295 N.C. App.—No. 3 Pages 440-588

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 30, 2025

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

DONNA S. STROUD
JOHN M. TYSON
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
JULEE T. FLOOD
MICHAEL J. STADING
CAROLYN J. THOMPSON

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES JR.
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS JR.
CLARENCE E. HORTON JR.
JOSEPH R. JOHN SR.[1]
ROBERT H. EDMUNDS JR.
JAMES C. FULLER
RALPH A. WALKER
ALBERT S. THOMAS JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN IV
SANFORD L. STEELMAN JR.
MARTHA GEER
LINDA STEPHENS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER JR.
WANDA G. BRYANT
PHIL BERGER JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK
RICHARD D. DIETZ
LUCY INMAN
DARREN JACKSON
ALLISON J. RIGGS

[1] Died 20 January 2025.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes

COURT OF APPEALS

CASES REPORTED

FILED 3 SEPTEMBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appellate rules violations—nonjurisdictional—substantial violation—sanction imposed—Where the appellant brief submitted by respondent-mother in a child custody case contained numerous nonjurisdictional violations of Appellate Procedure Rules 26 and 28—including misuse of appendices to evade word-count limits, use of nonconforming font and formatting, and failure to include a non-argumentative statement of facts—burdening both the appellee's response (and compelling a rule violation by appellee in its brief) and the appellate court's review, the Court of Appeals, as a sanction, declined to consider any arguments presented by respondent-mother in her appendices and addressed her challenges to the district court's findings of fact only to the limited extent they were referenced in the body of her brief. In so doing, the court overruled respondent-mother's contentions because she only argued the existence of evidence tending to conflict with the district court's findings and quibbled with their wording, and the weight and credibility of the evidence was for the district court to decide. **Harney v. Harney, 456.**

Preservation of issues—juvenile petition—order resolving father's motions—department of social services' issues automatically preserved—In a juvenile abuse and neglect matter, in which a county department of social services (DSS) appealed from the trial court's order ruling on several of the father's motions—

including the court's decision to dismiss the juvenile petition—although DSS did not object during the father's arguments at hearing or during the trial court's rendering of its rulings, issues raised by DSS regarding the preclusive effect of prior orders on the juvenile petition were automatically preserved for appeal because DSS was clearly challenging whether the trial court's decision to grant the father's motions was supported by its findings of fact and conclusions of law. **In re A.D.H., 480.**

Preservation of issues—violation of constitutional right to petition—failure to raise issue at trial—In an appeal from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act on behalf of the department of social services (DSS) against a former employee (respondent), who founded an organization dedicated to protesting against DSS and its policies, respondent's argument that the order violated her state and federal constitutional rights to petition the government was dismissed as unpreserved because she failed to raise a request, objection, or motion before the trial court regarding that specific issue. **Durham Cnty. Dep't of Soc. Servs. v. Wallace, 440.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect—preclusive effect of prior orders—some allegations remaining—motion to dismiss improperly granted—In a juvenile abuse and neglect matter, in which some, but not all, of the allegations of abuse of the minor child by her father were precluded by principles of collateral estoppel—because they covered the same time period as allegations that were determined to be unfounded in two prior orders of the trial court—the remaining allegations were sufficient to state a claim of abuse. Therefore, the trial court erred by granting the father's Rule 12(b)(6) motion to dismiss the juvenile petition. However, since some of the father's other pending motions potentially could result in the striking of some or all of the petition, the court's dismissal order was vacated rather than reversed. The matter was remanded for consideration of whether, after resolution of all of the motions, any allegations remained for purposes of Rule 12(b)(6). **In re A.D.H., 480.**

CHILD CUSTODY AND SUPPORT

Custody—awarded to non-parent—constitutionally protected status of parent—sufficiency of findings—In custody dispute between a minor child's mother and maternal grandfather, the district court's numerous well-supported findings of fact—including that the mother: had limited contact with the child after his birth; had little involvement with the child's medical and therapy providers, despite the grandfather's provision of their contact information; provided no financial support for the child, despite being employed; behaved in a hostile manner toward the grandfather, including in the child's presence; and was unprepared to manage the child's care in light of his extensive developmental and physical issues—supported its conclusion of law that the mother acted inconsistent with her constitutionally protected rights as a parent and, as a result, it would be in the child's best interests to award custody to the grandfather. **Harney v. Harney, 456.**

Custody—modification—temporary order—substantial change in circumstances—In a custody dispute between a minor child's mother and maternal grandfather which began in the courts of New York, a "So-Ordered Stipulation" entered in June 2019 by the New York court with the consent of the parties—which granted the parties "joint custody," awarded the grandfather "physical residential custody," and granted "supervised parental access to the mother"—was properly treated by the

district court as a temporary order, and the district court's statement that the stipulation "became more of a permanent agreement" simply reflected the mother's failure to take any action to regain physical custody of the child. Moreover, the substantial changes in the circumstances affecting the child's best interest detailed in the court's 144 findings of fact were obvious and supported custody being awarded to the grandfather. **Harney v. Harney, 456.**

Subject matter jurisdiction—UCCJEA—jurisdiction declined by foreign court—In a custody dispute between a minor child's mother (a resident of New York) and maternal grandfather (a resident of North Carolina) which began in the courts of New York, the district court in Vance County, North Carolina had subject matter jurisdiction where that court made findings of fact that: although the child was born in New York, he had lived in North Carolina since shortly thereafter; the New York court had entered an order declining to exercise jurisdiction in favor of North Carolina as the "more appropriate forum"; and North Carolina was the child's home state pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. **Harney v. Harney, 456.**

CIVIL PROCEDURE

Order denying motion to set aside judgment—language resembling Rule 11—harmless—An order denying a husband's Rule 60(b) motion to set aside a judgment for absolute divorce (entered earlier in a separate action filed by the wife) was affirmed, where the order contained language resembling that of Rule 11 concerning the husband's purported bad faith. The wife had not filed a motion for Rule 11 sanctions and the order did not sanction the husband; thus, any defect arising from the challenged language in the order was harmless and non-prejudicial. **Tuminski v. Norlin, 580.**

Rule 52(a)—specific findings requirement—civil no-contact order—content and source of harassment—A civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent)—who founded an organization dedicated to protesting against DSS and its policies—was vacated where the trial court's findings of fact regarding the "unlawful conduct" directed at DSS were insufficient to permit meaningful appellate review. Although the order documented respondent's protests against DSS, as well as a DSS social worker's receipt of numerous text messages that left her feeling "fearful," the trial court did not enter specific findings describing the content of the harassment or identifying the source of the texts, choosing instead to enter a finding merely incorporating the facts alleged in DSS's petition. The matter was remanded for entry of a new order containing specific findings as required under Civil Procedure Rule 52(a). **Durham Cnty. Dep't of Soc. Servs. v. Wallace, 440.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Juvenile abuse and neglect proceeding—preclusive effect of factual determination in prior orders—application of collateral estoppel—In an appeal by the Carteret County Department of Social Services seeking review of the trial court's order granting the father's motion to dismiss the juvenile petition (which had alleged that the minor child was abused, neglected, and dependent), where in two prior orders entered by the trial court—a permanent child custody order ("CCO") and an order dismissing an interference petition ("IPO") filed by the Craven County

employee (respondent)—who founded an organization dedicated to protesting against DSS and its policies—and her "followers" was vacated because the trial court did not identify who these "followers" were and therefore could not enjoin them, particularly given that injunctions are regularly voided where they affect the rights of non-parties who lack any identifiable relationship to the parties and who did not receive notice of the proceedings. **Durham Cnty. Dep't of Soc. Servs. v. Wallace, 440.**

No-contact order—Workplace Violence Prevention Act—harassment definition—respondent's direction of conduct by third parties toward petitioner— In an appeal from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent), who founded an organization dedicated to protesting against DSS and its policies, where advocates of the organization sent text messages and social media posts to DSS employees, it was held that the texts and social media posts met the WVPA's statutory definition of "harassment" as knowing conduct directed at a specific person that torments, terrorizes, or terrifies, and serves no legitimate purpose. Notably, the ordinary meaning of "directed at" implicated not only respondent's own harassing conduct but also her direction of third parties' conduct (here, the sending of messages and posts) toward DSS employees. **Durham Cnty. Dep't of Soc. Servs. v. Wallace, 440.**

JURY

Juror misconduct—sharing outside research with other jurors—statutory rape trial—trial court's investigation—no prejudice—In a prosecution for statutory rape and other sexual offenses involving defendant's minor daughter, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on juror misconduct, where the court was informed that one of the jurors ("Juror Four") may have conducted outside research on child development and shared her findings with other jurors. After removing Juror Four for cause and examining each juror individually, the court found that nobody had heard Juror Four mention outside research, although some jurors did hear her express sympathy for the victim before another juror quickly cut her off. After replacing Juror Four with an alternate, the court instructed the jury not to discuss the case until deliberations began and not to conduct outside research. Finally, the court properly found that defendant suffered no prejudice, since each juror testified that they could remain impartial despite hearing Juror Four's sympathetic comments about the victim, and because the jurors' exposure (if any) to outside information during their interactions with Juror Four was minimal. **State v. Galbreath, 523.**

PROCESS AND SERVICE

Complaint and summons—absolute divorce—statutory requirements for service—presumption of valid service—In an action filed by a recently divorced husband, the trial court did not abuse its discretion in denying the husband's motion to set aside the judgment for absolute divorce entered earlier in a separate action filed by the wife, where the wife had complied with all of the statutory requirements for service of process under Civil Procedure Rule 4(j)(1)(c) and, therefore, the divorce judgment was not void for lack of personal jurisdiction. The wife served the complaint and summons by certified mail, return receipt requested, to the husband's personal mailbox at a United Parcel Service ("UPS") store, which the husband had

contractually authorized to act as his agent for receiving service of process. The wife provided proof of service by filing an affidavit with the return receipt attached, which raised a presumption of valid service that the husband was unable to rebut on appeal. **Tuminski v. Norlin, 580.**

SEARCH AND SEIZURE

Ankle monitor location data—accessed without warrant—no reasonable expectation of privacy—In a prosecution for second-degree murder and related charges, the trial court properly denied defendant's motion to suppress data from his ankle monitor, which was accessed by law enforcement without a search warrant after defendant was implicated in a fatal drive-by shooting. Where defendant was subject to electronic monitoring as a condition of post-release supervision (PRS) (pursuant to N.C.G.S. § 15A-1368.4), he did not have a reasonable expectation of privacy in the location data generated by his monitor, and access of that data did not constitute a search for Fourth Amendment purposes. Further, the controlling statute does not limit the law enforcement agencies or officers who may access data generated from electronic monitoring; here, although the officer who obtained the data was not defendant's supervising officer for PRS, he had authorization to access the data directly. Therefore, evidence collected from the ankle monitor could be presented by the State in defendant's new trial (which the appellate court granted on an unrelated basis). **State v. Thomas, 564.**

Warrantless search of vehicle—probable cause—odor and appearance of marijuana—The trial court did not err by denying defendant's motion to suppress evidence of a firearm, bullets, alleged marijuana, and sandwich bags found during a warrantless search of defendant's vehicle after a lawful traffic stop. Officers had probable cause to search defendant's vehicle after detecting a strong odor of marijuana, viewing a significant amount of marijuana residue on the passenger side floorboard, and, after specifically asking defendant about marijuana, obtaining a response that the residue was from defendant's cousin. Contrary to defendant's argument, the recent liberalization of laws regarding hemp did not substantially alter the plain view doctrine with regard to marijuana, even if industrial hemp and marijuana look and smell the same. Here, based on the trial court's unchallenged findings of fact, the officers had a reasonable belief based on their observations and experience that the substance detected by odor and sight was marijuana. **State v. Little, 541.**

TERMINATION OF PARENTAL RIGHTS

Neglect—failure to address domestic violence—likelihood of future neglect shown—The district court did not err in concluding that the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) existed to terminate a mother's parental rights to her minor child where there was a reasonable probability that the child, who had previously been removed from the mother's custody and adjudicated a neglected juvenile (primarily due to extensive domestic violence between his parents, such as the father punching the mother in the stomach while she was pregnant with the child), would experience a repetition of neglect if returned to the mother's care. That determination was supported by the findings and evidence, including that the mother was not credible in her denials that—in violation of her case plan and court orders—she remained in an ongoing relationship with the father and had taken the child to see him during each of three extended unsupervised overnight visits she was allowed in the weeks leading up to the termination hearing. **In re R.H., 494.**

VENUE

Motion to change venue—N.C.G.S. § 1-77—no error—motion to reconsider—no abuse of discretion—In a medical malpractice case filed in Pender County and arising from allegedly negligent care provided to a Pender County resident while he was admitted to UNC Hospitals in Orange County, the trial court did not err in denying motions for change of venue filed by two physicians (defendants) who sought a change in venue pursuant to N.C.G.S. § 1-77 (requiring a case brought against a public officer to be tried in the county where the cause of action arose) based on their argument that they were employees of UNC Hospitals, a state-created entity. Defendants, in their answers to the complaint, had denied allegations that they had employment or agency relationships with UNC Hospitals and, moreover, failed to offer any affidavits, sworn testimony, or other evidence establishing such relationships at the motion hearing. Additionally, the denial of defendants' request for further hearing or reconsideration (after their motions for change of venue were denied) was not an abuse of discretion given that reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised when the original motion was pending. **Reynolds v. Burks, 515.**

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.

DURHAM COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER
v.
AMANDA SHENELLE WALLACE, RESPONDENT

No. COA23-96

Filed 3 September 2024

1. Injunctions—no-contact order—Workplace Violence Prevention Act—harassment definition—respondent's direction of conduct by third parties toward petitioner

In an appeal from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent), who founded an organization dedicated to protesting against DSS and its policies, where advocates of the organization sent text messages and social media posts to DSS employees, it was held that the texts and social media posts met the WVPA's statutory definition of "harassment" as knowing conduct directed at a specific person that torments, terrorizes, or terrifies, and serves no legitimate purpose. Notably, the ordinary meaning of "directed at" implicated not only respondent's own harassing conduct but also her direction of third parties' conduct (here, the sending of messages and posts) toward DSS employees.

2. Civil Procedure—Rule 52(a)—specific findings requirement—civil no-contact order—content and source of harassment

A civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent)—who founded an organization dedicated to protesting against DSS and its policies—was vacated where the trial court's findings of fact regarding the "unlawful conduct" directed at DSS were insufficient to permit meaningful appellate review. Although the order documented respondent's protests against DSS, as well as a DSS social worker's receipt of numerous text messages that left her feeling "fearful," the trial court did not enter specific findings describing the content of the harassment or identifying the source of the texts, choosing instead to enter a finding merely incorporating the facts alleged in DSS's petition. The matter was remanded for entry of a new order containing specific findings as required under Civil Procedure Rule 52(a).

3. Injunctions—no-contact order—enjoining unidentified non-parties—unenforceable

A civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent)—who founded an organization dedicated to protesting against DSS and its policies—and her "followers" was vacated because the trial court did not identify who these "followers" were and therefore could not enjoin them, particularly given that injunctions are regularly voided where they affect the rights of non-parties who lack any identifiable relationship to the parties and who did not receive notice of the proceedings.

4. Constitutional Law—freedom of speech—time, place, manner restrictions—intermediate scrutiny—protests outside government office and employee's home

In a case where the trial court entered a civil no-contact order pursuant to the Workplace Violence Prevention Act (WVPA) on behalf of the department of social services (DSS) against a former employee (respondent), who founded an anti-DSS organization and led protests on the streets and sidewalks near DSS's main office and the DSS director's personal residence, the court did not violate respondent's state or federal free-speech rights by ordering respondent to peacefully protest no less than twenty-five feet from the DSS office employee entrance without using "voice amplification devices" or yelling when children were leaving the building. These content-neutral restrictions properly regulated the time, place, and manner of respondent's speech where they passed the highest applicable judicial standard—here, intermediate scrutiny—because they were narrowly tailored to serve a significant government interest (protecting DSS employee safety and preventing psychological harm to children leaving the DSS office) and left ample alternative channels of communication open for respondent to peacefully protest.

5. Appeal and Error—preservation of issues—violation of constitutional right to petition—failure to raise issue at trial

In an appeal from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act on behalf of the department of social services (DSS) against a former employee (respondent), who founded an organization dedicated to protesting against DSS and its policies, respondent's argument that the order violated her state and federal constitutional rights to petition the government was dismissed as unpreserved because she failed to raise a

request, objection, or motion before the trial court regarding that specific issue.

Appeal by Respondent from order entered 24 August 2022 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 7 June 2023.

Stam Law Firm, PLLC, by R. Daniel Gibson, for the respondent-appellant.

Teague Campbell, Dennis & Gorham, L.L.P., by Patrick J. Scott, Natalia Isenberg and Jacob H. Wellman, for the petitioner-appellee.

The ACLU of North Carolina Legal Foundation, by Samuel J. Davis, Kristi L. Graunke, and Muneeba S. Talukder, amicus curiae.

STADING, Judge.

Respondent Amanda Wallace appeals from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act. N.C. Gen. Stat. §§ 95-260 to -271 (2023). After carefully reviewing the trial court's no-contact order, we hold that its findings of fact are insufficient to permit meaningful appellate review and thus vacate and remand the order for further proceedings.

I. Background

Respondent previously worked as a child abuse and neglect investigator for Petitioner Department of Social Services ("DSS") in Durham, North Carolina. Dissatisfied with DSS's child-placement policies, Respondent pursued external advocacy. She founded an organization, Operation Stop Child Protective Services ("Operation Stop CPS"), purporting to "be a solution, to give families a voice and empower them to be able to speak out about what's going on." Operation Stop CPS maintained a social media presence, rallied against DSS's policies, and protested against DSS.

Respondent was involved with many of these protests against what she terms "the kidnapping of children in Durham County." She also led these protests near DSS's office at the intersection of East Main Street and Queen Street in Durham. Respondent and at least two of her fellow Operation Stop CPS advocates protested near the personal residence of the Durham DSS Director on 24 May 2022 and 13 August 2022. As

a result of these protests, DSS employees began to express concerns about their personal safety and that of their family members.

In response to these concerns, on 16 August 2022, Petitioner filed a complaint for a civil no-contact order on behalf of itself and its employees to enjoin Respondent "and her followers" from contacting either party at their office or home under North Carolina's Workplace Violence Prevention Act (the "WVPA" or "Act"). N.C. Gen. Stat. §§ 95-260 to -271. The complaint's allegations focused on protests near DSS's office and an employee's house, as well as social media posts and text messages sent to Petitioner's employees by Operation Stop CPS advocates.

The trial court granted Petitioner's motion for a temporary *ex parte* no-contact order and, on 24 August 2022 conducted a hearing on whether to make the no-contact order permanent. The trial court heard from multiple witnesses whom Respondent cross-examined. After the hearing, the trial court found that Respondent's actions constituted harassment and issued a permanent no-contact order. In this order, the trial court documented the following findings of fact:

- Respondent and her followers have regularly appeared and protested on E[ast] Main [and] Queen St[reet] at DSS offices[;]
- Respondent and her followers have appeared at the personal residence of [the Durham DSS Director] and harassed and intimidated [him;]
- [A named social worker] received no less than 300 text messages [on] July 27—28 [2022] from 7:43 PM—2 AM complaining of her handling of DSS cases[;]
- [The Durham DSS Director] and DSS employees are fearful[; and]
- All other facts allege[d] in [the] petition are incorporated herein[.]

As a conclusion of law, the trial court held that Respondent committed "unlawful conduct" under N.C. Gen. Stat. § 95-264 (2023), but would still "be allowed to peacefully protest." The no-contact order also directed Respondent to:

- [N]ot visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace or otherwise interfere with the employer's operations[;]

- [C]ease stalking the employer's employee at the employer's workplace[;]
- [C]ease harassment of the employer or the employer's employee at the employer's workplace[;]
- [N]ot abuse or injure the employer, including employer's property, or the employer's employee at the employer's workplace[;]
- [N]ot contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace.

The no-contact order further decreed that "Respondent and her followers" must:

- [B]e allowed to peacefully protest[;]
- [R]emain no less than [twenty-five] feet from the employee entrance and the main entrance of DSS while protesting[;]
- [N]ot use any voice amplification devices[;]
- [N]ot yell or chant when minor children are leaving the building when they appear to be exercising DSS supervised visitation.

Following its entry, Respondent timely appealed the no-contact order.

II. Jurisdiction

This Court has jurisdiction to consider Respondent's appeal of the trial court's no-contact order because it is a "final judgment of a district court in a civil action." N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Analysis

Although Respondent timely objected to Petitioner's standing at trial, she abandoned the issue with this Court because she raised it only in her reply brief. *McLean v. Spaulding*, 273 N.C. App. 434, 441, 849 S.E.2d 73, 79 (2020) (citing N.C. R. App. P. 28(b)(6)). Further, because Respondent did not "present to the trial court a timely request, objection, or motion" that clearly and specifically "state[d] the grounds for the ruling [she] desired the court to make," she also abandons her right-to-petition claim. N.C. R. App. P. 10(a)(1). Thus, Respondent presents four preserved issues on appeal:

(1) Whether the statutory meaning of "harassment . . . directed to a specific person" under N.C. Gen. Stat.

§§ 14-377.3A(b)(2) (2023) and 95-260(3)(b) (2023) includes these repeated text messages to an employee and social media posts about Petitioner;

(2) Whether a no-contact order in response to Respondent's "harassment" requires an express finding of fact that she acted "with the intent to place the employee in reasonable fear" of their safety under N.C. Gen. Stat. § 95-260(3)(b);

(3) Whether N.C. Gen. Stat. § 95-264 grants a trial court authority to enjoin non-parties; and

(4) Whether the no-contact order's prohibition of noise-amplification devices, protesting within twenty-five feet of DSS's office, or yelling violates Respondent's freedom of speech under the United States and North Carolina Constitutions.

This Court reviews a trial court's record for "competent evidence that supports the trial court's findings of fact" and the propriety of its "conclusions of law . . . in light of such facts." *DiPrima v. Vann*, 277 N.C. App. 438, 442, 860 S.E.2d 290, 293 (2021). Those conclusions of law are reviewed *de novo*. *Id.*

A. The WVPA's Statutory Meaning

[1] First, Respondent argues that the trial court's no-contact order violates the statutory requirements of the WVPA's own language because the text messages and social media posts do not meet the Act's statutory definition of "harassing." *See* N.C. Gen. Stat. § 95-260 (2023) (incorporating by reference the definition of "harassment" found in N.C. Gen. Stat. § 14-277.3A(b)(2) (2023)); *see also Ramsey v. Harman*, 191 N.C. App. 146, 150, 661 S.E.2d 924, 927 (2008). A trial court may issue a civil no-contact order upon a finding that an "employee has suffered unlawful conduct committed by" a respondent. N.C. Gen. Stat. § 95-264(a). In addition to several statutory elements not at issue here, this "unlawful conduct" includes a catch-all element of "otherwise harassing [conduct], as defined in [N.C. Gen. Stat. §] 14-277.3A. . . ." *Id.* § 95-260(3)(b).

In this context, civil harassment constitutes five relevant elements: (1) knowing conduct (2) directed at (3) a specific person (4) that torments, terrorizes, or terrifies, and (5) serves no legitimate purpose. *Id.* § 14-277.3A(b)(2). Absent a controlling statutory definition, this Court otherwise interprets statutory text according to its ordinary meaning "understood at the time of the law's enactment at issue." *Birchard v. Blue Cross & Blue Shield of N.C., Inc.*, 283 N.C. App. 329, 333, 873 S.E.2d 635,

638 (2022) (citation omitted). Respondent does not address the fourth element's meaning on appeal, nor do we. Contrary to Respondent's argument, for the reasons below, we hold that the text messages and social media posts meet the Act's statutory definition of "harassment."

1. Knowledge & Specificity

"Knowing conduct" and "specific person" are statutorily undefined but reasonably ascertainable in this context. N.C. Gen. Stat. § 14-277.3A(b)(2). "Knowing" describes the required *mens rea* for civil harassment here. *See Knowing*, *Black's Law Dictionary* (12th ed. 2024) (defining as a "[d]eliberate" or "conscious" action). Respondent acknowledged that she sought to engage in community advocacy by "protest[ing] the kidnapping of children of Durham County." Respondent at least knowingly intended to advocate for certain causes and deliberately acted in furtherance of her objective by taking those actions which Petitioner sought to have enjoined.

"Specific person" similarly refers to Petitioner and its employees. In any event, the order listed two specific employees. Most of the texts and social media posts in the record did explicitly relate to or involve particular named DSS employees—the Durham DSS Director and a specific social worker named in the no-contact order. *See Specific*, *Black's Law Dictionary* (12th ed. 2024) (defining "specific" as "[o]f, relating to, or designating a particular or defined thing."). Whether Respondent's intentional advocacy and the specific people involved rose to sanctionable harassment is a separate question for the factfinder to determine. *Duke v. Xylem, Inc.*, 284 N.C. App. 282, 286, 876 S.E.2d 761, 764 (2022) ("It is a long-standing principle of appellate law that appellate courts 'cannot find facts.' "). Thus, we hold that Respondent's conduct here accords with the ordinary meaning of the "knowing conduct" and "specific person" elements of N.C. Gen. Stat. § 14-277.3A(b)(2).

2. Direction

Although the term "directed at" also is statutorily undefined, our case law indicates that "directed at" or "directed to" involves an action personally undertaken by one person in relation to another. In *State v. Wooten*, 206 N.C. App. 494, 498, 696 S.E.2d 570, 574 (2010), this Court upheld a stalking conviction in part because the defendant included personalized mailing and telephone information on his harassing faxes to identify the victim as their "directed" recipient. This Court upheld another stalking conviction on similar grounds in *State v. Van Pelt*, 206 N.C. App. 751, 754–55, 698 S.E.2d 504, 506 (2010), when it affirmed the trial court's finding that the defendant "directed" repeated messages

and notes by specifically identifying the victim to his employees as the intended recipient.

The passive voice used in § 14-277.3A(b)(2)'s text,[1] however, allows for another equally reasonable interpretation: whether a respondent can "direct at" a victim the harassing conduct of a *third party*. Both parties frame their arguments around whether Respondent *directed* third parties' texts and social media posts *at* those employees. A statute with multiple reasonable interpretations—such as subsection (b)(2) here—is subject to judicial construction. *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 754, 876 S.E.2d 804, 813 (2022). Although we have not yet addressed the plain meaning of this specific statutory phrase, reading the proscription in its grammatically logical orientation allows for a straightforward analysis.

The WVPA sanctions unlawful conduct committed by the respondent defined for our purposes as a willful act of harassing conduct. N.C. Gen. Stat. §§ 95-260(3)(b), -264(a). The incorporated § 14-277.3A provision defines "harassment" as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and serves no legitimate purpose." *Id.* § 14-277.3A(b)(2). That said, all but one legal definition of "direct" as a verb that we have found expressly contemplate one person orienting or otherwise influencing another person's actions towards a specific outcome. *See Direct*, *Black's Law Dictionary* (12th ed. 2024) ("*vb.* (14c) 1. To *aim* (something or *someone*). 2. To *cause* (something or *someone*) to *move on a particular course.* 3. To *guide* (something or *someone*); to govern. 4. To *instruct* (*someone*) with authority. 5. To address (something or *someone*).") (italicized emphases added). Thus, this Court holds, as a question of law, that the ordinary meaning of Paragraph (2)'s "direct at" element also implicates Respondent's direction of third parties towards a targeted employee.

3. Legitimacy

N.C. Gen. Stat. § 95-260 sheds light on § 14-277.3A(b)(2)'s meaning of "legitimate" with its own element of "legal purpose." N.C. Gen. Stat. § 95-260. Our precedents discussing this element inform our understanding here. In *St. John v. Brantley*, 217 N.C. App. 558, 563, 720 S.E.2d 754, 758 (2011) (citing § 14-277.3A(b)(2)), this Court upheld the trial

1. *See generally* Bryan A. Garner with Jeff Newman & Tiger Jackson, *The Redbook: A Manual on Legal Style* § 29.3(b), at 605 (5th ed. 2023) ("Omitting [an implied subject from a statutory sentence] leads to . . . the *truncated passive*—often the source of inexplicit ambiguity in governmental prescriptions.").

court's finding that the defendant's actions to discourage the plaintiff from testifying in a pending court case were for a "criminal purpose" and "without any legitimate purpose." In *Keenan v. Keenan*, 285 N.C. App. 133, 140, 877 S.E.2d 97, 103 (2022) (citing § 14-277.3A(b)(2)), this Court also upheld the trial court's finding that the defendant ex-husband's single instance of "passive-aggressive" trespass to mow his ex-wife's lawn "did not serve a legitimate purpose" and thus constituted civil harassment. Since the trial court found Respondent "intimidated" the Durham DSS Director, case law supports its conclusion that this is not a "legitimate purpose." Numerous text messages sent within a short timeframe could also be considered for an illegitimate purpose. Yet, we must still review the sufficiency of the underlying findings of fact.

B. No-Contact Order

Second, Respondent argues that the trial court erred by: (1) not expressly finding that Petitioner had "suffered unlawful conduct committed by" Respondent; and (2) purporting to enjoin her "followers" without constitutional or jurisdictional authority. N.C. Gen. Stat. § 95-264(a). We review a trial court's findings of fact only to determine whether they competently support the conclusions of law undergirding the judgment. *See DiPrima*, 277 N.C. App. at 442, 860 S.E.2d at 293.

1. Findings of Fact

[2] When acting as the sole factfinder, a trial court must state the specific findings of fact on which it bases its conclusions of law. *See* N.C. R. Civ. P. 52(a)(1). A trial court must expressly document this specific intent, not merely imply it for this Court to infer. *See St. John*, 217 N.C. App. at 562, 720 S.E.2d at 757 ("[A] civil no-contact order requires findings of fact that show . . . the defendant's harassment was accompanied by . . . specific intent." (quotation omitted)); *see also DiPrima*, 277 N.C. App. at 443, 860 S.E.2d 294 (Rejecting the argument "that such a finding can be inferred from the trial court's other findings" because "our holdings in *Ramsey* and *St. John* [make clear] that such a finding must be specifically made, not inferred.").

In *Ramsey*, 191 N.C. App. 146, 661 S.E.2d 924, this Court interpreted near-identical statutory language and schema, N.C. Gen. Stat. §§ 50C-1 to -11 (2007).[2] The Court held that statutory "stalking" requires discrete

2. North Carolina's jurisprudence on civil no-contact orders focuses on Chapter 50C of our General Statutes, which parallels the WVPA's statutory framework. *See* Act of 17 August 2004, ch. 50C, 2003 N.C. Sess. Laws 2004-194 (codified at N.C. Gen. Stat. §§ 50C-1 to -11), https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/2003-2004/sl2004-194.pdf.

findings of harassment as defined in N.C. Gen. Stat. § 14-277.3(c) (2007), "accompanied by the *specific intent*" to engage in one of two statutory acts. *Ramsey*, 191 N.C. App. at 148–49, 661 S.E.2d at 925–26 (emphasis added) (quoting § 50C-1(6)). The analogously "unlawful conduct" at issue here requires discrete findings of harassment, as defined in N.C. Gen. Stat. § 14-277.3A, "without legal purpose and with the *intent* to place the employee in reasonable fear for the employee's safety." N.C. Gen. Stat. § 95-260 (emphasis added).

Here, the trial court documented in its no-contact order Respondent's protests at DSS's main office and the personal residence of an employee. It also found that "Respondent and her followers . . . intimidated" the DSS Director. Furthermore, it found that the named social worker received text messages numerous enough to make the social worker and her coworkers "fearful." But other than incorporating the facts alleged in the petition, the trial court omitted any findings concerning the content of the "harass[ment] and intimidat[ion]." The facts alleged in the petition may be sufficient to support the claim; however, the trial court did not expressly document them in its order. *See DiPrima*, 277 N.C. App. at 443, 860 S.E.2d at 294. Absent those findings, we cannot review whether Respondent's conduct served a "legitimate purpose" or specific intent to "torment, terrorize, or terrif[y]" Petitioner's employees—relevant elements of the harassment statute at issue. N.C. Gen. Stat. § 14-277.3A(b)(2). Because the trial court did not make specific findings of fact about this conduct, we remand this matter to the trial court with instructions to make specific findings of fact to arrive at its conclusion of law of whether Respondent engaged in the "unlawful conduct" of "harassment" under N.C. Gen. Stat. §§ 14-277.3A(b)(2) and 95-260(3)(b). The trial court also did not identify the source of the numerous text messages; it merely found that the social worker received them. For this reason, we must also remand the order for the trial court to determine who sent these messages, if it is able to do so, thereby permitting meaningful appellate review.

See generally DiPrima v. Vann, 277 N.C. App. 438, 860 S.E.2d 290 (2021); *Francis v. Brown*, No. COA21-466, 872 S.E.2d 182 (N.C. App. 17 May 2022) (unpublished table decision).

For example, Chapters 50C and 95 both require "intent to place" either a person or an employee, respectively, "in reasonable fear for the[ir] safety." *Compare* N.C. Gen. Stat. § 95-260, *with id.* § 50C-1(6). The General Assembly further synthesized these two protective order chapters by incorporating the same § 14-277.3A "harassment" definition into their respective provisions. *See* Act of 5 June 2009, chs. 50C, 95, secs. 6–7, 2009 N.C. Sess. Laws 2009-58 (amending N.C. Gen. Stat. § 50C-1(6); then amending N.C. Gen. Stat. § 95-260(3)(b)), https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/2009-2010/sl2009-58.pdf.

2. Injunction

[3] Respondent asserts that the no-contact order against her "followers" violates her constitutional right to due process. Petitioner suggests that Respondent lacks standing to raise this claim. However, both are mistaken. The trial court cannot enforce its no-contact order against these non-parties—the "followers"—because it failed to identify them. As discussed above, this Court can only review those conclusions of law supported by findings of fact. Here, the trial court did not identify any "followers" to enjoin in the order. Our courts have long voided injunctions "affecting [the] vested rights" of non-parties who lack any identifiable relationship to the parties or any notice of the proceedings. *Buncombe Cnty. Bd. of Health v. Brown*, 271 N.C. 401, 404, 156 S.E.2d 708, 710 (1967) (quoting *Card v. Finch*, 142 N.C. 140, 144, 54 S.E. 1009, 1010 (1906)); *see Ferrell v. Doub*, 160 N.C. App. 373, 378, 585 S.E.2d 456, 459 (2003). Thus, we vacate the portion of the trial court's injunction against Respondent's undetermined and unnamed "followers."

C. Constitutional Rights

Third, Respondent argues that the no-contact order violates her State Article One and Federal First Amendment rights to speak freely and petition the government. *See* N.C. Const. art. I, §§ 12, 14; U.S. Const. amend. I, cls. 3, 6. We base our analysis of Respondent's rights under North Carolina's Article I, § 14 on an articulation of preexisting federal Free Speech Clause jurisprudence. U.S. Const. amend. I, cl. 3.

The Free Speech Clause of our State Constitution guarantees the citizens of North Carolina the freedom of speech as one "of the great bulwarks of liberty. . . ." N.C. Const. art. I, § 14, cl. 1. The adjacent Responsibility Clause expresses what the federal First Amendment only implies: that "every person shall be held responsible for . . . abus[ing]" his or her free-speech rights.[3] *Id.* art. I, § 14, cl. 3. These Clauses collectively mirror their federal counterpart in jurisprudence and enforcement. *See State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840–41 (1993). The United States Supreme Court's interpretations of the First Amendment do not bind this Court in interpreting our State's equivalent, though we weigh them heavily in doing so. *Id.* Respondent's outcomes

3. *See Hest Techs. v. State ex rel. Perdue*, 366 N.C. 289, 297–98, 749 S.E.2d 429, 435 (2012) (recognizing that "particular categories of speech [ ] receive no First Amendment protection; these categories include 'obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.' ") (quoting *United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 1584 (2010)).

on appeal do not substantively or materially differ depending on her state or federal sources of constitutional free-speech protections.

1. Free Speech Claim

[4] Respondent asserts that the no-contact order violated her right to freedom of speech under North Carolina's Article I, § 14 because the streets and sidewalks outside DSS's office and its employees' homes are "traditional public forums." In *Petersilie*, our Supreme Court adopted federal jurisprudence addressing time, place, and manner ("TPM") restrictions of speech on government-owned property (*i.e.*, a "forum"). 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993). *See N.C. Council of Churches v. State*, 343 N.C. 117, 468 S.E.2d 58 (1996), *aff'g per curiam*, 120 N.C. App. 84, 90, 461 S.E.2d 354, 358 (1995).

Considering the complex landscape of public-forum jurisprudence and our State courts' careful examination of TPM restrictions to date, we must first summarize the general principles applicable to Respondent's claims. *State v. Bishop*, 368 N.C. 869, 873–74, 787 S.E.2d 814, 817–18 (2016). We review this preexisting First Amendment approach to apply North Carolina's Free Speech and Responsibility Clauses to private speech in public fora.[4] Analyzing the intersection of Article One–First Amendment free-speech rights and government fora requires four inquiries, the first three of which our Supreme Court has already applied in similar cases:

(1) Whether the restriction affects protected speech or expressive conduct, *e.g.*, *Hest Techs. v. State ex rel. Perdue*, 366 N.C. 289, 296–97, 749 S.E.2d 429, 434–35 (2012);

(2) If so, whether the restriction is either content-based or content-neutral, *e.g.*, *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818;

(3) If content-neutral, which tier of judicial review below strict scrutiny applies to the restriction, *e.g.*, *id.*; and

(4) Which category of forum the restriction concerns.

---

4. The Court in *Petersilie* expressly adopted the entire corpus of federal free-speech jurisprudence to interpret our state Constitution's Article I, § 14 through at least its 1993 disposition. As our current Supreme Court noted, though, "it was unclear how a court should determine" certain threshold questions of the federal public-forum doctrine until the recent decision in *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218 (2016). *State v. Bishop*, 368 N.C. 869, 818–19, 787 S.E.2d 814, 875–76 (2016) (citing *Reed*, 576 U.S. at 166, 135 S. Ct. at 2228).

a. Expression, Content, & Scrutiny

The first inquiry is whether the restriction affects either protected speech, inherently expressive conduct, or non-expressive conduct. *See Hest Techs*, 366 N.C. at 296–97, 749 S.E.2d at 434–35. Non-expressive conduct does not raise free-speech concerns. However, restrictions on either of the former two activities implicate constitutionally protected rights that require further inquiry. *See id.*; *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. Neither party contests Respondent's facially sincere desire to protest DSS's alleged practices. Both parties acknowledge that the no-contact order and its organic statutes, N.C. Gen. Stat. §§ 14-277.3A(b)(2) and 95-264, apply to expressive conduct (*i.e.*, Respondent's protests). Thus, the trial court's effectuation of these statutes through the no-contact order implicates Respondent's constitutional free-speech rights as a question of law.

The second inquiry is whether the restriction is either content-*based* or content-*neutral*. *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. A content-based speech restriction *prima facie* discriminates against the speech's message, ideas, or subject matter; a content-neutral restriction does not. *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2018) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226 (2015); then citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989); then citing *Bishop*, 368 N.C. at 872–75, S.E.2d at 817–18). A court may identify this discrimination in the restrictions "plain text of the statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message." *Bishop*, 368 N.C. at 875, 787 S.E.2d at 819. If the restriction is content-based, it is presumptively unconstitutional and must survive strict scrutiny review. *Id.* at 874, 787 S.E.2d at 818. If the restriction is content-neutral, different tiers of judicial scrutiny apply depending on the forum. *Id.* Because Respondent challenges the WVPA only as applied to her, we need not consider the *prima facie* content-neutrality of the Act itself.

The next inquiry is which tier of judicial scrutiny applies to the restriction and the appropriate forum. These tiers of judicial scrutiny apply to speech regulations in descending order of exactness. To satisfy strict scrutiny, the restriction must serve a compelling government interest and be narrowly tailored to effectuate that interest. *Id.* at 876, 787 S.E.2d at 819 (citing *Reed*, 576 U.S. at 163, 135 S. Ct. at 2226); *Hest Techs*, 366 N.C. at 298, 749 S.E.2d at 436. To satisfy intermediate scrutiny's free-speech variant, the restriction must be narrowly tailored to achieve an important or substantial government interest in a manner that allows

for ample alternative channels of communication. *See Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818 (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753); *Hest Techs*, 366 N.C. at 298, 749 S.E.2d at 436. This particular "regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but [ ] it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757. Lastly, to satisfy rational basis, the restriction need only rationally further a legitimate state interest. *Hest Techs*, 366 N.C. at 298–99, 749 S.E.2d at 436. Content-neutral restrictions of traditional and designated (collectively, "unlimited") fora are subject to intermediate scrutiny while limited and nonpublic fora restrictions need only have a rational basis. *Id.*

b. Forum Categorization

To determine which level of scrutiny applies, we must determine which of the four forum categories the speech or expressive conduct occurred: (1) a "traditional" public forum, (2) a "designated" public forum, (3) a "limited" public forum, or (4) a "nonpublic" forum. *Christian Legal Soc. Ch. v. Martinez*, 561 U.S. 661, 679 n.11, 130 S. Ct. 2971, 2984 n.11 (2010). Our state courts have described unlimited fora as "quintessential community venue[s], such as a public street, sidewalk, or park." *State v. Barber*, 281 N.C. App. 99, 108, 868 S.E.2d 601, 607 (2021). These opinions have relied on federal Supreme Court precedents that describe a limited public forum as "property that the State has opened for expressive activity by part or all of the public" on a temporary basis, *Int'l Soc. for Krishna Consc. v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705 (1992) (cited by *Council*, 120 N.C. App. at 90, 461 S.E.2d at 358), and a nonpublic forum as property maintained for a purpose "inconsistent with . . . [or] disrupted by expressive activity." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804, 105 S. Ct. 3439, 3450 (1985) (cited by *Barber*, 281 N.C. App. at 107–08, 868 S.E.2d at 606–07).

Here, the order's findings provide that "Respondent . . . regularly appeared and protested on E. Main [and] Queen St. at DSS offices and at the personal residence of [the Durham DSS Director]." Resting on those and other findings, the order concluded that Respondent violated the WVPA and decreed that Respondent shall be allowed to peacefully protest no less than twenty-five feet from the DSS office employee entrance without voice amplification devices or yelling when minor children are leaving the building. Respondent does not challenge the *prima facie* constitutionality of the statutes at issue, N.C. Gen. Stat. §§ 14-277.3A, 95-260(3)(b), and 95-264. She instead suggests their application to her through the no-contact order's decrees is unconstitutional.

In its current form, the no-contact order's findings of fact lack sufficient precision, which creates difficulty for judicially scrutinizing forum classification. For example, the order ambiguously points to protesting at DSS's office at the corner of East Main Street and Queen Street in Durham. In any event, presuming this is a "quintessential community venue," the restrictions imposed here pass the appropriate level of scrutiny. *Barber*, 281 N.C. App. at 108, 868 S.E.2d at 607. This is not to say that we hold the places referenced in this order are traditional public fora. To be certain, protesting on private property, such as a personal residence, is not a protected right under the Federal or State Constitutions. *See State v. Felmet*, 302 N.C. 173, 177, 273 S.E.2d 708, 712 (1981). In this case, we merely employ the most stringent applicable test—intermediate scrutiny—to evaluate whether the restrictions imposed by the trial court pass constitutional muster. *See Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818.

The plain text of the no-contact order places limitations on Respondent's conduct without consideration of the content. *Id.* at 875, 787 S.E.2d at 819. Since the restrictions are content-neutral, they are permissible regulations of the time, place, and manner of expression, so long as they are narrowly tailored to serve a significant government interest and leave ample alternative channels of communication open. *See Ward*, 491 U.S. at 791, 109 S. Ct. at 2753; *see also Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818. Protecting employee safety and preventing psychological harm to minor children entering or leaving the building serve a significant government interest. *See Bishop*, 368 N.C. at 877, 787 S.E.2d at 819 (holding protecting children from physical and psychological harm is a compelling interest). The order is narrowly tailored because its restrictions promote this significant government interest and would be achieved less effectively absent the restrictions. *See Ward*, 491 U.S. at 796–99, 109 S. Ct. at 2758 (enumerating the standard for narrow tailoring and addressing limitations such as sound-amplification); *see also Burson v. Freeman*, 504 U.S. 191, 209, 112 S. Ct. 1846, 1857 (1992) (holding that, even under strict scrutiny, a 100-foot boundary may be "perfectly tailored" to achieve the government's interest). Finally, the no-contact order leaves open ample alternative channels of communication, as it specifies that Respondent may still peacefully protest subject to those narrow limitations. Accordingly, this Court holds that the no-contact order at least satisfies intermediate scrutiny and does not violate Respondent's free speech rights under the Federal or State Constitutions.

2. Redress of Grievances

[5] Respondent asserts that the no-contact order violated her right to petition DSS under the state Application Clause and federal Petition Clause. However, Petitioner correctly points out that Respondent preserved her free-speech claim for appeal but not her right-to-petition claim. *See* N.C. Const. art. I, § 12, cl. 3 (Application Clause); *cf.* U.S. Const. amend. I, cl. 6 (Petition Clause). To properly preserve an issue for review, Respondent must "present[ ] to the trial court a timely request, objection, or motion" that clearly states "the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(a)(1).

Here, Respondent objected at trial only to "freedom of speech on [her] social media" in response to Petitioner's motion to enter certain photographs into evidence. Respondent did not raise otherwise valid right-to-petition claims at any point during the trial or as part of an expressed objection. Article One and First Amendment rights to free speech may very well be "closely intertwined with the right to protest and petition the government." Nonetheless, because Respondent did not raise a request, objection, or motion regarding the state Application Clause or federal Petition Clause at any point during the trial, this Court holds she did not preserve any constitutional right-to-petition claim for appeal.

IV. Conclusion

For the reasons above, we vacate the trial court's civil no-contact order and remand it to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

HARNEY v. HARNEY

[295 N.C. App. 456 (2024)]

OLIVER HARNEY, PLAINTIFF
v.
CHRISTINA HARNEY, DEFENDANT

No. COA23-364

Filed 3 September 2024

1. Child Custody and Support—subject matter jurisdiction—UCCJEA—jurisdiction declined by foreign court

In a custody dispute between a minor child's mother (a resident of New York) and maternal grandfather (a resident of North Carolina) which began in the courts of New York, the district court in Vance County, North Carolina had subject matter jurisdiction where that court made findings of fact that: although the child was born in New York, he had lived in North Carolina since shortly thereafter; the New York court had entered an order declining to exercise jurisdiction in favor of North Carolina as the "more appropriate forum"; and North Carolina was the child's home state pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

2. Appeal and Error—appellate rules violations—nonjurisdictional—substantial violation—sanction imposed

Where the appellant brief submitted by respondent-mother in a child custody case contained numerous nonjurisdictional violations of Appellate Procedure Rules 26 and 28—including misuse of appendices to evade word-count limits, use of nonconforming font and formatting, and failure to include a non-argumentative statement of facts—burdening both the appellee's response (and compelling a rule violation by appellee in its brief) and the appellate court's review, the Court of Appeals, as a sanction, declined to consider any arguments presented by respondent-mother in her appendices and addressed her challenges to the district court's findings of fact only to the limited extent they were referenced in the body of her brief. In so doing, the court overruled respondent-mother's contentions because she only argued the existence of evidence tending to conflict with the district court's findings and quibbled with their wording, and the weight and credibility of the evidence was for the district court to decide.

3. Child Custody and Support—custody—modification—temporary order—substantial change in circumstances

In a custody dispute between a minor child's mother and maternal grandfather which began in the courts of New York, a

"So-Ordered Stipulation" entered in June 2019 by the New York court with the consent of the parties—which granted the parties "joint custody," awarded the grandfather "physical residential custody," and granted "supervised parental access to the mother"—was properly treated by the district court as a temporary order, and the district court's statement that the stipulation "became more of a permanent agreement" simply reflected the mother's failure to take any action to regain physical custody of the child. Moreover, the substantial changes in the circumstances affecting the child's best interest detailed in the court's 144 findings of fact were obvious and supported custody being awarded to the grandfather.

4 Child Custody and Support—custody—awarded to non-parent—constitutionally protected status of parent—sufficiency of findings

In custody dispute between a minor child's mother and maternal grandfather, the district court's numerous well-supported findings of fact—including that the mother: had limited contact with the child after his birth; had little involvement with the child's medical and therapy providers, despite the grandfather's provision of their contact information; provided no financial support for the child, despite being employed; behaved in a hostile manner toward the grandfather, including in the child's presence; and was unprepared to manage the child's care in light of his extensive developmental and physical issues—supported its conclusion of law that the mother acted inconsistent with her constitutionally protected rights as a parent and, as a result, it would be in the child's best interests to award custody to the grandfather.

Appeal by defendant from order entered 15 June 2022 by Judge S. Katherine Burnette in District Court, Vance County. Heard in the Court of Appeals 14 November 2023.

Gailor Hunt Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton, for plaintiff-appellee.

The Law Office of Colon & Associates, PLLC, by Arlene L. Velasquez-Colon and Kendra R. Alleyne, for defendant-appellant.

STROUD, Judge.

Defendant-mother appeals from a custody order granting custody of her minor child, Sam[1], to Plaintiff, who is Sam's maternal grandfather. Although Sam was born in New York and a temporary custody order was entered in New York shortly after his birth, the New York court declined to exercise continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") following a hearing in compliance with North Carolina General Statute Section 50A-207. *See* N.C. Gen. Stat. § 50A-207(a) (2023) ("A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court."). North Carolina has subject matter jurisdiction over custody under the UCCJEA. *See* N.C. Gen. Stat. § 50A-203 (2023) ("Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and: (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207[.]"). The trial court's detailed and extensive findings of fact, made by clear and convincing evidence, are supported by competent evidence. These findings support the trial court's conclusion that Mother acted inconsistently with her constitutionally protected right as a parent and the trial court did not err by granting custody to Grandfather based on Sam's best interests.

I. Background

Mother lives in New York and she gave birth to Sam in New York in June 2019. Plaintiff ("Grandfather") lives in Vance County, North Carolina. When the complaint in this matter was filed, Sam's biological father was "unknown" to Grandfather[2] although Mother later identified

---

1. We have used a pseudonym for the minor child to protect his identity.

2. The custody complaint in North Carolina alleged that Sam's father is "unknown," and Mother admitted this allegation in her answer. Sam's birth certificate has no father listed. The New York Stipulation and other documents do not mention a father for Sam. However, Mother later admitted she knew the identity of the biological father although she had previously claimed he was an anonymous sperm donor. The trial court ordered that he be notified of this proceeding, and he accepted service of the complaint and other documents in the custody case and waived any further rights to notice or participation in this proceeding.

the biological father during this custody case. Grandfather traveled to New York to be with Mother when Sam was born. Soon after Sam's birth, Grandfather had a "consultation with the New York child protective services agency," and Grandfather "was able to obtain temporary custody of [Sam]." On 26 June 2019, about a week after Sam's birth, Grandfather filed an "Order to Show Cause Pursuant to Section 651 of the Family Court Act with Temporary Relief and Petition for Custody" in Suffolk County, New York seeking custody of Sam. He alleged Mother's home was a health hazard due to water damage and mold and that Mother was a hoarder. At the time of Sam's birth, Mother's home was not habitable due to "mold issues that had not been remediated or addressed by" Mother and the home "smelled of mold and cat urine." Grandfather also alleged concerns regarding Mother's mental health.

After Grandfather filed his petition in New York on 26 June 2019, the Suffolk County Family Court entered an order granting emergency temporary custody of Sam to Grandfather.[3] On 28 June 2019, with the consent of both parties, the Suffolk County Family Court entered a "So-Ordered Stipulation"[4] ("Stipulation") which granted the parties "joint custody" of Sam, with Grandfather as "the physical residential custodian" and giving Mother "rights of supervised parental access through EAC or with a family member or other person approved by [Grandfather]" or as "otherwise agreed" by the parties in writing. The Stipulation noted that Grandfather would pay for Mother's flight for a "scheduled visit" with Sam on 11-16 July as Grandfather "is currently residing in" North Carolina and Sam would reside with him. Mother agreed to "undergo psychiatric evaluation and follow through with any and all recommendations by medical professionals" and to make the results of the evaluation available to Grandfather. The Stipulation granted Grandfather "final decision making authority regarding all major decisions" as to Sam's care and

---

3. The 28 June 2019 Stipulation provides that Grandfather "*was* awarded temporary physical and residential custody of the infant issue by way of Order of the Honorable Matthew Hughes, which Order is on file with this Court" but the initial New York emergency order is not in our record. (Emphasis added.)

4. Under New York law, "[a] so-ordered stipulation is a contract between the parties thereto and as such, is binding on them and will be construed in accordance with contract principles and the parties' intent[.]" *Tyndall v. Tyndall*, 144 A.D.3d 1015, 1016, 42 N.Y.S.3d 250, 251 (2016) (citation and quotation marks omitted). The Stipulation also provided that it would be construed based upon New York law: "13. This Agreement is being executed and entered into in the State of New York. This Agreement shall be construed in accordance with and shall in all respects be governed by the Laws of New York now or hereafter in effect, without giving effect to the choice of law provisions thereof, and regardless of where the parties, or either of them, in fact reside."

education. The Stipulation also provided that both parties "were entitled to receive all medical records and to converse with any physician or professional" regarding Sam. Mother agreed to have three mold tests done of her home in New York by a "certified air quality specialist," to be done in three month increments and "all three (3) tests shall prove to be negative for any mold." The Stipulation notes that Grandfather was represented by counsel in New York and Mother was *pro se*, although she "was encouraged and strongly advised to seek independent representation but has refused[.]" After entry of the Stipulation, Grandfather and Sam traveled back to his home in North Carolina "on June 29, 2019 and [ ] remained there since that time[.]"

On 17 June 2020, Grandfather filed a "Complaint for Custody and Protective Order" against Mother in Vance County, North Carolina. His complaint included allegations regarding the New York custody action and an attached copy of the Stipulation. On 6 July 2020, Mother filed a "Petition for Modification of Order of Custody" in New York, alleging that she lived in New York at the same address as she lived at the time of Sam's birth, and Grandfather and Sam lived in North Carolina. She alleged there "has been a change of circumstances" since the prior order in that "Mold Air test passed and evaluations met. Ready for unification.[5] Requirements met. N.Y State jurisdiction, not North Carolina." She further alleged Grandfather "is trying to remove my custody rights and order I can not fight for them with an order. Parental alienation, malice, hersay (sic) & defamation of my character." She also filed a "Petition to Enforce Custody or Visitation Order" in New York, making allegations regarding the entry of the Stipulation and the filing of the North Carolina custody action by Grandfather. She sought in part "to continue jurisdiction in New York" and "to protect my rights as mother and continue all cases in N.Y. Suffolk Family Court." On 22 July 2020, Mother also filed a Motion for "Dismissal Based on Lack of Jurisdiction" in Vance County.

On 2 October 2020, Mother filed an "Amended Answer and Motion to Dismiss" in Vance County. She alleged North Carolina did not have jurisdiction over custody of Sam and that New York "has Exclusive, Continuing Jurisdiction" regarding custody. She also admitted or denied the allegations of Grandfather's complaint for custody. As relevant to this appeal, Mother admitted Sam had been living in North Carolina with Grandfather since June 2019. She also admitted the allegation that Sam's father is "unknown."

---

5. Or "verification." This portion of the Motion is hand-written and difficult to read.

On 23 October 2020, the Suffolk County Family Court in New York entered a "Final Order on Petition for Modification of Order of Custody made by Family Court." This Order indicates that the Honorable Heather P.S. James Esq, Referee in Suffolk County and Judge Adam Keith in Vance County conducted the hearing and both parties "appeared in North Carolina with counsel[.]" The New York Order declining to exercise jurisdiction stated:

> [A]fter examination and inquiry into the facts and circumstances of the case, after hearing the arguments of the parties through their counsel both in the Family Court of the State of New York, County of Suffolk, before the undersigned and in the General Court of Justice, District Court Division, Vance County, NC [Docket# 20CVD592] (hereinafter, 'the North Carolina matter') before the Hon. Adam Keith, and for all of the reasons set forth upon the record this date,
>
> **NOW, therefore, it is hereby**
>
> **ORDERED**, that pursuant to DRL section 76-f, New York hereby declines exclusive continuing jurisdiction in favor of the more appropriate forum in North Carolina; and it is further,
>
> **ORDERED**, that the parties are directed to appear in and cooperate with the further proceedings in the North Carolina matter.

On 3 June 2021, the trial court entered a temporary custody order addressing various issues including communication between the parties, family therapy, mental health assessments for both parties, and visitation for Mother. The trial court also noted that "[a]ccording to the parties, the natural father of the minor child" was an "anonymous sperm donor" and "all parties necessary to this action are properly before the court for hearing."

On 16 July 2021, the trial court entered an "Order Regarding Expert Appointment and Notice." This order appointed a psychiatrist to evaluate both parties and provide a report to the trial court for the 9 December 2021 hearing. In addition, by this point in the proceeding – after Grandfather had filed a motion seeking to compel Mother to identify the biological father based on a need for medical history information to assist in dealing with a health condition of the child – Mother identified the previously "anonymous" sperm donor as the putative father

of the child. This order states that "[n]either party objected to providing the putative father with notice of the proceeding pursuant to N.C. Gen. Stat. § 50A-205(a). Via the parties, the putative father has request[ed] that his name be placed under seal in the Court file." This order required Grandfather to "properly notice the putative father of the child-custody proceeding[.]"

On 9 September 2021, Mr. Doe,[6] the putative father of Sam, filed an "Acceptance of Service and Waiver of Responsive Pleading." Mr. Doe averred that "he is the biological father of the minor child involved in this proceeding" and he acknowledged receipt of the Summons, Complaint, Amended Answer, and orders "in this action"; that he was making a general appearance in this matter; and that he waived "further responsive pleadings" and "all notice requirements."

A hearing was held on custody on 1 June 2021[7] and 21 April 2022, and on 15 June 2022, the trial court entered a Custody Order granting legal and physical custody of Sam to Grandfather, with Mother to have limited visitation after complying with various requirements for Mother to consult with Sam's medical providers to learn about his diagnosis of autism and "to understand [his] diagnosis and treatment options." Mother filed timely notice of appeal of this Order and included the orders entered on 23 October 2020 and 3 June 2021.[8]

II. Subject Matter Jurisdiction under the UCCJEA

[1] Although Mother's last argument on appeal addresses jurisdiction under the UCCJEA, we will address this first, as subject matter jurisdiction is a necessary prerequisite for a court to take any action. *See McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) ("When a court decides a matter without the court's having jurisdiction, then the

---

6. This is a pseudonym to protect the putative father's identity. Although the trial court directed the putative father's name be placed under seal, the Record on Appeal filed with this Court included his unredacted "Acceptance of Service and Waiver of Responsive Pleading" but was not sealed as required by North Carolina Rule of Appellate Procedure 42(a). *See* N.C. R. App. P. 42(a) ("Items sealed in the trial tribunal remain under seal in the appellate courts."). We have therefore *sua sponte* sealed the Record.

7. The trial court noted the June 2021 court date resulted in the entry of the 3 June 2021 order requiring the parties to "obtain a psychiatric assessment based on each party's assertion that the other party had a serious mental health condition that would prevent that party from caring for the minor child."

8. Other than her general argument regarding subject matter jurisdiction under the UCCJEA, Mother made no arguments on appeal regarding the 23 October 2020 and 3 June 2021 orders.

whole proceeding is null and void, *i.e.*, as if it had never happened." (citations and quotation marks omitted)). Mother's entire argument on this issue is "[t]he Vance County trial court never ruled on Mother's motion to dismiss due to lack of subject matter jurisdiction with a North Carolina order and instead stamped and filed the New York order." Despite Mother's failure to cite any authority or make an argument regarding jurisdiction under the UCCJEA, we will address this issue since we have a duty to inquire as to subject matter jurisdiction even if not raised by any party. *See Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) ("[T]his Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." (citation omitted)).

The trial court addressed subject matter jurisdiction in the Custody Order. The trial court made findings of fact regarding the New York custody proceeding and the New York court's entry of its order declining to exercise jurisdiction. In the Custody Order, the trial court concluded as follows:

> 1. The Court has subject matter jurisdiction over this matter and personal jurisdiction over the parties.
>
> 2. The Court hereby reincorporates the Findings of Fact set forth in the foregoing paragraphs as if set forth fully herein.
>
> 3. In October, 2020, New York State, the birth state of the minor child, declined to exercise exclusive jurisdiction in favor of the "more appropriate forum" in North Carolina.
>
> 4. The minor child has resided in North Carolina since shortly after his birth. North Carolina is the minor child's home state.

The 23 October 2020 "Final Order on Petition for Modification of Order of Custody" entered in Suffolk County Family Court in New York shows the trial courts of both North Carolina and New York held a hearing on Mother's motions filed in New York, with Mother and Grandfather and counsel for both participating. The Suffolk County court entered an order declining "exclusive continuing jurisdiction in favor of the more appropriate forum in North Carolina" and directed the parties "to appear in and cooperate with the further proceedings in the North Carolina matter." Mother did not appeal this New York order, and it is binding upon the North Carolina courts. *See Travelers Ins. Co. v. Rushing*, 36 N.C. App. 226, 229, 243 S.E.2d 420, 422 (1978) (explaining that the defendant

cannot collaterally attack an order that she did not appeal). In addition, the trial court's findings show the trial court properly exercised subject matter jurisdiction under the UCCJEA based on the New York order.

III. Violations of Appellate Rules

[2] Mother's second issue in her brief challenges 38 of the trial court's 144 findings of fact and "additional findings" within 12 of its conclusions of law. Mother asserts "[t]he trial court made findings of fact unsupported by competent evidence." Mother "respectfully contends that all or a significant portion of the following findings of fact are not supported by competent evidence; additional analysis is presented in Appendix C, organized by topic." She then lists 38 findings of fact and 12 more findings "within Conclusions of Law." Appendix C includes a 27-page table with columns noting "Court's Text" for the findings or conclusions challenged and "Analysis" including her argument as to each item, all single spaced in sans serif font, possibly calibri.[9] The substance of Appendix C sets out detailed arguments as to each challenged finding of fact. North Carolina Rule of Appellate Procedure 28(d) requires this type of analysis and argument to be included in the body of the brief. *See* N.C. R. App. P. 28(d).

Mother's attempt to extend the word count of her principal brief by about twice the allowed limit is a violation of North Carolina Rule of Appellate Procedure 28(j), *see* N.C. R. App. P. 28(j), which is one of the "comprehensive set of nonjurisdictional requirements [ ] designed primarily to keep the appellate process 'flowing in an orderly manner.' " *Dogwood Dev. & Mgmt. Co., LLC, v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (citation omitted). Rule 28 of the North Carolina Rules of Appellate Procedure governs briefs filed before this Court, including word counts:

---

9. (g) Formatting of Documents Filed with Appellate Courts. (1) . . . Documents shall be prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. The body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6 ½ inches, leaving a margin of approximately one inch on each side. The format of all documents presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

N.C. R. App. P. 26(g)(1).

> (j) A principal brief filed in the Court of Appeals may contain no more than 8,750 words. A reply brief filed in the Court of Appeals may contain no more than 3,750 words.
>
> > (1) Portions of Brief Included in Word Count. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

N.C. R. App. P. 28(j).

Although appendixes to briefs do not count against the word limitations of the brief, an appellant cannot simply label an argument as an appendix to extend the word count for the body of the brief indefinitely. *See* N.C. R. App. P. 28(b)(6) ("(b) An appellant's brief shall contain . . . (6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned. The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues. The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.").

The appendix has a purpose, as Rule 28(d) describes, and that purpose is not to extend the body of the brief. *See* N.C. R. App. P. 28(d). The purpose of the appendix is to include parts of the transcript, evidence, statutes, or other documents necessary or helpful to understand the "issue[s] presented in the brief" or, for the appellee, to address an issue raised in the opposing brief. *See id.* Mother's brief also includes two Appendixes which are proper appendixes as allowed by Rule 28(d) and Rule 30(e)(3); one appendix includes "portions of the transcript of the proceedings" and the other includes an unpublished opinion she cites in her brief. *See* N.C. R. App. P. 28(d); *see also* N.C. R. App. P. 30(e)(3). An appendix is not intended to present the issues in the brief as if it were actually part of the body of the brief, but that is exactly what Appendix C does. Allowing an appendix to be used to extend the argument portion

of the body of the brief indefinitely would defeat the entire purpose of the word limitations and formatting restrictions set out in Rule 28. *See* N.C. R. App. P. 28.

Rule 28(d) addresses both required and allowed appendixes to the appellant's principal brief:

> (d) Appendixes to Briefs. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).
>
> (1) When Appendixes to Appellant's Brief Are Required. Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:
>
> a. those portions of the transcript of proceedings which must be reproduced in order to understand any issue presented in the brief;
>
> b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;
>
> c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;
>
> d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement, the study of which are required to determine issues presented in the brief.
>
> (2) When Appendixes to Appellant's Brief Are Not Required. Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:
>
> a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced in the body of the brief;
>
> b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

> c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).
>
> . . . .
>
> (4) Format of Appendixes. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of copies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

N.C. R. App. P. 28(d).

As Mother's brief violates Rules 28(d) and 26(g), we must first consider whether this violation is a "substantial failure" to follow the appellate rules or a "gross violation" of the rules. *Dogwood*, 362 N.C. at 200-01, 657 S.E.2d at 366-67. If so, our Supreme Court has instructed that in our discretion, we should "fashion [ ] a remedy to encourage better compliance with the rules." *Id.* at 198, 657 S.E.2d at 365. But as always, "it is preferred that an appellate court address the merits of an appeal whenever possible." *Id.* at 198-99, 657 S.E.2d at 365-66 ("We stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal[.] *See, e.g.*, *Hicks v. Kenan*, 139 N.C. 337, 338, 51 S.E. 941, 941 (1905) (per curiam) (observing this Court's preference to hear merits of the appeal rather than dismiss for noncompliance with the rules); 5 Am. Jur. 2d *Appellate Review* § 804, at 540 (2007) ('It is preferred that an appellate court address the merits of an appeal whenever possible. An appellate court has a strong preference for deciding cases on their merits; and it is the task of an appellate court to resolve appeals on the merits if at all possible.' (footnotes omitted)); Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 2 (1976) ('Appellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies.'). Rules 25 and 34, when viewed together, provide a framework for addressing violations of the nonjurisdictional requirements of the rules. Rule 25(b) states that 'the appellate court may impose a sanction when the court determines that a party or attorney or both *substantially* failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34[.]' Rule 34(a)(3) provides, among other things, that 'the appellate

court may impose a sanction when the court determines that a petition, motion, brief, record, or other paper filed in the appeal *grossly* violated appellate court rules.' Rule 34(b) enumerates as possible sanctions various types of monetary damages, dismissal, and 'any other sanction deemed just and proper.' " (emphasis in original) (citations, ellipses, and brackets omitted)).

We determine Mother's noncompliance with the appellate rules to be a substantial violation. In fashioning a remedy for this violation, we have conducted a "fact-specific inquiry into the particular circumstances" of this case, keeping in mind "the principle that the appellate rules should be enforced as uniformly as possible. Noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation." *Id.* at 199-200, 657 S.E.2d at 366.

This violation does not rise to the level of dismissal of the appeal, which is an "extreme sanction to be applied only when less drastic sanctions will not suffice." *Id.* at 200, 657 S.E.2d at 366 (citations, quotation marks, and ellipses omitted).

> In most situations when a party substantially or grossly violates nonjurisdictional requirements of the rules, the appellate court should impose a sanction other than dismissal and review the merits of the appeal. This systemic preference not only accords fundamental fairness to litigants but also serves to promote public confidence in the administration of justice in our appellate courts.

Id.

Mother's substantial violation of the appellate rules imposes a burden on both this Court and Grandfather, and we must also consider the need to treat all parties to appeals fairly and equally and to enforce the rules uniformly. The first and most immediate consequence of a party's improper extension of the body of an appellant's brief without seeking approval as allowed by the appellate rules, *see* N.C. R. App. P. 28, is obvious. That burden falls first upon the appellee, who incurs increased costs from responding to the entire brief, as he may not safely assume this Court will dismiss the appeal or simply ignore any additional improper argument; instead, he must pay his counsel to address all the appellant's arguments. And here, Grandfather unfortunately responded in like manner, adding to his brief on appeal a 31-page table including Appendix A, containing an "analysis of the 106 uncontested findings of fact supporting the court's conclusions" and the responses to the

challenged findings of fact and Appendix B, addressing "the unchallenged, and therefore binding, findings of fact that support the finding of Grandfather being awarded sole legal and physical custody" and the "trial court's Conclusions of Law Mother claims are unsupported by competent evidence." North Carolina Rule of Appellate Procedure 28(d)(3) sets out the requirements for the appellee's brief:

> (3) *When Appendixes to Appellee's Brief Are Required.* An appellee must reproduce appendixes to its brief in the following circumstances:
>
> a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.
>
> b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement as if it were the appellant with respect to each such new or additional issue.

N.C. R. App. P. 28(d)(3) (emphasis added).

Grandfather's Appendixes did not include any portions of the transcript or supplement and did not present any new or additional issues; they simply presented his arguments in response to Mother's arguments. Thus, Mother's substantial violation of the appellate rules led Grandfather to violate North Carolina Rule of Appellate Procedure 28(d) in like manner, as he attempted to address Mother's improperly extended arguments. *Id.*

Grandfather's response to Mother's violation of the appellate rules illustrates clearly why this Court must address rule violations and must at times sanction those who violate the rules: one party's violation of the rules may inspire the opposing party to respond in the same manner. But even if Grandfather had instead responded by filing a motion, such as a motion to strike part of Mother's brief or for some other sanction, he would still have to incur increased costs and may create additional delay in the appeal. Either way, this Court must spend more time

in reviewing the improperly extended briefs[10] and determining how to address the issues or the rule violations and the appropriate sanction for any violations, while this Court has other appeals in which the parties have dutifully followed the appellate rules and are awaiting rulings on their appeals. It may seem it would be easier for this Court to overlook Mother's substantial rule violations (and Grandfather's similar substantial violation) and to address each of her arguments regarding the findings of fact raised in the Appendix in detail – instead of using this Court's time and effort to address the rule violations – but that may encourage others to believe they have found a new way to extend their briefs without seeking permission of this Court.

As a sanction for Mother's substantial violation of the North Carolina Rules of Appellate Procedure, we could elect not to address Mother's argument regarding the findings of fact entirely just by striking Appendix C, but we recognize that some of Mother's "argument," so to speak, regarding the findings of fact is presented not only within Appendix C; it is also presented within her Statement of the Facts. Grandfather correctly notes in his Restatement of the Facts that

> [p]ursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, the appellant is required to provide a ***non-argumentative*** summary of material facts. Defendant-Appellant failed to follow this directive in her brief, and Plaintiff-Appellee makes this restatement of the facts, in compliance with the North Carolina Rules of Appellate Procedure.

(Emphasis in original.)

Mother's argumentative Statement of Facts is yet another violation of the appellate rules, but here, Grandfather responded in a way allowed by the appellate rules. *See* N.C. R. App. P. 28(b)(5) ("An appellant's brief shall contain . . . . (5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review[.]"); *see also* N.C. R. App. P. 28(c) ("[The appellee's brief] does not need to contain a statement of . . . the facts . . . unless the appellee disagrees with the appellant's statements and desires to make

---

10. Here, Mother's brief including improper Appendixes is 73 pages and about 17,000 words. She also included appropriate Appendixes comprised of transcript pages and an unpublished case as required by Rule 30(e)(3). *See* N.C. Gen. Stat. § 30(e)(3). Grandfather's brief including improper Appendixes is 83 pages and about 14,000 words.

a restatement[.]"). Mother's statement of the facts is primarily based on her own testimony and evidence presented in the light most favorable to her and most disfavorable to Grandfather. Of course, an appellate advocate should seek to highlight the facts favorable to their client's position, but the *argument* should be in the "Argument" section of the brief, not in the Statement of Facts. *See* N.C. R. App. P. 28(b)(5)-(6).

Thus, as a sanction for Mother's substantial appellate rule violations, pursuant to Rules 25 and 34, in our discretion, we will not address or consider Mother's arguments presented in Appendix C. *See* N.C. R. App. P. 25(b) (stating upon a substantial failure to comply with the appellate rules, "The [C]ourt may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals"); *see also* N.C. R. App. P. 34(b)(3) ("(b) A court of the appellate division may impose one or more of the following sanctions: . . . (3) any other sanction deemed just and proper."). We will address Mother's challenges to the findings of fact and conclusions of law only to the limited extent they are referenced in the body of the brief, including the Statement of Facts, but we will not address each one in detail. In determining this sanction, we have also considered Grandfather's substantial violation of the appellate rules in extending the body of his brief by attaching an improper appendix in response to Mother's improper appendix, but because he was trying to respond to Mother's brief, and because his brief otherwise complies with the Appellate Rules, we will not sanction Grandfather. However, we admonish counsel for both parties to comply with the Rules of Appellate Procedure in the future and note that if the appellant violates a rule, this does not give the appellee license to violate the rules in response.

Overall, Mother argues the existence of evidence tending to conflict with the trial court's findings of fact or quibbles with the exact wording of a finding, but it is well established that a finding of fact must be upheld if there is competent evidence to support it.

> The standard of review when the trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*. If the trial court's

> uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.

See Scoggin v. Scoggin, 250 N.C. App. 115, 117-18, 791 S.E.2d. 524, 526 (2016) (citations, quotation marks, ellipses, and brackets omitted).

The trial court has the duty to consider the weight and credibility of the evidence, and we may not substitute our judgment for that of the trial court. *See Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 340 (1995) ("As fact finder, the trial court is the judge of the credibility of the witnesses who testify. The trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom."). Mother has failed to demonstrate any of the trial court's challenged findings of fact were unsupported by competent evidence.

IV. Modification of Custody or Initial Custody Determination

[3] Mother next contends that "[t]he trial court erred by concluding that the temporary New York custody order 'became more of a permanent custody agreement in that [Mother] took no court action to regain custody of the minor child[.]' " Mother argues that the Stipulation was a temporary order but "[i]f the court truly believed that the New York order converted to permanent, it should have unambiguously stated that, rather than labeling it 'more of a permanent agreement,' and conducted a substantial-change analysis per N.C. Gen. Stat. §50-13.7 (2021) before considering the modification." In other words, Mother first contends the Stipulation should properly be considered as a temporary order, but *if* the trial court considered it a permanent order, it erred by treating it as a permanent order and then modifying custody without conducting a substantial change analysis. Mother's argument concludes by noting "[p]erhaps the qualifier 'more of a' indicates the trial court did not fully intend to conclude the New York order converted to permanent, explaining why it did not treat it as such."

Although it would be to Grandfather's benefit to agree with Mother that the trial court treated the Stipulation as a temporary order, he instead argues the trial court did treat it as a permanent order but did not err by doing so. He argues that "it is not contested that the June 2019 New York temporary agreement was intended to be a temporary custodial arrangement." But because of "passage of time and the lack of action by Mother, the trial court correctly held that the June 2019 New York temporary agreement became more of a permanent agreement." Grandfather has taken a different position on appeal than he did before the trial court, but he then argues why the trial court did not err by treating the Stipulation as permanent, even though it did not actually characterize the Stipulation as a permanent order.

As to Grandfather's argument, we note that neither party argued at the hearing that the Stipulation should be considered as a permanent order or that the trial court should consider modification based upon a substantial change in circumstances since entry of the Stipulation. Grandfather did not file a motion seeking modification of the Stipulation; he filed a complaint seeking an initial determination of permanent custody. In other words, Grandfather argues a theory on appeal he did not raise before the trial court, but "[o]ur Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotation marks omitted).

We review the trial court's characterization of the Stipulation as a temporary or permanent order *de novo*:

> [W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo.
>
> As this Court has previously held, an order is temporary if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.

Smith v. Barbour, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citations, quotation marks, and brackets omitted).

Neither the title of an order nor the intentions of the parties or court at the time of entry of the order controls whether an order is treated as temporary or permanent, as a temporary order may become permanent after a reasonable passage of time. *See id.* ("[T]he trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court." (citation omitted)); *see also LaValley v. LaValley*, 151 N.C. App. 290, 292-93, 564 S.E.2d 913, 915 (2002) ("[The order] was, however, converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time after entry of the [o]rder." (footnotes omitted)).

First, as Mother's argument recognizes, it is not apparent that the trial court treated the Stipulation as a permanent order, so we must consider what, if anything, the trial court concluded about whether the Stipulation was permanent or temporary. The Custody Order does not address this issue directly, but overall, the Custody Order's findings and

conclusions treat the determination of custody as an initial ruling on permanent custody and did not treat the Stipulation as a permanent order. The Custody Order tacitly treated the Stipulation as a temporary order, just as it treated its own 3 June 2021 Temporary Order as a temporary order. Neither party filed a motion in the North Carolina action to modify the Stipulation and both parties' pleadings treated the custody issue before the trial court as an initial determination following a temporary emergency order entered in New York. Although we recognize those pleadings do not necessarily control the issue, we also note neither party argued at the hearing that the Stipulation should be considered as a permanent order or that the trial court should consider modification based upon a substantial change in circumstances since entry of the Stipulation.

Mother's primary argument at trial was that as a natural parent, she had a constitutional right to custody unless she was found by clear and convincing evidence to be unfit as a parent or she had acted inconsistently with her rights as a parent. And in keeping with the parties' arguments at the hearing, the only mention of a "permanent agreement" in the Custody Order is included in one of the trial court's conclusions addressing how Mother had acted inconsistently with her constitutionally protected rights as a parent. Specifically, the trial court concluded:

> 9. Based on clear and convincing evidence, since [Sam's] birth, . . . *[M]other has acted inconsistently with her constitutionally protected status as a parent* by, including but not limited to, the following, in that:
>
> a. Since [Sam's] birth, [Mother] has been employed but has provided no child support to [Grandfather] despite [Mother's] ability to provide some monetary support.
>
> b. The June 2019 New York temporary agreement became more of a permanent agreement in that [Mother] took no court action to regain custody of [Sam] in the New York court or in any other court until [Grandfather] filed this action for custody;
>
> c. [Mother] also did not timely act under the terms and conditions of the temporary agreement to rectify her home, but expected [Grandfather] to pay for the remediation or repairs to her home in New York (the home he'd helped her to buy);
>
> d. During her visits on the phone or in person with [Sam], [Mother] has made very little effort to establish a

> parent/child bond with [Sam], and, instead, has focused primarily on memorializing visits and calls in the form of photos and videos and in lambasting [Grandfather] for his care of [Sam] while [Sam] is present.

(Emphasis added.)

The rest of Conclusion No. 9 includes twelve more subparagraphs. In summary, these subparagraphs address Mother's profanity and screaming during phone calls to Grandfather; her failure to spend quality time with Sam when visiting in North Carolina; her failure to consult with Sam's medical providers and to participate in Sam's medical and psychological care; Mother's consistent and repeated rejection of Sam's diagnoses made by qualified medical professionals; her failure to truthfully answer Grandfather's complaint by "admitting" the child's father was "unknown" while she did know the identity of the child's biological father; her "disregard of the truth" which included the potential to affect the health of the child; and her intent to remain in New York and not to move to be closer to Sam.

Considering the words "more of a permanent agreement" in context, Mother is correct: the trial court did *not* conclude the Stipulation was a permanent order or that it should be treated as such due to passage of time. Instead, the trial court's statement that the "June 2019 New York temporary agreement became *more of a permanent agreement*" because Mother took no action to regain custody was not a conclusion that the trial court was treating the Stipulation as a permanent order. (Emphasis added.) Instead, the trial court was simply describing Mother's failure to take action to regain custody either in New York or North Carolina until after Grandfather filed for custody here. Thus, we need not address the part of Mother's argument that the trial court erred by treating the Stipulation as a permanent order further. We will not address Grandfather's argument that the trial court correctly treated the Stipulation as a permanent order because that is not what the trial court determined and because neither party presented this argument to the trial court. The trial court treated the Stipulation as a temporary order, and the trial court did not err by treating it as a temporary order.

There is no dispute that the Stipulation entered in New York about 2 weeks after Sam's birth was intended to be temporary. It was entered to address an urgent situation upon his birth: Mother's home was not safe for a baby; there were serious concerns regarding Mother's mental health; and Grandfather was the only other available person to care for Sam, but Grandfather lives in North Carolina. As a non-parent, he needed the ability and authority to take Sam to North Carolina and to

make decisions regarding Sam's medical care and other needs. The Stipulation did not determine all issues. The Stipulation set out specific requirements for Mother to be able to regain custody of Sam and to ensure Mother would be able to care for Sam safely; she was required to remediate the mold in her home and to have a mental health evaluation and follow treatment recommendations. The only factor favoring treating the Stipulation as a permanent order was that it did not set a date for another hearing, although the terms of the Stipulation clearly anticipated further hearings to review Mother's progress and compliance.[11]

After *de novo* review, we conclude the trial court properly considered the Stipulation was a temporary order and the Stipulation did not convert to a permanent order based on the passage of one year. However, we also note that even if we treated the Stipulation as a permanent order, the result would be the same. The trial court's extensive and detailed findings of fact set out many substantial changes in circumstances affecting the best interest of the minor child, even if it does not use those exact words. Sam was less than 3 weeks old when the Stipulation was entered; at the time of the hearing, he was age three. The substantial changes in circumstances affecting his best interests are so obvious in the trial court's 144 findings of fact we will not belabor this point further. *See Shipman v. Shipman*, 357 N.C. 471, 479, 586 S.E.2d 250, 256 (2003) ("[T]he effects of the substantial changes in circumstances on the minor child in the present case are self-evident, given the nature and cumulative effect of those changes as characterized by the trial court in its findings of fact.").

V. Mother's Constitutionally Protected Rights as a Parent

[4] Mother's last argument is that "[t]he trial court erred by conducting a best interests of the child analysis to determine custody when mother has not acted inconsistently with her constitutionally protected status

---

11. We also note the Stipulation was entered under New York law and provided it should be "*construed in accordance with and shall in all respects be governed by the Laws of New York now or hereafter in effect, without giving effect to the choice of law provisions thereof, and regardless of where the parties, or either of them, in fact reside.*" (Emphasis added.) Although it is clearly a temporary custody order, it is different in many respects from North Carolina temporary orders entered under North Carolina General Statute Chapter 50. *See generally* N.C. Gen. Stat. Ch. 50 (2023). New York and North Carolina have substantial differences in court processes and procedures, especially in Family Court. *See generally* N.Y. Legis. 686 (2023). We recognize the possibility that New York statutes or rules of the Suffolk County Family Court may set out or anticipate additional proceedings even though the Stipulation did not specifically set a court date, but as neither party made this argument to the trial court or addressed it on appeal, we will not address it either.

as a parent and is not unfit." "A trial court's determination that a parent has acted inconsistently with his or her constitutionally protected status as the parent is subject to de novo review[.]" *In re B.R.W.*, 381 N.C. 61, 77, 871 S.E.2d 764, 775 (2022) (citation omitted).

We first note that the trial court's 144 findings of fact made by "clear and convincing evidence" are all binding on this Court. *See Scoggin*, 250 N.C. App. at 117-18, 791 S.E.2d. at 526. Most of the findings were not challenged on appeal, and Mother has not shown merit in her challenges to the rest of the findings, as discussed above. Most of Mother's argument focuses on her efforts to improve her situation and her view of the evidence. For example, she argues she

> has diligently worked toward [Sam's] return. The trial court found that, per the terms of the temporary New York order, Mother completed the psychological examination and that Mother "had professionals in to clear the mold" and spent over $10,000 on remediation to make her home safe for [Sam's] return, but it still "took a long time to get the mold totally removed."

Mother is correct that the order does include some findings favorable to her, such as the findings about ways she complied with the Stipulation. In fact, the trial court did not find Mother was unfit as a parent but concluded she "is a fit and proper person to have visitation" with Sam. But overall, the findings show Mother's contact with Sam was very limited, although Grandfather did not prevent Mother from visiting or participating in Sam's medical visits and care. Instead, he "paid for the majority of [Mother's] flights from New York to North Carolina in the first few months." He also provided information regarding Sam's medical providers, but Mother refused to communicate with them.

Sam's medical needs were an important factor in this case. The trial court made extensive findings regarding Sam's medical issues, including a hospitalization at about eighteen months old. Sam had "developmental problems including muscles in the right foot and hip," delays in his "speech development" and "issues with his hands." By April 2022, Sam was diagnosed with "level III of autism" for which he was receiving "daily therapy" in addition to "physical therapy twice a week, occupational once a week and speech therapy once a week." Although Mother was informed about these medical needs and had more than a year to arrange for a transition of care to New York, Mother "presented no plan for any kind of therapy for [Sam]." Mother also "has no childcare arrangements for [Sam] while she works because she plans to take"

him with her to work. "[Mother] made one visit with [Grandfather] to [Sam's] pediatrician in December, 2019. She looked up the doctor's credentials and did not like them." She did not participate in Sam's care or communicate with Sam's medical providers although Grandfather provided information for all the providers on Our Family Wizard. Mother provided no financial support for Sam, although she was employed. In contrast, Grandfather provided for all Sam's needs and took Sam to "approximately 120 medical appointments" in the two years preceding the hearing.

The trial court also made many findings addressing Mother's increasingly hostile behavior toward Grandfather and that her angry outbursts sometimes were in Sam's presence. The trial court made detailed findings regarding Mother's "numerous calls to [Grandfather] in which she screamed at him, used a lot of profanity directed toward [Grandfather] and repeated the profanity over again multiple times in each call. On at least two occasions, [Sam] was present and became upset during the calls."

Mother had some visits in New York with Sam but had never taken him to her home, even after the mold remediation was done, because "she only wants him there when he permanently comes to live with her." Despite Sam's autism and difficulty adjusting to changes in his environment, Mother "refused to take into consideration any affect that a new place to live or to stay overnight would have on [Sam] and has proposed no plan of transition for [Sam] if she is awarded custody." Overall, the findings indicate Mother was entirely unprepared to care for a child with Sam's extensive developmental and medical needs, nor had she made any effort to address these issues.

We will not repeat the extensive findings the trial court relied on to conclude Mother had acted inconsistently with her constitutionally protected rights as a parent, but the trial court relied primarily on the facts noted above in our discussion of Conclusion of Law No. 9. In addition, the trial court made extensive findings regarding Grandfather's care for Sam, his efforts to assist Mother, and his close and loving relationship with Sam.

As our Supreme Court directed in *In re B.R.W.*, 381 N.C. at 82-84, 871 S.E.2d at 779-80 (citations, quotation marks, and brackets omitted), the trial court must examine the facts of each case to determine if a parent has acted in a manner inconsistent with her rights as a parent:

> [U]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy, but other types of conduct, which must be

> viewed on a case-by-case basis, can rise to this level so as to be inconsistent with the protected status of natural parents. For that reason, there is no bright line rule beyond which a parent's conduct meets this standard; instead, we examine each case individually in light of all of the relevant facts and circumstances and the applicable legal precedent. *Boseman*, 364 N.C. at 549, 704 S.E.2d 494. *See also Estroff v. Chatterjee*, 190 N.C. App. 61, 64, 660 S.E.2d 73 (2008) (acknowledging that no litmus test or set of factors can determine whether this standard has been met.). In conducting the required analysis, evidence of a parent's conduct should be viewed cumulatively.
>
> . . . .
>
> Finally, we reiterated in *Owenby* that a parent's failure to maintain personal contact with the child or failure to resume custody when able could amount to conduct inconsistent with the protected parental interests.
>
> In *Price*, we directed trial courts, in evaluating cases involving nonparental custodial arrangements, to consider the degree of custodial, personal, and financial contact the parent maintained with the child after the parent left the child in the nonparent's care.
>
> . . . .
>
> Finally, in *Speagle*, we held that, when a trial court resolves the issue of custody as between parents and nonparents, any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding.

The trial court's extensive factual findings support its conclusion that Mother acted inconsistently with her constitutionally protected rights as a parent and the trial court therefore correctly considered the best interests of the child in awarding custody to Grandfather.

VI. Conclusion

As we determine the trial court properly exercised jurisdiction under the UCCJEA, its findings are supported by competent evidence, and the findings are sufficient to conclude Mother acted inconsistently

with her protected status as a parent, we affirm the trial court's Custody Order.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

IN THE MATTER OF A.D.H.

No. COA23-168

Filed 3 September 2024

1. Appeal and Error—preservation of issues—juvenile petition—order resolving father's motions—department of social services' issues automatically preserved

In a juvenile abuse and neglect matter, in which a county department of social services (DSS) appealed from the trial court's order ruling on several of the father's motions—including the court's decision to dismiss the juvenile petition—although DSS did not object during the father's arguments at hearing or during the trial court's rendering of its rulings, issues raised by DSS regarding the preclusive effect of prior orders on the juvenile petition were automatically preserved for appeal because DSS was clearly challenging whether the trial court's decision to grant the father's motions was supported by its findings of fact and conclusions of law.

2. Collateral Estoppel and Res Judicata—juvenile abuse and neglect proceeding—preclusive effect of factual determination in prior orders—application of collateral estoppel

In an appeal by the Carteret County Department of Social Services seeking review of the trial court's order granting the father's motion to dismiss the juvenile petition (which had alleged that the minor child was abused, neglected, and dependent), where in two prior orders entered by the trial court—a permanent child custody order ("CCO") and an order dismissing an interference petition ("IPO") filed by the Craven County Department of Social Services—allegations of sexual abuse of the minor child by her father over a particular period of time were determined to be unfounded, the trial court properly invoked collateral estoppel—which governed rather than res judicata—to bar some of the factual allegations in

the instant juvenile petition. Where the burdens of proof applicable in the CCO and IPO determinations were lower than and the same as, respectively, the burden of proof in the juvenile petition at issue here, both of those prior orders precluded a contrary finding to the same factual allegations. The trial court erred, however, in determining that all of the current petition's factual allegations were barred, since some of the allegations concerned abuse in the time period after the CCO and IPO were entered.

3. Child Abuse, Dependency, and Neglect—abuse and neglect—preclusive effect of prior orders—some allegations remaining—motion to dismiss improperly granted

In a juvenile abuse and neglect matter, in which some, but not all, of the allegations of abuse of the minor child by her father were precluded by principles of collateral estoppel—because they covered the same time period as allegations that were determined to be unfounded in two prior orders of the trial court—the remaining allegations were sufficient to state a claim of abuse. Therefore, the trial court erred by granting the father's Rule 12(b)(6) motion to dismiss the juvenile petition. However, since some of the father's other pending motions potentially could result in the striking of some or all of the petition, the court's dismissal order was vacated rather than reversed. The matter was remanded for consideration of whether, after resolution of all of the motions, any allegations remained for purposes of Rule 12(b)(6).

Appeal by Petitioner from order entered 19 September 2022 by Judge W. David McFadyen III in Carteret County District Court. Heard in the Court of Appeals 22 January 2024.

Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for petitioner-appellant Carteret County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Schulz Stephenson Law, by Sundee G. Stephenson and Bradley N. Schulz, for respondent-appellee father.

No brief for respondent-appellee mother.

MURPHY, Judge.

Petitioner-appellee Carteret County Department of Social Services ("Petitioner") appeals from an order granting various motions filed by respondent-father ("Father") and dismissing the juvenile petition. For the reasons below, we vacate the trial court's order and remand for further proceedings.

BACKGROUND

A. Prior Proceedings

A.D.H. ("Alice")[1] was born to Father and respondent-mother ("Mother") in 2013. In February 2021, Mother filed a complaint in Carteret County District Court seeking custody of Alice. On or about 9 March 2021, the trial court entered a temporary custody order granting Mother and Father joint legal custody of Alice, with Mother having primary physical custody and Father having visitation. Father's visitation included overnight visits and a "two weeks on/two weeks off" schedule during Alice's summer vacation.

In March 2021, Alice began making statements to schoolmates and her school guidance counselor that Father had sexually abused her. These reports were ultimately relayed to Petitioner then forwarded to the Craven County Department of Social Services ("Craven County DSS") due to a purported conflict. Craven County DSS opened an investigation into the alleged abuse and arranged a trauma screen with the Child Advocacy Center ("CAC"), a Child Medical Evaluation ("CME"), and a Child and Family Evaluation ("CFE") for Alice. By November 2021, the Ashe County Sheriff's Office had also opened an investigation into Father's conduct.

On 5 April 2022, the trial court entered a permanent child custody order ("CCO") in the custody dispute finding any allegations of abuse were unfounded. It found that "after two (2) investigations by the Ashe County Sheriff's [Office] it was determined that there was not sufficient evidence to charge [Father] with any wrongdoing." Additionally, Alice had made no disclosures about sexual abuse during the CAC trauma screen, CME, or CFE arranged by Craven County DSS. Furthermore, "[a]ll professionals involved in [the custody] matter[,]" including Craven County social workers, Ashe County detectives, and the CFE evaluator, "had concerns that [Mother] was coaching the minor child and feeding into a false narrative with regards to" the allegations against Father. The trial court found there had been additional reports of abuse since

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

March 2021, but none of the reports had been substantiated. Instead, Mother appeared to be creating a false narrative around Father's alleged abuse of Alice in an attempt to obtain full custody of Alice by (1) taking Alice to a substance abuse counselor who "was not qualified to counsel the minor child as she was not even a licensed clinical mental health counselor, had a lack of training to interview the child, and was quite possibly indorsing a false narrative when counseling the child"; (2) "misrepresent[ing] the findings of DSS to various professionals"; and (3) giving untruthful testimony at the custody hearing. The trial court ultimately found "[F]ather did not abuse the minor child in any way. The Court does find as fact that the Defendant father did not engage in inappropriate parenting or activities with the minor child." The trial court ordered, *inter alia*, that Father be granted primary legal and physical custody of Alice and prohibited anyone except Alice's current, qualified therapist from discussing any past allegations with Alice.

On 17 June 2022, Craven County DSS filed an "Interference Petition Pursuant to [N.C.G.S.] § 7B-303" alleging Father was obstructing or interfering with its investigation. The interference petition alleged that, on 28 March 2022, there was another report that Father abused Alice. This report was made to Petitioner and referred to Craven County DSS. The interference petition alleged Alice was recommended another CME, but Father was refusing to allow Alice to participate in the examination. Craven County DSS moved for the trial court to order that Father cease obstructing its investigation and that Craven County DSS be allowed to conduct home studies, interviews, and medical examinations as necessary for its investigation.

On or about 15 July 2022, *nunc pro tunc* 17 June 2022, the trial court entered an order dismissing the interference petition ("IPO"). The trial court found counsel for Craven County DSS "stated to the Court that DSS could complete its[] investigation without requiring a medical evaluation of the child and without requiring further home visits at the Respondent father's residence[,] [but] [t]hey did, however, need a child and family evaluation" completed by someone other than the initial evaluator. The court concluded "[g]ood cause exists to grant Respondent father's Motion to Dismiss, with prejudice[,]" and dismissed the interference petition, broadly reiterating much of what had already been said in the CCO.

B. Current Proceeding

On 29 August 2022, Petitioner filed a juvenile petition alleging Alice was an abused, neglected, and dependent juvenile. The juvenile petition

acknowledged the ongoing civil custody dispute and interference proceeding but did not discuss any of the prior orders in detail or delineate which allegations were found noncredible. The allegations in the juvenile petition recited at length verbatim statements made by Alice to various reporters that she was repeatedly sexually abused by Father. These specific statements are not necessary to resolution of this appeal and are not discussed in detail.

The petition alleged Alice made statements before entry of the CCO and IPO in March 2021, May 2021, September 2021, October 2021, and March 2022, as well as statements after entry of the CCO and IPO. Most recently, Petitioner received a report in July 2022 that, while at a sleepover with a friend, Alice disclosed sexual abuse by Father. Thereafter, one of Petitioner's social workers, Kelly Dorman, interviewed Alice at her school on 29 August 2022. Alice made additional disclosures of abuse at this interview. However, the timeline of alleged abuse was not clear from Alice's statements. Alice stated that the abuse could have occurred as far back as two years in the past or may have still been ongoing. The juvenile petition ultimately alleged Alice was abused and neglected due to sexual abuse by Father and dependent because neither Father nor Mother were able to provide for Alice's care or supervision or had appropriate alternative childcare arrangements.

On 29 August 2022, the trial court entered an order granting Petitioner nonsecure custody of Alice.

On 31 August 2022, Father filed various motions to dismiss, motions in limine, motions to sanction DSS officials or hold the officials in contempt, and a response to the juvenile petition. The two relevant motions to dismiss asserted the juvenile petition should be dismissed (1) pursuant to Rule of Civil Procedure 12(b)(6) for failure to state a claim and (2) pursuant to the doctrines of *res judicata* and collateral estoppel. The Rule 12(b)(6) motion specifically asserted the juvenile petition failed to state a claim because "[t]he claims made in the Petition are a restatement of the claims previously made and litigated in" the CCO and IPO and, therefore, Petitioner was barred from relitigating these claims in the juvenile petition. The preclusion motion similarly asserted the CCO, IPO, and a 15 July 2022 temporary emergency custody order entered in the custody matter, including all findings of fact and conclusions of law that Father had not abused Alice, were binding on the trial court and warranted dismissal of the juvenile petition with prejudice. Father also filed one motion to hold Social Worker Dorman in contempt ("Contempt Motion") because she interviewed Alice on 29 August 2022 with full knowledge of the provisions of the CCO prohibiting anyone but

Alice's therapists from discussing the prior allegations with Alice. One of Father's motions *in limine* requested Father be allowed to examine Dorman under oath regarding circumstances surrounding the nonsecure custody order, juvenile petition, and "the events occurring specifically as they relate to the minor child . . . since the entry of" the nonsecure custody order on 29 August 2022.

On 1 September 2022, the trial court held a hearing and allowed Father to examine Dorman. On 19 September 2022, the trial court entered a written order dismissing the juvenile petition ("Dismissal Order"). Based on Dorman's testimony, the trial court found she was aware of the CCO and IPO before she interviewed Alice, that the CCO found Father did not abuse Alice, and that "[n]o one, other than the child's current, qualified therapist" was permitted to discuss the previous allegations against Father with Alice. The trial court found that, "[b]ased upon the four corners of the Petition filed in this cause there are no colorable allegations of abuse, neglect or dependency that are alleged to have occurred subsequent to the" CCO and IPO, and the prior allegations against Father had been previously litigated and could not form the basis for the juvenile petition. The trial court granted Father's Rule 12(b)(6) motion, preclusion motion, and motion *in limine* to examine Dorman; declared "it was not necessary for the Court to hear, and rule, upon Respondent-father's other Motions in this matter"; and dismissed the juvenile petition with prejudice.

Petitioner appealed; and, on 13 May 2024, while the appeal was still pending, Mother waived her right to counsel before the trial court. On 29 May 2024, we entered an order providing Mother until 14 June 2024 to file an appellee brief, if desired. Mother did not file an appellee brief within the allotted time window.

ANALYSIS

On appeal, Petitioner presents four issues for our review: (1) whether Father gave Petitioner adequate notice of his motions to dismiss; (2) whether the trial court reviewed the juvenile petition under the correct standard when ruling on the Rule 12(b)(6) motion; (3) whether Petitioner was precluded by *res judicata* and collateral estoppel from litigating the issues in the juvenile petition; and (4) whether the trial court abused its discretion by granting one of Father's motions *in limine* and sanctioning Social Worker Dorman.

We need not address the first issue because the second and third issues are dispositive; the trial court erred as a matter of law in granting Father's motions, and we must vacate the dismissal order. We do

not address the fourth issue because the record indicates the trial court did not address Father's Contempt Motion or otherwise sanction Social Worker Dorman.[2]

A. Preservation and Motion to Dismiss Appeal

[1] We preliminarily address preservation of Petitioner's second and |third issues for appellate review. Father argues both in his brief and in a separate motion to dismiss Petitioner's appeal filed before us that Petitioner waived appellate review of the trial court's rulings on his motions because Petitioner did not object during Father's arguments on his motions or the trial court's rendering of its ruling on his motions. But, here, Petitioner's issues were automatically preserved for review because Petitioner is very clearly challenging whether the trial court's decision to grant Father's motions is supported by its findings of fact and conclusions of law regarding the preclusive effect of the prior orders on the juvenile petition. Such issues are automatically preserved for review. *See* N.C. R. App. P. 10(a)(1) ("Any such issue that . . . was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, . . . may be made the basis of an issue presented on appeal."); *see also Brown v. Lumbermens Mut. Cas. Co.*, 90 N.C. App. 464, 467-68 (1988) (citations omitted) ("[P]laintiffs' notice of appeal is sufficient to raise the limited issues of law relevant to our review of Rule 12(b)(6) motions and summary judgments. We will therefore . . . address plaintiffs' basic contention that the face of the record shows that neither LMCC nor GMC were entitled to judgment as a matter of law."), *aff'd*, 326 N.C. 387 (1990). Because the two remaining issues are preserved for review, we deny Father's motion to dismiss this appeal and reach the merits of Petitioner's arguments.

B. Motions to Dismiss

Both motions assert the doctrines of collateral estoppel and *res judicata* barred Petitioner from relitigating allegations of abuse in the juvenile petition that predate the CCO and IPO. A review of the record indicates the trial court determined, as a matter of law, that both the Rule 12(b)(6) motion and preclusion motion should be granted because the doctrines of collateral estoppel and *res judicata* operated to bar

---

2. As discussed above, the district court did not rule on Father's motions other than the Rule 12(b)(6) Motion, preclusion motion, and motion *in limine* seeking to examine Social Worker Dorman. The district court did not address contempt in the dismissal order other than to note Father filed the Contempt Motion.

Petitioner from relitigating allegations in the juvenile petition that were litigated in both the CCO and IPO.[3] We first address the underlying issue of law, whether collateral estoppel or *res judicata* could form the basis for granting either motion to dismiss based on the findings and conclusions in the CCO, before more specifically addressing dismissal under Rule 12(b)(6).

1. Preclusion Motion

[2] Whether a court is barred by collateral estoppel or *res judicata* "is a question of law unrelated to any specific facts of a case. Questions of law are reviewed *de novo*." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, *disc. rev. denied*, 362 N.C. 679 (2008). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re K.S.*, 380 N.C. 60, 64 (2022) (marks and citations omitted).

Although the parties' dispute pertains to both collateral estoppel and *res judicata*, the present dispute is most squarely governed by collateral estoppel. Collateral estoppel prevents "the subsequent adjudication of a previously determined [factual] issue, even if the subsequent action is based on an entirely different claim." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15 (2004). "Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Johnson v. Starboard Ass'n, Inc.*, 244 N.C. App. 619, 627 (2016) (marks omitted) (citing *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414 (1996)). "Collateral estoppel will apply when: (1) a prior suit resulted in a final judgment on the merits; (2) identical issues were involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 193 (2005) (marks omitted). For present purposes, we see no meaningful dispute that both the CCO and IPO were final judgments on the merits, contained at least some overlapping factual issues with the present juvenile petition, and were actually litigated and determined.

---

3. Most of the trial court's findings of fact indicate it based its ruling as to Father's motions on the preclusive effect of the CCO. However, a review of the dismissal order indicates that the trial court also noted "there are no colorable allegations of abuse, neglect or dependency that are alleged to have occurred subsequent to" the IPO. Especially given the heavy discussion of the CCO in the IPO, we believe the trial court correctly considered the preclusive effect of both orders.

Moreover, for purposes of privity,[4] we note that both Carteret and Craven County DSS intervened in the custody action; and, as co-actors with respect to this family and arms of the State, we do not see a reason to treat them as analytically distinct with respect to the IPO.

The more meaningful dispute, we think, is whether collateral estoppel applies in this case given the discrepancy in the standard of review between the CCO and the present litigation. DSS argues, citing our holding in *In re K.A.*, that "collateral estoppel cannot apply where the proceedings involve a different burden of proof." *See In re K.A.*, 233 N.C. App. 119, 127 (2014) (citing *State v. Safrit*, 154 N.C. App. 727, 729 (2002), *disc. rev. denied*, 357 N.C. 65 (2003)). However, this was an overstatement—and oversimplification—of the existing law, directly contradicting long-established precedent and failing to fully recognize the conceptual underpinnings of collateral estoppel. North Carolina's appellate courts have, for nearly two centuries, recognized the availability of collateral estoppel as between a prior criminal proceeding and a subsequent civil proceeding, directly contradicting the idea that a mere difference in burdens of proof renders the doctrine inapplicable. *Mays v. Clanton*, 169 N.C. App. 239, 242 (2005) (citing *Burton v. City of Durham*, 118 N.C. App. 676, 680 (1995) and *Hill v. Winn–Dixie Charlotte, Inc.*, 100 N.C. App. 518 (1990)) ("[T]his Court has upheld collateral estoppel of an issue in a civil suit when that issue was previously established as an element in a criminal conviction."); *Griffis v. Sellars*, 20 N.C. 315, 315 (1838) ("In an action for a malicious prosecution, a verdict and judgment of conviction in a Court of competent jurisdiction[] . . . is conclusive evidence of probable cause, and precludes the plaintiff in the action for the malicious prosecution from showing the contrary."). These cases demonstrate that the actual principle animating the result

4. We note that the significance of privity as a component of collateral estoppel has been somewhat murky as applied by our Court, with some cases acknowledging privity as an essential element of collateral estoppel, *see Perryman v. Town of Summerfield*, 899 S.E.2d 884, 893 (N.C. Ct. App. 2024); *Green v. Carter*, 900 S.E.2d 108, 114 (N.C. Ct. App. 2024); *Johnson*, 244 N.C. App. at 627, and others omitting mention of it altogether, *see Collier v. Bryant*, 216 N.C. App. 419, 423 (2011); *Youse*, 171 N.C. App. at 193. The cause may be that, when our Supreme Court last spoke at length on the topic, it was unclear whether the concept of privity was subsumed into the requirement that "the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre*, 358 N.C. at 15, 35-37 (omitting privity from the basic definition of collateral estoppel while noting later in its analysis that privity is required for collateral estoppel to apply). Without further guidance, we do not intend for this opinion to resolve any outstanding ambiguity as to the role of privity in collateral estoppel cases, only to explain why we discuss privity when some of our other cases have not; we think it the better practice to err on the side of inclusion.

in *In re K.A.* was that collateral estoppel cannot apply to a proposition proven in a prior action when the subsequent action involves a *higher* standard of proof.

Nonetheless, even this statement falls short of explaining the whole of collateral estoppel. Our caselaw, when viewed holistically, demonstrates that collateral estoppel operates on a system of transitivity; a factual proposition is deemed true or false in the subsequent action if the truth value of the proposition in that action logically follows from the truth or falsehood of the same proposition in the prior action, bearing in mind the relative burdens of proof. Put differently, assume that the extent to which a given proposition is proven in a prior case is quantifiable as a number X; that the minimum confidence threshold at which any proposition is deemed proven in a prior case—in other words, the burden of proof—is quantifiable as a number A; and that the minimum confidence threshold at which any proposition is deemed proven in a subsequent action is quantifiable as a number B. In such a system, knowing the relationship between X and A, as well as the relationship between A and B, can—but does not always—necessarily imply a relationship between X and B.

Our caselaw bears this out. For example, the above-referenced holdings applying collateral estoppel in a prior criminal case to a subsequent civil case, *see Mays*, 169 N.C. App. at 242, *Griffis*, 20 N.C. at 315, are expressions of the principle that, if X equals or exceeds A and A exceeds B, then X must exceed B. The outcome of these holdings is an expression of the broader transitive relationship outlined above.

Our holding in *In re K.A.* is, taken in context, also an expression of this broader transitive relationship. In *K.A.*, the trial court declined to apply collateral estoppel where there was affirmative finding of abuse in a prior custody order. *In re K.A.*, 233 N.C. App. at 127. The subsequent action—a juvenile abuse, neglect, and dependency case—was subject to a higher standard of proof than the first. *Id.* In other words, if X equals or exceeds A but A is less than B, we cannot know the value of X relative to B.

Finally, in *Fox v. Johnson*, we demonstrated, consistent with the same transitive relationship, that the doctrine continues to apply when discussing a *failure* to meet a burden:

> It is well settled that "[a] dismissal under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." *Hoots v. Pryor*, 106

> N.C. App. 397, 404[] . . . (citations omitted), *disc. review denied*, 332 N.C. 345[] . . . (1992); *see also* [N.C.G.S.] § 1A-1, Rule 41(b) (2013). However, the federal court did not dismiss Plaintiffs' federal claims under North Carolina Rule 12(b)(6), but rather dismissed them pursuant to Federal Rule 12(b)(6). *See Fox*, 807 F.Supp.2d at 484. No North Carolina case law or statute that we have discovered directly addresses the question of whether a dismissal under Federal Rule 12(b)(6) operates as an adjudication on the merits so as to collaterally estop a plaintiff from re-litigating a claim or issue in our State's courts. Of course, if the evaluation of a claim in light of a motion to dismiss pursuant to Federal Rule 12(b)(6) were identical to the evaluation made in response to a motion under North Carolina Rule 12(b)(6), it would be clear that the federal court's dismissal had adjudicated and settled the same issue Plaintiffs raise in their state complaint. However, our review of the pertinent statutes and case law demonstrates that the standard under Federal Rule 12(b)(6), which the federal court here held Plaintiffs failed to meet, is a different, *higher* pleading standard than mandated under our own General Statutes. In other words, the fact that Plaintiffs' allegations of proximate cause in the federal complaint did not meet the pleading standard under Federal Rule 12(b)(6) does not *necessarily* mean that their allegations of proximate cause would have resulted in dismissal pursuant to North Carolina Rule 12(b)(6).

Fox v. Johnson, 243 N.C. App. 274, 285 (2015), *disc. rev. denied*, 368 N.C. 679 (2016). We see in *Fox* that, if X is less than A but A is greater than B, we cannot necessarily know whether X is also less than B or somewhere between B and A. *See also Hussey v. Cheek*, 31 N.C. App. 148, 149 (1976) ("When the burden of proof at the second trial is less than that at the first, the failure to carry that burden at the first trial cannot raise an estoppel to carrying the lesser burden at the second trial."); *Safrit*, 154 N.C. App. at 729 (holding that the prior failure to establish Defendant's existing convictions under a beyond a reasonable doubt standard did not preclude a subsequent finding that those convictions took place under the lower preponderance standard).

As it pertains to this case, "the applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence[,]" *Speagle v. Seitz*, 354 N.C. 525, 533 (2001) (citations omitted),

and "[t]he standard of proof for an adjudicatory order entered on a petition alleging abuse, neglect, or dependency in a juvenile matter[] . . . is 'clear and convincing evidence.' " *In re K.A.*, 233 N.C. App. at 127 (quoting N.C.G.S. § 7B-805 (2013)); *see also* N.C.G.S. § 7B-805 (2023) ("The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence."). "Clear and convincing evidence is [a] greater [standard] than the preponderance of the evidence standard required in most civil cases." *In re A.K.*, 178 N.C. App. 727, 730 (2006) (marks and citations omitted). Moreover, the proposition that the movant was required to prove in both cases was that Father abused Alice—a proposition which, under the preponderance standard, the trial court ruled had not been proven in the CCO. In other words, in keeping with the earlier model, we know that X (Father abused Alice) is less than A (preponderance of the evidence), and we know that A is less than B (clear and convincing evidence). Since we can necessarily deduce from this relationship that X must also be less than B, collateral estoppel applies to the issue of whether Father abused Alice. The doctrine therefore precludes a contrary finding in the present action, and the trial court properly invoked it as to the allegations of abuse against Father already covered by the CCO.

Any future litigants, of course, need not cite our holding in this case in algebraic terms; it is enough to say that, where a party fails to establish a fact in a prior case under a lower burden of proof, collateral estoppel applies to preclude a subsequent finding that the same fact has been established under a higher standard of proof.

Having established the preclusive effect of the CCO, we now turn to the preclusive effect of the IPO. This analysis is far simpler: The burdens of proof applicable to both the interference petition and the juvenile petition were clear and convincing evidence, *see* N.C.G.S. § 7B-805 (2023), so collateral estoppel naturally applies to the failure to prove abuse. As the IPO's conclusions that Father had not been shown to abuse Alice were determinative as to the allegations through those alleged in the interference petition, this means that, in addition to the preclusion of the allegations contained in the CCO, the IPO also precludes the allegations arising in the timeframe it alleged; namely, 28 March 2022. Thus, these issues were also correctly dismissed by the trial court as barred by collateral estoppel.

Nonetheless, to the extent the trial court held that *all* factual allegations in the juvenile petition were barred by collateral estoppel, thereby justifying its dismissal in the entirety, this ruling was too broad. Specifically, we note that the juvenile petition appears to further allege

instances of abuse taking place in July 2022, supported by evidence gathered through at least August of 2022. These allegations, which were not estopped by the earlier orders, render dismissal inappropriate. Accordingly, the trial court correctly ruled estopped most, but not all, of the factual issues in the juvenile petition; but, since factual issues pertaining to allegations after March of 2022 remain, the trial court erred in dismissing the entire petition.

2. Rule 12(b)(6) Motion

[3] The trial court also granted the Rule 12(b)(6) motion and found "there are no colorable allegations of abuse, neglect or dependency that are alleged to have occurred" after the CCO and IPO. As to a Rule 12(b)(6) motion to dismiss,

> this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted. We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.

In re K.G., 260 N.C. App. 373, 376 (2018) (citations omitted). Nevertheless,

> the review of an order granting a Rule 12(b)(6) motion to dismiss does not involve an assessment or review of the trial court's reasoning. Rather, the appellate court affirms or reverses the disposition of the trial court—the granting of the Rule 12(b)(6) motion to dismiss—based on the appellate court's review of whether the allegations of the complaint are sufficient to state a claim.

Taylor v. Bank of Am., N.A., 382 N.C. 677, 679 (2022). Therefore, we ordinarily ignore the trial court's rationale in granting a Rule 12(b)(6) motion to dismiss. But, here, because the trial court determined the juvenile petition failed to state a claim based on the idea that collateral estoppel and *res judicata* precluded Petitioner from asserting the entire spectrum of abuse allegations contained therein, we note that, to the extent the trial court's ruling on the Rule 12(b)(6) motion was based on collateral estoppel and *res judicata*,[5] it is erroneous, in part, for the same reasons as above. *See supra* Part B-1.

---

5. As discussed above, while the preclusion motion discusses both *res judicata* and collateral estoppel, collateral estoppel is the more directly applicable doctrine.

As to whether the juvenile petition states a claim, Chapter 7B specifically provides that a valid petition must include "allegations of facts sufficient to invoke jurisdiction over the juvenile[,]" N.C.G.S. § 7B-402 (2023), including allegations that the juvenile is abused, neglected, or dependent. *See* N.C.G.S. § 7B-200 (2023) ("The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent."). An abused juvenile, neglected juvenile, and dependent juvenile are specifically defined in Chapter 7B. *See* N.C.G.S. § 7B-101 (2023) (defining abuse, neglect, and dependency). For purposes of the instant appeal, a juvenile whose parent commits a sex offense defined by Chapter 14 upon the juvenile is abused. *See* N.C.G.S. § 7B-101(1)(d) (2023). A neglected juvenile is one whose parent "[d]oes not provide proper care, supervision, or discipline[,]" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15)(a), (e) (2023). And a dependent juvenile is

> [a] juvenile in need of assistance or placement because (i) the juvenile has no parent . . . responsible for the juvenile's care or supervision or (ii) the juvenile's parent . . . is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-101(9) (2023).

Here, the juvenile petition contained sufficient allegations to state a claim that Alice was an abused, neglected, and dependent juvenile within the meaning of Chapter 7B despite the partially preclusive effect of the CCO and IPO. The petition alleged that Alice was abused and neglected because Father sexually abused Alice, and at least some of these alleged acts occurred after those already ruled upon in the CCO and IPO. The petition specifically alleged that Father committed an enumerated sex offense under Chapter 14 against Alice and that such abuse constituted improper supervision and created an injurious environment for Alice. The petition also alleged that Alice was dependent because neither of her parents were appropriate caregivers—Father was an inappropriate caregiver due to the allegations of sexual abuse, and Mother was an inappropriate caregiver due to the allegations that she had coached Alice to accuse Father of sexual abuse—and there was no other caregiver available on either side of Alice's family.

Considering all of the remaining factual allegations, the juvenile petition was sufficient to state a claim under Chapter 7B, even when excluding factually precluded subject matter. However, we further note that Father's pending motions before the trial court may—depending on

the relief granted, if any—result in the striking of some or all of the petition, which may, by extension, affect the appropriateness of any further Rule 12(b)(6) rulings on remand. In light of this potential, rather than reversing the dismissal order, we vacate the order and remand for consideration of whether, after resolution of all potentially relevant motions and in light of our holding, any allegations remain for purposes of Rule 12(b)(6).

CONCLUSION

The allegations in the juvenile petition were not fully barred by the doctrine of collateral estoppel, and the factually precluded portions of the juvenile petition did not themselves merit dismissal under Rule 12(b)(6). As our holding with respect to collateral estoppel unmoots some number of motions potentially impacting the materiality of the remaining factual allegations in the juvenile petition, the dismissal order is vacated and the case remanded for further proceedings.

VACATED AND REMANDED.

Judges COLLINS and HAMPSON concur.

IN THE MATTER OF R.H.

No. COA23-1060

Termination of Parental Rights—neglect—failure to address domestic violence—likelihood of future neglect shown

The district court did not err in concluding that the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) existed to terminate a mother's parental rights to her minor child where there was a reasonable probability that the child, who had previously been removed from the mother's custody and adjudicated a neglected juvenile (primarily due to extensive domestic violence between his parents, such as the father punching the mother in the stomach while she was pregnant with the child), would experience a repetition of neglect if returned to the mother's care. That determination was supported by the findings and evidence, including that the mother was not credible in her denials that—in violation of her case plan and court orders—she remained in an ongoing relationship with the father and had taken the child to see him during each of three extended unsupervised overnight visits she was allowed in the weeks leading up to the termination hearing.

IN RE R.H.

[295 N.C. App. 494 (2024)]

Appeal by Respondent-Mother from order entered 24 August 2023 by Judge J. Rex Marvel in Mecklenburg County District Court. Heard in the Court of Appeals 28 May 2024.

Mecklenburg County Attorney's Office, by Senior Associate Attorney Kristina A. Graham, for petitioner-appellee Mecklenburg County Youth and Family Services.

Guardian ad Litem Program Staff Counsel Michelle FormyDuval Lynch for petitioner-appellee Guardian ad Litem

Robinson & Lawing, LLP, by Christopher M. Watford, for respondent-appellant mother.

STADING, Judge.

Respondent-mother (Mother) appeals from the trial court's order terminating her parental rights to her minor child R.H. (Rory[1]). For the reasons below, we affirm.

I. Background

This case began on 25 February 2020, when Mecklenburg County Youth and Family Services (YFS) filed a petition alleging that newborn Rory was neglected and dependent. YFS claimed that it had been involved with the family since 2018, when four of Mother's children were taken into YFS custody and subsequently adjudicated neglected and dependent due to domestic violence between their parents, unstable housing, and inappropriate care and supervision. YFS alleged that Mother had not made progress in alleviating the conditions that led to the children's removal, and as a result, YFS petitioned to terminate Mother's parental rights to Rory's three half-siblings.

The fourth child taken into YFS custody in 2018 was the only previous child of Mother and respondent-father (Father). According to YFS, that child passed away in early 2019, and then Father did not engage in domestic violence services. Yet Mother and Father—who was married to another woman—continued to engage in a relationship rife with incidents of domestic violence. YFS alleged that, during the summer of 2019, there were at least four incidents of domestic violence, which led to Father being arrested and charged with assault

1. A pseudonym is used to protect the minor child's identity.

on a female, assault by strangulation, assault with a deadly weapon, and communicating threats.

Based on the allegations in the petition, YFS obtained nonsecure custody of Rory. YFS subsequently filed an amended neglect and dependency petition, which added an allegation that there was another domestic violence incident on 23 December 2023, during which Father grabbed pregnant Mother by the neck and punched her in the stomach. Father was charged with assault on a female and assault on an unborn child (Rory) because of this incident.

The petition, as amended, was heard on 7 July 2020. On 12 August 2020, the trial court entered an order adjudicating Rory as a neglected and dependent juvenile. The trial court ordered a safety plan to be put into place to work towards unsupervised visitation between Mother and Rory. Father was not to be informed of the location and times of any visitation, and Mother was ordered to report any domestic violence incidents to YFS. Rory remained in YFS custody.

The trial court entered a permanency planning order on 22 July 2021, establishing a primary plan of reunification with Mother and a secondary plan of adoption. In this order, the trial court found that Mother had made significant progress in the case involving her other children and was engaging in services and cooperating with YFS and the guardian ad litem (GAL) in Rory's case. Mother was awarded a mix of supervised and unsupervised visitation, and YFS was permitted to expand unsupervised visitation in its discretion.

In a July 2022 permanency planning order, the trial court changed Rory's primary permanent plan to adoption with a secondary plan of reunification. In this order, the trial court found that Mother had completed services and was cooperating with YFS and the GAL but that she was also acting inconsistently with Rory's health and safety by failing to consistently attend visitation, which had been changed to weekly supervised visitation in a prior permanency planning order. The trial court also found that there were incidents of domestic violence at Mother's home in 2022. Noting that Rory had been in foster care for twenty-seven months, the trial court ordered the GAL to file a termination petition.

The GAL petitioned to terminate Mother's and Father's parental rights on 21 November 2022. As for Mother, the GAL alleged four grounds for termination: neglect, willfully leaving Rory in foster care for more than twelve months without making reasonable progress to correct the conditions that led to his removal, willful failure to pay a reasonable portion of Rory's cost of care, and that Mother's parental rights

to another child had been involuntarily terminated and Mother lacks the ability or willingness to establish a safe home. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (9) (2023).

The termination petition was heard over four days in May and June 2023. Several witnesses testified about Mother's ongoing relationship with Father and the repeated incidents of domestic violence that occurred as part of that relationship. During her testimony, Mother admitted that she and Rory met with Father during an overnight trip to Myrtle Beach and at the Carolina Place Mall; these meetings occurred less than two weeks before the termination hearing began. Mother acknowledged that these meetings violated her case plan but claimed they were not preplanned or intentional.

On 24 August 2023, the trial court entered an order terminating Mother's parental rights.[2] The trial court concluded that all four termination grounds alleged by the GAL existed and that termination of Mother's rights was in Rory's best interest. Mother appeals.

II. Jurisdiction

This Court has jurisdiction to hear this appeal under N.C. Gen. Stat. §§ 7B-27(b) and 7B-1001(a)(7) (2023).

III. Analysis

On appeal, Mother challenges the four grounds for termination found by the trial court. This Court reviews the trial court's adjudication of termination grounds to determine "whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence." *In re A.J.L.H.*, 384 N.C. 45, 53, 884 S.E.2d 687, 693 (2023) (citing *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019)). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

We first consider whether the trial court properly found that Mother's parental rights were subject to termination based on neglect. A parent's rights may be terminated under this ground if that parent neglects their child such that the child meets the statutory definition of a "neglected juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2023). A neglected

2. The trial court's order also terminated Father's parental rights. However, Father did not appeal.

juvenile includes a juvenile whose parent "[d]oes not provide proper care, supervision, or discipline[,]"or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e) (2023).

When a child has been out of their parent's custody for a significant time, "neglect may be established by a showing that the child was neglected on a previous occasion and the presence of the likelihood of future neglect by the parent if the child were to be returned to the parent's care." *In re J.D.O.*, 381 N.C. 799, 810, 874 S.E.2d 507, 517 (2022) (citation omitted). "When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (citation omitted). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

Here, the trial court found and concluded that Mother had previously neglected Rory and that there was a probability of repetition of neglect in the future if Rory was returned to Mother's care. Mother does not dispute that Rory was previously adjudicated neglected. Still, she challenges many of the trial court's findings of fact[3] and its conclusion that there is a likelihood of repetition of neglect. "[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58-59.

Mother first contends that several portions of the trial court's finding of fact 10 are merely "recitations of witness testimony" and thus do not constitute proper findings:

> j. There was testimony the children suffered trauma from domestic violence and [Mother] suffered trauma and sought counseling to address domestic violence.
>
> . . . .

3. We note that YFS, although an appellee in this case, joins Mother in challenging many of the findings of fact made by the trial court in its termination order. Nonetheless, YFS maintains that terminating Mother's parental rights is ultimately proper. To the extent YFS' arguments could be construed as a concession of error, we observe that such concessions do not bind this Court. *See State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) ("This Court, however, is not bound by the State's concession. The general rule is that stipulations as to the law are of no validity." (citations omitted)).

> m. [A law enforcement officer] testified about being called to residence regarding [Father] allegedly breaking and entering and stealing gaming equipment.
>
> n. The Officer testified regarding responding to a domestic violence disturbance during which [Father] allegedly threw a tool at [Mother].
>
> o. [Another law enforcement officer] testified that on November 1, 2022 he determined that residence of [Mother] was also the residence of [Father] . . . .
>
> . . . .
>
> v. [Mother] testified that during the [three] extended unsupervised overnight visits she was given that started May 10, 2023, [] she took her children, including [Rory] to see [Father]. [Mother] testified she took [Rory] out of state to Myrtle Beach with [Father] the weekend of May 13, 2023. [Mother] testified she took [Rory] to a restaurant in South Carolina and a Walmart in South Carolina with [Father]. [Mother] testified that during the next extended weekend visit on May 19th, 2023, she took [Rory] to Carolina Place Mall in North Carolina with [Father].
>
> . . . .
>
> cc. [A social worker] testified that [Mother] makes risky decisions that puts her children at risk and there is no evidence that [Mother] will leave [Father].

Our Supreme Court has explained that "[t]here is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes[.]" *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (citations omitted). We agree with Mother that in paragraphs j., m., n., o., and cc., the trial court recited testimony without any indication that it evaluated the credibility of the relevant witness. Accordingly, we disregard those findings. *See id.*

With respect to paragraph v., the trial court made additional findings that reflected that it did not find Mother's testimony regarding the circumstances of her trip to Myrtle Beach and her meeting with Father at Carolina Place Mall to be credible. Mother challenges these findings as not supported by clear, cogent, and convincing evidence:

> y. [Father] has not made any progress on his case plan and has not visited [Rory] until theses [sic] visits where

> [Mother] brought [Rory] to him when he is alleged to have blackmailed [Mother].
>
> . . . .
>
> bb. [Mother] and [Father] are still in a relationship, [Father] has never worked a case plan and [Father] still excerpts [sic] power and control over [Mother].
>
> . . . .
>
> hh. Despite [Mother] claiming she and [Father] were no longer in a romantic relationship there were domestic violence incidents in May 2021, November 2022 and May 2023[.] [Mother] violated this Court's order and the YFS safety plan when she took [Rory] to [Father] out of state and against the orders of the Court.
>
> ii. The facts show the amount of control [Father] has over [Mother]. [Mother's] inappropriate decision making and willingness to hide the truth from the Court, YFS and GAL to conceal her continued relationship with [Father] even though it jeopardizes her case progress as well as the health and safety of any children in her care.
>
> jj. It is clear to the Court from the evidence that [Father] has perpetrated acts of domestic violence against [Mother], has not changed his behaviors, not engaged in his case plan, still contacts [Mother] and went on an unsanctioned vacation with her and [Rory] in May 2023.

Mother argues that there was insufficient evidence for the trial court to infer that she and Father were in an ongoing relationship or that she intentionally met with Father in Myrtle Beach or at the Carolina Place Mall, and that to the extent these findings imply or state otherwise, they are erroneous.

As for the meetings with Father in Myrtle Beach and at the Carolina Place Mall, Mother acknowledges that the meetings occurred. However, she argues that her testimony that the meetings were unplanned was uncontroverted, such that the trial court's findings that suggest the meetings were intentional are unsupported.

"In the context of termination of parental rights proceedings, the proper inquiry is often fact-dependent and the trial court, as a fact-finding court, is in the best position to determine the credibility of the witnesses before it and make findings of fact." *In re S.R.*, 384 N.C. 516, 517, 886

S.E.2d 166, 169 (2023) (citation omitted). Thus, the trial court "determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial court alone determines which inferences to draw and which to reject." *In re M.M.*, 272 N.C. App. 55, 69, 845 S.E.2d 888, 898 (2020) (citation and internal quotation marks omitted).

In this case, the trial court determined that Mother's claims that her recent meetings with Father were unplanned and unintentional were not credible. In addition to making a finding noting that "[t]here is a long history of [Mother] hiding information of domestic violence and the court has in prior orders questioned the mom's veracity," the trial court also expressed concerns about Mother's truthfulness during the termination hearing. Contrary to Mother's argument, the trial court was not required to uncritically accept her explanation for her multiple meetings with Father, including at a location hours away and out of state, shortly before the termination hearing. Given that Mother admitted that the meetings had occurred, the trial court could infer that the meetings were intentional and planned based on Mother's behavior throughout the history of this case. Accordingly, we reject Mother's challenges to the rial court's findings about these meetings.

As to the existence of her ongoing relationship with Father, Mother does not challenge the trial court's finding that on 22 December 2021, Mother gave birth to another child she had conceived with him. Moreover, during the termination hearing, multiple witnesses testified regarding Mother's ongoing relationship with Father throughout the history of this case. A police officer who responded to a domestic violence call at Mother's home on 1 November 2022 stated that he believed Father was living in the home because Father "showed us a lot of his belongings" there. In addition, the GAL supervisor testified to having seen Father's car at Mother's residence between May 2022 and November 2022. Finally, as noted previously, Mother took Rory on an out-of-state trip to meet with Father and then met with Father again at the Carolina Place Mall just days before the termination hearing began. Based on these facts and findings, the trial court could reasonably infer that Mother and Father remained in a relationship at the time of the termination hearing. *See In re M.M.*, 272 N.C. App. at 69, 845 S.E.2d at 898. Mother's challenges to these findings are therefore overruled.

The final two paragraphs of finding of fact 10 reflect the trial court's ultimate determination that there would be a repetition of neglect if Rory was returned to Mother's care:

> kk. [Mother] has engaged in all services offered. The question is whether her behavior changed. There is clear, cogent, and convincing evidence that [Mother's] behaviors have not changed based on her ongoing relationship with [Father]. [Father] continues to use power and control over [Mother] as evidenced by [Mother's] own testimony that [Father] is blackmailing her, yet [Mother] chose to have another child with [Father]. If this Court gave custody of [Rory] to [Mother] based on [Mother's] ongoing relationship with [Father], [Rory] will continue to be exposed to domestic violence. Severing this relation is important to [Rory's] safety and [Rory] is neglected in that there exists a reasonable probability the neglect will continue despite [Mother's] engaging in services, counseling, and signing safety plans as she continues to be in a relationship with her abuser even though it jeopardizes her relationship with her children.
>
> ll. The ground of neglect continues to exist and there is a reasonable probability that it will continue in the future. [Mother] has gone to parenting classes, has completed domestic violence education, is in therapy that is ongoing, and has completed certain other aspects of her case plan. However, the aspect about receiving domestic violence counseling and then incorporating the counseling into her decision-making has not been established. This is the main reason the child is in custody.

These findings reflect that the trial court gave due consideration to Mother's progress throughout the case, including completing many of her case plan goals. Thus, the trial court properly "consider[ed] evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re R.L.D.*, 375 N.C. at 841, 851 S.E.2d at 20. Even so, the trial court weighed this progress against Mother's inability to end her relationship with Father. As shown by the trial court's findings, Rory came into YFS custody just days after his birth because Father had violently assaulted Mother by punching her in the stomach while she was pregnant with Rory. During Rory's time in YFS' care, there were repeated domestic violence incidents between Mother and Father, but Mother refused to end the volatile relationship that was the primary basis for Rory's previous adjudication as a neglected juvenile. Despite knowing it violated her case plan, Mother was still bringing Rory to meet with Father regularly in the weeks leading up to the termination hearing. Based on Mother's failure to address

her issues with domestic violence, the trial court properly determined there was a probability of repetition of neglect in the future if Rory was returned to Mother's care. *See In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) ("A careful review of the record persuades us that the trial court's findings concerning respondent-father's failure to adequately address the issue of domestic violence have ample evidentiary support and are, standing alone, sufficient to support a determination that there was a likelihood of future neglect in the event that the children were returned to respondent-father's care."); *In re M.C.*, 374 N.C. 882, 889, 844 S.E.2d 564, 569 (2020) ("[R]espondent's refusal to acknowledge the effect of domestic violence on the children and her inability to sever her relationship with Walter, even during or immediately following his periods of incarceration, supports the trial court's determination that the neglect of the children would likely be repeated if they were returned to respondent's care.").

Accordingly, the trial court properly determined that Mother's parental rights were subject to termination based on neglect under N.C. Gen. Stat. § 7B-1111(a)(1) in that Rory was previously neglected and there was a likelihood of repetition of neglect if Rory was returned to Mother's care. Since we have concluded the neglect ground is adequately supported, we need not address Mother's remaining arguments regarding the other grounds for termination found by the trial court. *See In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights[.]").

IV. Conclusion

There were sufficient findings of fact, supported by clear, cogent, and convincing evidence, to support the trial court's conclusion that Mother's parental rights could be terminated based on neglect. Mother does not challenge the trial court's determination that termination was in Rory's best interest. Accordingly, we affirm the termination order.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

KERSLAKE v. KERSLAKE

[295 N.C. App. 504 (2024)]

JASON FORREST KERSLAKE, PLAINTIFF
v.
VICKII MICHELLE KERSLAKE (TODD), DEFENDANT

No. COA23-995

Filed 3 September 2024

1. Divorce—equitable distribution—classification of post-separation support loan—acquired for improvements to marital asset—divisible debt

The trial court in an equitable distribution action did not err in classifying a post-separation support loan to the husband as divisible debt where competent, credible evidence showed that the husband used the loan proceeds to pay for repairs to the marital home—an undisputed marital asset—after a detached garage on the property caused a run-off leak into the basement. The wife had been living in the home for a year post-separation and admitted that the detached garage was a fixture of the house.

2. Divorce—equitable distribution—classification of debt—incurred by each spouse to purchase marital property

In an equitable distribution action, where both the husband and the wife had obtained loans in order to acquire an undeveloped parcel of land (previously owned by the husband and his former spouse) out of foreclosure, the trial court properly classified both parties' loans as marital debt and therefore did not err in distributing both loans to the wife as a marital debt.

3. Divorce—equitable distribution—classification of property—gifts—vehicles bought for children with marital funds

In an equitable distribution action involving spouses who each had children from previous marriages, where the husband's testimony regarding the use of marital funds to buy vehicles for the parties' respective children—together with the undisputed delivery of those vehicles to the children—provided competent evidence of donative intent by both parties, the trial court did not err by classifying the vehicles as gifts and distributing them to the children.

4. Divorce—equitable distribution—classification of property—scaffolding acquired before marriage

The trial court in an equitable distribution action erred in classifying $7,800 worth of scaffolding as a marital asset and in including it as part of the value of the marital estate, where competent

evidence showed that the husband had purchased the scaffolding years before the parties got married and without any financial contribution from the wife.

5. Divorce—equitable distribution—classification of debt—incurred on date of separation—judgment against husband's business

The trial court in an equitable distribution action erred in classifying a judgment entered against the husband's business as a marital debt, crediting the husband for paying off the debt, then using the judgment as a factor to award an unequal distribution in the husband's favor. The judgment was entered on the date of separation, not before, and was related only to the husband's business (classified as his separate property) and not to any existing marital debt.

6. Divorce—equitable distribution—credits for mortgage payments for the marital home—made post-separation

In an equitable distribution action, where the trial court ultimately distributed the marital home and the mortgage debt attached to it to the husband, the court did not abuse its discretion when it credited the husband with a reduced mortgage principal for the ten months that he made mortgage payments while the wife was living in the home as its sole occupant post-separation. However, where the wife had also made payments on the mortgage and property taxes for part of her occupancy, the court erred in charging the wife rent for remaining in the marital home post-separation and in failing to credit her for any part of the mortgage and property tax payments that came from her separate funds.

7. Divorce—equitable distribution—distributive award—in addition to unequal distribution—sufficiency of findings

In an appeal from an equitable distribution order, the wife failed to show that the trial court abused its discretion by ordering an additional distributive award to the husband after awarding him more than eighty-one percent of the marital estate. The court entered considerable and detailed findings regarding the distributional factors set forth in N.C.G.S. § 50-20(c), and therefore there was no basis for the wife's assertion that the court had failed to make any findings supporting its decision.

8. Divorce—equitable distribution—unequal distribution—vacated and remanded

In light of its holdings to vacate an equitable distribution order in part and remand the matter for further proceedings, the Court

of Appeals also vacated the trial court's unequal distribution of the marital estate—distributing more than eighty-one percent of the estate to the husband—and directed the trial court to enter a new judgment after consideration of its new conclusions.

Appeal by defendant from judgment entered 14 April 2023 by Judge Donna Forga in Haywood County District Court. Heard in the Court of Appeals 14 August 2024.

Emily Sutton Dezio, PA, by Emily S. Dezio, for the plaintiff-appellee.

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

TYSON, Judge.

Vickii Kerslake Todd ("Wife") appeals from equitable distribution judgment. We affirm in part, reverse in part, and remand.

I. Background

Wife and Jason Forrest Kerslake ("Husband") were married on 30 July 2016 and separated three- and one-half years later on 21 January 2020. No children were born of the marriage. Both parties are parents of children from previous marriages.

Husband was previously married to Rebecca Kerslake Thomason. Husband and Thomason divorced in June 2016. Husband and Thomason owned a single-family home located at 620 Red Maple Drive in Waynesville. Thomason quitclaimed her interest by deed to Husband on 20 September 2019. The same day, Husband quitclaimed an interest to other property by deed as tenant by the entirety to Wife.

Husband and Thomason also owned an undeveloped 1.62-acre lot located on Covered Bridge Trail. The parcel was foreclosed as collateral for unpaid debt, and Husband and Wife acquired the lot out of foreclosure on 18 December 2017. Wife obtained a loan to acquire the property and Husband acquired a loan against their 2024 Spectre Cat boat to pay other costs associated with the acquisition of the foreclosed property.

Following separation, Wife remained in the Red Maple Drive property until leaving for vacation on 1 February 2021. Wife paid the *ad valorem* property taxes on this property in 2019 and 2020. Husband paid the mortgage payments until December 2020. Wife paid the mortgage payments for December 2020 and January 2021. Husband resumed paying the mortgage on 1 February 2021.

Wife filed a complaint for equitable distribution on 5 February 2020. An equitable distribution trial was held on 20-22 March 2023. The trial court entered an equitable distribution judgment on 14 April 2023. Wife appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Standard of Review

Trial courts are accorded discretion when distributing marital property, and "the exercise of that discretion will not be disturbed in the absence of clear abuse." *McNeely v. McNeely*, 195 N.C. App. 705, 709, 673 S.E.2d 778, 781 (2009) (citation and quotations omitted). "A ruling committed to the trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Once the trial court decides that an unequal division of the marital property would be equitable, its decision will only be reversed for an abuse of discretion." *Albritton v. Albritton*, 109 N.C. App. 36, 42, 426 S.E.2d 80, 84 (1993) (citation omitted).

"[C]lassification of property in an equitable distribution proceeding requires the application of legal principles," and is therefore subject to *de novo* review. *Romulus v. Romulus*, 215 N.C. App. 495, 500, 715 S.E.2d 308, 312 (2011). A trial court's conclusions of law are reviewed *de novo*. *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citation omitted).

IV. Issues

Wife argues the trial court erred by: (1) classifying a post-separation loan to Husband as a divisible debt; (2) including Husband's separate property as part of the value of the marital estate; (3) distributing Husband's separate foreclosure debt to Wife as a marital debt; (4) finding that a judgment against Husband's business was a marital debt that existed on the date of separation, crediting Husband for paying off the debt, then using this judgment as a factor to award an unequal distribution to Husband; (5) distributing marital property to children; (6) charging Wife rent for remaining in the marital residence post-date of separation then distributing Husband the residence; (7) ordering an additional distributive award after awarding Husband in excess of 81% of the marital estate; and, (8) ordering an unequal distribution of the marital estate without basis for the award.

V. Classification of Post-Separation Support

[1] Wife argues the trial court erred by classifying a post-separation support loan to Husband as a divisible debt when he used the loan proceeds to improve the marital residence that was distributed to him. In equitable distribution actions, the trial court follows a three-step analytical framework: "(1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property." *Mugno*, 205 N.C. App. at 277, 695 S.E.2d at 498.

Our General Assembly has defined marital property as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2023).

The General Assembly further defined divisible property, in relevant part, as "[a]ll appreciation and diminution in value of marital property and divisible property of the parties . . . , except that appreciation or diminution in value which is the result of post-separation actions or activities of a spouse shall not be treated as divisible property[,]" and "passive increases and passive decreases in marital debt[.]" N.C. Gen. Stat. §§ 50-20(b)(4)(a),(d) (2023).

Marital debt is "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). "[A]ny debt incurred by one or both of the spouses after the date of separation to pay off a marital debt existing on the date of separation is properly classified as a marital debt." *Id.*

The trial court made the following finding of fact:

> The court received competent, credible evidence that the detached garage was causing a run-off leak into the basement of the house. The Plaintiff obtained a loan after the date of separation to have the garage repaired and run-off water re-directed. The plaintiff acquired a loan in the total amount of $18,215.55 which the court considers divisible property.

Competent evidence supports the finding of fact that the detached garage was causing water damage to the house. The house is an undisputed marital asset. Wife admitted the carport was a fixture of the house.

Husband acquired the post-separation debt to remedy the source of the water damage and prevent further damage to a marital asset.

This Court in *Sluder* upheld a trial court's classification of a debt acquired after the date of separation as marital debt. *Sluder v. Sluder*, 264 N.C. App. 461, 465, 826 S.E.2d 242, 245 (2019). The husband in *Sluder* testified he had "refinanced the parties' existing mortgage due to high interest rates and because the parties could not reach a decision on the property." *Id*. at 465, 826 S.E.2d at 245.

Here, Wife had been staying in the house for a year post-separation, and, upon Husband's return, he discovered ongoing water damage and acted to prevent further damage to the marital asset. The trial court relied upon competent, credible evidence regarding the source of the damage to the marital asset and the costs undertaken to remedy it. Wife's argument is overruled. The trial court's order classifying the loan as divisible property is affirmed.

VI. Foreclosure Debt

[2] Wife argues the trial court erred by distributing Husband's separate foreclosure debt to Wife as a marital debt.

A. Standard of Review

A trial court's determination regarding whether property is marital or separate should not be disturbed provided competent evidence supports the findings. *See Riggs v. Riggs*, 124 N.C. App. 647, 649, 478 S.E.2d 211, 212 (1996) (citation omitted). An equitable distribution judgment "will not be disturbed absent a clear abuse of discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citation omitted).

B. Analysis

Marital debt is "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet*, 113 N.C. App. at 536, 439 S.E.2d at 210.

Here, Husband and Wife purchased the property out of foreclosure during their marriage and both incurred debt to do so. The debt incurred was correctly classified as marital debt. The trial court's order distributing the foreclosure debt to Wife as a marital debt is affirmed.

VII. Distributing Marital Property to Children

[3] Wife argues the trial court erred by distributing marital property to children, who were not a party to the proceeding, and occurred without the donative intent of both parties.

In *Berens v. Berens*, this Court examined gifts to minor children, holding:

> [p]roperty that was acquired but then given away to some third party during the marriage–including a gift to the married couple's minor children–is not subject to equitable distribution . . . . In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery. These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery[.]

Berens v. Berens, 260 N.C. App. 467, 469, 818 S.E.2d 155, 157-58 (2018) (citations and quotation marks omitted).

This Court in *Berens* held money contributed to the parties' minor children's 529 Savings Plans was not a gift because the parties did not deliver an ownership interest to their children. *Id.* at 470, 818 S.E.2d at 158.

Here, all three children, who were adults at the time the parties separated, presently possessed and used the vehicles in different states. Husband's testimony regarding the use of marital funds used in purchasing vehicles for both Husband and Wife's respective children, together with the delivery of the vehicles to the children, provides competent evidence of donative intent to not disturb the trial court's decision and judgment. Wife's argument is overruled.

VIII. Scaffolding in Marital Estate

[4] Wife argues the trial court erred in classifying $7,800 worth of scaffolding as a marital asset because it was acquired by Husband before the marriage. Only marital property is subject to equitable distribution under N.C. Gen. Stat. § 50-20(b) (2023). *Chandler v. Chandler*, 108 N.C. App. 66, 68, 422 S.E.2d 587, 589 (1992). Marital property refers to "real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties." N.C. Gen Stat. § 50-20(b)(1). Property acquired by either spouse before marriage is separate property. N.C. Gen. Stat. § 50-20(b)(2) (2023).

Defendant cites *Wade v. Wade* in support of the trial court's authority to transfer title of property when it was necessary for an equitable distribution. 72 N.C. App. 372, 382-83, 325 S.E.2d 260, 270 (1985). In *Wade*, the asset in question, a house, was characterized as partly marital due to the substantial contribution of the defendant to its construction. *Id.* at 380, 325 S.E.2d at 268. Because the house was classified as partly

marital property, it was subject to equitable distribution, even though the land it was built upon was the plaintiff's separate property. *Id*. at 382-83, 325 S.E.2d at 270.

Here, Wife made no investment in the scaffolding. It cannot be properly classified as marital or partly marital property. *Id*. As Husband's separate property, it is not subject to equitable distribution. The uncontested evidence shows Husband acquired the scaffolding years prior to his marriage to Wife, making and retaining it as his separate property. The trial court erred in classifying the scaffolding as marital property and distributing it to Wife.

IX. Business Debt

[5] Wife argues the trial court erred in classifying a judgment against Husband's business as a marital debt. Wife asserts the debt existed on the date of Husband and Wife's separation. The trial court credited Husband for paying off the debt and then used this judgment as a factor to award an unequal distribution to Husband.

A marital debt is "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet*, 113 N.C. App. at 536, 439 S.E.2d at 210. A debt incurred on the date of separation, not before, only qualifies as a marital debt if it is incurred by one or both spouses to pay off an existing marital debt. *Id*.

The judgment against Husband's business was entered on the date of separation. Husband's business is his separate property and is not a marital asset. The judgment does not constitute a marital debt. Despite Husband's assertion that Wife made herself "part and parcel" of his business, the debt was not incurred before the date of separation. The debt was unrelated to any existing marital debt, excluding it from being classified as marital debt. The debt was improperly denominated as marital debt in the judgment for equitable distribution and is properly classified as Husband's separate debt on remand.

X. Marital Residence Rent

[6] Wife argues the trial court erred in charging her rent for remaining in the residence after the date of separation, paying the *ad valorem* taxes, and then distributing Husband the residence with a reduced mortgage principal following her mortgage payments.

A spouse is entitled to consideration in equitable distribution proceedings for any post-separation payments made for the benefit of the

marital estate, as well as for post-separation use of the marital property by the other spouse. *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002) (citations omitted).

If the property is distributed to the spouse, who had the post-separation use of it, or who made post-separation payments relating to its maintenance, as a general proposition, no entitlement to a credit or a distributional factor is due. The trial court may weigh the equities in a particular case and find, in its discretion, a credit or distributional factor would be appropriate under the circumstances. *Id.* at 732, 561 S.E.2d at 577.

A spouse to whom the marital debt is not distributed, but who nonetheless makes some payment on the debt from separate funds after separation and before equitable distribution, is entitled to either direct reimbursement by the other spouse or a proportionate increase in the share of the equitable distribution award or marital properties. *Loving v. Loving*, 118 N.C. App. 501, 505-06, 455 S.E.2d 885, 888 (1995). The form and manner of compensation rests within the trial court's discretion. *Id.*

The court is required "to credit a former spouse 'with at least the amount by which he decreased the principal owed' on marital debt by using his separate funds." *McLean v. McLean*, 88 N.C. App. 285, 293, 363 S.E.2d 95, 100 (1987). "[I]f a spouse used separate funds to benefit the marital estate, those payments may be credited to the payor when distributing the marital estate." *Mosiello v. Mosiello*, 285 N.C. App. 468, 476, 878 S.E.2d 171, 178 (2022).

Here, Husband was distributed the marital home and paid the mortgage for ten months while Wife solely occupied it post-separation. Husband is entitled to credit for Wife's post-separation use of the property. Husband used income earned after the date of separation to make the payments. It was within the trial court's discretion to award Husband credit for the mortgage payments. Wife has not shown it was arbitrary or unreasonable for the trial court to credit Husband with a reduced mortgage principal for the ten months he made payments while Wife solely occupied the marital residence post-separation.

Wife also asserts she made payments on the mortgage and property taxes for part of her occupancy. Because the mortgage debt was not distributed to her, Wife is entitled to credit for these payments, if made with her separate funds. There is no indication the trial court gave any consideration to Wife's purported payments. If on remand the trial court determines Wife's payments were made using her separate funds,

it should credit Wife the equivalent amount either through direct reimbursement or through an increase in her share of the marital estate.

XI. Distributive Award

[7] Wife argues the trial court erred by ordering an additional distributive award after awarding Husband in excess of 81% of the marital estate.

A. Standard of Review

"[T]his Court reviews the trial court's actual distribution decision for abuse of discretion." *Mugno*, 205 N.C. App. at 276, 695 S.E.2d at 498 (citation omitted). An equitable distribution judgment "will not be disturbed absent a clear abuse of discretion." *Wiencek-Adams*, 331 N.C. at 691, 417 S.E.2d at 451.

B. Analysis

The North Carolina General Statutes define "distributive award" as:

> Payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

N.C. Gen. Stat. § 50-20(b)(3) (2023).

The statute further states "[t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c) (2023). "[I]t shall be presumed in every action that an in-kind distribution of marital property or divisible property is equitable," however, "[t]his presumption may be rebutted by the greater weight of the evidence[.]" N.C. Gen. Stat. § 50-20(e) (2023).

"[I]f the trial court determines the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908. Should the trial court determine the presumption of an in-kind distribution has been rebutted, the statutes instruct the court to "provide for a distributive award in order to achieve equity between the parties[.]" N.C. Gen. Stat. § 50-20(e).

Wife asserts "the trial court does not make any findings of fact to support that an in-kind distribution has been rebutted nor does i[t] make any findings of fact to support the payment of a distributive award." This assertion is unsupported and misplaced.

In *Hill v. Sanderson*, the trial court made numerous "findings corresponding with . . . the twelve distributional factors set forth in N.C. Gen. Stat. § 50-20(c)." *Hill v. Sanderson*, 244 N.C. App. 219, 240, 781 S.E.2d 29, 44 (2015). This Court "conclude[d] the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered." *Id.* at 241, 781 S.E.2d at 44.

Here, the trial court made considerable and detailed findings regarding the distributional factors set forth in N.C. Gen. Stat. § 50-20(c). Wife has failed to carry or meet the substantial burden of demonstrating the trial court abused its discretion by acting in a manner that is "so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 224, 781 S.E.2d at 34 (citation omitted). Wife's argument is overruled.

XII. Unequal Distribution

[8] Wife argues the trial court erroneously ordered an unequal distribution of the marital estate. In light of this Court's holdings to vacate in part and remand for further proceedings, the trial court's equitable distribution award is vacated and this cause remanded for the exercise of the trial court's discretion and entry of a judgment after consideration of the conclusions and mandate herein.

XIII. Conclusion

We affirm the trial court's findings and conclusions to classify the post-separation loan as marital debt, to distribute the foreclosure debt to Wife, to classify vehicles as the property of Husband and Wife's respective children, to credit Husband for the mortgage payments on the marital residence, and the distributive award to Husband.

We reverse the trial court's classification of Husband's scaffolding as a part of the marital estate, the classification of Husband's business as a marital asset, and the court's failure to credit Wife for her mortgage and *ad valorem* taxes payments, if any, paid from her separate funds on the marital residence.

We vacate the equitable distribution award and remand for further consideration and entry of a new order consistent therewith. In its discretion the trial court may take additional evidence and consider additional factors. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, VACATED AND REMANDED.

Judges STADING and THOMPSON concur.

REYNOLDS v. BURKS

[295 N.C. App. 515 (2024)]

WILLIAM WAYNE REYNOLDS, PLAINTIFF
v.
ALLEN COLE BURKS, M.D., INDIVIDUALLY, AND SOHINI GHOSH, M.D., INDIVIDUALLY, DEFENDANTS

No. COA24-75

Filed 3 September 2024

Venue—motion to change venue—N.C.G.S. § 1-77—no error—motion to reconsider—no abuse of discretion

In a medical malpractice case filed in Pender County and arising from allegedly negligent care provided to a Pender County resident while he was admitted to UNC Hospitals in Orange County, the trial court did not err in denying motions for change of venue filed by two physicians (defendants) who sought a change in venue pursuant to N.C.G.S. § 1-77 (requiring a case brought against a public officer to be tried in the county where the cause of action arose) based on their argument that they were employees of UNC Hospitals, a state-created entity. Defendants, in their answers to the complaint, had denied allegations that they had employment or agency relationships with UNC Hospitals and, moreover, failed to offer any affidavits, sworn testimony, or other evidence establishing such relationships at the motion hearing. Additionally, the denial of defendants' request for further hearing or reconsideration (after their motions for change of venue were denied) was not an abuse of discretion given that reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised when the original motion was pending.

Appeal by Defendants from Orders entered 13 September 2023 and 11 October 2023 by Judge Tiffany Powers in Pender County Superior Court. Heard in the Court of Appeals 12 June 2024.

Edwards Kirby, LLP, by Mary Kathryn Kurth and David F. Kirby, for Plaintiff-Appellee.

Gordon Rees Scully Mansukhani, LLP, by Samuel G. Thompson, Jr., for Defendant-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

Allen Cole Burks, M.D. (Dr. Burks) and Sohini Ghosh, M.D. (Dr. Ghosh) (collectively, Defendants) appeal from an Order denying their respective Motions to Change Venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 and a subsequent Order denying their request for findings of fact. The Record before us tends to reflect the following:

On 12 January 2023, William Wayne Reynolds (Plaintiff)—a resident of Pender County—filed a Complaint in Pender County Superior Court against Defendants. The Complaint alleged medical negligence on the part of Defendants for treatment Plaintiff received while admitted at the University of North Carolina Medical Center in Chapel Hill, North Carolina.

With respect to Dr. Ghosh, Plaintiff's Complaint alleged upon information and belief, at all times relevant to Plaintiff's action, Dr. Ghosh:

A. was a third-year pulmonology fellow at UNC Hospitals;

B. was a fellow in interventional pulmonology at the School of Medicine of the University of North Carolina;

C. was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina; and

D. was acting as an employee, agent and/or apparent agent of UNC Hospitals.

Similarly, with respect to Dr. Burks, Plaintiff alleged upon information and belief, at all times relevant to Plaintiff's action, Dr. Burks:

A. was an attending physician at UNC Hospitals;

B. was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina; and

C. was acting as an employee, agent and/or apparent agent of UNC Hospitals.

On 5 April 2023, Defendants each filed an Answer to the Complaint. In their Answers, with respect to Dr. Ghosh, each Defendant:

A. denied she was a third-year pulmonology fellow at UNC Hospitals;

B. denied she was a fellow in interventional pulmonology at the School of Medicine of the University of North Carolina;

C. objected and moved to strike the allegation Dr. Ghosh was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegation; and

D. objected and moved to strike the allegation Dr. Ghosh was acting as an employee, agent and/or apparent agent of UNC Hospitals or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegation.

With respect to Dr. Burks, each Defendant:

A. denied he was an attending physician at UNC Hospitals;

B. objected and moved to strike the allegation Dr. Burks was acting as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegations; and

C. objected and moved to strike the allegation Dr. Burks was acting as an employee, agent and/or apparent agent of UNC Hospitals or in the alternative alleged lack of knowledge or information sufficient to form a belief as to the truth of the allegation.

In their Answers, both Defendants also moved to change venue to Orange County Superior Court under N.C. Gen. Stat. § 1-77 on the basis that this was the county the care occurred and where UNC Hospital—a state-created hospital—and the School of Medicine are located. Alternatively, both Defendants moved for a change of venue under N.C. Gen. Stat. § 1-83 based on convenience of the witnesses.

Defendants' Motions to Change Venue were heard by the trial court on 5 September 2023. At the hearing, Plaintiff and Defendants each presented arguments of counsel. Defendants contended they were entitled to a change of venue under Section 1-77, which provides a case "must be

tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial" where the action is "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office[.]" N.C. Gen. Stat. § 1-77 (2023). Defendants contended they were employees of UNC Hospitals—and thus covered by the statute—and the action arose from the medical care they provided in Orange County. Defendants, however, presented no evidence or affidavits to support their position, instead relying on trial court orders entered in other cases.

Later in the day on 5 September 2023, the trial court issued its rendered ruling via email. The trial court informed the parties it was "denying the Motion[s] to Change Venue." The trial court expressly indicated "I am not making a finding that the Doctors are not covered under NCGS 1-77, but I am denying the Motion[s] on both grounds."

On 13 September 2023, the trial court entered its Order Denying Defendants' Motions to Change Venue. The Order determined: "The Court makes no finding that Dr. Burks or Dr. Ghosh are not covered under N.C. Gen. Stat. [§] 1-77, but based upon what was presented to the Court, the motions to change venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 are both denied." The trial court ordered the matter to proceed in Pender County.

On 25 September 2023, Defendants filed a "Motion to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue and Alternative Motion for Reconsideration of the Court's Denial of Defendants' Request for an Opportunity to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue." On 11 October 2023, the trial court entered an Order denying Defendants' request for further hearing or reconsideration.

The same day—11 October 2023—Defendants filed Notice of Appeal from the trial court's Order Denying Defendants' Motions to Change Venue. The following day—12 October 2023—Defendants filed Notice of Appeal from the trial court's Order denying their Motion for further hearing or reconsideration.

Appellate Jurisdiction

The trial court's Orders in this case are interlocutory orders. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "Generally, there is no right of immediate appeal from

interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an appeal is permitted "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Harris & Hilton, P.A. v. Rassette*, 252 N.C. App. 280, 282, 798 S.E.2d 154, 156 (2017) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)).

This Court has previously held "[t]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper." *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citations omitted). *See also Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005) ("Motions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable." (citations omitted)); *Odom v. Clark*, 192 N.C. App. 190, 195, 668 S.E.2d 33, 36 (2008) ("[B]ecause the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable." (citation omitted)).

This Court has previously held an interlocutory order denying a motion to change venue brought under N.C. Gen. Stat. § 1-77 is immediately appealable. Here, Defendants center their argument on the trial court's denial of their Motions under Section 1-77.[1] To the extent the trial court denied Defendants' Motions under this statute, Defendants have a right to an immediate appeal.[2]

Issues

The issues on appeal are whether the trial court: (I) erred by denying Defendants' Motions to Change Venue based on the record before it; and (II) abused its discretion by denying reconsideration of its decision.

Analysis

I. Change of Venue

N.C. Gen. Stat. § 1-83 governs changes of venue in civil actions. Relevant to Defendants' appeal, it provides:

---

1. Defendants assert they are reserving their right to appeal from the denial of their Motions to Change Venue based on convenience of the witnesses for appeal from a final judgment.

2. Defendants have also filed a Petition for Writ of Certiorari requesting this Court grant review. We dismiss the Petition for Writ of Certiorari as moot. Defendants' Motion for Leave to File a Reply in connection to Plaintiff's Response to their Petition is dismissed.

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83(1) (2023).

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

Defendants contend venue in this case is governed—and mandated—by N.C. Gen. Stat. § 1-77. Under N.C. Gen. Stat. § 1-77, a case "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial" where the action is "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office[.]" N.C. Gen. Stat. § 1-77 (2023). Defendants assert they constitute "public officers" or "persons especially appointed" under the statute because of their alleged employment relationships with UNC Hospitals. As such, Defendants argue venue was improper in Pender County and only proper in Orange County where their alleged negligence took place.

Here, however, the trial court expressly stated in its Order Denying Defendants' Motions to Change Venue: "The Court makes no finding that Dr. Burks or Dr. Ghosh are not covered under N.C. Gen. Stat. [§] 1-77[.]" Instead, the trial court ruled "based upon what was presented to the

Court, the motions to change venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 are both denied."

Indeed, Defendants presented nothing to the trial court that established they were either "public officials" or "persons especially appointed." Defendants point to the allegations in Plaintiff's Complaint alleging an employment or agency relationship between Defendants and UNC Hospitals and School of Medicine. However, their argument completely ignores the fact they either denied or objected to and moved to strike each of those material allegations. *See Jackson v. Love*, 82 N.C. 405, 408 (1880) ("The denial [of an allegation in a pleading] destroys the force of an allegation and puts the controverted fact in issue."). Further, there is no indication Defendants obtained any ruling on their objections or motions to strike. Moreover, in the alternative, Defendants claimed they lacked knowledge or information sufficient to form a belief as to the truth of the pertinent allegations in Plaintiff's Complaint. Thus, the pleadings do not conclusively establish Defendants' relationship with UNC Hospitals or the School of Medicine.

Not only do the pleadings not resolve the issue, but Defendants also presented no evidence to support a determination they constituted public officials or persons especially appointed. Defendants presented no affidavits, sworn testimony, or other exhibits, which might support findings establishing the nature of their relationship with UNC Hospitals or the School of Medicine. Rather, Defendants rely solely on the arguments of counsel. However, "[i]t is axiomatic that the arguments of counsel are not evidence." *State v. Bare*, 197 N.C. App. 461, 476, 677 S.E.2d 518, 529 (2009) (citation and quotation marks omitted); *see also Harter v. Eggleston*, 272 N.C. App. 579, 584, 847 S.E.2d 444, 448 (2020) ("It is long established that the arguments of counsel are not evidence." (citation and quotation marks omitted)). In turn, arguments of counsel do not support findings of fact. *See Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018) (discussions between counsel and trial court did not constitute evidence and did not support findings of fact in the absence of an evidentiary hearing or stipulations by the parties).

As such, there was nothing on the record before the trial court that would have permitted the trial court to make findings regarding the relationship of Defendants to UNC Hospitals or the School of Medicine—let alone determine whether Defendants constituted public officials or persons especially appointed as contemplated under N.C. Gen. Stat. § 1-77. Thus, on this Record, there is no basis to determine venue is mandated by application of N.C. Gen. Stat. § 1-77. Therefore, venue was not improper in Pender County where Plaintiff resides. *See* N.C. Gen. Stat.

§ 1-82 (2023) ("In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement"). Consequently, the trial court did not err in denying Defendants' Motions to Change Venue based on the materials presented to the trial court.

II. Reconsideration

Ancillary to Defendants' argument regarding the trial court's denial of their Motions to Change Venue, Defendants further argue the trial court erred by failing to allow them to be heard further on the Motion or to reconsider and revisit its Order. Defendants' arguments are without merit.

Defendants' Motion asked the trial court to reconsider its ruling and to allow Defendants to be heard further and reconsider the text of its Order Denying Defendants' Motions to Change Venue. We review a denial of a motion to reconsider only for an abuse of discretion. *See Jackson v. Culbreth*, 199 N.C. App. 531, 538, 681 S.E.2d 813, 818 (2009) (noting that this Court reviews a denial of a motion for reconsideration for abuse of discretion).

"A motion for reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923 (8th Cir. 2015). "The limited use of a motion to reconsider serves to ensure that parties are thorough and accurate in their original pleadings and arguments presented to the Court. To allow motions to reconsider offhandedly or routinely would result in an unending motions practice." *Wiseman v. First Citizens Bank & Tr. Co.*, 215 F.R.D. 507, 509 (W.D.N.C. 2003) (citation omitted).

Here, Defendants' Motion was an attempt to identify facts or further arguments that could have been made to the trial court while their Motions to Change Venue were pending. Moreover, to the extent Defendants now couch this as a request for the trial court to make findings of fact, Defendants' Motion was untimely because it was filed after entry of the trial court's underlying Order. *J.M. Dev. Grp. v. Glover*, 151 N.C. App. 584, 586, 566 S.E.2d 128, 130 (2002) ("A request [for findings] is untimely if made after the entry of a trial court's order."). In any event, as noted above, there was no evidence on which the trial court could make findings of fact.

Thus, the trial court was not required to revisit or reconsider its ruling on Defendants' Motions to Change Venue. Therefore, the trial

court did not abuse its discretion in denying Defendants' Motion to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue and Alternative Motion for Reconsideration of the Court's Denial of Defendants' Request to be Heard on Findings Made by the Court Following Defendants' Motion to Transfer Venue. Consequently, Defendants' arguments are meritless.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Orders are properly affirmed.

AFFIRMED.

Chief Judge DILLON and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER GALBREATH, DEFENDANT

No. COA24-48

Filed 3 September 2024

Jury—juror misconduct—sharing outside research with other jurors—statutory rape trial—trial court's investigation—no prejudice

In a prosecution for statutory rape and other sexual offenses involving defendant's minor daughter, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on juror misconduct, where the court was informed that one of the jurors ("Juror Four") may have conducted outside research on child development and shared her findings with other jurors. After removing Juror Four for cause and examining each juror individually, the court found that nobody had heard Juror Four mention outside research, although some jurors did hear her express sympathy for the victim before another juror quickly cut her off. After replacing Juror Four with an alternate, the court instructed the jury not to discuss the case until deliberations began and not to conduct outside research. Finally, the court properly found that defendant suffered no prejudice, since each juror testified that they could remain impartial despite hearing Juror Four's sympathetic comments about

the victim, and because the jurors' exposure (if any) to outside information during their interactions with Juror Four was minimal.

Appeal by Defendant from Judgments entered 1 September 2022 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ellen Newby, for the State.

Christopher J. Heaney for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Defendant appeals from his convictions for two counts of Statutory Rape of a Child by an Adult, three counts of Statutory Sex Offense with a Child by an Adult, and two counts of Indecent Liberties with a Child. The record reflects the following:

In 2007 G.M. was born to her mother and Defendant, who were not in a relationship but worked together and were friends. Until she was in the sixth grade, G.M. and Defendant primarily interacted on birthdays and holidays.

In November 2018, G.M. began living with Defendant. She slept on a pad on a bedroom floor with him. One night, G.M. woke up with her hand on Defendant's penis. She reported this to her grandmother, who lived in the home with Defendant and G.M., but was told to go back to sleep. After this, Defendant began regularly forcing G.M. to perform oral sex on him at night. He would also drive her to a location in the woods where he forced her to perform oral and vaginal sex. He continued raping her orally, vaginally, and anally in the home, on at least one occasion to the point of injury, and did not stop after G.M. told him she was hurt. Defendant gave G.M. alcohol and forced her to take emergency contraception when her menstruation was late, telling her that if she got pregnant he would go to prison for a long time. He would also get drunk and tell G.M. that she "deserved to be raped."

In August 2019, G.M. called the police after Defendant struck her. She was taken to a hospital and reported the sexual abuse. Defendant was indicted for two counts of Statutory Rape of a Child by an Adult, three counts of Statutory Sex Offense with a Child by an Adult, and two

counts of Indecent Liberties with a Child. The case came on for jury trial in August 2022.

At trial, G.M. testified to the above. During the State's case, one of the bailiffs reported to the trial court that one of the jurors, Juror Number Four, appeared to have torn pages out of her notepad and taken them with her when the court recessed for the day. The district attorney's legal assistant also reported that one of the State's witnesses had overheard Juror Four talking with other jurors about research she had done. That witness testified:

> I heard someone who had a red jury tag on saying something about development. I thought she said maybe child or psychological development, but I heard the word "development" very clearly. And so I told Ms. Byrum that. And I said it a little more decidedly when I told Ms. Byrum about it, but I know I heard the word "development," and I thought I heard the word "psychological child development" when I heard it, so I mentioned it to Ms. Shekita's assistant.

She identified Juror Four as having made the comments and did not hear any additional conversation.

The trial court questioned Juror Four, who denied having any conversation as described by the witness and claimed that she only tore blank pages out of her notepad. She testified that she was struggling to keep up with testimony and had taken the pages to write down notes in the jury room. The trial court reopened voir dire, and both the State and counsel for the defense challenged Juror Four for cause. The trial court sustained the challenge and removed Juror Four.

The defense moved for a mistrial based on Juror Number Four's conduct. The trial court examined each juror individually.

Jurors One, Three, Six, Seven, and Nine and Alternate Juror Two did not hear any statements by other jurors about the evidence in the case or issues involved.

Several of the other jurors testified that Juror Four had spoken to them or they had overheard her speaking. Juror Two heard Juror Four make some statements the previous day, but did not know what she had said, and said that another juror stopped Juror Four from continuing to speak. Juror Five testified that Juror Four attempted to talk to him, but he couldn't recall what she had started to say and he stopped her from finishing. Juror Eight testified that Juror Four attempted to make a statement on the first day of the trial but that another juror told her to

stop talking: "She started to say something about little girl, and the other girl told her to stop talking, and that was -- that was it." Juror Ten testified that Juror Four had "said something to the effect of I feel very bad for that girl," and Juror Ten told her they were not allowed to talk about the case. Juror Eleven also heard Juror Four speak about G.M.'s testimony and how she felt after hearing it. Juror Twelve also heard Juror Four "remarking about her personal feelings about the information she had heard in the courtroom," describing G.M.'s testimony as "awful." Alternate Juror One testified that he only heard one other juror say that it was difficult to hear the evidence and testimony presented.

No juror stated that Juror Four had spoken about child development or conducting outside research. Each juror, when asked, responded that they could continue to serve as a fair and impartial juror.

After the trial court had examined the jurors, Defendant renewed his motion for a mistrial. The trial court found that no juror had heard any comments from Juror Four regarding child development or outside research she had conducted. It found that some had heard her comment on the difficult nature of G.M.'s testimony, but that each juror who had heard her remarks reported that she was quickly cut off. It also found that the jurors were not impacted by Juror Four's conduct and could serve as fair and impartial jurors and denied the motion for a mistrial.

The trial court seated the first alternate in place of Juror Number Four, and instructed the jury not to have any conversations about the case until deliberations began and not to consider outside resources or conduct outside research.

The trial continued and the jury found Defendant guilty of all charges. The trial court sentenced Defendant to three consecutive sentences of 300 to 420 months' imprisonment, and a concurrent sentence of 21 to 35 months. Defendant gave oral notice of appeal.

Issue

The sole issue on appeal is whether the trial court erred in denying Defendant's motion for a mistrial based on juror misconduct.

Analysis

We review the trial court's denial of a motion for mistrial for abuse of discretion. *State v. Burgess*, 271 N.C. App. 302, 305, 843 S.E.2d 706, 710 (2020). A trial court abuses its discretion when its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Due process guarantees defendants a panel of impartial jurors, and the trial court has a duty to ensure the jurors "remain impartial and uninfluenced by outside persons." *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1985). When allegations of juror misconduct are made, the trial court must make "such investigations as may be appropriate" to determine if misconduct has occurred and if the defendant has been prejudiced. *State v. Drake*, 31 N.C. App. 187, 191, 229 S.E.2d 51, 54 (1976). "The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). The trial court's ruling is given deference because questions of juror misconduct and its effect depend on facts and circumstances specific to the case. *Drake*, 31 N.C. App. at 190, 229 S.E.2d at 54.

When investigating possible juror misconduct, the trial court is vested with the "discretion to determine the procedure and scope of the inquiry." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996). Because the trial court is in the best position to examine the facts and circumstances, we give great weight to its determination of whether juror misconduct occurred and whether to declare a mistrial. *State v. Boyd*, 207 N.C. App. 632, 640, 701 S.E.2d 255, 260 (2010). "[A] mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Jones*, 241 N.C. App. 132, 138, 772 S.E.2d 470, 475 (2015).

In sum, where the trial court has made a "careful, thorough" investigation and concluded the conduct has not prejudiced the jury on any key issue, we have generally declined to find it abused its discretion. *Drake*, 31 N.C. App. at 191, 229 S.E. 2d at 53.

In this case, the trial court was informed Juror Four may have conducted outside research and shared that information with other jurors, based on the prosecutor's legal assistant's testimony that she overheard Juror Four say the word "development" and possibly "psychological child development." The trial court examined Juror Four and excused her. It then questioned each remaining juror and alternate individually. None of the jurors testified that they had heard Juror Four speak about outside research she had done or child development. Of the jurors who heard Juror Four speak, several could not specify what she had said, or testified that she was stopped from speaking before communicating any information. Three jurors heard her remark on her sympathy for G.M., and one heard her say the testimony was "hard to hear." During the examinations, the trial court allowed counsel for the State and Defendant to ask the jurors additional questions. Each juror stated they

could remain fair and impartial. The trial court allowed the trial to continue, instructing the jurors not to have any conversation about the case until deliberations began and not to consider outside information or do their own research.

The trial court's investigation was appropriate and sufficient. In *State v. Taylor*, for example, the trial court investigated a report by a juror that their vehicle was followed by a person from the gallery when court recessed the previous day. 362 N.C. 514, 537, 669 S.E.2d 239, 260 (2008). Our Supreme Court held that the trial court's investigation, consisting of examining the affected juror, examining another juror who had witnessed the alleged incident, and rebuking the audience member, was sufficient. As in *Taylor*, the trial court here "thoroughly question[ed] all parties involved in or affected by the incident," it "received assurances . . . of impartiality" from each juror, and it concluded that Defendant had not been prejudiced. *Id.* at 538, 669 S.E.2d at 260. We cannot identify, nor does Defendant propose, any way in which the trial court's investigation was deficient.

Instead, Defendant argues that the trial court's ruling was an abuse of discretion: (1) because its findings of fact were unsupported by the jurors' testimony; and (2) because it erred in concluding that Defendant did not suffer prejudice. We disagree. A trial court does not abuse its discretion when its decision on a motion for mistrial is based on its findings of fact and those findings are supported by evidence. *State v. Smith*, 320 N.C. 404, 418-19, 358 S.E.2d 329, 337 (1987).

Defendant argues the trial court found that "only two or three of the jurors heard [Juror Four's] comments," but that finding was unsupported because five of the jurors testified to hearing Juror Four comment on the case. He also takes issue with the finding that the comments were made only "yesterday" (Tuesday), arguing there was testimony Juror Four had also made comments on Monday, the first day of trial. However, the trial court actually found:

> that two or three of the jurors reported to the Court, upon questioning, that [Juror Four] yesterday in the jury room did made some statement concerning the testimony of the alleged victim in this case and in particular commenting on the – how difficult it may have been for this young lady to testify.

Of the jurors who testified that Juror Four spoke, most did not recall the substance of her comments. Only Jurors Ten, Eleven, and Twelve testified they had heard Juror Four talk about G.M.'s testimony, and

each stated the comments had been made on Tuesday. Alternate Juror One additionally testified to hearing another juror, possibly Juror Four, state that the testimony was "hard to hear." To the extent the trial court's finding as to the exact number of jurors who overheard Juror Four or the days on which this occurred were unsupported, these facts do not undermine its conclusions: that (1) no outside research into child development had been communicated to the other jurors and (2) each juror could remain impartial after Juror Four had expressed sympathy for G.M. following her testimony.

Defendant also argues the trial court abused its discretion in concluding that Defendant was not prejudiced. Defendant contends that, because G.M.'s testimony was crucial to the case, Juror Four's expression of sympathy after hearing the testimony irreparably tainted the jury.

"The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *Drake*, 31 N.C. App. at 191, 229 S.E.2d at 54. Where the trial court's investigation was sufficient, we rarely disturb trial court rulings on juror misconduct.

The testimony of the jurors showed that their exposure to outside information was minimal, if any, and each testified that they could remain impartial. The extent of the jury's exposure to outside information was Juror Four's expression of sympathy for G.M. after hearing her testimony. There is "no evidence tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict." *Taylor*, 362 N.C. at 538, 669 S.E.2d at 260. The trial court did not abuse its discretion in ruling Defendant had not been prejudiced.

Thus, the trial court properly discharged its duty to investigate possible juror misconduct. Therefore, the trial court did not abuse its discretion in ruling that Defendant had not been prejudiced by any alleged juror misconduct. Consequently, the trial court did not err in denying Defendant's motion for mistrial

Conclusion

Accordingly, for the foregoing reasons, there was no error at trial and the Judgments are affirmed.

NO ERROR.

Judges MURPHY and WOOD concur.

STATE OF NORTH CAROLINA
v.
GREGORY HAHN, DEFENDANT

No. COA23-238

Filed 3 September 2024

Contempt—criminal—refusal to wear a mask—no contemptuous act—invalid local emergency order—no showing of willfulness

A trial court's judgment and order finding defendant—who, upon being called for jury service in Harnett County during the COVID-19 pandemic, refused to wear a face mask in the jury assembly room—in direct criminal contempt was reversed where: (1) defendant's refusal was not a contemptuous act because it neither interrupted court proceedings nor impaired the respect due the court's authority; (2) the emergency directives from the Chief Justice underlying the local emergency order had been revoked some four months previously, rendering the local order invalid; and (3) in any event, no findings or evidence indicated that defendant had willfully failed to comply with the local emergency order (which made mask wearing optional in "meeting rooms and similar areas" but permitted judges to require masks in their courtrooms) at the time he was found in contempt.

Judge GRIFFIN concurring in the result by separate opinion.

Appeal by Defendant from order entered 10 October 2022 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 29 August 2023.

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

Dobson Law Firm, PLLC, by Miranda Dues, for the defendant-appellant.

STADING, Judge.

Defendant Gregory Hahn appeals from the trial court's order finding him in criminal contempt. For the reasons set forth below, we reverse the trial court's order.

I. Background

In March 2020, the Chief Justice of the North Carolina Supreme Court entered an emergency order to address public health concerns over COVID-19. *See* Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020). Thereafter, additional emergency directives ("the emergency directives") were ordered by the Chief Justice for county courthouses, among them Emergency Directive 21, addressing the use of face coverings, and Emergency Directive 22, requiring a plan for the resumption of jury trials. *See* Order of the Chief Justice Issuing Emergency Directives 21 to 22 (16 July 2020). On 14 May 2021, the emergency directive "that pertains to face coverings in court facilities" was modified, and "that decision [was left] to the informed discretion of local court officials." Order of the Chief Justice Modifying Emergency Directive 21 (14 May 2021). The next month, the Chief Justice revoked all outstanding emergency directives. *See* Order of the Chief Justice Revocation of Emergency Directives (21 June 2021).

Citing the authority provided by the emergency directives, the Senior Resident Superior Court Judge of Superior Court District 11A (the "Senior Resident Superior Court Judge, trial court, or judge") entered an order mandating the use of face masks on 25 June 2020. Additionally, the Senior Resident Superior Court Judge approved a plan to resume jury trials stating that "[p]otential jurors will be notified before reaching the courthouse of the rules regarding social distancing and of other requirements and steps being taken for the protection of their health and that of courthouse personnel and trial participants." Claiming consistency with "the most recent recommendations of the Chief Justice," on 10 March 2022, the Senior Resident Superior Court Judge, entered a "Joint Order on Masks" ("the local emergency order") without an expiration date, that decreed:

> 1. Masks are optional in hallways, foyers, restrooms, meeting rooms and similar areas. Masks are encouraged for unvaccinated persons.
> 2. The presiding judge in each courtroom may decide, in their discretion, whether masks are required in their courtroom.
> 3. The ranking official is [sic] each courthouse agency (e.g., Clerk of Court, District Attorney, Guardian Ad Litem) shall determine, in their discretion, whether masks are required in their respective offices.
> 4. Any person who so chooses shall be permitted to wear a mask.

5. This order is subject to revision based on changing public health conditions and CDC guidance.

On 10 October 2022, as required by summons, Defendant reported for jury duty at the Harnett County Courthouse. He was directed to the jury assembly room along with other potential jurors to await orientation. While in this room, a courthouse employee asked Defendant to wear a mask, which he declined. The trial court was informed that Defendant would not wear a mask in the jury assembly room. After that, Defendant was removed from the jury assembly room during juror orientation and taken upstairs to a courtroom.

Once in the courtroom, the judge told Defendant that "it's a requirement [to wear a mask] in this courtroom where you're going to be a potential juror, and it's a requirement while you're seated with the other potential jurors downstairs in the jury assembly room." Defendant responded, "with all due respect, I will not be wearing a mask, sir." The judge informed Defendant, "if you decline to wear a mask, it's contempt of court, which is punishable by up to thirty days in the Harnett County jail or a 500 dollar fine." To which, Defendant replied, "yes sir." Then, the judge charged Defendant with direct criminal contempt of court and asked if he had anything to say. Defendant responded, "no, sir." The judge found Defendant in direct criminal contempt of court and summarily punished him by imposing a twenty-four-hour jail sentence.

On a standardized form provided by the Administrative Office of the Courts ("the contempt order"), the judge entered a finding of fact that Defendant "REFUSED TO WEAR A MASK AFTER BEING ORDERED TO DO SO [THREE] TIMES." The form's prepopulated text listed as additional findings that "during the proceeding [Defendant] willfully behaved in a contemptuous manner" and his "conduct interrupted the proceedings of the court and impaired the respect due its authority." Based on the findings in the contempt order, the judge concluded that Defendant was "in contempt of court." Subsequently, Defendant petitioned this Court for a writ of *certiorari*, which was granted on 23 January 2023.

II. Jurisdiction

Under N.C. Gen. Stat. §§ 5A-17 and 7A-27(b)(1), this Court has jurisdiction to hear Defendant's appeal of his contempt conviction. N.C. Gen. Stat. § 5A-17(a) (2023) ("A person found in criminal contempt may appeal . . . ."); *id.* § 7A-27(b)(1) ("[A]ppeal lies of right . . . [f]rom any final judgment of a superior court . . . .").

III. Analysis

The ability of a judge to maintain order is a necessary function underlying the administration of justice. And when appropriate, direct criminal contempt is a proper mechanism to facilitate order. Contempt of court is a well-established principle of our jurisprudence:

> [I]t is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court . . . the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions.

Ex parte Terry, 128 U.S. 289, 313, 9 S. Ct. 77, 83 (1888).

Inherent in this power is the ability of an entrusted public servant—the judge—to assess a criminal conviction to a citizen's record without the full gambit of protections provided by due process. The United States Supreme Court has explained this narrowly limited exception to due process requirements includes only:

> [C]harges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

In re Oliver, 333 U.S. 257, 275, 68 S. Ct. 499, 509 (1948). As such, it is incumbent upon judicial authorities exercising this power to use judicial restraint and act with well-reasoned discernment. *See In re Little*, 404 U.S. 553, 555, 92 S. Ct. 659, 660 (1972) ("Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.") (alteration in original). Safeguards are apparent in our criminal contempt statutes. *See In re Oldham*, 89 N.C. 23, 25 (1883) ("While the essential judicial functions are . . . protected . . . from legislative encroachment, it is equally manifest that subordinate thereto, the law-making power may designate the cases in which

the power to summarily punish for a contempt shall be exercised; may prescribe its nature and extent, and prohibit in others."). In conducting our review, we remain mindful of the competing interests vital to our system of justice and are guided by the relevant statutory and precedential authority.

Criminal contempt can be imposed for those grounds enumerated in N.C. Gen. Stat. § 5A-11 (2023). *See In re Odum*, 133 N.C. 250, 252, 45 S.E. 569, 570 (1903). For a judicial official to find direct criminal contempt, the contemptuous act must be committed within their sight or hearing or in immediate proximity to the room where proceedings are being held that is likely to interrupt or interfere with matters then before the court. N.C. Gen. Stat. § 5A-13(a) (2023); *see Nakell v. Att'y Gen.*, 15 F.3d 319, 323 (4th Cir. 1994). In response to direct criminal contempt, the presiding judicial official may summarily impose punishment "when necessary to restore order or maintain dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a) (2023).

"[O]ur standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020). "The trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *Id.* Furthermore, "[a]s a contemnor is liable to be imprisoned the rule that a criminal statute should be strictly construed is applicable." *West v. West*, 199 N.C. 12, 15, 153 S.E. 600, 602 (1930).

A. Contemptuous Act

Defendant asserts that the trial court's findings of fact do not support its conclusion of law that his actions amounted to a contemptuous act. The trial court based its order on two sections of the criminal contempt statute: "(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings" and "(2) [w]illful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority." N.C. Gen. Stat. §§ 5A-11(a)(1), (2).

The North Carolina Supreme Court has long recognized that interruptions of court proceedings include "all cases of disorderly conduct, breaches of the peace, noise, or other disturbance near enough and designed and reasonably calculated to interrupt the proceedings of a court then engaged in the administration of the State's justice and the dispatch of business presently before it." *State v. Little*, 175 N.C. 743, 745,

94 S.E. 680, 680 (1917). More recently, this Court affirmed a finding of contempt when a "[d]efendant was inaudibly speaking throughout the trial, facing the witness stand, and made a hand gesture in the form of a gun while the witness was testifying, causing the interruption." *State v. Baker*, 260 N.C. App. 237, 242, 817 S.E.2d 907, 910 (2018). The United States Court of Appeals for the Fourth Circuit similarly upheld a contempt conviction when the contemnor interrupted ongoing proceedings by "refusing to sit down when ordered to do so, refusing to be quiet, being disruptive of the proceedings, unduly prolonging the proceedings, pandering to the audience and encouraging [the] defendant [in the underlying case] to be disruptive." *Nakell*, 15 F.3d at 321-22. This Court's precedents also recognize that "[o]ur trial court judges must be allowed to maintain order, respect and proper function in their courtrooms" because "[c]ourtroom decorum and function depends upon the respect shown by its officers and those in attendance." *State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002) (holding refusal to stand for adjournment of court or answer the judge's questions are contemptuous actions).

The present matter vastly differs from the cases cited by the State or referenced above. The record shows that the actions of Defendant—who was reporting for jury service—neither interrupted the trial court's proceedings nor impaired the respect due its authority. Defendant was not a participant in ongoing proceedings in a courtroom. Rather, he reported to the courthouse to perform his civic duty as a potential juror. Before Defendant's presence was required in the courtroom for jury service, the judge summoned Defendant from the jury assembly room to his courtroom. Defendant complied with this direction. Upon entering the courtroom, Defendant's act of not wearing a mask did not disrupt the trial court's proceedings. Even so, the judge ceased ongoing business in the courtroom upon learning that Defendant "declined to wear a mask" in another room on a separate floor of the courthouse. In response to the inquiries posed by the judge to Defendant, he replied "yes, sir" or "no sir." Throughout their exchange, Defendant was respectful to the trial court. After the judge's admonishment to Defendant that "I've ordered you to do something" and "it appears that you have refused to do it," he was found in criminal contempt. Contrary to the State's argument, we see no parallel between Defendant's actions in this matter and the actions of the contemnors in their referenced cases. We hold that Defendant's refusal to wear a face mask was not a contemptuous act. Thus, the trial court's finding that Defendant "behaved in a contemptuous manner" is not supported by competent evidence, and, in turn, does not support its conclusion of law. *See Wendorf*, 274 N.C. App. at 483, 852 S.E.2d at 902.

B. Lawful Order

The text of the trial court's order reflects that its ruling is based on N.C. Gen. Stat. § 5A-11(a)(1) and (2). Even so, the State argues for the applicability of N.C. Gen. Stat. § 5A-11(a)(3) or (7), reasoning that Defendant was in contempt for "[w]illful disobedience of . . . a court's lawful process, order, directive, or instruction" or "[w]illful . . . failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court." To resolve any doubt as to which subsection of the statute applies, we next consider whether Defendant was in contempt for willful disobedience of the trial court's lawful process, order, directive, or instruction pursuant to a valid local emergency order. Citing the rescinded 14 May 2021 emergency directive that deferred to the "discretion of local court officials," as well as the 10 March 2022 local emergency order mandating the use of face masks, the State maintains that "aside from . . . inherent authority to govern courtroom decorum," the trial court "possessed express discretionary authority to require masks." Order of the Chief Justice Modifying Emergency Directive 21 (14 May 2021).

The local emergency order was created under the authority provided by the emergency directives and purported to be "consistent with . . . the most recent recommendations of the Chief Justice." By statute, the Chief Justice of the North Carolina Supreme Court is explicitly permitted to:

> Issue any emergency directives that, notwithstanding any other provision of law, are necessary to ensure the continuing operation of essential trial or appellate court functions, including the designation or assignment of judicial officials who may be authorized to act in the general or specific matters stated in the emergency order, and the designation of the county or counties and specific locations within the State where such matters may be heard, conducted, or otherwise transacted.

N.C. Gen. Stat. § 7A-39(b)(2) (2023). Beginning on 13 March 2020, citing this statute, emergency directives were issued by the Chief Justice. Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020). However, even emergency directives issued under this statutory authority "shall expire the sooner of the date stated in the order, or 30 days from issuance of the order, but [ ] may be extended in whole or in part by the Chief Justice for additional 30-day periods if the Chief Justice determines that the directives remain necessary." N.C. Gen. Stat.

§ 7A-39(b)(2). In any event, on 21 June 2021, the Chief Justice revoked all previously issued emergency directives. Order of the Chief Justice Revocation of Emergency Directives (21 June 2021). This included the emergency directive deferring to the discretion of local court officials to address face coverings in court facilities. Order of the Chief Justice Modifying Emergency Directive 21 (14 May 2021).

The authority underlying the local emergency order at issue was revoked. Particularly troubling, unlike the emergency directives issued by the Chief Justice under N.C. Gen. Stat. § 7A-39(b)(2), the local emergency order contained no corresponding expiration date. If orders issued by the Chief Justice, necessitated by emergency, expire on the earlier event of a stated expiration date or thirty-day time limitation, then any such orders derived from this authority cannot exceed the same temporal restrictions provided by the General Assembly. Our review of the State's argument on these statutory grounds leads us to conclude that this particular administrative order was invalid. Citing *Walker v. Birmingham*, which affirmed a lower court's holding protestors in contempt for violating an injunction subsequently declared invalid, the State maintains that Defendant's actions were unlawful regardless of the local emergency order's validity. 388 U.S. 307, 320-21, 87 S. Ct. 1824, 1832 (1967). While this argument ignores the United States Supreme Court's clarification that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity," we nevertheless proceed to evaluate the willfulness of Defendant's actions. *Id.* at 315, 87 S. Ct. at 1829.

C. Willfulness

No matter the basis, to be found guilty of criminal contempt, "an individual must act willfully or with gross negligence." *State v. Okwara*, 223 N.C. App. 166, 170, 733 S.E.2d 576, 580 (2012). With contempt proceedings, for an act to be willful, "it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse." *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987). Willfulness "has also been defined as more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (internal quotation marks and citations omitted). Gross negligence "implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." *Chriscoe*, 85 N.C. App. at 158, 354 S.E.2d at 291 (citation omitted). Without findings "that [the defendant] had knowledge that court was in session or that he had knowledge his conduct was interfering

with the regular conduct of business at a court session," there is not support for the conclusion that such conduct constitutes a willful interference with the orderly functioning of a session of court. *In re Hennis*, 276 N.C. 571, 573, 173 S.E.2d 785, 787 (1970).

Here, a misapplication of the local emergency order served as the impetus of the conflict. The text of the local emergency order plainly states that "[m]asks are optional in hallways, foyers, restrooms, meeting rooms and similar areas." Defendant had not violated the text of the local emergency order when confronted by an employee of the courthouse—not the judge, and he was in the jury assembly room—not the judge's courtroom. Even so, the judge compelled Defendant to enter the courtroom on another floor of the courthouse because the judge believed "it's a requirement [to wear a mask] while . . . in the jury assembly room." The judge also informed Defendant of the same requirement in his courtroom where Defendant was "going to be a potential juror." But the record is clear that Defendant had not yet been called to the courtroom for this reason. Instead, he was preemptively summoned before the judge to address the incorrect belief that mask-wearing was required in the jury assembly room as well as perceived future noncompliance in his courtroom. There are no findings, nor evidence in the record sufficient to support findings, that Defendant could have known his discussion with the courthouse employee in the jury assembly room might directly interrupt proceedings or interfere with the court's order or business. *See id.* In the absence of these findings, there is no support for the conclusion that Defendant's conduct amounted to willful interference with the orderly functioning of a court session. *See id.* Accordingly, our review of the State's argument shows that Defendant did not willfully fail to comply with any of the asserted statutory grounds for criminal contempt.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's judgment and order finding Defendant in direct criminal contempt of court.

REVERSED.

Judge WOOD concurs.

Judge GRIFFIN concurs in the result by separate opinion.

GRIFFIN, Judge, concurring in result.

Mr. Hahn appeals from a trial court order finding him in contempt of court. The majority holds the State failed to show that Mr. Hahn willfully failed to comply with any of the asserted statutory grounds for criminal contempt. I agree with the result. However, I would hold the trial court's findings fail to support the conclusion that Mr. Hahn's act was "likely to interrupt or interfere with matters then before the court[,]" as necessary to support a direct criminal contempt action. *See* N.C. Gen. Stat. § 5A-13 (2021).

On 10 October 2022, Mr. Hahn appeared at the Harnett County Courthouse in response to a summons for jury duty. He was not provided prior notice of the court's COVID-19 guidelines. There were no signs or publications posted directing him to wear a mask upon arrival at the courthouse. Mr. Hahn assembled with other potential jurors, both masked and unmasked, before being singled out by a clerk for not wearing a mask. Mr. Hahn declined to wear one when asked by a clerk. Judge Gilchrist summoned Mr. Hahn into his courtroom, interrupting an on-going proceeding, to examine him about wearing a mask. Mr. Hahn respectfully answered every question Judge Gilchrist presented to him. In fact, Mr. Hahn bookended his answers with "Sir." However, Mr. Hahn would not put on a mask as requested. Judge Gilchrist held him in direct criminal contempt and sentenced Mr. Hahn to twenty-four hours in jail. After sentencing but prior to being taken into custody, Mr. Hahn asked whether he would have the ability to contact his minor children. The trial judge stated he did not know about that. Notably, Mr. Hahn alleges Judge Gilchrist was not wearing a mask during the proceedings.

We review a criminal contempt order to determine ' "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020) (quoting *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008)). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *State v. Robinson*, 281 N.C. App. 614, 619, 868 S.E.2d 703, 708 (2022) (citation and internal marks omitted).

Section 5A-11 of the North Carolina General Statutes provides an exhaustive list of acts constituting criminal contempt. N.C. Gen. Stat. § 5A-11 (2023). Direct criminal contempt occurs when an "act [enumerated in section 5A-11]: (1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate

proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13 (2023). "Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice." *State v. Simon*, 185 N.C. App. 247, 251, 648 S.E.2d 853, 855 (2007) (citation and internal marks omitted). While mindful that a trial court judge's ability to maintain order in their court room is paramount to the efficient administration of justice, *see State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002) ("Our trial court judges must be allowed to maintain order, respect and proper function in their courtrooms."), their discretion is not unfettered. Rather, "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion . . . [t]rial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *In re Little*, 404 U.S. 553, 555 (1972) (citations and internal marks omitted).

Here, the facts do not support a finding that Mr. Hahn's act was "likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13 (2023). For one, Mr. Hahn was not involved in any proceeding before the court when first admonished for failing to wear a mask. Rather, Mr. Hahn was present in an "assembly room" for potential jurors which could reasonably be construed to be a meeting room where masks were optional per the 10 March 2022 order. Moreover, Mr. Hahn's failure to wear a mask was unlikely to interrupt or interfere with any court business. The record fails to show evidence that Mr. Hahn took any affirmative action to impede a court proceeding. Instead, the record reflects that Judge Gilchrist stopped the proceedings in his courtroom to address Mr. Hahn. Simply put, the facts presented here reflect an offense to sensibilities, not an "obstruction to the administration of justice." *In re Little*, 404 U.S. at 555 (citation and internal marks omitted).

I would hold these facts alone do not support the conclusion that Mr. Hahn interfered with the administration of justice.

STATE v. LITTLE

[295 N.C. App. 541 (2024)]

STATE OF NORTH CAROLINA
v.
BRYANT R. LITTLE

No. COA23-410

Filed 3 September 2024

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

The trial court did not err by denying defendant's motion to suppress evidence of a firearm, bullets, alleged marijuana, and sandwich bags found during a warrantless search of defendant's vehicle after a lawful traffic stop. Officers had probable cause to search defendant's vehicle after detecting a strong odor of marijuana, viewing a significant amount of marijuana residue on the passenger side floorboard, and, after specifically asking defendant about marijuana, obtaining a response that the residue was from defendant's cousin. Contrary to defendant's argument, the recent liberalization of laws regarding hemp did not substantially alter the plain view doctrine with regard to marijuana, even if industrial hemp and marijuana look and smell the same. Here, based on the trial court's unchallenged findings of fact, the officers had a reasonable belief based on their observations and experience that the substance detected by odor and sight was marijuana.

Appeal by defendant from orders and judgments entered 13 July 2022 and 26 August 2022 by Judge Michael A. Stone in Superior Court, Hoke County. Heard in the Court of Appeals 20 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Martin T. McCracken, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's denial of his motion to suppress evidence of a firearm, bullets, alleged marijuana, and sandwich bags found during a roadside vehicular search. Defendant contends that the law enforcement officer's grounds for probable cause, the odor and appearance of marijuana, was insufficient to conduct a search of his vehicle. Thus, Defendant argues the evidence was obtained through

an unlawful warrantless search and all evidence obtained should have been suppressed. We hold that the trial court did not err when it denied Defendant's motion to suppress, as probable cause existed to search Defendant's vehicle without a warrant.

I. Factual and Procedural Background

On 12 May 2020, Hoke County Sheriff's Deputy Daniel Barron observed a Ford F-150 truck "cross the center line and travel left of center at least on three separate occasions." Deputy Barron executed a traffic stop on the vehicle. The trial court made the following findings of fact as to the traffic stop and search:

> 3. That Barron approached the driver's side of the F-150 and the driver's window was down. That Barron immediately smelled a strong and distinct odor of marijuana. Barron had over ten years of law enforcement experience and was familiar with the properties and odor of marijuana. That Barron requested the license of the driver and registration of the vehicle. The driver and sole occupant of the F-150 was the defendant, Bryant Little. The defendant could not produce registration for the F-150 and indicated to Barron that the vehicle was a rental.
>
> 4. That backup officers, Corporal Kavanaugh ("Kavanaugh") and Deputy Schell ("Schell") arrived to assist Barron. That both Barron and Schell observed in plain sight on the passenger floorboard of the F-150 extensive marijuana residue which almost completed [sic] covered the area. That the passenger side window was not tinted, nor had any obstructions to obstruct the plain view of the officers.
>
> 5. That Kavanaugh specifically asked the defendant about marijuana and defendant responded by accusing the marijuana residue as being from a cousin. Upon further conversation with the defendant, that Kavanaugh learned that the defendant was on federal post release. The federal criminal judgment includes as a condition that the defendant be subject to warrantless searches. While this may not be relevant to these proceedings, this will be noted by the Court.
>
> 6. At no time did the defendant indicate that the substance observed in plain view all over the front floorboard of the F-150 was hemp or any other substance not

> under the subject matter of the North Carolina Controlled Substances Act or Chapter 90 of the North Carolina General Statutes.
>
> 7. Additionally, at no time did the defendant claim the substance was hemp or that he was legally entitled to possess the substance. Furthermore, there was no evidence that the controlled substance was hemp.

The officers conducted a full search of the vehicle while Corporal Kavanaugh observed and stayed with Defendant. Ultimately, the officers recovered a firearm; bullets; an open box of sandwich bags; a flip phone; a touch screen cell phone; and $10,600.00 in cash from Defendant's vehicle.

On or about 16 November 2020, Defendant was indicted for possession of a stolen firearm, carrying a concealed firearm, and possession of a firearm by a felon. On 16 May 2022, Defendant filed a motion to suppress all the evidence seized from the search of his vehicle following the traffic stop. Defendant argued that the officers conducted an unlawful search of his vehicle because the odor or appearance of marijuana, standing alone, after the legalization of hemp was insufficient to establish probable cause.

On 12 July 2022 the trial court conducted a hearing on Defendant's motion to suppress and denied the motion in open court that same day, giving a detailed rendition of its findings of fact and conclusions on the record. On 13 July 2022 and 2 August 2022, the trial court reduced its ruling to written orders.[1]

---

1. We note that the trial court entered two orders denying Defendant's motion to suppress. The hearing was held on 12 July 2022. The trial court rendered a brief ruling denying the motion to suppress on 12 July 2022 and then rendered a detailed ruling on the record on 13 July 2022. The first written order was filed on 13 July 2022; Defendant then filed notice of appeal on 19 July 2022. The second order denying the motion to suppress was filed on 26 August 2022 but states it was "[e]ntered, this the 12th day of July 2022." The second order has more detailed findings of fact than the first order and was based directly upon the oral rendition of the ruling on 12 July 2022 except for the addition of the sentence regarding federal probation. Defendant contends that "[t]he trial court also drafted a second version of its suppression hearing Order, dated August 23, 2022, to which it added the following finding of fact:

> Upon further conversation with defendant, that Kavanaugh learned that the defendant was on federal post release. The federal criminal judgment includes a condition that the defendant be subject to warrantless searches. While this may not be relevant to these proceedings, this will be noted by the Court."

After the trial court's ruling on the motion to suppress, Defendant pled guilty to possession of a stolen firearm, carrying a concealed firearm, possession of a firearm by a felon, possession of marijuana paraphernalia, and driving left of center. Defendant reserved his right to appeal the denial of his suppression motion. On 13 July 2022, the trial court entered judgment on the charges of possession of a firearm by a felon, possession of a stolen firearm, carrying a concealed gun, and possession of marijuana paraphernalia. Defendant gave oral notice of appeal in open court on 13 July 2022 and later filed written notice of appeal from the trial court's order and judgments on 19 July 2022.

II. Standard of Review

Defendant does not challenge any of the trial court's findings of fact but argues only that "the trial court in his case erred when it drew the following conclusion of law from the facts presented at the suppression hearing: Under the totality of circumstances, the officers' smell and opinion regarding the substance being marijuana, law enforcement had probable cause to search defendant's vehicle."

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

III. Motion to Suppress

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to suppress the evidence found in his vehicle. Defendant contends that "[a]s our State Bureau of Investigation concluded in a memorandum addressing the impact of the Industrial

---

The only material difference between the two orders is the sentence regarding federal probation. We agree with Defendant that the federal judgment did not provide part of the legal basis for this search, as it was discovered during the course of the search and thus could not have been part of the basis for probable cause to conduct the search.

Hemp Act, it is simply 'impossible' to distinguish legal hemp from illegal marijuana by sight and smell alone." Thus, Defendant asserts that the trial court in his case erred when it concluded "under the totality of the circumstances, the Hoke County Sheriff's Office deputies had probable cause to search the defendant's vehicle, based on the plain view doctrine and the strong odor of marijuana."

We first note that Defendant did not specifically challenge the trial court's findings of fact as unsupported by competent evidence, so they are binding on appeal.[2] *See id.* Instead, Defendant contends the trial court should have made a finding of fact that hemp and marijuana are indistinguishable by smell or appearance and that this fact requires a conclusion that the officers did not have probable cause to conduct the search. Defendant's "Statement of Facts" section in his brief relies almost entirely upon the transcript and not the trial court's findings of fact. But as Defendant has not challenged the trial court's findings of fact as unsupported by competent evidence, our analysis will rely primarily on those findings. In any event, there is no material difference between the facts as discussed by Defendant and the trial court's findings of fact. Defendant's main argument is that the trial court should have made findings of fact specifically based upon the State Bureau of Investigation ("SBI") memo, particularly as to the inability of officers to distinguish between marijuana and hemp based only upon sight or smell and based upon that finding, the trial court's conclusion of law as to probable cause was error. We review the trial court's conclusion of law *de novo*. *See id.*

A. The Industrial Hemp Act

Defendant's arguments and the trial court's ruling require us to first address the state of the law in May 2020 as to industrial hemp. Under the Industrial Hemp Act adopted in 2015 and amended in part in 2016 and 2018, the General Assembly established "an agricultural pilot program for the cultivation of industrial hemp in the State" and "to provide for reporting on the program by growers and processors for agricultural or other research, and to pursue any federal permits or waivers necessary to allow industrial hemp to be grown in the State." N.C. Gen. Stat. § 106-568.50 (2019). "Industrial hemp" was defined as "[a]ll parts and varieties of the plant Cannabis sativa (L.), *cultivated or possessed by*

2. As noted above, the trial court entered two orders denying Defendant's motion to suppress. The second order has more detailed findings of fact than the first order and appears to be based directly upon the oral rendition of the ruling on 12 July 2022. The orders do not conflict in any material way. Neither party has raised any issue regarding the two orders, and none of the trial court's findings in either order are challenged, so we have relied upon facts from either order as needed.

a grower licensed by the Commission, whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis." N.C. Gen. Stat. § 106-568.51(7) (2019). This legislation created a Commission "[t]o establish an industrial hemp research program to grow or cultivate industrial hemp in the State, to be directly managed and coordinated by State land grant universities." N.C. Gen. Stat. § 106-568.53(1) (2019). One of the duties of the commission was "[*t*]*o issue licenses* allowing a person, firm, or corporation to cultivate industrial hemp for research purposes to the extent allowed by federal law, upon proper application as the Commission may specify, and in accordance with G.S. 106-568.53A." N.C. Gen. Stat. § 106-568.53(2) (2019) (emphasis added). The Commission also was required to "adopt by reference or otherwise the federal regulations in effect regarding industrial hemp and any subsequent amendments to those regulations. No North Carolina rule, regulation, or statute shall be construed to authorize any person to violate any federal law or regulation." N.C. Gen. Stat. § 106-568.53 (2019). The Industrial Hemp Act also established civil penalties and criminal offenses for certain violations of the Act. *See* N.C. Gen. Stat. § 106-568.56 (2019) ("Civil penalty"); *see also* N.C. Gen. Stat. § 106-568.57 (2019) ("Criminal penalties").

In short, under North Carolina law in May 2020, the possession, cultivation, or transportation of industrial hemp was legal under some circumstances, but it was not entirely "legalized"; industrial hemp was still heavily regulated and required a license. *See generally* N.C. Gen. Stat. Ch. 106, art. 50e (2015). To be legal, in addition to having a "delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis," the industrial hemp was required to be grown or possessed by a person licensed by the Commission to grow industrial hemp. N.C. Gen. Stat. § 106-568.51(7); *see* N.C. Gen. Stat. § 106-568.53(2) (discussing licensing requirements). Therefore, possession of industrial hemp was possibly legal in May 2020, but it was also possibly illegal, depending upon the circumstances. *See id.*

B. The SBI Memo

Defendant's main argument relies heavily upon an SBI memo ("Memo") issued in 2019. The Memo has been noted in prior cases of this Court and has been the source of much argument in this case and others. Defendant here even asked the trial court to take judicial notice of this Memo, which the trial court correctly refused to do and Defendant has not challenged that ruling on appeal. Ultimately, the trial court did allow Defendant to introduce the Memo as evidence. The Memo is undated

and unsigned but appears to be on letterhead of the North Carolina SBI. As described in *State v. Parker* and discussed at the hearing in this case,

> The memo was published by the SBI in 2019 in response to then-pending Senate Bill 315—legislation which sought to clarify whether the possession of hemp is also legal within the state. S.B. 315 was eventually signed by the Governor and enacted on 12 June 2020, though the final version of the law did not clarify the legality of hemp possession.

277 N.C. App. 531, 540, 860 S.E.2d 21, 28 (2021). The purpose of the Memo was to address various issues and questions for law enforcement raised by Senate Bill 315 which was filed on 20 March 2019 and to suggest "Possible Solutions" to some of those issues. State Bureau of Investigation, Industrial Hemp/CBD Issues (2019). The Memo stated a concern that ***"[t]he unintended consequence upon passage of this bill is that marijuana will be legalized in NC because law enforcement cannot distinguish between hemp and marijuana and prosecutors could not prove the difference in court."*** *Id.* (emphasis in original).

Defendant's argument focuses on the portion of the Memo which states:

> There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. There is currently no field test which distinguishes the difference.
>
> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The *proposed legislation* makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp.

Id. (emphasis added).

Defendant also contends this Court addressed the Memo in *Parker* and *State v. Teague*, 286 N.C. App. 160, 879 S.E.2d 881 (2022), stating "[i]n this case at trial, Defendant offered an SBI Memorandum addressing the continued viability of identifying marijuana by sight and smell in light of the Industrial Hemp Act. This is the same SBI Memorandum presented to this Court in *Parker* and *Teague*." *Parker* did address the Memo, and *Teague*[3] cited to *Parker*, but neither *Parker* nor *Teague* accorded the Memo the status of binding law. *See Parker*, 277 N.C. App. at 538, 860 S.E.2d at 27; *see also Teague*, 286 N.C. App. at 166, 879 S.E.2d at 888. In *Parker*, the defendant argued that based on the Memo, there was a material conflict in the evidence presented at the suppression hearing and the trial court was required to make findings of fact resolving this conflict. *See Parker*, 277 N.C. App. at 538, 860 S.E.2d at 27. This Court disagreed:

> Defendant appears to argue that a material conflict existed because of the SBI memo that he introduced at the hearing (which discussed the similarities between legal hemp and marijuana), asserting that this memo introduced a conflict regarding whether the odor of marijuana was sufficient to support probable cause.
>
> We disagree. Although the memo did perhaps call into question the State's legal theory regarding whether Officer Peeler's perception of the scent of marijuana provided probable cause to search the vehicle, this conflict was not a material issue of *fact*. Thus, because (1) Defendant introduced no evidence creating a material conflict in the evidence supporting the probable cause determination; and (2) the trial court issued a ruling from the bench to explain its rationale, we hold that the trial

---

3. In *Teague*, this Court did not address the Memo directly but noted the defendant's arguments based on *Parker*:

> Defendant then makes several arguments that arise from our General Assembly's legalization of industrial hemp. *See* An Act to Recognize the Importance and Legitimacy of Industrial Hemp Research, to Provide for Compliance with Portions of the Federal Agricultural Act of 2014, and to Promote Increased Agricultural Employment, S.L. 2015-299, 2015 N.C. Sess. Laws 1483. The Industrial Hemp Act 'legalized the cultivation, processing, and sale of industrial hemp within the state, subject to the oversight of the North Carolina Industrial Hemp Commission.' *State v. Parker*, 277 N.C. App. 531, . . . 860 S.E.2d 21, *disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021).

State v. Teague, 286 N.C. App. 160, 166, 879 S.E.2d 881, 888 (2022).

> court was not required to enter a written order when denying Defendant's motion to suppress.

Id. (emphasis in original).

Thus, *Parker* noted the existence and content of the Memo but concluded it did not create a material conflict in the facts in that case. *Id.*

C. Plain View Doctrine

The Fourth Amendment of the United States Constitution, as well as Article 1, Section 20 of the North Carolina Constitution, prohibits unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. "Typically, a warrant is required to conduct a search unless a specific exception applies." *Parker*, 277 N.C. App. at 539, 860 S.E.2d at 28 (citations omitted). One exception is the "motor vehicle exception," which states that the "search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *Id.* (citation omitted). "Probable cause is generally defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty of an unlawful act." *Id.* (citation omitted). Under the motor vehicle exception, probable cause exists when

> the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

Id. (citation omitted).

Under the plain view doctrine, if a law enforcement officer who has conducted a legal stop of a vehicle or is in a location where he has a right to be observes contraband or other incriminating evidence in plain view, he has probable cause to proceed with a search and seize the item. *See State v. Grice*, 367 N.C. 753, 756-57, 767 S.E.2d 312, 316 (2015) ("While the general rule is that warrantless seizures are unconstitutional, a warrantless seizure of an item may be justified as reasonable under the plain view doctrine, so long as three elements are met: First, 'that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed'; second, that the evidence's 'incriminating character was "immediately apparent" '; and third, that the officer had 'a lawful right of access to the object itself.' " (citations,

quotation marks, ellipses, and brackets omitted)). In the context of marijuana, the "plain view" doctrine is often referred to as the plain smell doctrine, as an officer may smell the contraband even if he can't see it. *See State v. Parker*, 285 N.C. App. 610, 628, 878 S.E.2d 661, 675 (2022) ("[T]his Court has previously explained plain smell of *drugs* by an officer is evidence to conclude there is probable cause for a search. *Downing*, 169 N.C. App. at 796, 613 S.E.2d at 39 (emphasis added). In *Downing*, the drug the officers smelled was cocaine, not marijuana. *Id*. And as Defendant recognizes, we have caselaw holding the smell of marijuana alone provides probable cause." (citation and brackets omitted)). Here, the officers both saw and smelled what they believed to be marijuana in Defendant's car.

The United States Supreme Court has held that "officers may rely on a distinctive odor as a physical fact indicative of possible crime[.]" *Taylor v. United States*, 286 U.S. 1, 6, 76 L. Ed. 951, 953 (1932). For an odor to establish probable cause, the law enforcement officer must be qualified to recognize the odor and the odor is "sufficiently distinctive to identify a forbidden substance." *Johnson v. United States*, 333 U.S. 10, 13, 92 L. Ed. 436, 440 (1948). Further, our Supreme Court held that the smell of marijuana gives officers the probable cause to search an automobile. *See State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) ("[The Court of Appeals] further correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug."). But these cases were all decided before the legalization of industrial hemp, so they were based upon the distinctive odor and appearance of marijuana without any consideration of the delta-9 tetrahydrocannabinol concentration in the substance. With the legalization of industrial hemp, which according to the Memo smells and looks just like marijuana, Defendant argues it could not be "immediately apparent" to the officers that the substance in the car was marijuana, which is illegal, because it might be hemp.

In *Coolidge v. New Hampshire*, the United States Supreme Court described the plain view doctrine as applying when it is "immediately apparent" to the officers that the item is contraband or incriminating to the accused based upon their knowledge at the time of the search:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit,

> search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, *the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges*.

403 U.S. 443, 466, 29 L. Ed. 2d 564, 583 (1971) (emphasis added) (citations omitted).

In *Texas v. Brown*, 460 U.S. 730, 741, 75 L. Ed. 2d 502, 513 (1983), the United States Supreme Court noted that courts have interpreted the words "immediately apparent" to mean that "the officer must be possessed of near certainty as to the seizable nature of the items." However, the Court then noted the "use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Id.* But the standard of certainty in this instance is no different than in other cases dealing with probable cause:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief, that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. Moreover, our observation in *United States v. Cortez*, 449 U.S. 411, 418, (1981), regarding particularized suspicion, is equally applicable to the probable-cause requirement:
>
> > The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and

> weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id. at 742, 75 L. Ed. 2d at 514 (citations omitted).

D. Discussion

Defendant argues that the law enforcement officers lacked probable cause to perform the warrantless search of his car because after the legalization of industrial hemp, the identification of marijuana by smell and plain view is not possible and probable cause cannot rely only upon the officers' beliefs based on sight and smell. Defendant points to the recent cases, such as *Parker*, raising arguments regarding an officer's inability to differentiate between marijuana, an illegal substance, and industrial hemp.

Here, the trial court's order relied upon the "totality of the circumstances" including the officers' beliefs that they smelled or saw marijuana. Defendant contends that the trial court was required by the Memo to make a finding of fact that the officers could not have the ability to distinguish between marijuana and industrial hemp based on smell and appearance and therefore the trial court's conclusion cannot be supported as a matter of law. However, even if the trial court did not consider the Memo, the evidence from the officers was consistent with the Memo. At least two of the officers were aware that hemp and marijuana look and smell the same, and the other had experience only with marijuana.

As to the smell and appearance of marijuana in the car, Deputy Barron testified that he was familiar in his law enforcement career with marijuana, both smoked or raw, and it has "a very distinct smell. It stinks real bad." He testified he did not have any experience with hemp and had "never had . . . any contact with hemp" or training in detecting hemp. Corporal Kavanaugh testified that he asked Defendant "multiple times about the odor of marijuana, the smell, and the marijuana residue" and Defendant did not mention or "bring up the idea of hemp as being the cause or source of the odor of marijuana[.]" Deputy Schell testified that he assisted with the search of the car and the "raw marijuana [smell] was very present in the vehicle." He was aware at the time of the search that hemp and marijuana "have the same appearance and the same odor" and he was aware of the SBI Memo although he was not sure if he saw the Memo before or after this traffic stop. Corporal Kavanaugh also testified that there was no way to distinguish between hemp and marijuana in a "roadside" test but that would have to be done in a "scientific laboratory."

He was also aware that "an individual would have to have a license" to "transport hemp" even if it is being done legally, and Defendant did not "produce some license . . . in regards to hemp" and did not mention hemp or claim that he was licensed to grow it or transport it.

Therefore, there was evidence before the trial court that all three officers smelled and saw what they believed to be marijuana based upon their training and experience. The trial court's findings of fact adequately addressed this evidence as it found that all three officers had smelled and seen what they believed to be marijuana, and ultimately, they were correct. Corporal Kavanaugh asked Defendant about the marijuana smell, and he did not claim it was hemp or that he was legally entitled to possess hemp but instead claimed it was "from a cousin." The trial court did not make a specific finding that hemp and marijuana are indistinguishable by smell or appearance, but even without the Memo, the evidence was not conflicting on this fact. And based upon the trial court's comments during the hearing, it is apparent that the trial court was well aware of this fact. But this fact does not end the inquiry as Defendant claims it should.

First, the trial court noted that "the 800-pound elephant in the room nobody's talking about" was the fact that "unless you are licensed and under the supervision of the Industrial Hemp Commission, it's still illegal." As discussed above, industrial hemp could be legally possessed and transported under the law in 2020, but not all possession of industrial hemp was legal. *See generally* N.C. Gen. Stat. Ch. 106, art. 50e (2019). Defendant did not claim the substance was hemp or that he had a permit for producing or transporting hemp. In this regard, hemp could be compared to medications for which a prescription is required. It is legal for a person to possess certain controlled substances with a valid prescription, but it would be illegal for a person to possess the same controlled substance without a valid prescription. A law enforcement officer may have probable cause to seize a bottle of pills in plain view if he reasonably believes the pills to be contraband or illegally possessed. For example, in *State v. Crews*, our Supreme Court affirmed the trial court's denial of the defendant's motion to suppress a bottle of amphetamines seized by police. 286 N.C. 41, 46, 209 S.E.2d 462, 465 (1974). In *Crews*, officers were legally in the defendant's home to serve an arrest warrant. *Id.* at 45, 209 S.E.2d at 465. The officers saw in plain view

> a clear, brown-tinted bottle about five inches high and two to three inches in diameter located on the front of the shelf above the clothes that were hanging in the closet. The bottle had no writing or labels on it. It appeared to

> Officer Spillman to contain pills of various colors. Officer Spillman took [the defendant], and the bottle to the police station. The bottle was found to contain several hundred amphetamines.

Id. at 43, 209 S.E.2d at 463. The Supreme Court affirmed the trial court's denial of the motion to suppress, stating

> Officer Spillman was legally in the apartment. He testified that he had had some training in drug detection, that he had seen amphetamine pills before, and that the pills in the bottle looked like amphetamines. He further testified that the size of the bottle, the large number of pills, and the fact that there [was] no prescription or label on the bottle, all led him to believe that they were amphetamines.
>
> When an officer's presence at the scene is lawful, he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime[.]

Id. at 45, 209 S.E.2d at 465 (citations and ellipses omitted).

Although the Industrial Hemp Act made the possession of industrial hemp legal under some circumstances, the Act still regulated hemp. The technical difference between marijuana and industrial hemp is the tetrahydrocannabinol ("THC") content, which must be less than 0.3 percent in industrial hemp. N.C. Gen. Stat. § 106-568.51(7) (2019). This technical difference between hemp and marijuana is crucial for purposes of sufficient evidence for conviction of an offense:

> In a criminal case, the State must prove every element of a criminal offense beyond a reasonable doubt. In the context of a controlled substance case, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. The North Carolina Supreme Court held in *Ward* that unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.

State v. Carter, 255 N.C. App. 104, 106-07, 803 S.E.2d 464, 466 (2017) (citations, quotation marks, and brackets omitted).

But the issue here is not whether the officers could identify the substance in Defendant's car as hemp or marijuana for purposes of proving the elements of a criminal offense beyond a reasonable doubt. The issue for purposes of probable cause for the search is only whether the officer, based upon his training and experience, had reasonable basis to believe there was a " 'practical, nontechnical' probability that incriminating evidence" would be found in the vehicle. *Brown*, 460 U.S. at 742, 75 L. Ed. 2d at 514 (citations omitted).

The requirement of the plain view doctrine at issue here is whether it may be "immediately apparent" that the item viewed – or smelled – is likely to be contraband. *Coolidge*, 403 U.S. at 466-67, 29 L. Ed. 2d at 583. "Our courts have defined the term 'immediately apparent' as being satisfied where the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Hunter*, 286 N.C. App. 114, 117, 878 S.E.2d 676, 679 (2022) (citation omitted).

Even if industrial hemp and marijuana look and smell the same, the change in the legal status of industrial hemp does not substantially change the law on the plain view or plain smell doctrine as to marijuana. The issue is not whether the substance was marijuana or even whether the officer had a high degree of certainty that it was marijuana, but "whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused." *State v. Peck*, 54 N.C. App. 302, 307, 283 S.E.2d 383, 386 (1981) (citation omitted). In addition, even if the substance was hemp, the officer could still have probable cause based upon a reasonable belief that the hemp was illegally produced or possessed by Defendant without a license, just as the officers in *Crews* believed the pills in the unmarked bottle to be illegally possessed. *See Crews*, 286 N.C. at 45, 209 S.E.2d at 465. Either way, the odor and sight of what the officers reasonably believed to be marijuana gave them probable cause for the search. Probable cause did not require their belief that the substance was illegal marijuana be "correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Brown*, 460 U.S. at 742, 75 L. Ed. 2d at 514; *see also Teague*, 286 N.C. App. at 179, 879 S.E.2d at 896; *State v. Johnson*, 288 N.C. App. 441, 457-58, 886 S.E.2d 620, 632 (2023) (explaining that although smell alone was not the basis of probable cause in the case, "The smell of marijuana alone supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because *only the probability, and not a*

prima facie showing, of criminal activity is the standard of probable cause" (emphasis in original) (citations and ellipses omitted)).

We conclude that despite the liberalization of laws regarding possession of industrial hemp, and even if marijuana and industrial hemp smell and look the same, the trial court did not err in concluding there was probable cause for the search of Defendant's vehicle based upon the officer's reasonable belief that the substance he smelled and saw in the vehicle was marijuana.

IV. Conclusion

We hold the trial court did not err in denying Defendant's motion to suppress the evidence seized after a lawful traffic stop and search based upon probable cause.

AFFIRMED.

Judges STADING and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
CORIANTE LAQUELLE PIERCE

No. COA23-348

Filed 3 September 2024

Constitutional Law—right to counsel—waiver—pro se waiver of indictment—knowing and voluntary—trial court's jurisdiction to enter judgment

Where defendant knowingly and voluntarily waived his right to assistance of appointed counsel—after an extensive colloquy conducted by the trial court regarding the consequences and responsibilities of proceeding pro se—and then signed a waiver of indictment and entered a plea agreement with the State (pursuant to which his three original indicted charges were dismissed in exchange for defendant pleading guilty to two crimes for which he had waived indictment), the trial court had subject matter jurisdiction to enter judgments against defendant. Defendant was previously appointed four attorneys in succession, which contributed to years of delay, and then was appointed standby counsel who was present at all remaining hearings and when defendant pleaded guilty. Assuming

without deciding that error occurred, any error was invited by defendant's actions.

Appeal by defendant from judgment entered 30 June 2021 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Appellate Defender's Office, by Glenn Gerding, and Assistant Appellate Defender Michele A. Goldman, for the defendant-appellant.

TYSON, Judge.

I. Background

Coriante Laquelle Pierce ("Defendant") was indicted by a grand jury for felony statutory rape of a 13/14/15-year-old minor, first-degree kidnapping, and indecent liberties with a child on 6 February 2017. From first appearance to trial date, Defendant was provided with five court-appointed attorneys to either represent him or to serve as standby counsel. Defendant knowingly and voluntarily exercised his Sixth Amendment right to proceed *pro se*. U.S. Const. amend. VI; N.C. Const. art I, §§ 19, 23. The court appointed Defendant's former appointed counsel as standby counsel. On 29 June 2021 in open court, Defendant and the assistant district attorney both signed a bill of information charging him with the three previously indicted crimes and two additional charges for crimes against nature and sexual battery.

The court had appointed Defendant four separate attorneys over the course of the litigation to represent him: Idrissa Smith, Ralph K. Fraiser, Jr., Matt Suczynski, and Sean Ravi Ramkaransingh. Attorney Ramkaransingh was appointed by the trial court as standby counsel after Defendant chose to represent himself. A fifth attorney, Daniel A. Meier, replaced Attorney Ramkaransingh as standby counsel on 30 July 2020. Defendant insisted on proceeding *pro se* on numerous occasions.

Defendant knowingly signed a Waiver of Indictment, agreeing for the case to be tried on the information, including the two charges for crimes against nature and sexual battery not included in the original charges and indictments. His standby counsel did not sign the attorney line on the Waiver of Indictment.

Defendant and the State entered into a plea agreement, wherein Defendant agreed to plead guilty only to the charges of crime against nature and sexual battery. The three original indicted charges were dismissed. Defendant was sentenced on 30 June 2021 to 8-19 months' imprisonment for crime against nature, 150 days for sexual battery, and was ordered to register as a sex offender.

Defendant purportedly signed and served a copy of his Notice of Appeal on 6 July 2021. The notice of appeal, however, was not file stamped until 15 July 2021, which exceeds the fourteen-day period permitted under N.C. R. App. P. 4(a)(2). Defendant seeks review through a petition for writ of *certiorari* ("PWC") and argues the trial court lacked subject matter jurisdiction.

II. Jurisdiction

Defendant acknowledges the inadequacy of his notice of appeal and petitions this Court to issue a writ of *certiorari* to invoke jurisdiction and authorize appellate review of his plea agreement.

"[A] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1).

A defective notice of appeal "should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation and quotation marks omitted).

Here, the State has not advanced any allegations tending to show it has been delayed, misled, or prejudiced by Defendant's defective notice of appeal. Defendant's intent to appeal can be "fairly inferred" from his Notice of Appeal dated 6 July 2021, despite the 15 July 2021 file stamp. *Id.*

Defendant has lost his appeal of the judgment through "failure to take timely action[.]" N.C. R. App. P. 21(a)(1). The State has not shown prejudice by the defective notice. We allow Defendant's PWC, in the exercise of our discretion, and address whether the trial court possessed jurisdiction to enter judgment on Defendant's plea agreement.

III. Issue

Defendant argues the trial court lacked jurisdiction to enter judgments based upon Defendant's *pro se* guilty pleas to charges contained

in a Bill of Information. He asserts his Waiver of Indictment was invalid, as he was not represented by counsel.

A. Standard of Review

This Court reviews subject matter jurisdiction *de novo*. Under *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) (citation and quotation marks omitted).

B. Analysis

Defendant argues the trial court lacked jurisdiction because he was not represented by counsel when he waived grand jury indictment in violation of N.C. Gen. Stat. § 15A-642(b) and (c) (2023).

1. Sixth Amendment Right to Counsel

Both the Constitution of the United States and the North Carolina Constitution recognize a criminal defendant's right to assistance of counsel. U.S. Const. amend. VI; N.C. Const. art I, §§ 19, 23. *See also Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (citations omitted); *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000).

Criminal defendants also have the absolute right to waive counsel, represent themselves, negotiate plea agreements, and handle their case without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172–73 (1972). "A defendant has only two choices—to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel." *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992) (citations and quotation marks omitted).

2. *Pro Se* Waiver of Indictment

a. State v. Nixon

Defendant repeatedly cites *State v. Nixon*, wherein this Court vacated a criminal judgment because the defendant's Waiver of Indictment was not valid. *State v. Nixon*, 263 N.C. App. 676, 680, 823 S.E.2d 689, 693 (2019). The defendant in *Nixon* was represented by counsel, who had also signed the waiver. *Id.* at 679, 823 S.E.2d at 692. The waiver reviewed in *Nixon* was held to be invalid because no clear language waived the indictment in the signed Bill of Information, not because defendant was proceeding *pro se*. *Id.*

Here, the Bill of Information and Waiver of Indictment signed by Defendant was clear and unambiguous. Defendant knowingly and intentionally proceeded *pro se*, and the trial judge had explained the consequences and process in detail to Defendant. *Nixon* does not support Defendant's assertions. *Id.*

b. State v. Brown

Defendant also cites *State v. Brown*, wherein a defendant had waived an indictment for a charge of armed robbery, but not to the charge of accessory after the fact of armed robbery. *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 799 (1974). This Court vacated the judgment because the second indictment had not been waived. *Id.* at 89, 202 S.E.2d at 799. Here, Defendant signed a Waiver of Indictment for all charges. *Brown* is not controlling. *Id.*

c. State v. Futrelle

Defendant also cites *State v. Futrelle*, wherein this Court found the bill of information charging defendant with two offenses was invalid because the Waiver of Indictment was not signed by his attorney, as required per N.C. Gen. Stat. § 15A-642(c). *State v. Futrelle*, 266 N.C. App. 207, 208, 831 S.E.2d 99, 100 (2019). Defendant's case is distinguishable from the facts in *Futrelle*, because Defendant had chosen not to be represented by an attorney and had intentionally chosen to exercise his rights to proceed *pro se*. *Id.* at 209-10, 831 S.E.2d at 100–01; *Thomas*, 331 N.C. at 677, 417 S.E.2d at 477 ("There is no right to appear both *in propria persona* and by counsel.").

Though Defendant cites case law wherein a Waiver of Indictment was invalidated as defective or ineffective, his case is distinguishable because he had previously waived multiple appointed counsels and had elected to proceed *pro se*. Defendant knowingly chose to represent himself, instead of accepting representation from any of his four court-appointed attorneys.

Defendant had two conversations with the trial judge, which lasted "close to half an hour," about the consequences of waiving his right to counsel and the associated responsibilities. Even though Defendant elected to proceed *pro se*, the trial court also appointed standby counsel for Defendant.

d. N.C. Gen. Stat. § 15A-642(b)–(c)

Because no precedent holds a Waiver of Indictment was invalidated when a defendant insisted on proceeding *pro se*, as is his absolute Sixth

Amendment right to do. *Mems*, 281 N.C. at 670-71, 190 S.E.2d at 172. This Court reviews N.C. Gen. Stat. § 15A-642, to determine its applicability.

Defendant repeatedly insisted on discharging appointed counsel, was warned by the trial court of the consequences of representing himself and proceeding *pro se*, and was appointed standby counsel. Although the plain language of N.C. Gen. Stat. § 15A-642(b) and (c) protects those unrepresented, Defendant had knowingly and voluntarily waived and refused the assistance of appointed counsel. U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23; N.C. Gen. Stat. § 15A-642(b)–(c).

Defendant's continued purported conflicts with multiple court-appointed attorneys continuously delayed the trial. The assistant district attorney argued Defendant "ha[d] routinely used the court-appointed counsel system to his benefit to attempt[ ] to delay this trial for years now." Defendant knowingly and voluntarily exercised his Sixth Amendment and State Constitutional rights to proceed *pro se*. U.S. Const. amend. VI.; N.C. Const. art. I, §§ 19, 23.

Defendant is not entitled to either a free attorney or an attorney of his choice. Our statutes clearly provide a court-appointed attorney is not free. *See* N.C. Gen. Stat. §§ 7A-455.1 and -458 (2023). In *State v. Moore*, this Court explained:

> Our Supreme Court has long held "the right to be defended by chosen counsel is not absolute." *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745 (citation omitted). "[A]n indigent defendant does not have the right to have counsel of his choice to represent him." *State v. Anderson*, 350 N.C. 152, 167, 513 S.E.2d 296, 305 (1999) (citing *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980)).

State v. Moore, 290 N.C. App. 610, 634, 893 S.E.2d 231, 247 (2023).

In *Moore*, "[d]efendant waived and forfeited his right to counsel through dilatory tactics and serious and egregious misconduct after being warned multiple times of the consequences of his behavior." *Id.* at 649, 893 S.E.2d at 256.

The trial judge advised Defendant he could fully waive his right to counsel and invoke his Sixth Amendment right. Defendant knowingly chose to invoke and exercise his Sixth Amendment right to accept a beneficial plea bargain in exchange for dismissal of his three indicted charges after a four-year delay. Defendant cannot "have it both ways."

Defendant's continued purported conflicts with court-appointed attorneys and Defendant's knowing and eventual choice to proceed *pro*

se delayed the trial for years. Courts and counsel cannot promote nor condone abuse of, and gamesmanship in, the appointed counsel system to allow defendants to waste scarce judicial resources, cause delays for their cases and other pending cases, increase the costs of the appointed attorney system to the taxpayers, or delay justice for the victims of crime. *Moore*, 290 N.C. App. at 649, 893 S.E.2d at 256.

The trial judge also inexplicably waived imposing counsel costs and fees on Defendant for the five attorneys appointed to either represent him or serve as his standby counsel. *See* N.C. Gen. Stat. § 7A-304 (2023).

Defendant's arguments are without merit. We overrule Defendant's argument that the trial court lacked subject matter jurisdiction to vacate the judgments entered consistent with his plea agreement.

C. Invited Error

Presuming, without deciding, the trial court committed prejudicial error by allowing Defendant to plead guilty for the two crimes for which he waived indictment, any such error was invited by Defendant. Defendant was represented by four court-appointed attorneys throughout the course of his case, and each time he demanded for the court to withdraw their appointment and to represent himself. The district attorney explained in the 24 May 2021 hearing:

> Every single attorney, he had a conflict with that attorney and it was his request that the attorney withdraw. And attorneys have said to the Court that there was an impasse between them and the client because [Defendant] wanted them to file things that were not of legal basis and would have been considered frivolous motions.

The trial court engaged in an extensive colloquy with Defendant about the consequences of his decision to proceed *pro se*, and that conversation lasted nearly half an hour. Defendant also had standby counsel appointed and present throughout the remaining hearings and when he pled guilty pursuant to his plea agreement.

Any purported error in the trial court's allowance of Defendant to sign the Waiver of Indictment while proceeding *pro se* is invited error. *See Sain v. Adams Auto Grp., Inc.*, 244 N.C. App. 657, 669 781 S.E.2d 655, 663 (2016) (explaining invited error is defined as "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining").

Further, N.C. Gen. Stat § 15A-1443(c) (2023) provides "[a] defendant is not prejudiced by . . . error resulting from his own conduct." Defendant

created any purported error of proceeding unrepresented through his own demands when signing the Waiver of Indictment *after* he deliberately chose to proceed *pro se*. Any asserted error committed by the trial court in allowing Defendant to knowingly and voluntarily represent himself was invited error. Defendant's arguments are overruled.

IV. Conclusion

Defendant knowingly and voluntarily waived assistance of appointed counsel and chose to exercise his Sixth Amendment absolute right to represent himself after being appointed multiple counsels by the court. Defendant was informed of the risks and consequences of signing this waiver and proceeding *pro se*.

Defendant secured a beneficial plea agreement, which resulted in the dismissal of his three indicted charges. Appointed standby counsel was present at the time he signed the Waiver of Indictment.

Presuming, without deciding, the trial court committed error by allowing Defendant to plead guilty for the two crimes for which he waived indictment pursuant to a plea agreement, any such purported error was invited by Defendant. N.C. Gen. Stat § 15A-1443(c).

The trial court did not lack subject matter jurisdiction to enter judgments based upon Defendant's *pro se* guilty pleas. The judgment entered upon Defendant's knowing and voluntary guilty pleas is affirmed. *It is so ordered.*

AFFIRMED.

Judges STADING and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KEDRICK DAQUANE THOMAS, DEFENDANT

No. COA23-210

Filed 3 September 2024

1. Constitutional Law—North Carolina—juror substitution after start of deliberations—new trial required

In a prosecution for second-degree murder and related charges, where the trial court substituted a juror with an alternate juror after deliberations began—without objection from defendant—and defendant was subsequently found guilty, defendant was entitled to a new trial pursuant to a prior binding appellate decision.

2. Search and Seizure—ankle monitor location data—accessed without warrant—no reasonable expectation of privacy

In a prosecution for second-degree murder and related charges, the trial court properly denied defendant's motion to suppress data from his ankle monitor, which was accessed by law enforcement without a search warrant after defendant was implicated in a fatal drive-by shooting. Where defendant was subject to electronic monitoring as a condition of post-release supervision (PRS) (pursuant to N.C.G.S. § 15A-1368.4), he did not have a reasonable expectation of privacy in the location data generated by his monitor, and access of that data did not constitute a search for Fourth Amendment purposes. Further, the controlling statute does not limit the law enforcement agencies or officers who may access data generated from electronic monitoring; here, although the officer who obtained the data was not defendant's supervising officer for PRS, he had authorization to access the data directly. Therefore, evidence collected from the ankle monitor could be presented by the State in defendant's new trial (which the appellate court granted on an unrelated basis).

Appeal by defendant from judgments entered 20 December 2021 and 23 February 2022 by Judge Keith O. Gregory in Superior Court, Wake County. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Marilyn G. Ozer for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments convicting him of one count of second-degree murder, one count of assault with a deadly weapon with intent to kill or seriously injure, and attaining the status of violent habitual felon. Because the Defendant was a supervisee on post-release supervision including electronic monitoring by an ankle monitor, he did not have a reasonable expectation of privacy as to the tracking data from his ankle monitor that would prevent a law enforcement officer authorized to access the data from doing so as part of the investigation of a crime, so the trial court did not err by denying his motion to suppress this evidence. But because an alternate juror was substituted for one of the original jurors after the jury had begun deliberations, albeit without objection from Defendant, we are required to grant Defendant a new trial based upon *State v. Chambers*, 292 N.C. App. 459, 461-62, 898 S.E.2d 86, 88 (2024).[1] Thus, we will not address his remaining issues presented on appeal as they may not arise at a new trial.

I. Background

The State's evidence tended to show that on the night of 8 November 2019, a shooting occurred at a convenience store on Bragg Street in Raleigh, North Carolina. Kimberly Holder, who was hanging out outside the store with a group of friends, was shot and killed; Ron Hyman was shot and seriously injured.[2]

Witnesses described a red Charger slowing down near the scene of the shooting immediately before the shooting and taking off immediately after. Video footage recordings of the scene showed a red Charger applying its brakes, as indicated by the car's brake lights, and slowing down as it approached the convenience store. The investigation by the Raleigh Police Department ("RPD") connected the red Charger to Ivette Uriostegui and her boyfriend, Stephon McQueen. Police also had a confidential source who reported Mr. McQueen and Defendant were connected to the shooting.

After researching "some background information" on Defendant, police learned that on the date of the shooting he was wearing a GPS

1. On 26 June 2024, the Supreme Court of North Carolina granted the State's petition for Writ of Supersedeas and for discretionary review of *Chambers*, but this Court remains bound by this precedent. *See State v. Chambers*, No. 56PA24 (N.C. June 26, 2024).

2. The State further alleged two other victims were shot, Bonnie Jones and Geann Onivagui; however, the State dismissed the charges related to Bonnie Jones and the jury found Defendant not guilty of the assault involving Geann Onivagui.

ankle monitor which catalogued his location. An employee of BI Incorporated, a company that is "contracted with the State of North Carolina to provide electronic monitoring services for Department of Juvenile Justice and the Department of Adult Probation and Parole[,]" testified the ankle monitor Defendant was wearing at the time of the shooting reported his location in sixty second intervals. The employee testified RPD has "two different levels of access." One level of access is described as a "data dump" in which a police department "criminal analyst gets a - - basically, the live file at the end of the day every day" which includes data on "every single client." The second level of access included "individual users that have their own individual log-ins. . . . They can retrieve records and view them." In 2019, about ten officers from RPD had this second level of access.

Sergeant Lane of RPD testified he ran Defendant's name through a database and found he was wearing the ankle monitor through Community Corrections, so Sergeant Lane "went into BI, typed the name in, and started looking at the points from that night." Sergeant Lane was one of the ten officers with access to BI's software. Defendant's ankle monitor showed he was travelling towards the scene of the shooting before it happened, was near the shooting at the time it happened, and was travelling away from the scene after it happened. Sergeant Lane did not have a search warrant before looking into the GPS information from Defendant's ankle monitor.

Police arrested Defendant on 14 November 2019. Defendant spoke to police officers and admitted he was on Bragg Street at the time of the shooting but claimed he was not in the red Charger. Defendant was ultimately indicted on or about 3 December 2019 for first-degree murder and three counts of assault with a deadly weapon with intent to kill or seriously injure. Defendant was also indicted on or about 26 October 2021 for attaining the status of a violent habitual felon.

Police arrested Mr. McQueen and Ms. Uriostegui in Texas on 15 November 2019. Mr. McQueen admitted to police he was the driver of the red Charger the night of the shooting, Ms. Uriostegui was in the front passenger seat, and Defendant was in the "rear of the vehicle as the only other occupant." Further, Mr. McQueen

> admitted to driving the vehicle down the Bragg Street area slowly, coming almost to a stop in front of the store, and that then numerous rounds were fired. And he looked around his back, he didn't know what was going on, and he observed [Defendant] firing the weapon from the interior of the car.

Mr. McQueen also indicated to police that Defendant had been robbed "several weeks" before the shooting and that there was a "rumor on the street that [Defendant] was snitching or giving up information on people" and Defendant was upset about both events.

On 3 December 2021, Defendant filed a motion to suppress the ankle monitor data. The motion to suppress alleged that "on November 14, 2018, the defendant was placed on probation for felony possession of cocaine in file number 18 CRS 208275 in Wake County, North Carolina" and that electronic monitoring was "included or added at a later date" as a special condition of probation. Defendant contended the controlling statute was North Carolina General Statute Section 15A-1343(b)(13), which did not allow police to access Defendant's ankle monitor data without a warrant and since the police did not have a warrant, the evidence should be suppressed under "the Fourth and Fourteenth Amendments of the United States Constitution" and "Article 1, 19, 23, and 27 of the North Carolina State Constitution." The trial court denied Defendant's motion to suppress.

Jury selection began on 6 December 2021. During jury selection, Juror number 8 informed the trial court that he had a vacation planned beginning on Sunday of the next week and would be able to sit for the jury if the trial ended before then. The State and Defendant both accepted Juror 8, who was then seated on the jury. During the trial, the trial court indicated it was possible the trial would not end as soon as previously thought and it may need to substitute an alternate for Juror 8. However, Juror 8 remained on the jury until they began deliberations on 17 December 2021. On 17 December 2021, during jury deliberations, the trial court received a note from the jury which read "[w]e have a hung jury situation at this point. After reviewing the evidence and discussing it thoroughly, we are not seeing any movement towards a decision." The trial court then suggested that it may have to release Juror 8 since the jury had not come to a decision before Juror 8 was scheduled to leave for a vacation; neither the State nor Defendant objected to the juror's release. The trial court ultimately released Juror 8 and replaced him with Alternate Juror 1, and the trial court instructed the jury that "the jury would now be required to start their deliberations over because the alternate juror was not privy to the previous deliberations. So you would be required to start the deliberations over." The jury then returned its verdicts on 20 December 2021, finding Defendant guilty of second-degree murder for the killing of Kimberly Holder and assault with a deadly weapon with intent to kill or seriously injure for the shooting of Ron Hyman.

Defendant's violent habitual felon proceeding began on 21 February 2022. Kimberly Holder's family was in the courtroom watching the proceedings, and one of the family members was wearing a shirt with the statement "Justice for Kim" and a picture of Ms. Holder on the front of the shirt. Defendant objected to the shirt and stated it could violate Defendant's due process rights. Defendant asked the trial court to require the shirt be worn inside out or covered up. The trial court found that only one person in the courtroom was wearing the shirt and ultimately denied Defendant's objection to the shirt as it was not prejudicial to Defendant. The next day, another family member was wearing the same shirt, Defendant renewed his objection, and the trial court again denied it.

The jury convicted Defendant as a violent habitual felon. Defendant was sentenced to two life sentences without the possibility of parole. Defendant gave oral notice of appeal in open court.

II. Issues on Appeal

Defendant makes four arguments on appeal. Defendant's first argument is that the trial court erred by denying his motion to suppress because "a Raleigh patrol officer accessed data from the ankle monitor worn by Defendant in violation of the constitutional prohibition against warrantless searches." (Capitalization altered.) Defendant's third issue presented on appeal is that "Defendant's state constitutional right to have his guilt determined by a properly constituted jury of twelve was violated when a juror was excused and replaced by an alternate after deliberations had begun and the jury had informed the court it was hung." (Capitalization altered.) Defendant also makes two additional arguments on appeal: that "the court erred by admitting testimony concerning an armed robbery in which Defendant was the victim and an undefined involvement in a murder[;]" and that "t-shirts bearing the photo of the victim worn in the courtroom and calling for justice violated Defendant's right to a fair trial by an impartial jury." (Capitalization altered.)

A. Substitution of Alternate Juror

[1] We will address Defendant's third issue first, as we are required by *Chambers* to grant Defendant a new trial based upon the substitution of an alternate juror after the jury had begun deliberations. *See Chambers*, 292 N.C. App. at 462, 898 S.E.2d at 88. Although North Carolina General Statute Section 15A-1215 was amended in 2021 to allow substitution of an alternate juror after deliberations have begun, on 20 February 2024 in *Chambers*, this Court held the 2021 amendment to North Carolina

General Statute Section 15A-1215 allowing a juror substitution after deliberations have begun was unconstitutional. *See id.* Although the Supreme Court of North Carolina has granted discretionary review of *Chambers*, this Court remains bound by *Chambers* and we are therefore required to grant Defendant's request for a new trial based upon the juror substitution. *See id.* Because we are required to grant Defendant a new trial, we need not address Defendant's arguments as to the testimony regarding his earlier bad acts or the t-shirts worn by the victim's family as these issues may not arise at the new trial. However, we will address the trial court's denial of Defendant's motion to suppress since that issue will arise at the new trial.

B. Motion to Suppress Defendant's Ankle Monitor Data

[2] Defendant first contends his rights under the Fourth Amendment of the United States Constitution were violated when Sergeant Lane obtained the data from his ankle monitor without first getting a search warrant.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Hamilton*, 262 N.C. App. 650, 654, 822 S.E.2d 548, 552 (2018) (citation omitted). Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. It is well-established that in "considering whether a warrantless search was unreasonable, the inquiry focuses on whether an individual has manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (citation, quotation marks, brackets, and emphasis omitted). The United States Supreme Court has held that "a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady v. North Carolina*, 575 U.S. 306, 309, 191 L. Ed. 2d 459, 461-62 (2015).

But here, Defendant's argument does not arise from the attachment of the ankle monitor to his body; he does not contend it was unconstitutional for him to be subjected to electronic monitoring as a condition of post-release supervision ("PRS"). Instead, his argument is the State exceeded the scope of the search allowed by North Carolina General Statute Section 15A-1368.4 because the law enforcement officer who accessed the data from his ankle monitor was not his supervising officer under his PRS.

Defendant contends under North Carolina General Statute Section 15A-1343(b1)(3c), only officers from Defendant's probation or parole supervising agency could check the GPS data shown by Defendant's ankle monitor without first obtaining a search warrant, but officers with RPD could not do so. The State first contends that the record is not clear on whether Defendant was wearing an ankle monitor under North Carolina General Statute Section 15A-1343(b1)(3c) as a condition of probation or under North Carolina General Statute Section 15A-1368.4 as a condition of PRS. *Compare* N.C. Gen. Stat. § 15A-1343 (2023) ("Conditions of probation") *with* N.C. Gen. Stat. § 15A-1368.4 (2023) ("Conditions of post-release supervision").

The trial court did not enter a written order denying the motion to suppress and did not make any findings of fact on the record. Since there is no written order, we must first determine if there was any "material conflict in the evidence" relevant to Defendant's monitoring.

> In determining whether evidence should be suppressed, the trial court shall make findings of fact and conclusions of law which shall be included in the record. N.C.G.S. § 15A-974(b) (2013); *see also id.* § 15A-977(f) (2013) ("The judge must set forth in the record his findings of facts and conclusions of law."). A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. Although the statute's directive is in the imperative form, only a material conflict in the evidence – one that potentially affects the outcome of the suppression motion – must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.

State v. Bartlett, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations and quotation marks omitted).

Here, Defendant's argument on the motion to suppress was primarily a legal argument, but both Defendant and the State argue there are potential differences in the analysis of this argument depending upon whether Defendant's monitoring was conducted as a condition of probation or a condition of post-release supervision. Thus, there is one fact necessary for our review of the order on appeal since the statutes

addressing electronic monitoring for probation are different from electronic monitoring for PRS. Initially, there was some confusion at trial over the legal basis for Defendant's ankle monitoring, but ultimately there was no "material conflict" in the evidence; the evidence showed Defendant's monitoring was imposed under North Carolina General Statute Section 15A-1368.4 as a condition of post-release supervision.

In Defendant's motion to suppress, he alleged that "on November 14, 2018, the defendant was placed on probation for felony possession of cocaine in file number 18CR208275 in Wake County, North Carolina" and that electronic monitoring was "included or added at a later date" as a special condition of probation. On 3 December 2021, the trial court heard and ruled on about 21 various motions, including its initial ruling on the motion to suppress. At that hearing, the State noted the motion to suppress and informed the trial court that Defendant "was not on probation but he was actually on parole at the time." Defendant's attorney apparently agreed and informed the trial court,

> [t]his is post-supervision. He's not on - - he's not on standard conditions of probation, so it's a less sort of monitoring system and restrictions and it has sort of measures in place. So it's for curfew, make sure he's where he's supposed to be when he's supposed to be."

The trial court initially denied the motion to suppress based upon the fact that it was not "timely filed." But at another pretrial hearing on 6 December 2021, Defendant's counsel informed the trial court that at the previous hearing, the timeline given regarding the timing of the filing of the motion to suppress was incorrect. The State conceded this point, and the trial court then revisited the motion to suppress based upon Defendant's argument that the RPD officer's accessing the ankle monitor data was a search in violation of the Fourth Amendment on the basis of "this clearly being a search by law enforcement, not probation." Defendant requested an evidentiary hearing on the motion to suppress. Ultimately, the trial court again denied the motion to suppress without holding an evidentiary hearing on the basis that there was "no reasonable legal basis" to allow the motion. Defendant's counsel asked to be allowed to make a proffer of evidence regarding the motion to suppress after the State's presentation of testimony from Sergeant Lane and the trial court allowed this request.

During the trial, after Sergeant Lane's trial testimony and cross-examination, Defendant presented his proffer of evidence for purposes of the motion to suppress by questioning Sergeant Lane on voir

dire regarding his access to and search of the ankle monitor tracking data. The evidence on voir dire tended to show that Sergeant Lane was a patrol officer with RPD when he was called to the scene of the drive-by shooting on 8 November 2019. Afterwards, he did further investigation in the area and ultimately identified Defendant as a potential suspect. After checking the CJLEADS database for Defendant's name, he found that Defendant "had an active sentence that he had been released on, and actually was on post supervision – or post-release." Sergeant Lane did not consult with Defendant's probation officer but checked the Total Access data personally. Defendant renewed his motion after the proffer, and the trial court again denied the motion to suppress. The State did not present any evidence countering Sergeant Lane's testimony that Defendant was on PRS. In fact, the State had consistently argued from the first hearing on the motion to suppress that Defendant was on PRS and not probation. The trial court did not make any findings of fact on the record or enter a written order denying the motion to suppress.

In his brief on appeal, Defendant argues he "was on post-release supervision" in one section of his brief but in another section states Defendant "was wearing an ankle monitor pursuant to a special condition[ ] provision of N.C.[G.S.] § 15A-1343" and cites the language of North Carolina General Statute Section 15A-1343 – which deals with probation – in support of his argument. *See* N.C. Gen. Stat. § 15A-1343. But as we have determined there was no conflict in the evidence and Defendant was on PRS, we will address Defendant's arguments based only upon the basis of PRS under North Carolina General Statute Section 15A-1368.4.

In *State v. McCants*, this Court described the PRS program in detail:

> The post-release supervision program was created in the 1993 "Act to Provide for Structured Sentencing" ("Structured Sentencing Act") as Article 84A of Chapter 15A of the North Carolina General Statutes ("Article 84A"). 1993 North Carolina Laws Ch. 538, § 20.1. (H.B. 277). Post-release supervision is defined in Article 84A as:
>
> > The time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and

> other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

N.C.G.S. § 15A-1368(a)(1) (emphasis added).

> Determinations regarding the imposition or violation of conditions of PRS or parole are made by the Commission, which was created by the Structured Sentencing Act: "There is hereby created a Post-Release Supervision and Parole Commission of the DAC4 of the DPS." N.C.G.S. § 143B-720(a) (2017); 1993 North Carolina Laws Ch. 538, § 20.1.5 The "general authority of the Commission is described in G.S. 143B-720." N.C.G.S. § 15A-1368(a)(3) (2017). The Commission "shall administer post-release supervision as provided in" Article 84A. N.C.G.S. § 15A-1368(b). The Commission consists of "four full-time members" "appointed by the Governor." N.C.G.S. § 143B-720(a) and (a2). Decisions concerning parole are determined by a majority vote of the Commission, however, "a three-member panel of the Commission may set the *terms and conditions* for a post-release supervisee *under G.S. 15A-1368.4* and may decide questions of violations thereunder, *including the issuance of warrants*." N.C.G.S. § 143B-721(d) (2017).

State v. McCants, 275 N.C. App. 801, 814-15, 854 S.E.2d 415, 426 (2020) (emphasis in original) (brackets and footnotes omitted).

A supervisee under post-release supervision is "[a] person released from incarceration and in the custody of the Division of Community Supervision and Reentry of the Department of Adult Correction and Post-Release Supervision and Parole Commission on post-release supervision."[3] N.C. Gen. Stat. § 15A-1368(a)(2) (2023). Various conditions may be imposed upon a supervisee in PRS, and "electronic monitoring" is one of the "controlling conditions" allowed by North Carolina General Statute Section 15A-1368.4(13). N.C. Gen. Stat. § 15A-1368.4(13). There is no evidence in this case of the exact conditions included in Defendant's

3. "(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education." N.C. Gen. Stat. § 15A-1368 (2023).

PRS, but there is no dispute Defendant was subject to electronic monitoring, and based upon Sergeant Lane's testimony, he was being monitored as a condition of PRS. In addition, in this case, Defendant has not challenged the Commission's authority to impose electronic monitoring as a condition of his PRS. *But cf. McCants*, 275 N.C. App. at 842, 854 S.E.2d at 443 ("The Commission therefore erred in imposing that unlawful condition in Defendant's case, and the Operation Arrow warrantless search of Defendant's premises lacked legal authority. Defendant's purported consent did not serve to justify the otherwise unlawful search, as Defendant was obligated by statute to consent to PRS and the conditions imposed. Defendant's compliance with his legal duty, by signing the PRS agreement and not attempting to refuse or hinder Chief Gibson from carrying out one of the conditions contained therein, was not true consent to search as contemplated by the Fourth Amendment or Art. I § 20 of the North Carolina Constitution, and it did not serve to render constitutional the otherwise unconstitutional warrantless search.").

Defendant argues that only his probation officer could have access to his ankle monitoring data, based upon North Carolina General Statute Section 15A-1368.4(e)(10), which provides that a supervisee must

> (10) Submit at reasonable times to warrantless searches by a post-release supervision officer of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Division of Adult Correction and Juvenile Justice of the Department of Public Safety for the actual cost of drug testing and drug screening, if the results are positive.

N.C. Gen. Stat. § 15A-1368.4. But this subsection addresses searches of the supervisee's person, vehicle, or premises, not electronic monitoring. *See id.* Here, there was no search of Defendant's person, vehicle, or premises. Instead, the alleged unconstitutional search here arises solely from Sergeant Lane's accessing the data generated by Defendant's electronic monitoring. Electronic monitoring is not governed by North Carolina General Statute Section 15A-1368.4(e)(10); it is governed by North Carolina General Statute Section 15A-1368.4(e)(13), which allows the Commission to impose a condition requiring a supervisee to:

> (13) Remain in one or more specified places for a specified period or periods each day, and wear a device *that permits the defendant's compliance with the condition to be monitored electronically* and pay a fee of ninety dollars ($90.00) for the electronic monitoring device and a daily fee in an amount that reflects the actual cost of providing the electronic monitoring. The Commission may exempt a person from paying the fees only for a good cause. Fees collected under this subsection for the electronic monitoring device shall be transmitted to the State for deposit in the State's General Fund. The daily fees collected under this subsection shall be remitted to the Department of Public Safety to cover the costs of providing the electronic monitoring.

N.C. Gen. Stat. § 15A-1368.4(e)(13) (emphasis added).

As noted above, Defendant's brief includes arguments contending he was on probation instead of PRS although he addresses PRS as well, perhaps seeking to make sure all the bases were covered. The wording of the statute regarding electronic monitoring for purposes of probation is different from the PRS statute. The probation statute provides that "[t]he offender shall be required to wear a device which *permits the supervising agency to monitor* the offender's compliance with the condition electronically and to pay a fee for the device as specified in subsection (c2) of this section." N.C. Gen. Stat. § 15A-1343(b1)(3c). Although we express no opinion regarding access to data arising from electronic monitoring a person on probation, the difference in the language of the statute is notable as the probation statute states that the "supervising agency" monitors the defendant's compliance. *See id*. The PRS statute simply allows a supervisee "to be monitored electronically," without limiting which law enforcement agency or personnel may access data to review a supervisee's compliance with the condition that he "remain in one or more specified places." N.C. Gen. Stat. § 15A-1368.4(e)(13).

In addition, even within North Carolina General Statute Section 15A-1368.4, the language regarding warrantless searches of supervisees differs from the language regarding electronic monitoring. *See id*. North Carolina General Statute Section 15A-1368.4(e)(10) provides that the "post-release supervision officer" may conduct warrantless searches "at reasonable times" "of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present for purposes reasonably related to the post-release supervision." N.C. Gen. Stat. § 15A-1368.4(e)(10). But subsection (e)(13) does not limit the access

to electronic monitoring data to the supervisee's post-release supervision officer or any particular law enforcement agency. N.C. Gen. Stat. § 15A-1368.4(e)(13). Instead, a supervisee can be required to "remain in one or more specified places" at specific times and to "wear a device that permits the defendant's compliance with the condition *to be monitored electronically*[.]" *Id.* (emphasis added).

The evidence showed that the Department of Juvenile Justice and the Department of Adult Probation and Parole has contracted with BI Incorporated "to provide electronic monitoring services" for PRS and this information is made available to authorized officers within law enforcement agencies such as RPD. If the General Assembly wanted to impose the same restrictions and limitations on access to electronic monitoring data for purposes of probation, it could have done so. In fact, for PRS, the General Assembly did impose different limitations for searches of "the supervisee's person and of the supervisee's vehicle and premises" than for electronic monitoring as a condition of PRS. *See* N.C. Gen. Stat. § 15A-1368.4. The language of the statute governing warrantless searches of the person, vehicle, or premises is different from that governing electronic monitoring, and we must presume the statutes mean what they say. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." (citation omitted)).

We also stress that we cannot address the exact conditions of Defendant's PRS because notably, Defendant did not provide either to the trial court or to this Court the judgment for his prior conviction under which he was imprisoned before being released on PRS or any documentation from the Post-Release Supervision and Parole Commission regarding the details of his PRS.[4] Under North Carolina General Statute Section 15A-1368.4, the Commission must set certain required conditions for each supervisee and may set additional required conditions, discretionary conditions, reintegrative conditions, and controlling conditions, depending upon the circumstances of the particular case. *See* N.C. Gen. Stat. § 15A-1368.4. Since Defendant has the duty to provide any information necessary for review of his arguments, we are addressing only the information provided by Defendant in this record. *See State*

4. In contrast, in *State v. McCants*, this Court addressed many details of the defendant's PRS and the specific conditions imposed as well as why particular conditions were imposed on the defendant, but here, this information was not in evidence. *See McCants*, 275 N.C. App. at 835-39, 854 S.E.2d at 438-41.

v. Alston, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete." (citation omitted)). According to the evidence presented in this case, Defendant was subject to electronic monitoring as a condition of his PRS. Defendant was required as a condition of his PRS to "[r]emain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically[.]" N.C. Gen. Stat. § 15A-1368.4(e)(13).

Thus, the question here is whether Defendant may have a reasonable expectation of privacy in the location data generated by his ankle monitor, where his monitoring was legally being conducted as a condition of PRS and the officer who accessed the location data was authorized to access the data directly, without going through another agency or officer. The State contends that to the extent Defendant believed he had an expectation of privacy as to his location data, particularly as to authorized law enforcement agencies, this belief is "unreasonable and not one that society is prepared to recognize as reasonable." Thus, the State contends "law enforcement's mere review of Defendant's location from his ankle monitor did not constitute a search."

The State is correct; under these circumstances, Sergeant Lane's accessing the ankle monitor data was not a "search" as defined by law. As the United States Supreme Court noted in *Kyllo*, most warrantless searches of a home are unreasonable and thus unconstitutional:

> On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. . . .
>
> In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog (persons, houses, papers, and effects) that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he justifiably relied upon the privacy of the telephone booth. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society

> recognizes as reasonable. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a house is concerned—unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search[.]

Kyllo v. United States, 533 U.S. 27, 31-33, 150 L. Ed. 2d 94, 100-01 (2001) (emphasis in original) (citations, quotation marks, and brackets omitted).

As a general principle, a defendant on PRS has a lower expectation of privacy than a defendant who has either completed his sentence or is subject to lifetime satellite-based monitoring. *See State v. Carter*, 283 N.C. App. 61, 69, 872 S.E.2d 802, 807-08 (2022) ("An offender subject to post-release supervision has a diminished privacy expectation. *See Samson v. California*, 547 U.S. 843, 844, 126 S. Ct. 2193, 165 L. Ed. 2d 250, 254 (2006) ('An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone.'); *Hilton*, ('SBM is clearly constitutionally reasonable during a defendant's post-release supervision period.'); § 15A-1368.4(b1)(6) (mandating SBM as a condition of post-release supervision for recidivists). So SBM as a condition of Defendant's 60-month period post-release supervision is constitutional.")); *see also State v. Grady*, 259 N.C. App. 664, 670, 817 S.E.2d 18, 24 (2018) ("Supervised offenders include probationers and individuals under post-release supervision following active sentences in the custody of the Division of Adult Correction. These individuals 'are on the "continuum" of state-imposed punishments[,]' and their expectations of privacy are accordingly diminished. Unsupervised offenders, however, are statutorily required to submit to SBM, but are not otherwise subject to any direct supervision by State officers." (citation omitted)).

In support of his argument that only probation or parole officers can access a defendant's ankle monitor data without a warrant, Defendant

cites to caselaw which indicates law enforcement cannot conduct a warrantless search of a defendant's person, residence, or vehicle without the participation of the defendant's probation or parole officer and caselaw where a place was searched without statutory authorization. *See State v. Grant*, 40 N.C. App. 58, 60, 252 S.E.2d 98, 99 (1979) ("[T]he requirement that [the defendant] submit to a search by *any* law enforcement officer without a warrant is invalid." (emphasis added)); *see also U.S. v. Midgette*, 478 F.3d 616, 626 (2007) ("In sum, these North Carolina cases hold that police officers may conduct the warrantless search of a probationer – indeed may even suggest the search – so long as the search is authorized and directed by the probation officer."); *McCants*, 275 N.C. App. at 841, 854 S.E.2d at 442 ("We hold the trial court erred by denying Defendant's motion to suppress the firearm and other evidence found as the result of the 11 May 2017 warrantless search of the Home."). But these cases address specific provisions of the statute governing searches of the person, residence, or vehicle of defendants on probation, not electronic monitoring of supervisees on PRS. The expectation of privacy is lower for a supervisee on PRS, and any expectation that an authorized law enforcement agency would not be able to access location tracking data is clearly unreasonable where the PRS statute does not limit the law enforcement agencies or personnel who may access the electronic monitoring data.

Here, a manager from BI Incorporated, the agency which provides the electronic monitoring services for North Carolina, testified "authorized users" have access to the GPS data, and authorized users are "officers of the North Carolina Department of Probation and Parole, Juvenile Justice and . . . the Department of Public Safety has vetted certain law enforcement agencies to be able to view this information[,]" which includes a screening process through the Department of Public Safety. Defendant was subject to electronic monitoring under PRS, and Sergeant Lane had authorization from DPS to utilize ankle monitor data maintained by BI Incorporated. Sergeant Lane reviewed only GPS data; he did not search Defendant's home, vehicle, or person. As a supervisee under PRS under North Carolina General Statute Section 15A-1368.4, Defendant had a lower expectation of privacy than the offenders subject to lifetime SBM under the *Grady* caselaw who were "unsupervised" but still subject to *lifetime* satellite based-monitoring. *See Grady*, 259 N.C. App. at 670, 676, 817 S.E.2d at 24, 28.

Therefore, the trial court did not err by denying Defendant's motion to suppress and properly allowed the State to present evidence as to Defendant's ankle monitor at trial.

III. Conclusion

Since this Court recently held North Carolina General Statute Section 15A-1215(a) is unconstitutional, and we are bound by our precedent, we must grant Defendant a new trial as a juror was substituted after deliberations had begun. We further affirm the trial court's denial of Defendant's motion to suppress as to the data from his ankle monitor and this evidence may be used in the new trial. Finally, as we must grant a new trial, we need not address the evidentiary issues involving Defendant's prior bad acts and the shirts worn by the victim's family members during part of the trial as these issues may not arise at the new trial.

AFFIRMED AND NEW TRIAL.

Judges ZACHARY and MURPHY concur.

MICHAEL EDWARD TUMINSKI, Plaintiff
v.
KRISTEN ANN NORLIN, Defendant

No. COA24-15

Filed 3 September 2024

1. Process and Service—complaint and summons—absolute divorce—statutory requirements for service—presumption of valid service

In an action filed by a recently divorced husband, the trial court did not abuse its discretion in denying the husband's motion to set aside the judgment for absolute divorce entered earlier in a separate action filed by the wife, where the wife had complied with all of the statutory requirements for service of process under Civil Procedure Rule 4(j)(1)(c) and, therefore, the divorce judgment was not void for lack of personal jurisdiction. The wife served the complaint and summons by certified mail, return receipt requested, to the husband's personal mailbox at a United Parcel Service ("UPS") store, which the husband had contractually authorized to act as his agent for receiving service of process. The wife provided proof of service by filing an affidavit with the return receipt attached, which raised a presumption of valid service that the husband was unable to rebut on appeal.

2. Divorce—motion to set aside—divorce judgment entered in earlier action—improper collateral attack

In an action filed by a recently divorced husband, the trial court did not abuse its discretion in denying the husband's motion to set aside the judgment for absolute divorce entered earlier in a separate action filed by the wife, where the husband argued that the judgment was void because the parties had not been separated for a year prior to the wife's filing for divorce. A divorce judgment that is regular on its face but was obtained through false swearing is voidable, not void ab initio, and the proper procedure for challenging such a judgment is to file a motion in the cause in the divorce action rather than to file an independent action. Although an exception exists for parties in divorce cases who are not properly served with process, that exception was inapplicable here, and therefore the husband's collateral attack on the divorce judgment was improper.

3. Civil Procedure—order denying motion to set aside judgment—language resembling Rule 11—harmless

An order denying a husband's Rule 60(b) motion to set aside a judgment for absolute divorce (entered earlier in a separate action filed by the wife) was affirmed, where the order contained language resembling that of Rule 11 concerning the husband's purported bad faith. The wife had not filed a motion for Rule 11 sanctions and the order did not sanction the husband; thus, any defect arising from the challenged language in the order was harmless and non-prejudicial.

Appeal by plaintiff from judgment entered 14 March 2023 by Judge Joal H. Broun in Chatham County District Court. Heard in the Court of Appeals 14 August 2024.

Patrick Law PLLC, by Kristen A. Grieser, for the plaintiff-appellant.

Jackson Family Law, by Jill S. Jackson, for the defendant-appellee.

TYSON, Judge.

Michael E. Tuminski ("Plaintiff") appeals from an order denying Plaintiff's Rule 60(b) Motion to set aside judgment for divorce and for declaratory judgment. We affirm.

I. Background

Plaintiff and Kristen A. Norlin ("Defendant") were married on 26 May 2018 and separated two years later on 4 May 2020. The marriage

produced no children. Plaintiff began spending the night in a room located above a detached garage. Within the same month, Plaintiff acquired a boat and began living on both the boat and above the detached garage. Defendant began holding herself out as separated from Plaintiff to friends and co-workers.

Plaintiff and Defendant remained in contact while separated. The parties picked up Plaintiff's boat, spent Plaintiff's birthday, and spent Christmas holidays together. Plaintiff became stranded in Jacksonville, Florida. Defendant flew down to help him move his boat to Ft. Myers, Florida.

Between 4 May 2020 and Christmas 2020, the parties occasionally engaged in sexual relations. The parties did not reconcile their marital issues and Defendant did not intend to reconcile. Plaintiff completed his move to Ft. Myers, Florida in January 2021 and began to live on his boat full time.

In early July 2021, Defendant informed Plaintiff of her intent to file for divorce. Defendant filed a verified Complaint for Absolute Divorce in Chatham County on 23 July 2021 with assigned court file number 21-CVD-497.

The Complaint and Summons were served by certified mail, return receipt requested, to Plaintiff's personal mailbox located in the Ft. Myers United Parcel Service ("UPS") store. Plaintiff contracted with UPS and authorized it to act as Plaintiff's agent for receiving service of process. The return receipt was labeled as having been received by "BP/FP" and had "COVID-19" instead of a signature.

Plaintiff additionally received notice of the divorce hearing scheduled on 1 September 2021. Neither Plaintiff nor his counsel appeared for the hearing. The court granted Defendant's motion and entered a Judgment for Absolute Divorce. Plaintiff did not appeal this judgment entered in 21-CVD-497.

Plaintiff filed a new complaint and action under assigned court file number 22-CVD-380 on 31 May 2022 to set aside the Judgment for Absolute Divorce pursuant to Rules 4(j)(1) and 60(b)(4) of our Rules of Civil Procedure. The trial court denied Plaintiff's purported motions by order filed 30 July 2023 on 31 July 2023. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Plaintiff argues the trial court erred by denying his Rule 60(b) motion to set aside the judgment for an absolute divorce and by sanctioning him pursuant to Rule 11(b).

IV. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court, and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 195, 217 S.E.2d 532, 540 (1975). A judgment is "subject to reversal for abuse of discretion only upon a showing by [the appellant] that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted). The trial court's findings of fact are binding upon appeal if supported by competent evidence. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998).

V. Plaintiff's Motion to Set Aside

A. Service of Process

[1] Plaintiff argues the trial court abused its discretion by denying his Rule 60(b) motion to set aside the earlier judgment entered in 21-CVD-497 as void due to a lack of personal jurisdiction caused by defective service of process. We disagree.

Our General Statutes allow a court to "reli[e]ve a party . . . from a final judgment, order, or proceeding" where "the judgment is void." N.C. Gen. Stat § 1A-1, Rule 60(b)(4) (2023). Personal jurisdiction over a defendant may only be obtained in two ways: (1) "the issuance of summons and service of process by one of the statutorily specified methods[;]" or (2) the defendant's voluntary appearance or consent to the court's jurisdiction. *Fender v. Deaton*, 130 N.C. App 657, 659, 503 S.E.2d 707, 708 (1998) (citation omitted); *Tobe-Williams v. New Hanover Cnty. Bd. of Educ.*, 234 N.C. App. 453, 461, 759 S.E.2d 680, 687 (2014) (citation omitted). "The law is well settled that without such jurisdiction, a judgment against [a] defendant is void." *Freeman v. Freeman*, 155 N.C. App. 603, 606-07, 573 S.E.2d 708, 711 (2002) (citation omitted).

Plaintiff failed to appear at the underlying trial court's hearing in 21-CVD-497, did not file a responsive pleading, nor did he contest the court's jurisdiction by other means. Effective service of process must be shown to enable the trial court to acquire personal jurisdiction over Plaintiff.

Defendant elected to complete service of process by serving the summons and the complaint through certified mail, return receipt

requested. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2023) authorizes service of process "[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." Defendant properly addressed and sent the certified mail to Plaintiff and the mail was delivered to Defendant's personal mailbox, located in the Ft. Myers UPS store. Defendant provided proof of service by filing an affidavit in the court file, with the return receipt attached. *Id.*

Sufficiency of proof of service is controlled by N.C. Gen. Stat. § 1-75.10(a)(4) (2023). When service of process is completed by certified mail, the proof of service can be provided "by affidavit of the serving party averring":

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (2023).

"If the record demonstrates compliance with the statutory requirements for service of process, such compliance raises a presumption the service was valid." *Yves v. Tolentino*, 287 N.C. App. 688, 691, 884 S.E.2d 70, 72 (2023) (citing *Patton v. Vogel*, 267 N.C. App. 254, 258, 833 S.E.2d 198, 202 (2019)); N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2023).

Plaintiff purports to challenge the presumption and the trial court's conclusion the summons and complaint were received. The trial court's findings of fact in a denial of a Rule 60(b) motion are binding on appeal, if supported by competent evidence. *See Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998). Defendant's affidavit, with return receipt attached, constitutes competent evidence supporting the trial court's finding and conclusion of delivery to the addressee. *See State v. Bradley*, 282 N.C. App. 292, 296, 870 S.E.2d 297, 301 (2022) ("Competent evidence is evidence that is admissible or otherwise relevant.") (citation omitted).

The record demonstrates Defendant's compliance with the statutory requirements and the judgment entered was a default judgment.

Defendant's affidavit "raises a [rebuttable] presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2023).

Beyond this presumption and affidavit of service, Plaintiff admits to "receiving all of his mail at the UPS [personal mailbox,]" as he was living on a boat at the time, and "he signed a contract authorizing the UPS store to act as his agent for receiving service of process addressed to his UPS [personal mailbox.]"

The requirements of Rule 4(j)(1) for service of process were met and service of process was effective. The trial court correctly concluded it acquired personal jurisdiction over Plaintiff in the underlying absolute divorce action in 21-CVD-497. *Id.*

B. One Year Requirement for Divorce

[2] Plaintiff argues the trial court abused its discretion by denying his Rule 60(b) motion to set aside the underlying judgment for absolute divorce as void. He asserts the parties had not been separated for a year prior to Defendant's filing for divorce, despite allegations in Defendant's complaint and affidavit.

Under N.C. Gen. Stat. § 50-6 (2023), parties must be separated for at least a year prior to filing for absolute divorce. "A party may obtain relief from a final judgment pursuant to Rule 60(b)(4) of the Rules of Civil Procedure, if . . . the judgment is void *ab initio*." *Dunevant v. Dunevant*, 142 N.C. App. 169, 174, 542 S.E.2d 242, 245 (2001) (citation omitted).

Where a party contends a divorce judgment was obtained through false swearing and the judgment is otherwise regular on its face, the judgment is voidable, not void *ab initio*. *See Stoner v. Stoner*, 83 N.C. App. 523, 525, 350 S.E.2d 916, 918 (1986). The procedure to challenge such a divorce judgment is through a motion in the cause in the divorce action, 21-CVD-497, rather than asserting an independent action. Plaintiff's collateral attack on the divorce judgment through independent action in 22-CVD-380 is improper. *See Carpenter v. Carpenter*, 244 N.C. 286, 295, 93 S.E.2d 617, 625-26 (1956).

While an exception exists for a defendant to a divorce action, who is prevented from presenting his case by an improper service of process, such exception does not apply in this case where Plaintiff was properly served. *Compare id.*, *with Henderson v. Henderson*, 232 N.C. 1, 9, 59 S.E.2d 227, 233-34 (1950).

As both the record and judgment are regular on their face and Plaintiff appointed an agent and admittedly received effective service of process through that agent, Plaintiff cannot collaterally attack the divorce judgment through independent action. *Id.* The trial court did not abuse its discretion by denying Plaintiff's Rule 60 motion. Plaintiff's argument is overruled.

VI. Rule 11 Language

[3] Plaintiff argues the trial court erred in including Rule 11 language in the order denying his Rule 60(b) motion. Defendant did not file a motion for Rule 11 sanctions, nor did the order sanction Plaintiff. Any language in the order concerning purported bad faith is harmless and non-prejudicial. *See* N.C. Gen. Stat. § 1A-1, Rule 61 (2023) ("No . . . error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right."). Plaintiff's argument is overruled.

VII. Conclusion

The trial court correctly denied Plaintiff's Rule 60 motion to set aside the prior absolute divorce decree in 21-CVD-497. Defendant did not file a motion for Rule 11 sanctions nor did the order sanction Plaintiff. Any language concerning Plaintiff's bad faith in the order was harmless and non-prejudicial. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges STADING and THOMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 SEPTEMBER 2024)

BRYAN v. FIREFLY MOUNTAIN PROPS., LLC No. 24-28	Haywood (20CVS894)	Dismissed
IN RE A.J. No. 24-141	Forsyth (21JT75-77)	Affirmed
IN RE G.R.R. No. 24-131	Forsyth (22JT89)	Affirmed
IN RE J.A. No. 24-161	Beaufort (20JT109)	Affirmed
REDEVELOPMENT COMM'N OF GREENSBORO v. MERIDIAN CONVENTIONS, LLC No. 23-941	Guilford (21CVS9622)	Affirmed
STATE v. BROOKS No. 23-1072	Pender (20CRS50629)	No Error
STATE v. BYNUM No. 23-1102	Mecklenburg (20CRS10046) (20CRS208153) (20CRS211153)	No Error
STATE v. DAVIS No. 23-953	Forsyth (22CRS361) (22CRS51576-77) (22CRS52480)	Affirmed
STATE v. DIAZ No. 24-104	Swain (21CRS387) (21CRS50326) (22CRS131)	No Error
STATE v. GIVENS No. 23-500	Iredell (21CRS51155) (21CRS752) (22CRS50197) (22CRS50865)	Vacated and Remanded
STATE v. HIGGS No. 24-45	Wake (20CR209675-910)	Vacated and Remanded
STATE v. KARAMIKIAN No. 23-895	Iredell (20CRS50955)	Dismissed

STATE v. MADDOX No. 24-148	Cleveland (20CRS54831) (22CRS18)	Affirmed
STATE v. McCOLLUM No. 23-1144	Rockingham (22CRS457-58) (22CRS51130-31)	Affirmed in Part, Vacated in Part, and Remanded for a new trial in 22 CRS 51130
STATE v. PARRY No. 24-229	Cherokee (17CRS50777) (17CRS50989)	Affirmed
STATE v. ROBINSON No. 24-290	Alamance (21CRS54417-19)	Dismissed
STATE v. SALDANA No. 24-9	Duplin (20CRS51229-30)	Affirmed
STATE v. SATTERFIELD No. 23-857	Person (21CRS50163) (22CRS132)	No Error
STATE v. SMITH No. 24-231	Pitt (22CRS1499) (22CRS1790)	Affirmed
STATE v. SUMMERS No. 24-317	Gaston (21CRS55086)	No Error
STATE v. THOMAS No. 23-558	Robeson (19CRS54864)	No Error
STATE v. VALENTINE No. 23-520	Forsyth (19CRS051876-79)	Affirmed
STATE v. WOMBLE No. 24-118	Moore (15CRS1840-41) (15CRS53116) (15CRS53120) (15CRS53404-07) (15CRS702982) (16CRS142) (16CRS50403)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS