. Accordingly, the trial court properly granted Defendant summary judgment on Plaintiffs' equal protection claim.

V. Conclusion

Because an adequate state law remedy exists for each of Plaintiffs' distinct *Corum* claims, the trial court properly granted summary judgment to Defendant.

AFFIRMED.

Judges ARROWOOD and STADING concur.

EST. OF LONG v. FOWLER

[295 N.C. App. 307 (2024)]

ESTATE OF MELVIN JOSEPH LONG, BY AND THROUGH MARLA HUDSON LONG, ADMINISTRATRIX, PLAINTIFF
v.
JAMES D. FOWLER, INDIVIDUALLY, DAVID A. MATTHEWS, INDIVIDUALLY, AND DENNIS F. KINSLER, INDIVIDUALLY, DEFENDANTS

No. COA23-629

Filed 20 August 2024

1. Negligence—wrongful death suit—summary judgment—proximate cause—foreseeability of injury—mobile chiller—unexpected pressurization

In a wrongful death case, where maintenance workers (defendants) at a university campus failed to put antifreeze into a mobile chiller when shutting it down for winter, after which the chiller became pressurized because residual water inside the chiller's pipes expanded and burst the pipes, and where a pipefitter (decedent)—who helped to move the chiller as part of a construction project—suffered fatal injuries upon removing a heavy metal cap securing the pipes, which flew off from the pressure and struck him, the trial court properly granted summary judgment to defendants because no genuine issue of material fact existed as to proximate cause. Specifically, the evidence showed that, even without antifreeze, "it should have been impossible" for the chiller to pressurize because it was "deenergized" (meaning not connected to electricity or water) for many weeks, and therefore decedent's injury was not a reasonably foreseeable consequence of defendants' conduct. Further, the chiller's manual and warning labels only warned of damage to the chiller itself if it became pressurized, not of danger to those working on it; thus, even if defendants had read the manual, they would not have known that failing to add antifreeze to the chiller could potentially cause bodily harm to somebody working on it.

2. Negligence—contributory—wrongful death suit—summary judgment—failure to take precautions despite extensive safety training

In a wrongful death case, where maintenance workers (defendants) at a university campus failed to put antifreeze into a mobile chiller when shutting it down for winter, after which the chiller became pressurized because residual water inside the chiller's pipes expanded and burst the pipes, and where a pipefitter (decedent)—who helped to move the chiller as part of a construction project—suffered fatal injuries upon removing a heavy metal cap securing

the pipes, which flew off from the pressure and struck him, the trial court properly granted summary judgment to defendants because no genuine issue of material fact existed as to decedent's contributory negligence. Although decedent did check the chiller's pressure gauges before removing the metal cap, he failed to check the bleed valve, which would have alerted him to the chiller's pressurization. This failure came in spite of decedent's extensive safety training, in which his employer instructed him to check for pressurization via valve even when the pressure gauges read zero and not to rely on others' work when verifying the safety of pressurized systems.

Judge HAMPSON dissenting.

Appeal by Plaintiff from order entered 25 January 2023 by Judge John M. Dunlow in Person County Superior Court. Heard in the Court of Appeals 29 November 2023.

Sanford Thompson, PLLC, by Sanford W. Thompson IV, and Hardison & Cochran, PLLC, by Timothy M. Lyons and John Paul Godwin, for Plaintiff-Appellant.

Parker Poe Adams & Bernstein, LLP, by Jonathan E. Hall and Patrick M. Meacham, for Defendants-Appellees.

GRIFFIN, Judge.

Plaintiff appeals from an order granting Defendants' Motion for Summary Judgment. Plaintiff contends the trial court erred by entering summary judgment because there are genuine issues of material fact as to whether the accident underlying the cause of action was foreseeable and as to whether the decedent was contributorily negligent. We affirm the trial court's order granting summary judgment.

I. Factual and Procedural Background

Defendants are North Carolina State University employees who are responsible for performing a variety of maintenance tasks on N.C. State's campus. Plaintiff is the Administratrix of her deceased husband's estate. Prior to his death, Decedent was an OSHA-certified pipefitter employed by Quate Industrial Services, an industrial equipment contractor that worked on piping, boilers, chillers, and pressure vessels.

Decedent worked at QSI intermittently for twenty years. Decedent was QSI's site supervisor for the project and was responsible for

day-to-day safety on site. Decedent's safety training while employed by QSI included a thirty-hour OSHA class as well as extensive third-party training provided through his employer. This training included instructions to double-check pressures valves, to not stand in front of caps while removing them, and to independently verify mechanisms and safeguards prior to beginning work on equipment that others have performed work on.

Defendant Dennis Kinsler was an "HVAC Advanced Technician" and employed by NCSU from 2012 to 2017. Kinsler worked on the water side of HVAC machines for NCSU in December 2016 and January 2017. Defendant James Fowler took HVAC courses at a community college in 1990 and 2000 and worked with several companies doing HVAC service and repair after 1990. Fowler began work as an "HVAC Mechanic" at NCSU in 2014. Defendant David Matthews was a "Field Maintenance Technician" who worked on HVAC equipment and supporting HVAC technicians.

In 2016, NCSU began a construction project at the Monteith Research Center on its Centennial Campus. NCSU contracted with Thalle Construction Company to provide related services. Thalle, in turn, subcontracted with QSI, Decedent's employer. As part of the project, QSI was responsible for moving a large mobile chiller attached to a tractor-trailer located outside of the MRC a few feet. The chiller has two cooling circuits, each of which has a chiller barrel containing water cooler tubes and high-pressure refrigerant. Water passes through the chiller barrels inside copper tubes, and the water is cooled by refrigerant outside the tubes. Several warning labels related to the use and maintenance of the chiller are attached to its exterior. One of the labels represented it was not possible to completely drain all the water from the chiller and directed that workers put five gallons of antifreeze into the chiller when shutting it down for winter. NCSU kept the manual to the chiller in one of its workshops on Centennial Campus.

On 19 December 2016, an NCSU supervisor, pursuant to a service request placed by QSI, issued a work order instructing employees to "PLEASE DRAIN AND SECURE CARRIER CHILLER FOR RELOCATION." Defendants Fowler and Matthews were assigned to drain the water from the chiller. Defendant Kinsler instructed them to undertake several specific steps, including performing a "nitrogen purge" to blow nitrogen through the water piping. Defendant Kinsler admittedly did not read the chiller's manual prior to entering the assignment. On 21 December 2016, Defendants Fowler and Matthews drained the chiller until the flow of water became a trickle. They then performed the nitrogen purge.

On 3 January 2017, Defendants Fowler and Matthew secured the chiller by attaching metal caps and flanges over the inlet and outlet pipes. Between 3 January 2017 and 20 January 2017, temperatures in Raleigh fell below freezing causing water in the chiller's pipes to freeze and expand. The expanding water burst the pipes, allowing high-pressure refrigerant to escape into the water system causing the chiller to become pressurized.

On 20 January 2017, Decedent and another QSI employee, Nate Weston, were assigned to remove the caps and flanges from the chiller. Prior to beginning their work, Decedent and Weston checked the chiller's pressure gauges located at various points on the exterior of the chiller, all of which read zero. However, they did not check the bleed valve on top of the chiller. The chiller was not connected to water or electricity at this point and, because the pressure gauges also read zero, they assumed the system was not pressurized. Decedent and Weston began removing one of the thirteen-pound caps from the chiller's suction line by loosening a nut on the side of the flange. There was no indication, such as the smell or sound of gas escaping from the cap, that the chiller was pressurized. Decedent proceeded to use a socket wrench on the flange when the cap flew off and struck him in the face and head. Emergency Medical Technicians transported Decedent to WakeMed where he was treated for his injuries. While at WakeMed, Decedent's blood tested positive for marijuana. Five days later, Decedent passed away from his injuries.

On 13 November 2018, Plaintiff filed a wrongful death lawsuit in Person County Superior Court. On 3 May 2019, the trial court entered an order granting Defendants' Motion to Dismiss because sovereign immunity barred claims against public employees sued in their individual capacities. Plaintiff appealed to this Court from that order. On appeal, we reversed the trial court's order holding Plaintiff's complaint sufficiently alleged claims for negligence and punitive damages and that sovereign immunity did not bar Plaintiff's claim. *Long v. Fowler*, 270 N.C. App. 241, 245–53, 841 S.E.2d 290, 293–300 (2020). Defendants then appealed to the North Carolina Supreme Court, which affirmed this Court's decision and remanded the case to Person County Superior Court. *Long v. Fowler*, 378 N.C. 138, 142–55, 861 S.E.2d 686, 691–98 (2021).

On remand, the parties conducted discovery over the course of sixteen months. During discovery, depositions were taken of each Defendant, Rusty Quate, Nate Weston, and experts from both sides, and documentation related to warning labels on the chiller and provisions of the chiller manual were produced.

On 26 December 2022, Defendants filed a Motion for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure. On 5 January 2023, the Motion came on for hearing. On 25 January 2023, the trial court entered an order granting Defendants' Motion for Summary Judgment. Plaintiff timely appealed.

II. Analysis

Plaintiff argues the trial court erred in granting Defendant's Motion for Summary Judgment because there are genuine issues of material fact as to whether Defendants proximately caused Decedent's death and as to whether Decedent was contributorily negligent.

An order granting summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 401, 858 S.E.2d 581, 588 (2021) (citation and internal marks omitted); *see also* N.C. R. Civ. P. 56(c).

> While summary judgment is rarely appropriate in cases involving negligence and contributory negligence, summary judgment is appropriate in such cases when the moving party carries his initial burden of showing the nonexistence of an element essential to the other party's case and the non-moving party then fails to produce or forecast at hearing any ability to produce at trial evidence of such essential element of his claims.

Terry v. Pub. Serv. Co. of N.C., 385 N.C. 797, 801, 898 S.E.2d 648, 651 (2024) (citations and internal marks omitted). To this point, summary judgment should be granted in cases where "only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Estate of Graham v. Lambert*, 385 N.C. 644, 650–51, 898 S.E.2d 888, 895 (2024) (citation and internal marks omitted). Moreover, where a party "presents an argument or defense supported by facts which would entitle him to judgment as a matter of law, the party opposing the motion must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief." *Cone v. Cone*, 50 N.C. App. 343, 347, 274 S.E.2d 341, 343–44 (1981) (citation and internal marks omitted).

We review an order granting summary judgment de novo. *Bryan v. Kittinger*, 282 N.C. App. 435, 437, 871 S.E.2d 560, 562 (2022) (citation

omitted). Under de novo review, we "consider[] the matter anew and freely substitutes [our] own judgment for that of the lower court[]." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422, 894 S.E.2d 709, 712 (2023) (citation and internal marks omitted).

A. Proximate Cause

[1] Plaintiff argues the trial court erred by granting Defendants' Motion for Summary Judgment because there exists genuine issues of material fact about whether the accident resulting in Decedent's death was proximately caused by Defendants' conduct. Specifically, Plaintiff contends that because the chiller's manual specifically warned of system pressures that could result from failing to use antifreeze, and the accident resulted from system pressure, Defendants were negligent by failing to read the manual and by failing to use antifreeze when shutting the chiller down. Because the manual only warns of potential damage to the chiller itself, and not of injury to persons resulting from system pressures, we disagree that the injury caused was reasonably foreseeable.

To prevail on a claim of negligence, a "plaintiff must show that: (1) the defendant [or defendants] failed to exercise due care in the performance of some legal duty owed to the plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health and Hum. Servs.*, 383 N.C. 31, 61, 881 S.E.2d 558, 580 (2022) (quoting *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)) (cleaned up). Proximate cause is defined as

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from *which a person of ordinary prudence could have reasonably foreseen* that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (citing *Hairston v. Alexander Tank and Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)) (emphasis added).

"Foreseeability of injury is an essential question of proximate cause." *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972) (citation omitted). Thus, to establish proximate cause, "a plaintiff is required to prove that in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or

omission, or that consequences of a generally injurious nature might have been expected." *Williamson*, 141 N.C. App. at 10, 539 S.E.2d at 319 (citation and internal marks omitted). However, the law of negligence "requires only reasonable prevision. A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (citing *Bennett v. Southern Ry. Co.*, 245 N.C. 261, 270–71, 96 S.E.2d 31, 38 (1957)). To this end, "[t]he law does not charge a person with all the possible consequences of his negligence," but rather recognizes that "[a] man's responsibility for his negligence must end somewhere." *Phelps v. City of Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967). Specifically, a party's responsibility for their negligent acts ends where "the connection between negligence and the injury appears unnatural, unreasonable and improbable[.]" *Id.*

Here, the record contains uncontested facts showing that it was not reasonably foreseeable that Defendants failing to put antifreeze in the chiller would result in catastrophic injury to Decedent. Rather, the resulting injury came about from an improbable chain of events that industry veterans had never seen before.

At the outset, it is noteworthy that the chiller was not energized, meaning it was not connected to electricity or water, and, therefore, according to the accident report prepared the day of, "it should have been impossible for it to contain pressure[.]" However, the chiller became pressurized by a chemical reaction occurring while the chiller was deenergized. Nonetheless, Decedent's employer and coworkers, as well as Plaintiff's expert, testified an accident of this nature was completely unexpected.

At his deposition, Marshall Quate, Decedent's employer and twenty-four-year veteran of the HVAC industry, represented that QSI had never worked "on a jobsite where [] a chiller unit was drained and antifreeze was added to it." In fact, despite having knowledge of the freezing temperatures and caps on the chiller, Marshall Quate did not consider pressurization to be a possibility and had never heard of an accident like this happening before. He testified that he could "not understand how [the accident] could happen."

QSI's other employee present that day, Nathan Weston, drafted an accident report characterizing the accident as resulting from "unexpected pressure." This characterization was based upon twenty-eight years of experience in pipefitting where he had never "heard of a disconnected, deenergized cooler actually being pressurized after sitting three

to four weeks without a connection[.]" To that point, Nathan Weston had "no clue" what caused the chiller to become pressurized and testified,

> Q: . . . In all your experience, all your years working around chillers, have you ever heard of a situation where there was water left in a chiller unit, and it caused freezing of the pipes or freezing of the refrigerant tubes to the point that they cracked or leaked?
>
> A: I have not heard of it. No. But this is probably the only time I've ever heard of one even blowing up like this. I've never heard of it anywhere.

Another QSI pipefitter and Mr. Weston's brother, Danny Weston, had never heard of antifreeze leaking into a pipe.

Plaintiff cites the deposition testimony of Defendants Fowler and Matthews to show they understood the sequence of events leading to the accident, and this understanding therefore makes the accident foreseeable. However, Defendant Fowler initially explains his understanding of the sequence in terms of causing damage to the chiller, not in terms of causing a fatal injury. Specifically, Defendant Fowler represented that the purpose of adding antifreeze to the chiller was "to protect the machine," and intended "to prevent the tubes from freezing and being damaged," not to prevent an accident of the type which occurred. Defendant Matthews, on the other hand, stated he did not know whether the series of events led to the cap hitting Decedent in the head. Instead, he agreed only with bare assertions of fact reflecting the sequence of events; not whether the outcome was foreseeable. Moreover, Defendant Matthews stated he had "very limited knowledge" about how the chiller worked.

Defendant Fowler's testimony exemplifies and contradicts a point Plaintiff contends warrants the reversal of summary judgment. Specifically, Plaintiff contends Defendants' failure to read the chiller's manual and warning labels could constitute actionable negligence and therefore warrants submission of the case to a jury. This is incorrect. Even assuming Defendants read the manual prior to commencing their work, the manual and labels only warned of damage to the chiller if it became pressurized, not of danger to those working on it. Thus, even if Defendants read the manual, they would not have noticed that failing to add antifreeze to the chiller during winter shutdown could result in a condition hazardous to the safety of those working on it.

This is not to say the manual does not warn of *other* hazards created by the chiller. Rather, the chiller's manual frequently cites electrical

shock as a potential cause of injury. Of relevance here, there is a black box titled "CAUTION" that states: "Electrical shock can cause personal injury. Disconnect all electrical power before servicing." In contrast, the section immediately following the warning, entitled "Winter Shutdown Preparation," does not contain any sort of indication that failure to use refrigerant may cause personal injury. Rather, the section warns about possible injury occurring while *draining* the chiller. The manual also warns about various points in the maintenance process where there is a risk of injury but does not specify failure to use refrigerant as one of these instances.

Alongside the manual, the labels attached directly to the chiller did not warn of the potential for injury to persons. One such label stated "**FREEZE WARNING!** It is not possible to drain all water from this heat exchanger! For freeze protection during shutdown, exchanger must be drained and refilled with 5 gals Glycol min. **TRAPPED WATER!**" Neither the manual nor the attached labels provide notice to technicians working on the chiller that failure to use refrigerant could potentially cause bodily harm to technicians servicing the chiller; much less those moving it.

Plaintiff's expert deposition summarizes the foreseeability of this accident:

> Q: And nowhere in the manual does it state that a failure to properly winterize the machine or add antifreeze, properly drain it, fully drain it, nowhere does it say that may present a hazard to humans, true?
>
> A: It does not specify hazard to humans in that verbiage.
>
> Q: It never talks about it being a safety concern, does it?
>
> A: It discusses it as a damage to the unit, correct.
>
> Q: And, again, so it does not discuss it as being a safety concern - -
>
> A: Not as a safety concern.

Ultimately, the undisputed facts show the accident resulting in Decedent's death was, as the depositions, expert testimony, and after-accident report reflects, the result of *unexpected* pressure and therefore not foreseeable. Being so, the law cannot hold Defendants responsible where "the connection between negligence and the injury appears unnatural, unreasonable and improbable[.]" *Phelps*, 272 N.C. at 30, 157 S.E.2d at 723. Resultingly, the trial court properly granted

summary judgment for Defendants because the uncontested facts show the accident was an unforeseeable result of Defendants' failure to use antifreeze, and thus Defendants' conduct could not be the proximate cause of Decedent's death.

B. Contributory Negligence

[2] Even assuming arguendo that there is a genuine issue of material fact as to whether Decedent's injury was reasonably foreseeable, Decedent's contributory negligence is sufficient to warrant summary judgment and bar recovery.

Under North Carolina law, every person has a duty "to take reasonable care to not harm others and a corresponding duty . . . to take reasonable care to not harm oneself." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 480, 843 S.E.2d 72, 74 (2020). In recognition of the latter duty, "a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury." *Id.* at 483, 843 S.E.2d at 76 (citation and internal marks omitted). "To establish contributory negligence, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 424, 677 S.E.2d 485, 499 (2009) (citations and internal marks omitted). Whether a plaintiff was contributorily negligent "does not depend on [the] plaintiff's subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective standard of behavior*, such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citation and internal marks omitted) (emphasis added). When a plaintiff "possesses the capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and is injured as a result, [they] are charged with contributory negligence." *Moseley v. Hendricks*, 292 N.C. App. 258, 264, 897 S.E.2d 680, 684 (2024) (citing *Proffitt v. Gosnell*, 257 N.C. App. 148, 152–53, 809 S.E.2d 200, 204 (2017)).

Here, Decedent, as a matter of law, failed to conform his conduct to that of a reasonably prudent person in the same circumstances. QSI required Decedent to attend extensive safety training that, if heeded, would have ensured his safety. One fact of initial importance is that Decedent and his coworker discussed the possibility that the chiller could be pressurized, thus showing Decedent "possesse[d] the capacity to understand . . . a known danger." *Hendricks*, 292 N.C. App. at 264, 897 S.E.2d at 684. Unlike Defendants, Decedent should have reasonably

foreseen the danger presented by the chiller's potential pressurization because of his extensive safety training and his employer's safety procedures which reinforced his training.

For example, Decedent's training included instruction to stand to the side of a cap when removing it from a pipe for the purpose of mitigating any unexpected risk presented by the cap. Rusty Quate stated that Decedent had received training to this effect on multiple occasions. Defendants' expert opined that a pre-task safety plan, which was within the scope of Decedent's responsibilities, would have included this measure as well. Thus, Decedent not only possessed the capacity to understand the possibility of an unforeseeable danger, but also the training on how to avoid potential unforeseen circumstances that could present danger.

In anticipation of unexpected hazards, OSHA and QSI safety training disavowed relying on others' work when verifying the safety of pressurized systems. However, Decedent and his coworker, on the day of the accident, "assumed [the chiller was] completely deenergized," as it was "locked out, [and] tagged out." So, they "figured [they were] good to go." This assumption was incorrect. Rather than incorrectly assuming the system was depressurized, Decedent could have checked the bleed off valve located next to one of the pressure gauges on top of the chiller. Doing so, according to Plaintiff's expert, would not only have alerted Decedent to the chiller's pressurization but also allowed the pressure to be relieved, thereby preventing the cap from flying off and injuring Decedent. QSI trained Decedent to check for pressurization via valve even when a system's pressure gauges read zero. In failing to do so, Decedent's actions contradicted his training which he was given for the purpose of preventing unexpected accidents.

As Plaintiff's expert summarized the unexpected nature of Decedent's injury, QSI's owner summarized Decedent's contributory negligence:

> Q: Okay. So by its very definition, even if you think a system is depressurized, you train people, "Don't trust it. Keep your head out of the way. Don't stand in front of a cap when you're taking it off." Is that true?
>
> A: That's true.
>
> Q And even if you think a system is depressurized, if you have something like a bleed valve that you can check to be sure, you should use it, true?
>
> A: True.

Decedent failed to take these measures to ensure his own safety, despite his training to do so, showing his contributory negligence. Plaintiff failed to forecast evidence to the contrary. Defendants have carried their burden of showing, based on the uncontested facts, Decedent's contributory negligence. As "a plaintiff cannot recover for injuries resulting from a defendant's negligence if the [decedent]'s own negligence contributed to his injury[,]" *Draughon*, 374 N.C. at 483, 843 S.E.2d at 76 (citation omitted), the trial court properly entered summary judgment for Defendants.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err by granting Defendants' Motion for Summary Judgment.

AFFIRMED.

Judge ARROWOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

Factual and Procedural Background

The Estate of Marvin Joseph Long (Decedent), by and through Marla Hudson Long as Administratrix (Plaintiff), appeals from an Order on Summary Judgment entered 25 January 2023 which granted Summary Judgment in favor of James D. Fowler (Fowler), David A. Matthews (Matthews), and Dennis F. Kinsler (Kinsler) (collectively, Defendants). The Record before us tends to reflect the following:

Defendants in this case are all employees of North Carolina State University (NCSU). Kinsler was an "HVAC Advanced Technician" and at NCSU from 2012 to 2017. In December 2016 and January 2017, Kinsler worked for NCSU, including on the water side of HVAC machines. Fowler took HVAC courses at a community college in 1990 and 2000, and he worked with several companies doing HVAC service and repair after 1990. He began work as an "HVAC Mechanic" at NCSU in 2014. Matthews was a "Field Maintenance Technician" working on HVAC equipment and supporting HVAC technicians.

The Carrier Chiller (Chiller) is a mobile chiller unit, which was placed at the rear of the Monteith Research Center (MRC) at NCSU.

The Chiller has two cooling circuits, each of which has a chiller barrel inside of which are water cooler tubes and high-pressure refrigerant. Water passes through the chiller barrels inside copper tubes, and the water is cooled by refrigerant outside the tubes. When the Chiller was not operating, the refrigerant in the chiller barrels was under more pressure than the water tubes in the barrels; thus, the refrigerant would go into the water piping system if there were leaks or cracks in the walls of the water tubes.

As part of a construction project, contractors had to move the Chiller approximately ten feet from its original location. Quate Industrial Services (Quate) was a subcontractor on the NCSU construction project and employed Decedent. Quate placed a service request with NCSU's Facilities Maintenance Department to "drain and secure" the Chiller so it could be relocated. On 19 December 2016, an NCSU supervisor issued a work order, which instructed employees to "PLEASE DRAIN AND SECURE CARRIER CHILLER FOR RELOCATION." Fowler and Matthews were assigned to drain the water from the Chiller. Kinsler instructed them to undertake several specific steps, including performing a "nitrogen purge" to blow nitrogen through the water piping. Kinsler testified he had never looked at the Chiller manual. Matthews had done preventative maintenance on the Chiller prior to the incident in this case and had worked with an AC mechanic when refrigerant was installed.

On 21 December 2016, Fowler and Matthews drained the Chiller by opening a valve at its base and allowing the water to drain until the unit appeared empty. They then used a cannister of compressed nitrogen to attempt to "push [the water], get [the water] out of the machine and dry the tubes . . . [s]o it doesn't freeze up." Fowler testified he knew if there was water left in the Chiller, it could freeze and break the tubes. The Winter Shutdown Preparation section of the Chiller manual and warning labels on the Chiller instructed antifreeze be used when shutting down the machine in the winter. However, Defendants did not put any antifreeze in the Chiller. Fowler and Matthews then "secured" the Chiller by attaching metal caps and flanges over the Chiller's inlet and outlet pipes on 3 January 2017. The caps weighed approximately thirteen pounds each.

Between 3 January 2017, when the caps were installed, and 20 January 2017, the date of the underlying incident, the Chiller remained outside near the MRC. Decedent was an employee of Quate and a pipefitter. He had training on safety procedures and was reportedly familiar with piping around chiller units generally. Defendants did not tell any Quate employee they had not filled the cooler tubes with antifreeze.

Quate was not responsible for shutting down the Chiller, nor were its employees trained to operate the Chiller. On 20 January 2017, Decedent and another Quate employee, Nate Weston, began to take the caps off the inlet and outlet pipes. The Chiller was not attached to electricity or water and was not running. Decedent and Weston walked around the Chiller to inspect it. They examined the pressure gauges on the water lines and the gauges read "zero."

When they began to loosen the flange to take the cap off of one suction line, Decedent loosened a nut on the right side of the flange "a couple of turns[.]" When the nut was loosened, Weston did not hear any sound of air escaping or smell any odor. Rusty Quate, Decedent's supervisor, testified at his deposition this would indicate there was no pressure in the line, and it was safe to continue to remove the cap. Decedent and Weston continued to remove the cap. Decedent started to use a socket wrench when the cap exploded out suddenly and struck him. Decedent died as a result of his injuries five days later.

After this incident, an Eddy Current Tube Analysis performed on the water tubes in the two chiller barrels revealed water tubes in the lower path of each chiller barrel were broken due to freeze damage. Defendants' expert testified water left in the Chiller when it was drained would collect in the lower tubes, and it was "very likely" when the water froze, the resulting ice expanded and ruptured the tubes, causing the damage shown by the Eddy Current Test. Weather records showed sub-freezing temperatures between 7 and 10 January 2017—after the caps had been installed on the Chiller pipes. Defendants' expert testified if any refrigerant had gotten into the water system as a result of damage to the tubes, this would have resulted in system pressure.

On 13 November 2018, Plaintiff filed a wrongful death lawsuit in Person County Superior Court. The Complaint alleged Decedent's death was caused by the negligence of six NCSU maintenance employees, who were sued in their individual capacities. Defendants filed a motion to dismiss under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Appellate Procedure. The trial court entered an order granting Defendants' motion to dismiss on 3 May 2019. Plaintiff appealed, and a panel of this Court reversed the dismissal, holding sovereign immunity did not bar claims against public employees sued in their individual capacities and the Complaint sufficiently alleged claims for negligence and punitive damages. *Long v. Fowler*, 270 N.C. App. 241, 245-53, 841 S.E.2d 290, 293-300 (2020). Defendants then appealed to the North Carolina Supreme Court, which affirmed this Court's decision and remanded the case to Person County Superior Court. *Long v. Fowler*, 378 N.C. 138, 142-55, 861 S.E.2d 686, 691-98 (2021).

On remand, the parties proceeded with discovery over the course of sixteen months. During discovery, depositions were taken of each Defendant, Rusty Quate, Weston, and experts from both sides, and documentation related to warning labels on the Chiller and provisions of the Chiller manual was produced.

On 26 December 2022, Defendants filed a Motion for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure. Prior to the summary judgment hearing, Plaintiff voluntarily dismissed without prejudice the punitive damage claim and the negligence claims against three defendants. The trial court heard arguments on the Motion for Summary Judgment on 5 January 2023. On 25 January 2023, the trial court entered an Order on Summary Judgment granting Defendants' Motion. Plaintiff timely filed Notice of Appeal on 21 February 2023.

Issues

The issues on appeal are whether the trial court erred by granting Defendant's Motion for Summary Judgment on the basis of (I) foreseeability of the injury to Decedent from Defendants' alleged negligence; and (II) contributory negligence on the part of Decedent.

Analysis

We review a trial court's summary judgment order de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under de novo review, "the 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) (citation and quotation marks omitted). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021) (emphasis added). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party." *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and quotation marks omitted). "The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). All inferences are resolved against the moving party. *Id.*

"[S]ummary judgment is proper where the evidence fails to establish negligence on the part of defendant[.]" *Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 327 (1993) (alterations, citations, and quotation marks omitted). Further,

> To survive a motion for summary judgment, plaintiff must have established a prima facie case of negligence by showing: (1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed.

Finely Forest Condominium Ass'n v. Perry, 163 N.C. App. 735, 739, 594 S.E.2d 227, 230 (2004) (citation and quotation marks omitted).

Summary judgment generally is a "drastic remedy" that should be used with caution. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)). Thus, "[w]hile our Rule 56 . . . is available in all types of litigation to both plaintiff and defendant, 'we start with the general proposition that issues of negligence . . . are ordinarily not susceptible to summary adjudication . . . but should be resolved by trial in the ordinary manner.' " *Page*, 281 N.C. at 706, 190 S.E.2d at 194. Consequently, in *Wilson Brothers v. Mobil Oil*, this Court held there is a presumption against summary judgment in negligence cases. 63 N.C. App. 334, 338, 305 S.E.2d 40, 43 (1983), *cert. denied*, 309 N.C. 634, 308 S.E.2d 718 (1983).

The majority incorrectly characterizes Defendants' evidence as "uncontested." In my view, Plaintiff's evidence, as well as contradictory statements by Defendants themselves, clearly create a genuine issue of material fact. To be clear, the amount of evidence on each side is of no matter in evaluating a motion for summary judgment so long as there is *some* evidence on each side. If so, summary judgment is properly denied so that the case may be submitted to a jury to assess the evidence's weight and credibility. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999) ("Before summary judgment may be entered, it must be *clearly established* by the record before the trial court that there is a lack of *any* triable issue of fact." (quoting *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998))).

I. Foreseeability

Plaintiff first contends the trial court erred in granting Summary Judgment for Defendants on the basis Decedent's injury was not a

reasonably foreseeable result of Defendants' failure to put anti-freeze into the Chiller's barrels.

"Foreseeability of some injurious consequence of one's act is an essential element of proximate cause[.]" *Hastings for Pratt v. Seegars Fence Co.*, 128 N.C. App. 166, 170, 493 S.E.2d 782, 785 (1997) (citing *Sutton v. Duke*, 277 N.C. 94, 107, 176 S.E.2d 161, 169 (1970)). "Issues of proximate cause and foreseeability, involving application of standards of conduct, are ordinarily best left for resolution by a jury under appropriate instructions from the court." *Id.* Further, this Court has stated

> [I]t is *only in exceptional cases*, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. *[P]roximate cause is ordinarily a question of fact for the jury*, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.

Poage v. Cox, 265 N.C. App. 229, 245, 828 S.E.2d 536, 546 (2019) (quoting *Williams*, 296 N.C. at 403, 250 S.E.2d at 258) (emphasis in original). Defendants contend Plaintiff cannot establish any genuine issue of material fact to show foreseeability. Defendants argue first the warning labels and the Chiller's manual provisions mentioned only potential damage to the machine, but they did not mention the possibility of inadvertent pressurization nor the creation of a potential hazard. Thus, in Defendants' view, the labels and manual are irrelevant. *See Burns v. Forsyth Cnty. Hosp. Auth.*, 81 N.C. App. 556, 562-63, 344 S.E.2d 839, 844-45 (1986). In opposing Defendants' Motion for Summary Judgment, however, Plaintiff presented evidence showing the first page of the Carrier manual specifically warned: "Installing, starting up, and servicing this equipment can be hazardous due to system pressures[.]" The Manual also instructs all those working on the Chiller to "observe precautions in the literature, and on tags, stickers, and labels attached to the equipment, and *any other safety precautions* that apply." These warnings may reasonably be interpreted as relating to potential dangers to persons working on the machine and the potential for pressurization.

Additionally, contrary to Defendants' assertions, a jury could reasonably conclude the system pressure hazard was foreseeable even though the Manual does not state the exact means by which the system became pressurized in this case. "The test of proximate cause is whether the risk of injury, *not necessarily in the precise form in which it actually occurs*, is within the reasonable foresight of the defendant." *Williams*, 296 N.C. at 403, 250 S.E.2d at 258 (citations omitted) (emphasis

added). Thus, Plaintiff need not establish the exact chain of events was reasonably foreseeable in order to recover. Rather, "[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected." *Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965). Given the warnings above, a jury could conclude Defendants should have foreseen the risk of injury resulting from pressurization of the Chiller.

Defendants also contend their training and experience was insufficient to put them on notice of a reasonable likelihood of injury if they failed to add antifreeze to the system. Defendants point to portions of their depositions and affidavits stating none of them had ever heard of this occurrence happening, they were unaware the Chiller had any residual water after they had drained it, and they did not know failing to completely drain the Chiller and add antifreeze could lead to injury.

Plaintiff put forward evidence of Defendants performing a "nitrogen purge" to attempt to blow out remaining water from the tubes and contends this shows Defendants appreciated the danger of leaving water behind in the tubes.

> [Plaintiff's Counsel]: And what made you think that you should use nitrogen if you were going to drain the water out?
>
> [Fowler]: Just to help push it, get it out of the machine and dry the tubes.
>
> [Plaintiff's Counsel]: And why would you want to dry the tubes?
>
> [Fowler]: So there's no water there.
>
> [Plaintiff's Counsel]: And why would you want there to be no water in there?
>
> [Fowler]: So it doesn't freeze up.
>
> [Plaintiff's Counsel]: Why would you care whether the water froze up in the tubes?
>
> [Fowler]: Well, you don't want them—you don't want to bust them.

Fowler also stated in his deposition he was familiar with refrigerants and knew they could pressurize the machine if the tubes were damaged. He further testified to his comprehension of the chain of events leading to Decedent's injury:

[Plaintiff's Counsel]: Okay. And were there ever—did you ever have occasion where you were using refrigerant, and something wasn't screwed on tight, or the threads didn't get quite right, and it would pop the—pop something loose?

[Defendants' Counsel]: Objection to form.

[Fowler]: A couple times.

[Plaintiff's Counsel]: Yeah. So the pressurized gas would be pressurized, and it could expel through an opening with force; is that right?

[Fowler]: Right.

[Plaintiff's Counsel]: All right. I said that with a lot of vulgar words, but if you've got pressurized gas, and it gets out, it can blow a coupling loose or knock something out; right?

[Fowler]: It comes out with pretty good force.

[Plaintiff's Counsel]: It comes out with good force.

[Fowler]: Yeah.

[Plaintiff's Counsel]: And was it your understanding, after you learned about this, that what had happened is there was refrigerant inside the water system and that, when the cap—the end cap loosened out, that it blew it out with force? Is that—was that your understanding of what happened?

[Defendants' Counsel]: Object to the form. Do you have an understanding of what happened? Go ahead. You can answer.

[Fowler]: Nobody ever came right out and said it, but I kind of figured.

[Plaintiff's Counsel]: Figured what?

[Fowler]: That something had gave, and the gas had got over there on the water side.

[Plaintiff's Counsel]: Yes, sir. And that caused the end cap to blow off?

[Fowler]: Right.

. . . .

> [Plaintiff's Counsel]: Now, we covered before the break that, if water was in the tubes that were in the heat exchanger, that, if it froze, it could damage the tubes; is that right?
>
> [Fowler]: Right.
>
> [Plaintiff's Counsel]: And if there was refrigerant surrounding the tubes, and they broke, then the refrigerant could get into the water system that way, couldn't it?
>
> [Fowler]: Yes, it could.
>
> [Plaintiff's Counsel]: And then, if the water system had this refrigerant in it, that would be why there would be pressurized gas in the water system; is that right?
>
> [Defendants' Counsel]: Object to the form.
>
> [Fowler]: Right.
>
> [Plaintiff's Counsel]: And the gas would have been trapped if it got in there after you put the caps on; right?
>
> [Fowler]: Yes.
>
> [Plaintiff's Counsel]: And then, if the cap was loosened, the gas would be the cause for expelling the cap outward from the water pipe. Would you agree with that?
>
> [Defendants' Counsel]: Object to the form.
>
> [Fowler]: I agree.

Matthews similarly testified to his understanding of the process by which Decedent was injured in his deposition:

> [Plaintiff's Counsel]: And so if the tubes inside the coolant chamber broke, then the coolant that surrounded those tubes could get into the water system, couldn't it?
>
> [Defendants' Counsel]: Objection to form.
>
> [Matthews]: Yes.
>
> [Plaintiff's Counsel]: And these refrigerants were like the nitrogen? They were pressurized gas; is that right?
>
> [Defendants' Counsel]: Objection.

> [Matthews]: I believe so, yes.
>
> [Plaintiff's Counsel]: Okay. So if, on January 20th of 2017, when [Decedent] went to start loosening the nuts on the flanges, if there was pressurized gas in there, that could have caused the end cap to shoot out and hit him in the head, couldn't it?
>
> [Defendants' Counsel]: Objection to form.
>
> [Matthews]: I believe so.

The majority asserts Defendants' deposition testimony reflected only an understanding of "the sequence of events; not whether the outcome was foreseeable." The majority improperly infers that its interpretation of the Defendants' depositions is the only way to interpret that testimony. While that is one interpretation of the testimony, a reasonable juror could also infer that because Defendants understood the process of creating a closed, pressurized system, an injury to an individual opening that pressurized system was foreseeable. Moreover, "[i]t is not essential, . . . in order that the negligence of a party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted, should have been foreseen." *Drum v. Miller*, 135 N.C. 204, 215, 47 S.E. 421, 425 (1904). *See also Hall v. Coble Dairies*, 234 N.C. 206, 210, 67 S.E.2d 63, 66 (1951) ("[I]t is not necessary that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred, nor to have been able to anticipate the particular consequences ultimately resulting from the negligent act or omission.").

This is not to say that the majority's assessment is unreasonable or less reasonable—the point is that it is not our role to draw those inferences. Indeed, Rule 56 "does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists." *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830 (citations omitted). Rather, our Courts have consistently affirmed that it is the role of the jury, in all but the exceptional case, to determine negligence. *See*, *e.g.*, *Jenrette Transp. Co. v. Atl. Fire Ins. Co.*, 236 N.C. 534, 540, 73 S.E.2d 481, 486 (1952); *Gladstein v. S. Squire Assocs.*, 39 N.C. App. 171, 173, 249 S.E.2d 827, 828 (1978), *rev. denied*, 296 N.C. 736, 254 S.E.2d 178 (1979); *Cullen v. Logan Devs., Inc.*, 289 N.C. App. 1, 5, 887 S.E.2d 455, 458 (2023). This is particularly true as to the issue of negligence, where "[t]he jury has generally been recognized as being uniquely competent to apply the reasonable man standard[.]" *Green v. Wellons, Inc.*, 52 N.C.

App. 529, 531-32, 279 S.E.2d 37, 39 (1981) (quoting *Gladstein*, 39 N.C. App. at 174, 249 S.E.2d at 829).

Additionally, Plaintiff presented evidence portions of Fowler's and Matthews' affidavits contradicted their deposition testimony. For example, in Fowler's affidavit accompanying Defendants' Motion for Summary Judgment, Fowler stated "it never occurred to [him] that the [C]hiller could become pressurized" when capping the pipes. Further, "[e]ven if [he] had known the [C]hiller pipes could not be completely drained of water, it would not have occurred to [him] that the system could become pressurized if [Defendants] put caps over the open pipes." Matthews' affidavit contains identical paragraphs, although his deposition testimony likewise demonstrated an understanding of how the Chiller became pressurized. These statements are in contrast to Fowler's and Matthews' deposition testimony, recounted in part above, showing their understanding of how the Chiller became pressurized in just such a manner. Such contradictions raise an issue of Fowler's and Matthews' credibility. *See Kidd*, 289 N.C. at 367-68, 222 S.E.2d at 408-09. "Clearly, if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial, inasmuch as this situation presents the type of dispute over a genuine issue of material fact that should be left to the trier of fact." *Id.* at 367-68, 222 S.E.2d at 409.

Further, Defendants' own expert wrote in his report: "When the chillers are not operating, the refrigerant system is under higher pressure than the chilled water piping system. When not operating, any leaks in the evaporator tubes allow higher pressure refrigerant to enter the chilled water piping system." Defendants' own expert testified it was reasonable to expect someone would have to take the caps off because a person had put them on. Based on this evidence, a jury could find Defendants reasonably should have foreseen the risk of injury if they improperly shut down the Chiller. Moreover, the contradictions between Defendants' deposition testimony and affidavits clearly raise an issue of credibility which should be resolved by a jury. *See Kessing*, 278 N.C. at 535, 180 S.E.2d at 830 ("If there is *any question as to the credibility of witnesses* or the weight of evidence, a summary judgment should be denied." (emphasis added) (citation omitted)). Defendants make colorable arguments around foreseeability, but so too does Plaintiff. Accordingly, there is a triable issue of fact as to whether Decedent's injury was reasonably foreseeable. Consequently, the trial court erred by granting Defendants' Motion for Summary Judgment.

II. Contributory Negligence

"Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152, 809 S.E.2d 200, 204 (2017) (citation and quotation marks omitted). "In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: '(1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.' " *Daisy v. Yost*, 250 N.C. App. 530, 532, 794 S.E.2d 364, 366 (2016) (quoting *W. Constr. Co. v. Atl. Coast Line R. Co.*, 184 N.C. 179, 180, 113 S.E.2d 672, 673 (1922)). "It is well established that a claim is barred by the doctrine of contributory negligence if the injured party fails to exercise ordinary care for her own safety and such failure contributes to the injury." *Williams v. Odell*, 90 N.C. App. 699, 702, 370 S.E.2d 62, 64 (1988). "As our appellate courts have long recognized, negligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment." *Patterson v. Worley*, 265 N.C. App. 626, 628, 828 S.E.2d 744, 747 (2019) (quoting *Sims v. Graystone Ophthalmology Assocs., P.A.*, 234 N.C. App. 65, 68, 757 S.E.2d 925, 927 (2014)).

Defendants point to Decedent's experience, training, and knowledge in support of their contention there is no genuine issue of material fact as to his contributory negligence. They allege Decedent failed to check pressure relief valves or stand clear of the metal before loosening the bolts, and these failures constitute contributory negligence.

Plaintiff produced evidence showing Decedent looked at pressure gauges, which read "zero," indicating the Chiller was not pressurized. Plaintiff also produced evidence showing Decedent loosened the nut on the flange before removing the cap and checked for noise, smell, or other indications of pressure, and there were none. Lastly, Plaintiff's evidence showed Defendants did not warn Decedent they had not filled the Chiller's tubes with antifreeze. Based on this evidence, a jury could determine Decedent could not reasonably have anticipated the Chiller was improperly drained and thus pressurized, and therefore find Decedent was not contributorily negligent.

In support of their position, Defendants cite to cases which are distinguishable from the facts of this case. Defendants point first to an unpublished opinion of this Court in which we upheld a trial court's grant of summary judgment where the evidence showed the plaintiff, a service technician, fell off of a ladder he had "merely visually inspected

and touched . . . to make sure it was not wobbling." *Sealey v. Farmin' Brands, LLC*, 273 N.C. App. 710, *1, 847 S.E.2d 924 (2020) (unpublished). Unpublished opinions are not controlling legal authority. N.C. R. App. P. Rule 30(e)(3) (2023). Still, the present case is distinguishable because there is evidence Decedent took greater efforts to check whether the Chiller was pressurized, including reading the pressure gauge and looking for signs of pressurization when first loosening the nut on the flange. These efforts also distinguish this case from another which Defendants cite in passing where the plaintiff made no attempt at all to inspect a scaffold before climbing onto it. *Bullard v. Elon Dickens Constr. Co., Inc.*, 29 N.C. App. 483, 486, 224 S.E.2d 708, 710 (1976).

The majority's position on contributory negligence plainly contradicts its position on foreseeability. The majority asserts Decedent's injury was not foreseeable, even considering Decedent's supervisor's experience, as well as the Chiller's manual and warning labels. Yet, in the majority's view, Decedent failed to exercise objectively reasonable behavior to prevent his injury. If Decedent's injury was not foreseeable, what additional actions should Decedent have undertaken to prevent his injury? Indeed, Decedent's supervisor, whose testimony the majority cites approvingly throughout its opinion, expressly said "I would have done the same thing [Decedent] and Nate did." The majority effectively holds Decedent's injury was unforeseeable as to Defendants, but Decedent should have taken steps to prevent it. Both cannot be true.

In addition, the majority points to *Moseley v. Hendricks* to support its conclusion Decedent was contributorily negligent. 292 N.C. App. 258, 897 S.E.2d 680 (2024). There, a golfer was found contributorily negligent where he put himself in front of a driving range and took no precautions to determine whether his position was safe. *Id.* at 685. *Moseley*, too, is readily distinguishable from the case before us. Here, unlike the golfer in *Moseley* who took no precautions, Decedent took several precautions, including reading the pressure gauges on the Chiller and checking for signs of pressurization after initially loosening the nut on the flange. Further, this Court in *Moseley* stated "a prudent person in plaintiff's position would have noticed such a precarious position and moved out of harm's way." *Id.* In contrast, again, Decedent's supervisor in this case testified that had he been present after the initial loosening of the nut without any indication of pressure, "I would have done the same thing [Decedent] and Nate did." Although Defendants point to deposition testimony by Decedent's supervisor as to his experience and training in support of their argument, they cannot dismiss this portion of his testimony.

Thus, on the issue of contributory negligence, Defendants' evidence is not so conclusive as to render there no genuine issue of material fact on this point. Therefore, the trial court erred in granting summary judgment in favor of Defendants.

Conclusion

Accordingly, for the foregoing reasons, I respectfully dissent.

VIVIAN B. FEDEROWICZ, D.C., PETITIONER
v.
NORTH CAROLINA BOARD OF CHIROPRACTIC EXAMINERS, RESPONDENT

No. COA23-955

Filed 20 August 2024

1. Chiropractors—disciplinary proceeding—treatment of pregnant patient—suspension of license—evidentiary support

The trial court properly affirmed the decision of the Board of Chiropractic Examiners to suspend petitioner's Doctor of Chiropractic license for six months and to place her on two years of probation with conditions upon reinstatement, where the Board's unchallenged findings of fact and record evidence supported its conclusions that petitioner was negligent and failed to render acceptable chiropractic care in her treatment of a pregnant patient, who was under the impression that petitioner was her primary care doctor and who was encouraged by petitioner to have a home birth and not to go to the hospital when she began experiencing problems in delivering the baby. Petitioner's argument that the Board exceeded its jurisdiction and regulatory authority by disciplining petitioner for failure to render medical prenatal care was without merit where the Board's decision to discipline petitioner was based on the scope of acceptable chiropractic care.

2. Chiropractors—disciplinary proceeding—conditions after reinstatement of license—informed-consent requirement for pregnant patients

In a disciplinary matter in which the Board of Chiropractic Examiners suspended petitioner's Doctor of Chiropractic license for six months and required conditions of probation upon reinstatement for a further two years, including an informed-consent

requirement before petitioner could treat a patient known to be pregnant, the trial court properly upheld the conditions as being within the Board's discretion. Further, the informed-consent requirement was directly related to the grounds for discipline, which included petitioner having committed unethical conduct by publicly claiming a specialization in maternal and pediatric care without having the necessary qualifications, and did not place an improper burden on petitioner or violate a patient's freedom of choice in selecting a provider of chiropractic care.

3. Chiropractors—disciplinary hearing—costs imposed as condition of reinstatement—statutory authority

In a disciplinary matter in which the Board of Chiropractic Examiners suspended petitioner's Doctor of Chiropractic license for six months and required conditions of probation upon reinstatement for a further two years, the trial court properly upheld the Board's decision to impose costs of the proceedings (in the amount of $10,000) as a condition of petitioner's reinstatement as being within the Board's statutory authority pursuant to N.C.G.S. § 90-157.4(d). Further, petitioner failed to carry her burden on appeal of demonstrating that the award of costs was in error or unreasonable.

Appeal by petitioner from order entered 15 June 2023 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 2 April 2024.

Vinson Law PLLC, by Robin K. Vinson, for petitioner-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by A. Grant Simpkins and Anna Baird Choi, for respondent-appellee.

ZACHARY, Judge.

This case arises from two complaints submitted to the North Carolina Board of Chiropractic Examiners ("the Board") alleging that Petitioner Vivian B. Federowicz, D.C., violated the North Carolina General Statutes regulating chiropractic care. Petitioner appeals from the superior court's order affirming the Board's decision to suspend her Doctor of Chiropractic license for six months and, upon reinstatement, place her on two years of probation with conditions. After careful review, we affirm.

I. Background

At the time of the complaints, Greenway Chiropractic, PLLC, ("Greenway") employed Petitioner as a licensed chiropractor. Petitioner focused her practice on "pediatrics and pregnancy." Petitioner taught birthing classes at Greenway's office and maintained a podcast and social media accounts titled "Birthing Outside the Box," in which she emphasized the advantages of giving birth in one's home and other settings outside of a hospital. In a caption for her podcast, Petitioner described herself as "a chiropractor who specializes in maternal and pediatric care."

In December 2021, S.B.,[1] who was 33 years old and pregnant with no prior experience giving birth, heard Petitioner's podcast and sought her out for "holistic prenatal care." S.B. became a patient of Petitioner and began attending her birthing classes. Based on a conversation with Petitioner early in their relationship, S.B. was under the impression that Petitioner was her primary care provider and that visiting an OB-GYN was unnecessary.

S.B.'s chiropractic appointments consisted of Petitioner discussing her podcast with S.B., recommending books to her, and—although Petitioner did not document it in her records—treating S.B. with the "Webster Technique."[2] Additionally, Petitioner "measured the fundal height" of S.B.'s baby and told her that "it felt like [her] baby was head down and ready to be born."

Petitioner's medical records indicated that she was treating S.B. only "for routine chiropractic maintenance/wellness care"; none of Petitioner's 38 treatment records from December 2021 to August 2022 mention S.B.'s pregnancy or prenatal care. Petitioner never conducted an ultrasound or took S.B.'s vitals. At appointments and in birthing classes, Petitioner discussed what she perceived as the risks of the use of fetal ultrasounds. Additionally, despite knowing that S.B. suffered from mild scoliosis, Petitioner did not order an x-ray of S.B. until her last visit on 3 August 2022.

At an appointment close to her delivery date, S.B. voiced concern about not having a reliable midwife to assist with her home birth, and Petitioner suggested that S.B. and her baby's father could "just do

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1. We use the patient's initials to protect her identity.

2. In its amended final decision, the Board explains: "The Webster Technique is a chiropractic technique used to treat pregnant patients."

it"—deliver the baby on their own. After S.B. expressed doubt, Petitioner told S.B. that, for a fee, she could be present for the birth depending on her work schedule. On the afternoon of 9 July 2022, S.B.'s water broke, and early the following morning, Petitioner visited her home. When S.B. expressed alarm over her delivery not progressing, Petitioner encouraged her not to go to the hospital. Subsequently, Petitioner attempted to use a Doppler[3] that S.B.'s partner had borrowed from a midwife to measure the fetal heartbeat. Shortly thereafter, Petitioner left S.B. and the father alone in their home.

As S.B.'s labor progressed, serious complications arose, and a call was placed to 911. When EMS arrived, they discovered that the baby was partially delivered "in the breech position—delivering feet first." EMS transported S.B. to the emergency room at WakeMed Hospital. Petitioner arrived at the hospital shortly after. Hospital staff pronounced S.B.'s baby deceased. Thereafter, S.B. had three additional office visits with Petitioner; however, the Board would later note that even "[t]he medical records from those visits do not reflect [that S.B.] had previously attempted childbirth."

On 14 July 2022, Lindsay Lavin, M.D. ("Dr. Lavin"), an emergency room physician who treated S.B. at WakeMed, filed a complaint with the Board against Petitioner. In her complaint, Dr. Lavin alleged the existence of the following grounds for the professional discipline of Petitioner: (1) unethical conduct; (2) negligence, incompetence, or malpractice; and (3) "[n]ot rendering acceptable care in the practice of the profession." Dr. Lavin cited Petitioner leaving S.B.'s home before EMS arrived, and upon appearing at the hospital, merely "introduc[ing] herself as a 'friend' to medical staff and . . . not provid[ing] any [of S.B.'s] medical history." On 20 July 2022, the Board received an emailed complaint from Coryell Perez, M.D. ("Dr. Perez"), a labor and delivery physician who also treated S.B. at WakeMed, alleging that Petitioner "practiced outside of the scope of chiropractic by providing prenatal care and/or attending to a patient during a home birth" and asserting that "[t]his outcome was completely preventable."

After opening an investigation, the Board interviewed Dr. Lavin and Dr. Perez and reviewed Petitioner's social media posts and podcast, the 10 July EMS report, and S.B.'s medical records from WakeMed. The Board's investigation concluded that Petitioner could be in violation

3. A "Doppler ultrasound uses sound waves to measure [a] baby's heart rate." *Fetal Heart Rate Monitoring*, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/ 23464-fetal-heart-rate-monitoring (last updated July 13, 2022).

of the prohibitions against "[u]nethical conduct" and failure to render "acceptable care in the practice of the profession[.]"

On 13 October 2022, the Board issued an order for summary suspension of Petitioner's license pending a hearing. On 21 October 2022, Petitioner filed a motion to lift the summary suspension. After a hearing on 3 November 2022, the Board entered an order lifting the summary suspension. In its order, the Board noted that Greenway had adopted an informed-consent form for pregnant patients that included affirmations that patients understand that the chiropractic care they would receive "is not equivalent and does not replace medical prenatal care"; that Petitioner is a chiropractor and not a medical doctor; that the Webster Technique is not performed to "flip my baby" *in utero*; and that Petitioner is "unable to tell me the position of my baby."

On 16 December 2022, the Board held an administrative hearing, and on 21 December, it issued its amended final agency decision and order,[4] in which the Board made the following conclusions of law:

> 1. Disciplinary action is appropriate pursuant to [N.C. Gen. Stat. §] 90-154(b)(4). [Petitioner] violated 21 NCAC 10.0302(b)(3) and 21 NCAC 10.0304 and engaged in unethical conduct, as defined in [N.C. Gen. Stat. § 90-154.2(5)], by publicly describing herself as a chiropractor "who specializes in maternal and pediatric care", when she does not have the qualifications required by Rule 21 NCAC 10.0304.
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> The Board recognizes only those specialties listed in 21 NCAC 10.0304(b) or approved pursuant to 21 NCAC 10.0304(c), and licentiates desiring to use a specialty designation must first demonstrate that all requirements to do so have been met. Any published claim of specialization outside the recognized specialties or any published claim of specialization made by or at the behest of a licentiate who has not satisfied all applicable provisions of 21 NCAC 10.0304 constitutes false or misleading advertising. 21 NCAC 10.0304(e). [Petitioner] has not satisfied all applicable provisions of 21 NCAC 10.0304. Thus, [Petitioner]'s published description of herself as a chiropractor who specializes in maternal and pediatric care constitutes false

4. The Board amended its final decision to correct the effective date of its decretal portion; this amendment does not affect any of the issues on appeal.

> or misleading advertising, which constitutes unethical conduct pursuant to [N.C. Gen. Stat. § 90-154.2(5)].
>
> 2. Disciplinary action is appropriate pursuant to [N.C. Gen. Stat. §] 90-154(b)(5). [Petitioner] committed negligence in the practice of chiropractic by failing to secure appropriate care for a patient. [Petitioner] was aware that her 33-year-old patient had no prior experience in giving birth, had not had an ultrasound, and for at least some period had not been receiving medical pre-natal care. [Petitioner] was aware that her patient's water had broken more than 24 hours before the time she left the home of a laboring patient knowing that a mid-wife or other medical provider was not present and was not forthcoming. She failed to secure appropriate care for the patient.
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> 3. Disciplinary action is appropriate pursuant to [N.C. Gen. Stat. §] 90-154(b)(7). [Petitioner] failed to render acceptable care in the practice of the profession, as defined in [N.C. Gen. Stat. §] 90-154.3(a), by failing to properly examine, document and manage the care of a pregnant patient, including during such times that [Petitioner] knew no other provider was providing care.

Based upon these conclusions of law, the Board suspended Petitioner's license for six months and placed her on two years of probation with conditions for reinstatement. Among the conditions for reinstatement, the Board required Petitioner to complete courses in professional standards and documentation, as well as pay to the Board $10,000.00 for the costs of her disciplinary proceeding. Additionally, during her period of probation, Petitioner was prohibited from providing chiropractic care to "any patient known to be pregnant[,]" unless the patient had executed a revised version of Greenway's informed-consent form that included a statement that the patient is "under the care of a formally trained and certified provider (obstetrician or nurse midwife) who could provide standard-of-care prenatal monitoring and labor/delivery care."

On 12 January 2023, Petitioner filed a petition for judicial review of the amended final decision. Petitioner did not challenge the Board's conclusion of law 1, concerning the ground for discipline of unethical conduct based on false or misleading advertising. However, she did challenge the remaining two conclusions of law, as well as certain aspects of the discipline that the Board ordered in its amended final decision. On

23 May 2023, the matter came on for hearing in Wake County Superior Court, and on 15 June 2023, the court entered its order affirming the Board's amended final decision. In its order, the superior court concluded, *inter alia*:

> 2. [The Board's] Conclusion of Law 2 is supported by the evidence in the record, testimony at hearing, and the Board's statutes and rules governing the practice of chiropractic. The Board did not exceed statutory authority in finding [Petitioner] negligent in the practice of chiropractic.
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> 3. [The Board's] Conclusion of Law 3 is supported by the evidence in the record, testimony at hearing, and the Board's statutes and rules governing the practice of chiropractic. The Board properly determined [Petitioner] failed to render acceptable care in the practice of chiropractic.
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> 4. The Board did not abuse its discretion in imposing probationary terms in Order paragraph 6 based on the evidence presented at the contested case and in light of the entire record.
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> 5. The Board has statutory authority to impose payment of costs and/or attorney's fees to a licensee found to have violated Board statutes and rules.
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> 6. [Petitioner] has failed to meet her burden under N.C. Gen. Stat. § 150B-51(b) of showing that the Board prejudiced her substantial rights.

Petitioner filed timely notice of appeal.

II. Discussion

As she did before the superior court, Petitioner primarily raises issues of law on appeal, concerning the breadth of the Board's ordered discipline.

First, Petitioner asserts that "[t]he Board did not and does not have jurisdiction and regulatory authority over" her "private conduct[.]" Petitioner then argues that she "cannot be responsible for managing the medical prenatal and obstetrical care of a chiropractic patient whether or not [Petitioner] has knowledge that no other provider was providing prenatal and obstetrical care for the chiropractic patient[.]" She also contends that "the Board cannot require [her] to treat only pregnant patients who are undergoing medical prenatal care and to

ensure that such medical prenatal care is maintained at all times during the pregnancy[.]"

Additionally, Petitioner alleges that "there is no factual basis in [the] record, the Board's findings of fact or its conclusions of law that support an award of costs and/or attorneys' fees in this proceeding[.]" For the reasons explained below, Petitioner's arguments fail to persuade.

A. Standard of Review

The Board is an "occupational licensing agency" as defined by N.C. Gen. Stat. § 150B-2(4b) (2023). Accordingly, hearings conducted by the Board are governed by the North Carolina Administrative Procedure Act ("the APA"). *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 632, 596 S.E.2d 324, 327, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 312 (2004). The Board's final decisions are appealable to "the superior court of the county where the person aggrieved by [a final decision] resides[.]" N.C. Gen. Stat. § 150B-45(b)(2).

The superior court may reverse or modify the Board's final decision "if the substantial rights of the petitioners may have been prejudiced because the [Board's] findings, inferences, conclusions, or decisions are":

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

Id. § 150B-51(b). In reviewing questions of fact, the superior court applies "the 'whole record test' and is bound by the findings of the [Board] if they are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Hardee*, 164 N.C. App. at 633, 596 S.E.2d at 328 (cleaned up). The superior court reviews errors of law de novo. *Id.*

The superior court's order is appealable to this Court, which applies the same scope of review as for other civil cases. *See* N.C. Gen. Stat. § 150B-52. "Thus, this Court examines the [superior] court's order for

errors of law; this twofold task involves: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Hardee*, 164 N.C. App. at 633, 596 S.E.2d at 328 (cleaned up).

On appeal, the appellant bears the burden to show an error by the lower court. *Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 349, 799 S.E.2d 378, 384, *disc. review denied*, 370 N.C. 67, 803 S.E.2d 385 (2017). "Unchallenged findings of fact are binding on appeal." *Sharpe-Johnson v. N.C. Dep't of Pub. Instruction*, 280 N.C. App. 74, 81, 867 S.E.2d 188, 192 (2021).

B. Analysis

In that we are reviewing an order of the superior court acting as a reviewing court, our first task under the APA is to determine "whether the [superior] court exercised the appropriate scope of review[,]" *Hardee*, 164 N.C. App. at 633, 596 S.E.2d at 328 (citation omitted), as governed by the type of error asserted by Petitioner, *see* N.C. Gen. Stat. § 150B-51(c). Here, the superior court determined that most of Petitioner's asserted errors raised questions of law and applied de novo review to those issues. The sole exception appears to be the issue of whether the Board could "require the language in the informed[-]consent form" found in the decretal portion of the amended final decision, which the trial court determined was "a fact-based challenge" and to which it applied whole-record review.

On appeal, Petitioner argues that the informed-consent issue, like her jurisdictional and regulatory authority arguments, reveals "that the Board does not have the lawful authority to impose an obligation upon a licensee[.]" Petitioner also argues that the issue of the imposition of costs as a condition of reinstatement "is not based on any evidence, finding of fact, or conclusion of law that concludes that the fees assessed in this case were 'reasonable,' as required by statute" and, therefore, deserves whole-record review.

Nevertheless, Petitioner does not contend that this discrepancy in the trial court's applied standards of review is a reversible error in and of itself, and nor would it necessarily be so. On appeal from an administrative tribunal, a reviewing court's "use of an incorrect standard of review does not automatically require remand. If the record enables the appellate court to decide whether grounds exist to justify reversal or modification of that decision under N.C. Gen. Stat. § 150B-51(b), the reviewing court may make that determination." *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C. App. 598, 607, 608 S.E.2d 831, 838 (2005)

(citation omitted). Accordingly, we review Petitioner's legal issues de novo, while applying the whole-record test to the costs issue.

1. Scope of the Board's Review

[1] Petitioner first maintains that the superior court erred "when it failed to overturn the Board's decision" that she was negligent. Specifically, Petitioner directs her argument at the Board's conclusion of law 2, in which the Board determined that Petitioner "failed to secure appropriate care for" S.B. Petitioner alleges that the Board exceeded its "jurisdiction and regulatory authority" because this conclusion "does not relate to the practice of Chiropractic."

This challenge to the Board's conclusion of law 2 implicates the superior court's conclusion that "[t]he Board did not exceed statutory authority in finding [Petitioner] negligent in the practice of chiropractic." *See* N.C. Gen. Stat. § 90-154(b)(5) (authorizing the Board to take disciplinary action on the grounds of "[n]egligence, incompetence, or malpractice in the practice of chiropractic"). "Chiropractic" is defined in our General Statutes as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body." *Id.* § 90-143(a). Considering the scope of this definition, Petitioner contends that the Board's reasoning governs "[m]edical prenatal care and obstetrics"—topics that are not "subject to the Board's authority."

However, we need not consider the legal issue of whether the Board's jurisdiction extends to disciplining licensees for practice beyond the scope of chiropractic care—such as Petitioner's apparent practices here—because both the superior court and the Board also made unchallenged findings of fact and conclusions of law concerning Petitioner's negligence within the scope of the practice of chiropractic.

On judicial review of the Board's conclusion, the superior court found as fact that the Board's conclusion of law 2 was "supported by the findings that [Petitioner] failed to keep adequate clinical notes or records, and failed to perform proper examinations of the patient" and, therefore, "was supported by the evidence in the record, testimony at [the] hearing, findings of fact, and pertinent law." Moreover, in the underlying amended final decision, the Board found as fact that, *inter alia*, Petitioner did not document in any of her records her use of the "Webster Technique" that she used to treat S.B., which Petitioner conceded "should've been documented." Additionally, the Board found that—except for the initial visit—Petitioner's treatment

records for each of S.B.'s 38 office visits "is virtually identical to the others in all respects."

Petitioner does not challenge the superior court's findings of fact, which are thus binding on appeal. *Sharpe-Johnson*, 280 N.C. App. at 81, 867 S.E.2d at 192. Further, these findings of fact, as well as the Board's findings of fact in the underlying amended final decision, plainly relate to the practice of chiropractic. It is manifest that the superior court correctly concluded that the Board did not exceed its jurisdictional authority, as a matter of law, by disciplining Petitioner for her negligence in the practice of chiropractic. Petitioner's challenge is overruled.

Similarly, Petitioner contends that the superior court erred by concluding that "[t]he Board properly determined [Petitioner] failed to render acceptable care in the practice of chiropractic." The superior court also determined that the Board's conclusion of law 3 "was supported by the evidence in the record, testimony at [the] hearing, findings of fact, and pertinent law." And as before, Petitioner does not challenge these findings of fact, by which we are thus bound on appeal. *Id.*

Rather, Petitioner alleges that "the Board is holding [her] to a standard of care which is not within the practice of chiropractic and beyond the scope of the Board's power of regulation" and asserts that it is "outrageous that a chiropractor should be required to step in and take over for a medical prenatal provider when the chiropractor finds that the provider is no longer tending to the pregnant patient." However, as with her challenge to the negligence issue, Petitioner overreads the Board's conclusion.

The Board did not discipline Petitioner because she failed to provide "medical prenatal" care; rather, as the superior court noted, the Board disciplined Petitioner because she failed to render acceptable *chiropractic* care. As the superior court astutely explained, it was "within the province of the Board to determine whether [Petitioner] committed negligence in the practice or failed to render acceptable care in the profession." Consequently, Petitioner's contention that the superior court erred by failing to overturn the Board's conclusion of law 3 also fails.

2. Informed Consent

[2] Petitioner next challenges the superior court's conclusion that "[t]he Board did not abuse its discretion in imposing probationary terms in . . . paragraph 6 [of the decretal section of the amended final decision] based on the evidence presented at the contested case and in light of the entire record."

Paragraph 6 of the amended final decision's decretal section states:

> During probation, [Petitioner] shall not provide chiropractic care to any patient known to be pregnant unless such patient has executed an Informed Consent in substantially the same form as the Informed Consent attached to the Order Lifting Summary Suspension; provided that the Informed Consent form shall be edited to include a statement that such pregnant patient must be under the care of a formally trained and certified provider (obstetrician or nurse midwife) who could provide standard-of-care prenatal monitoring and labor/delivery care.

Petitioner contends that this informed-consent condition "is beyond the proper regulation and supervision of the practice of chiropractic[.]" However, we have previously recognized that "[t]he discipline imposed upon chiropractors is consigned to the discretion of the Board. In exercising this discretion, the Board may consider evidence concerning a chiropractor's truthfulness and character. Indeed, honesty and good moral character are prevalent themes in the North Carolina Chiropractic Act." *Hardee*, 164 N.C. App. at 635, 596 S.E.2d at 329. Here, as detailed above, the Board found that Petitioner had committed unethical conduct "by publicly describing herself as a chiropractor 'who specializes in maternal and pediatric care[,'] when she does not have the qualifications" for such specialization. The challenged informed-consent requirement relates directly to the grounds for discipline and is properly within "the discretion of the Board." *Id.*

Petitioner also claims that "the Board appears to require [Petitioner] . . . to, in effect, assure that the chiropractic patient is at all times under the medical prenatal care of a 'formally trained and certified provider (obstetrician or nurse midwife) who can provide standard-of-care prenatal monitoring and labor/delivery care.' " Our review of the informed-consent form reveals no such appearance, however. The challenged portion of the informed-consent form cited by Petitioner places the burden of assurance on the prospective patient, not Petitioner; that is, read in concert with the rest of the informed-consent form, it is plain that the patient signing the form must assure Greenway that the patient is "under the care of a formally trained and certified provider (obstetrician or nurse midwife) who could provide standard-of-care prenatal monitoring and labor/delivery care." When read in its proper context, the informed-consent requirement places no improper burden on Petitioner.

Petitioner further argues that the informed-consent requirement "violates the patient's freedom of choice in selecting chiropractic care" as guaranteed by N.C. Gen. Stat. § 90-157.1, which provides:

> No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed chiropractor as the provider of care or services which are within the scope of practice of the profession of chiropractic as defined in this Chapter.

N.C. Gen. Stat. § 90-157.1.

However, the Board persuasively observes that it is not a "board administering relief" under § 90-157.1, and it does not "deny [to any] recipients or beneficiaries of [its] aid or services the freedom to choose a [duly] licensed chiropractor" when it imposes a condition of reinstatement upon Petitioner's license. Nothing about the required informed-consent language denies any "patient's freedom of choice"—either as initially provided by Greenway or as revised by the Board. Petitioner's argument is thus overruled.

3. Reasonable Costs

[3] Finally, Petitioner challenges the superior court's determination that the Board properly imposed costs of the disciplinary proceedings as a condition of reinstatement. On this issue, the superior court held that "the Board has sufficient statutory authority to impose costs and attorney's fees for a licensee found to have violated Board statutes and rules pursuant to N.C. Gen. Stat. § 90-157.4(d)" and that, accordingly, Petitioner "failed to show that the Board erred with respect to awarding costs and/or attorney's fees."

Petitioner contends that the Board impermissibly imposed costs without making findings of fact or conclusions of law as to the reasonableness of the $10,000.00 award of costs. "If a licensee is found to have violated any provisions of this Article or any rule adopted by the Board, the Board may charge the costs of a disciplinary proceeding, including reasonable attorneys' fees, to that licensee." N.C. Gen. Stat. § 90-157.4(d). Petitioner homes in on the word "reasonable" and argues that the Board's imposition of costs, "without any factual foundation and analysis, . . . cannot stand."

Petitioner cites *Early v. County of Durham, Department of Social Services*, in which this Court addressed the reasonableness of attorney's fees under N.C. Gen. Stat. § 6-19.1. 193 N.C. App. 334, 346–47, 667 S.E.2d 512, 521–22 (2008), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 237 (2009). However, that case is inapposite, as a court may award attorney's fees pursuant to § 6-19.1 "only upon a finding that the agency acted without substantial justification and that there are no special circumstances that would make the award of attorney's fees unjust." *Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contr'rs*, 374 N.C. 726, 734, 843 S.E.2d 207, 213 (2020). "The purpose of [N.C. Gen. Stat.] § 6-19.1 is to curb unwarranted, ill supported suits initiated by State agencies, by requiring that the State's action be substantially justified." *Id.* at 735, 843 S.E.2d at 213 (cleaned up). Not only was Petitioner not the prevailing party in this case, but it is evident that the Board's initiation of this disciplinary proceeding was neither "unwarranted" nor "ill supported[.]" *Id.* (citation omitted).

Here, as noted above, the superior court correctly found that "[t]he Board has sufficient statutory authority to impose costs and attorney's fees for a licensee found to have violated Board statutes and rules pursuant to N.C. Gen. Stat. § 90-157.4(d)." The court also found that Petitioner "failed to show that the Board erred with respect to awarding costs and/or attorney's fees." So too on appeal. Petitioner primarily asserts that "[t]here is no factual or legal basis upon which to determine whether the award of costs" was "reasonable." By grounding her argument in the requirement that the Board make explicit findings and conclusions regarding reasonableness, however, Petitioner has essentially forgone any attempt to argue that the amount of the award was *un*reasonable. Petitioner merely alleges—without support—that "[t]he assessment of $10,000.00 against [her] is punitive in nature."

It is axiomatic that the burden is on the appellant to show an error by the lower court. As the superior court concluded, the Board indisputably has the statutory authority to impose an award of reasonable costs. N.C. Gen. Stat. § 90-157.4(d). Because Petitioner does not demonstrate on appeal how the award of costs was unreasonable, Petitioner has not carried her burden. Therefore, this argument is overruled.

III. Conclusion

Accordingly, we affirm the superior court's order affirming the Board's amended final decision.

AFFIRMED.

Judges HAMPSON and THOMPSON concur.

HILL v. EWING

[295 N.C. App. 345 (2024)]

MARY A. HILL, PLAINTIFF
v.
RENEE P. EWING, CURTIS E. EWING, HERMAN T. EWING, NATHANIEL V. EWING, AND MONICA Y. EWING, THE HEIRS OF ANNIE MARIE EWING, AND CORA LEE BRANHAM, HERMAN BRANHAM, ROSLYN BRANHAM PAULING, LARUE BRANHAM, AND LEROY BRANHAM, THE HEIRS OF ANNIE BRANHAM, BRIGHT & NEAT INVESTMENT LLC, THOMAS RAY, CLARISSA JUDIT VERDUGO GAXIOLA (AKA CLARISSA J. VERDUGO) AND GEOFFREY HEMENWAY, DEFENDANTS

No. COA23-982

Filed 20 August 2024

1. Aiding and Abetting—action against attorney—aiding conduct involving champerty and maintenance—sufficiency of pleading

The trial court erred by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against an attorney for aiding and abetting another defendant's conduct involving champerty and maintenance with regard to plaintiff's property. The other defendant had contacted multiple parties about potential claims they had to plaintiff's property, promised to bring a suit on their behalf in exchange for 25% of any money recovered from the prosecution of those claims, and then hired defendant attorney. Plaintiff sufficiently stated a claim upon which relief could be granted by alleging that defendant attorney engaged in legal work in pursuit of the claims put forth by the other defendant, including by preparing a non-warranty deed, with no title examination, purporting to grant rights to plaintiff's property without plaintiff's involvement.

2. Aiding and Abetting—action against attorney—aiding slander of title—failure to allege special damages

The trial court properly dismissed, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against an attorney for aiding and abetting another defendant in his alleged slander of title because plaintiff failed to allege the essential element of slander of title that she suffered special damages as a result of false statements contained in a deed that was recorded by defendant attorney and that purported to transfer title to plaintiff's property. Generalized assertions that plaintiff suffered damages, including that she incurred expenses in hiring an attorney to defend title, were insufficient to demonstrate special damages.

Appeal by plaintiff from order entered 3 April 2023 by Judge David H. Strickland in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2024.

The Odom Firm, PLLC, by Thomas L. Odom, Jr., and Martha C. Odom, for plaintiff-appellant.

Alexander Ricks, PLLC, by Amy P. Hunt, for defendant-appellee Geoffrey Hemenway.

DILLON, Chief Judge.

This case arises from a dispute over a parcel of land located in the Berryhill Township area of Mecklenburg County (the "Property"). Plaintiff Mary A. Hill purportedly owns a one-half interest in the Property. Until recently, the other half interest was owned by the defendants with "Branham" as their last name, who are the heirs of Annie Branham (the "Branham Defendants").

This present appeal does not concern Plaintiff's claim regarding the true ownership in the Property. Rather, this appeal concerns her claims against an attorney, Defendant Geoffrey Hemenway (the "Defendant Attorney"), who was hired to represent the interests of the Branham Defendants. Specifically, Plaintiff brought claims against Defendant Attorney for the aiding and abetting of slander of title, champerty, and maintenance. The trial court dismissed these claims against Defendant Attorney pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. Plaintiff appeals that interlocutory order. We affirm in part and reverse in part.

I. Background

As this is an appeal from a Rule 12(b)(6) dismissal, we must assume the factual allegations of the complaint are true, but not the conclusions of law. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). The factual allegations in Plaintiff's complaint show as follows:

In 1945, Pearlie Ellison purchased the Property. In 1970, Ms. Ellison died intestate. Her two daughters, Cora Washington and Annie Branham, each inherited a one-half interest in the Property.

In 2008, Ms. Branham died, and her heirs (the "Branham Defendants") acquired her one-half interest in the Property.

In 1973, Ms. Washington died, leaving her one-half interest to her husband Herman Washington, in accordance with her will. She did not leave any interest in the Property to her daughter Annie Marie Ewing. And neither Ms. Ewing nor *her* heirs (the "Ewing Defendants") ever acquired any interest in the Property, as Mr. Washington eventually left this half-interest to *his* daughter Plaintiff Mary Hill upon his death in 2011. During his lifetime, Mr. Washington did, however, grant an easement in the Property to Piedmont Natural Gas Company, Inc., ("Piedmont") for $95,000.00.

Accordingly, as of 2011, Mary Hill has owned a one-half interest in the Property, subject to Piedmont's easement interest; and the Branham Defendants owned the other one-half interest in the Property.

For a number of years, up through 2020, Mr. Washington—and then his daughter (Plaintiff) after his death—paid the ad valorem taxes on the Property.

In early 2020, Defendant Thomas Ray, the owner of Defendant Bright & Neat Investment LLC, contacted the Branham Defendants and Ewing Defendants, "advising them that they had claims against [Plaintiff and Piedmont] and he would assist them with money and pay for an attorney to prosecute alleged claims against [Plaintiff and Piedmont] and they would divide the recovery of any money, with Defendant Ray receiving 25%."

Defendant Ray hired the Defendant Attorney to assist him in his efforts to help the Branham Defendants and the Ewing Defendants. The Defendant Attorney prepared a non-warranty deed, with no title examination, wherein the Ewing Defendants and the Branham Defendants granted to themselves and each other the Property, making no mention in the deed to Plaintiff's interest in the Property. Plaintiff alleges that Defendant Attorney prepared the deed in this way, even though he was well aware of Plaintiff's interest in the Property.

In any event, the Ewing defendants and Branham Defendants executed the deed, and Defendant Attorney recorded the deed.

Shortly thereafter, Defendant Attorney prepared multiple letters that were sent to Plaintiff and Piedmont in which he claimed to be representing the Branham Defendants and the Ewing Defendants.

In November 2020, the Ewing Defendants and the Branham Defendants executed a document purportedly granting Piedmont an easement on the Property in exchange for $12,000. This money was split

among the Branham Defendants and Ewing Defendants, with $3,000 going to Defendant Ray as his 25% facilitation fee.[1]

Plaintiff commenced this action, stating claims against Defendant Ray for champerty, maintenance, and slander of title. She also brought claims against Defendant Attorney for aiding and abetting Defendant Ray's tortious acts.

The trial court dismissed Plaintiff's claims against Defendant Attorney pursuant to Rule 12(b)(6) for failure to state a claim. Plaintiff appeals.

II. Appellate Jurisdiction

The trial court determined the dismissal to be a final judgment as to Defendant Attorney and certified there was no just reason for delay, thus allowing for immediate appeal to our Court. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (2023).

III. Analysis

On appeal, our Court reviews *de novo* a trial court's ruling on a motion to dismiss under Rule 12(b)(6). We must determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000).

[1] Plaintiff first alleges that Defendant Attorney aided and abetted Defendant Ray in his alleged violations of champerty and maintenance.

Maintenance is "an officious intermeddling in a suit which belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it," and champerty is a type of maintenance "whereby a stranger makes a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." *Smith v. Hartsell*, 150 N.C. 71, 76, 63 S.E. 172, 174 (1908).

In her complaint, Plaintiff alleges that Defendant Ray notified the Ewing Defendants and the Branham Defendants about potential claims they had against Plaintiff, that he told them he would pay for the prosecution of those claims, that he would receive 25% of any money recovered

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1. In August 2021, the Branham Defendants deeded their "1/2 interest" in the Property to Defendant Bright & Neat (Defendant Ray's LLC) pursuant to a non-warranty deed. Defendant Bright & Neat now claims to own a one-half interest in the Property as tenants in common with Plaintiff. Defendant Ray and/or Defendant Clarissa Verdugo own all of the ownership interest in Bright & Neat.

from the prosecution of those claims, that he engaged Defendant Attorney to pursue those claims, and that Defendant Attorney indeed engaged in legal work in the pursuit of those claims. Based on the notice pleading requirements under our Rules of Civil Procedure, *see*, *e.g.*, *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106, 868 S.E.2d 5, 14 (2022), we conclude Plaintiff sufficiently alleged claims against Defendant Attorney for aiding and abetting Defendant Ray's alleged conduct involving champerty and maintenance. Thus, we conclude the trial court erred in dismissing Plaintiff's complaint against Defendant Attorney as to those claims.

[2] Plaintiff next alleges that Defendant Attorney aided and abetted Defendant Ray in his alleged slander of title. For the reasoning below, we conclude that Plaintiff failed to allege a claim for slander of title and, accordingly, that the trial court properly dismissed Plaintiff's claim against Defendant Attorney for aiding and abetting Defendant Ray in his alleged slander of title.

"The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) *special damages*." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 30, 588 S.E.2d 20, 28 (2003) (emphasis added).

Our Supreme Court has instructed that "the gist of [a slander of title claim] is the special damages sustained." *Cardon v. McConnell*, 120 N.C. 461, 462, 27 S.E. 109, 109 (1897). Regarding "special damages," that Court has stated that "general damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to a particular individual by reason of the particular circumstances of the case." *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945).

Our General Assembly has provided in our Rules of Civil Procedure that "[w]hen items of special damages are claimed[,] each shall be averred." N.C. Gen. Stat. § 1A-1, Rule 9(g) (2023).

Citing that Rule, our Supreme Court has determined that where special damages is an element of a cause of action, the plaintiff *must* allege facts showing how (s)he suffered special damages; otherwise, the complaint is subject to dismissal under Rule 12(b)(6):

> [D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6).

> Moreover [Rule] 9(g) requires that when items of special damages are claimed, each shall be averred. Thus, where the special damage is an integral part of the claim for relief, its insufficient allegation could provide the basis for dismissal under Rule 12(b)(6).

Stanback v. Stanback, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (internal marks omitted).

Indeed, in *Cardon*, our Supreme Court instructed that unless a plaintiff seeking damages for slander of title can show how he suffered special damages from the false/malicious statements of the defendant, "he cannot maintain the action." *Cardon*, 120 N.C. at 462, 27 S.E. at 109. *See also Ringgold v. Land*, 212 N.C. 369, 371, 193 S.E.2d 267 (1937) (concluding that a complaint seeking damages for slander *per quod* which fails to allege facts showing special damages is properly dismissed).[2]

In *Stanback*, for instance, our Supreme Court held that mere allegations that the plaintiff had to pay attorneys to challenge the false statements of the defendant, and that the plaintiff suffered a certain dollar amount of special damages, without more, are inadequate. *Stanback*, 297 N.C. at 204, 254 S.E.2d at 626. Specifically, in that case, the Court held that dismissal was proper for failure to allege special damages where the plaintiff alleged that she "has been damaged in that she has incurred expenses in defending said claim and has suffered embarrassment, humiliation, and mental anguish in the amount of $100,000.00." *Id.*

Accordingly, it is incumbent on a plaintiff seeking damages for slander of title to allege in her complaint how she suffered special damages. That is, it is not enough simply to allege generally that she was damaged because of the false and malicious statements contained in the deed made regarding her interest in the Property or that she hired an attorney to challenge the false statements. For instance, in *Cardon*, our Supreme Court held that the plaintiff suffered special damages for a slander of title where the plaintiff showed that the defendant interfered in the plaintiff's attempt to sell the property, with evidence that the defendant had falsely claimed to a prospective buyer that the plaintiff did not own

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2. Our Court, likewise, has held that where special damages is an element of a cause of action, the failure to allege facts showing special damages subjects the complaint to dismissal. *See Casper v. Chatham Cnty.*, 186 N.C. App. 456, 651 S.E.2d 299 (2007) (dismissal of petition by landowners challenging special use permit granted to a neighbor was proper where landowners failed to allege how they suffered special damages); *Donvan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994) (complaint for slander *per quod* properly dismissed where plaintiff failed to allege special damages).

the property, thereby causing the sale to fall through. 120 N.C. at 461, 27 S.E. at 109.

Here, Plaintiff has not alleged facts showing special damages suffered. She simply alleges that she suffered damages in excess of $25,000 by Defendants' actions associated with false statements concerning the Property's title and has incurred expenses in hiring an attorney. Plaintiff has alleged that some of the Defendants split proceeds from the sale of an easement to Piedmont in 2020. However, she does not allege how she suffered special damages from that sale. That sale did not affect Plaintiff's interest in the Property, as a proper title search would have revealed Plaintiff's one-half interest and Plaintiff did not join in that 2020 transaction. Accordingly, her record interest was not affected by that sale. Also, Plaintiff's father (Mr. Washington) had already sold easement rights to Piedmont before his death—though he owned only a one-half interest in the Property.

In sum, since Plaintiff has not alleged facts showing special damages – an essential element of slander of title – we conclude the trial court properly dismissed Plaintiff's claims against Defendant Attorney associated with slander of title.

IV. Conclusion

We reverse the trial court's dismissal of Plaintiff's claims against the Defendant Attorney alleging aiding and abetting the torts of champerty and maintenance. However, we affirm the trial court's dismissal of her claim against Defendant Attorney alleging slander of title and aiding and abetting slander of title. We remand for further proceedings consistent with this opinion on Plaintiff's surviving claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges TYSON and GRIFFIN concur.

IN THE MATTER OF D.R.J.

No. COA23-671

Filed 20 August 2024

1. Appeal and Error—preservation of issues—failure to renew motion to dismiss—Appellate Rule 2 not invoked

In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), the Court of Appeals declined to invoke Appellate Rule 2 to review juvenile's unpreserved argument that the district court erred by failing to dismiss petitions for second-degree forcible rape and sexual battery (for insufficiency of evidence that juvenile used physical force beyond that inherent in the sexual contact), where the juvenile did not renew his motion to dismiss at the close of all evidence and the argument was without merit.

2. Constitutional Law—effective assistance of counsel—failure to renew motion to dismiss—prejudice not shown

In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile could not demonstrate the prejudice necessary to show he received ineffective assistance when his counsel failed to renew a motion to dismiss petitions for second-degree forcible rape and sexual battery for insufficiency of evidence that juvenile used physical force beyond that inherent in the sexual contact. The evidence—including testimony from the victim that juvenile grabbed her and would not let her leave the room after she said no to his advances and told him to stop—taken in the light most favorable to the State, showed juvenile's use of force, however slight, to compel the victim's submission. Accordingly, even had juvenile's counsel renewed the motion to dismiss, it would have been properly dismissed.

3. Evidence—exclusion of testimony—no offer of proof—argument dismissed

In a delinquency proceeding arising from the sexual assault of a thirteen year-old-girl by her older brother (juvenile), juvenile's argument that the district court erred in excluding testimony from the grandparents of the juvenile (and the victim) about prior instances when the victim allegedly conflated fictional television portrayals with her real life—which juvenile contended was relevant to the victim's untruthfulness and admissible pursuant to Evidence Rule

404(b)—was dismissed because juvenile failed to make an offer of proof regarding the excluded testimony, preventing the Court of Appeals from determining whether the exclusion was prejudicial. The court further noted that Evidence Rule 608(b)—not Rule 404(b)—addresses the admission of specific instances of conduct concerning a witness's character for truthfulness or untruthfulness.

Appeal by juvenile from adjudication order entered 17 August 2022 and disposition order entered 5 December 2022 by Judge Julius H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 16 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Henry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for juvenile-defendant-appellant.

ZACHARY, Judge.

Juvenile-Appellant "David"[1] appeals from the district court's juvenile adjudication and disposition orders adjudicating him delinquent on petitions for misdemeanor sexual battery, felony second-degree forcible rape, and felony incest, and placing him on probation and ordering his cooperation with placement into a sex-offender-specific treatment program. After careful review, we affirm the court's adjudication and disposition orders.

BACKGROUND

On 12 July 2021, David's younger sister Claire shared with a friend that she feared that she might be pregnant, and the girls visited their middle school nurse. Claire told the nurse that she "was concerned she may be pregnant" because "[s]omething happened with [her] brother." After the school nurse explained what intercourse is, Claire confirmed that she and David had had intercourse. Claire also stated that David did not use a condom, and that she did not know "the last time [she] had a period[.]"

At this time, David and Claire were 15 and 13 years old, respectively, and they lived with their grandparents. Further, Claire has an

1. We use the pseudonyms adopted by the parties to protect the identities of the juveniles involved in this matter. *See* N.C. R. App. P. 42(b).

intellectual disability such that "she basically functions at the level of a second grader and emotionally and mentally like an eight-year-old[.]"

Following her conversation with Claire, the school nurse conferred with the school's social worker, who decided to "take it forward and call the county[.]" That same day, Detective Kelsey Allen of the New Hanover County Sheriff's Office Crimes Against Children Unit interviewed Claire at school. The New Hanover County Department of Social Services removed Claire from the home that afternoon.

According to Claire, David slept in Claire's bedroom over the July 4th weekend to accommodate a family guest. Claire recalled that on the evening in question she was in bed when David entered her room and removed her clothing and underwear. Claire remembered that David was naked and that he touched her body with his hands, at one point "laying on top of [her.]" She said that David inserted his penis into her vagina and "ma[d]e [her] hand touch his penis[.]" David told Claire not to tell anyone and then "left the room . . . [t]o go play Xbox."

On 29 July 2021, the State filed juvenile petitions alleging that David was delinquent for the commission of the offenses of felony incest, felony second-degree forcible rape, and misdemeanor sexual battery. On 26 July 2022, the State filed a fourth juvenile petition alleging that David committed the offense of felony crime against nature.[2]

David's adjudicatory hearing took place on 2 August 2022. On 17 August 2022, the district court entered an order adjudicating David delinquent on the misdemeanor sexual battery, felony second-degree forcible rape, and felony incest petitions. On 5 December 2022, the district court entered its disposition order, in which the court, *inter alia*, placed David on supervised probation and ordered that David "cooperate with placement in . . . a residential treatment facility [for] sex offense specific treatment[.]" David filed timely written notice of appeal.

DISCUSSION

On appeal, David first argues that the district court "erred by failing to dismiss the second-degree forcible rape and sexual battery petitions because the State failed to prove the use of force, an essential element of each" offense. Alternatively, if the Court concludes that this issue was not preserved for appeal because David's counsel failed to renew the motion to dismiss at the close of all evidence, David asks that this Court hold that he received ineffective assistance of counsel. Finally, David

2. The State subsequently dismissed this petition.

argues that "[w]here the State's case rested squarely on Claire's version of events[ ] the [district] court erred by excluding testimony from David and Claire's grandparents about prior instances of Claire conflating fictional television portrayals with her real life."

Motion to Dismiss for Insufficiency of the Evidence

[1] David first asserts that the district court "erred by failing to dismiss the second-degree forcible rape and sexual battery petitions," arguing that the State "failed to present substantial evidence that [he] used physical force beyond what was inherent in the sexual contact itself."

David concedes that although his counsel moved to dismiss the second-degree forcible rape and sexual battery petitions at the close of the State's evidence, he failed to renew the motion at the close of all evidence. *See In re Hodge*, 153 N.C. App. 102, 106–07, 568 S.E.2d 878, 881 (explaining that "a [juvenile] who moves to dismiss a charge based on insufficiency of the evidence after the close of the State's evidence waives the benefit of that objection if, after the motion is denied, the [juvenile] presents his own evidence" but "fails to move to dismiss the action at the close of all the evidence" (cleaned up)), *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 681 (2002); *see also* N.C. R. App. P. 10(a)(3). Thus, David lacks the right to "assert the denial of his motion as grounds for relief on appeal." *Hodge*, 153 N.C. App. at 107, 568 S.E.2d at 881.

Nonetheless, David contends that review of the court's denial of his motion to dismiss is warranted under Rule 2. Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, this Court may suspend the appellate rules and reach the merits of an otherwise unpreserved issue on direct appeal where necessary "to prevent manifest injustice to a party" that would result from sustaining an adjudication that lacked evidentiary support. *In re S.A.A.*, 251 N.C. App. 131, 134, 795 S.E.2d 602, 605 (2016) (citation omitted). Rule 2 is an "extraordinary step" that must be invoked cautiously; "inconsistent application of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (cleaned up), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018). "This residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in exceptional circumstances . . . ." *In re A.W.*, 209 N.C. App. 596, 599, 706 S.E.2d 305, 307 (2011) (cleaned up).

Here, David's unpreserved argument is without merit, as explained below. Accordingly, in our discretion, we decline to invoke Rule 2 on this issue. *See In re I.W.P.*, 259 N.C. App. 254, 258, 815 S.E.2d 696, 701 (2018).

Ineffective Assistance of Counsel

[2] In the alternative, David maintains that his counsel below provided ineffective assistance in failing to renew the motion to dismiss the second-degree forcible rape and sexual battery petitions at the close of all evidence, thus foreclosing our review of that issue. We are not persuaded.

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient, and that this deficient performance prejudiced his defense. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (cleaned up). "[T]he two prongs of an ineffective assistance claim (attorney error and prejudice) need not be considered in any particular order. In fact, the [United States Supreme] Court [has] intimated that disposing of an ineffective assistance claim on the ground of lack of sufficient prejudice, if possible, is preferable." *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985).

Accordingly, we begin by determining whether "there is a reasonable probability that, but for counsel's" failure to renew the motion to dismiss on sufficiency grounds at the close of all evidence, "the result of the proceeding would have been different." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citation omitted).

Denial of a juvenile's motion to dismiss will be upheld if there is "substantial evidence (1) of each essential element of the offense charged and (2) of the juvenile's being the perpetrator of such offense." *In re K.M.M.*, 242 N.C. App. 25, 27, 774 S.E.2d 430, 431 (2015) (cleaned up). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re T.T.E.*, 372 N.C. 413, 420, 831 S.E.2d 293, 298 (2019) (citation omitted). "[C]ontradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* (citation omitted). "So long as the evidence supports a reasonable inference of the [juvenile's] guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the [juvenile's] innocence." *Id.* at 420–21, 831 S.E.2d at 298 (cleaned up). Thus,

> [t]he bar to survive a . . . motion to dismiss for insufficiency of the evidence is low, such that . . . . if there be *any* evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, . . . the case should be submitted to the [finder of fact].

State v. Taylor, 379 N.C. 589, 611, 866 S.E.2d 740, 757 (2021) (citation omitted).

Both sexual battery and second-degree forcible rape include force as an element. "The crime of sexual battery is committed when any person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person by force and against the will of the other person." *In re J.U.*, 384 N.C. 618, 624, 887 S.E.2d 859, 864 (2023) (cleaned up); *accord* N.C. Gen. Stat. § 14-27.33(a)(1) (2023). Similarly, "[a] person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person . . . ." N.C. Gen. Stat. § 14-27.22(a)(1).

Our Supreme Court recently addressed the quantum of evidence required to satisfy the force element in the offense of sexual battery. *J.U.*, 384 N.C. at 625, 887 S.E.2d at 864. "[T]he requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion." *Id.* (cleaned up). "Although the term 'by force' is not defined in the relevant statutory scheme," the term "physical force" has been determined to "mean[ ] force applied to the body." *Id.* (citation omitted). The element is present "if the defendant uses force sufficient to overcome any resistance the victim might make[.]" *Id.* at 624, 887 S.E.2d at 864 (citation omitted). Of particular relevance to the present case is the Supreme Court's conclusion that "common sense dictates that . . . one cannot engage in nonconsensual sexual contact with another person without the application of some 'force,' however slight." *Id.* at 625, 887 S.E.2d at 864 (citations omitted). Because the identical phrase "by force and against the will of the other person" is used in both statutes, we apply the Supreme Court's well-reasoned analysis regarding the use of force in sexual battery cases to the second-degree forcible rape petition as well.

In the case at bar, David maintains that "the State failed to elicit any evidence of the use of force during Claire's testimony" and notes that, on cross-examination, "Claire explicitly disavowed that David used any force, denying that she was held, threatened with violence, or hit."

While in response to defense counsel's inquiry, "did [David] hold you—did he grab your hands or—or force you with his hands at all[,]" Claire did respond, "No, sir," our review of the entire transcript of her testimony reveals the following. Claire testified that she told David, "No," that she told him to stop, that she did not give him permission, and that she tried to leave the room. Claire confirmed on cross-examination that she remembered trying "to walk away" and "[l]eave the room"; furthermore, when she refused to remove her clothing, David removed them from her himself. Defense counsel asked, "and so what happened when you tried to step away from him?" Claire responded that David "just made [her] come in closer." She also confirmed on cross examination that David "grab[bed]" her and would "not let [her] go[.]" In evaluating sufficiency, such "conflicts in the evidence are resolved in favor of the State[.]" *T.T.E.*, 372 N.C. at 420, 831 S.E.2d at 298 (citation omitted).

This evidence shows the use of force, however slight, to "compel [Claire's] submission to the sexual acts[,]" *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987), and to "overcome any resistance[,]" *J.U.*, 384 N.C. at 624, 887 S.E.2d at 864 (citation omitted). It is therefore sufficient to clear the low bar of a motion to dismiss and to submit the matter to the finder of fact. *See Taylor*, 379 N.C. at 611, 866 S.E.2d at 757.

Therefore, even had David's counsel renewed the motion to dismiss the second-degree forcible rape and sexual battery petitions at the close of all evidence, the district court would have properly denied it. *See State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013); *see also In re Clapp*, 137 N.C. App. 14, 24, 526 S.E.2d 689, 696 (2000) ("Thus, even assuming *arguendo* that the juvenile's attorney should have moved to dismiss the petition for insufficient evidence of force, we conclude that this omission did not prejudice the juvenile's defense since sufficient evidence of force was presented during the hearing."). Accordingly, David cannot show prejudice in his counsel's performance on this point, and we overrule David's alternative claim of ineffective assistance of counsel.

Exclusion of Testimony

[3] Finally, David argues that because "the State's case rested squarely on Claire's version of events, the [district] court erred by excluding testimony from [her] grandparents about prior instances of Claire conflating fictional television portrayals with her real life." Specifically, David contends that the district court erred in excluding the grandparents' testimony because the evidence "was [for] a permissible purpose . . . under Rule 404(b)." According to David, "[i]f the [district] court had heard that

Claire's grandparents . . . generally believed her to be untruthful and believed she had difficulty distinguishing between reality and fiction, the court probably would have recognized . . . her story was untrue[.]" We disagree.

Although both Rule 404(b) and Rule 608(b) of the North Carolina Rules of Evidence "concern the use of specific instances of a person's conduct, the two rules have very different purposes and are intended to govern entirely different uses of extrinsic conduct evidence." *State v. Morgan*, 315 N.C. 626, 633, 340 S.E.2d 84, 89 (1986).

Rule 608(b) "provides that specific instances of a witness'[s] conduct may, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning [her] character for truthfulness or untruthfulness." *State v. Lewis*, 365 N.C. 488, 494–95, 724 S.E.2d 492, 497 (2012) (cleaned up). Rule 608(b) states:

> (b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting [her] credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning [her] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b).

Under this rule, "[t]he focus . . . is upon whether the conduct sought to be inquired into is of the type which is indicative of the actor's character for truthfulness or untruthfulness." *Morgan*, 315 N.C. at 634–35, 340 S.E.2d at 90. Finally, if evidence is admissible under Rule 608(b), then the adjudication judge "must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness." *Id.* at 634, 340 S.E.2d at 90.

After the State rested its case, David presented the grandparents as witnesses on his behalf. David's counsel first examined the grandmother regarding Claire's understanding of reality:

Q. Does [Claire] sometimes have difficulty differentiating between what's happening on television and what's real?

A. Yes.

Q. And can you give an example—

[THE STATE]: Objection. . . . [T]ruthfulness of a witness and talking about specific instances of conduct . . . . [is] only allowed on cross-examination. . . .

. . . .

THE COURT: Overruled at this point, but I'll be glad to revisit that with other questions.

. . . .

Go ahead, [defense counsel].

Q. My next question [is] can you give an example of that?

A. There was times when she'd be watching different shows . . . or be watching any shows . . . , she had problems understanding or comprehending that these were actors portraying somebody that this wasn't, like, a livestream of somebody's life. She had hard times understanding that these people were going off a script, and they were acting because she'd see them perhaps on another show, and she'd be like, well, how come, for example, Emmie Fleming is [in] that show? Won't the people on that show get mad at her because she's over there? She couldn't comprehend that these were actors portraying people on situation shows.

Q. Was there ever a time where after seeing a show or a movie that she would claim something similar was experienced by her?

A. She—

[THE STATE]: Objection.

THE COURT: Sustained.

The grandfather attempted to testify similarly:

Q. Okay. And the night before [Claire reported the allegation to school personnel], what were you doing that night?

A. Watching T.V. with [Claire]. We usually sit down and watch Heartland together and then Baywatch and different shows.

Q. And is there something specifically you remember about watching television that night?

A. Yeah. Baywatch had . . . a show where the lifeguards were performing different stunts and stuff and then, they found out that one of their lifeguards was actually a predator that had molested a younger child the night before. And she had seen that and she was asking questions about it, and I told her it was wrong, you don't do that . . . .

. . . .

Q. And then, it was the very next day that [Claire]—

A. Yes, sir.

Q. —said that that happened?

A. Yes, sir.

Q. Is that the first time something like that had happened?

A. No.

[THE STATE]: Objection.

THE COURT: Sustained.

[THE STATE]: Also motion to strike.

THE COURT: Court will consider the witness'[s] statement.

. . . .

Q. Has [Claire] ever said that she was pregnant—

A. Yes, she has.

Q. —or thought she was pregnant prior to that—

A. Yes, sir.

Q. When was that?

[THE STATE]: Objection. . . .

THE COURT: Sustained.

> [DEFENSE COUNSEL]: Judge, I would just argue that it is relevant and that it shows a pattern of behavior by [Claire] and is not character evidence as it's showing . . . . what she did in kind of a sequential kind of patterned behavior.
>
> . . . .
>
> [THE STATE]: Your Honor, it's talking about the credibility of a witness and . . . attacking the credibility of the witness based on previous pattern of behavior . . . . And Rule 608 states that the credibility of a witness may be attacked or supported by evidence in the form of a reputation or opinion . . . .
>
> . . . .
>
> [S]pecific instance[s] of the conduct [are] only allowed on cross-examination with a few other exceptions that just don't apply in this situation . . . .
>
> . . . .
>
> THE COURT: All right. Objection sustained.

"It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness'[s] testimony would have been had [the witness] been permitted to testify." *State v. Applewhite*, 190 N.C. App. 132, 137, 660 S.E.2d 240, 244 (citation omitted), *review denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). "Without a showing of what the excluded testimony would have been, we are unable to say that the exclusion was prejudicial." *Id.* at 138, 660 S.E.2d at 244 (cleaned up). Here, David failed to make an offer of proof demonstrating the substance of the grandparents' excluded testimony, thus hampering our review, and this argument is dismissed.

CONCLUSION

We dismiss David's appeal as to his unpreserved argument regarding the trial court's denial of his motion to dismiss, deny his ineffective assistance of counsel claim, and dismiss his argument regarding the district court's exclusion of testimony. The district court's adjudication and disposition orders are affirmed.

DISMISSED IN PART; AFFIRMED IN PART.

Judges COLLINS and FLOOD concur.

IN RE K.C.

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

IN THE MATTER OF K.C.

No. COA24-112

Filed 20 August 2024

Child Abuse, Dependency, and Neglect—adjudication—neglect—substantial risk of future neglect—mental health and substance abuse—failure to provide necessary medical care

The trial court did not err in adjudicating respondent-mother's child as neglected where both respondent-mother and the child tested positive for illegal drugs immediately after the child's birth, and where respondent-mother's subsequent failure to complete a substance abuse assessment, timely complete a mental health assessment, and arrange for necessary medical care for the child indicated a substantial risk of future neglect. Notably, even though the child suffered from multiple health issues, including a hernia that required surgical removal, respondent-mother failed to attend twenty-four out of forty-one doctor's appointments for the child due to cancellations and no-shows, all within the first year of the child's life.

Appeal by Respondent-Mother from order entered 24 October 2023 by Judge Beth Heath in Lenoir County District Court. Heard in the Court of Appeals 14 May 2024.

Jeffrey L. Miller, for Respondent-Mother.

Sonya Davis, for Respondent-Father, no brief filed.

Robert Griffin, for Petitioner-Appellee Lenoir County Department of Social Services.

Winston & Strawn, LLP, by Stacie C. Knight, for the Guardian Ad Litem.

CARPENTER, Judge.

Respondent-Mother appeals from an order (the "Order") adjudicating the juvenile, Ken,[1] neglected within the meaning of N.C. Gen. Stat.

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

§ 7B-101(15) and granting temporary custody of Ken to the Lenoir County Department of Social Services ("DSS"). On appeal, Respondent-Mother argues the trial court erred in adjudicating Ken as a neglected juvenile. After careful review, we affirm the Order.

I. Factual & Procedural Background

Ken was born in August of 2022 to Respondent-Mother and Father, who were and remain an unmarried couple. On 19 May 2023, DSS filed its juvenile petition. The petition alleged that Ken was a neglected juvenile due to a positive meconium test, unsuccessful attempts by DSS to engage Respondent-Mother in substance-abuse treatment, a lack of response from Respondent-Mother to texts and calls from DSS, and multiple missed medical appointments regarding Ken's health issues. That same day, the trial court signed an order for nonsecure custody, placing Ken under temporary DSS custody. On 18 September 2023, the trial court conducted the adjudication hearing. Respondent-Mother appeared with counsel, and the evidence tended to show the following.

At Ken's birth, Respondent-Mother's urine screen was positive for amphetamines. Ken's meconium screening, which tested Ken's first bowel movement, was positive for amphetamines and methamphetamine. On 9 August 2022, DSS began its involvement with Ken, Respondent-Mother, and Father due to Respondent-Mother's positive urine screen and Ken's positive meconium test. DSS regularly communicated, or made unsuccessful attempts to communicate, with Respondent-Mother and Father, attempted to engage Respondent-Mother in substance-abuse treatment, and assisted Respondent-Mother with transportation to some of Ken's necessary medical appointments.

Soon after his birth, Ken developed health conditions—including jaundice, an abscess, a hernia, and MRSA—which required medical care in addition to his wellness checks. On 8 August 2022, Respondent-Mother took Ken to the doctor for jaundice, but then cancelled a newborn visit on 9 August 2022 and no-showed for a sick-newborn recheck on 10 August 2022. On 11 August 2022, Respondent-Mother took Ken to the doctor for a well-child visit. On 15 August 2022, Respondent-Mother took Ken to the doctor for a walk-in appointment due to concerns over his deep sleep, jaundiced color, and white patches on his tongue. She then cancelled a weight check on 18 August 2022 and no-showed two weight checks on 19 and 20 August 2022.

A month later, Respondent-Mother took Ken to the doctor for: concerns regarding formula intolerance, thrush, nasal congestion, coughing, and sneezing on 16 September 2022; a diaper rash on 26 September

2022; and a hernia on 4 October 2022. Respondent-Mother then cancelled an ultrasound appointment for the hernia on 7 October 2022 before completing the ultrasound on 11 October 2022. Afterward, she missed an appointment with the surgical center for Ken's hernia and cancelled twice before meeting with the surgical center on 2 November 2022. Respondent-Mother cancelled a follow-up surgical appointment on 8 November 2022 and a well-child visit at the clinic on 11 November 2022.

On 8 December 2022, Respondent-Mother took Ken to the doctor regarding an abscess on his buttocks. Afterward, she cancelled a well-child visit, a surgical appointment for the hernia, and a checkup for the abscess. On 19 December 2022, Respondent-Mother attended a checkup for Ken's abscess, but cancelled a well-child visit and two checkups for Ken's cough and congestion afterward. On 6 February 2023, she took Ken to the doctor for a positive COVID test but subsequently cancelled two well-child visits.

On 23 February 2023, Respondent-Mother took Ken for his five-month well-child visit when he was six months old. Then she cancelled two follow-up appointments regarding Ken's cough and no-showed a surgical appointment regarding Ken's hernia. Respondent-Mother took Ken for a well-child visit on 24 April 2023, a sick visit regarding seizure activity and MRSA on 9 May 2023, a diagnostic neurological visit for MRSA on 10 May 2023, and a visit for hernia removal on 11 May 2023. Afterward, she cancelled a well-child visit on 26 June 2023 and a urology visit on 29 June 2023. In sum, as of 30 June 2023, Respondent-Mother failed to attend twenty-four out of forty-one medical appointments for Ken.

Respondent-Mother denied any substance use after discovering she was pregnant with Ken at eighteen weeks. She also claimed DSS did not request substance-abuse and mental-health assessments until December 2022. Respondent-Mother did not obtain a mental-health assessment until the week before the adjudication hearing due to issues with insurance, and she never completed a substance-abuse assessment due to having "a lot going on." Respondent-Mother then said she "did not recall" the missed appointments or claimed she only rescheduled or postponed them to a later date. She had difficulty arranging transportation without her own car, despite qualifying for Medicaid and its transportation services, and obtained transportation from her mother, friend, social worker, and EMS when necessary.

In the Order, the trial court made the following findings of fact within Finding 11, in pertinent part:

> [t]he minor child's meconium tested positive for amphetamines and methamphetamines at birth
>
> . . . .
>
> Respondent Mother has no explanation as to why the minor child's meconium was positive for methamphetamine and amphetamines
>
> . . . .
>
> Many of those appointments were no shows and cancellations because of issues with transportation
>
> . . . .
>
> Respondent Mother was requested to complete a mental health assessment and substance abuse assessment; however, Respondent Mother has not submitted to a mental health assessment and/or substance abuse assessment, until submitting to a mental health assessment on the last business day prior to the trial of this matter, more than one year from the birth of the minor child . . . .

Based on these findings, the trial court concluded Ken was a neglected juvenile. A disposition hearing followed the trial court's adjudication decision, and the trial court entered an initial disposition order. On 17 November 2023, Respondent-Mother timely appealed from the Order. Father did not appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(3) (2023).

III. Issue

The issue on appeal is whether the trial court erred in adjudicating Ken as a neglected juvenile.

IV. Analysis

On appeal, Respondent-Mother challenges the trial court's adjudication of Ken as a neglected juvenile. Specifically, Respondent-Mother argues that her attempts to obtain substance-abuse and mental-health assessments, coupled with the fact that she provided Ken with necessary medical care, do not constitute neglect, since a positive meconium test alone is not enough to sustain an adjudication of neglect. Conversely, DSS argues that Respondent-Mother did not provide proper care for

Ken, had not provided or arranged necessary medical care, and allowed the creation of an environment that was injurious to Ken's welfare. We agree with DSS.

A. Standard of Review

"When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by findings of fact.' " *In re F.C.D.*, 244 N.C. App. 243, 246, 780 S.E.2d 214, 217 (2015) (quoting *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007)). "It is well settled that in a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, 372 N.C. 1, 8, 822 S.E.2d 693, 698 (2019) (*purgandum*).

"The clear and convincing standard requires evidence that 'should fully convince.' " *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (quoting *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002)). "This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Id.* at 721, 693 S.E.2d at 643 (citing *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363–64, 177 S.E. 176, 177 (1934)).

Findings of fact are binding if they are not challenged on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). When reviewing findings of fact in a juvenile order, we set aside findings that lack sufficient evidentiary support and examine whether the remaining findings support the trial court's determination. *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 693 (2023).

The determination of whether a child is abused, neglected, or dependent is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999). We review the trial court's conclusions of law de novo. *In re K.S.*, 380 N.C. 60, 65, 868 S.E.2d 1, 9 (2022) (citing *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019)). 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)).

B. Adjudication of Neglect

We have a two-step process for abuse and neglect proceedings: an adjudicatory stage and a dispositional stage. *In re K.W.*, 272 N.C. App. 487, 493, 846 S.E.2d 584, 589 (2020). "If the trial court finds at adjudication that the allegations in a petition have been proven by clear and convincing evidence and concludes based on those findings that a juvenile is abused, neglected, or dependent, the court then moves on to an initial disposition hearing." *Id.* at 493, 846 S.E.2d at 589 (citing N.C. Gen. Stat. § 7B-901 (2019)). At the dispositional stage, "the trial court, in its discretion, determines the child's placement based on the best interests of the child." *Id.* at 493, 846 S.E.2d at 589. As Respondent-Mother's appeal is limited to the adjudication phase, we focus our review on the adjudication portion of the Order.

The Juvenile Code defines a neglected juvenile as "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:"

> a. Does not provide proper care, supervision, or discipline.
>
> b. Has abandoned the juvenile, except where that juvenile is a safely surrendered infant as defined in this Subchapter.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under [N.C. Gen. Stat. §] 14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2023).

Before adjudicating a juvenile neglected, the trial court must also find "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993)). With newborns, "the decision of the trial court must of necessity be predictive in nature, as

the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). The Supreme Court of North Carolina has found neglect in cases where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258.

"[T]he clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019). But "[t]he trial court is granted some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re A.D.*, 278 N.C. App. 637, 642, 863 S.E.2d 317, 321–22 (2021) (internal quotations and citation omitted). "It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780 (2009).

As such, a trial court can consider evidence of a parent's mental health and substance-abuse issues. *See In re C.C.*, 260 N.C. App. 182, 191–94, 817 S.E.2d 894, 900–01 (2018). Mental health issues, which are a "fixed and ongoing circumstance," can lead to an adjudication of neglect. *In re G.W.*, 286 N.C. App. 587, 594, 882 S.E.2d 81, 88 (2022) (citing *In re Q.M.*, 275 N.C. App. 34, 41, 852 S.E.2d 687, 693 (2020) and *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 870 (2015)). Findings that "show a prolonged period of drug use in the home" which pose a substantial risk of harm to a child can support an adjudication of neglect. *See In re K.H.*, 281 N.C. App. 259, 270, 867 S.E.2d 757, 765 (2022).

1. Meconium Test

On appeal, Respondent-Mother does not challenge the finding of fact that Ken's meconium test, taken shortly after his birth, was positive for amphetamines and methamphetamine. Thus, the results of the meconium test are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

A positive meconium test alone, however, is not sufficient to support an adjudication of neglect. *See In re D.S.*, 286 N.C. App. 1, 16, 879 S.E.2d 335, 346 (2022) ("[T]here [must be] additional adjudicatory evidence showing [the child] was at any further risk of harm from Mother's prior drug use after she was discharged from the hospital . . . ."). Rather, "the trial court must find that there were 'current circumstances' that rendered [the child's] environment unsafe." *Id.* at 16, 879 S.E.2d at 346

(citing *In re G.C.*, 284 N.C. App. 313, 318, 876 S.E.2d 95, 99 (2022), *rev'd on other grounds*, 384 N.C. 62, 884 S.E.2d 658 (2023)).

2. Health Assessments

Health assessments of a parent can help the trial court determine the "current circumstances" of a child's environment. *See id.* at 16, 879 S.E.2d at 346; N.C. Gen. Stat. § 7B-101(15)(e). This is especially true with newborns, when "the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case" and make a decision that is "predictive in nature." *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

Here, Respondent-Mother disputes the timeliness of DSS's requests for her health assessments, arguing that DSS only notified her of its request for a substance-abuse assessment in December 2022, and that she consistently attempted to get a mental-health assessment. We disagree.

First, after a positive drug screen at Ken's birth, Respondent-Mother never completed a substance-abuse assessment. Respondent-Mother's drug use during pregnancy posed "a substantial risk of harm" to Ken. *See In re K.H.*, 281 N.C. App. at 270, 867 S.E.2d at 765. Thus, a substance-abuse assessment after Ken's meconium results and Respondent-Mother's positive urine screen was necessary for the trial court to assess the "current circumstances" of Ken's environment. *See In re D.S.*, 286 N.C. App. at 16, 879 S.E.2d at 346.

Second, Respondent-Mother did not timely obtain a mental-health assessment before the September 2023 adjudication hearing. Respondent-Mother's mental health issues are a "fixed and ongoing circumstance," *see In re G.W.*, 286 N.C. App. at 594, 882 S.E.2d at 88, that pose a "substantial risk of harm" to Ken, *see In re K.H.*, 281 N.C. App. at 270, 867 S.E.2d at 765. Thus, this information is relevant for a trial court to render a decision "predictive in nature" regarding the child's environment. *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

Respondent-Mother's failure to complete the substance-abuse assessment and timely complete the mental-health assessment is clear and convincing evidence tending to support a substantial risk of future neglect. *See id.* at 390, 521 S.E.2d at 123. Without these assessments, Respondent-Mother cannot get the proper treatment for the "fixed and ongoing" issues, *see In re G.W.*, 286 N.C. App. at 594, 882 S.E.2d at 88, that impact her ability to provide adequate care for Ken, *see* N.C. Gen. Stat. § 7B-101(15). Thus, because of Ken's positive meconium test and

Respondent-Mother's positive urine screen, coupled with her failure to take substance-abuse and mental-health assessments, the trial court appropriately determined that "there [was] a substantial risk of future abuse or neglect of [Ken] based on the historical facts of the case." *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

3. Medical Appointments

Respondent-Mother also contests the trial court's finding of fact that she missed "many" of Ken's medical appointments. Although she concedes she did miss "some" of Ken's medical appointments, she argues that these appointments were merely "rearranged" due to transportation issues, which is not enough to show neglect in providing necessary medical treatment. We disagree.

Despite Ken's health concerns, including a hernia that needed surgical removal, an abscess, and MRSA, Respondent-Mother failed to attend twenty-four out of forty-one appointments due to cancellations and no-shows, all within the first year of Ken's life. When an infant has substantial health concerns, sporadically attending necessary medical appointments and procedures can pose a "substantial risk" of harm. *See In re J.G.B.*, 177 N.C. App. 375, 380–81, 628 S.E.2d 450, 454–55 (2006) (finding that attending some but not all medical appointments can lead to an adjudication of neglect); *see also In re J.N.J.*, 286 N.C. App. 599, 616, 881 S.E.2d 890, 902 (2022) (adjudicating a medically fragile infant as neglected when parents did not provide all necessary medical equipment); *In re S.W.*, 187 N.C. App. 505, 507, 653, S.E.2d 425, 426 (2007) (affirming an adjudication of neglect where respondents allowed the juvenile's four broken ribs to go untreated for up to eight weeks).

By missing a substantial number of Ken's necessary medical appointments, Respondent-Mother failed to provide necessary medical care. *See In re F.C.D.*, 244 N.C. App. at 246, 780 S.E.2d at 217. For example, when Ken needed a hernia removed, Respondent-Mother cancelled or no-showed several surgical appointments. This is "clear and convincing evidence" that Respondent-Mother did not arrange necessary medical care for Ken. *See id.* at 246, 780 S.E.2d at 217.

Respondent-Mother failed to provide Ken with proper care by not ensuring his attendance for necessary medical appointments, not completing the substance-abuse assessment, and not timely completing the mental-health assessment. *See* N.C. Gen. Stat. § 7B-101(15)(a), (c). This evidence, in combination with the unchallenged finding of fact that Ken's meconium test was positive for amphetamines and methamphetamine, *see Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, fully convinces that Ken's

environment was injurious to his welfare, *see Scarborough*, 363 N.C. at 721, 693 S.E.2d at 643; N.C. Gen. Stat. § 7B-101(15)(e). Thus, the trial court correctly determined that Ken faced a substantial risk of future neglect based on the historical facts of the case. *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127.

Based upon the foregoing, the trial court's findings of fact were supported by clear and convincing evidence, and its conclusions were supported by those findings of fact. *See In re F.C.D.*, 244 N.C. App. at 246, 780 S.E.2d at 217. Accordingly, the trial court did not err in adjudicating Ken as a neglected juvenile. *See* N.C. Gen. Stat. § 7B-101(15).

V. Conclusion

We hold that the trial court did not err in adjudicating Ken as a neglected juvenile. The trial court made sufficient findings of fact supported by clear and convincing evidence relating to the current circumstances of Respondent-Mother, which show a substantial risk of future neglect to Ken. The findings in turn support the conclusion of law that Ken is a neglected juvenile.

AFFIRMED.

Judges TYSON and MURPHY concur.

STATE OF NORTH CAROLINA, on relation of the CITY OF SANFORD, Plaintiff
v.
OM SHREE HEMAKASH CORPORATION, a North Carolina Corporation, AMITA PARESHA NAIK, manager PARESHA NARENDRA NAIK, PADMAVATI, LLC, a North Carolina Limited Liability Company, and BHADRESH SHAH, Defendants

No. COA23-1171

Filed 20 August 2024

1. Appeal and Error—abandonment of issues—order modifying temporary restraining order—no issue presented

In a city's action to abate a public nuisance filed against multiple parties, including the owners and manager of a motel (motel defendants), where the motel defendants appealed from two orders of the trial court but presented issues in their brief as to just one of the orders (a default judgment entered against them), their appeal from the second order (granting another defendant's motion to modify a

temporary restraining order and allowing the initiation of foreclosure proceedings) was deemed abandoned and was therefore dismissed.

2. Discovery—sanctions—striking of answer—default judgment —lesser sanctions considered

In a city's action to abate a public nuisance filed against multiple parties, including the owners and manager of a motel, the trial court properly exercised its discretion in imposing sanctions for discovery violations, pursuant to Civil Procedure Rule 37(d), by striking defendants' answer and entering default judgment against them, based on its determination that defendants' failure to respond to the city's written discovery requests was willful and deliberate. Further, the trial court clearly stated in its order that it considered lesser sanctions and gave reasons why more severe sanctions were appropriate.

Appeal by defendants Om Shree Hemakash Corporation, Amita Paresha Naik, and Paresha Narendra Naik from orders entered 30 June 2023 by Judge W. Taylor Browne in Lee County Superior Court. Heard in the Court of Appeals 28 May 2024.

Cranfill Sumner LLP, by Steven A. Bader and James C. Thornton, for plaintiff-appellee.

Hutchens Law Firm LLP, by Michael B. Stein, for defendants-appellees Padmavati, LLC, and Bhadresh Shah.

Wilson, Reives, Silverman & Doran, PLLC, by Jonathan Silverman, for defendants-appellants Om Shree Hemakash Corporation, Amita Paresha Naik, and Paresha Narendra Naik.

ZACHARY, Judge.

Defendants Om Shree Hemakash Corporation, Amita Paresha Naik, and Paresha Narendra Naik ("the Om Shree Defendants") appeal from the trial court's order granting Plaintiff City of Sanford's ("the City") motion to compel discovery and for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. After careful review, we affirm in part and dismiss in part.

I. Background

This case arises out of an action brought by the City in the name of the State to abate a public nuisance pursuant to N.C. Gen. Stat.

§ 19-2.1. On 14 June 2022, the City filed a complaint alleging that "prohibited nuisance activity is maintained and exists" at the "Prince Downtown" motel in Sanford. At the time of the filing of the complaint, the Om Shree Hemakash Corporation owned and operated the motel; Amita Naik was the registered agent, president, and sole shareholder of the Om Shree Hemakash Corporation; and Paresha Naik was the motel's general manager. Padmavati, LLC, which sold the motel to Om Shree on 1 March 2021, held a promissory note for $700,000 that was secured by a deed of trust on the motel property. Bhadresh Shah is the manager of Padmavati, LLC.

In its complaint, the City alleged that the motel "has a general reputation among citizens within the City of Sanford community and among the law enforcement community as a nuisance . . . and as a place where numerous unlawful activities . . . have taken place." According to the City, the motel "has been established, continued, maintained, used, and owned by . . . Defendants as a place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute breaches of the peace as defined by" N.C. Gen. Stat. § 19-1.1(1). Those acts include, but are not limited to, "fights, communicating threats, assaults inflicting serious injury, homicides, loud abusive and profane language, assaults on females, assaults with deadly weapons, shootings, and drunk and disruptive behavior."

On 27 June 2022, the trial court entered a temporary restraining order prohibiting any further "nuisance[-]related activities" as well as, *inter alia*, prohibiting Defendants from "giving, granting, selling, conveying, or otherwise disposing or transferring ownership" of the motel. On 12 July 2022, the Om Shree Defendants filed a motion for an extension of time to file responsive pleadings, which the trial court granted, extending the Om Shree Defendants' time within which to respond until 22 August 2022. The Om Shree Defendants did not meet this deadline.

On 25 August 2022, the City served the Om Shree Defendants with a set of interrogatories and a request for production of documents. On 1 September 2022, the City filed a motion for entry of default against Defendant Padmavati for failure to file a responsive pleading; the trial court entered default against it on 6 September. On 12 September 2022, the City filed a motion for entry of default against the Om Shree Defendants, which the trial court entered the following day.

On 19 September 2022, the Om Shree Defendants filed their joint answer together with a motion to set aside the entry of default. The next day, the City filed motions for default judgment against the Om Shree Defendants and Padmavati. On 11 January 2023, Padmavati filed a motion to modify the temporary restraining order to allow the initiation

of foreclosure proceedings on the motel, alleging that the Om Shree Defendants had failed to make the previous three monthly payments in accordance with the terms of the note, and were therefore in "arrears[.]"

On 27 March 2023, the trial court entered an order setting aside the entry of default against the Om Shree Defendants for good cause shown. The next day, the Om Shree Defendants filed another answer.

Meanwhile, between December 2022 and March 2023, law enforcement officers had "investigated at least six" drug-related crimes that occurred at the motel. On 5 April 2023, citing these incidents, the City filed a motion to enforce the temporary restraining order by shutting down the motel and holding the Om Shree Defendants in contempt of court. The City supported its motion with multiple law enforcement officer affidavits, including the affidavit of the Captain of the Sanford Police Department Narcotics Division, in which he averred that the motel "has, and for a considerable period of time maintained, the general reputation through the community as a place where crimes . . . take place" such as homicide, robbery, assault, prostitution, and the sale, possession, and use of illegal drugs. The Captain also averred that, based upon his conversations with the Om Shree Defendants, "they do not appear to be concerned about or take any interest in the drug and criminal activity" at the motel. He noted that even after a death on the property resulting from a drug overdose, the Om Shree Defendants "were made aware of the incident, but again showed no interest or concern that it had occurred."

On 27 April 2023, the trial court granted the City's motion, finding the Om Shree Defendants in civil contempt for violating the 27 June 2022 temporary restraining order and ordering that the motel "be closed effective immediately for any further business operations pending trial on the merits." Also on 27 April 2023, the trial court entered an order denying Padmavati's motion to modify the temporary restraining order.

On 17 May 2023, the City filed a motion to compel the Om Shree Defendants to respond to the interrogatories and requests for production of documents with which they had been served on 25 August 2022. On 19 May 2023, Padmavati filed another motion to modify the temporary restraining order to allow the initiation of foreclosure proceedings on the motel.

On 25 May 2023, after the Om Shree Defendants failed to appear for noticed depositions, the City amended its motion to compel requesting, *inter alia*, that the trial court sanction the Om Shree Defendants pursuant to Rule 37 of the Rules of Civil Procedure, including striking the Om Shree Defendants' answer and entering default judgment in favor of the City.

On 30 June 2023, the trial court determined that the Om Shree Defendants' failure to answer interrogatories and produce documents "was willful and deliberate[,]" and sanctioned them by striking their answer and entering default judgment against them. That same day, the trial court entered an order allowing Padmavati to initiate foreclosure proceedings on the motel.

The Om Shree Defendants filed timely notice of appeal from both the default judgment and the order allowing initiation of foreclosure proceedings.

II. Appellate Jurisdiction and Scope of Appeal

[1] The Om Shree Defendants noticed appeal from the default judgment entered against them and the trial court's order granting Padmavati's motion to modify the temporary restraining order and allowing the initiation of foreclosure proceedings. As to the default judgment, "although it is interlocutory, a party may appeal from an order imposing sanctions by striking its answer and entering judgment as to liability." *Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331–32, 826 S.E.2d 202, 207 (2019). Because the trial court struck the Om Shree Defendants' answer and entered default judgment as a sanction pursuant to Rule 37, the Om Shree Defendants' appeal of the default judgment is properly before us.

However, the Om Shree Defendants have abandoned their appeal of the order granting Padmavati's motion to modify the temporary restraining order by failing to present and discuss any issue related to that order in their appellate brief. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."); *see also Branch Banking & Tr. Co. v. Chicago Title Ins. Co.*, 214 N.C. App. 459, 470, 714 S.E.2d 514, 522 (2011) (declining to review as abandoned order included in appellant's notice of appeal where the appellant made "no argument on appeal concerning the . . . order"). Accordingly, we dismiss the Om Shree Defendants' appeal in part, as to the trial court's order granting Padmavati's motion to modify the temporary restraining order.

III. Discussion

[2] The Om Shree Defendants argue that the trial court abused its discretion by striking their answer and entering default judgment against them as sanctions pursuant to Rule 37(d) for their willful and deliberate failure to respond to the City's 25 August 2022 written discovery requests. We disagree.

A. Standard of Review

"The imposition of sanctions under Rule 37 is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." *Moore v. Mills*, 190 N.C. App. 178, 180, 660 S.E.2d 589, 591 (citation omitted), *appeal withdrawn*, __ N.C. __, 668 S.E.2d 784 (2008). Additionally, this Court has recognized that the

> imposition of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits.

Id. at 180–81, 660 S.E.2d at 591 (cleaned up).

"An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Dunhill Holdings, LLC v. Lindberg*, 282 N.C. App. 36, 54, 870 S.E.2d 636, 653 (2022) (citation omitted). "A trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is among those expressly authorized by statute and there is no specific evidence of injustice." *Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210 (cleaned up). Additionally, "[i]n reviewing the trial court's order under the abuse of discretion standard, any unchallenged findings of fact are binding on appeal. Any challenged findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Dunhill*, 282 N.C. App. at 55, 870 S.E.2d at 654 (cleaned up).

B. Analysis

The Om Shree Defendants argue that the trial court "erred and abused its discretion in striking the[ir] answer and entering a default judgment without first considering lesser sanctions." The Om Shree Defendants posit that "there is no indication in the transcript of the 5 June 2023 hearing that the trial court considered any lesser sanction" and that "there was no discussion from the trial court on the record as to the relative merits or insufficiencies of any lesser sanction that might have been imposed." These assertions are without merit.

In appropriate circumstances, Rule 37 authorizes a trial court to impose sanctions in the form of "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed,

or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c). "[B]efore imposing a severe sanction such as striking an answer and entering judgment as to liability, a trial court must consider the appropriateness of less severe sanctions." *Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210. "Critically, the trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions." *Dunhill*, 282 N.C. App. at 86, 870 S.E.2d at 672 (cleaned up).

"In determining whether the trial court properly considered lesser sanctions, this Court has noted, the trial court is not required to list and specifically reject each possible lesser sanction[ ] prior to determining that [a more severe sanction] is appropriate." *Id.* (cleaned up). "Language stating the trial court considered lesser sanction[s] but had reason to impose the more severe sanction[ ] is sufficient." *Id.*

As the City notes, the Om Shree Defendants' "argument is refuted by the [trial] court's order," in which the trial court made the following findings of fact:

> 25. The Court, in considering ordering default judgment as a sanction, has balanced the right of the proponent to discovery under the North Carolina Rules of Civil Procedure with the Due Process rights of the offending party to have a trial of the case on the merits.
>
> 26. The Court, in considering ordering default judgment as a sanction, has considered lesser sanctions as urged by defense counsel and finds in its discretion that all lesser sanctions are inappropriate. The record amply demonstrates the severity of the disobedience of [the Om Shree] Defendants in failing to respond to the written discovery and thereby impeding the necessary and efficient administration of justice.

These thorough findings of fact, in which the trial court explained that it "considered lesser sanctions" and explained why "all lesser sanctions are inappropriate[,]" are sufficient under our precedents. *See id.* at 88, 870 S.E.2d at 673; *see also*, *e.g.*, *Feeassco*, 264 N.C. App. at 341, 826 S.E.2d at 212; *Batlle v. Sabates*, 198 N.C. App. 407, 421–22, 681 S.E.2d 788, 798–99 (2009); *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828–29 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006). "Given this explanation, the trial court did not abuse its discretion in its choice of sanction." *Dunhill*, 282 N.C. App. at 88, 870 S.E.2d at 673.

The Om Shree Defendants also argue that "it cannot be inferred from the record that the trial court considered all available sanctions" because the trial court did not consider several factors that they advanced. However, there is no need to resort to inference in this instance because, as just discussed, the terms of the trial court's order manifestly demonstrate that the court considered all available sanctions. Moreover, as previously stated, "the trial court is not required to list and specifically reject each possible lesser sanction[ ] prior to determining that [a more severe sanction] is appropriate." *Dunhill*, 282 N.C. App. at 86, 870 S.E.2d at 672 (citation omitted).

Finally, we observe that the Om Shree Defendants do not challenge the trial court's findings of fact as regards their failure to respond to written discovery requests, which are therefore binding on appeal, *id.* at 55, 870 S.E.2d at 654, and which support the trial court's determination to impose sanctions. Moreover, "there is no specific evidence of injustice." *Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210 (cleaned up).

"[A] broad discretion must be given to the trial judge with regard to sanctions." *Id.* (citation omitted). Here, "the trial court considered lesser sanctions prior to striking [the Om Shree Defendants'] answer and entering judgment for [the City] . . . , sanctions which are expressly authorized by statute. Thus, the trial court did not abuse its discretion" by striking the Om Shree Defendants' answer and entering default judgment in accordance with Rule 37. *Id.* at 341, 826 S.E.2d at 212.

IV. Conclusion

The trial court's default judgment order is affirmed. As to the trial court's order granting Padmavati's motion to modify the temporary restraining order, the Om Shree Defendants' appeal is dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Judges COLLINS and STADING concur.

STATE OF NORTH CAROLINA
v.
BLAINE DALE HAGUE

No. COA23-734

Filed 20 August 2024

1. Homicide—first-degree murder—premeditation and deliberation—sufficiency of evidence—new trial

Defendant was entitled to a new trial on a first-degree murder charge—arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm—where the trial court erroneously denied his motion to dismiss the charge for insufficient evidence. Specifically, the evidence did not show that defendant acted with premeditation and deliberation where: defendant, a disabled seventy-two-year-old man, shot the victim, a forty-six-year-old man, after the victim had pushed him to the ground; the altercation was brief, the shooting was sudden, and defendant fired only one shot; and, as a war veteran, defendant had a habit of carrying a gun whenever he left his house. Additionally, defendant's conduct after the shooting did not show planning or forethought where: he drove home and immediately called law enforcement; left his gun on a picnic table outside of his house and directed police to it upon their arrival; and was forthcoming with law enforcement about the shooting.

2. Homicide—first-degree murder—jury instructions—self-defense—omission of stand-your-ground doctrine—private property

In a prosecution for first-degree murder arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm, the trial court did not err by omitting the stand-your-ground doctrine from its jury instructions on self-defense, where there was no evidence that defendant was lawfully on the cornfield, which was located on privately owned property. Even if the court's omission had been erroneous, it was not prejudicial where the court properly instructed the jury that the degree of force used in self-defense must be proportional to the surrounding circumstances—a rule that applies even in instances where defendants are entitled to stand their ground—and, therefore, the jury implicitly decided that defendant used excessive force when it found that defendant did not act in self-defense.

3. Evidence—murder trial—victim's prior felony convictions—admissibility—to show defendant's state of mind—prejudice

In a prosecution for first-degree murder arising from an altercation in a cornfield about the victim hunting too close to defendant's horse rescue farm, where defendant fatally shot the victim after the victim pushed defendant to the ground, the trial court erred in excluding evidence that defendant knew of the victim's status as a convicted felon. Under Evidence Rule 404(b), while evidence of the victim's prior felony convictions was inadmissible to show the victim's propensity for violence, it was admissible to show defendant's state of mind during the shooting; specifically, the evidence tended to explain why defendant—a disabled seventy-two-year-old war veteran—might have been afraid of the victim after being assaulted by him. Because the evidence spoke to the reasonableness of defendant's fear, it was essential to his claim of self-defense, and therefore its exclusion was prejudicial to defendant. The court's error further prejudiced defendant where it lead to the exclusion of other evidence regarding defendant's state of mind, and the exclusion of that evidence likely misled and confused the jury.

Judge STADING concurring in part and dissenting in part.

Appeal by Defendant from a judgment entered 9 December 2022 by Judge David L. Hall in Iredell County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Sandra Payne Hagood, for Defendant.

WOOD, Judge.

Blaine Dale Hague ("Defendant") appeals from a jury verdict finding him guilty of first-degree murder for which he was sentenced to life in prison without parole. Defendant argues the trial court erred (1) by denying his motion to dismiss the first-degree murder charge, (2) by omitting the stand-your-ground provision from the jury instructions when it instructed on self-defense, and (3) by excluding certain evidence that was relevant to his claim of self-defense. For the following reasons, we reverse, vacate and remand to the trial court for a new trial.

I. Factual and Procedural Background

On the morning of 7 September 2020, Tommy Cass ("Tommy") had plans to dove hunt with a group of people, namely: Thomas Cass ("Thomas"), Tommy's son; Don White ("Don"); Grant Evans ("Grant"); and Brent Cass ("Brent"). Tommy told the group to meet him at Bonnie Campbell's cornfield ("the field"), a location where he had written permission from the owner, Bonnie Campbell, to hunt on the "lower field" of the property. The field extends alongside Toby's Footlog Road. Defendant and his wife own fifty acres of property on Toby's Footlog Road adjacent to the field. Defendant and his wife use the property as their primary residence and operate it as a horse rescue farm. Their home is positioned on the property approximately 100 yards from the field in which Tommy and the group had gathered to hunt.

Defendant was aware that Tommy hunted on the property. A few years earlier, around 2017, Tommy had been with a group of hunters in the field when one of Defendant's rescued horses had been shot twice by a dove hunter. Tommy told Defendant he did not know the man who shot the horse. Following the incident, Defendant asked Tommy to be more cautious and not to hunt too close to the fence line because one of his horses had been shot and because the gun fire spooked the horses. Defendant regarded their conversation as a civil encounter and characterized his relationship with Tommy as "[they] had a pretty good rapport."

According to Defendant, they would generally acknowledge one another when Tommy was hunting in the field. Additionally, Defendant had run into Tommy at a Subway. He recalled Tommy making aggressive comments and having a "bad-day attitude," but not directed toward Defendant personally. Tommy's wife, Karla, testified that about a week prior to 7 September 2020, he had told her that Defendant approached him at a 7-Eleven saying that he was not allowed to hunt on the field anymore. Karla claimed Tommy took that conversation as a "joke" and "basically laughed it off."

On the day of the hunt, Grant, Brent, and Don arrived at the field at approximately 6:00 or 6:30 a.m. Tommy arrived shortly thereafter. While waiting for the sun to come up, the group stood around their vehicles engaged in conversation. According to Grant, Tommy started talking about Defendant saying that he was an "asshole." Don testified that during the conversation Tommy informed them that "there was an old man that would come and give him a hard time about hunting, but he would usually tell him that we had permission, and [Defendant] would

just leave, and everything would be alright." Don claimed the group laughed it off since Defendant had not given Tommy any trouble previously. Brent did not remember the specific conversation that took place that morning, but Don and Grant said Tommy did not appear to be angry when he spoke about Defendant.

That morning, Defendant woke up to the sound of gunshots and horse hooves pounding on the ground. Before heading outside to calm the horses, Defendant put his gun in his back pocket as he usually did. Defendant testified it has been "automatic for [him] for the last 50 years." As Defendant drove on Toby's Footlog Road, Thomas was arriving to meet the group. Thomas testified Defendant's vehicle cut him off as he was approaching the entrance to the field. Thomas parked next to Defendant's truck at the parking area near the field. They both exited their vehicles. Thomas testified that Defendant asked if he was there with Tommy. Thomas claimed Defendant appeared to be angry and upset; Defendant denied this exchange occurred. Thomas testified he told Defendant that they had permission from Bonnie Campbell to hunt in the field and that Defendant replied "[the group] didn't have permission to shoot his horses." Thomas then returned to his vehicle to call his father, Tommy, to alert him that Defendant was walking onto the field. During this call, Tommy said to Thomas, "that's fine" and "we have permission to be [here]."

At some point, Defendant encountered Brent and asked him to move from the fence line because the horses were spooked. While Brent was talking to Defendant, Tommy shot two doves nearby. Brent informed Defendant that the shots he had heard earlier were from a different group of dove hunters because no one from their group had fired until just then. Grant and Don testified that the earlier shots had come from another nearby field. Brent reiterated to Defendant that the group was with Tommy, who had permission to be on the field, to which Defendant replied "oh, I know Tommy" and proceeded to walk in Tommy's direction.

As Defendant approached, Tommy rose from where he was sitting and walked to meet him. Grant, Don, and Brent testified that Tommy's hands were empty as he approached Defendant and Don stated that he saw Tommy put his gun down before he started walking. Don testified that Tommy was walking fast and appeared mad, and Grant testified Tommy seemed to be aggravated. Defendant and Tommy continued towards one another until they were about two or three feet apart, almost "face to face." Tommy then stated "every time I come over here hunting you come over here f**king with me."

Tommy then pushed Defendant with both open hands causing Defendant to fall flat of his back onto the ground. Brent, Grant, and Don observed Tommy just stand there after pushing Defendant down. Defendant was almost seventy-two years old; Tommy was forty-six years old. Defendant testified that he struggled to get up from the ground because he was using a cane, had a leg boot on, had two bad legs, and had a torn Achilles tendon on his left leg. Defendant testified it took him around ten seconds to get up from the ground. Don and Grant testified Defendant got up fast, after only a few seconds.

After Defendant stood up, the testimony of what occurred immediately after diverges. Defendant testified that Tommy had walked approximately twenty feet away when Defendant said, "[t]his is a classic felony, assault on a disabled veteran and senior citizen." Defendant stated then Tommy spun around, started coming at him, appeared extremely angry, and said something to the effect of "I'm done with you." Defendant alleged Tommy then did the following:

> He -- well, when he was coming back at me, he grabbed this vest that he had with his left hand. He stuck his right hand inside the pocket area of the vest, right here, and was rummaging around.
>
> So I -- automatically, I looked up at his eyes. And he was coming at me full-steam. And at that second, I knew I was going to die. And fear ran through me that I have never felt since Vietnam.
>
> And the thought of the gun didn't even go into my mind until he kept coming on me so quick. And when that hand was in that vest, that's when it dawned on me I had a weapon for defense.
>
> I can't even tell you that I remember pulling the weapon. It happened that quick. When I came up, I came off so quick to where I was -- I didn't stretch out my arm because by the time I shot -- and that's why, if you heard the testimony by the doctor, the bullet entered underneath the left eye. And it went up in an upward motion because I came up like so.

From Defendant's perspective he shot Tommy to "defend" himself, and according to him, even as Tommy hit the ground after being shot, "his hand was still inside the vest."

Grant offered contradictory testimony during the prosecutor's questioning:

> Q. How long was he standing before he pulled the gun out?
>
> A. As soon as he got up.
>
> Q. Just as soon as he got up?
>
> A. As soon as he got up, he raised his arm.
>
> Q. Okay. If I heard you correctly, Dale gets up and you're saying that he extends his right arm, correct? And you can see the gun from where you're at?
>
> A. Right.
>
> Q. If I heard you right, you just said you could hear Tommy say something. What did Tommy say?
>
> A. He put his hands up and said, "no."
>
> Q. Is that all? That's it? Just the word "no"?
>
> A. Whoa, wait a minute, wait a minute. Bang, and he shot.

Don testified that "as [Defendant's] knees were straightening up, his arm came up in a motion. And I said no, no, and about that time I heard the gunshot." However, Don was unable to see the gun from his point of view, and testified that he said "no, no" because he was familiar with the movement for a handgun. Brent testified that as Defendant was getting up from the ground, he heard Don or Grant holler, turned toward them, and then heard "bang." Testimony was inconsistent as to whether Tommy reached his hand inside his vest and whether Defendant's arm was fully extended or not.

Afterwards, brief exchanges occurred between Defendant and the witnesses. Ultimately, Defendant returned to his truck and left the field. On his way out, he gave Grant his name and told him that he was going home to notify law enforcement. Defendant told his wife what had happened, unloaded his gun, set it on the picnic table, and then called law enforcement. Grant and Thomas also called 911.

During Defendant's call to law enforcement, he told the dispatcher his account of what had happened. His testimony at trial was consistent with his account of events to the dispatcher. He stated that he was disabled, unable to protect himself, and that "[he] had no choice." Further, he told the dispatcher that he advised Tommy's friends to stay away from Tommy's body because he had a gun in his vest.

Grant, Don, and Brent testified they did not touch Tommy's body or remove anything from the area. Grant and Don further testified they

did not see Tommy with any gun that day other than the one with which he was hunting. State Bureau of Investigation Special Agent Williams Waugh, ("Agent Waugh"), assisted with the investigation of the scene that day. He found a note signed by Bonnie Campbell in Tommy's pocket which stated, "Tommy Cass has permission to hunt in [the] lower field." Agent Waugh did not find any weapons on or near Tommy's body other than his shotgun, which was 121 feet from his body. Agent Waugh recovered a pill grinder, five white round pills, two marijuana joints, and a lighter in his jacket. Additionally, he observed that there were no pockets on the chest area of Tommy's jacket and that it was zipped up to his neck.

On 30 September 2020, Defendant was indicted for first-degree murder. Defendant's case came on for trial at the 5 December 2022 session of Iredell County Superior Court. At a pre-trial hearing, the court heard the State's motion in limine to exclude improper character evidence related to Tommy's prior convictions. Tommy had two previous felony convictions: possession of cocaine in 2005 and assault inflicting serious bodily injury in 2009. Since Defendant intended to argue self-defense, defense counsel asserted his knowledge of Tommy's prior convictions should be admissible to show the reasonableness of Defendant's fear of Tommy. The State argued that Defendant did not know Tommy was a felon, and if he did, Defendant did not know what his convictions were. Defendant contended that while he did not know what Tommy's convictions were, he was aware that Tommy was a felon, and that because he was a felon, he was not allowed to possess a firearm but did anyway. The trial court noted that knowledge of a felony conviction has "little to do with the law of self-defense" but, it did not rule on the motion until Defendant decided to testify.

Once Defendant decided to testify, the trial court ruled on the State's motion in limine. The trial court granted the State's motion, explaining:

> But that would go back to the general rule that character evidence is generally impermissible to offer evidence of a person's character to show that the person acted in conformity therewith.
>
> In other words, he was a bad fellow. He was a felon. He must have been the aggressor here because he's a bad fellow because he had been convicted of a felony or, because he is a felon, he shouldn't have been carrying a gun. Those things in my view are probative of nothing.

> So that simply -- the fact that he -- this alleged victim was a felon and could not possess a firearm, just doesn't have any evidentiary value.

Thus, Tommy's prior convictions and testimony related to those convictions were excluded. The State also objected to the jury hearing the portions of Defendant's 911 call that related to Tommy's convictions. The trial court redacted statements from the 911 call to prevent the jury from hearing Defendant's statement about Tommy's status as a convicted felon.

At the close of the State's case, Defendant moved to dismiss the charges for insufficiency of the evidence as relates to premeditation and deliberation. The trial court denied the motion. Defendant renewed his motion at the close of all evidence, which was also denied. At the charge conference, Defendant objected to the trial court's refusal to include the stand-your-ground doctrine in the self-defense instructions to the jury. On 9 December 2022, Defendant was convicted of first-degree murder, and sentenced to life without parole. Defendant gave notice of appeal in open court.

II. Analysis

Defendant raises three issues on appeal. Defendant first argues that the trial court erred when it denied his motion to dismiss the charge of first-degree murder because the State failed to present substantial evidence on premeditation and deliberation. Defendant next contends the trial court erred by omitting the stand-your-ground provision from its instructions on self-defense to the jury. Lastly, Defendant contends that the trial court erred when it excluded evidence of Tommy's felony convictions, because it was crucial to his claim of self-defense. We consider each of Defendant's arguments in turn.

A. First-Degree Murder

[1] We review the trial court's denial of Defendant's motion to dismiss the charge of first-degree murder *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (1980) (citations omitted). When reviewing a motion to dismiss, the evidence

is viewed in the light most favorable to the State, and the State is given "every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). Furthermore, "[c]ontradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. If there is substantial evidence to support a finding that the offense has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925 (citations omitted).

"First-degree murder is the unlawful killing – with malice, premeditation and deliberation – of another human being." *State v. Simonovich*, 202 N.C. App. 49, 53, 688 S.E.2d 67, 70-71 (2010) (citation omitted). Our Supreme Court defines the elements as:

> Premeditation and deliberation are processes of the mind which are generally proved by circumstantial evidence. Premeditation means that [the] defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing. Deliberation means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation. Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation. Thus, proof of premeditation and deliberation is also proof of intent to kill.

State v. Chapman, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (cleaned up). "Premeditation requires proof of the *time* when the intent to kill was formed, and deliberation requires proof of the defendant's *emotional state* when he formed this intent." *State v. Smith*, 92 N.C. App. 500, 504, 374 S.E.2d 617, 620 (1988).

When considering the circumstances, this Court has outlined factors which assist in the determination of whether premeditation and deliberation were present at the time of the killing. These factors include: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; (4) the dealing of lethal blows after deceased has been felled and rendered helpless; (5) the nature and number of the victim's wounds; (6) whether the defendant left the deceased to die without attempting to obtain assistance for the deceased; (7) whether he disposed of the murder weapon; and (8) whether the defendant later

lied about what happened. *State v. Horskins*, 228 N.C. App. 217, 222, 743 S.E.2d 704, 709 (2013) (cleaned up). These factors are assessed under the totality of the circumstances, rather than by giving weight to any one single factor. *State v. Walker*, 286 N.C. App. 438, 442, 880 S.E.2d 731, 736 (2022) (citations omitted).

Defendant requests this Court to vacate the first-degree murder conviction on the grounds of insufficient evidence of premeditation and deliberation, as held in *State v. Corn* and *State v. Williams*. *State v. Corn*, 303 N.C. 293, 298, 278 S.E.2d 221, 224 (1981); *State v. Williams*, 144 N.C. App. 526, 530-31, 548 S.E.2d 802, 805-06 (2001). In *Corn*, the victim, who was "highly intoxicated," went into the defendant's home and insulted the defendant as he was lying on the couch. The defendant "immediately jumped from the sofa," grabbed his gun normally kept near the sofa then shot the victim multiple times in the chest. *Corn*, 303 N.C. at 297-98, 278 S.E.2d at 223-24. Subsequently, the defendant walked across the street to his sister's house, called the police, and returned home to await the arrival of the police. In light of these facts, our Supreme Court held that the shooting was sudden, brought on by provocation by the victim, and the altercation lasted "only a few moments"; the defendant did not "exhibit any conduct which would indicate that he formed any intention to kill [the victim] prior to the incident"; the defendant and victim did not have "a history of arguments or ill will"; and no shots were fired after the victim fell. *Id.* at 298, 278 S.E.2d at 224. The Court concluded that since the defendant killed the victim "without aforethought or calm consideration," the evidence was insufficient to prove the requisite elements of premeditation and deliberation. *Id.*

In *Williams*, the defendant and victim were observing a fight in the parking lot of a nightclub. *Williams*, 144 N.C. App. at 527, 548 S.E.2d at 803. After a verbal altercation between the victim and the defendant, the victim "punched defendant in the jaw" then, "[d]efendant produced a handgun and fired a shot which struck [the victim] in the neck." *Id.* at 527, 548 S.E.2d at 803-04. Considering these factors, this Court concluded that there was no evidence the two individuals knew each other prior to the altercation, there was no "animosity" or "threatening remarks," and the defendant was provoked by the victim's assault, leading to the defendant immediately firing one shot. *Id.* at 530-31, 548 S.E.2d at 805. Further, the "defendant's actions before and after the shooting did not show planning or forethought on his part" as he left immediately but turned himself into the police the next day. *Id.* at 531, 548 S.E.2d at 805.

In the present case Defendant argues, as in *Corn* and *Williams*, that he did not have a history of arguments, ill will, or serious animosity

towards Tommy. Defendant points to his testimony that after Tommy assaulted him, he was in fear for his life because he thought Tommy was reaching for a gun. Moreover, Defendant argues he shot Tommy once immediately following the assault, indicating a reaction to being assaulted, rather than a prior plan or intention to kill him. Lastly, Defendant contends his actions after the shooting did not show "planning or forethought" because he called law enforcement to report what had happened and waited for their arrival at his home. We agree.

We note that whether Tommy reached inside his vest attempting to locate a gun, as Defendant testified, or whether Tommy simply stood there, as the witnesses testified, are "discrepancies [ ] for the jury to resolve." *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925. Thus, we evaluate, in the light most favorable to the State, whether there is substantial evidence of both premeditation and deliberation, to the exclusion of conflicting evidence which is contemplated by the jury. *Id.* First, as in *Corn*, the shooting was sudden, Defendant was provoked by Tommy's assault and yelling, and the altercation was brief. *Corn*, 303 N.C. at 298, 278 S.E.2d at 224. Further, Defendant shot Tommy once, without any "calm consideration," in reaction to being pushed to the ground. *Id.* Similarly, as in *Williams*, Defendant's actions "after the shooting did not show planning or forethought." *Williams*, 144 N.C. App. at 531, 548 S.E.2d at 805. Following the shooting, Defendant left the scene, drove the short distance home, left his weapon on the picnic table outside of his house, and immediately called law enforcement for assistance. Additionally, Defendant gave Grant his name as he was leaving and informed him, he was going to meet law enforcement himself.

The State argues certain interactions that occurred between Defendant and Tommy prior to the incident demonstrated a "history of animosity" between the two. The State directs us to the following: a conversation a few years prior after Defendant's horse was shot by an individual in Tommy's hunting group; an interaction at a Subway; and Karla's testimony that Defendant told Tommy he could no longer hunt on the property. At trial, Defendant testified he and Tommy had a "pretty good rapport" and had "never had an argument" or previously fought. There was no contradictory testimony by any of the other witnesses. Don testified he and Tommy joked about Defendant giving Tommy a hard time about hunting, but that Defendant "usually left" and "never gave him no trouble." Grant and Don testified Tommy seemed normal, not angry, when speaking about Defendant on the day of the hunt. As to the conversation about which Karla testified, she stated Tommy took that conversation as a joke, that it was nothing serious, and he was not

angry at Defendant. Lastly, Defendant did not threaten Tommy or make any statements of a violent nature.

We disagree that these encounters rise to the level of a "history of arguments or ill will." *Corn*, 303 N.C. at 298, S.E.2d at 224. First, the conversation about Defendant's horse being shot by a dove hunter occurred a few years earlier, and Tommy had hunted on the field numerous occasions since without further incident. Second, their encounter at Subway occurred approximately one year earlier and their conversation did not concern their relationship.

Furthermore, upon consideration of the eight factors enumerated by this Court, we are unable to conclude under the facts of this case that premeditation and deliberation were met. *Horskins*, 228 N.C. App. at 222, 743 S.E.2d at 709. The uncontroverted evidence showed Tommy provoked Defendant, an injured 72-year-old man, by yelling at him and pushing him to the ground, and the evidence further demonstrated that it had been Defendant's "habit" since serving in the Vietnam war to carry his gun when leaving the house. The State asserts that "arriving at the scene of a murder with a weapon supports an inference of premeditation and deliberation." *State v. Hicks*, 241 N.C. App. 345, 355, 772 S.E.2d 486, 493 (2015) (cleaned up). We cannot agree. Defendant did not threaten Tommy before or during their interaction leading to the shooting. Defendant did not approach Tommy's body nor attempt to tamper with anything at the scene. Tommy was shot once. Defendant did not deal additional lethal blows after Tommy had fallen to the ground. Defendant left the scene to call law enforcement although aware that others present were also calling for assistance. Defendant did not dispose of his gun, rather he unloaded it, placed it on the picnic table and directed law enforcement to it upon their arrival. Although the witnesses' testimony conflicted at trial, Defendant's statements in his 911 call were consistent with his testimony at trial. Defendant did not attempt to lie about killing Tommy or conceal any facts to law enforcement. Under the totality of the circumstances, giving equal weight to all factors, we are unable to hold Defendant's conduct met the threshold of premeditation and deliberation. *Walker*, 286 N.C. App. at 442, 880 S.E.2d at 736.

The dissenting opinion concludes that there is sufficient evidence of premeditation and deliberation, in relevant part, because the parties had a history of arguments and ill will. When drawing such conclusion, the dissent focuses on a confrontation between Defendant and Tommy at a Subway; that Tommy was hunting on the same property when Defendant's horse had been shot; and the conversation between

Defendant and Tommy at a 7-Eleven, when Defendant told him that he could not hunt on the property.

First, Defendant and Tommy's conversation at Subway occurred approximately one year prior. Defendant stated that while in the store, Tommy was making comments about judges, attorneys, and cops, and it seemed like he was having a bad day. The conversation ended with Defendant patting Tommy on his shoulder and saying "[h]ave a good day. Be careful out there," and Defendant exiting the store. This interaction does not rise to the level of "confrontation" and there is no evidence to indicate otherwise. Second, although the dissent is correct that Tommy was hunting on the same property where Defendant's horse had been shot by someone in Tommy's hunting party, it occurred several years prior. As noted previously, Tommy subsequently hunted on the field without the parties having any further issues. Lastly, in response to Defendant telling Tommy that he could not hunt on the field during their interaction at 7-Eleven, Karla, Tommy's wife, testified that he "basically laughed it off." These interactions cannot amount to ill will or animosity between the parties, as Defendant did not communicate any threatening remarks and generally, Defendant "never gave [Tommy] no trouble, just a hard time" about hunting on the field.

For these reasons, taken in the light most favorable to the State, the evidence is insufficient to prove the requisite elements to support a conviction of first-degree murder. *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925. Accordingly, Defendant's conviction of first-degree murder must be reversed and vacated.

B. Jury Instructions

[2] Defendant next argues the trial court erred in omitting the stand-your-ground doctrine from the jury instructions. "[T]he trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (citation omitted). "A trial court must give the substance of a requested jury instruction if it is correct in itself and supported by the evidence." *State v. Williams*, 283 N.C. App. 538, 542, 873 S.E.2d 433, 436–37 (2022) (cleaned up). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation omitted). A defendant has the burden of establishing prejudice. *Id.* (citation omitted).

At the charge conference, Defendant objected to the omission of the stand-your-ground doctrine from the self-defense instruction of the jury charge. The trial court reasoned:

> [T]he evidence is as follows, the defendant lived on an adjacent, or a pertinent, tract of land. All the evidence, including that of the defendant is that the defendant went on this land owned by a Campbell, and then Bonnie Campbell, as a tenant in common, being the wife of the other gentleman. The alleged victim had written permission from the landowner.
>
> There's no evidence that one way or another that the defendant had permission to be on the property, but it's worthy to note that it was not the defendant's property, it was not his home, it was not his place of business, it was not a common area, and it was not public property.

Defendant argues pursuant to N.C. Gen. Stat. § 14-51.3, he was entitled to the stand-your-ground instruction. Under the statute, "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be" if "[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." N.C. Gen. Stat. § 14-51.3. Thus, "one who is not the initial aggressor may stand his ground, regardless of whether he is in or outside the home" and therefore has no duty to retreat. *State v. Lee*, 370 N.C. 671, 675 n.2, 811 S.E.2d 563, 566 n.2 (2018).

Defendant's argument as to these instructions centers on whether Defendant shot Tommy at a place he was lawfully allowed to be. He argues (1) the court erred in finding that he was not entitled to the instruction because he was not in his home, workplace, or motor vehicle; and (2) the trial court erroneously assumed that a person who has not been given explicit permission to be on the land of another cannot be present there lawfully. Defendant urges this Court to hold that "a person who is merely somewhere he or she has a lawful right to be has the same right to stand his ground and not retreat as a person in his home, workplace, or motor vehicle." Further, Defendant argues he was prejudiced by the omission of the instruction because the reasonableness of his actions is intertwined with whether he had a duty to retreat and had the jury understood that he had no duty to retreat, but could stand his ground, he likely would have been acquitted based on self-defense.

It is undisputed that Defendant shot Tommy in a field located on property owned by Bonnie Campbell. There is no evidence that Defendant

had a lawful right to be on this *privately owned* property. Defendant contends however, that absent evidence that he was a trespasser, he had a lawful right to be in the field and there is no reason to assume he was there unlawfully. We disagree.

Defendant's argument is contradicted by our case law which establishes the circumstances in which the individual had a *lawful right to be* in the respective place. For example, in *Lee*, our Supreme Court held the defendant could stand his ground while standing in a public street, a place where he had a lawful right to be. *Lee*, 370 N.C. at 675-76, 811 S.E.2d at 567. In *Irabor*, this Court held the defendant was entitled to a stand-your-ground instruction when he shot the victim while standing outside the door to his apartment. *State v. Irabor*, 262 N.C. App. 490, 496, 822 S.E.2d 421, 425 (2018). In *Ayers*, this Court held "[the] [d]efendant was present in a location he lawfully had a right to be: driving inside his vehicle upon a public highway." *State v. Ayers*, 261 N.C. App. 220, 228, 819 S.E.2d 407, 413 (2018). Here we cannot conclude Defendant had a lawful right to be on *privately* owned property, absent evidence sufficient to establish that he had the lawful right to be in the field on property he did not own. Defendant failed to present any evidence that the owner of the field had given permission for him to be in the field that day or any other day. In contrast, the State presented evidence that Tommy had written permission from the owner to hunt in the field on the day he was killed.

Assuming *arguendo*, the trial court erred by omitting the instruction, Defendant was not prejudiced by its omission. The trial court instructed the jury as follows:

> The defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.
>
> And second, the circumstances as they appear to the defendant at the time, were sufficient to create such belief in the mind of a person of ordinary firmness. In determining the reasonableness of the defendant's belief, you should consider these circumstances as you find them to have existed from the evidence presented, including the size, age, strength of the defendant as compared to the victim, the fierceness of the assault, if any, by the victim upon the defendant, whether the victim had

> a weapon in the victim's possession at the time he was killed. The defendant would not be guilty of any crime if the defendant acted in self-defense, if the defendant did not use excessive force under the circumstances.
>
> A person is also justified in using defensive force when the force used by the alleged victim was so serious that the defendant reasonably believed that he was in imminent danger of death or serious bodily harm and the defendant had no reasonable means to retreat. And the use of force likely to cause death or serious bodily harm was the only way for the defendant to escape the danger.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to decide the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.

Under the stand-your-ground doctrine, a defendant is permitted to "use deadly force against the victim under Subsection 14-51.3(a) *only* if it was necessary to prevent imminent death or great bodily harm, *i.e.*, if it was proportional." *Walker*, 286 N.C. App. at 449, 880 S.E.2d at 739. Thus, "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to *stand his or her ground*." *State v. Benner*, 380 N.C. 621, 636, 869 S.E.2d 199, 209 (2022) (emphasis added).

Here, the trial court provided the jury with the excessive-force instruction and the reasonableness of such force. The trial court also instructed the jury to contemplate the "size, age, strength of the defendant as compared to the victim, the fierceness of the assault, if any, by the victim upon the defendant, [and] whether the victim had a weapon in the victim's possession at the time he was killed." In other words, the trial court instructed the jury to evaluate the proportionality between the degree of force and the surrounding circumstances. Thus, the jury implicitly decided that Defendant's use of force was not proportional by declining to find that Defendant acted in self-defense. Further, the record contains substantial evidence from which a reasonable jury could have concluded that Defendant used excessive force when he shot Tommy. Accordingly, even if the trial court erred by omitting the instruction, Defendant failed to establish "a reasonable possibility that,

had the error in question not been committed, a different result would have been reached at the trial." *Benner*, 380 N.C. at 636, 869 S.E.2d at 209 (citation omitted).

C. 404(b) Evidence of Prior Convictions

[3] Defendant next argues the trial court erred by excluding testimony concerning Tommy's prior convictions. "We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). The defendant is tasked with the burden of proving "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *State v. Scott*, 331 N.C. 39, 46, 413 S.E.2d 787, 791 (1992) (citation omitted). As discussed *supra*, the trial court excluded the evidence on the basis that "character evidence is generally impermissible to offer evidence of a person's character to show that the person acted in conformity therewith." The trial court opined that evidence that Tommy was a felon, and therefore could not legally possess a firearm, would lead the jury to conclude he was a "bad fellow" and "must have been the aggressor." Further, the trial court found "[a] criminal conviction of an alleged victim may be introduced if the defendant had knowledge of the conviction at the time of the fatal encounter . . . pursuant to [Rule] 404(b)" and, "being aware that one is a felon is simply not going to pass evidentiary muster."

Here, the trial court contemplated the exclusion of the evidence under Rules 404(a)(2) and 404(b). Rule 404(a) provides, "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C. Gen. Stat. § 8C-1, Rule 404. However, Rule 404(a)(2) provides an exception to the general rule and allows a party accused of a criminal offense to offer evidence of a pertinent character trait of the victim. *Id.* Rule 404(a)(2). It provides that the following evidence is admissible:

> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

Id. Under this Rule, the trial court excluded the evidence based on a finding that Defendant offered it to prove that Tommy was the

initial aggressor and to prove a particular character trait of Tommy. Alternatively, Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id. Rule 404(b). Here, the trial court excluded the evidence because Defendant did not know what Tommy's prior convictions were.

Defendant argues that under Rule 404(b) the evidence should have been admitted, not to prove that Tommy had a propensity for violence, but that Defendant's knowledge that Tommy was a convicted felon was relevant to the reasonableness of Defendant's fear. Defendant contends that knowing that Tommy was a convicted felon, and thus was more afraid of him, was essential to his claim of self-defense. Defendant concedes he did not know the "exact nature" of Tommy's prior convictions; however, because he knew of Tommy's "status" as a convicted felon, the evidence was relevant for the jury when analyzing Defendant's state of mind at the time he killed Tommy.

In *Jacobs*, our Supreme Court analyzed a similar admissibility issue. *State v. Jacobs*, 363 N.C. 815, 689 S.E.2d 859 (2010). The Court explained:

> Defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim's time in prison led defendant to believe he was about to be shot, is principally pertinent to defendant's claim at trial that he shot the victim in self-defense and consequently was not guilty of first-degree murder on the basis of malice, premeditation, and deliberation. This excluded evidence supports defendant's self-defense claim in two ways: (1) defendant's knowledge of the victim's past at the time of the shooting is relevant to defendant's mental state; and (2) the light this knowledge cast on the victim's character could make it more likely that the victim acted in a way that warranted self-defense by defendant.

Id. at 822, 689 S.E.2d at 864. Like *Jacobs*, Defendant's proposed testimony here, that he was aware of Tommy's status as a convicted felon, and that such knowledge led Defendant to be more afraid of Tommy and believe he was going to be shot, is "principally pertinent to [D]efendant's

claim at trial that he shot the victim in self-defense." *Id.* Further, with respect to self-defense, this evidence provides insight as to Defendant's state of mind at the time of the killing and an understanding as to the reasonableness of Defendant's fear and whether such fear justified his actions.

Additionally, the *Jacobs* Court clarified that such evidence would be impermissible character evidence if its only basis for admissibility was to explain the victim's behavior at the time of the incident. *Id.* at 823, 689 S.E.2d at 864. On the other hand, "because the evidence is relevant to defendant's state of mind, it is not prohibited by Rule 404(b)." *Id.* (citation omitted). Defendant did not wish to testify about Tommy's status as a convicted felon to show Tommy had a propensity for violence or that his previous convictions were connected to his behavior that day; rather, Defendant's proposed testimony was relevant to his state of mind at the time he shot Tommy and was not prohibited by Rule 404(b).

We note North Carolina Courts have uniformly held that Rule 404(b) is a rule of *inclusion*. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "Rule 404(b) is a clear general rule of *inclusion* of relevant evidence . . . subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citation omitted). Therefore, "evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *Id.* (cleaned up). We are unpersuaded by the State's argument in support of the trial court's decision to exclude evidence of Tommy's status as a felon as the evidence presented serves a non-propensity purpose and such evidence should generally be admissible. Accordingly, the trial court erred in excluding this evidence.

If the trial court's Rule 404(b) ruling was erroneous, this Court "must then determine whether that error was prejudicial." *State v. Pabon*, 380 N.C. 241, 260, 867 S.E.2d 632, 645 (2022) (citation omitted). To determine if a 404(b) error is prejudicial, the test is "whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial" and "[t]he burden of demonstrating prejudice lies with defendant." *Id.* 380 at 260, 867 S.E.2d at 645 (cleaned up). Here, Defendant has shown a reasonable possibility that the jury would have reached a different result had he had the ability to testify about his knowledge of Tommy's status as a convicted felon. At trial, the jury heard two conflicting narratives: (1) Defendant's testimony that Tommy charged at him and was reaching in his vest for what Defendant

believed was a weapon; and (2) the witnesses' testimony that Tommy stood there after pushing Defendant to the ground when Defendant retrieved his weapon and shot Tommy. The excluded evidence would most certainly have provided the jury with insight into Defendant's state of mind, which is essential to his claim of self-defense, and whether Defendant's fear and degree of force was reasonable. Without this evidence, Defendant's testimony about the sequence of events that day lacks corroboration and support. Accordingly, a different result would probably have been reached at trial had the jury heard evidence related to Defendant's state of mind.

Further, the trial court's exclusion of this evidence required portions of Defendant's 911 call to be redacted, preventing the jury from hearing evidence of Defendant's state of mind. In the call, the dispatcher asked Defendant, "And y'all have had this issue before in previous years?" Defendant responded, "No. No. I've known Tommy. He's a felon. When I was a detention officer at Iredell County, he was also my neighbor at one time. And I've always known he hunts illegally, and I could have called the law on him a million times, and I didn't." After the trial court redacted statements from the call, the jury heard, "And y'all have had this issue before in previous years?" "[H]e was also my neighbor at one time. And I've always known he hunts illegally, and I could have called the law on him a million times, and I didn't." Thus, the jury was allowed to hear that Defendant knew Tommy hunts illegally but did not have the context to understand Defendant's basis for this statement.

During the cross-examination of Agent Waugh, the State asked if a valid hunting license was found in Tommy's wallet, to which Agent Waugh responded "Yes, there was." This evidence was allowed to be presented to the jury, even though Tommy was hunting there illegally because as a convicted felon he could not *legally possess* a firearm *even with* a valid hunting license. Further, evidence that Defendant knew Tommy from when he was employed as a detention officer for the Iredell County Sheriff's office was omitted.

Additionally, at trial, the jury heard numerous times that Tommy was lawfully on the field, with written permission from the owner. This was offered through the testimony of the witnesses and the State's exhibit of the note found in Tommy's jacket that stated he had such permission. Further, other testimony was presented that revealed Defendant took issue with whether Tommy had permission and even if he did, Defendant did not want Tommy hunting on the property. Therefore, when the statements from the 911 call were excluded, the jury could only speculate as to why Defendant believed Tommy hunted illegally,

likely concluding that "illegally" meant "without permission" because they heard evidence that Tommy had a valid hunting license.

This exclusion from the 911 call likely misled and confused the jury. The State presented evidence that Tommy had a valid hunting license and written permission to be on the property. The redacted statements rebutted this evidence, providing the jury with a basis for Defendant's statements. Moreover, it could have led the jury to affirmatively conclude that Defendant did not believe Tommy had permission, when in fact his statement related to Tommy's status as a convicted felon, not Defendant's belief of whether Tommy had permission. This redaction was both error and prejudicial to Defendant. We conclude Defendant satisfied his burden of proving "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Scott*, 331 N.C. at 46, 413 S.E.2d at 791.

While the dissent correctly acknowledges that the trial court engaged in the Rule 403 balancing test and recognized the potential for prejudice, we disagree that the trial court did not abuse its discretion in reaching its conclusion. The dissent notes that the jury arrived at their decision after hearing all the evidence and judging the credibility of the witnesses. However, as a result of the trial court's 404(b) exclusion, the jury heard incomplete, misleading evidence, which potentially undermined Defendant's credibility and defense. Without this evidence, Defendant was unable to articulate his state of mind at the time he shot Tommy and could not explain his basis for why he believed Tommy was hunting illegally. Without this context, the jury could have drawn incorrect conclusions, believing Defendant shot Tommy because he did not want him hunting on the land anymore and did not believe he had permission, especially when presented with Tommy's hunting license and written note of permission. Thus, this evidence was crucial for Defendant to develop his defense. When viewing the excluded evidence as it applies to each set of facts, specifically Defendant's state of mind, the redacted 911 call, and the admission of Tommy's hunting license and note, we hold the trial court abused its discretion when it reached its conclusion to exclude the Rule 404(b) evidence of Tommy's status as a convicted felon.

III. Conclusion

We hold the trial court erred in denying Defendant's motion to dismiss the charge of first-degree murder because substantial evidence of premeditation and deliberation was not presented at trial. The trial court did not err in omitting the stand-your-ground doctrine from the

jury instructions; however, the trial court erred in excluding the Rule 404(b) evidence of Tommy's status as a convicted felon. Because Defendant was prejudiced by the trial court's error, Defendant's conviction is reversed and vacated. Defendant is entitled to a new trial, and we remand to the trial court for a new trial. It is so ordered.

NEW TRIAL.

Judge HAMPSON concurs.

Judge STADING concurring in part and dissenting in part by separate opinion.

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

I concur with part B of the majority's analysis addressing Defendant's argument about the trial court's jury instructions. However, I respectfully dissent from the majority's conclusion in part A and would hold that there is sufficient evidence to survive a motion to dismiss when considering the evidence in the light most favorable to the State. I also dissent from the majority's opinion in part C and would hold that the trial court did not err by excluding the victim's status as a felon.

I. Motion to Dismiss

First-degree murder is a "willful, deliberate, and premeditated killing." N.C. Gen. Stat. § 14-17(a) (2023). To survive a motion to dismiss, there must be substantial evidence that the defendant intentionally killed the victim with malice, premeditation, and deliberation. *State v. Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981) (citations omitted). "Whether an action is premeditated depends on whether thought preceded action, not the length of the thought. Further, both premeditation and deliberation are mental processes generally proven by actions and circumstances surrounding the killing." *State v. Joyner*, 329 N.C. 211, 215, 404 S.E.2d 653, 655 (1991) (citation omitted).

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case – they are for the jury to resolve. The

> court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. The defendant's evidence, unless favorable to the State, is not to be taken into consideration.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (cleaned up).

Considering the evidence through the proper lens shows that the trial court did not err. Before the events of 7 September 2020, a confrontation had occurred between Defendant and the victim at a Subway. And during a prior dove season, the victim was hunting on the same property when Defendant's horse had been shot. At the time, Defendant questioned the victim about the responsible party and believed the victim's response was dishonest. Also on an earlier occasion, while at a 7-Eleven, Defendant told the victim he could not hunt on the neighboring property. On 7 September 2020, Defendant was awakened by the sounds of gunshots and horse hooves pounding. He got up, put on his clothes, placed a pistol in his back pocket, and drove to confront the hunters. Defendant exited his truck, was angry, and asked the victim's son if he was there with the victim by name. The victim's son replied in the affirmative and added that they had written permission to hunt on the property. Defendant walked towards the victim. The victim put down his shotgun and had nothing in his hands when walking to meet Defendant. The victim expressed his irritation with Defendant continually bothering him while hunting on the property. The two men exchanged words, and the victim pushed Defendant down. Defendant remained on the ground for a few seconds and then drew his gun as he got up. The victim put up his hands and said "no," but Defendant shot him from a distance of only a few feet. The other hunters nearby also said "no" upon seeing Defendant draw his gun before shooting the victim. One of the hunters called 911 and told Defendant not to leave. Defendant walked by another hunter on the way to his car, told him to put down his gun, and nonchalantly acknowledged killing the victim. Defendant then got in his truck and returned to his home.

Viewing the evidence in the light most favorable to the State and weighing the factors noted by the majority under the totality of the circumstances shows substantial evidence was presented from which a jury could determine that Defendant intentionally shot the victim with malice, premeditation, and deliberation at the time of the killing. *See State v. Hager*, 320 N.C. 77, 82, 357 S.E.2d 615, 618 (1987); *see also State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) ("Some of the circumstances from which premeditation and deliberation may be

implied are (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."). Contrary to Defendant's urging, the present matter is distinguishable from *Corn*, 303 N.C. 293, 298, 278 S.E.2d 221, 224 (1981) and *State v. Williams*, 144 N.C. App. 526, 530-31, 548 S.E.2d 802, 805 (2001) because, among other reasons, the parties here have a history of arguments and animosity.

II. Evidence the Victim was a Felon

Generally, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused. . . ." N.C. Gen. Stat. § 8C-1, R. 404(a) (2023). And, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, R. 404(b) (2023). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* "[P]rior to admitting extrinsic conduct evidence, [the trial court is required] to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect." *State v. Morgan*, 315 N.C. 626, 640, 340 S.E.2d 84, 93 (1986). This balancing test requires the trial court to determine whether the offered evidence may be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." N.C. Gen. Stat. § 8C-1, R. 403 (2023). The trial court's determination concerning admitting evidence under Rule 403 is reviewed for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Here, the trial court found that Defendant's awareness that the victim was a felon did not permit admission of such fact before the jury under either evidentiary rule. Even so, Defendant maintains that Rule 404(b) applies, and the trial court erred in not permitting evidence that the victim was a convicted felon as it was relevant to show that Defendant was afraid of the victim. The majority analysis holds for Defendant in comparing this matter to *State v. Jacobs*, 363 N.C. 815,

689 S.E.2d 859 (2010). Yet, *Jacobs* instructs that "under Rule 403, relevant evidence may be excluded if its probative value 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *Id.* at 823, 689 S.E.2d at 864 (citing N.C. Gen. Stat. § 8C-1, R. 403). And "[t]he exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). The trial court here engaged in this balancing test, noted the potential for prejudice, and determined that the evidence was "probative of nothing" and did not abuse its discretion in reaching its conclusion.

After receiving instructions from the trial court on first-degree murder, second-degree murder, and voluntary manslaughter, the jury found Defendant guilty of first-degree murder. The jury arrived at their decision after hearing all the evidence and judging the credibility of the witnesses. Here, Defendant received a fair trial free from prejudicial error. Based on the foregoing, I would affirm the judgment below.

STATE OF NORTH CAROLINA
v.
FREDERICK PLOTZ, DEFENDANT

No. COA23-749

Filed 20 August 2024

1. Stalking—jury instruction—conduct alleged in charging instrument—plain error not shown

In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor, the trial court did not plainly err by failing to instruct the jury that it could only convict defendant if it believed he harassed his neighbor specifically "by placing milk jugs outside [the neighbor's] home spelling" racial and homophobic slurs, as alleged in the statement of charges. While defense counsel acquiesced and failed to object to the pattern jury instruction for the offense as requested by the State, the course of conduct alleged in the charging instrument was not discussed in the charge conference, and thus defendant's appellate argument was not waived by invited error. However, although at least eight other

examples of defendant's harassing conduct were before the jury, he could not show prejudice given the overwhelming evidence regarding his use of the milk jugs to harass his neighbor—including defendant's admission that he wrote letters on the jugs that would spell the epithets and placed them in his driveway (although he denied arranging them to be read by his neighbor).

2. Evidence—other crimes, wrongs, or acts—limiting instruction not requested—no error

In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor by means of epithets written on milk jugs, the trial court did not err in failing to give a limiting instruction regarding evidence of additional, uncharged harassing acts by defendant—including making a profane gesture and racist remarks, revving his truck and flashing its headlights at the neighbor's residence in the middle of the night, and banging on a shared wall of the duplex—admitted pursuant to Evidence Rule 404(b) where defendant did not request such an instruction, either when the evidence was admitted or during the charge conference.

3. Stalking—jury instruction—fear of death and bodily injury—invited error

In a prosecution for misdemeanor stalking arising from defendant's harassment of his duplex neighbor, the trial court did not plainly err by instructing the jury on all three statutory forms of emotional distress that can support a stalking conviction—being placed in fear of death, bodily injury, or continued harassment—where the charging instrument only alleged that defendant knew his course of conduct would cause his neighbor to fear continued harassment. This portion of the pattern jury instruction was explicitly discussed in the charge conference, and defense counsel agreed to it; accordingly, any error was invited and could not be heard on appeal. Even if the argument had been before the appellate court, all of the evidence concerned the neighbor's fear of continued harassment, and therefore, defendant would not have been able to demonstrate prejudice.

4. Constitutional Law—effective assistance of counsel—failure to request limiting instructions and object to jury charge—prejudice not shown

The appellate court rejected defendant's arguments that he received ineffective assistance when his trial counsel failed to (1) request limiting instructions directing the jury to consider only the

conduct alleged in the charging instrument (communicating slurs spelled out on milk jugs displayed toward his neighbor's home) and regarding Evidence Rule 404(b) testimony of other harassing behavior directed at the neighbor; and (2) object to the jury instruction on stalking listing fear of death and bodily injury—in addition to fear of continued harassment—as a type of emotional distress defendant knowingly caused his neighbor. Defendant could not demonstrate prejudice in light of his admitted placement in his driveway of milk jugs he had had marked with letters spelling out slurs and the absence of evidence that the victim experienced any emotional distress other than a fear of continued harassment; accordingly, there was no reasonable probability that, but for defense counsel's alleged errors, the jury's verdict would have been different.

5. Stalking—motion to dismiss—insufficiency of evidence—course of conduct—properly denied

In a prosecution for misdemeanor stalking arising from defendant's placement of jugs bearing letters that were arranged to communicate slurs toward a duplex neighbor, the trial court properly denied defendant's motion to dismiss for insufficiency of evidence of his alleged course of conduct where, in the light most favorable to the State, the evidence of defendant's use of the jugs and the intent behind that use—including other harassing behavior by defendant such as calling the neighbor a racial slur, banging on their shared wall, revving his vehicle, and otherwise disturbing the neighbor at night—would permit the jury to determine that defendant engaged in harassing behavior that he knew or should have known would cause a reasonable person substantial emotional distress.

Appeal by Defendant from Judgment entered 1 February 2023 by Judge Robert Broadie in Forsyth County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General A. Mercedes Restucha, for the State.

Daniel M. Blau for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Frederick Plotz (Defendant) appeals from a Judgment entered on a jury verdict convicting him of Misdemeanor Stalking. The Record—including the evidence presented at the jury trial—reveals the following:

In 2019, Julious Parker, a 65-year-old Black man, moved into his new residence, one half of a duplex in Winston-Salem. Defendant lived in the other half of the duplex. Parker and Defendant had no communication with each other from the time Parker moved in until the following interactions occurred.

One night in July 2020, at approximately 4 AM, Parker observed Defendant taking yard waste and placing it on an existing pile on Parker's side of the yard. Parker went outside to confront Defendant, leading to the following exchange, as testified to by Parker:

Parker:	Excuse me. You need to put that stuff on your side.
Defendant:	You started that.
Parker:	Started what?
Defendant:	Boy.
Parker:	You call me what?
Defendant:	Nigga.

Defendant then returned to his house.

The next day, Parker found a letter from Defendant in his mailbox, addressed to "Occupant/Tenant" and indicating the owner of Parker's half of the duplex had been copied. The letter begins:

> Printed this out and hope it's clear *to you* in terms of our city ordinance(s). At the law firm, we deal with both civil and local ordnance. (sic) It would benefit you to read this as I highlighted the most significant sections of our city's sub code. Sec. 74-19 is for your review hoping your level of literacy lends itself to clear comprehension and the necessary expedience of your subsequent pending remedy.

The letter complains about a pile of debris in Parker's yard and alleges that it obstructs visibility for vehicles. It continues:

> Secondly, you may want to consider encroachment and destruction of property as it relates to trespassing. I will

> soon have to post NO TRESPASSING signs (no thanks to you). Do not cut or tamper the with (sic) survey line (again). Other than my recordation of said event(s) there are other means of surveillance employed. You've certainly made a huge statement about yourself based on the enormous junk & debris pile in front of YOUR RESIDENCE on our street. Not good! Not very bright, either. *Complete disregard on many counts*, **but mostly for the safety of drivers to navigate a residential street, in the city of Winston-Salem, North Carolina**.

(emphasis in original). The letter ends by quoting purportedly verbatim the majority of Section 74-19 of the Winston-Salem Code of Ordinances, which addresses the responsibility of residents to keep streets and sidewalks clear from vegetation.

Upon receiving this letter, Parker called the owner of his residence, who advised that he call the police. He did so, and officers arrived and spoke with Defendant.

Following this exchange, from July through August 2020, Defendant began placing milk jugs filled with water in his driveway. Some of these jugs had a letter written on them and were positioned such that Parker could read the letters from his bedroom window. Defendant would move the jugs around on his driveway and position them so that one jug at a time faced Parker's window. Parker informed the owner and began to take pictures of the jugs. He noticed that the jugs spelled out different words, one letter each day spelling out "N" "I" "G" "G" "A" and later "H" "O" "M" "O". On other days the jugs displayed two letters at a time, "F. N." and "Q. N." Parker understood these to be abbreviations for homophobic and racist slurs.

On several occasions during this time period, Defendant would rev his truck's engine with its taillights aimed at Parker's bedroom window at around 2:00 AM. Parker placed video cameras at the front of his property, which captured video recordings of Defendant positioning milk jugs and running his truck in the early hours of the morning. It also captured Defendant pointing a flashlight at Parker's floodlight sensor.

Parker testified at trial to multiple encounters he had with Defendant during July and August 2020. During one, Defendant "threw up his middle finger" at Parker and called him a racial slur. During another, Defendant, apparently speaking on the phone, spoke loudly enough while outside that Parker could hear him say: "Yeah they need to go back on his other side of town." During other telephone conversations

Defendant would "talk about bullets, ammo, gun," at a volume Parker interpreted as intended to allow him to overhear. Defendant would also at night bang on the adjoining wall between their residences, which was Parker's bedroom wall.

Following these events, Parker called the police a second time. Upon their advice, Parker went to the magistrate's office to take out charges against Defendant. The State filed a Misdemeanor Statement of Charges on 28 June 2021 charging Defendant with Misdemeanor Stalking and Disorderly Conduct by Abusive Language. Defendant received a bench trial in District Court on 4 August 2021. At this bench trial, Defendant was found not guilty of Misdemeanor Disorderly Conduct by Abusive Language. However, Defendant was found guilty of Misdemeanor Stalking. Defendant appealed this conviction to Superior Court.

Defendant was tried *de novo* in Superior Court on 30 January 2023. At trial, Parker testified to the above. Defendant testified that he had lived in the residence for nearly 40 years and that his family was "the original anchor family in the neighborhood." He said that when Parker moved in during 2019 Defendant attempted to introduce himself, but Parker turned to the men helping him move and said "Look, a cracker neighbor." He denied calling Parker slurs or spelling out slurs with the milk jugs. He explained that he would fill the jugs with water to distribute to unhoused persons, and that he would label them with the initials of different individuals. He also testified that the jugs in Parker's photographs were not placed where he had put them and appeared to have been moved. He denied banging on the adjoining wall and explained that the phone calls Parker overheard involving "ammo" and "gun" were likely conversations about varieties of coffee sold by the Black Rifle Coffee Company. He testified that he had not intended to intimidate or harass Parker.

On 1 February 2023, the jury returned its verdict finding Defendant guilty of Misdemeanor Stalking. The trial court sentenced Defendant to 18 months of supervised probation and a 15-day active sentence. Defendant gave written notice of appeal.

Issues

The multiple issues raised by Defendant on appeal are whether: (I) the trial court erred in instructing the jury on Misdemeanor Stalking without limiting its consideration to the course of conduct alleged in the charging instrument; (II) the trial court erred by failing to provide a limiting instruction regarding evidence of Defendant's conduct not alleged in the charging instrument; (III) the trial court's jury instruction as to the

elements of Misdemeanor Stalking was improper because it allowed the jury to consider the infliction of fear of death or bodily injury as an element, which was unsupported by the evidence and was not alleged in the charging instrument; (IV) Defendant received ineffective assistance of counsel because Defendant's trial counsel failed to object at trial regarding any of those issues; and, (V) there was sufficient evidence to support his conviction for Misdemeanor Stalking.

Analysis

I. Jury instructions regarding course of conduct alleged in charging instrument

[1] Defendant first argues the trial court erred by failing to instruct the jury as to the specific course of conduct alleged in the Misdemeanor Statement of Charges, allowing the jury to find him guilty of Misdemeanor Stalking upon a theory of conduct not alleged in the charging instrument.

Stalking is the (1) willful harassment on multiple occasions or (2) willful engagement in a course of conduct without legal purpose that the defendant knows or should know would cause a reasonable person (a) to fear for their safety or the safety of immediate family or close personal associates or (b) suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment. N.C. Gen. Stat. § 14-277.3A(c) (2023). The Statement of Charges filed against Defendant alleges he engaged in a course of conduct directed at Parker "by placing milk jugs outside of Mr. Parker's home spelling the words 'nigga' and 'homo.' " During the jury charge, the trial court instructed the jury on the elements of stalking:

> The Defendant has been charged with stalking. For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the Defendant willfully engaged in a course of conduct directed at the victim without legal purpose.
>
> And second, that the Defendant at the time knew or should have known that the course of conduct would create a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

The trial court did not specify to the jury that it was required to find the course of conduct described in the Misdemeanor Statement of Charges—the placement of the milk jugs—as the basis for a stalking

conviction. Defendant argues that, because evidence was presented at trial of additional conduct—including the first July 2020 confrontation, placing the letter in Parker's mailbox, revving his truck's engine at night, aiming a flashlight at Parker's floodlights, banging on the adjoining wall, calling him slurs, and using threatening language while on the phone—the jury instruction was ambiguous and potentially allowed the jury to convict based on a theory of conduct not alleged in the charging instrument.

A. Invited Error

As a threshold matter, the State argues that Defendant invited any error by agreeing to the jury instructions given, foreclosing his appeal on this issue. In general, we review jury instructions for plain error when the defendant failed to object at trial. *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000) (reviewing jury instructions for plain error when defendant had "ample opportunity to object to the instruction outside the presence of the jury" and did not do so). However, "a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001).

During the charge conference, the trial court discussed with counsel for Defendant and the State the jury instructions regarding Misdemeanor Stalking:

> The State: Yes, your honor. First parenthetical is on one or more occasion of harass and the other is charge a course of con–or sorry--engagement in a course of conduct. The misdemeanor statement alleges engaging in a course of conduct. We would be asking for that one.
>
> The Court: Okay. Any objection?
>
> Defense Counsel: No objection, your honor.
>
> The State: For the second parenthetical, harassment or course of conduct, same thing. Misdemeanor statement's alleged course of conduct. We would be asking for that.
>
> Defense Counsel: No objection.
>
> The Court: Okay.

The State: Your Honor, the statute says for misdemeanor stalking--I do have a copy of that if I may approach. And Mr. Hines.

Defense Counsel: Thank you.

The State: In reference to--the statute before A and B says "Any of the following." The State just interprets that as either A or B. Now you have to prove A and B. The instructions aren't really clear on that. The charging document falls into the category of B, so I would ask that A be stricken.

Defense counsel: That's fine, your Honor.

The Court: Okay. So we're going with A. I–

The State: No, we're striking it.

The Court: No, we're striking A. All right.

The State: Striking A and then going with B, which would just be "suffers substantial emotional distress by placing a person in fear of" the statute reads "death, bodily injury, or continued harassment." The charging document does allege continued harassment.

I think if you were to find any of those, that would be sufficient, so I would ask for all three with the "or in there between them. But if we just have to go with one, I would go with continued harassment as that's what's in the charging document.

Defense Counsel: Well, I'm not opposed to that, your Honor.

The Court: All right. So we'll go with death, bodily injury or--

The State: Continued harassment.

The court: Continued. Okay. All right.

The State: And I think the rest is just the same.

The Court: And so we went with course of conduct.

The State: Course of conduct striking A, and B is all three with "or continued harassment."

> The Court: So for the -- 4B is it-- okay. So suffer substantial emotional distress. Okay. All right.
>
> The State: Yeah, and then, yeah, engage in a course of conduct at the top of that page as well. I think I missed that but--
>
> The Court: All right. Yes.
>
> The State: And I think that should be it for the stalking charge.
>
> The Court: Okay
>
> Defense counsel: We're fine with that, Your Honor.

This discussion reflects the application of North Carolina Pattern Jury Instruction Crim. § 235.19 to the evidence before the trial court in this case. This pattern instruction includes various alternate constructions in brackets that may be used to apply the disjunctive elements of the charge to the specific facts of the case:

> The defendant has been charged with stalking.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant willfully [on more than one occasion harassed] [engaged in a course of conduct directed at] the victim without legal purpose.
>
> And Second, that the defendant at the time knew or should have known that the [harassment] [course of conduct] would cause a reasonable person to:
>
> a. [fear for [that person's safety] [the safety of that person's [immediate family] [close personal associates]. One is placed in reasonable fear when a person of reasonable firmness, under the same or similar circumstances, would fear [death] [bodily injury].]
>
> b. [suffer substantial emotional distress by placing the person in fear of [death] [bodily injury] [continued harassment]].

N.C.P.I. Crim. § 235.19.

During the charge conference quoted above, the State requested the trial court instruct the jury using the "course of conduct" option, and "emotional distress" as the result of that course of conduct. Defendant's counsel affirmed that he did not object to this implementation of the pattern instructions, and did not propose additional instructions limiting the underlying facts on which the jury could convict to those described in the charging instrument. We must determine if Defendant's level of participation in crafting this jury instruction constitutes invited error. Because the trial court did not discuss with the parties the specific issue of limiting the jury's consideration to the course of conduct alleged in the charging instrument, we conclude that it does not.

In prior cases examining invited error in jury instructions, we have reviewed a broad spectrum of attorney participation in crafting those instructions. At one end of that spectrum, error is clearly invited when the defendant requested the instruction at issue: in *State v. McPhail*, for example, the defendant specifically requested the trial court read the pattern jury instruction regarding confessions. 329 N.C. 636, 643-44, 406 S.E.2d 591, 596 (1991). Any error stemming from that instruction was invited error and could not be heard on appeal. *Id.*

At the opposite end of the spectrum, an attorney's simple failure to object to proposed instructions does not constitute invited error. In *State v. Harding*, the State argued the defendant was precluded from plain error review because he "failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018). In rejecting the State's argument, we noted that a failure to object does not constitute invited error but instead gives rise to plain error review. *Id.* (citing *Hooks*, 353 N.C. at 633, 548 S.E.2d at 505 (2001)). While the State argued the defendant participated in crafting the jury instruction at issue, the transcript only reflected participation in the subsection (a) "purpose" element of kidnapping and not the subsection (b) elements elevating the charge to first-degree, which were at issue on appeal. *Id.*; N.C. Gen. Stat. § 14-39.

We have recognized a threshold of participation in crafting jury instructions above the mere failure to object which constitutes invited error, even when the appealing party did not specifically request the instruction and language at issue. For example, the State cites to *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996). In that case, the defendant faced multiple charges, with the evidence supporting instruction on identical mitigating factors for each charge. 344 N.C. at 234-35, 474 S.E.2d at 395. During the charge conference, the trial court specifically inquired if the defendant objected to the court instructing the jury on the

mitigating factors a single time, rather than repeating them for each separate charge: "And there's no reason, particularly, to repeat the mitigating circumstances in the entire charge. But I'll only do it if the defendant consents that way." *Id.* at 235, 474 S.E.2d at 396. As the defendant specifically agreed to this manner of instruction, our Supreme Court held any error to be invited, additionally noting that the instructions were not erroneous and resulted in no prejudice to the defendant. *Id.* Also in that case, the defendant submitted a proposed instruction in writing, the trial court substituted a word in the proposed instruction, and the defendant did not object to that change. *Id.* at 213, 474 S.E.2d at 383. The Court held any error in that instruction to likewise be invited by the defendant. *Id.*

In *State v. White*, the defendant requested an instruction on nonstatutory mitigating factors but failed to provide the trial court with proposed language for the requested instruction. 349 N.C. 535, 568-69, 508 S.E.2d 253, 274 (1998). The trial court read out loud its proposed instruction on nonstatutory mitigating factors, and defense counsel specifically agreed to the language. *Id.* Citing *Wilkinson*, our Supreme Court held that any error in that instruction was invited, and the defendant could not raise as an issue on appeal the language used in that instruction. *Id.*

Likewise, when the State requested no instruction be given on a lesser-included offense and the defendant's counsel affirmatively stated no such instruction was necessary, the Court held any error resulted from the defendant's own conduct. *State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993). And in *State v. Harris* the defendant argued that the trial court erred in the language it used to instruct the jury on a mitigating factor, but he had "agreed at the charge conference that the court would charge on this feature of the case as it did." 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994). Therefore, any error was invited, though the Court also held there was no error in the trial court's instruction. *Id.* at 129, 449 S.E.2d at 380-81.

As Defendant did not request the instruction at issue in this case, the question before us is whether his participation in the crafting of the jury instruction from the Misdemeanor Stalking pattern instruction forecloses any appeal related to the instruction on that charge. The trial court and counsel effectively worked through the pattern instruction line by line, and Defendant, through counsel, consented to each of the trial court's choices of construction. However, the specific issue of instructing the jury that its conviction could only be based on the course of conduct alleged in the charging instrument did not arise during the charge conference.

This case is similar to our decision in *State v. Chavez*, 270 N.C. App. 748, 842 S.E.2d 128 (2020), *rev'd on other grounds*, 378 N.C. 265, 861 S.E.2d 469 (2021). In *Chavez*, the indictment named only a single co-conspirator in the offense of conspiracy to commit first-degree murder but, at trial, the State provided evidence of two co-conspirators. 270 N.C. App. at 754, 842 S.E.2d at 133. The defendant argued the trial court erred by failing to limit the jury's consideration to the co-conspirator named in the indictment. *Id.* Counsel for the defendant participated in crafting the instruction during the charge conference, did not object to the proposed instruction on the conspiracy charge, and additionally requested that an instruction on "mere presence" be added to the language. *Id.* at 755, 842 S.E.2d at 134. The trial court provided written copies of the instructions to both parties, the defendant had multiple opportunities to object outside the presence of the jury, and the defendant's counsel indicated to the court that she was satisfied with the instructions. *Id.* at 754-55, 842 S.E.2d at 133-34. Citing *Harding*, we held that the failure to object to the applied pattern instruction did not constitute invited error. *Id.* at 757, 842 S.E.2d at 135 ("As Defendant did not request the conspiracy instruction, but merely consented to it, Defendant did not invite error like the defendant in *Wilkinson*, and is entitled to plain error review like the defendants in *Harding* and *Hardy*.").[1]

As in *Chavez*, Defendant participated in the crafting of the jury instruction on the charge at issue, but on appeal argues the trial court should have added an instruction limiting the basis upon which the jury could convict. Following *Chavez*, Defendant did not invite the error.

This is in accord with the general patterns of our appellate decisions regarding invited error in jury instructions. In cases where the defendant participates in crafting the instructions and specifically consents to the instruction as given, he may not argue on appeal that the language or form of the instruction that was given was in error. *See*, *e.g.*, *Harris*, 338 N.C. at 150, 449 S.E.2d at 380. When a provision is excluded from the instruction and that provision was specifically discussed with the defendant who explicitly consented to its exclusion, likewise no appeal will be heard. *See Williams*, 333 N.C. at 728, 430 S.E.2d at 893. However, when a provision is excluded from the instruction and the appealing party did not affirmatively consent to its exclusion but only consented

1. In its review of this Court's decision in *Chavez*, our Supreme Court likewise reviewed the jury instructions for plain error, ultimately holding that the defendant could not show prejudice and reversing the prior decision. 378 N.C. 265, 270, 861 S.E.2d 469, 473 (2021).

to the instructions as given, even when given "ample opportunity to object," *Hardy*, 353 N.C. at 131, 540 S.E.2d at 342, we cannot say that he invited the alleged error. Accordingly, we review the trial court's instruction for plain error.

B. Plain error review

A defendant may only be convicted of "the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018) (citing *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016)). It is "error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the [charging instrument]." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980).

Because Defendant did not object to the jury instructions at trial, we review this issue for plain error. "The plain error rule . . . is always to be applied cautiously and only in the exceptional case[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378. To show plain error, Defendant must show not only that the trial court erred, but that the error had a probable impact on the jury's finding that he was guilty. *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 334 (2012).

Here, Defendant argues that, although the Statement of Charges alleges only the placing of milk jugs outside of Parker's home as the course of conduct underlying the stalking charge, the State introduced evidence of at least eight other types of harassing conduct directed toward Parker. As such, Defendant contends, we cannot know whether the jury convicted Defendant based on the course of conduct alleged in the charging instrument or other conduct for which evidence was presented.

"In order for a variance to warrant reversal, the variance must be material," meaning it must "involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). A jury instruction that is not specific to the factual basis alleged in the charging document is acceptable so long as there is "no fatal variance between the [charging instrument], the proof presented at trial, and the instructions given to the jury." *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993). For example, where evidence of only a single wrongful act is presented to the jury, it is not error for the

trial court to fail to give instructions specific to that act. *See, e.g.*, *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566-67 (2005).

In this case, evidence of multiple potentially wrongful acts was presented to the jury. For Defendant to show plain error, he must show that, but for the challenged instructions, the jury probably would have reached a different verdict. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). For this to be the case, the jury must have rejected the evidence of the milk jugs as satisfying the "course of conduct" element of stalking but accepted evidence of Defendant's other conduct to satisfy this element. There are only two ways the jury could have reached this result: by finding (1) that Defendant did not place the milk jugs in his driveway; or (2) that he did not do so with the requisite mental state: knowledge that placing the milk jugs would cause a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment. Neither of these possibilities are probable.

First, the evidence of the act of placement of the milk jugs was overwhelming. In addition to Parker's testimony, Defendant admitted to placing the milk jugs in his driveway and to writing the letters on them. The only conduct he did not concede was specifically turning the milk jugs to face Defendant's window in sequence, and he hypothesized that someone had repositioned them. But he conceded that he wrote the letters used to spell out multiple slurs and provided no explanation for who may have moved the jugs or why. He also engaged in a course of additional conduct that, under Defendant's argument, was sufficiently egregious that it caused the jury to convict him for stalking. Given the evidence before them, including Defendant's own testimony, it is not probable that the jury found he did not place the milk jugs in the driveway.

Nor is it likely that the jury found he did not place the milk jugs with the requisite intent. Defendant's theory requires that the jury convicted him based on a course of conduct other than the placement of the jugs, necessarily finding that this course of conduct was committed with knowledge that it would cause a reasonable person emotional distress. This would require the jury to conclude that, although Defendant engaged in a course of conduct he knew would cause emotional distress, the placement of milk jugs in his driveway—angled toward Parker's home and spelling out racial and sexual epithets—was coincidental and not a part of that course of conduct. We note as well that the primary focus of the trial was the course of conduct alleged in the charging document: a significant portion of the testimony at trial was related to the milk jugs, and Parker testified that he took out charges in response

to their placement. We cannot conclude that the jury found Defendant engaged in some course of conduct that constitutes stalking but that his conduct involving the milk jugs was innocent.

Defendant relies primarily on two cases to support his argument, both of which are distinguishable. In *State v. Taylor*, the trial court failed to instruct the jury on "removal," the theory of kidnapping contained in the indictment, and instead instructed on "confinement" and "restraint," neither of which were alleged in the indictment. 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). Unlike in this case, the variance in *Taylor* was fatal because the jury, following the trial court's instructions, could not have convicted under the theory alleged in the indictment. *Id.* In *State v. Ferebee*, 137 N.C. App. 710, 529 S.E.2d 686 (2000), the pattern jury instruction given was facially ambiguous and allowed the jury to convict for conduct the legislature did not intend to criminalize. Additionally, the defendant in that case objected to the instructions at trial and our review was not for plain error. 137 N.C. App. at 713-14, 529 S.E.2d at 688.

The evidence in this case supports a conviction based on the course of conduct alleged in the Statement of Charges, and a different jury instruction would not have produced a different result. Defendant was not prejudiced by the trial court's instructions. *See State v. Tirado*, 358 N.C. 551, 576, 599 S.E.2d 515, 533 (2004) ("[T]he evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions. Accordingly, we conclude . . . that the error in the instructions was not prejudicial."). The trial court did not plainly err.

II. Rule 404(b) evidence

[2] As described above, the State produced evidence of acts committed by Defendant that were not alleged in the charging instrument. Defendant argues that this evidence was admitted under Rule 404(b) of our Rules of Evidence, which allows evidence of other crimes and acts to be admitted, among other purposes, to show motive and intent. Because Rule 404(b) evidence is admissible only for limited purposes, he argues the trial court erred by failing to provide a limiting instruction to the jury, either at the time the evidence was admitted or during the formal jury charge.

However, as Defendant concedes, the trial court is not required to provide a limiting instruction when no party has requested one. "The admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for a limiting instruction. 'Such an instruction is not required unless

specifically requested by counsel.' " *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (citing *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989)). This is in accord with our Rules of Evidence: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C. Gen. Stat. § 8C-1, Rule 105 (emphasis added).

Here, Defendant failed to request a limiting instruction. Defendant did not at trial and does not on appeal challenge the admissibility of the evidence of his conduct. The trial court did not err by failing to give a limiting instruction when no instruction was requested. *State v. Wade*, 155 N.C. App. 1, 18, 573 S.E.2d 643, 654 (2002).

III. Death and Bodily Injury

[3] Defendant next argues that the trial court plainly erred by instructing the jury on extraneous theories of guilt not alleged in the charging document. In order to convict a defendant of stalking, the State must show that the defendant (1) harassed another person or (2) engaged in a course of conduct directed at that person. Then it must show that the defendant knew that their actions would cause a reasonable person to either (1) fear for their safety or that of others, or (2) suffer substantial emotional distress by being placed in fear of (a) death, (b) bodily injury, or (c) continued harassment. N.C. Gen. Stat. § 14-277.3A(c).

The charging instrument in this case alleged only that Defendant knew that his course of conduct would place Parker in fear of continued harassment. However, the trial court instructed the jury on all three forms of emotional distress that can support a stalking conviction:

> And second, that the Defendant at the time knew or should have known that the course of conduct would create (sic) a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Defendant argues that instructing the jury on the fear of death or bodily injury allowed the jury to convict based upon a theory of conduct not alleged in the indictment.

Unlike the instruction at issue above, where the trial court failed to give an instruction that was not discussed at the charge conference, the trial court discussed this instruction and its specific construction with the parties:

> The State: Striking A and then going with B, which would just be "suffers substantial emotional distress by placing a person in fear of" the statute reads "death, bodily injury, or continued harassment." The charging document does allege continued harassment.
>
> I think if you were to find any of those, that would be sufficient, so I would ask for all three with the "or" in there between them. But if we just have to go with one, I would go with continued harassment as that's what's in the charging document.
>
> Defense Counsel: Well I'm not opposed to that, Your Honor

Defendant, through counsel, specifically and affirmatively consented to this construction of the charge. Accordingly, any error in giving this instruction was invited and cannot be heard on appeal. *See Harris*, 338 N.C. at 150, 449 S.E.2d at 380.

Additionally, Defendant cannot show that he was prejudiced by the trial court's instruction. In order to show prejudice, absent an objection at trial, Defendant must show that it was probable the jury found that he had placed the victim "in fear of death or bodily harm" and that it probably would have found him not guilty if instructed only on "fear of continued harassment."

The evidence at trial related to Defendant's harassing behavior towards Parker, and Parker testified to his fear of continued harassment. Parker did testify that Defendant's behavior caused him to fear for his safety, but this evidence of Defendant's behavior constitutes further evidence of fear of continued harassment. We cannot conclude that the trial court instructing the jury only on continued harassment "would have tilted the scales in favor of Defendant." *See State v. Gainey*, 355 N.C. 73, 95, 558 S.E.2d 463, 478 (2002) (finding no plain error where kidnapping indictment alleged "confinement" as theory of conviction, trial court instructed on "restraint or removal," and evidence supported all three theories). Defendant was not prejudiced by this instruction.

IV. Ineffective Assistance of Counsel

[4] Defendant argues that he received ineffective assistance of counsel, in that his counsel failed to object to each of the alleged errors above: (1) by failing to request the trial court instruct the jury to limit its consideration to only the conduct identified in the charging document; (2) by failing to request a limiting instruction as to the 404(b) evidence of

the additional conduct; and (3) by failing to object to the jury instruction listing death and bodily injury in addition to continued harassment.

The right to effective counsel stems from the Sixth Amendment to the United States Constitution. In order to show ineffective assistance of counsel, Defendant must first show "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The North Carolina Constitution also guarantees effective counsel, but the rights protected and ensuing analysis are identical to the federal standard. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985); N.C. Const. Art. 1, §§ 19, 23.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). In particular, where the alleged deficient performance concerns "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *Id.* at 556, 557 S.E.2d at 548. Without evidence concerning the decisions made and strategy engaged by counsel, it can be difficult to determine if counsel's performance fell below an objective standard.

However, we need not address whether or not defense counsel's performance was deficient before examining whether or not Defendant was prejudiced by the alleged deficiencies. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 694.

In order to show prejudice in an ineffective assistance of counsel claim, Defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This "reasonable probability" standard is lower than the "probable impact" standard for plain error, and it is possible to find prejudice in an ineffective assistance claim where there was no plain error. *See State v. Lane*, 271 N.C. App. 307, 311-16, 844 S.E.2d 32, 37-40 (2020). And, unlike when we review trial court decisions for plain error, we may consider the cumulative effect of counsel's alleged errors. *Id.* Still, Defendant must show that "[t]he likelihood of a different result [is] substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 178 L. Ed. 2d 624, 647 (2011). Defendant does not meet this threshold.

We first consider the cumulative impact of defense counsel's failure to request an instruction limiting the jury's consideration to the course of conduct alleged in the indictment—the placement of the milk jugs—and counsel's failure to request a limiting instruction as to evidence of other conduct. Assuming counsel had properly objected, a limiting instruction had been given as to the evidence of defendant's other conduct, and the jury was instructed it could only convict based on the course of conduct from the charging instrument, we do not hold there is a substantial likelihood that the jury would have found Defendant not guilty. As discussed above, the possibility that the jury convicted Defendant of stalking based on his other behavior but believed his displaying of milk jugs with racial and homophobic slurs to be innocent behavior is remote at best.

Second, the trial court's instruction on fear of death or bodily harm made the jury no more likely to convict than if it had limited its instruction to the fear of continued harassment. We cannot hold that it was likely the jury believed Parker was placed in fear of death or injury but not further harassment. Defendant was not prejudiced by his counsel's allegedly deficient performance.

V. Sufficiency of evidence

[5] Finally, Defendant argues the trial court erred by denying his motion to dismiss as there was insufficient evidence to support his conviction for Misdemeanor Stalking. Specifically, Defendant contends the evidence of whether he communicated something to Parker using the milk jugs, or what was communicated thereby, is too speculative to sustain a conviction.

We review 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). On review, we determine "whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Lane*, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842-43 (2011) (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

To survive a motion to dismiss, the State was required to provide substantial evidence of each element of Misdemeanor Stalking. As applied

to this case, those elements are that Defendant (1) willfully engaged (2) in a course of conduct (3) directed at Parker (4) without legal purpose (5) which Defendant knew or should have known would cause a reasonable person to suffer substantial emotional distress (6) by placing that person in fear of continued harassment. N.C. Gen. Stat. § 14-277.3A(c). In this case, a "course of conduct" consists of two or more acts by which Defendant threatened or communicated with Parker. N.C. Gen. Stat. § 14-277.3A(b)(1).

Taken in the light most favorable to the State, the evidence showed Defendant placed milk jugs in his driveway with handwritten letters directed towards Parker's residence. Over the course of multiple days, these jugs spelled out "N" "I" "G" "G" "A" and "H" "O" "M" "O," as well as "Q" "N" and "F" "N," which Parker interpreted to be abbreviations for further slurs. Defendant admitted to labeling the milk jugs and placing them in his driveway, leaving only the question of whether he willfully engaged in this course of conduct, and whether he knew or should have known it would cause a reasonable person substantial emotional distress.

"It is well-established that intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Wooten*, 206 N.C. App. 494, 501, 696 S.E.2d 570, 576 (2010) (citations omitted). Taking the evidence of Defendant's course of conduct, combined with evidence of his other actions toward Parker, including calling him a racial slur, banging on the adjoining wall, and revving his vehicle and disturbing Parker's property at night, it was reasonable for the jury to conclude that Defendant's actions were willful and to find him guilty of Misdemeanor Stalking. The trial court did not err by denying Defendant's motion to dismiss.

Thus, in sum, the trial court properly submitted the case to the jury on the evidence presented and—to the extent error was not invited—did not plainly err in its jury instructions or in failing to provide additional limiting instructions, and trial counsel's allegedly deficient performance did not prejudice Defendant. Therefore, there is no reversible error in this case. Consequently, the trial court properly entered judgment upon the jury verdict.

Conclusion

Accordingly, for the foregoing reasons, there was no error at trial and we affirm the Judgment.

NO ERROR.

Judges ZACHARY and THOMPSON concur.

STATE v. SIMPSON

[295 N.C. App. 425 (2024)]

STATE OF NORTH CAROLINA
v.
SHANITA YVETTE SIMPSON

No. COA23-618

Filed 20 August 2024

1. Indictment and Information—uttering a forged instrument—subject matter jurisdiction—essential elements alleged

The trial court had subject matter jurisdiction in a prosecution for uttering a forged instrument (N.C.G.S. § 14-120) arising from the theft of personal checks by a home health care worker from the residence of a client where the indictment alleged each essential element of the offense, including that defendant passed a check bearing an endorsement that she knew was forged with the intent to defraud or injure.

2. Identification of Defendants—out-of-court identification—photograph—Eyewitness Identification Reform Act—not applicable

In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, the trial court properly admitted testimony from a police officer that the victim had identified a photograph of defendant as the only person (other than the victim's spouse, who suffered from dementia) who had been in her home when the checks were taken and to whom the forged checks had been made payable. This out-of-court identification was not a "show-up" under the Eyewitness Identification Reform Act (EIRA) and, therefore, was not rendered inadmissible on the basis that the officer failed to follow EIRA procedures.

3. Constitutional Law—due process—out-of-court identification—not raised in trial court—Appellate Rule 2 not invoked

In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, the Court of Appeals declined to invoke Appellate Rule 2 to reach defendant's argument—raised for the first time on appeal—that her constitutional due process rights were violated by the admission of testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks

were taken and to whom the forged checks had been made payable. Defendant could not show that the identification was so suggestive as to create a substantial likelihood of irreparable misidentification; thus, she failed to demonstrate the need for discretionary review to prevent a manifest injustice.

4. Constitutional Law—effective assistance of counsel—failure to move to suppress out-of-court identification—no error shown

In a prosecution for crimes including uttering a forged instrument arising from the theft of personal checks by a home health care worker from the residence of a client, defendant did not receive ineffective assistance as a result of her counsel's failure to move to suppress—as either a violation of the Eyewitness Identification Reform Act (EIRA) or her constitutional due process rights—testimony from a police officer that the victim had identified a photograph of defendant as the only other person who had been in her home (other than the victim's spouse, who suffered from dementia) when the checks were taken and to whom the forged checks had been made payable. The identification did not fall under the EIRA and was not so suggestive as to create a substantial likelihood of irreparable misidentification; accordingly, a motion to suppress on either basis would have been denied as meritless.

Appeal by defendant from judgment entered 9 December 2022 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Caryn Strickland for defendant-appellant.

ZACHARY, Judge.

Defendant Shanita Yvette Simpson appeals from the judgment entered upon a jury's verdicts finding her guilty of felony forgery of endorsement and felony uttering a forged endorsement. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error, but remand for correction of a clerical error.

BACKGROUND

This case concerns financial crimes committed against Gorda Singletary. Mrs. Singletary's late husband, Dr. Henry Singletary, had dementia and, beginning around 2012, Mrs. Singletary hired SYNERGY HomeCare ("Synergy") to provide in-home care for him, with various caretakers providing assistance. Synergy assigned Defendant to care for Dr. Singletary on 7 February 2019. After Defendant arrived that morning, Mrs. Singletary left the home to run errands and returned around noon, just before Defendant's shift ended.

The next day, Mrs. Singletary discovered that two checks were missing from her bank checkbook, which she kept "in a desk drawer in a spare bedroom" of the home. She then determined that "[t]here was a third check taken from a brokerage account[.]"

Mrs. Singletary "called the bank immediately" to place stop-payment orders on the missing checks,[1] and reported to Synergy that she believed that she "had checks stolen and that [Defendant] was the one who did it because [Defendant] was the only one that was in the house." As Mrs. Singletary noted, "besides [Defendant], it was just [her] and [her] husband between the last time [Mrs. Singletary] saw the checks on February 5th and the last time that [she] noticed . . . they were missing on February 8th[.]"

About six months later, on 23 August 2019, Mrs. Singletary received a notice regarding one of the checks on which she had placed a stop-payment order. The check, on which Mrs. Singletary's signature had been forged, was dated 20 July 2019 and made payable to "Shanitta Dixon" in the amount of $580.00. Officer Robert Ferencak of the Wilmington Police Department testified that in the course of his investigation he discovered that the name Shanitta Dixon was one of at least eight aliases used by Defendant.

On 22 June 2020, a New Hanover County grand jury returned an indictment charging Defendant with felony larceny of a chose in action, felony forgery of endorsement, and felony uttering a forged endorsement. On 16 August 2021, the grand jury returned a habitual-felon indictment against Defendant.

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1. Pursuant to N.C. Gen. Stat. § 25-4-403, "[a] customer . . . may stop payment of any item drawn on the customer's account . . . by an order to the bank describing the item . . . with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it[.]" N.C. Gen. Stat. § 25-4-403(a) (2023).

On 30 November 2022, this matter came on for jury trial. The same day, the jury found Defendant guilty of felony forgery of endorsement and felony uttering a forged endorsement,[2] and Defendant subsequently pleaded guilty to attaining habitual-felon status. On 9 December 2022, the trial court entered judgment, sentencing Defendant to a term of 36 to 56 months in the custody of the North Carolina Division of Adult Correction.[3]

Defendant gave oral notice of appeal.

DISCUSSION

Defendant raises three issues on appeal. First, she argues that the trial court erroneously denied her motion to dismiss the charge of uttering a forged endorsement because the indictment insufficiently alleged the essential elements of that offense. Defendant also contends that the trial court erred by admitting Mrs. Singletary's out-of-court identification of Defendant based on a photograph shown to her by an officer in violation of the Eyewitness Identification Reform Act ("EIRA") and Defendant's due process rights. Finally, Defendant maintains that she received ineffective assistance of counsel.

I. Sufficiency of Indictment

[1] Defendant first asserts that Count III of "[t]he indictment . . . was fatally defective because it failed to allege the essential elements of the offense of uttering a forged endorsement[,]" thereby depriving the trial court of subject-matter jurisdiction to enter judgment on this offense. We disagree.

A. Preservation

Both "jurisdictional and non-jurisdictional pleading issues [are] automatically preserv[ed] . . . for appellate review." *State v. Singleton*, 386 N.C. 183, 208, 900 S.E.2d 802, 819 (2024). "Thus, issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved . . . ." *Id.* at 210, 900 S.E.2d at 821.

B. Standard of Review

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). Under

2. The State dismissed the charge of larceny of a chose in action as part of Defendant's habitual-felon plea arrangement.

3. The record on appeal does not contain a copy of the judgment entered on Defendant's guilty plea to attaining habitual-felon status.

de novo review, an appellate court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (cleaned up).

C. Analysis

There are "two distinct species of indictment deficiencies, jurisdictional and non-jurisdictional[.]" *Singleton*, 386 N.C. at 196, 900 S.E.2d at 812. A jurisdictional defect, rendering a trial court without subject-matter jurisdiction, exists where the State's indictment "fails to charge a crime against the people or laws of this State." *Id.* at 184-85, 900 S.E.2d at 805. "[J]urisdictional defects are rare . . . ." *Id.* at 184, 900 S.E.2d at 805; *e.g.*, *id.* at 205, 900 S.E.2d at 818 (explaining that jurisdictional defects might include, for example, "charging a defendant with a crime committed in another state" or charging a defendant "with wearing a pink shirt on a Wednesday").

A nonjurisdictional defect occurs where the indictment fails "to allege with sufficient precision facts and elements of [the] crime[.]" *Id.* at 199, 900 S.E.2d at 814. Thus, "[t]aken together with the purpose of an indictment to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy, a test for indictment validity becomes whether the indictment alleges facts supporting the essential elements of the offense to be charged." *State v. Stewart*, 386 N.C. 237, 241, 900 S.E.2d 652, 656 (2024) (cleaned up). This category of deficiency is nonjurisdictional because "so long as a crime against the laws and people of this State has been alleged, defects in indictments do not deprive the trial court of jurisdiction." *Id.* at 240, 900 S.E.2d at 655. To obtain relief on the basis of a nonjurisdictional defect, a defendant must "show that the indictment contained a statutory or constitutional defect and that such error was prejudicial." *Id.*

Such is the case before us, in which Defendant does not assert that the indictment fails to charge a crime. Rather, Defendant contends that the indictment fails to allege the facts and elements of the crime of felony uttering a forged endorsement with sufficient precision, leaving her without notice of the offense being charged and unable to prepare a defense. As Defendant explains, "[w]hile counts I and II [of the indictment] identify a specific check number, Count III does not provide any information regarding the allegedly forged check except to state that [she] uttered 'a check, which contained a forged and falsely made endorsement of GLORIA C. SINGLETARY.' "

N.C. Gen. Stat. § 14-120 criminalizes the act of uttering a forged paper or uttering an instrument containing a forged endorsement:

> If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument . . . , whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, shall pass or deliver or attempt to pass or deliver any such instrument containing a forged endorsement to another person, the person so offending shall be guilty of a Class I felony.

N.C. Gen. Stat. § 14-120.

The essential elements of uttering a forged endorsement are therefore that (1) the defendant "passed a check"; (2) "such check contained an endorsement which was forged"; (3) the defendant "knew that such endorsement was forged"; and (4) the defendant "acted for the sake of gain or with the intent to defraud or injure any other person." *State v. Forte*, 80 N.C. App. 701, 702, 343 S.E.2d 261, 262, *disc. review denied*, 316 N.C. 735, 345 S.E.2d 400 (1986).

Here, Defendant was charged in Count III of the indictment with the offense of uttering a forged endorsement. The indictment cites the relevant statute—N.C. Gen. Stat. § 14-120—and lists an offense date of "02/07/2019-07/26/2019[.]" Count III of the indictment then alleges that, in New Hanover County, Defendant "unlawfully, willfully and feloniously did utter, publish, pass and deliver as true to NORTH CAROLINA STATE EMPLOYEE'S CREDIT UNION (LELAND BRANCH, BRUNSWICK COUNTY) a check, which contained a forged and falsely made endorsement of GLORIA C. SINGLETARY." Count III of the indictment further alleges that Defendant "knew at the time that the endorsement was falsely made and forged and acted for the sake of gain and with the intent to injure and defraud."

Count III of the indictment alleges facts supporting each essential element of the offense. "[T]he indictment states the charge against [D]efendant in a plain, intelligible, and explicit manner, citing the statute under which [D]efendant was charged. Defendant was placed on notice of the charge levied against h[er], allowing h[er] to prepare for trial and protecting h[er] from double jeopardy." *Stewart*, 386 N.C. at 242, 900 S.E.2d at 656. Indeed, Defendant did not "allege[ ] that [the indictment] failed to put [her] on notice of the charged offense[,]" a copy of the check at issue having been produced by the State in discovery. *Id*. Accordingly,

Count III of the indictment is facially valid, having sufficiently alleged each essential element of N.C. Gen. Stat. § 14-120.

"Because no error occurred, we need not consider the issue of prejudice." *Singleton*, 386 N.C. at 214, 900 S.E.2d at 823; *see id.* at 211 n.16, 900 S.E.2d at 821 n.16. Defendant's argument is overruled.

II. Compliance with the Eyewitness Identification Reform Act

[2] Next, Defendant contends that Mrs. Singletary's "out-of-court identification of [Defendant] based on a single photograph" did not comport with the requirements of the EIRA and that this error was prejudicial. We conclude that Defendant's argument is misplaced.

A. Standard of Review

"Only if the EIRA applies do we need to reach Defendant's arguments about a violation of the EIRA and the trial court's alleged errors in relation to any such violation." *State v. Morris*, 288 N.C. App. 65, 81, 884 S.E.2d 750, 762, *appeal dismissed*, 385 N.C. 315, 891 S.E.2d 288 (2023). "The applicability of the EIRA presents an issue of statutory interpretation[,]" which we review de novo. *Id.*

B. Analysis

"The EIRA, codified in N.C. Gen. Stat. § 15A-284.52, establishes standard procedures for law enforcement officers when conducting out-of-court eyewitness identifications of suspects." *State v. Crumitie*, 266 N.C. App. 373, 376, 831 S.E.2d 592, 594 (2019), *disc. review denied*, 374 N.C. 269, 839 S.E.2d 851 (2020). "The EIRA includes required procedures for . . . show-ups . . . ." *Morris*, 288 N.C. App. at 82, 884 S.E.2d at 762.

"Show-ups are procedures in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." *Crumitie*, 266 N.C. App. at 377, 831 S.E.2d at 594–95 (cleaned up). The EIRA bans photographic show-ups. *See Morris*, 288 N.C. App. at 82, 884 S.E.2d at 762 ("[A] show-up can only permissibly include a live person."); *see also id.* at 83–84, 884 S.E.2d at 763. However, not all out-of-court identifications are show-ups as defined in and subject to the EIRA.

In *Morris*, a witness identified the defendant after "seeing a single photograph of [the defendant] and being asked if he was the person from whom [the witness had] bought the drugs." *Id.* at 83, 884 S.E.2d at 762–63. The defendant challenged the identification as "a banned photographic show-up" in violation of the provisions of the EIRA. *Id.* at 84, 884 S.E.2d at 763. This Court explained that the EIRA show-up provisions

did not apply "where the State already had identified" and charged the defendant as the perpetrator of the crime. *Id.* at 85, 884 S.E.2d at 764. Accordingly, because "the identification . . . did not seek the same purpose as a show-up, it was not a show-up under the EIRA[,]" and therefore there could be no EIRA violation. *Id.* at 84, 884 S.E.2d at 764.

Similarly, in *Crumitie*, a law enforcement officer responding to a reported shooting at an apartment complex noticed a man running in the area. 266 N.C. App. at 375, 831 S.E.2d at 593. When the officer reached the injured victim, she "wrote down [the] defendant's name" and the officer looked up the defendant's Department of Motor Vehicles record. *Id.* at 375, 831 S.E.2d at 594. The officer recognized the "DMV photograph of [the] defendant . . . as the same man he had seen running [away] when he arrived at the scene." *Id.* This Court concluded that the officer's "inadvertent out-of-court identification of [the] defendant, based on a single DMV photograph [that he] accessed . . . , was neither a lineup or show-up under the EIRA, and thus not subject to those statutory procedures." *Id.* at 377, 831 S.E.2d at 595.

Here, Defendant challenges an out-of-court photographic identification of Defendant by Mrs. Singletary about which Officer Ferencak testified on direct examination:

> [THE STATE:] Could you tell the members of the jury about your meeting with Mrs. Singletary?
>
> [OFFICER FERENCAK:] Certainly. So [I] went to the residence, met with Mrs. Singletary. Dr. Singletary was there in another room. Spoke with Mrs. Singletary one-on-one, . . . and she was able to confirm for me that she hadn't given permission for anybody else to have this check, that the check had been stolen when only one other individual, [Defendant], had been in the house, and I actually brought a photo of [Defendant] from our police records system, and I showed her the photo—
>
> [DEFENSE COUNSEL]: I object, Your Honor. I'd like to be heard.
>
> . . . .
>
> [T]wo quick objections.
>
> . . . .
>
> Showing a single photograph to a witness violates the eyewitness identification act, which requires a photo

> lineup and procedure, detective not associated with the case to show six photographs, give the witness the speech about you may or may not see the person who's involved in the case . . . .
>
> The second objection is that Mrs. Singletary did not testify to identifying the photograph in her direct testimony. . . .
>
> So those are my two objections.
>
> THE COURT: Objection is overruled.
>
> . . . .
>
> [THE STATE:] And you spoke with [Mrs. Singletary], and what was the conversation?
>
> [OFFICER FERENCAK:] So she was able to confirm for me . . . that the only person that was in the residence other than she and her husband at the time that the check would have been stolen was [Defendant].
>
> . . . .
>
> I brought along a photo of the individual, [Defendant] Shanitta Dixon/Shanita Simpson, and I showed her the photo, saying, Is this the Shanitta Simpson/Shanitta Dixon you were speaking of? She confirmed that for me.
>
> . . . .
>
> [DEFENSE COUNSEL]: I'll repeat my objections from earlier, but I don't need to be heard.

The trial court again overruled Defendant's objections and then admitted the photograph into evidence as State's Exhibit 5.

Defendant argues that Mrs. Singletary's identification of Defendant as the person pictured in State's Exhibit 5, as recounted in Officer Ferencak's testimony, constituted "an unlawful 'show-up' that plainly failed to comply with the EIRA." She further contends that "at a minimum," she "was entitled to a jury instruction 'that it may consider credible evidence of . . . noncompliance [with the EIRA] to determine the reliability of eyewitness identifications.' " N.C. Gen. Stat. § 15A-284.52(d). The State asserts that the out-of-court identification of Defendant by Mrs. Singletary about which Officer Ferencak testified was not subject to the EIRA's statutory procedures. We agree with the State.

As in *Morris*, the procedure of which Defendant complains here was, "critically, . . . not conducted to try to determine if a suspect was the perpetrator." *Morris*, 288 N.C. App. at 84, 884 S.E.2d at 764. Officer Ferencak accessed the law enforcement database photograph of Defendant *after* Mrs. Singletary reported the missing checks and the fraudulent check that had been made payable to Defendant, and *after* Mrs. Singletary named Defendant as the only individual other than herself and her husband who had an opportunity to take the checks. "As a result," Mrs. Singletary and officers "had already concluded" that Defendant "was the perpetrator" at the time that Mrs. Singletary identified Defendant as the individual in State's Exhibit 5. *Id.* "Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA." *Id.*

"[T]he EIRA does not apply to the identification at hand"; thus, the trial court did not err in denying Defendant's objections to the admission of the identification as an EIRA violation. *Id.* at 85, 884 S.E.2d at 764. In turn, because the EIRA is inapplicable here, Defendant's arguments regarding prejudice and the need for a jury instruction are inapposite.

III. Due Process Protections

[3] Finally, Defendant argues that, even if the identification procedure here did not violate the EIRA, "[t]he admission of the out-of-court identification violated [her] due process rights because it was impermissibly suggestive and created a substantial likelihood of irreparable misidentification."

A. Direct Appeal

Defendant acknowledges that "[b]ecause [she] did not raise a due process challenge below, this Court's review is pursuant to Rule 2."

"[D]ue process protections exist on top of the EIRA's statutory protections." *Morris*, 288 N.C. App. at 85, 884 S.E.2d at 764. Nonetheless, a party must "make a timely request, objection, or motion at trial, stating the specific grounds for the desired ruling in order to preserve an issue for appellate review." *State v. Mulder*, 233 N.C. App. 82, 86, 755 S.E.2d 98, 101 (2014) (cleaned up). "As a general rule, constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *Id.* (cleaned up); *accord* N.C. R. App. P. 10(a)(1).

"Despite the rule disallowing appellate review of issues not raised at trial, our Supreme Court has stated that the appellate courts may elect to review an unpreserved [constitutional] issue on appeal pursuant to our supervisory power over the trial divisions and Rule 2 of the North

Carolina Rules of Appellate Procedure." *Mulder*, 233 N.C. App. at 87, 755 S.E.2d at 101 (cleaned up). The decision to invoke Rule 2 "is entirely discretionary" and is used only in exceptional cases to prevent manifest injustice to a party. *Id.*

We conclude that Defendant has not shown error by the trial court sufficient for this Court, in its discretion, to invoke Rule 2 to prevent a manifest injustice that occurred to Defendant.

Our Supreme Court has explained that in addressing the constitutional requirements of due process in eyewitness identification, we must determine "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *State v. Malone*, 373 N.C. 134, 146, 833 S.E.2d 779, 787 (2019) (citation omitted).

In the case at bar, Mrs. Singletary reported the fraudulent check, which was made payable to Defendant, as well as the other missing checks, and Mrs. Singletary reported that Defendant was the only individual other than Mrs. Singletary and her husband who had access to the checks during the time that the checks must have been taken. Subsequently, Officer Ferencak used the name given to him by Mrs. Singletary to access Defendant's law enforcement database photograph. He then showed the photograph to Mrs. Singletary and asked, "Is this the Shanitta Simpson/Shanitta Dixon you were speaking of?" Mrs. Singletary confirmed that Defendant was the individual in the photograph later admitted at trial as State's Exhibit 5.

Our Supreme Court has cautioned that the appellate "courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification." *Morris*, 288 N.C. App. at 76, 884 S.E.2d at 758 (quoting *State v. Yancey*, 291 N.C. 656, 661, 231 S.E.2d 637, 640 (1977)). However, in the present case, Mrs. Singletary had identified Defendant *prior* to being shown Defendant's law enforcement database photograph, "independent of [any alleged] impermissibly suggestive identification procedure conducted by the State." *Malone*, 373 N.C. at 152, 833 S.E.2d at 791. Even assuming that Mrs. Singletary's viewing of Defendant's photograph was "inherently suggestive[,]" Defendant fails to demonstrate that the procedure "create[d] a substantial likelihood of irreparable misidentification." *Id.* at 146, 833 S.E.2d at 787 (citation omitted).

"At this second step, the central question is whether under the totality of the circumstances the identification was reliable even if the confrontation procedure was suggestive." *Morris*, 288 N.C. App. at 71–72,

884 S.E.2d at 756 (cleaned up). Our Supreme Court has identified five factors for use in the totality of the circumstances analysis:

> [(1)] the opportunity of the witness to view the accused at the time of the crime[; (2)] the witness' degree of attention at the time[; (3)] the accuracy of [the] prior description of the accused[; (4)] the witness' level of certainty in identifying the accused at the time of the confrontation[;] and [(5)] the time between the crime and the confrontation.

Malone, 373 N.C. at 147, 833 S.E.2d at 787 (citation omitted).

A court need not conclude that "all five factors weigh against a substantial likelihood of irreparable misidentification to admit the evidence over due process concerns." *Morris*, 288 N.C. App. at 78, 884 S.E.2d at 760 (citation omitted). "The factors must ultimately be weighed against the corrupting effect of the suggestive procedure itself." *Id.* (cleaned up).

Here, as concerns the first and second factors, Mrs. Singletary had a clear opportunity to view Defendant. Mrs. Singletary saw Defendant twice, both during the daytime and in the home with the lights on. Mrs. Singletary showed Defendant around her home, and Defendant was not wearing a face mask while she interacted with Mrs. Singletary. There was also every incentive to pay close attention to Defendant: Mrs. Singletary planned to run some errands while Defendant cared for her husband, entrusting Defendant with her ill husband and her home. Thus, the first and second factors "count[ ] against a due process violation." *Id.* at 79, 884 S.E.2d at 760.

There does not appear to be any information as to Mrs. Singletary's physical description of Defendant, or its accuracy if she gave a description. Therefore, the third factor neither supports nor weighs against a determination of a due process violation.

As for Mrs. Singletary's "level of certainty in identifying the accused at the time of the confrontation," *Malone*, 373 N.C. at 147, 833 S.E.2d at 787 (citation omitted), she confirmed that the photograph produced by the officer was one of Defendant, who she knew by name independent of any suggestion by law enforcement officers. *See Crumitie*, 266 N.C. App. at 378–79, 831 S.E.2d at 595–96. This fourth factor weighs against a due process violation.

Finally, it is undisputed that more than six months had passed between the day of the crime and the confrontation. However, the length in time between the offense and the identification is mitigated by the

fact that Mrs. Singletary was familiar with Defendant prior to being shown the photograph. This factor slightly weighs in favor of a due process violation.

"Weighing all those factors as part of the totality of the circumstances against the corrupting influence of the identification procedure itself, the procedure did not create a substantial likelihood of irreparable misidentification." *Morris*, 288 N.C. App at 80, 884 S.E.2d at 761 (cleaned up). Therefore, Defendant's due process rights were not violated by the admission of the out-of-court identification, and Defendant has failed to show an error such that hers is "the exceptional case" in which the invocation of Rule 2 is appropriate. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

B. Ineffective Assistance of Counsel

[4] We likewise reject Defendant's alternative arguments that trial counsel's failure to move to suppress the out-of-court identification on either EIRA or due process grounds constituted ineffective assistance of counsel.

"A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel." *State v. Perdomo*, 276 N.C. App. 136, 144, 854 S.E.2d 596, 602 (2021) (citation omitted), *disc. review denied*, 380 N.C. 678, 868 S.E.2d 859 (2022). "To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *State v. Worley*, 268 N.C. App. 300, 310, 836 S.E.2d 278, 286 (2019) (cleaned up), *disc. review denied*, 375 N.C. 287, 846 S.E.2d 285 (2020). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985).

As discussed above, the identification here 1) does not fall "under the EIRA [and is] not subject to those statutory procedures," *Crumitie*, 266 N.C. App. at 377, 831 S.E.2d at 595, and 2) was not "so suggestive as to create a substantial likelihood of irreparable misidentification[,]" *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (citation omitted). Defendant's trial counsel was not ineffective in failing to file a motion to suppress on bases that lacked merit. Accordingly, Defendant's ineffective assistance of counsel arguments are overruled.

IV. Clerical Error

Finally, we note that the judgment in this case indicates that the trial court sentenced Defendant for felony forgery of endorsement and felony uttering a forged endorsement pursuant to Defendant's guilty plea, when the record reveals that Defendant was found guilty by jury verdict of these charges and pleaded guilty only to the charge of attaining habitual felon status. Because this error "result[ed] from a minor mistake or inadvertence . . . in writing or copying something on the record," it is a clerical error, and therefore we remand to the trial court for the limited purpose of correcting this error. *State v. Allen*, 249 N.C. App. 376, 380, 790 S.E.2d 588, 591 (2016) (citation omitted).

CONCLUSION

For the foregoing reasons, Defendant received a fair trial, free from error. We remand to the trial court for the limited purpose of correcting the clerical error in the judgment as indicated herein.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges HAMPSON and THOMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 AUGUST 2024)

2120 ARLINGTON PLACE TR. v. JONES No. 24-39	Henderson (22CVS527)	Affirmed
BAILEY v. S. LITHOPLATE, INC. No. 24-55	N.C. Industrial Commission (18-732798)	Remanded
CHAVEZ v. LOGAN No. 23-528	Edgecombe (21CVS1)	Reversed and Remanded
DYKERS v. TOWN of CARRBORO No. 23-638	Orange (23CVS124)	Affirmed
REISS v. REISS No. 23-950	Wake (20CVD7284)	Dismissed
STATE v. BELL No. 23-967	Beaufort (20CRS51204-05)	No Error
STATE v. DAVIS No. 22-938	Wake (18CRS219359)	No plain error in part; No error in part; Reversed and remanded in part.
STATE v. HOLDER No. 23-395	Nash (21CRS52515)	No Error
STATE v. JORDAN No. 24-1	Mecklenburg (18CRS213903) (18CRS213905)	No Error
STATE v. KNIGHT No. 23-67	Pitt (18CRS57744) (18CRS57746)	No Error and No Plain Error
STATE v. LEGETTE No. 23-1153	Mecklenburg (21CRS234379)	Affirmed
STATE v. McLAUGHLIN No. 23-929	New Hanover (15CRS58657)	No Error
STATE v. SISK No. 23-803	Transylvania (22CRS50240)	No Error

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