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290 N.C. APP.

TABLE OF CONTENTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

DONNA S. STROUD

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W. FRED GORE
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ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS JR.
CLARENCE E. HORTON JR.
JOSEPH R. JOHN SR.
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.
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LINDA STEPHENS
ANN MARIE CALABRIA
RICHARD A. ELMORE
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PHIL BERGER JR.
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANDREA CROWELL, PLAINTIFF
v.
WILLIAM CROWELL, DEFENDANT

No. COA22-737

Filed 1 August 2023

Jurisdiction—subject matter—equitable distribution—order entered during pendency of appeal—issues in new order embraced in order appealed from

In an equitable distribution action, an order granting a preliminary injunction—preventing plaintiff from disposing of certain real property categorized as separate property—was vacated because the trial court lacked subject matter jurisdiction to enter the order during the pendency of plaintiff's appeal from a prior order—which required plaintiff to pay a distributive award to defendant—since the order granting the injunction addressed issues that were embraced by the prior order being appealed from. Specifically, a key issue in the pending appeal was whether the court erred in requiring plaintiff to pay the sum it awarded defendant given the collateral effect it would have on plaintiff's separate property—the same property that the court's preliminary injunction prevented plaintiff from disposing of.

Appeal by Plaintiff from order entered 9 May 2022 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 10 May 2023.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, and Plumides, Romano & Johnson, PC, by Richard B. Johnson, for plaintiff-appellant.

No brief filed for defendant-appellee.

MURPHY, Judge.

N.C.G.S. § 1-294 strips a trial court of subject matter jurisdiction to enter further orders during the pendency of an appeal if the issues in the new order are embraced by the order previously appealed from. Here, the trial court entered an order granting a preliminary injunction on behalf of Defendant during the pendency of a previous appeal that prevented Plaintiff from disposing of property.[1] However, the appropriateness of an order based on its collateral effect on that property was the primary issue in the second appeal; thus, the current order contains issues embraced by the order previously appealed from, and the trial court lacked subject matter jurisdiction to enter it.

BACKGROUND

This is the third appeal in a protracted litigation involving the distribution of marital debt between Plaintiff Andrea Crowell and Defendant William Crowell. The bulk of the relevant facts were recounted in the previous appeal:

> Plaintiff and Defendant were married on 11 July 1998, separated on 3 September 2013, and divorced in April 2015. As of the date of separation, Plaintiff and Defendant had incurred a significant amount of marital debt. On 17 February 2014, Plaintiff filed a complaint against Defendant for equitable distribution, alimony, and postseparation support. Defendant filed an answer to the complaint and included a counterclaim for equitable distribution.
>
> From 6 July 2016 to 8 July 2016, the issues of equitable distribution and alimony were tried in Mecklenburg County District Court. The parties had stipulated in the final pretrial order that 14212 Stewarts Bend Lane, 14228 Stewarts Bend Lane, and 14512 Myers Mill Lane were all Plaintiff's separate property, and the trial court distributed the properties, along with their underlying debts, to Plaintiff. The trial court also found the following:

1. On 6 June 2023, we resolved that appeal by partially vacating the trial court's equitable distribution judgment and order because the trial court improperly reduced the distributive award to a money judgment. *Crowell v. Crowell*, COA22-111, 289 N.C. App. 112, 888 S.E.2d 227, 231. However, we rejected Plaintiff's argument that the award's collateral effect on her separate property violated the law of the case. *Id.* at 230.

> As a result of this equitable distribution Defendant[] will have more debt than property and Plaintiff[] will have to liquidate her property to pay the distributive award. . . . Neither party has any liquid marital property left. . . . There was no choice but to distribute all the debts to Defendant[] in his case which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff[] that she may never be able to pay before her death.

On 15 August 2016, the trial court entered its equitable distribution judgment and alimony order, denying alimony and specifically ordering Plaintiff to liquidate 14212 Stewarts Bend Lane and 14228 Stewarts Bend Lane to satisfy the distributive award to Defendant. On 14 September 2016, Plaintiff appealed from the equitable distribution judgment and alimony order; and, on 2 January 2018, this Court issued a divided opinion. *See Crowell v. Crowell*, 257 N.C. App. 264, 285 (2018). The Majority opinion held, in relevant part, that the trial court did not err by "considering" Plaintiff's separate property and ordering her to liquidate it to satisfy a distributive award to Defendant. *Id.* However, on 16 August 2019, our Supreme Court issued a unanimous opinion reversing this Court's affirmation of the equitable distribution judgment and order and remanding with further orders to remand to the trial court. *Crowell v. Crowell*, 372 N.C. 362, 368 (2019). The Court concluded that "the trial court distributed separate property . . . when it ordered Plaintiff to liquidate her separate property to pay a distributive award" and that "there is no distinction to be made between 'considering' and 'distributing' a party's separate property in making a distribution of marital property or debt where the effect of the resulting order is to divest a party of property rights she acquired before marriage." *Id.* Our Supreme Court ultimately held the trial court could not order Plaintiff to liquidate her separate property to satisfy the distributive award because "trial courts are not permitted to disturb rights in separate property in making equitable distribution award orders." *Id.* at 370.

Pursuant to our Supreme Court's holding, the trial court held a hearing on 10 February 2021; and, on 16 July 2021,

the trial court issued an *Amended Equitable Distribution Judgment and Alimony Order*. The trial court concluded "Plaintiff[] has the ability to pay the distributive award as outlined herein[,]" incorporated the bulk of the 2016 order by reference, and entered the following distribution order:

> 1. Paragraph 6 (a) – (d) of the Decretal Section of the Original Order is hereby amended as follows:
>
> In order to accomplish the equitable distribution, Plaintiff[] is required to pay a distributive award of Eight Hundred Sixteen Thousand Seven Hundred Ninety-Four Dollars and no/100 ($816,794[.00]) to be paid as follows:
>
> > a. A lump [sum] payment of Ninety Thousand Dollars and no/100 ($90,000[.00]) within sixty (60) days from [10 February 2021].
> >
> > b. A second lump [sum] payment of One Hundred Thousand Dollars and no/100 ($100,000[.00]) within ninety (90) days of [20 February 2021].
> >
> > c. A third lump [sum] payment of Two Hundred Ten Thousand Dollars and no/100 ($210,000[.00]) on or before [10 February 2022].
> >
> > d. The balance of Four Hundred Twenty-Four Thousand Two Hundred Ninety-Four Dollars and no/100 ([$424,294.00]) owed is reduced to judgment and shall be taxed with post judgment interest and collected in accordance with North Carolina law.
>
> 2. Except as specifically modified herein, the parties' separate property, marital property, and divisible property shall remain as it was previously classified, valued, and distributed in the [15 August 2016 order].
>
> 3. Except as specifically modified herein, the [15 August 2016 order] shall remain in full force and effect.

(Marks omitted.) Plaintiff timely appealed.

Crowell v. Crowell, 289 N.C. App. 112, 113–15 (2023).

On 3 November 2021, during the pendency of the second appeal, Defendant filed a motion to enjoin Plaintiff from hiding or disposing of property which, if relinquished, would prevent her from complying with her obligations under the trial court's *Amended Equitable Distribution Judgment and Alimony Order*. In an order entered the same day, the trial court granted the motion, making, *inter alia*, the following findings of fact:

> 12. On June 25, 2021, Plaintiff[] sold the 14212 Stewarts Bend [Lane] property for approximately $600,000.[00.]
>
> 13. On July 16, 2021, this Court entered an [*Amended Equitable Distribution Judgment and Alimony Order*]. Said order provided, in part, for Plaintiff[] to pay [the amount specified above].
>
> 14. Despite having the cash to do so (after surreptitiously selling the real property), Plaintiff[] has not made a single payment owed to Defendant[.]
>
> 15. On August 13, 2021, Plaintiff[] filed a Notice of Appeal to the Amended Order. This appeal has no legal merit and was filed only to thwart [Defendant's] ability to collect the monies he has been rightfully owed for three (3) years.
>
> 16. Plaintiff[] is strategically avoiding paying her distributive award and is doing so in bad faith.
>
> 17. The Court has a legitimate concern that Plaintiff[] is taking purposeful actions to make herself judgment proof and that she intends to spend all of the Sales Proceeds from the recent real property sale, that she intends to transfer, sell, or otherwise dispose of CKE Properties, LLC or its only asset, the Myers Mill House, for the purpose of secreting any assets she may have available to pay the distributive award outside of the reach of the Court and/or Defendant[.]
>
> 18. To prevent irreparable harm to Defendant[] the Court has the remedy pursuant to [N.C.G.S.] § lA-1, Rule 65 to impose injunctive relief enjoining Plaintiff[] or anyone acting on her behalf from wasting these assets by enjoining

> Plaintiff[] and/or anyone acting on [her] behalf or at [her] direction from liquidating, borrowing against, cashing out, or absconding with the proceeds or ownership of received from the sale of 14212 Stewart's Bend Lane, CKE, or the Myers Mill House.
>
> 19. To prevent irreparable harm to Defendant[,] the Court has the remedy pursuant to [N.C.G.S.] § 1-440.1 to attach all of Plaintiff['s] assets pending Defendant['s] execution on the Amended Order.
>
> 20. Defendant[] has no adequate remedy at law to protect himself from Plaintiff['s] actions which will likely result in the imminent waste of assets that are necessary to satisfy Plaintiff['s] obligations to Defendant[.] If Plaintiff[] is not enjoined and/or her assets attached, she will likely be judgment proof and outside of the jurisdictional reach of the Court.

Based on these findings of fact, the trial court issued the following temporary restraining order:

> 1. The Motion in the Cause for Injunctive Relief (Temporary Restraining Order/Preliminary Injunction/Mandatory Injunction) is **GRANTED;**
>
> 2. Plaintiff[] or anyone or entity acting at her request, for her, or in concert with her from liquidating, transferring, leveraging, encumbering, selling, wasting, or otherwise dissipating a) CKE Properties, LLC; b) the Myers Mill House; and c) the Sales Proceeds from the sale of 14212 Stewart's Bend Lane.
>
> 3. This Order Re: Injunctive Relief shall expire upon the conclusion of a hearing commencing on [17 November] 2021 at 4:00 p.m. in Courtroom 8150.
>
> 4. At this day and time, Defendant['s] request for permanent injunctive relief, mandatory injunction, and attachment shall be brought on for hearing.
>
> 5. No bond shall be required.
>
> 6. The findings of fact contained herein are for purposes of this Order only and as required by Rule 65 of the North Carolina Rules of Civil Procedure and are not intended to be binding on the Court in any future proceeding.

After the 17 November 2021 hearing, the trial court orally continued the injunction until further orders, and that continuance was reduced to a written order on 6 May 2022. Plaintiff appealed.

ANALYSIS

On appeal, Plaintiff attacks the validity of the injunction on a number of bases, many of which have already been raised and resolved during prior appeals.[2] However, she also challenges the injunction on the following unique bases: first, that the trial court lacked jurisdiction to enter injunctive relief while the previous appeal was pending; second, that the preliminary injunction was improperly initiated as an independent cause of action; and, third, that the injunction was entered pursuant to improper procedure. However, as the resolution of Plaintiff's jurisdictional argument renders her other two arguments moot, we reach only that issue.

"For over a century, the Supreme Court has recognized that an appeal operates as a stay of all proceedings at the trial level as to issues that are embraced by the order appealed." *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 491 (2017), *disc. rev. denied*, 371 N.C. 116 (2018); *see also* N.C.G.S. § 1-294 (2022) ("When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."). "This is [N.C.G.S. §] 1-294 in a nutshell, for the statute itself draws a distinction between trial court's inability to rule on matters that are inseparable from the pending appeal and the court's ability to proceed on matters that are not affected by the pending appeal." *Plasman*, 253 N.C. App. at 491 (marks omitted). When the trial court enters an order after an appeal is perfected, whether the trial court retains subject matter jurisdiction to enter the new order depends on whether the substantive issues in the new order "are embraced by the order [previously] appealed." *Id.*; *see also Cox v. Dine-A Mate, Inc.*, 131 N.C. App. 542, 545 (1998) (examining the substantive issues in the order at issue in a previous appeal for overlap with those in a later order allegedly entered without jurisdiction under N.C.G.S. § 1-294). "Whether a trial court has subject-matter

2. This most prominently includes her contention that the injunction violates the law of the case and arguments derivative of that position appearing throughout her brief, which was a topic in her second appeal. *Crowell*, 888 S.E.2d at 230.

jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511 (2010).

In *Romulus v. Romulus*, 216 N.C. App. 28 (2011), we resolved an issue regarding a similar operation of N.C.G.S. § 1-294. There, we held that a trial court theoretically retains jurisdiction to enter orders securing the enforcement of an equitable distribution judgment while an appeal is pending because, under N.C.G.S. § 1-289, the execution of an equitable distribution judgment is not stayed by the perfection of an appeal. *Id.* at 37 ("[A]n equitable distribution distributive award is theoretically a 'judgment directing the payment of money' which is enforceable during the pendency of an appeal unless the appealing spouse posts a bond pursuant to N.C.G.S. § 1–289[.]"); *see also* N.C.G.S. § 1-289 ("If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, as set forth in this section."). However, under the facts of that case, we nonetheless held that the trial court was without subject matter jurisdiction to enter a contempt order directing the payment of past-due amounts because the issue of which amounts, if any, were due was embraced by the pending appeal. *Romulus*, 216 N.C. App. at 37 ("[T]he trial court does not have jurisdiction after notice of appeal is given to determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment.").

Here, the pending appeal concerned an *Amended Equitable Distribution Judgment and Alimony Order*—reproduced in pertinent part above—specifically with respect to whether the order complied with the law of the case and whether the trial court was authorized to reduce the distributive award to a money judgment. *Crowell*, 2023 WL 3829196 at *2-4. As in *Romulus*, the fact that the *Amended Equitable Distribution Judgment and Alimony Order* is a "judgment directing the payment of money" under N.C.G.S. § 1-289 "theoretically" permits the trial court to act in a manner that ensures Plaintiff's compliance. *Romulus*, 216 N.C. App. at 37. However, one of the two issues in the previous appeal concerned whether the trial court was authorized in requiring Plaintiff to pay the sum it awarded Defendant because of the collateral effect on Plaintiff's separate real property. *Crowell*, 2023 WL 3829196 at *2-3.

That real property is, in part, the very property affected by the injunction at issue in this case. Thus, the injunction concerns issues "embraced by the order [previously] appealed[,]" and the trial court was therefore without jurisdiction to enter it during the pendency of the that

appeal. *Plasman*, 253 N.C. App. at 491. As it acted without subject matter jurisdiction, we vacate the trial court's order.[3] *Romulus*, 216 N.C. App. at 38.

CONCLUSION

Pursuant to N.C.G.S. § 1-294, the trial court lacked subject matter jurisdiction to enter an injunction on Defendant's behalf. Accordingly, we vacate the trial court's order.

VACATED.

Judges GORE and FLOOD concur.

3. We further note that, to the extent the injunction thwarted any attempt by Plaintiff to dispose of her assets to avoid her obligations to Defendant, Defendant may retain a viable remedy for any such actions under the Uniform Voidable Transactions Act. *See* N.C.G.S. § 39-23.1 *et seq.* (2022); *see also* N.C.G.S. § 50-16.7 (2022) ("A dependent spouse for whose benefit an order for the payment of alimony or postseparation support has been entered shall be a creditor within the meaning of Article 3A of Chapter 39 of the General Statutes pertaining to voidable transactions."); *Crowell v. Crowell*, 257 N.C. App. 264, 287 (2018) (Murphy, J., concurring in part and dissenting in part) ("The Majority goes to great length to illustrate that the transfers fall within the UFTA, and I agree with the analysis contained therein, but the Majority does not cite a single case where a transfer was rescinded without the transferee being a party to the litigation. By requiring non-parties to act and effectively rescind the transfers, the trial court has permanently barred CKE and Kirby from raising any defenses or protections they may have under N.C.G.S. §§ 39-23.8 (2015) or 39-23.9(3) (2015)."), *rev'd and remanded*, 372 N.C. 362 (2019).

FUN ARCADE, LLC, AND BARRACUDA VENTURES, LLC, PLAINTIFFS
v.
CITY OF HICKORY, THURMAN WHISNANT, HICKORY CHIEF OF POLICE, IN HIS OFFICIAL CAPACITY, CITY OF CONOVER, ERIC LOFTIN, CHIEF OF POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA22-557

Filed 1 August 2023

1. Gambling—electronic sweepstakes—game of chance versus game of skill—predominant factor test

Plaintiffs' operation of a game called Ocean Fish King violated the prohibition against the operation of electronic sweepstakes machines and similar games of chance (N.C.G.S. § 14-306.4) because—although some measure of dexterity was required to operate the joystick to aim and shoot at the game's sea creatures—the game was primarily one of chance, as players could not strategically optimize a favorable return on credits.

2. Civil Procedure—brief in support of motion for summary judgment—timely service

In an action involving the state's prohibition against the operation of electronic sweepstakes machines and similar games of chance (N.C.G.S. § 14-306.4), where defendants' brief in support of their motion for summary judgment was timely served on the Thursday before the summary judgment hearing that was scheduled for the following Monday—in compliance with Civil Procedure Rule 5(a1), which requires service at least two days before the scheduled hearing—the trial court did not abuse its discretion in denying plaintiffs' motion to continue the hearing.

Appeal by Plaintiffs from an order entered 15 March 2022 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 25 January 2023.

Posch Law Firm, by Gregory A. Posch, and Trapp Law PLLC, by Jonathan W. Trapp, for Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader, Patrick H. Flanagan, Martin & Monroe Pannell, P.A., by Monroe Pannell, and Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper, for Defendants-Appellees.

WOOD, Judge.

Section 14-306.4 of our General Statutes outlaws the operation of electronic sweepstakes machines and similar games of chance. We are tasked in this appeal with determining whether the controversial game Ocean Fish King has been caught up in the broad net of our state's sweepstakes prohibition.

I. Background

Fun Arcade, LLC, and Barracuda Adventures, LLC, (together "Plaintiffs") own several businesses that host certain gaming machines in this state. Plaintiffs' facilities allow players to buy gaming e-credits at kiosks and select to play from a host of electronic games. Players can exchange their gaming e-credits for cash value at a sales counter. The games available include titles such as Cop the Lot, Amigos Gold, Super Diamond Deluxe, Wheel of Riches, and Ocean Fish King. The game Ocean Fish King is the subject of this appeal.

In August 2018, the cities of Hickory and Conover and their respective Police Chiefs, Thurman Whisnant and Eric Loftin, (altogether "Defendants") sought to enforce against Plaintiffs this state's prohibition of slot machines and, later, electronic sweepstakes machines for their operation of Ocean Fish King and similar games.

Upon notice of Defendants' intent to enforce the prohibition, Plaintiffs filed a complaint for a declaratory judgment, a temporary restraining order, and a temporary and permanent injunction against Defendants on 20 September 2018 in Catawba County Superior Court. Defendants filed Answers to the complaint in December 2018.

On 14 March 2019, Defendants filed an expert affidavit from Andrew Baran ("Baran"), a Senior Engineering Manager for Gaming Laboratories International, LLC. Baran conducted an analysis of Ocean Fish King to determine the game's configuration settings and the effect of player interactions in relation to the game's outcome. The object of Ocean Fish King is to shoot at and destroy sea creatures that move around the screen. There are many sea creatures on the screen at any given time, so it is difficult for a player to miss hitting a sea creature with a shot. During the game, each shot taken at a sea creature equates to one wager being placed. A player is allowed to choose how many credits they wish to wager on each shot fired. Once they have selected the wager, the player uses a joystick to aim and shoot at the sea creatures. After each shot fired, the player's credit balance is debited by the amount of the selected

wager. When a shot hits a sea creature, the player is awarded a credit value based on the sea creature that was destroyed.

Baran observed no pattern for the number of shots required to destroy a sea creature. For example, a sea creature requiring thirty shots to be destroyed may require only five shots to be destroyed at a later point in the game. By analyzing the game's software, Baran determined that there was no specific strategy or advantage that a player could learn to receive a better outcome in the game. Furthermore, the game has a measurement called the return to player calculation ("RTP"). The RTP is the ratio of money paid to play the game to the amount of money returned to the player at the end of the game. Ocean Fish King has an RTP of approximately 97% to 99%, which means that, on average, 97% to 99% of the money paid to play the game is returned to the player in cash.

Plaintiffs filed an expert affidavit from Dr. Neil Mulligan ("Mulligan"), a Professor and Director of the PhD program in Cognitive Psychology at the University of North Carolina at Chapel Hill, on 20 March 2019. Mulligan described the process of playing the game, and the way the software operated, in the same manner Baran described it. Mulligan testified that the sea creatures vary in size, movement, and value and that the number of shots needed to destroy a creature is unknown to the player. However, he contended that players could develop a skill to memorize the game's patterns over time. He reasoned that a novice player could improve with experience in terms of accuracy, selection of optimal targets, and in terms of overall score if the player repeatedly played the game. In addition, Mulligan stated that success in the game was determined by the player's dexterity, because the players are required to aim at the creatures. Using Mulligan's testimony, Plaintiffs contend Ocean Fish King is not a lottery game because it is a game of skill.

On 12 March 2021, Defendants filed a joint motion for summary judgment against Plaintiffs. The matter was held in abeyance until our Supreme Court issued its decision in *Gift Surplus v. State ex rel. Cooper*. Thereafter, Defendants noticed their motion for hearing.

Plaintiffs moved to continue the hearing alleging procedural error with the timing of Defendants' service of their motion. On 14 March 2022, the trial court denied the motion to continue the summary judgment hearing and granted Defendants' motion for summary judgment on 15 March 2022. Plaintiffs appeal as of right pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

II. Standard of Review

We review a trial court's summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669, S.E.2d 572, 576 (2008). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted). A trial court's summary judgment order "is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. at 573, 669, S.E.2d at 576 (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "[T]he trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *In re Will of Jones*, 362 N.C. at 573, 669, S.E.2d at 576. "Nevertheless, '[i]f there is any question as to the weight of evidence, summary judgment should be denied.' " *Id.* at 573-74, 669 S.E.2d at 576 (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999)).

A trial court's denial of a motion to continue is reviewed for abuse of discretion. *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001). "The moving party has the burden of proof of showing sufficient grounds to justify a continuance." *Id.*

III. Discussion

On appeal, Plaintiffs first argue the trial court erred when it granted Defendant's motion for summary judgment regarding Ocean Fish King, as the court identified it as a prohibited gaming machine despite expert opinion to the contrary. Plaintiffs also argue the trial court erred when it denied Plaintiffs' motion to continue the summary judgment hearing. Plaintiffs contend that Defendants' service of briefs in support of their motion was untimely. For the reasons outlined below, we affirm the trial court's rulings.

A. Summary Judgment Order

[1] It is generally unlawful "to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display." N.C. Gen. Stat. § 14-306.4(b)(1) (2022). "Sweepstakes," in this sense, is defined as "any game, advertising

scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, *the determination of which is based upon chance*." *Id.* § 14-306.4(a)(5) (emphasis added).

Applying this prohibition, we are informed by our Supreme Court's recent decision in *Gift Surplus, LLC v. State ex rel. Cooper*, 380 N.C. 1, 868 S.E.2d 20 (2022). There, the court emphasized that a determination as to whether an electronic game violates the prohibition turns on whether the game is one of chance or one of skill. *Gift Surplus*, 380 N.C. at 10, 868 S.E.2d at 26. The court defined games of chance and skill consistent with a common understanding of the terms.

> A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance . . . A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory.

Id. (quoting *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 368, 762 S.E.2d 666, 685 (2014) (Ervin, J., dissenting)). In determining whether a game is one of chance or one of skill, the court re-affirmed the use of a predominant-factor test. *Id.* This test asks if chance or skill " 'is the dominating element that determines the result of the game, to be found from the facts of each kind of game,' or, 'to speak alternatively, whether . . . the element of chance is present in such a manner as to thwart the exercise of skill or judgment.' " *Id.* (quoting *Sandhill*, 236 N.C. App. at 368, 762 S.E.2d at 685 (Ervin, J., dissenting)). We must therefore decide if, "viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Id.*, 380 N.C. at 10, 868 S.E.2d at 27 (quoting *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 403, 858 S.E.2d 581, 589 (2021)).

Plaintiffs first argue the trial court erred in granting Defendants' summary judgment motion because material issues of fact remained as to whether Ocean Fish King is a game of chance or skill. Plaintiffs point to conflicting expert opinion to support this argument.

Defendants' expert testified in his affidavit that he believed Ocean Fish King operates predominantly as a game of chance, in which a game's outcome is predetermined from a formula programed into the

game. Conversely, Plaintiffs' expert testified that the game is one of skill and highlighted the hand-eye coordination, weapon selection, visual recognition, and other considerations necessary to succeed at the game.

Plaintiffs, however, do not disagree with Defendants as to how the game is played. Both acknowledge, for example, that players must use controllers to aim weapons at a screen full of fish, shoot the fish with these weapons, and receive points as a result of destroying the fish. "[W]hether chance or skill predominates in a given game is a mixed question of fact and law and is therefore reviewed de novo when there is no factual dispute about how a game is played." *Id.* at 11, 868 S.E.2d at 27. Thus, though the experts disagree as to whether the game is predominantly one of skill or chance, the trial court did not err in its determination when there is no dispute as to how the game actually is played.

Plaintiffs next argue that the trial court otherwise erred in determining that chance predominates over skill with Ocean Fish King, claiming that the trial court improperly applied the predominant-factor test. To the contrary, the court properly considered the uncontested means of play when it determined that Ocean Fish King is predominantly a game of chance.

As explained, the reviewing court must consider whether the game's outcome "varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Id.* at 12, 868 S.E.2d at 28 (quoting *Crazie Overstock*, 377 N.C. at 403, 858 S.E.2d at 589). Using this test, or variances of it, our Supreme Court concluded that bowling is predominantly a game of skill, *State v. Gupton*, 30 N.C. (8 Ired.) 271, 275 (1848), whereas poker is predominantly a game of chance, *Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409, 451 S.E.2d 306, 309 (1994). Again, *Gift Surplus* instructs. There, our Supreme Court held a game resembling a slot machine, but which featured "double-nudging" and always paid out some winnings, violated the electronic sweepstakes prohibition. *Gift Surplus*, 380 N.C. at 15, 868 S.E.2d at 30. Players could only slightly influence the game's outcome. *Id.* It concluded, even if a player were to become more skilled, "chance would always predominate because, when chance determines the relative winnings for which a player is able to play, chance 'can override or thwart the exercise of skill.' " *Id.*, at 14, 868 S.E.2d at 29 (quoting *Sandhill*, 236 N.C. App. at 369, 762 S.E.2d at 685).

In the present case, Ocean Fish King players use digital weapons, controlled with a joystick, to shoot projectiles at sea creatures as they appear on the display screen. The screen is crowded with fish. Each fish

requires a set amount of hits to destroy. The player does not know how many hits are required to destroy a given fish, and similar looking fish do not necessarily require the same number of hits every game.

Applying the predominant-factor test here, we likewise hold that Ocean Fish King is predominantly a game of chance. Though players must have some measure of dexterity to use the joystick, a player cannot know beforehand how many hits are necessary to destroy fish and, thus, cannot strategically optimize a favorable return on credits. Since a player wins credits proportional to the number and type of fish destroyed, this game is predominantly one of chance, and any "skill and dexterity involved is essentially *de minimis*." *Id.* at 14, 868 S.E.2d at 29.

This is true though the game, at first glance, appears less like a Vegas-styled slot machine and more like a classic arcade game, where multiple players feverishly compete with each other for the winning score. Yet, appearance is not controlling. "The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited." *Id.* (quoting *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 290, 749 S.E.2d 429, 431 (2012)). The trial court did not err when it granted summary judgment in favor of Defendants.

B. Continuance

[2] Plaintiffs next argue the trial court improperly denied their motion to continue the summary judgment hearing because Plaintiffs did not timely receive service of Defendants' brief in support of their motion. Plaintiffs argue that Defendants should have served their brief on Wednesday, 9 March 2022 instead of Thursday, 10 March 2022, because the hearing was scheduled for the following Monday, 14 March 2022.

Rule 5(a1) of the North Carolina Rules of Civil Procedure states that briefs must be served at least two days before the scheduled hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 5(a1) (2022). If the brief is not served on the opposing party at least two days before the hearing on the motion, the court may "continue the matter for a reasonable period" to allow the opposing party to respond to the brief. *Id.* Rule 6(a) states that the day of the hearing is included in the two-day window, as long as it is not a Saturday, Sunday, or legal holiday. § 1A-1, Rule 6(a).

This Court contemplated Plaintiffs' argument in *Harrold v. Dowd*, 149 N.C. App. 777, 786-87, 561 S.E.2d 914, 921 (2002). There, a brief was served upon opposing counsel on a Thursday when the hearing was scheduled for the following Monday. *Id.* The court determined that the service was proper under Rule 5(a1). *Id.* Likewise, we conclude Defendants' brief was timely served. Plaintiffs' argument is without merit.

IV. Conclusion

Defendants timely served their brief in support of their motion for summary judgment prior to the hearing. The trial court did not abuse its discretion in denying Plaintiffs' motion to continue the hearing. Because N.C. Gen. Stat. § 14-306.4 outlaws the operation of electronic sweepstakes machines and similar games of chance, Plaintiffs' operation of Ocean Fish King violated the prohibition against electronic sweepstakes machines. We therefore affirm the trial court's order granting Defendants' motion for summary judgment.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

GREASEOUTLET.COM, LLC, PLAINTIFF
v.
MK SOUTH II, LLC, DEFENDANT

No. COA22-648

Filed 1 August 2023

Landlord and Tenant—commercial lease—option to renew—unrecorded lease amendment—subsequent purchaser—not subject to leasehold interest

The trial court did not err by dismissing an action brought by a tenant (plaintiff) against its current landlord (defendant) to enforce a commercial lease amendment (agreed upon by the prior landlord, which gave plaintiff an option to renew its lease for another five-year term) where plaintiff's complaint failed to allege sufficient facts to show that defendant acquired its fee simple interest in the property subject to plaintiff's leasehold interest. Although a memorandum containing the option to renew was recorded, no new memorandum was recorded after the actual amendment was signed four months later; therefore, the memorandum was insufficient to bind future purchasers to the amendment's terms beyond the end of the original lease term. Further, defendant was not estopped from refusing to honor the option to renew because the deed conveying the property did not contain any language stating that defendant was taking subject to the unregistered lease amendment, and there was no basis for reformation of the deed where plaintiff did not assert that a term

had been left out by mutual mistake. Finally, neither the estoppel certificate provided to defendant during due diligence nor defendant's later acceptance of plaintiff's rent check (for a period of time beyond the end of the original lease) were sufficient bases for binding defendant to the renewal option.

Appeal by plaintiff from order entered 24 February 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 22 February 2023.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Gary S. Parsons and Sarah M. Saint, for Plaintiff-Appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Scott A. Miskimon and Jang H. Jo, for Defendant-Appellee.

DILLON, Judge.

Plaintiff appeals from an order granting Defendant's motion to dismiss all claims alleged in Plaintiff's complaint pursuant to Rule 12(b)(6). We affirm.

I. Standard of Review

We review a trial court's dismissal pursuant to Rule 12(b)(6) *de novo*, deciding whether the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Sykes v. Health Network*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). Dismissal under Rule 12(b)(6) is proper when the complaint on its face reveals either that no law supports the plaintiff's claim, the absence of facts sufficient to make a good claim, or some fact that necessarily defeats the plaintiff's claim. *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

II. Background

This appeal concerns a dispute between a landlord and its tenant over whether the landlord must honor the commercial lease amendment entered into by the tenant with the landlord's predecessor in title, including a provision granting the tenant options to renew. The allegations in Plaintiff's amended complaint show as follows:

Plaintiff Greaseoutlet.com, LLC, ("Tenant") operates an environmentally sensitive business, processing grease trap effluent generated by restaurants. To operate its business, Tenant must obtain certain permitting from the State.

In the Spring of 2016, Tenant entered into an agreement (the "Lease") to lease certain industrial property in Raleigh (the "Property") from the Property's then-owner ("Former Owner") for a term of five years, to expire on 30 April 2021. In August 2016, a memorandum executed by Former Owner that outlined certain Lease provisions, including that the term was for five years, was recorded in the Wake County Registry.

Four months later, in December 2016, Tenant and Former Owner entered an agreement amending certain provisions of the Lease (the "Amendment"). This Amendment contained a provision granting Tenant the option to renew the Lease term past 30 April 2021 for two successive five-year terms. However, no new memorandum regarding this Amendment was recorded in the Wake County Registry.

In December 2018, Tenant secured the necessary State permit to continue operating its business on the Property through 30 April 2021, coinciding with the original Lease term. As part of Tenant's permit application, Former Owner signed a landlord authorization form required by the State to issue the permit.

A year later, in December 2019, Former Owner sold the Property to Defendant MK South II, LLC, ("Current Owner"). Current Owner purchased the Property with plans to combine it with other properties for future redevelopment. Prior to purchasing the Property, Current Owner conducted due diligence. During the due diligence period, Current Owner received a copy of the Lease and of the Amendment. Also, during the due diligence period, Tenant signed a tenant estoppel certificate (the "Estoppel Certificate") directed to Current Owner, acknowledging, among other things, that it was currently a tenant under a lease, that neither it nor Former Owner were in default, and that it had not prepaid any rent to Former Owner.

In early 2020, Current Owner told Tenant that Tenant needed to vacate the Property at the end of the current five-year term, ending in April 2021. Tenant essentially responded that it would be too expensive to move its business.

In August 2020, Tenant notified Current Owner that it was exercising its option (as contained in the unregistered Amendment) to renew the lease for a new five-year term, to begin on 1 May 2021. In October 2020, Tenant sent a check, prepaying the rent for all of 2021, which included rent for the last four months of the initial term and the first eight months of the new term. Current Owner deposited the check. During this time, however, Current Owner was working towards gaining approvals to repurpose its assembled tracts, including the Property,

for redevelopment, gaining rezoning approval in December 2020. Also, in November 2020, when Tenant asked Current Owner to sign a new landlord authorization required as part of Tenant's application with the State to renew Tenant's permit to operate its business beyond April 2021, Current Owner refused to sign. Instead, the parties discussed an extension of Tenant's leasehold beyond April 2021. In January 2021, Current Owner notified Tenant it would sign the landlord authorization required for Tenant's permit renewal and agree to allow Tenant to extend its leasehold for five years (through April 2026) *if* Tenant agreed that Landlord could unilaterally terminate the Lease after two years into the renewal term (April 2023). Tenant refused this offer.

In March 2021, Current Owner notified Tenant that it did not consider itself bound by the Amendment and that Tenant's leasehold would terminate at the end of the next month (30 April 2021). Current Owner sent a check to reimburse Tenant for the prepaid rent for the last eight months of 2021. Tenant has not deposited or otherwise accepted this reimbursement. Rather, Tenant attempted to exercise its option to renew the Lease term as contained in the Amendment. However, Current Owner refused to honor Tenant's option as contained in the Amendment.

Tenant commenced this action against Current Owner, alleging six claims based on Current Owner's actions and inactions regarding the Lease and Amendment, including its failure to honor Tenant's right to renew the lease term.

In February 2022, after a hearing on the matter, the trial court granted Current Owner's Rule 12(b)(6) motion to dismiss Tenant's claims. Tenant appeals.

III. Analysis

Tenant's arguments on appeal turn on whether Current Owner's fee simple interest is subject to Tenant's leasehold interests beyond April 2021.

Specifically, in the Spring of 2016, Tenant acquired a leasehold interest in the Property ending in April 2021 when Former Owner executed the Lease. In December 2021, Tenant acquired a new interest in the Property, specifically the option to extend its leasehold beyond April 2021 for two five-year terms when Former Owner executed the Amendment.[1]

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1. Whether the options to renew granted to Tenant in the Memorandum was supported by consideration from Tenant is not before us. *See, e.g.*, *Barnes v. Saleeby*, 177 N.C.

Three years later, in December 2019, Current Owner acquired a fee simple interest in the Property when Former Owner executed a deed conveying the same to Current Owner. This deed did not contain any language stating that Current Owner's fee simple interest was subject to Tenant's leasehold interest. However, though Current Owner's deed was immediately registered, Current Owner concedes its fee simple interest was subject to Tenant's leasehold interest through April 2021, based on the prior recorded Memorandum. On appeal, Tenant makes several arguments as to why Current Owner's fee simple interest is also subject to its leasehold renewal interest, which we address in turn.

A. Connor Act

Tenant argues that Current Owner's interest is subject to its leasehold renewal interest contained in the Amendment because the registered Memorandum complied with the Connor Act in providing record notice of the Amendment, notwithstanding that the Memorandum was filed four months prior to the date of the Amendment. For the reasoning below, we disagree.

Prior to 1829, North Carolina was essentially a notice state, such that any "unregistered incumbrance would be upheld . . . against a subsequent registered incumbrance or conveyance with notice of the former[.]" *Robinson v. Willoughby*, 70 N.C. 358, 363 (1874). In 1829, our General Assembly passed the predecessor to Section 47-20, declaring "no deed in trust or mortgage . . . shall be valid at law to pass any property as against creditors and purchasers for a valuable consideration." *Id.* Accordingly, the interest of a subsequent purchaser for value of property is not subject to a prior, unregistered mortgage against that property, even if the subsequent purchaser had full knowledge of the prior, unregistered mortgage. *Id.* at 364 ("[N]o notice, however full or formal, will supply the want of registration."). The 1829 Act, however, only applied to unregistered mortgages and deeds of trust; North Carolina remained a notice state with respect to other prior, unregistered interests. *Id.*

In 1885, with the passage of the Connor Act, now codified as N.C. Gen. Stat. § 47-18, our General Assembly made North Carolina a "pure race" state with respect to most other real estate interests. *See DOT v. Humphries*, 347 N.C. 649, 657, 496 S.E.2d 563, 567 (1998) (describing North Carolina as a " 'pure race' state"). The Connor Act was named

256, 260, 98 S.E. 708, 710 (1919) ("An option *in the original lease* to renew would not be without consideration, but a promise *during the lease [term]* to give the tenant such option [without separate consideration] is without consideration[.]" (Emphasis added.)).

for its sponsor, Senator Henry Groves Connor[2], later a member of our Supreme Court. While serving on our Supreme Court, Justice Connor explained that the purpose of the Act was to make land titles more certain:

> The purpose of the statute was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. That hardship would come to some in applying the rigid statutory rule was well known and duly considered. . . .
>
> The change in our registration laws was demanded by the distressing uncertainty into which the title to land had fallen in this State. . . .
>
> If the [holder of an unrecorded interest] has sustained injury [because his interest with the prior owner should have been recorded], it is to be regretted, but it is not the fault of the law. Its protective provisions are clear and explicit. To permit him to disregard it at the expense of the [subsequent purchaser] who has obeyed it would be to seriously impair the value of the statute and return to many of the evils which its enactment sought to remove.

Wood v. Tinsley, 138 N.C. 507, 515, 51 S.E. 59, 62 (1905). Accordingly, as with unregistered deeds of trust and mortgages under the 1829 Act, the Connor Act affirms the principle that "[a]ctual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or [long-term] lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel." *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965).

The Connor Act does not require all leasehold interests to be registered in order to have priority over the interests of a subsequent purchaser for value. Rather, the Connor Act only requires a leasehold interest for more than three years to be registered. N.C. Gen. Stat. § 47-18(a) (Connor Act applies to a "lease of land for more than three years"). *See Perkins v. Langdon*, 237 N.C. 159, 165-66, 74 S.E.2d 634, 640

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2. In referring to the Connor Act, our Supreme Court and our Court have occasionally misspelled the Senator's name when referring to the Act, as "Conner". *See, e.g.*, *DOT v. Humphries*, 347 N.C. 649, 654, 496 S.E.2d 563, 566 (1998); *Hornets Nest v. Cannon*, 79 N.C. App. 187, 193, 339 S.E.2d 26, 30 (1986). The authoring judge here recently used both spellings to refer to the Act in the same paragraph of an opinion. *Benson v. Prevost*, 277 N.C. App. 405, 417, 861 S.E.2d 343, 351 (2021).

(1953) (purchaser takes subject to short-term lease when it had knowledge of the lease or if circumstances put the purchaser on inquiry notice regarding the lease's existence).

For instance, in *Bourne*, our Supreme Court held that purchasers with actual knowledge of an existing five-year lease were not bound by its terms, including the term granting the tenant an option to renew its leasehold for five years, where the lease was not registered. *Bourne*, 264 N.C. at 35, 140 S.E.2d at 771 (recognizing "[a] lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded"). The Court explained in a later case that a new owner of real estate was not bound by the existing tenant's unregistered lease containing options to renew for five years:

> [Plaintiff] recorded her deed [in 1979], and the defendant recorded its options to renew the lease [in 1980]. It is well settled in this state that only actual prior recordation of an interest in land will serve to put a bona fide purchaser for value or a lien creditor on notice of an intervening interest or encumbrance on real property. Because defendant's lease was not recorded prior to the date on which plaintiff recorded her deed, plaintiff did not take the deed subject to the lease. Therefore, [she] is entitled to possession, and summary judgment on the issue of ejectment should have been entered for the plaintiff.

Simmons v. Quick-Stop, 307 N.C. 33, 42, 296 S.E.2d 275, 281 (1982).[3]

It is sufficient under the Connor Act to register a memorandum, rather than the actual lease, so long as the memorandum recites the lease's key terms sufficient to put the world on record notice the extent of tenant's leasehold interest. N.C. Gen. Stat. § 47-118(a) (2021). Tenant contends that the Memorandum recorded four months before Former Owner executed the Amendment granting Tenant options to renew its leasehold beyond April 2021, nonetheless, satisfied the Connor Act with respect to the Amendment since the Memorandum refers to any subsequent amendments to the Lease, stating in relevant part:

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3. Our Court, likewise, has also recognized that a purchaser for value is not bound by an existing long-term lease that is not recorded. *New Bar v. Martin*, 221 N.C. App. 302, 316, 729 S.E.2d 675, 687-88 (2012) (purchaser with actual knowledge of an existing long-term unrecorded lease is not bound by its terms); *Purchase Nursery v. Edgerton*, 153 N.C. App. 156, 161, 568 S.E.2d 904, 907 (2002) (stating that a lease with a term of more than three years "must be recorded to be valid against a lien creditor or a third party purchaser value[.]").

> This Memorandum of Lease . . . is of that certain Lease Agreement dated March 12, 2016 . . . by and between [Tenant and the Former Owner].
>
> . . . [Former Owner has leased] to Tenant [the Property] for a term that began on May 1, 2016 and continues until April 30, 2021, unless sooner terminated in accordance with the terms of the Lease.
>
> The provisions set for the in the Lease and *any amendments entered into by the parties subsequent to this Memorandum* between [the Current Owner] and Tenant are hereby incorporated into this Memorandum by reference.
>
> . . . Upon the expiration of the state[d] Lease term, this Memorandum shall automatically terminate.

(Emphasis added.)

We, however, conclude this Memorandum is insufficient to bind Current Owner beyond the initial term ending in April 2021. Our General Assembly requires that a memorandum of lease *shall* state the term of the lease, *including extensions/renewals*:

> (a) A lease of land . . . may be registered by registering a memorandum thereof which shall set forth:
>
> * * *
>
> (3) The term of the lease, including extensions, renewals options to purchase, if any;
>
> * * *
>
> (b) If the provisions of the lease make it impossible or impractical to state the maximum period of the lease because of conditions, renewals and extensions, or otherwise, then the memorandum of the lease shall state in detail all provisions concerning the term of the lease as fully as set forth in the written lease agreement between the parties.

N.C. Gen. Stat. § 47-118(a)-(b).

Section 47-118 provides a form that may be used when drafting a memorandum to be recorded, *see* N.C. Gen. Stat. § 47-118(a), but also allows for other forms to be used, provided they "are sufficient in law[,]" *see* N.C. Gen. Stat. § 47-117(a) (2021).

The recorded Memorandum in this case states the term of Tenant's leasehold interest expires on "April 30, 2021, unless sooner terminated in accordance with the terms of the Lease" and that "[u]pon the expiration of the *state[d] Lease term*, this Memorandum shall automatically terminate." (Emphasis added.) To protect its leasehold rights in the Property beyond April 2021 against subsequent recorded interests, Tenant should have caused a new memorandum to be registered. But it did not. The Memorandum recorded was not in a form "sufficient in law" to subject future purchasers to its leasehold interest beyond April 2021, as contained in the Amendment.

B. Estoppel

Tenant argues that, even if the Memorandum was not sufficient under the Connor Act to protect its leasehold interests beyond April 2021, it has sufficiently alleged facts to support its contention that Current Owner is estopped from not honoring Tenant's said interests. Specifically, Tenant notes its allegation that "[o]n information and belief, the [written] purchase and sales contract . . . required [Current Owner] to assume all lease obligations owed to any tenants at the Property[.]" As explained more fully below, we conclude Tenant's estoppel fails because Tenant has not alleged that Current Owner's deed from Former Owner stated that Current Owner was taking subject to Tenant's unregistered leasehold interest beyond April 2021 or facts showing that the deed should be reformed to include such language.

Our Supreme Court has stated that "matters creating estoppel" may bind a subsequent purchaser to the terms of an existing, unrecorded [long-term] lease." *Bourne*, 264 N.C. at 35, 140 S.E.2d at 771. However, "matters of estoppel" refers to situations where a subsequent purchaser accepts a deed from the seller which contains language the purchaser is taking subject to an existing, unrecorded interest:

> When a grantee accepts the conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by the grantor, he takes the estate burdened by such claim or interest. By his acceptance of the deed, he ratifies the unrecorded instrument, agrees to stand seized subject thereto, and estops himself from asserting its invalidity.

Dulin v. Williams, 239 N.C. 33, 40, 79 S.E.2d 213, 218 (1953) (quoting *State Trust Co. v. Braznell*, 227 N.C. 211, 215, 41 S.E.2d 744, 747 (1947)). It is not enough for the deed to merely refer to the lease; for estoppel to apply, the deed must clearly state that the purchaser is taking subject

to that lease. *See Bourne*, *supra* (our Supreme Court holding that a provision in a deed that "[t]here is a lease on the [property being conveyed] in favor of [name of tenant] which lease is for a period of 10 years" is not sufficient to subject the purchaser's interest to the tenant's leasehold interest).

Tenant, though, argues Current Owner is estopped if it is shown, as alleged, that Current Owner's *purchase contract* with Former Owner contained a provision that the property is being sold subject to the lease, notwithstanding such language was not in the deed, relying on *Braznell*, 227 N.C. at 215, 41 S.E.2d at 747. We conclude Tenant's reliance on *Braznell* is misplaced. As explained below, the Court in *Braznell* did not hold that "subject to" language in a purchase contract can trigger estoppel. Rather, *Braznell* held that estoppel may apply where it is shown that the deed is subject to reformation to include the appropriate "subject to" language, with evidence that the seller and purchaser expressly agreed such language was to be included in the deed and that the language was left out of the deed by mutual mistake.

Braznell involved the sale of a building. A bank held a 15-year leasehold interest in the building based on an unregistered lease. The owner entered an agreement to sell the building to a purchaser. At closing, the owner gave to the purchaser a deed with language that the purchaser's fee simple interest was "subject to the leases of the several tenants." The deed, however, did not expressly refer to the leasehold interest of the bank specifically which was, under our case law, insufficient to trigger estoppel. *See Braznell*, 227 N.C. at 213, 41 S.E.2d at 745-46.

The bank sued the purchaser seeking a reformation of the deed to include language stating the purchaser was taking subject to the bank's lease specifically. A jury found that the bank was entitled to this relief. The purchaser appealed.

In its opinion, our Supreme Court first noted that the bank, as a tenant, had standing to sue for reformation of the provision in the deed concerning its lease, notwithstanding the bank was not a party to the deed. *Id.* at 213, 41 S.E.2d at 745.

The Court then recognized the "subject to" language in the deed was not sufficient to protect the bank. *Id.* The Court held, however, that the evidence was sufficient to make out a case for reformation of the deed, noting the evidence showing "(1) the contract of purchase and sale was made subject to existing leases [including the lease to the bank]; (2) it was understood and agreed [by and between the seller and the purchaser] that the deed of conveyance should contain a provision fully

protecting the leasehold rights of the [bank]; and (3) this intent was inadequately expressed and a valid, enforceable provision was omitted by mutual mistake of the parties." *Id.*

In the present case, Tenant makes no allegation that the parties agreed that Former Owner was to incorporate "subject to" language into its deed to the Current Owner, but was omitted due to a mutual mistake. *See Wells Fargo v. Stocks*, 378 N.C. 342, 350, 861 S.E.2d 516, 523 (2021) (noting that where a "deed . . . fails to express the true intention of the parties, it may be reformed . . . whe[n] the failure is due to the mutual mistake of the parties[.]") Rather, Tenant merely alleges the purchase contract contained a provision that Current Owner would "assume all lease obligations owned to any tenants at the Property." Such language, alone, is not enough to make out a claim for reformation of the deed to express that Current Owner's fee simple interest was subject to Tenant's leasehold interests beyond April 2021.

C. Estoppel Certificate

Tenant next argues that Current Owner is estopped from avoiding its leasehold interest based on the Estoppel Certificate that Current Owner required Former Owner to procure from Tenant during Current Owner's due diligence. We disagree.

An estoppel certificate is a document routinely required by a purchaser of real estate to be signed by the existing tenants of the real estate being sold. When real estate is sold, any tenant "ceases to hold under the [seller]" and "becomes a tenant of [the purchaser]." *Pearce v. Gay*, 263 N.C. 449, 451, 139 S.E.2d 567, 569 (1965). As such, it is not uncommon for a purchaser, as part of its due diligence, to require each tenant to make representations regarding its lease by signing an estoppel certificate.

Here, Tenant attached the Estoppel Certificate prepared by Current Owner to its complaint. There is nothing in the Estoppel Certificate which stated that Current Owner would be subjecting its to-be-acquired fee simple interest to Tenant's existing, unregistered leasehold interests; it merely requested Tenant to acknowledge what it perceived its leasehold interest in the Property to be. We conclude that the Estoppel Certificate does not give rise to an estoppel.

Tenant, though, argues Current Owner is bound by the statement in the cover letter transmitting the Estoppel Certificate signed by Current Owner's real estate broker that the sale to Current Owner would not affect Tenant's leasehold interests. However, such language is not sufficient to create an estoppel, as Current Owner has failed to show how

it "omitted some act or changed [its] position in reliance upon the representations or conduct of [the Current Owner, which was] actual, substantial and justified." *Bourne*, 264 N.C. at 37, 140 S.E.2d at 772. Assuming the language in the cover letter was sufficient to evidence an offer by Current Owner to honor Tenant's leasehold interest, it would not be sufficient to constitute an offer or agreement to allow Tenant to extend the lease for five years beyond April 2021. Specifically, the draft Estoppel Certificate attached to the letter provided that *the landlord* must approve any lease extension. In any event, Tenant alleges it did not agree to this provision as outlined in the Estoppel Certificate.

D. Acceptance of 2021 Rent Check

Tenant next argues that Current Owner must honor Tenant's option to renew for five years beyond April 2021 because Current Owner accepted and deposited the rent check sent by Tenant in 2020 covering all of 2021, which included the first eight months of the renewal term. However, our Supreme Court held in *Bourne* that the mere acceptance of rent payments by a new owner during what would be the renewal term does not bind the subsequent purchaser to the longer renewal term outlined in an unregistered lease with a former owner:

> [A]re plaintiffs estopped [from avoiding the lease] by accepting the rent according to the terms of the lease for more than two years? The answer is . . . [a subsequent purchaser] is entitled to rents as long as [the tenant] remains in possession. Acceptance of rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery. The receipt of money for the use of premises is not inconsistent with a demand for possession, for it has not misled the defendant nor put him to any disadvantage.

Bourne, 264 N.C. at 37, 140 S.E.2d at 772 (internal marks and citation omitted).

Here, in March 2021, Current Owner notified Tenant that it was demanding possession at the end of April 2021 more than a month prior to the end of the current term and attempted to refund any overages it had received. We conclude that Current Owner did not ratify Tenant's right to five-year renewal options by virtue of accepting rent for eight months beyond the expiration of the initial term but returning it before the renewal term began. In so concluding, we note Current Owner was entitled to part of the proceeds of the rent check, for the period up through April 2021, and returned the difference it was not entitled to. We

further note Tenant's allegations that Current Owner otherwise acted inconsistently with any understanding it was going to honor Tenant's renewal rights as contained in the Amendment, for instance, by refusing to sign the landlord authorization to extend Tenant's permit five years, by seeking and obtaining approvals in connection with its planned redevelopment, and by offering Tenant the option to renew its leasehold for two years beyond April 2021.

E. Other Claims

Because we conclude Tenant has failed to allege facts showing that Current Owner is obligated to honor the Lease and the Amendment, we conclude Tenant's other arguments, including those concerning Current Owner's refusal to sign a landlord authorization for Tenant's permit, its anticipatory repudiation of the Lease, and its unfair and deceptive trade practice claim must fail.

III. Conclusion

We conclude that the trial court did not err by dismissing Tenant's complaint. Tenant acquired valid interests in and incurred obligations to the Property based on the Lease and the Amendment executed by the Former Owner. Former Owner's sale of the Property to Current Owner did not void these interests and obligations. However, Tenant's complaint fails to allege facts showing that Current Owner's fee simple interest is subject to Tenant's leasehold interests beyond April 2021 as contained in the Amendment.

Accordingly, we affirm the trial court's order dismissing Tenant's complaint pursuant to Rule 12(b)(6) of our Rules of Civil Procedure.

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

HINMAN v. CORNETT

[290 N.C. App. 30 (2023)]

WILLIAM HINMAN AND JOANNE W. HINMAN, PLAINTIFFS
v.
WADE R. CORNETT AND TERESA B. CORNETT, DEFENDANTS

No. COA22-481

Filed 1 August 2023

1. Easements—appurtenant—ingress and egress—benefit to specific tract of land—overburdening

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—defendants' use of the easement to access Tract 1 constituted a misuse or overburdening of the easement because the easement only benefited and allowed access to Tract 2 from the main road.

2. Appeal and Error—preservation of issues—new theory advanced on appeal

In a property dispute between neighbors, defendant neighbors could not advance a new theory on appeal regarding a prescriptive easement; therefore, the Court of Appeals declined to consider the merits of the new argument.

3. Adverse Possession—easement—claim by owner of dominant tenement—mistaken belief in ownership of land

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—defendants presented sufficient evidence to overcome plaintiffs' motion to dismiss defendants' counterclaim for adverse possession of the strip of land between the driveway and defendants' deeded property containing defendants' garden, brick pillar, several trees, fencing, and portions of their carports. Specifically, defendants presented a survey exhibit outlining the known and visible lines and boundaries of their purported adverse possession; they listed in their counterclaim the disputed encroachments and the dates in which the encroachments were established; and they presented their deposition to the trial court with further information. The appellate court held that where the elements of adverse possession are otherwise satisfied, the owner

of a dominant tenement may adversely possess the land underlying his own easement; furthermore, a party may adversely possess land even when he mistakenly believes that he is the owner during the entirety of the prescriptive period.

4. Adverse Possession—trespass claim—easement—dismissal of counterclaim

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—and where the Court of Appeals held that the trial court erred in dismissing defendants' adverse possession counterclaim, the appellate court further held that, in light of that holding, the trial court also erred in granting plaintiffs' motion for summary judgment on their trespass claim.

5. Easements—fence—location unresolved—remand

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—the issue of whether a fence erected by plaintiffs was located on defendants' property or on plaintiffs' property was remanded to the trial court because it remained unresolved.

Judge MURPHY concurring in the result only without separate opinion.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by Defendants from an order entered 22 November 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 2 November 2022.

Craige Jenkins Liipfert & Walker PLLC, by Thomas J. Doughton, for Plaintiffs-appellees.

The Dawson Law Firm PC, by Kenneth Clayton Dawson, for Defendants-appellants.

WOOD, Judge.

This is an appeal from a summary judgment order settling a property dispute between disgruntled neighbors and involves questions of the parties' property interests in an old easement. The summary judgment order granted one neighbor's trespass claim and dismissed the other neighbor's counterclaims for adverse possession and nuisance. For reasons explained below, we hold that the adverse possession counterclaim was improperly dismissed, reverse the trial court's summary judgment order, and remand the matter to the trial court for further proceedings.

I. Background

In 1983, the Cornetts, husband and wife, rented a home from Ms. Tilley before purchasing the same property in 1995. The entire property comprises several tracts of land which Ms. Tilley acquired at different times prior to conveying them to the Cornetts. For instance, the home rests on what has now been labeled Tract 1. As the diagram below shows, this square, half-acre tract abuts the main road to its north, and a driveway extends from the road along the tract's western side. Tract 2, similar in size and shape to Tract 1, comprises the Cornetts' backyard and rests behind Tract 1, to its south. The same driveway runs along this tract's western border as well. Behind and adjoining Tract 2 of the Cornetts' property lies a larger property originally owned by the Churches, a family who, by all accounts, maintained a cordial relationship with the Cornetts for the duration of their ownership. In 2019, however, the Churches sold this larger, southern property to the Hinmans, and relations between the Cornetts and these newcomers quickly soured.

Armed with a recent land survey, the Hinmans insisted the Cornetts were encroaching on the Hinmans' recently acquired property and requested that the Cornetts remove such encroachments. The survey showed that the Hinmans owned the land containing the driveway running along the western sides of Tracts 1 and 2 as well as a strip of land several feet wide running along the eastern side of the driveway and into what a casual observer might mistake for the Cornetts' land. The Hinmans identified the corridor at issue, featuring the driveway and the adjacent strip of land, as an easement conveyed by their predecessor in title to Ms. Tilley. Ms. Tilley subsequently conveyed the easement to the Cornetts when she conveyed the two tracts of land to them. Allegedly oblivious to this easement and believing that they owned the disputed corridor, the Cornetts had used the driveway to access both Tracts 1 and 2 of their property, paved and maintained the driveway, and allowed guests and others to park on the driveway. On a strip of land adjacent to the driveway, the Cornetts maintained gardens, fences, a brick column, and several trees. Also, two carports extended from the home on Tract 1 to the driveway, thus extending into the adjacent strip of land in the

corridor easement. These two carports and the other structures existed on the land prior to 2000. The brick column predated the Cornetts' ownership of the property. The Cornetts began planting trees and a garden in 1983. They added another carport and a fence in 1991 and 1992 respectively. Another carport was added in 1996. Since 1999, the Cornetts further maintained another garden, crepe myrtle trees, and a fence. The Cornetts refused to remove these alleged encroachments. The Hinmans built a fence, with a gate, along the boundary between the driveway and Tract 1 and subsequently filed suit against the Cornetts.

In their complaint, filed 23 March 2021, the Hinmans alleged trespass. The Cornetts counterclaimed, alleging that they had obtained title of the disputed corridor easement by adverse possession, that the twenty-year statute of limitations for the recovery of adversely possessed land barred the Hinmans' trespass claim, and that the Hinmans' new fence constituted a nuisance.

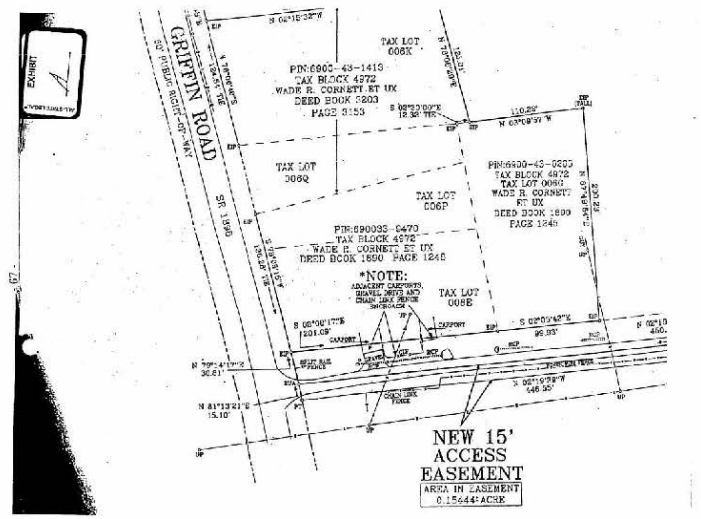
The Hinmans moved for summary judgment, filed 22 October 2021, upon their claims of trespass and requested an injunction for the removal of the alleged encroachments. The Hinmans alleged "that there is no genuine issue as to any material fact" that the Cornetts were trespassing upon their land. In support of their summary judgment motion, the Hinmans filed affidavits, including their own, and one from the land surveyor. The Cornetts responded with their own motion for summary judgment, filed 3 November 2021, requesting the trial court grant them title to the strip of land in the corridor easement between the driveway and the Cornetts' property. They also requested the trial court hold that the Hinmans' trespass claim was barred by the applicable twenty-year statute of limitations and contested the Hinmans' construction of a "nuisance fence."

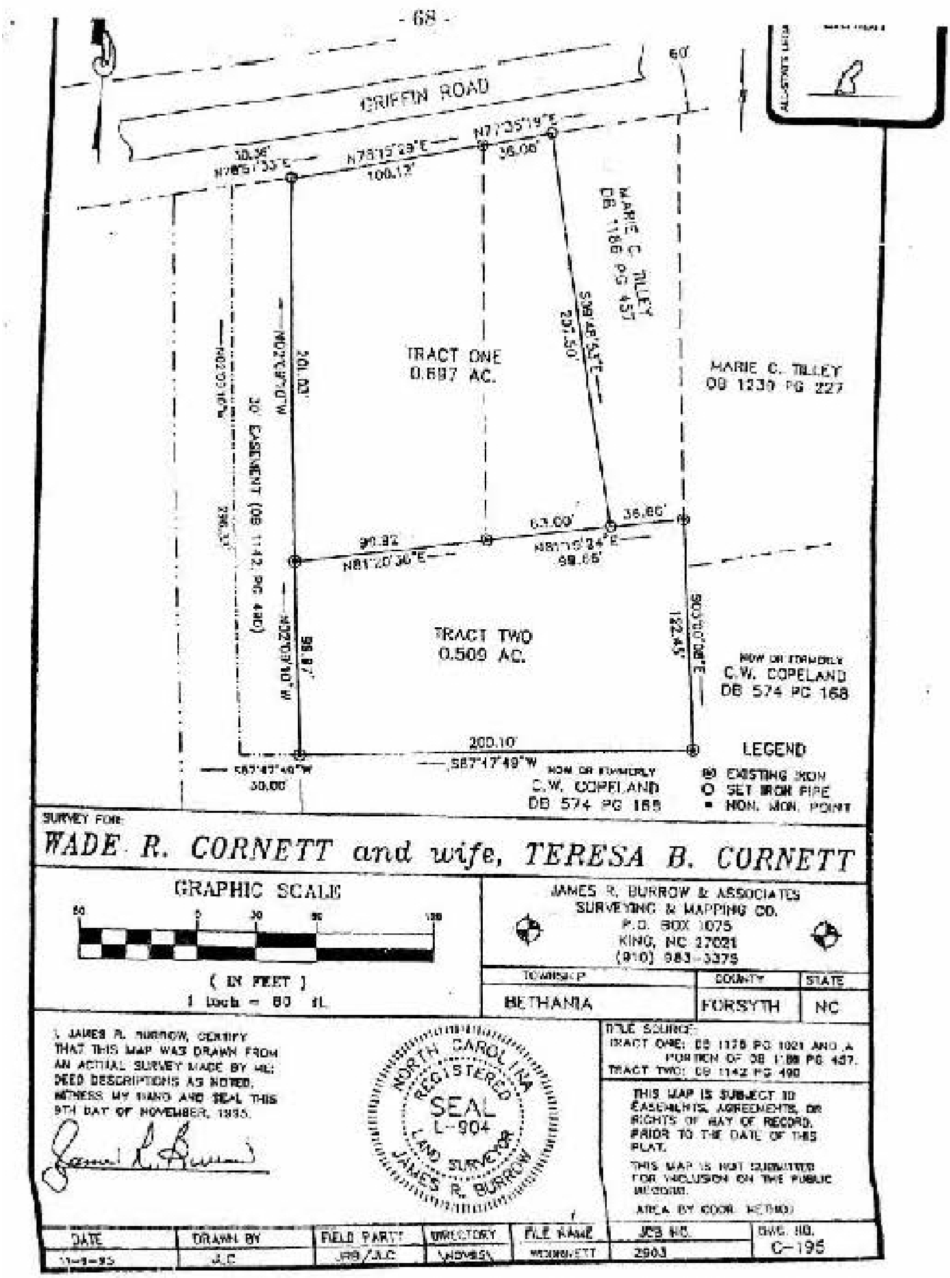
After a 9 November 2021 hearing on the matter, the trial court granted the Hinmans' motion and dismissed the Cornetts' counterclaims in a summary judgment order filed 22 November 2021. The order states:

> [S]ummary judgment is granted in favor of plaintiffs against defendants on all claims asserted by the plaintiffs and that defendants counterclaims are dismissed with prejudice and that defendants are further ordered to remove all structures, within 15 days of the date of this order, that are encroaching on Plaintiffs' property including the portion of Plaintiffs two carports that are located on Plaintiffs property, the split rail fence, the lion statue, chain link fence and post, a brick column and the concrete base to the smaller carport. Attached hereto as Exhibit A

is a survey that shows the encroachments and Exhibit B which shows tracts 1 and 2 of Defendants property. It is further ordered that the recorded easement as set out in Book 1890 Pages 1245-1247 of the Forsyth County Register of Deed [sic] is on land owned by the Plaintiffs and the easement only applies to tract 2 as set out in Book 1890 page 1247 and shown on Exhibit B. Thus, the Defendants may only use the 30-foot recorded easement to access tract 2. Defendants may not use the recorded easement to access tract 1 which includes but is not limited to accessing their current carports. In addition, Defendants cannot use the area in the recorded easement to park vehicles on or to allow third parties to park vehicles or delivery vehicles on. In addition, Defendants may not drive on or otherwise use the paved driveway to the West of their property which is outside the 30-foot recorded easement. Defendants may use the portion of the paved driveway that is contained within the 30-foot recorded easement but only to access tract 2 of their property. Finally, the fence as built by the Plaintiffs along the eastern boundary of the 30-foot easement is legal under North Carolina law and may remain and that the cost of this action be taxed against the Defendants.

Attached to the order are two survey exhibits of the same properties, which are convenient for our demonstrative purposes here:




- 68 -
GRIFFIN ROAD
60'
TRACT ONE
0.687 AC.
TRACT TWO
0.509 AC.
MARIE C. TILLEY
DB 1188 PG 457
MARIE C. TILLEY
DB 1230 PG 227
30' EASEMENT (DB 1142 PG 490)
NOW OR FORMERLY
C.W. COPELAND
DB 574 PG 168
LEGEND
EXISTING IRON
SET IRON PIPE
NON. MON. POINT
SURVEY FOR:
WADE R. CORNETT and wife, TERESA B. CORNETT
GRAPHIC SCALE
(IN FEET)
JAMES R. BURROW & ASSOCIATES
SURVEYING & MAPPING CO.
P.O. BOX 1075
KING, NC 27021
TOWNSHIP
BETHANIA
COUNTY
FORSYTH
STATE
NC
I, JAMES R. BURROW, CERTIFY THAT THIS MAP WAS DRAWN FROM AN ACTUAL SURVEY MADE BY ME; DEED DESCRIPTIONS AS NOTED. WITNESS MY HAND AND SEAL THIS 9TH DAY OF NOVEMBER, 1995.
NORTH CAROLINA REGISTERED LAND SURVEYOR SEAL L-904 JAMES R. BURROW
TITLE SOURCE:
THIS MAP IS SUBJECT TO EASEMENTS, AGREEMENTS, OR RIGHTS OF WAY OF RECORD, PRIOR TO THE DATE OF THIS PLAT.
THIS MAP IS NOT SUBMITTED FOR INCLUSION ON THE PUBLIC RECORD.
DATE
DRAWN BY
FIELD PARTY
FILE NAME
JOB NO.
2903
DWG. NO.
C-195

The Cornetts appeal the order as a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b).

II. Standard of Review

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). We review a trial court's summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). " '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) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)). We cannot affirm a trial court's summary judgment order if a "genuine issue as to any material fact" remains when viewed in the light most favorable to the non-moving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)).

III. Discussion

Challenging the trial court's summary judgment order, the Cornetts argue the trial court erred when it determined that the Cornetts may not utilize the easement to access their Tract 1, failed to consider the presence of a prescriptive easement, improperly ruled on the matter of adverse possession where material facts remained contested, ordered the Cornetts to remove items alleged to have trespassed upon the Hinmans' land, and allowed the Hinmans to establish a nuisance fence. We address these issues in turn.

A. Easement to Access Tract 1

[1] We first address whether the trial court erred in granting summary judgment as to whether the Cornetts may use the driveway to access Tract 1 of their property. As explained above, the thirty-foot wide easement contains the driveway, or some part of it, and a strip of land east of the driveway. This issue concerns only the driveway and not the disputed strip of land which we discuss below.

"An easement is an interest in land" and is generally treated as a contract when deeded. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). Easements may either be appurtenant or in gross. *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). "An appurtenant easement is one which is attached to and passes with the dominant tenement as an appurtenance

thereof; it is owned in connection with other real estate and as an incident to such ownership." *Id.* It "is incapable of existence apart from the particular land to which it is annexed." *Id.* Because an appurtenant easement runs with the land, it "passes with the transfer of the title to the land." *Id.* at 454, 133 S.E.2d at 186. An appurtenant easement exists between the dominant tenement (the tract that benefits from the use of the easement) and the servient tenement (the tract that is burdened by the use of the easement). *Ingraham v. Hough*, 46 N.C. (1 Jones) 39, 43 (1853). An appurtenant easement is only allowed to be used "in connection with an estate to which it is appurtenant, and cannot be extended to any other property which [the easement owner] may then own or afterwards acquire." *Hales v. Atl. Coast Line R.R. Co.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916). In contrast, an easement in gross is more like a personal license, a permit, and "is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another." *Shingleton*, 260 N.C. at 454, 133 S.E.2d at 185. An easement in gross generally terminates "with the death of the grantee" unless abandoned or otherwise extinguished. *Id.*

The easement here was conveyed by deed with a dominant tract of land and is presumed to be appurtenant. *Id.* at 455, 133 S.E.2d at 186. Therefore, it ran with the land when Ms. Tilley deeded the dominant tenement to the Cornetts. We now look at what interests Ms. Tilley received.

Ms. Tilley gained ownership of Tracts 1 and 2 through two separate deeds. The deed to Tract 2, which does not contain road frontage, contained the easement at issue. After describing the metes and bounds of Tract 2, it reads, "The Grantor also conveys to the Grantee a road right-of-way or easement to and from the above described parcel of land for purposes of ingress, egress and regress, said right-of-way being 30.0 feet in width and described as follows . . . ." When Ms. Tilley was deeded Tract 1, no similar easement appears. In fact, the record is devoid of any evidence showing that Ms. Tilley acquired an access easement for Tract 1.

Ms. Tilley subsequently deeded both Tracts 1 and 2 as well as the access easement to the Cornetts via a single deed. That deed, after describing Tracts 1 and 2 by metes and bounds, reads, "Also conveyed herein is a thirty (30) foot right-of-way or easement for the purpose of ingress, egress and regress from Griffin Road more particularly described as follows . . . ."

Just as "no one can transfer a better title than he himself possesses," no one can transfer a greater easement than he himself enjoys.

Miller v. Tharel, 75 N.C. 148, 152 (1876). Thus, when Ms. Tilley conveyed Tract 1, Tract 2, and the access easement to the Cornetts via a single deed, the easement only benefited and allowed access to Tract 2 from the main road. Ms. Tilley could only transfer an interest in property, in the form of an access easement here, that she herself had received. Even if Ms. Tilley had desired to, she could not transfer an access easement to Tract 1 unless, perhaps, she had previously purchased the property that the Hinmans now owned and absorbed the original easement by merger. *See Patrick v. Jefferson Standard Life Ins. Co.*, 176 N.C. 660, 670, 97 S.E. 657, 661 (1918) ("A merger, technical or ideal, takes place when the owner of one of the estates, dominant or servient, acquires the other, because an owner of land cannot have an easement in his own estate in fee."). Yet, the record lacks any evidence for this possibility as well. All evidence suggested that the easement allowed for access to Tract 2 and that the Cornetts' use of the easement to access Tract 1 constituted a "misuse or overburdening" of the easement. *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 20, 675 S.E.2d 59, 71 (2009). We therefore affirm the trial court's order as to the access easement for Tract 2 but not for Tract 1, which has frontage and direct access to Griffin Road.

B. Prescriptive Easement

[2] The Cornetts next argue that the trial court erred in granting summary judgment against them by failing to consider whether the Cornetts had gained a prescriptive easement over the disputed land. However, the Cornetts did not advance this theory before the trial court. Instead, they advanced an adverse possession counterclaim. Though the elements necessary to maintain adverse possession and prescriptive easement claims are similar, they are nonetheless distinct actions requiring distinct pleadings. We therefore cannot consider this argument on appeal. *See* N.C. R. App. P. 10(a)(1); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal.).

C. Adverse Possession

[3] We next address the issue of adverse possession. The Cornetts clarified at the summary judgment hearing and in their reply brief that they allege adverse possession only of the strip of land consisting of their garden, brick pillar, several trees, fencing, and portions of their carports. The Cornetts do not allege adverse possession of the shared driveway, which they used with the Churches' permission and acknowledge is contained within the easement. Like the driveway, though, this disputed strip of land rests within the easement. Yet, because the Cornetts pleaded that they maintained this strip of land for over twenty years and

alleged all elements necessary to support a claim of adverse possession, the Cornetts challenge the trial court's dismissal of this claim in its summary judgment order.

Adverse possession "is not favored in the law." *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981). The possessor's use of the land, therefore, "is presumed to be permissive." *Id.* at 666, 273 S.E.2d at 288.

A successful claim of adverse possession requires that the possession be "open, continuous, exclusive, actual and notorious" ("OCEAN") for the prescribed period. *Jones v. Miles*, 189 N.C. App. 289, 299, 658 S.E.2d 23, 30 (2008). Our Supreme Court has more eloquently described these requirements as follows:

> It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

Locklear v. Savage, 159 N.C. 236, 237, 74 S.E. 347, 348 (1912). The prescriptive period for adverse possession, without color of title, is 20 years. N.C. Gen. Stat. § 1-40 (2022).

> No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.

Id. One may assert a claim of adverse possession upon a portion of a tract of land so long as such portion is identifiable by "known and visible lines and boundaries." *Dockery v. Hocutt*, 357 N.C. 210, 218, 581 S.E.2d 431, 436 (2003). However, "his claim is limited to the area(s) actually possessed, and the burden is upon the claimant to establish his title to the land in that manner." *Id.*

We are met with an initial question: may the owner of a dominant tenement adversely possess the same land described in the easement burdening the servient tenement?

Neither party cites and we did not locate North Carolina authority definitively answering this question. One commentator who published many treatises on real property writes,

> The adverse user may be, not only by the owner of the servient tenement, but also by another person, and such other person may be one who has also an easement in the same land. That is, if there is adverse possession sufficient to divest a fee simple title to land, it will also operate to extinguish an easement in such land, without reference to whether the adverse possessor previously had himself an estate or an easement in the land.

Herbert Thorndike Tiffany, *The Law of Real Property*, Vol. 3, 397 (Basil Jones ed., 3d ed. 1939). While helpful, this commentary does not explicitly suppose that the adversely possessed land is also the possessor's easement.

Looking beyond our borders, no other state has yet to address this question, save for the state of Washington. There, its Court of Appeals concluded that the owner of an easement in common property, held in title by a homeowners association, could adversely possess that land without offending the requisite elements of adversity. *Timberlane Homeowners Ass'n v. Brame*, 901 P.2d 1074, 1078 (1995), *superseded by statute*, Wash. Rev. Code § 36.70A.165 (2022). "Although the use was originally permissive[,] . . . the construction of a fence and a concrete patio on the property far exceeded a reasonable exercise of that easement right." *Id.*

Our precedent allows the owner of a *servient* tenement to successfully claim adverse possession so as to extinguish an easement on his own property. *Skvarla v. Park*, 62 N.C. App. 482, 488, 303 S.E.2d 354, 358 (1983). Here, though, the alleged adverse possessor is the easement owner, the owner of the *dominant* tenement. A successful action for adverse possession in this case would not only extinguish the easement but would, in effect, divest the servient estate owner of title to his land.

The principal concern with adversely possessing the land of one's own easement lies in the adverseness—or hostility—of the possession. This hostility element requires "a use of such nature and exercised under such circumstances as to manifest and give notice that the use

is being made under claim of right." *Dulin v. Faire*s, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). "[T]his does not mean that ill will or animosity must exist between the respective claimants. It only means that the one in possession of the land claims the exclusive right thereto." *Brewer v. Brewer*, 238 N.C. 607, 611, 78 S.E.2d 719, 722 (1953). Regardless of the "length of time in the enjoyment of his easement," an easement owner cannot divest the servient owner of his land merely because he made some use of the land consistent with the easement. *Everett v. Dockery*, 52 N.C. (7 Jones) 390, 392 (1860). However, where the dominant estate owner's use of the easement is so inconsistent with its permissive use as to inhibit the rights of the servient estate owner, it follows that the possession is hostile. We therefore hold that, where the elements of adverse possession are otherwise satisfied, the owner of a dominant tenement may adversely possess the land underlying his own easement.

We briefly address another dispositive question: may a party properly claim adverse possession when he is unaware of the adverse nature of his possession? In other words, may a party adversely possess land when he mistakenly believes that he was the owner during the entirety of the prescriptive period? Our Supreme Court has answered this question in the affirmative. A party may succeed in an adverse possession claim "though the claim of title is founded on a mistake." *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985). Since 1985, this state has been among a majority of states which allow a claim for adverse possession though the adverse possessor be oblivious to the adverse nature of his possession. *Id*. Therefore, though the Cornetts allege in their depositions that they were unaware of any encroachments upon their neighboring property and believed they owned the strip of land at issue, this mistake is not fatal.

Further, though the Cornetts admit their use of the driveway was permissive, this, too, is not fatal to their claim of adverse possession over the disputed strip of land. The disputed land here is not the driveway but the strip of land between the driveway and the Cornetts' recorded property line, said land containing a brick column, small garden, trees, fencing, and two carports. Nothing in the record suggests the Cornetts received permission from the Churches or their successor in title, the Hinmans, to possess and erect permanent structures on this disputed strip of land.

Next, we consider whether the Cornetts appropriately alleged an adverse possession claim sufficient to overcome a motion to dismiss. As our Supreme Court has held, "[a] party seeking to prove adverse possession of a portion of a parcel has the burden of pleading and proving

all elements of the claim." *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013). Yet, "[i]n actions to recover land, wherein the plaintiff alleges title and right to the possession, it is generally sufficient for the defendant to make a simple denial and introduce evidence of his possession for twenty years . . . in support of his denial." *Whitaker v. Jenkins*, 138 N.C. 476, 478, 51 S.E. 104, 105 (1905).

Further, "[a] party against whom summary judgment is sought 'may not rest upon the mere allegations or denials of his pleading, but must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial.' " *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 504, 631 S.E.2d 884, 888 (2006) (quoting *Enterprises v. Russell*, 34 N.C. App. 275, 278, 237 S.E.2d 859, 861 (1977)); *see* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2022). Put another way, presuming without deciding the Cornetts' allegations relating to the adverse possession claim are true, would they be entitled to a grant of title by adverse possession? We hold that they would.

Here, the Cornetts did not merely allege adverse possession without supporting evidence. Though they did not provide the trial court with affidavits, they submitted a highlighted survey exhibit outlining the "known and visible lines and boundaries," *Dockery*, 357 N.C. at 218, 581 S.E.2d at 436, of their purported adverse possession. In their counterclaim, the Cornetts list the disputed encroachments upon this portion of the easement and the dates in which the encroachments were established or presented as evidence of their continuous possession for the prescriptive period. In the Cornetts' depositions, which were presented to the trial court, the Cornetts state that they believed the contested strip of land was theirs and had improved and maintained it since 1983. The Cornetts' counsel at the summary judgment hearing argued that the Cornetts treated the strip of land as their own and did not hide their maintenance of the structures. This evidence is sufficient to support every element of adverse possession, that the Cornetts actually possessed the land in a manner that was open, continuous, exclusive, actual, and notorious ("OCEAN") for the prescribed period and under known and visible lines and boundaries.

Presumably, the Hinmans' predecessor in title, the Churches, had the opportunity to discover and remedy the Cornetts' encroachment for over twenty years but did not do so. Indeed, this case serves as a stark reminder that "the law aids the vigilant and not those who sleep over their rights." *Butler v. Bell*, 181 N.C. 85, 90, 106 S.E. 217, 220 (1921). This is true even for the Churches' successor in title, the Hinmans, who brought the trespass action after the Cornetts had possessed the land

for over twenty years. Prior to buying the property from the Churches, the Hinmans had the opportunity to discover the encroachments by obtaining a survey.

Our statute and caselaw treats the twenty-year prescriptive period of adverse possession as a "statute of limitations" for actions to recover property, and we have never held that the prescriptive period must restart due to the sale of land adversely possessed. *Duke Energy Carolinas, LLC v. Gray*, 369 N.C. 1, 3, 789 S.E.2d 445, 446 (2016). So long as the adverse possessor continues to possess the land for the prescriptive period, the time required to adversely possess the land is not tolled or otherwise reset by the sale of the land adversely possessed. "At the expiration of the requisite period of possession, the possessor acquires fee simple title to the land; a new title is created and the title of the record owner is extinguished." *Fed. Paper Bd. Co. v. Hartsfield*, 87 N.C. App. 667, 672, 362 S.E.2d 169, 172 (1987). If the Cornetts did adversely possess the land of the Churches prior to the sale of the Churches' interest to the Hinmans, then the Hinmans would not have received fee title in the disputed land. *See, e.g.*, *Deans v. Mansfield*, 210 N.C. App. 222, 229, 707 S.E.2d 658, 664 (2011) (holding that the prescriptive period acts to divest a record owner's interest in the land even though the adverse possessor files a claim for title after a period of subsequent interruption).

These circumstances are juxtaposed to those found in *Dockery v. Hocutt*. There, our Supreme Court held that a party's evidence, even "when considered in the light most favorable to" the party, was not sufficient to bring the matter to a jury. 357 N.C. 210, 218, 581 S.E.2d 431, 437 (2003). The record was "devoid of evidence of known and visible boundaries" where the court was left to merely speculate as to where an ambiguous boundary was. *Id.* Further, the party did not evidence an encroachment "for the requisite twenty-year period." *Id.* at 219, 581 S.E.2d at 437. The Cornetts, by contrast, identified the contested strip of land where known and visible boundaries exist between it and the driveway. The Cornetts alleged that they possessed this property for over twenty years and listed the dates for the establishment of structures existing on the disputed strip of land.

These circumstances are also juxtaposed to those found in *Jones v. Miles*. This Court held that the hostility requirement of adverse possession may be extinguished with a subsequent grant of permission, unless "the possessor either rejects the grant of permission or otherwise takes some affirmative step to put the true owner on notice that the possessor's use of the land remains hostile." 189 N.C. App. 289, 294, 658 S.E.2d 23, 27 (2008). In the present case, the record demonstrates

the Churches allowed the Cornetts to use the driveway but contains no indication that the Cornetts received permission to possess the disputed strip of land as their own. Although the disputed strip of land is within an easement, the easement was for ingress and egress, not for the building of permanent structures.

The Cornetts presented evidence sufficient to overcome the Hinmans' motion to dismiss, and the trial court erred in granting summary judgment for the Hinmans when genuine issues of material fact remained.

D. Trespass

[4] Because we hold that the trial court erred in dismissing the Cornetts' adverse possession counterclaim, we hold that the trial court erred in granting the Hinmans' motion for summary judgment on their trespass claim. One party's successful adverse possession claim necessarily defeats another's trespass claim upon the same land.

Further, adverse possession is a defense to trespass. In *Williams v. South & South Rentals*, the plaintiff sought to require the removal of an apartment building which encroached approximately one square foot onto the plaintiff's property. This Court in *Williams* said, "While the action sounds in trespass because there is no dispute over title or location of the boundary line, plaintiff seeks a permanent remedy and is subject to the twenty-year statute of limitations for adverse possession." 82 N.C. App. 378, 382, 346 S.E.2d 665, 667 (1986). In the case of *Bishop v. Reinhold*, this Court held the plaintiff's action to remove structures built by the defendants which partially encroached onto the Bishops' property "would not be barred until defendants had been in continuous use thereof for a period of twenty years." 66 N.C. App. 379, 384, 311 S.E.2d 298, 301 (1984). Thus, if the Cornetts are successful in showing adverse possession of the disputed strip of land for twenty years, it would defeat the Hinmans' claim of trespass and request to remove the encroachments.

E. Nuisance Fence

[5] The Cornetts allege that the Hinmans erected a nuisance fence between the driveway and the Cornetts' property. It is not clear, presuming the Cornetts' succeed in their adverse possession counterclaim, whether the fence would be on the Cornetts' or the Hinmans' property.

If the fence is on the Hinmans' property, its mere presence on the easement is not an actionable issue so long as its presence does not interfere with the Cornetts' permissive use of the easement. "The owners of the servient estate may make any use of their property and road

not inconsistent with the reasonable use and enjoyment of the easement granted." *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963); *cf. Ingraham v. Hough*, 46 N.C. (1 Jones) 39, 44 (1853) (holding that an impassable gate across a right of way is an "interruption[] to the user of the easement"). The Cornetts allege that the fence frustrates their use of the easement in that it does not allow them access to Tract 1 of their property or, rather, makes it more difficult to access Tract 1. Because we hold that the easement does not grant access to Tract 1 and because the Cornetts did not otherwise argue that the fence impedes their access to Tract 2, the Cornetts and their land are uninjured. Therefore, this argument is overruled. Yet, because the issue of whether the fence is on the Cornetts' property or the Hinmans' property is unresolved, this issue must be remanded to the trial court.

IV. Conclusion

The trial court did not err when it prohibited the Cornetts from using the driveway to access Tract 1 of their property, as the Cornetts do not have an easement to access Tract 1. However, the trial court did err in dismissing the Cornetts' counterclaim for adverse possession of the strip of land between the driveway and the Cornetts' deeded property. Because of this error, the trial court further erred in granting the Hinmans' motion for summary judgment on the issue of trespass. Consequently, we reverse the dismissal order and the summary judgment order of the trial court and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge TYSON concurs in the result in part and dissents in part by separate opinion.

Judge MURPHY concurs in the result only without separate opinion.

TYSON, Judge, concurring in the result in part and dissenting in part.

The plurality's opinion properly affirms the trial court's prohibition of the Cornetts from using the driveway easement to access Tract 1 of their property. The plurality's opinion further holds the trial court erred in dismissing the Cornetts' counterclaim for adverse possession of the strip of land between the driveway easement and their deeded property. I vote to affirm the trial court's dismissal of the Cornetts' counterclaim and of Hinmans' motion for summary judgment on their trespass claims. I respectfully dissent.

I. Standard of Review

North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show that they are "entitled to a judgment as a matter of law" and "that there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

A genuine issue is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

When reviewing the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). On appeal, "[t]he standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

II. Adverse Possession for Twenty Years

"To acquire title to land by adverse possession, the claimant must show actual, open, hostile [notorious], exclusive, and continuous ["OCEAN"] possession of the land claimed for the prescriptive period [.]" *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). The law does not favor adverse possession and the presumption before the court is that a claimant's use is permissive. *See Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981) (citation omitted). Adverse possession of privately-owned property without color of title must be continuously

maintained for twenty years before a claimant may successfully assert a claim to acquire title to the land. N.C. Gen. Stat. § 1-40 (2021).

A hostile use is "simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). "[I]n order for plaintiffs to succeed in their claim, they must have shown sufficient evidence of the hostile character of their use to create an issue of fact for the jury." *Potts*, 301 N.C. at 667, 273 S.E.2d at 288. *Webster's Real Estate Law* describes hostile possession as by claimant's possession, which excludes "any recognition of the true owner's rights" to the property. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 14.06 (Patrick K. Hetrick & James B. McLaughlin, J. eds., 6th ed. 2022) ("Hostile possession is possession that excludes any recognition of the true owner's rights in the property." (citing *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1993))); *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969)).

"The hostility element may be satisfied by a showing that a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto." *Jones v. Miles*, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citation and quotation marks omitted). "However, the hostility requirement is not met if the possessor's use of the disputed land is permissive." *Id.* (citation omitted).

The common law of North Carolina presumes the user's possession, claiming title by adverse possession, is permissive:

> Plaintiffs have vigorously urged us *to reject* our present position that a *user is presumed to be permissive* and adopt the rule, obtaining in the majority of jurisdictions, that the user is presumed to be adverse. *This we decline to do*. An easement by prescription, like adverse possession, is *not favored in the law* and we deem it the better-reasoned view to place the burden of proving every essential element, including hostility, on the party who is claiming against the interests of the true owner. Additionally we note that the modern tendency is to restrict the right of one to acquire a prescriptive right-of-way whereby another, through a mere neighborly act, may be deprived of his property by its becoming vested in one whom he favored. Thus, in order for plaintiffs to succeed in their claim, they must have shown *sufficient evidence*

> *of the hostile character* of their use to create an issue of fact for the jury.

Potts, 301 N.C. at 666-67, 273 S.E.2d at 288 (internal citations, footnote, alterations, and quotation marks omitted) (emphasis supplied).

Nearly seventy-five years ago, our Supreme Court held:

> A statute prescribing the length of time during which an adverse possession of land must be maintained in order for it to ripen into title will not begin to run until these two things concur: (1) The claimant has *actual possession* of the land under color of title, or claim of right; *and* (2) the possession of the claimant gives rise to a cause of action in favor of the true owner. *In other words, an adverse possession will never run against the owner of an interest in land unless he has legal power to stop it.*

Eason v. Spence, 232 N.C. 579, 587, 61 S.E.2d 717, 723 (1950) (internal citation omitted) (emphasis supplied).

Here, the undisputed evidence tends to show and the trial court's judgment concludes the Cornetts paid the Churches, the Hinman's predecessor-in-title, directly for the driveway easement to be paved in 1996 and shows the Cornetts also paid for the installation of drainage pipes within the easement to the Churches. The structures including: the brick driveway; the front carport; the chain link fence about the front carport; the gravel, later paved, road; the chain link fence; and, the garden were in place before the Cornetts first rented the parcel.

The burden on proving each element rests on the party claiming title by adverse possession. This party also has the burden of rebutting a presumption that its use is permissive and is not adverse. The Cornetts cannot overcome the presumption of permissive use. *See Potts*, 301 N.C. at 667, 273 S.E.2d at 288 ("Thus, in order for plaintiffs to succeed in their claim, they must have shown sufficient evidence of the hostile character of their use to create an issue of fact for the jury.").

The Cornetts installed the rear shelter during the Gulf War in 1991, the wood rail fence was constructed in 1992, the front car port in 1996, the chain link fence in 1996, and the garden and crepe myrtle trees were planted and maintained since 1999. This Court found possession not to be hostile, where the putative adverse possessor's actions acknowledge the continuing ownership rights of the landowner. *New Covenant Worship Center v. Wright*, 166 N.C. App. 96, 104, 601 S.E.2d 245, 251-52 (2004).

During his deposition, Mr. Cornett was asked "[S]o Bennie Church was fine with you using the driveway. Correct?" He replied: "Oh, yes." Mr. Cornett further stated there was no problem with the placement of drainage pipes in the easement from the Churches nor when they planted crepe myrtles in the easement. The Churches, who owned the servient estate, helped to pay for the paving of the driveway that they shared use of with the dominant estate. The Hinmans insisted for the Cornetts to move a disabled vehicle from the easement after a few weeks, and it is now on the parcel the Cornetts' son lives on.

The running of the prescribed twenty-year statutory period to assert and adversely possess real property was tolled by the Churches' granting permissive use of the easement and parcel at issue to the Cornetts. *Id.*; *Eason*, 232 N.C. at 587, 61 S.E.2d at 723. The record shows the Churches, the Hinmans' predecessors-in-title, had expressly granted permission to the Cornetts to use the now-disputed tract of land. This permissive use tolled the running of the twenty-year statute of limitations pursuant to N.C. Gen. Stat. § 1-40. The Hinmans acquired the servient parcel in 2019. The Hinmans timely filed this action to quiet title and for trespass in 2021.

The plurality's opinion states: "A party may succeed in an adverse possession claim 'though the claim of title is founded on a mistake.' " (citing *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985)). This is an accurate quote from *Walls*, and the Cornetts purportedly and may have mistakenly believed they owned the land contained within the easement. Even if true, their belief does not address the tolling of the statutory period by their admittedly permissive use and the Churches' ownership of the servient parcel prior to the Hinmans' acquisition. During Wade Cornett's deposition, he testified he believed he owned the land under which the easement ran.

In *Walls*, the Supreme Court of North Carolina overruled its prior holdings in *Price v. Whisnant*, 236 N.C. 381, 72 S.E.2d 851 (1952) and *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951), which required an adverse possessor to have the mind of a thief in order for his possession of the property to be adverse:

> [W]e now join the overwhelming majority of states, return to the law as it existed prior to *Price* and *Gibson*, and hold that when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse.

Walls, 315 N.C. at 249, 337 S.E.2d at 562.

However, the plurality opinion's reliance on this application of *Walls* under these facts is misplaced and erroneous. While the Cornetts' purported mistaken belief may not necessarily defeat their claim, the plurality's opinion erroneously labels it as a dispositive question, without making an analysis of the Churches' prior ownership and their express permissive allowance of the Cornetts use. The Supreme Court's analysis in *Eason* and this Court's analysis in *Jones* is dispositive. *See Eason*, 232 N.C. at 587, 61 S.E.2d at 723 ("[C]laimant has actual possession of the land. . . an adverse possession will never run against the owner of an interest of land unless he has the legal power to stop it."); *Jones*, 189 N.C. App. at 292, 658 S.E.2d at 26 (true owner must be on "notice that the [adverse] use is being made under claim of right.").

III. Conclusion

The plurality's opinion properly affirms the trial court's prohibition of the Cornetts from using the driveway to access the non-dominant Tract 1 of their property.

The Cornetts did not prove open, continuous, exclusive, actual, and notorious ("OCEAN") possession of the Hinman's property for the requisite statutory period. Viewed in the light most favorable to the Cornetts, no genuine issues of material fact exist of whether they failed to hold possession of the disputed tract for the requisite statutory twenty-year period. *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407-08, *disc. review denied*, 358 N.C. 236, 595 S.E.2d 154 (2004). The trial court's order granting summary judgment to the Hinmans should be affirmed. I respectfully dissent.

IN RE E.Q.B.

[290 N.C. App. 51 (2023)]

IN THE MATTER OF E.Q.B., M.Q.B., S.R.R.B.

No. COA22-736

Filed 1 August 2023

1. Termination of Parental Rights—grounds for termination—abandonment—failure to contact or provide for children—six-month period

The trial court properly terminated a father's parental rights in his three children on the ground of abandonment where the court found—based on clear, cogent, and convincing evidence—that the father failed to provide care, affection, financial support, and a safe and loving home for the children in the six months before the termination petition was filed. The father could not communicate with the children through their mother, with whom the children lived, after the mother started blocking his phone calls and then obtained a domestic violence protective order (DVPO) barring him from contacting her. However, the DVPO did not appear to prohibit the father from contacting his children directly. Further, the record and the court's unchallenged findings showed that the father could have communicated indirectly with the children through his aunt and that he had the ability to file a custody complaint or sign a voluntary support agreement at any time, but that the father made no effort to exercise any of those options.

2. Termination of Parental Rights—appellate review—multiple grounds for termination—single ground sufficient to uphold termination—potential implications for mootness doctrine

In an appeal from an order terminating a father's parental rights in his children on three separate grounds, where the appellate court affirmed the order on the basis of one of those grounds, the appellate court was not required under the applicable jurisprudence to review the other two grounds for termination. The appellate court recognized a potential need to reconsider this "single ground for termination" line of jurisprudence under the mootness doctrine, noting that: in applying the "single ground" rule, it had essentially determined that issues concerning the remaining grounds for termination were moot on appeal; and a refusal to review those remaining grounds could have collateral consequences (such as affecting a parent's ability to regain his or her parental rights in the future pursuant to N.C.G.S. § 7B-1114). Nevertheless, because the father

did not challenge the "single ground" jurisprudence on appeal, the appellate court was bound to follow it.

3. Termination of Parental Rights—dispositional order—no-contact provision—not authorized by statute

After finding grounds to terminate a father's parental rights in his three children, the trial court exceeded its authority when it included a provision in its dispositional order prohibiting any future contact between the father and the children, as there are no statutory provisions authorizing a trial court to issue a no-contact order in a Chapter 7B case.

Appeal by Father from order entered 4 May 2022 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 10 May 2023.

Samantha Belton, pro se, for petitioner-appellee mother.

Edward Eldred for respondent-appellant father.

MURPHY, Judge.

When a parent challenges the trial court's conclusion that he willfully abandoned his children, the determinative period which we consider for this alleged abandonment is the six consecutive months prior to the filing of the petition to terminate parental rights. The obstruction of a parent's ability to contact the children is relevant to the court's consideration; however, the trial court may consider the parent's other actions and inactions in determining the impact of the obstruction on the parent's lack of contact. Here, the trial court's findings of fact support its conclusion that Father willfully abandoned his children, and these findings are supported by clear, cogent, and convincing evidence. Applying our current "single ground" line of jurisprudence, we need not address the other grounds for termination disputed by Father.

While we affirm the adjudication and termination of Father's parental rights, the trial court exceeded its authority by including a no-contact provision in its dispositional order that was unsupported by statutory provisions, and we must vacate this portion of the order.

BACKGROUND

On appeal, Respondent-Father challenges the trial court's adjudicatory order terminating his parental rights of his three minor children

—E.Q.B. ("Dean"), M.Q.B. ("Barry"), and S.R.R.B. ("Allison")—and the trial court's dispositional order prohibiting Father from contacting his children.[1] In August 2007, Father married Petitioner-Mother. While the parents lived in Georgia, they had two children: Dean in 2008 and Barry in 2010. At some time after Barry's birth in 2010, Father was incarcerated, and in 2013, during his incarceration, Mother and Father divorced. After Father's release in 2015, the parents reconciled for a brief period, and Mother became pregnant with the parents' third child. During this period of reconciliation, the children would tell Mother that Father abused them when he was alone with them. After one incident, Mother took Dean to the hospital because he told her, "[D]addy kicked me in my back." Dean was treated for constipation after the kick. During another incident, Father tied up Mother's son, who was conceived with another man, with a belt. This caused that son pain and put him in fear.

When Father returned to prison in late 2016, the parents again separated. After this separation, Mother moved from Virginia to North Carolina, where she gave birth to the parents' third child, Allison. During Father's incarceration, Mother maintained contact with Father to send him pictures of their children, and in turn, Father sent drawings and cards to the children. However, Mother did not take any of the children to visit him in prison.

In 2019, some time after Father's release, Mother took the children to visit Father at his aunt's house in Virginia. She had learned from Father's aunt that he would be visiting her before he turned himself in for a probation violation. When Father first met Allison at his aunt's house, she was two years old.

After Father's visit with the children, the children expressed a desire to show their father their new toys and home in Wilkesboro. Mother allowed Father to live in her home with the children from November 2019 until December 2019, and the parents began seeing a pastor for counseling. During this time, Mother paid all of Father's expenses. On or about 1 January 2020, Mother and Father again separated.

After the parents' separation in January 2020, Father called Mother from various numbers to threaten her and the children. During this time, Mother blocked the various numbers which Father used to contact her, until she ultimately changed her phone number. In March, April, and July 2020, "[Father] gave his aunt an unspecified amount of money to send to [Mother] for the children," and in July 2020, he "provided toys to

1. We use pseudonyms to protect the juveniles' identities and for ease of reading.

his aunt to send to [Mother] for the children." Aside from these gifts, the parties dispute whether Father had any actual contact with his children after January 2020. The trial court found that since Mother and Father's separation in January 2020, Father has "made no attempt to see his children and has had no communication with them, even indirectly through his aunt" and, while he gave money and toys to his children through his aunt, he has "made no other efforts to convey messages, other gifts, or any evidence of his love and affection for the children."

From 15 September 2020 until 1 December 2020, Father was incarcerated for a probation violation. Upon his release, Father moved to Arizona "without any attempt to see the children" and was married to another woman on 6 December 2020.

In February 2021, in a separate action "[Mother] sought and obtained a temporary domestic violence protective order against [Father] due to [Father's] threatening to harm [Mother] and/or the children." On 24 March 2021, Mother filed the *Petition to Terminate Parental Rights*, alleging neglect and abandonment. On 19 April 2021, the trial court "issued a Domestic Violence Protective Order [("DVPO")] prohibiting [Father] from having contact with [Mother,]" giving "[Mother] temporary custody of the parties' children[,]" and denying Father from having visitation with the children. The DVPO "did not … prevent [Father] from having contact with the children nor providing gifts, support or other involvement in the children's lives." On 18 April 2022, Judge Robert J. Crumpton extended the DVPO until April 2024.

During the TPR hearing, Father testified that, if his parental rights were not terminated, he would file a custody complaint and sign a voluntary support agreement. On 4 May 2022, the trial court issued the *Order Terminating Parental Rights* and also ordered that "[Father] shall have no further communication or contact with any of [his] children." The trial court found that Allison was too young to express her wishes, but that Father's sons, 12 and 14 at the time, "do not want a relationship with [Father]." The trial court also found that "[Father] has had the means, opportunity, and ability to [file a custody complaint and/or sign a voluntary support agreement] at any time, but has made no effort to do so"; Father did not offer any excuse "for such lack of effort[,] nor has one been revealed by the evidence"; and "[Father] abandoned the children." The trial court concluded that "a ground exists to terminate [Father's] parental rights" pursuant to N.C.G.S. §§ 7B-1111(a)(1) and (a)(7) and N.C.G.S. § 7B-101. Father timely appealed.

ANALYSIS

Father argues that the trial court erred by finding that clear, cogent, and convincing evidence supported its findings of fact, and that these findings were sufficient to support its termination of his parental rights on three grounds: (1) abandonment, (2) neglect by abandonment, and (3) neglect by failure to provide proper care. Father also argues the trial court exceeded its authority by entering a no-contact order at the conclusion of the TPR hearing.

A. Termination of Parental Rights

We review the trial court's adjudicatory order to determine "whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to *de novo* review." *In re N.D.A.*, 373 N.C. 71, 74 (2019), *abrogated in part on other grounds*, *In re G.C.*, 384 N.C. 62 (2023) (italics added) (citations and marks omitted). If we find the trial court's findings of fact are supported by clear, cogent, and convincing evidence and that any of the three grounds on which the trial court terminated Father's parental rights are supported by these findings of fact, we affirm the termination order:

> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. *See State v. Nicholson*, 371 N.C. 284, 288 (2018). However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. *In re B.O.A.*, 372 N.C. 372, 380 (2019); *accord In re Moore*, 306 N.C. 394, 404 (1982). Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds. *In re C.J.*, 373 N.C. 260, 263 (2020).

In re J.S., *C.S.*, *D.R.S.*, *D.S.*, 374 N.C. 811, 814-15 (2020) (citations omitted).

1. Abandonment

[1] A trial court may terminate a party's parental rights when it finds that the parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7) (2022). To find abandonment, the trial court must find that the parent's conduct "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[,]" but the relevant inquiry is limited to the statutory period

of six months. *In re C.B.C.*, 373 N.C. 16, 19, 22 (2019) (quoting *In re Young*, 346 N.C. 244, 251 (1997)). Thus, the dates at issue for this ground are 24 September 2020 to 24 March 2021.

On appeal, Father argues that "portions of findings 6, 22, 23, 24, and 26 are not supported by sufficient evidence." These findings read as follows:

> 6. [Mother] and [Father] were married to each other in August, 2007. They divorced in 2013. However, following the divorce, the parties reconciled in 2016 for a brief period during which [Allison] was conceived.
>
> …
>
> 22. Since the time of the parties' divorce in 2013, [Father] has made no effort to provide care for his children. Even when the parties reconciled in 2016 and spent the weeks together in 2019, [Mother] provided all of the financial support for the children.
>
> 23. Since 2013, [Father] has made no effort to provide a safe and loving home for the children.
>
> 24. Since 2013, [Father] has provided no emotional support for the children.
>
> …
>
> 26. For at least the six-month period preceding the filing of the Petition to Terminate Parental Rights, the Court finds that:
>
> (a) [Father] had no communication or contact with the children.
>
> (b) [Father] provided no financial or emotional support for the children.
>
> (c) [Father] provided no cards, gifts, letters, or tokens of affection for the children.
>
> (d) [Father] made no effort to strengthen the parent-child relationship.
>
> (e) [Father] did nothing to be a part of the respective lives of the children, other than sporadic attempts to contact

> them by some electronic means which he knew, or should have known, would be futile.
>
> (f) [Father] did nothing to demonstrate he had a genuine interest in the welfare and well-being of any of the children.
>
> (g) [Father] abandoned the children.

Father claims "[i]t is not factually accurate to say that [Father] 'made no effort' to provide care and 'provided no emotional support' for the children since 2013." Father claims his "efforts to do both" despite "[Mother] actively [taking] steps to prevent him from doing either beginning in August 2020" render these facts unsupported. Father did not explicitly challenge the trial court's finding in its *Order Terminating Parental Rights* that:

> Since January, 2020 [Father] has made no attempt to see his children and has had no communication with them, even indirectly through his aunt. Although it is apparent that his aunt was able to communicate with [Mother] and children, including being able to send money and toys supplied by [Father], [Father] made no other efforts to convey messages, other gifts, or any evidence of his love and affection for the children.

Father also does not explain with particularity which "portions" of the challenged findings were not supported by clear, cogent, and convincing evidence. Nevertheless, all components of the challenged findings of fact are supported by clear, cogent, and convincing evidence. During the TPR hearing, Mother testified that she and Father married in August of 2007, divorced in 2013, and reconciled in 2016, the period during which Allison was conceived. Mother also testified that, during the time when the parties lived together in late 2019, Father only paid for his cigarettes and "snuck … alcohol into [her] house" and that, "going back to 2016," he has not "provided any sort of financial support for the children." The trial court found, and Father does not challenge, that "[Father] has had the means, opportunity, and ability" to "file a Complaint seeking custody of the children and to sign a voluntary support agreement to provide monetary assistance" "at any time, but has made no effort to do so." According to Mother's testimony, the children have lived with her since birth, and when Mother left Father alone with their children in the past, the children would be injured, once to the point of requiring emergency medical attention. Additionally, Mother testified that the parties' children began "questioning themselves" over Father's absence from their lives, and the eldest children expressed to the Guardian *ad Litem* that

they "want [Father] to 'stay away from them.' " Consequently, we find that clear, cogent, and convincing evidence supports the trial court's findings of fact regarding the parties' relationship and Father's failure to provide care, financial support, a safe and loving home, and emotional support for the children.

Father more clearly challenges portions of the findings of fact specifically supporting the trial court's conclusion of abandonment. Father argues that for one and a half of the six consecutive months immediately preceding the filing of the petition or motion, which are reviewed for the purposes of N.C.G.S. § 7B-1111(a)(7) (2022), he was barred from contacting his children by the temporary DVPO which issued in February 2021. In contrast to the April 2021 DVPO, where the trial court explicitly noted the DVPO did not prevent Father from contacting his children through means other than through Mother; from providing financial support for them; or from having involvement in their lives, the trial court did not make a finding as to the terms of the February 2021 temporary order. Furthermore, although the trial court took judicial notice of the entire court file in that action, Father did not submit either DVPO as part of the Record for our review. When referring to the February 2021 DVPO in his brief, Father states, "for one-and-a-half … months, [Mother] had a DVPO preventing [Father] from contacting her." This language suggests that the February DVPO did not prohibit Father from contacting his children; it only prevented him from contacting Mother.

Father's brief argues that the abandonment conclusion was not supported by the facts because Father did "enough." Father notes that, despite the lack of an explicit trial court finding, both Father and Mother testified that during the six month period, Father "called [Mother] repeatedly and that they spoke once in December 2020." The trial court found "[Mother] has elected to 'block' [Father] from contacting her by telephone … out of fear for herself and the children based upon [Father's] history of abusive behavior." Although Father could not contact the children through Mother, the trial court found that "[Father] … had the means, opportunity, and ability to [file a custody complaint and/or sign a voluntary support agreement] at any time, but has made no effort to do so" and Father did not offer any excuse "for such lack of effort[,] nor has one been revealed by the evidence." Relying on Father's lack of effort to obtain custody, lack of effort to provide financial and emotional support, lack of effort to see his children before he moved to Arizona after his release from incarceration in December 2020, and knowledge that attempting to contact the children through Mother would be futile, the trial court found:

> By his actions and inactions described above, [Father] has elected to be absent from his children's lives … for more than six consecutive months preceding the filing of the Petitions in these cases. [Father] could have, and should have, made other choices to involve himself with the children as their parent. His failure to do so is, and has been, willful and without just cause or excuse.

The trial court's conclusion that Father willfully abandoned his children by demonstrating a "willful determination to forego all parental duties and relinquish all parental claims," *In re C.B.C.*, 373 N.C. at 19 (quoting *In re Young*, 346 N.C. at 251), to the children from September 2020 through March 2021 is supported by the findings of fact.

2. "Single Ground" Jurisprudence and N.C.G.S. § 7B-1114

[2] Only one ground is needed to support the termination of Father's parental rights. *In re J.S.*, 374 N.C. at 814-15 ("The issue of whether a trial court's findings of fact support its conclusions of law is reviewed *de novo*. *See State v. Nicholson*, 371 N.C. 284, 288, . . . (2018). However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. *In re B.O.A.*, 372 N.C. 372, 380, . . . (2019); *accord In re Moore*, 306 N.C. 394, 404, . . . (1982). Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds. *In re C.J.*, 373 N.C. 260, 263, . . . (2020)."). As we affirm the trial court's finding of abandonment in accordance with N.C.G.S. § 7B-1111(a)(7), we need not review either of the remaining grounds for the purposes of the termination of parental rights. Although our appellate courts have long held that our inquiry stops once we have affirmed one ground to support the termination of parental rights, *In re B.O.A.*, 372 N.C. at 372, we note that under N.C.G.S. § 7B-1114(g)(2), a discussion of these additional grounds may be a more appropriate exercise of appellate review.

A moot question is "one that would have no practical effect on the controversy." *Emerson v. Cape Fear Country Club, Inc.*, 259 N.C. App. 755, 764 (2018) (citation omitted). While the "single ground" for termination line of jurisprudence does not appear to explicitly reference our mootness doctrine, a careful reading discloses that we are essentially determining that there is no need to consider the other grounds for termination challenged on appeal, as resolving these issues would have no practical effect on the case. However, whether the trial court's conclusions in regards to each of the other grounds should be affirmed could

arguably impact a parent's ability to regain his or her parental rights in the future, pursuant to N.C.G.S. § 7B-1114, effective since 1 October 2011.

In a hearing to reinstate a party's parental rights, the trial court shall consider, *inter alia*, "[w]hether the parent whose rights the motion seeks to have reinstated has remedied the conditions that led to the juvenile's removal and termination of the parent's rights." N.C.G.S. § 7B-1114(g)(2) (2022). The validity of additional ground(s) for termination may very well be relevant to this future statutory procedure and would otherwise escape appellate review. Nevertheless, even if there is a need to reconsider this "single ground" line of jurisprudence in light of N.C.G.S. § 7B-1114(g)(2) and mootness principles, a party bears the responsibility to address mootness "or present us with any collateral consequences that may stem from the disposition order in question." *In re B.B.*, 263 N.C. App. 604, 605 (2019). Father has not argued in this appeal for any renewed consideration of our "single ground" jurisprudence. As such, we need not discuss the merits of the two remaining grounds for termination, but in an exercise of intellectual honesty we acknowledge the potential for such arguments to impact future appellate litigation.

B. No-Contact Order

[3] Father argues "[t]he trial court exceeded its authority and abused its discretion by imposing [the] restriction [on Father's ability to communicate with his children.]" Father bases the majority of this argument on an assumption that the trial court issued a no-contact order pursuant to Chapter 50B, despite a lack of statutory authority to do so. N.C.G.S. § 50B-2(a) (2022). There is no indication in the Record that the trial court attempted to issue its no-contact order under Chapter 50B. However, no statutory provisions support the issuance of a no-contact order in this Chapter 7B case. Thus, we agree with Father that the trial court lacked the statutory authority to issue the no-contact order.

CONCLUSION

The trial court's conclusion that Father abandoned his children pursuant to N.C.G.S. § 7B-1111(a)(7) is supported by findings of fact which are supported by clear, cogent, and convincing evidence. Father makes no arguments related to our "single ground" jurisprudence and we need not address Father's arguments regarding neglect by abandonment or neglect by failure to provide proper care under N.C.G.S. § 7B-1111(a)(1). However, we vacate the no-contact portion of the trial court's order.

AFFIRMED IN PART; VACATED IN PART.

Judges GORE and FLOOD concur.

IN RE K.B.

[290 N.C. App. 61 (2023)]

IN THE MATTER OF K.B., A.M.H., M.S.H.

No. COA22-597

Filed 1 August 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—guardian's understanding of legal significance of appointment

In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court's determination that the great aunt understood the legal significance of being appointed the children's guardian was supported by adequate evidence, including that the children had been living with her for three years—during which time she provided care for them, took them to medical and dental appointments, and attended meetings with their teachers—and that, in her testimony, the great aunt stated her desire and willingness to continue providing care for the children.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to in-state relative—consideration of out-of-state relative

In a permanency planning order in a neglect and dependency case, the trial court did not err by granting guardianship of three children to their great aunt—a North Carolina resident with whom the children had been living for three years in a kinship placement and with whom the children were bonded—before a home study could be completed regarding the children's grandmother, who lived in Georgia and who the trial court had previously ordered be considered for placement. There was no statutory requirement for the trial court to rule out the grandmother as a placement option, and the trial court did not abuse its discretion by determining that guardianship by the great aunt was in the children's best interests.

3. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—decretal portion of order—declaration of matter being closed

In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court did not err by stating in the decretal portion of the order that "[t]he matter is closed" and that the department of social services and its counsel "are released and relieved of their responsibilities regarding this matter." There was nothing

in the order that prevented respondent mother from filing future motions in the matter, where she had been granted visitation rights but had not had her parental rights terminated.

4. Child Abuse, Dependency, and Neglect—permanency planning—electronic visitation only—improper delegation of judicial authority

In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court erred by limiting the mother's visitation rights to electronic-only visitation without making the necessary findings of fact that the mother had forfeited her right to in-person visitation or that in-person visitation would be inappropriate. Further, the trial court's failure to specify the length of visits and whether supervision was required amounted to an improper delegation of judicial authority.

Chief Judge STROUD concurring in part and dissenting in part.

Appeal by respondent mother from order entered 21 March 2022 by Judge S. Katherine Burnette in Vance County District Court. Heard in the Court of Appeals 23 May 2023.

Sheneshia B. Fitts for petitioner-appellee Vance County Department of Social Services.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for respondent-appellant-mother.

Robinson, Bradshaw & Hinson, P.A., by Erica M. Hicks, for appellee guardian ad litem.

DILLON, Judge.

Mother appeals from an order granting guardianship of her three children, Amy, Matt, and Kelly,[1] to the children's great aunt ("Great Aunt"), a North Carolina resident. On appeal, Mother challenges the trial court's decision to grant guardianship to Great Aunt (with whom the

1. The children's pseudonyms were designated by the parties in accord with North Carolina Rule of Appellate Procedure 42(b).

children have resided for several years), instead of to Mother's mother ("Grandmother"), who resides in Georgia. The trial court restricted Mother, who also lived in Georgia, to electronic-only visitation.

I. Background

In February 2019, the Vance County Department of Social Services ("VCDSS") filed juvenile petitions alleging that Amy, Matt, and Kelly were neglected and dependent, that domestic violence between the children's parents in their presence, as well as Mother's homelessness, "untreated mental health issues including a lack of medication management[,]" and previous alternative placements not working out. Based on the petitions, the trial court granted VCDSS non-secure custody with placement authority. About a week later, VCDSS placed all three children with Great Aunt in a kinship placement.

In April 2020, after hearings on the matter, the trial court adjudicated the children as dependent and neglected. The court entered a dispositional order setting the primary plan as reunification and the secondary plan as "custody with a court approved caretaker." The court further ordered VCDSS to retain custody and placement authority. The children's placement continued to be with Great Aunt.

Over the next three years, the trial court continued to hold dispositional hearings and enter orders. During this time, the trial court ordered that Grandmother be considered for placement and that a home study assessment by Georgia officials be completed to evaluate her fitness. Throughout this time, the children remained in the kinship placement with Great Aunt.

In May 2021, the trial court entered an order ceasing reunification efforts and shifting the primary plan to guardianship with a secondary plan of adoption.

On 21 March 2022, following a series of hearings spanning five months and prior to the completion of Grandmother's home study, the trial court entered an order granting Great Aunt guardianship of the children. In its order, the trial court also granted Mother "voluntary visitation two times per week . . . via electronic devices." The trial court noted "[t]he matter is closed" and relieved VCDSS and the GAL of further responsibilities, but noted it was "retain[ing] jurisdiction of this matter." Mother timely appealed.

II. Argument

Mother makes four arguments on appeal, which we address in turn.

A. Evidence that Guardian Understood Legal Significance

[1] In awarding Great Aunt guardianship, the trial court determined she understood the legal significance of taking on that role as required by N.C. Gen. Stat. § 7B-600. Mother argues there was no evidence to support this determination. We disagree.

Before awarding guardianship, the trial court must, in part, determine the proposed guardian understands the legal significance of the placement. *See In re K.P.*, 383 N.C. 292, 306, 881 S.E.2d 250, 259 (2022). However, the trial court need not make specific findings to support this determination. *Id.* Rather, all that is required is that the record show the trial court received and considered adequate evidence on this point. *Id.*

Here, there was evidence that the children had been living with Great Aunt for three years, she had provided care for them, she had scheduled and taken the children to medical and dental appointments, she had potty-trained the children, and she had attended meetings with their teachers. Additionally, Great Aunt testified that she wanted to continue providing care for them as their guardian and was willing do so without the assistance of VCDSS. The evidence shows that she understood her obligations to comply with court orders regarding the children. And during the last hearing, on cross-examination, she acknowledged that, as guardian, she would have more control over the children. Though Great Aunt was not expressly asked about her understanding of her legal obligations, we are satisfied that the evidence shows the trial court received adequate evidence on this point.

B. Failure to Wait for Completion of Home Study of Grandmother

[2] Mother argues the trial court erred by granting Great Aunt guardianship of the children without the benefit of considering Grandmother as a placement option following completion of the home study. She argues that the trial court was required by N.C. Gen. Stat. § 7B-903(a1) to wait for the home study of Grandmother previously ordered by the court be completed before ruling Grandmother out as a placement option for the children. For the reasoning below, we conclude the trial court did not err or otherwise abuse its discretion in granting guardianship to Great Aunt, thus ruling out Grandmother, without the benefit of a home study on Grandmother.

Section 7B-903(a1) states that the trial court should consider the children's best interests when placing them in "out-of-home care," but that "[p]lacement of a juvenile with a relative outside of this State *must* be in accordance with the Interstate Compact on the Placement of Children ["ICPC"]." N.C. Gen. Stat. § 7B-903(a1) (2021). (emphasis

added). We have held that, where the ICPC applies, "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *See In re V.A.*, 221 N.C. App. 637, 640, 727 S.E.2d 901, 904 (2012).

Assuming the ICPC applies in this case, *see In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70 (2007) (holding that ICPC did not apply to an order granting guardianship to out-of-state grandparents), we conclude there is no obligation under the ICPC that a home study be completed *to rule out* an out-of-state relative as a placement option. The plain language of Section 7B-903(a1) states that the ICPC only applies where a child is actually placed with someone out-of-state, and only must be complied with with respect to the out-of-state person with whom the child is being placed. For instance, if the trial court was considering placement with ten different relatives in ten different states, the ICPC does not require the trial court to review a home study for all ten relatives but only for the out-of-state relative with whom the child is actually placed. That is, there is no requirement under the ICPC that the trial court consider home studies for the other nine relatives before ruling them out.

Mother argues, however, it was error for Judge Burnette, who entered the guardianship order we are reviewing, to grant Great Aunt guardianship without the benefit of a home study on Grandmother where a different judge in a prior hearing had ordered the home study be completed. We conclude, however, that it was not an abuse of discretion for Judge Burnette to make a placement with an in-state person without the benefit of the previously ordered home study of an out-of-state person, so long as her findings and conclusions, otherwise, support her exercise of discretion in awarding guardianship.

And, here, we conclude the order does support Judge Burnette's discretionary decision to place the children with Great Aunt. For instance, the trial court found Great Aunt's home was the only home the children had ever known, her home is near other relatives, the children were generally doing well living with Great Aunt, and Grandmother already had three minor children in her home she was taking care of. Further, we note the trial court's findings that over many years, the children bonded with Great Aunt but not with Grandmother and that it would be in the children's best interest to remain in the only home they have ever known.

It may be that VCDSS inappropriately delayed in following through on its obligation to request a home study of Grandmother as was previously ordered, as the dissent in this case suggests. Notwithstanding, the matter was properly before Judge Burnette in the latest round of hearings, and she had the discretion both to enter her guardianship order

without the benefit of the home study and to deal with VCDSS' behavior separately, as may be warranted.

In sum, it may be an abuse of discretion in some cases *to rule out* a placement option, whether in-state or out-of-state, without the benefit of a home study assessment. It may be an abuse of discretion in some cases to place a child with an in-state person without a home study assessment of that person. In such cases, when the child is placed with an in-state person, the issue is whether the trial court abused its discretion in conducting its "best interests of the child" analysis without the benefit of a home study. However, pursuant to Section 7B-903, it is only when a trial court judge *actually places a child with an out-of-state person* that the trial court lacks discretion to make that placement without the benefit of a home study *of that person*, because such study is required under the ICPC. However, since Judge Burnette ordered that the children remain with their in-state Great Aunt, we need only consider whether it was an abuse of discretion for her to do so without the benefit of a home study of Grandmother. And, for the reasons above, most notably that the children have now lived with Great Aunt for several years and have bonded well with her, we conclude that Judge Burnette did not abuse her discretion.

C. Order Stating "The Matter is Closed"

[3] In the decretal portion of her order, Judge Burnette stated that "[t]he matter is closed and [VCDSS] and its counsel are released and relieved of further responsibilities regarding this matter." Mother contends that the clause "[t]he matter is closed" constitutes error to the extent that the clause could be construed as stating the entire case has been resolved. Mother notes this clause may simply refer to the matter being closed as far as VCDSS is concerned. We do not read the clause as preventing Mother from filing motions in the future concerning her children. Her parental rights have not been terminated, and she was granted visitation rights in the trial court's order.

D. Electronic Visitation

[4] The trial court granted Mother certain visitation rights as follows:

> That there is voluntary visitation two times per week between each of the juveniles in the care of Ms. P[] and [Mother],via electronic devices. The Respondent [M]other is allowed to continue these visits.

Mother argues the trial court abused its discretion by failing to comply with Section 7B-905.1 in this visitation. As Mother asserts, this visitation

provision raises two concerns: (1) the findings are not sufficient to support the grant of electronic-only visitation; and (2) the order improperly delegates visitation decisions to the parties. *See In re J.R.*, 279 N.C. App. 352, 366, 866 S.E.2d 1, 10 (2021) (stating that our Court "reviews the trial court's dispositional orders of visitation for an abuse of discretion") (citation and quotation marks omitted).

We agree that the visitation provision does not properly support the grant of electronic-only visitation. When a juvenile is placed outside the home, North Carolina General Statute § 7B-905.1(a) requires trial courts to "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C. Gen. Stat. § 7B-905.1(a) (2021). This Court has previously held the provision of electronic-only visitation is equivalent to the trial court granting no visitation. *See In re T.R.T.*, 225 N.C. App. 567, 573, 737 S.E.2d 823, 828 (2013) (agreeing with argument on appeal that visitation exclusively over Skype "effectively denie[d]" the mother visitation "as contemplated by" North Carolina General Statute § 7B-905(c)); *see also In re K.M.*, 277 N.C. App. 592, 601 n. 2, 861 S.E.2d 10, 16 (2021) (explaining § 7B-905(c) has been "substantively recodified" as § 7B-905.1(a)).

As a result, while a trial court may grant electronic-only visitation, the court must make specific findings to justify it that are equivalent to the findings a trial court must make when it sets no visitation. *See In re T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 829 (order failed to comply with § 7B-905(c) because "[d]espite denying visitation, the trial court did not make any specific findings that [the] respondent-mother forfeited her right to visitation or that visitation would be inappropriate under the circumstances"); *see also In re K.M.*, 227 N.C. App. at 602-04, 861 S.E.2d at 16-18 (distinguishing *In re T.R.T.* and holding the trial court did not abuse its discretion in suspending a mother's supervised in person visitation and only allowing "weekly video contact" because the trial court "ma[d]e specific findings that visitation would be inappropriate" other than supervised visitation, which could not take place because of the pandemic); *In re T.H.*, 232 N.C. App. 16, 34-35, 753 S.E.2d 207, 219 (2014) (remanding for entry of visitation order because the trial court failed to provide any visitation and had not made findings that the mother "had forfeited her right to visitation or that it was in the best interests of [the children] to deny visitation.") Specifically, to grant electronic-only visitation, the trial court must make "specific findings that" a parent "forfeited her right to visitation or that visitation would be inappropriate under the circumstances." *In re T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 829.

Here, the trial court granted electronic-only visitation without any "specific findings" that Mother "forfeited her right to visitation or that visitation would be inappropriate under the circumstances." *See id.* at 574, 737 S.E.2d at 829. The trial court's only findings regarding visitation stated:

> 12. The current visitation plan between the [M]other . . . who resides in Georgia, and the juveniles include weekly virtual visits and telephone calls. The calls are initiated by the biological [M]other of the children[.]
>
> . . . .
>
> 14. The [M]other's last in person visit with the juveniles was in December, 2020.
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> . . . .
>
> 23. [Mother] has not been consistent on visits with the three juveniles. She has made calls to [Ms. P's] household during school hours and dinner time. She forgets what times the children are in school and when they eat dinner.

These findings do not meet the requirements for electronic-only visitation. On remand, the trial court has discretion to grant electronic-only visitation or any other visitation provision, *see In re J.R.*, 279 N.C. App. at 366, 866 S.E.2d at 10 ("[t]his Court reviews the trial court's dispositional orders of visitation for an abuse of discretion"); but if the trial court wishes to set electronic-only visitation, it must make the required findings. *In re T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 829. We also note that if the children remain in North Carolina and Mother remains in Georgia, frequent in-person visitation may not be practical for Mother due to the cost and distance, but those factors alone may not justify the complete elimination of any possibility of in-person visitation, assuming the absence of other reasons to deny in-person visitation.

Turning to Mother's second area of concern, we agree that the visitation provision improperly delegates authority regarding her visitation. Trial courts must "provide a framework for . . . visitations." *In re N.B.*, 240 N.C. App. 353, 364, 771 S.E.2d 562, 570 (2015); *see also In re M.M.*, 230 N.C. App. 225, 240, 750 S.E.2d 50, 59 (2013) (terming the failure to provide such a framework as "leav[ing] the terms of visitation in the discretion of the custodian.").[2] Specifically, North Carolina General Statute § 7B-905.1(c) provides:

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2. *In re M.M.* used this language in reference to an old line of cases stemming from *In re E.C.* that required the court to provide for the "time, place and conditions under which

> If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(c) (eff. 1 Oct. 2021). Thus, the trial court must include three pieces of information when ordering visitation: (1) minimum frequency; (2) length of the visits; and (3) supervision, or lack thereof, necessary for the visits. *Id.*

In the order on appeal, the visitation provision only addresses one of the three required elements. *See id.* While the minimum frequency of the visits is two times per week, the trial court's order does not address the length of the visits or whether they need to be supervised. As a result, to the extent the trial court, in its discretion, provides for visitation on remand, it must at least address the minimum frequency, length, and supervision, or lack thereof, for the visits. *See id.*; *see also In re J.R.*, 279 N.C. App. at 367, 866 S.E.2d at 10.

II. Conclusion

We vacate the portion of the order granting Mother electronic-only visitation due to both the lack of any findings that electronic-visitation would be in the children's best interest and the trial court's failure to address the frequency, length and supervision (or lack thereof) concerning the visitation. We remand the matter to the trial court to reconsider Mother's visitation and enter an order that complies with Section 7B-905.1 of our General Statutes.

We affirm the order in all other respects.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge CARPENTER concurs.

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visitation may be exercised." *In re M.M.*, 230 N.C. App. at 239-40, 750 S.E.2d at 59 (quoting *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005)). While *In re E.C.*'s requirement a trial court provide "the time, place, and conditions of visitation" was abrogated by the enactment of North Carolina General Statute § 7B-905.1, the new statute still provides a new, more limited framework. *See In re N.B.*, 240 N.C. App. at 364, 771 S.E.2d at 570 (explaining how *In re E.C.* was abrogated after stating the new statute "only require[s] the trial court to provide a framework for . . . visitations."). As such, when the trial court has not complied with the requirements of § 7B-905.1, we still refer to this as leaving the terms of visitation to the discretion of the custodians.

Chief Judge STROUD concurs in part and dissents in part by separate opinion.

STROUD, Chief Judge, concurring in part, dissenting in part.

I agree with the Majority Opinion on three of the four issues: (1) the legal significance of guardianship, (2) the trial court's statement that "matter is closed[,]" and (3) visitation. But I disagree with the Majority Opinion that the trial court could make a placement determination without waiting for the ICPC home study of Grandmother, after having thrice ordered this study be obtained. Therefore, I concur in part and dissent in part.

I first note the potential importance of this opinion. The Majority Opinion reduces a statutory mandate established to protect the best interests of abused, neglected, or dependent children to a mere discretionary question. In other words, the Majority Opinion holds that the trial court has the discretion to ignore the statute and prior court orders. The Majority Opinion also overlooks egregious and unexplained delays and multiple violations of court orders by VCDSS. This case sets a dangerous precedent for the most vulnerable members of our society—children who are abused, neglected, or dependent. Departments of Social Services and Child Protective Services agencies have an incredibly important and difficult job, and most do this job admirably. But I fear those who do not do this job properly will be able to rely on the Majority Opinion to justify their failures to act, up to and including ignoring court orders directing them to take a specific action. The Majority Opinion also gives credence to VCDSS's argument that the ultimate placement of a child is up to the Department of Social Services; the trial court just serves as a rubber stamp for the Department's decision.

As an initial matter regarding the home study issue, the Majority Opinion improperly reviews for abuse of discretion rather than *de novo*. The Majority Opinion "conclude[s] the trial court did not err or *otherwise abuse its discretion* in entering its order granting guardianship to Great Aunt without the benefit of a home study of Grandmother." (Emphasis added.) While in general this Court "review[s] a trial court's determination as to the best interest of the child for an abuse of discretion[,]" *In re C.P.*, 252 N.C. App. 118, 122, 801 S.E.2d 647, 651 (2017) (citation and quotation marks omitted), Mother argues on appeal the failure to investigate a potential placement with Grandmother, who lives in Georgia, constituted "an inexcusable breach of [the] statutory commands" of North Carolina General Statute § 7B-903(a1) to comply with

the ICPC, N.C. Gen. Stat. § 7B-3800 *et seq.* (2021), when "determin[ing] whether a child should be placed with a willing and able relative that lives outside of North Carolina." *See* N.C. Gen. Stat. § 7B-903(a1) (eff. 1 Oct. 2021). This Court "review[s] statutory compliance *de novo*[,]" *see In re N.K.*, 274 N.C. App. 5, 13, 851 S.E.2d 389, 395 (2020) (stating in a case about § 7B-903(a1)), rather than for an abuse of discretion.

In addition to the Majority Opinion's incorrect standard of review, I also note the Majority Opinion's suggestion the ICPC may not even apply here relies on caselaw this Court has determined we are not bound by. Specifically, as part of merely "[a]ssuming the ICPC applies in this case[,]" the Majority Opinion cites to *In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70 (2007) and says it holds the ICPC does not apply to a grant of guardianship to out-of-state grandparents. While the Majority Opinion accurately states *In re J.E.*'s holding, *see id.* at 615, 643 S.E.2d at 72, the Majority does not acknowledge this Court's opinion in *In re J.D.M.-J.* The *In re J.D.M.-J.* Court concluded, after an analysis under *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), this Court is not bound by *In re J.E. See In re J.D.M.-J.*, 260 N.C. App. 56, 63, 817 S.E.2d 755, 760 (2018) (determining *In re J.E.* and the other case the Majority Opinion cites, *In re V.A.*, 221 N.C. App. 637, 727 S.E.2d. 901 (2012), "are in conflict" before concluding "we are bound by" *In re V.A.* and an earlier case on which it relies, *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446, 450-53, 665 S.E.2d 54, 57-59 (2008)). Instead, as *In re J.D.M.-J.* states by relying on the other case cited by the Majority Opinion (*In re V.A.*), under the ICPC, "custody placement with . . . out-of-state relatives . . . trigger[s] the requirements of the ICPC." *See In re J.D.M.-J.*, 260 N.C. App. at 63, 817 S.E.2d at 760 (citing *In re V.A.*, 221 N.C. App. at 640-41, 727 S.E.2d at 904) (concluding the ICPC applies to placement with out-of-state relatives because they count as a "placement in foster care" under the ICPC (emphasis omitted)); *see also* N.C. Gen. Stat. § 7B-3800, Art. III(b) (ICPC section stating it applies to placement "in foster care or as a preliminary to a possible adoption"). So I disagree we need to *assume* the ICPC applies; under our past caselaw, the ICPC definitively applies to the situation here where there is a potential placement with an out-of-state relative, Grandmother. *See In re J.D.M.-J.*, 260 N.C. App. at 63, 817 S.E.2d at 760 (explaining, under a line of cases it later holds this Court is bound by, that "custody placement with . . . out-of-state relatives . . . trigger[s] the requirements of the ICPC"). And aside from these statements of the law in other cases, in *this* case, the trial court itself had thrice ordered VCDSS to do the ICPC home study. Those orders were not appealed. VCDSS does not contend the trial court erred by entering

those orders, nor does VCDSS give any rational explanation for its failure to comply with the trial court's three orders.

Turning to the crux of the matter, I disagree with the Majority Opinion's determination that the ICPC only applies when a child is actually placed with an out-of-state relative. This interpretation is exactly the opposite of the actual purpose of the ICPC. While North Carolina General Statute § 7B-903(a1) states, "Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children[,]" N.C. Gen. Stat. § 7B-903(a1), to hold, as the Majority Opinion does, that the ICPC only applies to placement with an out-of-state relative, and not when an ultimate placement decision settles on an in-state relative instead of an out-of-state relative also under consideration, (1) does not comport with the purpose of the abuse, neglect, dependency subchapter of the Juvenile Code and (2) does not comport with the ICPC's goal to provide information to help make the ultimate determination between an in-state and out-of-state relative.

First, the Majority Opinion's view of the ICPC study as a step to be taken *after* the trial court has made a decision to place a child in an out-of-state placement entirely contradicts the goal of attaining permanency for children as soon as possible. *See* N.C. Gen. Stat. § 7B-100(5) (2021) (listing, as a purpose of the subchapter of the Juvenile Code on abuse, neglect, dependency, "[t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be *placed in a safe, permanent home within a reasonable amount of time*" (emphasis added)). A trial court may order the ICPC home study to be initiated at any point in the process if the court identifies a potential out-of-state placement for the child. Here, the first order directing a home study of Grandmother was rendered *a few days* after the petition was filed. Had VCDSS complied with the first order, or the other two orders directing VCDSS to "initiate" the ICPC home study and to "expedite" the ICPC home study, the trial court would have had the home study long before the final hearing. If a trial court had to wait until it was ready to make a final determination even to order an ICPC home study, this delay would be detrimental to the children and would prolong the process in getting to permanency for the children.

Turning to the disconnect between the Majority Opinion's interpretation and the purposes of the ICPC, in relevant part, the ICPC lists these purposes:

> It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:
>
> . . . .
>
> (b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.
>
> (c) The proper authorities of the state from which the placement is made may obtain *the most complete information on the basis of which to evaluate a projected placement before it is made*.
>
> (d) Appropriate jurisdictional arrangements for the care of children will be promoted.

N.C. Gen. Stat. § 7B-3800, Art. I (emphasis added). To support these purposes, Article III of the Compact sets forth an exchange of information between states to ensure any placement outside of the initial state, here North Carolina, "does not appear contrary to the interests of the child[:]"

> (a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this Article and with the applicable laws of the receiving state governing the placement of children therein.
>
> (b) Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:
>
> (1) The name, date, and place of birth of the child.
>
> (2) The identity and address or addresses of the parents or legal guardian.
>
> (3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

> (4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.
>
> (c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this Article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this Compact.
>
> (d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

N.C. Gen. Stat. § 7B-3800, Art. III.[1]

Based on these requirements in Article III of the ICPC, this Court has held "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *See In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 (quoting *In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400) (stating this requirement directly after discussing Article III of the ICPC). Thus, a home study ultimately helps provide "the most complete information on the basis of which to evaluate a projected placement before it is made." N.C. Gen. Stat. § 7B-3800, Art. I(c); *see also In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400 (linking the requirement of an ICPC home study to the ICPC's goal "that states will cooperate to ensure that a state where a child is to be placed 'may have full opportunity to ascertain the circumstances of the proposed placement' and the [s]tate seeking the placement 'may obtain the most complete information on the basis of which to evaluate a projected placement before it is made' " (quoting N.C. Gen. Stat. § 7B-3800, Art. I(b), (c))).

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1. As discussed above, while the language of the ICPC states it applies to placement "in foster care or as a preliminary to a possible adoption[,]" N.C. Gen. Stat. § 7B-3800, Art. III(b), this Court has previously held "custody placement with . . . out-of-state relatives [is] a 'placement in foster care,' thereby triggering the requirements of the ICPC." *See In re J.D.M.-J.*, 260 N.C. App. at 63, 817 S.E.2d at 760 (quoting *In re V.A.*, 221 N.C. App. at 640-41, 727 S.E.2d at 904) (discussing *In re V.A.* as part of a conflict between case lines from this Court and then later holding this Court is "bound by" the *In re V.A.* line of cases).

Here, the Majority Opinion allows placement with an in-state relative, Great Aunt, without requiring the trial court to receive complete information on an out-of-state relative, Grandmother. Instead, the Majority Opinion determines (1) the trial court could make a placement determination before receiving a home study as long as the trial court's findings supported its conclusions and (2) in this case, the findings did support the conclusions. The issue with such a holding is that it assumes the placement decision would be the same—*i.e.* with an in-state relative such that compliance with the ICPC would not be required under the Majority Opinion's reading of North Carolina General Statute § 7B-903(a1)—even after the home study is complete. But that assumption cannot be sustained under the facts.

The trial court made findings about Grandmother, based on the limited information before the trial court, to support its conclusion placement with her would be contrary to the children's best interest, but the home study could have provided information that may have affected those findings. For example, the trial court found:

> 59. The three juveniles in this case have not bonded with [Grandmother] or with [Grandmother's] three older children and each juvenile in this case would be one of six children in the [Grandmother's] household as opposed to being one of three children in a household wherein the only other children in the household are their siblings in the current household of [Great Aunt].

A home study could have addressed the bond of the children with Grandmother.[2] A home study also could have addressed how Grandmother would deal with balancing the needs of her three older children and of the three children whose custody is at issue in this case. Some caretakers can care for multiple children very well; some caretakers struggle with caring for even one child. Without the ICPC home study, it is impossible to be certain what we, the parties, or the trial court would learn about Grandmother's home or her capacity to care for more children. Because of that uncertainty, I disagree with a blanket holding the ICPC does not apply when a child is placed in-state instead of with an out-of-state relative who is a placement option.

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2. We also note a three-year delay by VCDSS in requesting the ICPC home study, discussed in greater detail below, effectively eliminated any opportunity Grandmother might have had to develop or strengthen her relationship with her grandchildren during this time.

I also recognize that under different facts, the trial court's failure to wait for the ICPC home study might be harmless. So I would also not make a blanket holding the other direction and always require a trial court to wait for completion of an ICPC home study when a potential out-of-state relative placement is identified, even if the trial court had ordered the study. Circumstances can change and a trial court may have good reason—such as an out-of-state relative no longer being available to be a placement option after lengthy proceedings—to forgo the home study. Instead, I would analyze whether the trial court should have waited for the home study in this case.

Here, I would ultimately conclude the trial court was required to wait for a home study. First, the trial court repeatedly ordered the home study and even continued the hearing that led to the order on appeal because the home study had not yet been received. Second, the home study was delayed not because of any fault of Mother or Grandmother but rather because of VCDSS's repeated failures to comply with the trial court's orders to initiate the home study.

From the very start of the case, only a few days after filing of the petition, Grandmother in Georgia was identified as a potential placement for the children, and the trial court initially ordered Grandmother "be investigated as a possible placement" in February 2019, although the order was not written down and filed until April 2020. This order notes it was "entered in open court[,]" and we have no reason to believe VCDSS was not aware of the trial court's directive for this home study in February 2019, even if the written order was filed woefully late, nearly a year later.[3] While that order did not explicitly mention an *ICPC* home

3. The delays in filing written orders continued throughout the case. The record does not reveal the reason the written orders were significantly delayed in this case, especially given all of the adjudication, disposition, and permanency planning orders were required by statute to be written and entered within 30 days after the completion of the relevant hearings. *See* N.C. Gen. Stat. § 7B-807(b) (2021) (mandating adjudication orders "shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing"); N.C. Gen. Stat. § 7B-905(a) (eff. 1 Oct. 2015 to 30 Sept. 2021) (stating dispositional orders "shall be in writing, signed, and entered no later than 30 days from the completion of the hearing"); N.C. Gen. Stat. § 7B-906.1(h) (eff. 1 Oct. 2021) (requiring permanency planning orders "be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing"); N.C. Gen. Stat. § 7B-906.1(h) (eff. 1 Oct. 2019 to 30 Sept. 2021) (previous permanency planning statute including identical timing requirements as current statute); *see also* N.C. Gen. Stat. § 7B-905(a) (eff. 1 Oct. 2021) (current version of dispositional order statute also requiring written order be entered within 30 days).

Given these delays, in general, I follow the dates the orders state they were rendered in open court rather than the dates they were filed, which no parties dispute.

study, placement with Grandmother in Georgia would have required an ICPC home study. *See In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 ("[A] child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.").

Then, in an order rendered in open court on 25 February 2021 but not written and entered until 25 May 2021, the trial court explicitly ordered VCDSS to "initiate the ICPC" for Grandmother. Third, in an order rendered 7 July 2021 but not filed until 20 January 2022, the trial court specifically ordered the ICPC home study of Grandmother "be expedited." Finally, on 25 August 2021, the trial court entered an order to continue hearing of the case to 18 October 2021. The stated reason for the continuance was:

> "For the court to receive additional evidence, reports, or assessments requested by the court or one of the parties. **That the results of the ICPC have not been received by the VCDSS.**"

(Emphasis in original.) Notably, despite the Majority Opinion's discussion of how a different judge than Judge Burnette had initially ordered the ICPC home study, Judge Burnette entered the order expediting the home study *and* continued the case because the home study had not been received.

Despite these orders and the continuance by the trial court, VCDSS had not even *requested* the home study from Georgia when the hearing in October 2021 began, as it was not requested until 5 November 2021. And the home study had not been completed by the last hearing date in February 2022 that was part of the proceedings that led to the guardianship order on appeal. During the series of hearings that led to the guardianship order—contrary to the statement by VCDSS's counsel at the start of the hearing that "It has been sent to Georgia, but we do not have results"—the VCDSS social worker on the case testified she did not send the ICPC on Grandmother to Georgia until 5 November 2021. The VCDSS social worker also explicitly testified this delay with the ICPC had nothing to do with Grandmother. Instead, VCDSS waited almost three years between the time when it was clear an ICPC home study would be necessary (February 2019), *see In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 (requiring an ICPC home study for an out-of-state relative placement), and the time it initiated the ICPC process by sending the ICPC to Georgia (November 2021). VCDSS failed to comply with the trial court's three orders—in February 2019, to investigate Grandmother as a potential relative placement; in February 2021, to initiate the ICPC home study; and in July 2021, to expedite the home study.

VCDSS continued to delay in *ordering* the home study even after the trial court's August 2021 order continuing hearing of the case to October expressly to obtain the home study from Georgia.

I also note that Mother did not abandon or waive her request for a home study of Grandmother but continued to assert the need for the study throughout the case and in the final hearing. Grandmother also participated in the hearing. When Mother's attorney asked at the end of the proceedings if the home study would "still be proceeding[,]" the trial court did not respond:

> [Mother's attorney]: Okay. Will the home study still be proceeding while this is going on?
>
> THE COURT: (No audible response.)
>
> [Mother's attorney]: Okay. So that – that's out of your hands. That's just . . .
>
> THE COURT: I do want to reiterate something [attorney advocate for the GAL] said. It is wonderful to see so many relatives with interest in these children.
>
> [Mother's attorney]: I agree, Your Honor.
>
> THE COURT: And I appreciate that.
>
> [Mother's attorney]: I do agree.
>
> THE COURT: All right.

As a result, by the end of the proceedings, despite three court orders and a continuance expressly to get the home study, no ICPC home study had been done to evaluate the suitability of Grandmother as a placement option.

Only VCDSS was at fault for the failure to obtain the home study; neither Grandmother nor Mother contributed to the delay. Rather, VCDSS had not initiated the home study as repeatedly ordered by the trial court. VCDSS also made misrepresentations to the trial court about the status of the request for the home study at the beginning of the hearing in October, claiming the request had been sent to Georgia, when in fact VCDSS did not send the request until November 2021.[4]

VCDSS's defense of its actions and inactions on appeal is also disconcerting. VCDSS repeatedly contends the delay in getting the ICPC home study done combined with the home study's lack of bearing on

4. The record does not reveal whether this misrepresentation was intentional or just negligent, but VCDSS's representation to the trial court that the home study had been ordered prior to November 2021 was clearly not true.

the children's placement given VCDSS's placement authority to make a determination means the trial court did not err. VCDSS argues:

> The juveniles have been in a kinship placement with [Great Aunt] since February 28, 2019, thirty-five (35) months. Reunification efforts were ceased and the primary plan changed to guardianship on February 25, 2021. In the same order, the court ordered that VCDSS initiate an ICPC but that DSS would also make the determination on the placement. *I would argue that the ICPC would not have had a bearing on the placement of the children. That still would have been up to DSS to make the determination.* (R. 162). Moreover, the request for the ICPC to be expedited did not occur until July 7, 2021.
>
> The Juvenile Code states that when the court places the child in out-of-home care with a relative outside of North Carolina, that dispositional placement "must be in accordance with the["] ICPC. N.C. Gen. Stat. § 7B-903(a)(1). *It is the Petitioner's contention that it did not intend to place the children in the home of [Grandmother]*, which would have removed them from the home that they have known for the past thirty-five (35) months with [Great Aunt] and place them in the home of a relative that they did not have a relationship with . . . . [G]randmother was not even aware that the children were in the custody of DSS until 2020 because she and the Respondent-Mother did not have a good relationship and the status of their relationship did not change until 2020. (R. 290).

(Emphasis added.) VCDSS's arguments misapprehend the situation.

First, VCDSS's reliance on the delay in the ICPC home study to justify continued placement with Great Aunt ignores the fact that *VCDSS was responsible for that delay and that it failed to comply with the trial court's three orders*. As recounted above, VCDSS failed to initiate the ICPC process for almost three years after the trial court initially rendered an order that Grandmother should be investigated. And the delay was not the fault of Grandmother but rather the fault of VCDSS. As VCDSS is entirely at fault for the delay with the ICPC home study even being initiated, it cannot now defend the trial court's decision to not wait for the home study by pointing to its own delay.

Further, VCDSS's argument about placement authority misunderstands the scope of its authority and the stage in proceedings at issue in

this appeal. To support its contention, VCDSS seems to contend it—not the trial court—would make the final placement determination by citing to the permanency planning order filed 25 May 2021. While that order granted VCDSS legal and physical custody with placement discretion, the order on appeal involved removing custody from VCDSS and instating Great Aunt as the children's guardian. When making the determination of whether Great Aunt or Grandmother would have custody, VCDSS thus did not have any sort of placement authority because it no longer would have custody.

VCDSS's placement authority only stemmed from the trial court's decision to grant it custody with placement authority. *See* N.C. Gen. Stat. § 7B-903(a) (authorizing "any *court* exercising jurisdiction" in an abuse, neglect, dependency proceeding to make a choice as to disposition where those choices include placing the juvenile with DSS (emphasis added)). In making a determination of whether to give custody or guardianship to Great Aunt or Grandmother, the trial court had the authority to decide, not VCDSS. *See id.* (again empowering the *court* to choose between placing the juvenile in the custody of a relative or appointing a guardian); *see also* N.C. Gen. Stat. § 7B-903(a1) ("In placing a juvenile in out-of-home care under this section, *the court* shall" undertake the listed actions. (Emphasis added.)). Because the trial court, not VCDSS, had authority, and the trial court was required to take into account the ICPC home study, as discussed above, VCDSS incorrectly argues the ICPC study was immaterial because VCDSS had placement authority.

In addition, VCDSS ignores the trial court's three orders directing VCDSS to obtain a home study of Grandmother. Whatever VCDSS may have "intend[ed]" as to the placement of the children, the trial court had ordered the home study, and VCDSS had an obligation to comply with the trial court's orders.

Given these facts, I agree with Mother that the trial court failed to comply with North Carolina General Statute § 7B-903(a1)'s command to comply with the ICPC. *See* N.C. Gen. Stat. § 7B-903(a1). Given the three court orders directing VCDSS to investigate Grandmother as a potential placement, the trial court was clearly considering her as a potential placement. Since the trial court was still considering placement with an out-of-state relative, it would have to comply with the ICPC. *See In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 (requiring an ICPC home study before there can be placement with an out-of-state relative). But the trial court did not comply with the ICPC's requirement of a home study, *see id.*, and instead considered and rejected placement with Grandmother without having a home study. Further, the trial

court did not provide sufficient reasoning for its decision to not wait for the home study under the unusual circumstances of this case. The trial court gave "[n]o audible response" when Mother's attorney asked about the home study at the end of the relevant hearing, and the trial court's findings in its written order were not sufficient as the home study could have provided pertinent information that could have affected those findings.

I would hold the trial court failed to comply with the ICPC and failed to comply with North Carolina General Statute § 7B-903(a1). Because the trial court failed to comply with a statutory mandate, I would vacate the trial court's order entirely and remand the case to the trial court for further proceedings and entry of a new order. For that reason, I would not reach the other issues raised on appeal. However, I concur with the Majority Opinion as to the remaining issues. Therefore, I respectfully concur in part and dissent in part.

STATE OF NORTH CAROLINA
v.
SCOTT LEE BRIDGES, DEFENDANT

No. COA22-208

Filed 1 August 2023

1. Constitutional Law—effective assistance of counsel—right to conflict-free counsel—Sullivan review—notice, inquiry, and waiver

In defendant's prosecution for charges arising from an attempted robbery and an assault with a deadly weapon, there was no violation of defendant's Sixth Amendment right to conflict-free counsel where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State. Upon defense counsel's motion to withdraw due to the alleged conflict of interest, the trial court did not err by denying the motion because the court had notice of the potential conflicts, the court conducted an adequate inquiry into the conflicts, and defendant gave a knowing, intelligent, and voluntary waiver of the conflicts.

2. Constitutional Law—effective assistance of counsel—right to conflict-free counsel—claim prematurely asserted on direct appeal—dismissal without prejudice

In defendant's prosecution for charges arising from an attempted robbery and assault with a deadly weapon, where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State, the Court of Appeals dismissed—without prejudice to his right to bring a motion for appropriate relief in the trial court—defendant's claim for ineffective assistance of counsel based on the allegation that defense counsel renewed his motion to withdraw yet asked the trial court not to grant the motion.

Appeal by Defendant from judgments entered 23 July 2021 by Judge James F. Ammons, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence D. Friedman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

MURPHY, Judge.

When a trial court denies a defense counsel's motion to withdraw due to an alleged conflict of interest, the defendant may demonstrate reversible error by showing that either (1) defense counsel had an actual conflict of interest which implicated the defendant's Sixth Amendment right to conflict-free counsel or (2) despite the absence of an actual conflict of interest, the defense counsel provided ineffective assistance which prejudiced the defendant. However, when the trial court had notice of a potential conflict of interest and conducted an adequate inquiry into that conflict, and the defendant gave a knowing, intelligent, and voluntary waiver of that conflict, the defendant's Sixth Amendment claims fail.

Here, Defendant argues that his Sixth Amendment right to conflict-free counsel was implicated both when his defense counsel became a necessary witness and when, outside the presence of the jury,

the State accused counsel of misconduct. Defendant further argues that the denial of defense counsel's motion to withdraw, in light of these potential conflicts, violated his Sixth Amendment right to effective assistance of counsel. However, Defendant's arguments fail because the trial court had notice of defense counsel's potential conflicts; the trial court conducted an adequate inquiry into these conflicts; and Defendant gave a knowing, intelligent, and voluntary waiver of these conflicts. Defendant further raises an ineffective assistance of counsel challenge based on defense counsel's statements regarding his renewed motion to withdraw, which he argues were inconsistent with his interest in its granting. We dismiss this claim as being raised prematurely on appeal without prejudice to Defendant's ability to bring an MAR in the trial court.

BACKGROUND

On 5 October 2018, Defendant and two other individuals, Carmen Williams and Ramu Damu, traveled to a used car lot in Garner. There, Williams expressed interest in purchasing a red Cadillac and accompanied the manager to his office to discuss details of the purchase. Around this time, Defendant and Damu left the office, and Defendant and an individual with a shirt covering his face returned with a handgun. One of the men ordered the manager to "give up" his money as Williams exited the office. When the manager turned his back towards the men, one of them fired the gun. A bullet pierced the manager in the back of his neck and went through his right cheek. After the shooting, Defendant and Damu fled the scene in the car which they drove to the lot, and Williams "jumped in" the car. Afterwards, Williams called 911, provided a fake name, and told the dispatcher that someone had been shot.

After law enforcement tracked Williams from her phone call, she gave a series of inconsistent statements as to her presence at the lot. In January 2019, she denied being present and making the 911 call. However, in February 2019 and March 2019, she admitted and maintained that she was present at the scene with Defendant and Damu. In March 2019, and again at trial, Williams identified Defendant as the shooter.

Beginning 12 July 2021, Defendant was tried in Johnston County Superior Court for charges associated with the 5 October 2018 shooting. During his trial, Williams served as a witness for the State. Prior to her testimony, defense counsel observed Williams crying in the hallway outside of the courtroom, approached her, and asked if she would like to talk to an attorney. The morning after this conversation, defense counsel asked the public bar if anyone would like to talk to her, and an attorney said he would advise her. After this exchange, the trial court addressed

Williams outside of the presence of the jury in an unsworn conversation. During this conversation, Williams stated that she was never at the scene of the incident, and that she did not wish to take the witness stand and perjure herself by claiming she was present. The trial court permitted the State to speak with Williams during the lunch recess, and after this recess, Williams was again willing to tesify without an attorney. Ms. Williams ultimately testified that she was present at the scene and that she did call 911.

Outside of the jury's presence, the trial court heard defense counsel's verified motion to withdraw as counsel. Counsel argued that he was "an essential, necessary witness to [Defendant's] case" because of "what [he] witnessed [outside of the courtroom] as an officer of the court, and what [the judge] witnessed in [the courtroom]." He also moved to withdraw on the basis that a conflict of interest was created when the State alleged that he "tampered with the witness" and "chilled her testimony[,]" and that he could not defend both Defendant and himself. The Defendant further asked that the trial court declare a mistrial. However, the trial court denied the *Motion to Withdraw* and motion for a mistrial. Defense counsel cross-examined Williams in the presence of the jury, and during this cross-examination, Williams admitted that she lied to the court about not being at the scene of the crime and about not calling 911. However, despite the court's permission to do so, counsel did not question Williams about the hallway conversation. He later renewed the motion to withdraw based on his alleged conflict of interest, but this motion was again denied.

The jury found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by felon. Defendant timely appealed.

ANALYSIS

Defendant first argues that the trial court violated his Sixth Amendment rights to conflict-free counsel and effective assistance of counsel when it denied defense counsel's *Motion to Withdraw* and permitted him to continue representing Defendant. Specifically, Defendant argues defense counsel became a necessary witness for Defendant and defense counsel was accused by the State of misconduct related to the case. Defendant also argues that his counsel provided ineffective assistance because, after renewing his motion to withdraw, he made statements which were inconsistent with a desire for this motion to be granted.

1. Conflict-Free Counsel

[1] We "analyze ineffective assistance of counsel claims based on conflicts under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), rather than employ the standard ineffective assistance of counsel analysis under *Strickland*." *State v. Williams*, 285 N.C. App. 215, 232 (2022) (citation omitted). While a defendant must generally demonstrate prejudice under a *Strickland* framework, "a defendant who shows an actual conflict of interest 'may not be required to demonstrate prejudice.' " *Id.* (quoting *State v. Choudhry*, 365 N.C. 215, 219 (2011)). We determine whether to apply *Sullivan* or *Strickland* based on "the level of notice given to the trial court and the action taken by that court in regard to the conflict issue." *Id.* (marks omitted).

> When the court knows or reasonably should know of a particular conflict, that court must inquire into the conflict. If the trial court fails to inquire into the conflict or the trial court's inquiry is inadequate or incomplete, reversal is automatic only if the defendant objected to the conflict issue at trial. If the defendant did not object to the conflict issue and the trial court failed to adequately conduct the required inquiry, prejudice will be presumed under *Sullivan* only if a defendant can establish on appeal that an actual conflict of interest adversely affected his lawyer's performance. However, if a defendant is unable to establish an actual conflict causing an adverse effect, he must show that he was prejudiced in order to obtain relief.
>
> Thus, in reviewing the alleged conflict issue, we employ a multi-step test. First, we ask whether the trial court had notice of the conflict such that it was required to inquire into the conflict. Second, we determine whether the trial court conducted an adequate inquiry into the conflict. If the trial court conducted an adequate inquiry, our review ends. *See State v. Yelton*, 87 N.C. App. 554, 557–59 (1987) (linking the adequacy of the trial court's inquiry with whether a defendant has made a "knowing, intelligent and voluntary waiver" of their rights to be free from conflicted counsel such that either the record reflects a knowing, intelligent, and voluntary waiver of any conflict or "an actual conflict of interest exists" without such waiver such that "the attorney must be disqualified"). But if the trial court did not conduct an adequate inquiry, we third consider whether the defendant objected to the conflict issue at trial; if the

> defendant objected to the conflict, we must reverse. *See Choudhry*, 365 N.C. at 220, 224 (explaining "prejudice is presumed" if a defendant objected and was not given the opportunity to show the dangers of the potential conflict through a trial court inquiry). If, however, the defendant did not object to the conflict, we move to the fourth step and determine whether the defendant can establish an actual conflict of interest adversely affected his lawyer's performance. If a defendant can establish such adverse performance, we presume prejudice. If a defendant cannot establish adverse performance, we move to the fifth and final step and determine whether the defendant can show prejudice and thus obtain relief.

Williams, 285 N.C. App. at 232-234 (citations and marks omitted).

"The trial court is on notice if it knows or reasonably should know of a particular conflict." *Id.* at 234 (marks omitted); *see, e.g.*, *Choudhry*, 365 N.C. at 220-22 (holding the trial court was on notice of a potential conflict based on defense counsel's previous representation of a witness for the State because the State told the trial court of this potential conflict). Here, the trial court was put on notice when the parties addressed outside of the presence of the jury "on the record … what happened with [Williams] and [defense counsel] outside [of the court room], and also [that] she ha[d] been threatened prior to her testimony." Thus, the trial court was required to conduct an "adequate inquiry into the conflict" to "protect a defendant's right to conflict free counsel" and "avoid the appearance of impropriety." *Id.* at 235; *see Yelton*, 87 N.C. App. at 557 ("Foremost in the court's inquiry must be the preservation of the accused's constitutional rights. The hearing by the trial court must ensure that the defendants are aware of these rights and that any waiver is a knowing, intelligent and voluntary waiver."); *see also State v. Shores*, 102 N.C. App. 473, 475 (1991) (explaining that courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession" and such an inquiry is important to "avoid[ ] the appearance of impropriety").

The trial court's "inquiry must be adequate to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." *Williams*, 285 N.C. App. at 235 (quoting *State v. Lynch*, 275 N.C. App. 296, 299 (2020) (citation and marks omitted). The trial court must "ensur[e] that the defendant fully understands the consequences of a potential or actual

conflict" and "has the discretion to decide whether a full-blown evidentiary proceeding is necessary or whether some other form of inquiry is sufficient." *Id.* (citation omitted). The defendant's understanding must be sufficient "to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest." *Choudhry*, 365 N.C. at 224.

In *Choudhry*, the trial court asked the defendant whether he "had any concerns about [his attorney's] ability to appropriately represent him, if he was satisfied with [his attorney's] representation, and if he desired to have [his attorney] continue to represent him." *Id.* Nevertheless, this inquiry was not adequate for the defendant to give a knowing, intelligent, and voluntary waiver because "the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question" the witness about the case in which he had previously represented her, "nor did defense counsel indicate he had given [the] defendant such an explanation." *Id.*

The trial court, State, defense counsel, and Defendant discussed the alleged conflict of interest and its potential implications at great length after the State had begun, but not finished, direct examination of Williams. Defense counsel explained he believed his "client now need[ed] [him] as a witness because of what [he] witnessed out[side of the court room] as an officer of the court, and what [the judge] witnessed in [the court room,]" and that "with [the State's] allegations [of misconduct], [he] can't defend [himself] and [Defendant]." The trial court asked counsel if he had "talked with [his] client about the results of [him] withdrawing," and counsel confirmed he had. The trial court then addressed Defendant directly:

> THE COURT: … Have you heard everything that [defense counsel] has said to me this morning?
>
> THE DEFENDANT: Yes.
>
> …
>
> THE COURT: Do you understand it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand that there are very few options the court would have if he withdraws from representing you? One of those would be that you would be representing yourself. Is that something that you want to do?
>
> THE DEFENDANT: No.

> THE COURT: Another would be that I would declare a mistrial and we'd throw this out and start over again at another time with a different attorney. Do you want me to do that?
>
> THE DEFENDANT: Something to think about. I mean –
>
> THE COURT: Okay. Well, you need to talk to your attorney about that?
>
> THE DEFENDANT: Yes.

The trial court then addressed defense counsel:

> THE COURT: … What is it that you would testify to?
>
> [DEFENSE COUNSEL]: What she stated out there.
>
> THE COURT: You can simply ask her that on the witness stand.
>
> [DEFENSE COUNSEL]: It's not the same, because then she told you, and then everything changed.
>
> THE COURT: "Didn't you tell me outside such-and-such? Didn't I see you outside and didn't you say such-and-such?"

After this, counsel conferred with Defendant and returned to the court.

> THE DEFENDANT: I believe that I need another attorney. I don't believe that we can go further with this trial.
>
> …
>
> THE COURT: So what is it that you want me to do? Let him withdraw? Declare a mistrial? Start over?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. I've listened to you.

Subsequently, the trial court ruled:

> [T]here is nothing about the conduct of the parties that requires the court to allow [defense counsel] to withdraw. There is nothing about the conduct of the parties that require the court to declare a mistrial. It would be an injustice for the court to stop this trial at this point. So I'm going to allow [defense counsel] to cross-examine her. I will give [counsel] wide latitude in cross-examining her, although I will not allow [counsel], as I've said before,

> to badger her or to harass the witness, but [counsel] can cross-examine her….

The entirety of this inquiry demonstrates the trial court conducted an adequate inquiry to determine "whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." *Williams*, 285 N.C. App. at 235. The transcript also reflects that the trial court ensured Defendant fully understood "the consequences of a potential or actual conflict" and properly exercised its discretion in deciding "whether a full-blown evidentiary proceeding [was] necessary or whether some other form of inquiry [was] sufficient." *Id.* Furthermore, unlike in *Choudhry*, defense counsel indicated he had also given Defendant such an explanation. The only remaining determination is whether Defendant, in light of this inquiry, made a knowing, intelligent, and voluntary waiver of the potential conflict.

"[E]ffective assistance of counsel, like any other constitutional right, [can] be waived but only so long as the waiver was voluntary, knowing, and intelligent." *Yelton*, 87 N.C. App. at 558 (citing *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

> As in [F.R.Crim.Pro.] 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.

Id. (citations and marks omitted). After trial counsel had the opportunity to cross-examine Williams, he renewed his motion to withdraw based on the argument that Williams had alleged misconduct. During Williams's testimony before the jury, she stated that she "wanted to make the right choice, and the right choice is telling the truth and not allowing somebody to badger [her], belittle [her], or scare [her] into not having [her] testimony." She also claimed defense counsel was "questioning" her and

"had lawyers trying to talk to [her]" prior to her testimony. During its consideration of the renewed motion, the trial court again addressed Defendant:

> THE COURT: All right. [Defendant], you understand what [counsel] has just said? …
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right…. Do you want him to withdraw?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay….

Defendant's statement, made after witnessing several discussions amongst the parties and the trial court regarding both grounds upon which he now alleges violations of his Sixth Amendment right to conflict-free and effective counsel, constitutes a knowing, intelligent, and voluntary waiver. Defendant explicitly stated, after witnessing the entirety of Williams's testimony, including his counsel's cross-examination of her, that he did not wish for his counsel to withdraw. The trial court conducted an adequate inquiry, and Defendnt voluntarily, knowingly, and intelligently waived his right to conflict-free counsel. *See Williams*, 285 N.C. App. at 233.

2. Counsel's Statements During Renewed Motion to Withdraw

[2] Defendant asserts a separate claim that he was provided ineffective assistance by counsel "filing a motion to withdraw and asking the trial court not to grant it." Defendant claims this prejudiced him because when counsel asked the trial court to deny his motion, "it increased the likelihood the judge would do so." During the proceedings, counsel made a renewed motion to withdraw, expressing that he felt he had "an ethical obligation to do [so]" after Williams accused him of felony intimidation of a witness.[1] The transcript reads as follows:

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1. N.C.G.S. § 14-226 provides:

> (a) If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, the person shall be guilty of a Class G felony.
>
> (b) A defendant in a criminal proceeding who threatens a witness in the defendant's case with the assertion or denial of parental rights shall be in violation of this section.

N.C.G.S. § 14-226 (2022).

> THE COURT: Okay. So do you really want me to grant it?
>
> [DEFENSE COUNSEL]: That's not the point. It's never the point with what I do. The point is, I've got to do my job and I've got to tell you that under the rules of professional conduct, if I am alleged to commit a crime in the case I'm representing somebody, I have to file a motion to withdraw."
>
> . . .
>
> [DEFENSE COUNSEL]: . . . I think we all agree that this is unusual circumstances. This is a road I've never been on before. So I'm just trying to do my job to the best of my ability. I think – I mean, I would assume that you are the honor – you're the judge. You can determine whether or not I can withdraw or not. I'm just covering my part of the rule. That's it."
>
> . . .
>
> [DEFENSE COUNSEL]: And I don't really want you to grant it, but that's not ever the point. That point is, I've got to ask for it.
>
> THE COURT: So that's kind of the place I'm getting to, that you don't really want it because it's not in your client's best interest at this point to –
>
> [DEFENSE COUNSEL]: No, but I have to ask for it, and this is no way me wavering on my motion. So I've made the motion. I leave it in your discretion, what you want to do.

Ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166 (2001). When a claim for ineffective assistance of counsel is "prematurely asserted on direct appeal, [we] dismiss [it] without prejudice to the defendant's right to reassert [it] during a subsequent MAR proceeding." *Id.* at 167. Defendant's claim of ineffective assistance of counsel based on counsel's above-referenced statements is prematurely asserted on direct appeal, as there was very little inquiry into or discussion of these statements in the Record.

CONCLUSION

Defendant's claims asserting the trial court violated his Sixth Amendment rights to conflict-free and effective assistance of counsel fail, as the trial court was on notice of any potential conflict arising from his counsel's conversation with Williams, the trial court conducted an adequate inquiry into this potential conflict, and Defendant knowingly, intelligently, and voluntarily waived his right to conflict-free counsel when he told the trial court, after observing the entirety of Williams's testimony, that he did not wish for his counsel to withdraw. Accordingly, we find no error on these issues. However, Defendant's claim for ineffective assistance of counsel on the basis of counsel's statements regarding his renewed motion to withdraw is dismissed without prejudice to his right to bring an MAR in the trial court.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Chief Judge STROUD and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
KENNETH MARTIN McDONALD, DEFENDANT

No. COA22-672

Filed 1 August 2023

1. Jurisdiction—prayer for judgment continued (PJC)—no conditions attached—PJC not final

The trial court did not err by granting the State's motion to enter judgment on defendant's plea of guilty to misdemeanor death by vehicle where, although seven years had passed since the court had continued judgment on the guilty plea, the prayer for judgment continued (PJC) was not a final judgment because it did not contain conditions that amounted to punishment. Although defendant had been required, as part of his plea agreement, to acknowledge responsibility by giving an apology in open court, he was not ordered to complete any further requirements after the PJC was granted, other than to follow the law.

2. Judgments—prayer for judgment continued—entry of judgment—seven-year delay—reasonableness

The trial court's seven-year-delay in entering judgment on defendant's plea of guilty to misdemeanor death by motor vehicle after having previously entered a prayer for judgment continued (PJC) was not unreasonable where the judgment was not continued for a definite amount of time, the State had no reason to file a motion to pray for judgment until defendant was charged with another motor vehicle offense, the delay was not due to any negligence by the State, defendant's failure to request entry of judgment amounted to consent to the delay, and defendant received a benefit from having his judgment continued for nearly seven years. Further, defendant could not show prejudice due to the delay—even though the State had already destroyed all criminal discovery related to the case—where defendant had stipulated to the factual basis for the plea and had knowingly and voluntarily pled guilty.

Judge RIGGS dissenting.

Appeal by Defendant from judgment entered 3 February 2022 by Judge Tiffany Peguise-Powers in Robeson County Superior Court. Heard in the Court of Appeals 22 March 2023.

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

Patterson Harkavy LLP, by Narendra K. Ghosh and Paul E. Smith, for Defendant.

GRIFFIN, Judge.

Defendant Kenneth Martin McDonald pled guilty to misdemeanor death by motor vehicle and the trial court continued judgment. Years later, the State prayed judgment on that conviction and the motion was allowed by the trial court. Defendant appeals from that judgment. Defendant contends the trial court erred in entering judgment because (1) the prayer for judgment continued ("PJC") was intended to be a final judgment and (2) the nearly seven-year delay in entering judgment was unreasonable. We affirm.

I. Factual and Procedural Background

This case arises from a vehicular collision between Defendant's vehicle and a motorcycle, resulting in the death of the motorcycle driver. The evidence at trial tended to show as follows:

On 6 October 2011, Defendant was preparing to make a left turn when he stopped his vehicle about three feet over the center yellow lines and into the neighboring lane. Ricky Oldfield was traveling on a motorcycle in the left, oncoming lane toward Defendant at that time. Oldfield saw Defendant stop in front of him and attempted to stop his motorcycle by engaging the brakes and sliding. Oldfield was unable to stop and collided with Defendant's vehicle. Oldfield hit his head on the front bumper of Defendant's car and died as a result of the accident.

Defendant was charged with misdemeanor death by motor vehicle. Defendant pled not guilty and his case came on for trial in April 2012 in Robeson County District Court. On 25 April 2012, Defendant was found guilty of misdemeanor death by vehicle and the District Court imposed a suspended sentence of twelve months of probation. Defendant appealed to superior court.

On 28 October 2014, Defendant pled guilty to the charge of misdemeanor death by vehicle in Robeson County Superior Court. Defendant's plea agreement stated that, as conditions for the acceptance of his plea, "Defendant shall plead guilty" and "Defendant shall acknowledge responsibility in open court." The agreement further stated that the trial court would "then enter a Prayer for Judgment in this matter."

The trial court proceeded to sentencing following Defendant's plea. During sentencing, Defendant issued an apology to the court and to Oldfield's family. After hearing from Defendant and Oldfield's family, the trial court concluded the hearing with the following remarks:

> Pursuant to the transcript of plea, judgment's continued in this matter upon payment of the costs.
>
> I hope that both sides can have some peace and resolution in this matter.
>
> . . .
>
> I wish both sides every good fortune.

The trial court then entered a written order "that prayer for judgment be continued from day to day, week to week, term to term until further motion of the state, upon payment of cost."

On 14 August 2020, nearly six years later, the State filed a motion to calendar and pray judgment after Defendant was charged with involuntary manslaughter in connection with another motor vehicle accident. On 25 September 2020, Defendant filed a motion in opposition. On 3 February 2022, the trial court filed a written judgment granting the

State's motion to pray judgment and entering judgment on Defendant's 2014 conviction, sentencing Defendant to 150 days' imprisonment, suspended for twelve months of supervised probation. Defendant appeals.

II. Analysis

Defendant contends the trial court erred in allowing the State's prayer for judgment and entering judgment on his 2014 conviction because (1) the court intended for his PJC to be a final judgment and (2) it was unreasonable to delay entry of judgment until nearly seven years after Defendant's conviction.

A. Jurisdiction

Defendant acknowledges he has no right to appeal from the entry of judgment upon his guilty plea. Accordingly, Defendant asks this Court to grant his petition for a writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e). *See* N.C. Gen. Stat. § 15A-1444(e) (2021) (stating a defendant who pleads guilty and thus has no right to appeal "may petition the appellate division for review by writ of certiorari"). We exercise our discretionary authority and grant review. *See State v. Posner*, 277 N.C. App. 117, 120, 857 S.E.2d 870, 872 (2021).

B. The PJC was not a Final Judgment

[1] Defendant first argues the trial court erred in entering judgment in 2022 because the "2014 [PJC] was meant to be final." This Court reviews the issue of whether a PJC constitutes a final judgment *de novo*. *See State v. Popp*, 197 N.C. App. 226, 228, 676 S.E.2d 613, 614 (2009).

"A trial court has the inherent power to designate the manner by which its judgments shall be executed." *State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 132 (2003). "For example, a court is authorized to continue a case to a subsequent date for sentencing." *Id.* "This continuance is frequently referred to as a '[PJC]' and vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated." *Id.* "When, however, the trial judge imposes conditions 'amounting to punishment' on the continuation of the entry of [the] judgment, the judgment loses its character as a PJC and becomes a final judgment." *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993) (citation omitted). We have held that fines and imprisonment terms constitute conditions "amounting to punishment," and transforming a PJC into a final judgment, while conditions requiring a defendant to "obey the law" and pay court costs do not cause such a change. *Id.*; *State v. Absher*, 335 N.C. 155, 157, 436 S.E.2d 365, 366 (1993) ("In this state, we have made a distinction between cases in which

prayer for judgment is continued with conditions imposed and cases in which prayer for judgment is continued without any conditions.").

Defendant argues his PJC became a final judgment by operation of law because the trial court included a condition amounting to punishment. Specifically, Defendant's argument turns upon the fact that his PJC was allowed only after he "acknowledge[d] responsibility in open court" by an oral apology, as outlined in his plea agreement.

Defendant relies on this Court's decision in *State v. Popp* to support his contention. In *Popp*, the defendant agreed to plead guilty to certain crimes charged upon the condition that the State would dismiss other charges. The trial court then continued judgment on the defendant's conviction, but also ordered him to "abide by a curfew, complete high school, enroll in an institution of higher learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology." *Popp*, 197 N.C. App. at 228, 676 S.E.2d at 615. On appeal, our Court held that the defendant had been "ordered to complete a number of conditions which [were] beyond a requirement to obey the law," and his PJC therefore "lost its character as a PJC and was transformed into a final judgment." *Id.* at 228, 676 S.E.2d at 615. In the similar case of *State v. Brown*, our Court found the defendant was required to do more than obey the law when he was ordered to continue mental health treatment in the future. *Brown*, 110 N.C. App. at 659, 430 S.E.2d at 434. Notably, the defendants in *Popp* and *Brown* were ordered to take actions following the grant of their PJCs which would require further court supervision or monitoring by the State.

Defendant's case is distinguishable from both *Popp* and *Brown*. In *Popp* and *Brown*, the defendants' PJCs were predicated on additional conditions which were to be completed after entry of the PJC. In the present case, Defendant was asked to follow through on his promise to issue an oral apology, after he had formally admitted responsibility in his plea agreement. Indeed, Defendant concedes in his brief on appeal that "[r]equiring [Defendant] to make an apology was . . . part of the 'terms and conditions' of the plea agreement"—terms which included that Defendant would receive a PJC. The language of Defendant's plea agreement shows that he signed the plea upon consideration that he would receive a PJC. He cannot now claim that the State's reciprocal terms were an improper condition on that subsequent PJC.

Once the PJC was granted, Defendant was free of additional requirements; other than the general requirement to obey the law. The State prayed for judgment in this case only after Defendant was charged with

a separate, but similar, crime. Defendant was not ordered to complete any condition that amounted to punishment transforming his PJC into a final judgment.

Defendant further argues the trial court intended the judgment to be final because the trial judge stated in open court that he hoped "both sides can have some peace and resolution in the matter" following entry of Defendant's PJC. Defendant's brief cites no authority in support of this argument. Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure requires that, in an appellant's brief on appeal, "[t]he body of the argument and the statement of applicable standard(s) of review shall contain citations of authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6). Defendant cites no authority and his argument is therefore abandoned. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401–02, 610 S.E.2d 360, 361 (2005). Nonetheless, assuming that this issue is properly before us, we are not persuaded that the trial court's statement caused Defendant's PJC to become a final judgment. Our criminal justice system consents to the entry of PJCs with purposeful hope that further action by the courts will not be necessary, while understanding that the need for such action may arise. *See State v. Miller*, 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945) (discussing that PJCs give a defendant the opportunity to escape punishment altogether). The trial judge's statements following heartfelt presentations from Defendant and Oldfield's family were well-wishes for the future, not statements of binding legal effect.

We hold that Defendant's PJC was not a final judgment. We now turn to whether it was reasonable for the court to enter judgment on Defendant's 2014 conviction in 2022.

C. The Trial Court's Delay was Not Unreasonable

[2] Defendant argues the trial court erred in entering judgment because "the delay in the State's prayer for judgment was unreasonable." This Court reviews the issue of whether the delay between a PJC and the entry of judgment on the continued conviction was unreasonable *de novo*. *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993).

A continuance resulting from a PJC "may be for a definite or indefinite period of time, but in any event the sentence must be entered 'within a reasonable time' after the conviction." *Id.* The State is authorized, pursuant to N.C. Gen. Stat. § 15A-1416(b)(1), to motion for prayer for judgment "[a]t any time after verdict." *Id.*; N.C. Gen. Stat. § 15A-1416(b)(1) (2021). Nonetheless, "the State's failure to do so within a reasonable time divests the trial court of jurisdiction to grant the motion." *Id.* " 'Deciding whether sentence has been entered within a 'reasonable

time' requires consideration of [1] the reason for delay, [2] the length of delay, [3] whether defendant has consented to the delay, and [4] any actual prejudice to [the] defendant which results from the delay.' " *State v. Marino*, 265 N.C. App. 546, 550, 828 S.E.2d 689, 693 (2019) (citation omitted); *see Absher*, 335 N.C. at 156, 436 S.E.2d at 366 ("As long as a prayer for judgment is not continued for an unreasonable period . . . and the defendant was not prejudiced . . . , the court does not lose the jurisdiction to impose a sentence.").

In this case, Defendant's judgment was entered almost seven years after judgment on Defendant's conviction was continued. Based upon the circumstances of this particular case, we hold that this delay was not unreasonable.

The State delayed its motion to pray judgment because it had no reason to do so before Defendant was charged with another motor vehicle offense. The delay was not caused by the State's negligence or failure to otherwise timely pray for judgment, and judgment was not continued for a definite period of time shorter than seven years. *See State v. Pelley*, 221 N.C. 487, 20 S.E.2d 850, 857 (1942) (finding no error in entry of judgment after seven-year delay, while conceding that jurisdiction would have been lost if court had failed to seek custody of the defendant prior to the prescribed five-year fixed continuance term); *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493 (affirming entry of continued judgment where "[t]he record [did] not reveal any improper purpose for the delay in sentencing"). Rather, Defendant was charged with a similar crime and the State motioned to calendar and pray judgment soon thereafter, even before Defendant's trial on the new charge. The length of the delay in this case mirrors that of the longest delay this Court has previously found acceptable, *see Pelley*, 221 N.C. 487, 20 S.E.2d at 857, and, in light of Defendant's additional, similar charges, we see no reason to reach a different result.

Whatever weight we would give to the somewhat novel length of delay in this case is diminished by Defendant's consent to the delay. This Court has consistently held that, where a defendant does not initially object to PJC and does not thereafter ask for judgment to be entered, his actions are "tantamount to consent." *See Lea*, 156 N.C. App. at 182, 576 S.E.2d at 131 (holding the defendant's actions were " 'tantamount to his consent' " where "the record [did] not show that [the] defendant [] objected to the continuation of the prayer for judgment or that he ever requested that the trial court enter judgment" (citation omitted)); *Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (holding the defendant's failure to request "judgment be pronounced" prior to a particular date, even where that date was definitely prescribed, was "tantamount

to his consent to a continuation of the sentencing hearing beyond that date"). Most notably, in *State v. Marino*, this Court affirmed entry of a continued judgment where the defendant "did not object to the trial court's PJC entered upon [the defendant's guilty] plea, and thereafter [the defendant] never requested the trial court enter judgment on his conviction." *Marino*, 265 N.C. App. at 554, 828 S.E.2d at 695. The defendant's "failure to do either [was] 'tantamount to his consent to a continuation of' judgment during that time period." *Id.* (citation omitted).

This factor routinely supports the reasonableness of a delayed entry of judgment, except in rare cases where the defendant does request that his judgment be entered at an earlier time and the State fails to timely comply. We note a majority of our cases, which treat a defendant's failure to request entry of judgment as consent, involve either actions by the defendant which may materially and beneficially affect the defendant's sentencing; a definite, prescribed period of continuation; or both. *See*, *e.g.*, *id.* (affirming where purpose of delay was to allow the defendant to provide "substantial assistance" to the State and receive a lower sentence as a result); *Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (affirming where the defendant did not request entry of judgment on or before the prescribed date when his definite continuance period was to end). However, our Courts have never found either of these factual circumstances to be required for a defendant's failure to request entry of judgment to constitute consent. Rather, they are relevant facts to consider when weighing the reasonableness of the State's delay. Here, Defendant did not prolong the State's ability to pray judgment at an earlier time, nor was his judgment continued for a definite time. We cannot say that these circumstances negate the benefit Defendant received by allowing his judgment to remain continued for nearly seven years.

Indeed, "there is a presumption that the [PJC] was made with the defendant's consent, if not at his request . . . , as an act of mercy to him, so that he might qualify himself by his good behavior to receive further clemency from the court, and thus avoid the rigor of the law." *State v. Everitt*, 164 N.C. 399, 79 S.E. 274, 276 (1913). Defendant's actions here were substantially similar to the defendant's conduct in *Marino*, and we reach the same result.

Lastly, Defendant cannot show actual prejudice due to the delay. Defendant argues that he has been prejudiced because the State destroyed all criminal discovery associated with this case before March 2020, thus frustrating the court's ability to appropriately review the evidence during sentencing. However, Defendant pled guilty to the underlying conviction and stipulated to the factual basis supporting the guilty

plea. There is nothing in the record that indicates Defendant was denied discovery when he knowingly and voluntarily pled guilty in superior court. He had the benefit of a trial in district court and any access afforded him in the superior court prosecution. Based upon the stipulated facts and Defendant's prior record level as of 2014, Defendant received a sentence of 150 days, suspended for a term of twelve months of supervised probation. Defendant cannot show that the outcome would have differed had the State not destroyed its discovery in this case.

The Dissent presents a number of points to be considered in weighing the factors for reasonableness in this case. We disagree, though, that these considerations are both proper for this Court at this time and practically beneficial advice for the effective administration of justice through PJCs. The present case lacks factual circumstances that speak to why Defendant received a PJC or why he never chose to pray judgment on his conviction. However, the record does show that if Defendant desired to avoid punishment for his 2014 conviction altogether, he simply needed to follow the law and not commit a similar offense. If circumstances arose, whatever they may be, such that Defendant deemed it favorable for him to request entry of judgment, he was free to do so. This happens routinely with Chapter 20 motor vehicle violations. Regardless of how or for what reason Defendant would do so, the record here shows that he never did request entry of judgment. That failure to request is tantamount to consent.

The Dissent insists that the practical effects of our decision will dissuade attorneys and defendants alike from employing PJCs in future cases, because a criminal defendant would never agree to a PJC without a definite, reasonable ending point to their potential liability. The Dissent's reasoning is flawed. PJCs are beneficial to the pursuit of justice under current law. The standard the Dissent attempts to create would dissuade all parties from considering a PJC as a potential resolution. Almost certainly, the Dissent's standard would create more work for the trial courts and give people charged with Chapter 20 motor vehicle violations fewer tools to restore their privilege to drive lawfully. In their current form, interpreted as we so hold, the State and a defendant may effectively negotiate PJCs, with the consent of the court. This discretion allows criminal defendants to avoid the consequences of their convictions indefinitely and gives the State a way to remain faithful to their oath as well.

III. Conclusion

We hold that Defendant's 2014 PJC did not include conditions that converted it into a final judgment, and the nearly seven-year delay

between the PJC and the subsequent entry of judgment was not unreasonable. We affirm the trial court's judgment.

AFFIRMED.

Judge FLOOD concurs.

Judge RIGGS dissents by separate opinion.

RIGGS, Judge, dissenting.

A prayer for judgment continued ("PJC") is a longstanding procedural tool that allows a judge to refrain from entering final judgment in a case, and this tool has been developed to allow judges to encourage efficient resolutions in their courtrooms, to promote rehabilitative resolutions in, most often, lower-level crimes, and to generally promote fairness in criminal judicial proceedings. *See* Dionne R. Gonder-Stanley, *Facing A Legislative Straight Jacket in the 21st Century: N. Carolina Courts & the Prayer for Judgment Continued*, 40 N.C. Cent. L. Rev. 32, 46 (2017). A PJC can be an act of judicial discretion which allows a defendant to satisfy his obligations in criminal court in exchange for abiding by stipulated conditions for a reasonable length of time. *State v. Miller*, 225 N.C. 213, 215-16, 34 S.E.2d 143, 145 (1945). But this Court and the North Carolina Supreme Court have been clear that where a PJC has been continued for an unreasonable length of time, the trial court will lose jurisdiction to enter final judgment.[1] This Court has held that the burden is on the State to establish jurisdiction to enter judgment. *State v. Watkins*, 229 N.C. App. 628, 634, 747 S.E.2d 907, 912 (2013) (citing *State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977) (holding that jurisdiction is a matter which, "when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment")).

In this case, the State did not meet its burden to establish jurisdiction in the hearing; the PJC was used without stipulated conditions or

1. It seems likely in this context that the term jurisdiction refers to the court's authority to enter a judgment rather than personal jurisdiction over the defendant or subject matter jurisdiction over the issue. *See*, *e.g.*, *State v. Graham*, 225 N.C. 217, 219 34 S.E.2d 146, 147 (1945) (rejecting a defendant's argument that courts are "without *authority* to continue prayer for judgment and impose sentence at a subsequent term" on the basis that "courts of general jurisdiction . . . have the *power* to continue the case to a subsequent term for sentence" (emphasis added)).

a definite timeline; and the entry of judgment was delayed more than *seventeen times* the maximum sentence for the underlying misdemeanor. Given that, I would hold that delay in entry of final judgment is unreasonable, and the trial court was divested of jurisdiction to enter judgment. Therefore, I respectfully dissent.

I. Analysis

The majority's analysis relies on cases that I believe are distinguishable. And, in extending the time before final entry of judgment, the majority's opinion introduces unintended consequences that will impede the ability of attorneys to give sound advice to their clients and of criminal defendants to make informed decisions. By approving the lengthy delay at issue in this case without any justifiable extenuating circumstances previously accepted under our precedents, the majority creates a legal landscape marked by uncertainty; a criminal defendant will not know what they must do to end their formal interaction with the criminal justice system, nor will they know when that relationship might reasonably come to an end. In fact, this uncertainty disincentives the settlement of cases with PJCs that can help to keep judicial workloads manageable.

To be clear, this Court has held that a PJC may be for a definite or indefinite period; however, the prayer for judgment may not be continued for an unreasonable period or the court will lose jurisdiction to enter judgment. *State v. Absher*, 335 N.C. 155, 156, 436 S.E.2d 365, 366 (1993); *see also State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 132 (2003) ("The continuance may be for a definite or indefinite period of time, but, in any event, the sentence must be entered within a reasonable time after the conviction or plea of guilty."). The trial court can include conditions with the entry of a PJC, but not conditions that constitute punishment, at least not without converting that PJC to a final judgment. *State v. Popp*, 197 N.C. App. 226, 228, 676 S.E.2d 613, 614 (2009) (internal citations omitted). "Conditions 'amounting to punishment' include fines and imprisonment. Conditions not 'amounting to punishment' include 'requirements to obey the law,' and a requirement to pay the costs of court." *Id.* (quoting *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993)).

While Mr. McDonald has argued that the PJC was, in essence, converted to final judgment on the date it was entered, I do not find that argument, standing alone, persuasive. Instead, I believe the determinative question presented is whether the delay in this case was so unreasonable such that it deprived the trial court of jurisdiction to enter final judgment seven years after the PJC was entered.

The perceived finality of the judgment is relevant in the analysis of the reasonableness of the length of the delay. To determine if the delay in entering judgment is reasonable such that the trial court retains jurisdiction, this Court considers: (1) the reason for the delay; (2) the length of delay; (3) whether the defendant has consented to the delay; and (4) any actual prejudice which results from the delay. *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993). These factors, when considered together, are both consistent with the public policy reasons behind the existence of PJCs and comport with due process guarantees. *See*, *e.g.*, *Betterman v. Montana*, 578 U.S. 437, 439, 194 L. Ed. 2d 723, 727 (2016) (noting that an unreasonable delay before sentencing may raise due process concerns). It is axiomatic that all parties—the State and criminal defendants—must be able to understand the contours of judicial involvement in a criminal matter and when and how that criminal matter will come to an end. *See State v. Ward*, 46 N.C. App. 200, 205, 264 S.E.2d 737, 740 (1980) (noting the State's and criminal defendants' numerous interests in the timely resolution of criminal charges); *Teague v. Lane*, 489 U.S. 288, 309, 103 L. Ed. 2d 334, 355 (1989) ("[T]he principle of finality . . . is essential to the operation of our criminal justice system.").

In this case, I would find that each of the factors utilized in analyzing the reasonableness of the delay, individually and collectively, lend themselves to a conclusion that the delay here was unreasonable and the trial court did, in fact, lose jurisdiction. First, because the trial court did not identify the purpose of the prayer for judgment and there seemed to be good faith misunderstanding of the purpose, the unascertainable reason for the continuance cannot be used to justify a long delay; second, the trial court did not provide Mr. McDonald with sufficiently definite instructions on how he might end the court's oversight such that he could make informed consent to the delay; third, the length of the delay significantly exceeds the boundaries, in analogous cases, previously approved by this Court for PJCs without predetermined timelines; and finally, the delay prejudiced Mr. McDonald.

1. The Reason for the PJC was Unclear and the Parties Were Not of Accord on that Reasoning

In this case, the reason for the delay in entry of the PJC does not support approving the delayed entry of judgment. The State argues that this was a conditional prayer for judgment that would continue *until* Mr. McDonald committed this or a similar crime. The problem with that argument is that it has no temporal bounds and inevitably runs afoul of this Court's rule that the PJC may not be used for an *unreasonable period*. *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493. Put another way,

this reason is not compelling to justify the delay because it has no reasonable bounds – this motivation can be used forever to justify delay. A person could commit a similar crime 10 years, 20 years, or 50 years down the road. Thus, the State's justification has no logical end and does not justify delay where it could also be used and extended to violate our Court's rule that trial courts lose jurisdiction where there is an unreasonable delay before entry of final judgment. *Lea*, 156 N.C. App. at 180, 576 S.E.2d at 132.

Conversely, Mr. McDonald and the attorney who represented him in 2014 believed that this prayer for judgment was the final resolution of the case. That is, it seems that Defendant and his counsel did not believe that he was in a situation where he was engaged in this long-standing relationship with the court for years long oversight under the PJC. Therein lies the problem.

There are, of course, multiple reasons why a trial court or a defendant may want (or agree to) continued interactions with and supervision of a criminal defendant (and thus delay in entry of final judgment). *See State v. Johnson*, 169 N.C. 311, 311, 84 S.E. 767, 768 (1915) (affirming an order continuing a prayer for judgment "upon condition of good behavior" for three years); *see also State v. Hilton*, 151 N.C. 687, 692 65 S.E. 1011, 1014 (1909) (explaining that prayer for judgment can be used for defendant to return to court to show good faith in some promise of reformation or continued obedience to the law). Alternatively, a PJC may be intended to serve as a final disposition in lieu of sentencing. *See*, *e.g.*, *Smith v. Gilchrist*, 749 F.3d 302, 305 n. 2, (4th Cir. 2014) (describing the use of PJC combined with driving school for efficient resolution of a moving traffic violation which benefits the court system by freeing up resources to handle other matters while allowing defendants to avoid increased insurance premiums). But where the intentions behind and intended effect of the PJC is unclear from the record, I would not hold that an unknown reason for the continuance can justify a delay this lengthy.

A recent trend in PJC statutes reaffirms the necessity for clarity in this area of the law. Our courts have used PJCs for over 100 years in all areas where sentencing is not mandated, with limited intercession by the General Assembly. *In re Greene*, 297 N.C. 305, 312, 255 S.E.2d 142, 147 (1979). In the 2011-12 session, the General Assembly passed legislation that expressly prohibited PJCs where the time before entry of judgment was continued more than a total of 12 months.[2] N.C. Gen.

2. The statute allows the trial court to continue the PJC for up to one additional 12-month period if in the interest of justice. N.C. Gen. Stat. § 15A-1331.2.

Stat. § 15A-1331.2 (2021). While this statute applies only to PJCs used in certain kinds of felony cases, it still indicates a legislative intent consistent with our courts' precedents, requiring some definition or limit to the terms for PJCs. During the discussion on this bill in the State House, Representatives discussed how the PJC was a valuable tool, but it requires clarity of scope to ensure it is used properly. House Audio Archives (28 Apr. 2011), https://www.ncleg.gov/Documents/9/1515 (remarks by Rep. Guice, Rep. Spear, Rep. Engle, and Rep. Faircloth at 3:39:00 - 4:03:00).

In sum, I believe the lack of clarity about the reason for the lengthy continuance—and the resulting confusion as to whether there even was an intended continuance rather than a final adjudication by PJC—in conjunction with the legislative trends to limit the time for entry of judgment after a PJC, counsel against holding that the delay in sentencing was reasonable.

2. The Defendant Did Not and Could Not Have Consented to a PJC Given the Indeterminate Length and Lack of Conditions Here

In the majority's acknowledgment of the "somewhat novel length of delay" in this case, the majority downplays the significance of the delay by asserting that, in their opinion, Mr. McDonald consented to this delay. The majority points to *State v. Degree* for the proposition that Defendant's failure to request sentencing is "tantamount to consent." 110 N.C. App. at 641, 430 S.E.2d at 493. However, first, consent is "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose." *Consent*, Black's Law Dictionary (11th ed. 2019). In *Degree*, the defendant agreed to a PJC for a fixed period of time of less than two weeks. 110 N.C. App. at 641, 430 S.E.2d at 493. That definite period of time provided the basis for agreement, or consent. Unlike in *Degree*, there was no end point in this case to which Mr. McDonald (or any criminal defendant) could knowingly agree. *Degree* does not mandate the outcome achieved by the majority: the rejection of any subsequent challenge to a delay in entry of judgment where a criminal defendant agrees to a PJC without a specific time period.

The majority's misreading of *Degree* and the outcome in this case would also create an unintended deterrence to the settlement of Chapter 20 or misdemeanor charges via a prayer for judgment. While our case law does not require that a prayer for judgment must have a definite time period, *id.* at 641, 430 S.E.2d at 493, it is hard to fathom a criminal

defendant agreeing to a prayer for judgment without a definite ending point if this Court is effectively issuing a rule holding that agreeing to an indefinite prayer for judgment constitutes consent to entry of judgment even after a delay of more than half a decade. This could limit the ability of courts and prosecutors to bring needed resolution to families and to lessen their workloads.

A marked characteristic of cases where this Court has affirmed longer delays in entry of judgment after a PJC on the basis of consent is that they have either had a definite time period or specific conditions of the PJC – both of which create the basis for informed consent for the PJC and an actual basis for assessing the reasonableness of the delay. For example, in *State v. Marino*, the trial court agreed to grant a PJC in exchange for the defendant providing substantial assistance in the conviction of a co-conspirator. 265 N.C. App. 546, 554 n.5, 828 S.E.2d 689, 696 n.5 (2019). The PJC required the State to pray for judgment within twelve months of the conviction. *Id.* The State moved for entry of judgment after nineteen months and this Court affirmed that the delay was not unreasonable. *Id.* It follows, then, that the defendant in *Marino* had information both on the approximate time frame and conditions that were informing his consent. The same underlying logic applied to the smaller delay incurred in *Degree*. 110 N.C. App. at 641-42, 430 S.E.2d at 493 (holding the defendant's failure to request judgment after expiration of the time set for the PJC was "tantamount to his consent to a continuation of the sentencing hearing beyond that date" (citations omitted)).

Significantly, the majority does not discuss under what circumstance Mr. McDonald, like the defendants in *Marino* and *Degree*, would know that he needed to request an entry of judgment. Nor does it address how Mr. McDonald could act affirmatively to end his interaction with the criminal justice system and bring closure to his case. During the sentencing in 2014, the court asked Mr. McDonald if he understood that he would "receive a prayer for judgment continued in this matter[.]" However, the transcript does not include any discussion about what the prayer for judgment continued actually meant in the context of this case—*i.e.*, where there was not a definite endpoint for the PJC and no conditions were detailed.

Neither the court nor the General Assembly have defined a clear process for defendants to bring final closure to an indefinite-period PJC. The General Assembly authorized the State to move for appropriate relief to enter a final judgment where a PJC had been previously entered. N.C. Gen. Stat. § 15A-1416(b)(1) (2021). This statutory enforcement mechanism is designed to address situations where a defendant who has

received a PJC has not satisfied the conditions imposed by the court in exchange for the PJC. *State v. Doss*, 268 N.C. App. 547, 551 n.4, 836 S.E.2d 856, 858 n.4 (2019). However, the General Assembly has not created any similar mechanism for a criminal defendant to end the coverage of an indefinite-period PJC. *Id.* *Doss* quite squarely highlights the problem with the majority's faulting Mr. McDonald for failure to request final judgment without a clear mechanism to do so. In *Doss*, this Court explained:

> Twenty years ago, in 1999, Defendant Jeffery Wade Doss was found guilty of assault on a female in Forsyth County District Court. The trial court entered a prayer for judgment continued (PJC) on that charge. Two years ago, in 2017, Defendant, now residing in West Virginia, was informed that he was ineligible for a concealed carry permit due to the 1999 matter. A year later, in 2018, Defendant moved the Forsyth County District Court to enter a final judgment on his 1999 matter, presumably so that he could (1) appeal the matter to superior court in hopes that the State would then be forced to dismiss the charge due to the staleness of the matter and (2) he could then regain his concealed carry permit in West Virginia.

Id. at 548, 836 S.E.2d at 856. The trial court denied that motion and the Court of Appeals held that because the PJC was not a final judgment, there was no mechanism for an appeal absent a petition for writ of certiorari. *Id.* at 550-51, 836 S.E.2d at 858. How can it be that a defendant is both without a path to force final judgment *and* deprived of his ability to complain of delayed final judgment because he did not force entry of final judgment.

Not only is Mr. McDonald similarly faced without a mechanism to force entry of a final judgment, the order itself, in this case, did not give this Defendant the option to bring final closure to the PJC; the order specifically stated that the prayer for judgment was continued "*until further motion of the State*." (Emphasis added). The situation in this case was further complicated by the fact that Mr. McDonald's attorney thought the PJC was a final judgment.

For these reasons, I do not think Mr. McDonald consented in a knowing and informed way to the delay, and indeed, had no mechanism available to him to avoid his "consent" being fatal to his appeal here. Analysis under this factor weighs in favor of concluding the delay was unreasonable.

3. The Length of the Delay Was Unreasonable

The majority here states that the length of delay in this case mirrors the longest delay this Court has found acceptable. However, in the cases relied upon by the majority, there were either multiple factors weighing in favor of the reasonableness of the delay or other extenuating circumstances. I do not think those cases mandate or even support the majority's outcome here.

Generally, where our courts have affirmed entry of judgment after a longer delay, the PJC had a predefined endpoint. *See*, *e.g.*, *State v. Thompson*, 267 N.C. 653, 655-56, 148 S.E.2d 613, 615 (1966) (affirming entry of judgment and sentencing roughly two years into a three-year PJC). Where no duration is established by the trial court, lengthy delays in sentencing have been held to be reasonable, in some cases, because of intervening appeals on related charges by the defendant or to resolve some, but not all, of the criminal charges pending. For example, in *State v. Lea*, the trial court entered a PJC on the lesser charges because the defendant was serving a longer sentence on attempted second-degree murder charges. *State v. Lea*, 156 N.C. App. at 180, 576 S.E.2d at 133. The trial court entered judgment four years after the PJC was granted when the North Carolina Supreme Court decided that the crime of attempted second-degree murder did not exist in North Carolina. *Id.* This Court held the delay was not unreasonable because the defendant was serving time on the other charges in the intervening four years. *Id.* In *State v. Van Trussel*, the trial court entered judgment four years after a jury verdict. 170 N.C. App. 33, 36, 612 S.E.2d 195, 197 (2005). In *Van Trussel*, the court *sua sponte* entered a PJC on the minor charges while the defendant appealed his convictions on the more serious charges where sentences had been entered. *Id.* at 35, 612 S.E.2d at 197. Here, Mr. McDonald's PJC had no definite term, and no intervening appeals justifying the delay here.

The majority relies heavily on an 80-year-old case, *State v. Pelley*, as precedent for a case where this Court approved a delay in judgment that approximated the seven-year delay in this case. 221 N.C. 487, 495, 20 S.E.2d 850, 855 (1942). But the facts of *Pelley* are distinguishable, and the simple reliance on the length of the delay in *Pelley*, divorced from the extenuating circumstances in that case, creates a rule that extends the permissible bounds of delayed entry of judgment without any discernible limitations. In *Pelley*, the original PJC had a fixed term of five years; the defendant was given a five-year suspended sentence with specified conditions on the first count and a five-year PJC on the second count. *Id.* at 491, 20 S.E.2d 853.

This Court based its approval of the seven-year delay in *Pelley* because the defendant violated the terms of the suspended sentence within the five-year period and then *absconded from the jurisdiction*. *Id*. at 492, 20 S.E.2d 854-55. Law enforcement found and arrested the defendant within the five-year period, but he was arrested outside of North Carolina. *Id*. at 494, 20 S.E.2d 854-55. The defendant resisted his return to North Carolina, resulting in a two-year *habeas* battle before he reentered the state. *Id*. at 494-95, 20 S.E.2d 855. Once the defendant returned to North Carolina, the court entered judgment and this Court affirmed that delay in entry of judgment as reasonable based upon the facts in that case. *Id*. at 495, 20 S.E.2d 855. Stated differently, two years of the asserted seven-year precedent in *Pelley* was because that defendant left the state, violating specific conditions of his suspended sentence, and then refused to return. That is hardly comparable to the case here. Taking, as I do, the facts of *Pelley* being quite unusual in allowing the justification of a seven-year delay, no other North Carolina case approves a delay even remotely reaching the length here. Therefore, I would hold that the length of delay in this case was unreasonable such that it divested the trial court of jurisdiction to enter the judgment.

I find persuasive cases from other jurisdictions that take into consideration the relationship between the length of the delay and the maximum penalty for the crime. These courts have considered the length of the possible sentence or probation period as a gauge of the reasonableness of the delay in entry of judgment after a PJC. *See*, *e.g.*, *People v. Kennedy*, 25 N.W. 318, 320 (Mich. 1885) (holding that the judgment could not be delayed longer than 90 days when the longest sentence that could be imposed was 90 days); *Jeffries v. Mun. Court of City of Tulsa*, 536 P.2d 1313, 1317 (Okla. Crim. App. 1975) (superseded by statute on other grounds) (holding that delaying entry of judgment beyond the maximum period which may have been accessed as a penalty for the violation divested the court of jurisdiction); *Commonwealth ex rel. Wilhelm v. Morgan*, 123 A 337, 400 (Pa. Super. 1924) (holding that sentence can only be suspended for a reasonable time not to extend beyond the maximum term of imprisonment). While our courts have not employed such a comparison, I do not read our precedent to preclude it either. And here, the maximum allowable sentence for this class A1 misdemeanor is 150 days. Entry of judgment was delayed for 7 years – over 17 times the maximum sentence for this misdemeanor.

4. The Delay Prejudiced the Defendant

Finally, in this case, the delay of seven years prejudiced Mr. McDonald. In the intervening years between when Mr. McDonald pled

guilty and the trial court entered judgment, the State destroyed all its evidence in the case. After the State made a motion for entry of judgment in 2020, Mr. McDonald made a discovery motion, and the State notified him that all evidence surrounding the 2011 incident had been destroyed.

Without discovery from the State, Mr. McDonald was unable to present mitigating factors, if any, that may have impacted the length of his sentence entered in 2022. For example, Mr. McDonald did not have access to the accident reconstruction report and a speed reconstruction compiled by an expert that were the basis of the State's proffer of guilt during the plea hearing. Additionally, Mr. McDonald did not have information on the speed the other driver was traveling, medical or vision issues of the victim that would have impacted his ability to respond to a car that was one or two feet into his lane, or the existence of any impairing substances in the victim's system at the time of the incident. Significantly, during the plea agreement in 2014, the trial court told Mr. McDonald that he would "have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case[.]" This Court has held that a defendant was prejudiced when the State failed to turn over evidence that is material to guilt *or punishment*. *State v. Williams*, 190 N.C. App. 301, 311, 660 S.E.2d 189, 195 (2008), *aff'd*, 362 N.C. 628, 669 S.E.2d 290 (2008) (emphasis added).

Ultimately, the trial court in 2022 sentenced Mr. McDonald to the maximum sentence, 150 days, suspended to 12 months of probation and loss of license. I would find that Defendant was prejudiced by the State's failure to turn over evidence that he might have used to argue for a sentence less than the maximum.

II. Conclusion

For the reasons explained above, I would hold that the State did not meet the burden of proving the trial court had jurisdiction to enter the order, the delay in entry of judgment in this case was unreasonable, and the trial court was divested of jurisdiction to enter judgment. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
RONALD EUGENE PATTON, DEFENDANT

No. COA22-994

Filed 1 August 2023

1. Indictment and Information—facial validity—intimidating or interfering with a witness—attempted bribery—encompassed by statutory definition of offense

In a prosecution for second-degree forcible sexual offense, in which the victim was set to testify at trial, an indictment charging defendant with intimidating or interfering with a witness under N.C.G.S. § 14-226 was facially valid (and, therefore, sufficient to vest the trial court with subject matter jurisdiction over the charge) where it alleged that defendant attempted to deter the victim from attending court by bribing her with $1,000. Section 14-226 prohibits intimidation of witnesses or interference with their testimony through "threats" and "menaces," but also "in any other manner." Therefore, the alleged conduct of attempting to bribe a witness fell within the statutory definition of the charged offense. Further, defendant's argument—that the statute criminalizes two types of conduct: intimidation of a witness in general, and intimidation for the specific purpose of deterring a witness from attending court (and that attempted bribery did not fall under either category)—lacked merit, as the first category of conduct necessarily encompasses the latter and would therefore render half the statute surplusage.

2. Crimes, Other—intimidating or interfering with a witness—through attempted bribery—specific intent to deter testimony—sufficiency of evidence

In a prosecution for second-degree forcible sexual offense, the trial court properly denied defendant's motion to dismiss a charge of intimidating or interfering with a witness under N.C.G.S. § 14-226 where sufficient circumstantial evidence supported an inference that, when defendant called the victim from prison and offered her $1,000 before his trial, defendant was attempting to bribe the victim with the specific intent of deterring her from testifying against him in court. The State's circumstantial evidence included: the context of defendant's offer (a phone call to his known accuser with an unsolicited offer of $1,000, before trial and for no other discernible reason, is inherently suspect); defendant's attempt to disguise his identity by using another inmate's telephone account to call the

victim, suggesting an improper motive; defendant's prior history of threatening and intimidating the victim in order to influence her; and the victim's own understanding of the conversation based on her history with defendant.

3. Crimes, Other—intimidating or interfering with a witness—by attempting to bribe witness—propriety of jury instruction

In a prosecution for second-degree forcible sexual offense, where defendant called the victim from prison and offered her $1,000 before his trial, in which the victim was set to testify, the trial court properly instructed the jury on the offense of intimidating or interfering with a witness under N.C.G.S. § 14-226. Firstly, because a defendant may violate section 14-226 through bribery and without making threats, the court was not required to instruct the jury that a conviction under section 14-226 required a threat. Secondly, the court's instruction, which followed the pattern instruction for interfering with a witness, properly conveyed the requisite intent for the offense. Thirdly, although merely offering someone $1,000 is not illegal, the court did not erroneously permit the jury to convict defendant of legal conduct where it informed the jury to convict him only if his offer of $1,000 constituted an attempt to deter the victim from testifying. Finally, the court's disjunctive instruction—that a guilty verdict required finding that defendant attempted to dissuade the victim from testifying by bribery "or" by calling the victim before trial and offering her $1,000—did not violate defendant's right to a unanimous jury verdict, because bribery and offering $1,000 are undistinguished parts of a single offense under section 14-226 rather than discrete offenses.

Appeal by Defendant from judgments entered 13 November 2021 by Judge Karen Eady-Williams in Buncombe County Superior Court. Heard in the Court of Appeals 9 May 2023.

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

W. Michael Spivey for Defendant-Appellant.

RIGGS, Judge.

Defendant Ronald Eugene Patton appeals from several judgments entered after a jury found him guilty of second-degree forcible sexual offense, intimidating or interfering with a witness, and attaining habitual

felon status. On appeal, Mr. Patton contends that the trial court: (1) lacked jurisdiction over the interfering with a witness charge because the criminal conduct alleged in the indictment—bribery—is not encompassed in the relevant statute, N.C. Gen. Stat. § 14-226 (2021); (2) erred in denying his motion to dismiss that same charge for insufficient evidence of the requisite criminal intent; and (3) prejudicially or plainly erred in its jury instruction on witness interference. After careful review, we hold that: (1) bribery of a witness is criminalized by N.C. Gen. Stat. § 14-226 such that the trial court had jurisdiction over the charged offense; (2) the trial court properly denied Mr. Patton's motion to dismiss that charge; and (3) Mr. Patton's alleged jury instruction arguments are without merit.

I. FACTUAL AND PROCEDURAL HISTORY

J.L.A. ("Jane") moved to Asheville, North Carolina from Ohio in February 2017. One day when she was waiting for the bus to take her to work, Mr. Patton approached her and offered her some marijuana. Jane declined and boarded the bus without further conversation with Mr. Patton. Later, Jane again ran into Mr. Patton at the bus station as she was heading home; this time, Jane took down Mr. Patton's number in case she ever wanted to buy marijuana from him.

Jane waited to contact Mr. Patton for some time, but she did eventually text message him to ask about buying marijuana. Mr. Patton obliged Jane's request and began selling marijuana to her. The two struck up a friendship, with Jane calling Mr. Patton "grandpa" because he was twice her age. After several drug transactions, Mr. Patton told Jane that he would give her $40 worth of marijuana in exchange for sex; Jane responded by cursing at him and threatening to cut off contact.

Jane ceased talking to Mr. Patton after the above exchange. She resumed contact with him out of desperation, and Mr. Patton gave her furniture and clothing and helped her buy a car. He also continued to supply her with marijuana and make sexual comments to her, though Jane never reciprocated with any showing of romantic or sexual interest.

On the night of 10 January 2019, Mr. Patton and Jane were together at her house drinking wine, smoking marijuana, and watching movies. Mr. Patton ended up staying over at Jane's house, as he had arrived after the buses had ceased running for the evening. Jane eventually fell asleep on the floor while Mr. Patton continued to watch TV on her couch. She later awoke to Mr. Patton grinding his groin against her backside through her blanket and leggings. Jane told Mr. Patton to stop and get off her, but he instead held her down, shoved her head into a pillow, and continued

to thrust against her while groping her body. Jane fought back against Mr. Patton, punching and scratching him in the face. After getting free and heading for the front door to escape, Jane was grabbed from behind by her hair and dragged into the bedroom by Mr. Patton.

Once in the bedroom, Mr. Patton released Jane to let her go to the bathroom; as soon as she was finished, he grabbed her by the hair again. Mr. Patton then told Jane to fellate him and that he would strip her and tie her up if she refused. Jane refused and lied to him about having HIV in the hopes that he would not rape her; Mr. Patton instead continued to try and force his penis into her mouth. He then pushed her back onto the bed and tried to smother her with a pillow. When Jane continued to struggle, Mr. Patton wrapped a cell phone charger cord around her neck to choke her. Mr. Patton eventually forced his penis into Jane's mouth and ejaculated, causing her to vomit.

Mr. Patton released Jane, and she immediately went to the bathroom to continue vomiting. When she returned to the bedroom, Mr. Patton held her by her wrist and walked her through the house as he collected his belongings. He then left the house and got into a car that was waiting for him outside, whereupon Jane called the police to report the assault. Law enforcement responded to the call, interviewed Jane, photographed the scene, and collected physical evidence corroborating Jane's account. Jane went to the hospital with a police officer, where DNA evidence was collected from Jane's hair, fingernails, nose, and cheek.

On 4 February 2019, Mr. Patton was indicted for one count each of first-degree forcible sex offense, first-degree kidnapping, and assault by strangulation. After Mr. Patton's arrest and while he was in jail, Jane received a call from an inmate, purportedly named "Richie," at the Buncombe County Jail. When Jane answered the call and asked who was calling, Mr. Patton identified himself and the following conversation ensued:

> MR. PATTON: This is Gene.
>
> JANE: Why are you calling me?
>
> MR. PATTON: If you're still in Asheville I'm gonna try and send you some money.
>
> JANE: This is who?
>
> MR. PATTON: This is Gene.
>
> JANE: Why are you calling me? You're not supposed to be talking to me.

MR. PATTON: I got $1,000 for ya.

Jane immediately hung up the phone; her tone of voice during the conversation clearly conveyed a sense of distress. Mr. Patton called Jane again, but she did not answer because she had blocked the number. Jane informed law enforcement of the call and, on 1 March 2021, Mr. Patton was indicted with intimidating or interfering with a witness in violation of N.C. Gen. Stat. § 14-226.

The State obtained a superseding indictment for forcible sexual offense and an additional indictment for attaining habitual felon status ahead of trial. At trial, Jane testified consistent with the above recitation of the facts, and the jailhouse phone call was published to the jury. Jane testified that, after receiving the call, "I was shocked, because, like, you're not supposed to be contacting me. . . . I felt like he was trying to bribe me trying to get out of what he done to me, like, no."

Mr. Patton's counsel moved to dismiss the charges against him at the close of the State's case-in-chief and at the close of all evidence; the trial court denied both motions. The trial court then held the charge conference, during which the parties discussed the appropriate instruction for the charge of interfering with a witness. That conversation included the following objection from Mr. Patton's counsel concerning reference to the specific act of offering Jane $1,000 in the trial court's proposed instruction:

> [T]hat instruction . . . that Your Honor is laying out . . . is not, you know, a crime. He said he had a thousand dollars. I think that ought to read probably bribery based on the way their indictment reads.
>
> . . . .
>
> I think bribery based on their indictment is what needs to be in there, by bribing her.
>
> . . . .
>
> Because, you know, my contention is that . . . a thousand dollars is not bribery. You know, maybe he was getting close to it, but I think that would be the question they decide is him stating that he has a thousand dollars, is that in fact bribery. So it should just read bribery.

After a lengthy back-and-forth with the parties, the trial court resolved to instruct the jury disjunctively, "so if they considered calling [Jane] before his trial and stating that he had a thousand dollars for her

that would be the substitute for bribery. They could look at it as bribery or the calling her." The final instruction was given as follows:

> For you to find the defendant guilty of this offense the [S]tate must prove four things beyond a reasonable doubt.
>
> First, that a person was summoned as a witness in a court of this state.
>
> Second, that the defendant attempted to deter any person who was summoned as a witness in the defendant's case.
>
> Third, that the defendant acted intentionally.
>
> And fourth, that the defendant did so by bribery or by calling the victim before his trial and stating he had $1,000 for her.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the person was acting as a witness in the defendant's case in a court of this state, and that the defendant . . . intentionally attempted to deter by bribery or by calling the victim before his trial and stating he had $1,000 for her, it would be your duty to return a verdict of guilty.

After deliberations, the jury returned guilty verdicts on second-degree forcible sexual offense, intimidating or interfering with a witness, and attaining habitual felon status, but acquitting Mr. Patton of assault by strangulation. The trial court sentenced Mr. Patton to consecutive sentences of 146 to 188 and 146 to 236 months' imprisonment. Mr. Patton gave oral notice of appeal at the conclusion of sentencing.

II. ANALYSIS

Mr. Patton's appeal asserts the existence of several errors in connection with the interfering with a witness conviction. First, he contends that the trial court lacked jurisdiction because the conduct alleged in the indictment—attempted bribery with $1,000—does not fall within his preferred interpretation of the statute defining the offense. Second, he argues that the trial court erred in denying his motion to dismiss based on inadequate evidence of intent to deter Jane from testifying. Third, he asserts plain error in the trial court's failure to instruct on the allegedly necessary element of threatened harm, prejudicial error in failure to instruct on the intent to deter Jane *from testifying* specifically, prejudicial error in its disjunctive instruction regarding attempted bribery or payment of $1,000, and constitutional error on the basis that the

disjunctive instruction violated his right to a unanimous jury verdict. We address each argument in turn, ultimately holding that Mr. Patton received a trial free from error.

A. Bribery and N.C. Gen. Stat. § 14-226

[1] In his first argument, Mr. Patton contends that attempted bribery of a witness does not fall within the conduct criminalized by N.C. Gen. Stat. § 14-226(a). That statute provides:

> If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, the person shall be guilty of a Class G felony.

N.C. Gen. Stat. § 14-226(a).

Mr. Patton argues that a defendant can only violate the statute in two ways:

> (1) by intentionally threatening or menacing a witness to intimidate or attempt to intimidate the witness, *or*;
>
> (2) by intentionally threatening, or menacing a witness to deter, or attempt to prevent or deter the witness from attending court.

Under this reading, bribing a witness does not fall within the statute because it is not a threat designed to intimidate a witness or deter her from testifying. But, as rightly argued by the State and explained *infra*, Mr. Patton's interpretation fails because it: (1) is contrary to the plain language and intent of the statute; and (2) results in a reading that renders one of its provisions redundant.

1. Standard of Review

Whether an indictment is facially valid—and thus sufficient to confer subject matter jurisdiction on the trial court—is reviewed *de novo*. *State v. Stephenson*, 267 N.C. App. 475, 478, 833 S.E.2d 393, 397 (2019). This same *de novo* standard applies to the interpretation of criminal statutes. *Id.* at 478-79, 833 S.E.2d at 397.

2. N.C. Gen. Stat. § 12-226 Criminalizes Bribery of a Witness

The pertinent indictment alleged that Mr. Patton "unlawfully, willfully and feloniously . . . did by bribery, attempt to deter [Jane] from

attending court by offering her $1,000.00," in violation of N.C. Gen. Stat. § 14-226. Mr. Patton now argues that this conduct did not fall within the statute by putting forth an interpretation that criminalizes two types of conduct: " 'intimidation' of a witness in general . . . [and] intimidation for the specific purpose of deterring a witness from attending court." This reading is unsupported by the plain language of the statute and contravenes a key canon of statutory construction.

The relevant statutory provision prohibits intimidation of witnesses or attempts to deter or interfere with their testimony "by threats, menaces *or in any other manner*." N.C. Gen. Stat. § 14-226(a) (emphasis added). The emphasized language, given its plain and ordinary meaning, straightforwardly expands the scope of prohibited conduct beyond "threats" and "menaces" to include *any other* act that intimidates a witness or attempts to deter or interfere with their testimony. Contrary to Mr. Patton's assertion, there is no ambiguity that arises from this phrasing, and we need not rely on any canons of statutory construction to discern the legislative will. *See, e.g.*, *Swauger v. Univ. of N.C. at Charlotte*, 259 N.C. App. 727, 817 S.E.2d 434 (2018) ("Where there is no ambiguity, this Court does not employ the canons of statutory interpretation, and instead gives the words their plain and definite meaning." (cleaned up)). *See also State v. Ross*, 272 N.C. 67, 71, 157 S.E.2d 712, 714-15 (1967) (noting that the canon of *ejusdem generis* applies only where a statute is ambiguous, and holding that the legislature's use of "any guardian, administrator, executor, trustee, or any receiver, or *any other fiduciary*" in an embezzlement statute showed a "manifest purpose . . . [t]o enlarge the scope of the embezzlement statute," as "[t]he words, 'or any other fiduciary', show clearly that the General Assembly did not intend to restrict the application of the [statute] to receivers.").

This reading is fully in accord with the intent of the statute, as "[t]he gist of this offense is the obstruction of justice." *State v. Neely*, 4 N.C. App. 475, 476 166 S.E.2d 878, 879 (1969).[1] As we have since

1. To be clear, and as correctly argued by both Mr. Patton and the State in their briefs, the statute is not co-extensive with the common law offense of obstruction of justice. For example, destroying evidence is an obstruction of justice that does not fall within the scope of the statute. *See, e.g.*, *Jones v. City of Durham*, 183 N.C. App. 57, 59, 643 S.E.2d 631, 633 (2007) (holding allegations of destruction of videotape evidence from a police dashboard camera sufficed to allege the common law offense of obstruction of justice). But this statute, as with other related statutes, criminalizes a specific subset of acts that would otherwise fall within the larger common law crime. *See, e.g.*, N.C. Gen. Stat. § 14-225.2 (2021) (criminalizing harassment of a juror). Our holding that bribery constitutes an illegal act under the relevant statute does not expand the statute to entirely encompass the broader crime of obstruction of justice.

observed, "*Neely* . . . considers 'attempting to intimidate' a witness, 'attempting to threaten' a witness, and 'attempting to prevent a witness from testifying' as undistinguished parts of a single offense under N.C. Gen. Stat. § 14-226." *State v. Clagon*, 279 N.C. App. 425, 434, 865 S.E.2d 343, 349 (2021) (cleaned up) (citing *Neely*, 4 N.C. App. at 476, 166 S.E.2d at 879).

Even were the statute ambiguous, Mr. Patton's reading renders the second category of criminalized conduct redundant in violation of our statutory construction canons. *See State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) ("We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would render any of its words superfluous. . . . [A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." (cleaned up)). Per Mr. Patton's Reply Brief, "one section of the statute addresses 'intimidation' of a witness in general while the second addresses intimidation for the specific purpose of deterring a witness from attending court." But the former crime, under Mr. Patton's own formulation, necessarily encompasses the latter, with both subject to the same felony offense classification. Mr. Patton's reading thus renders half of the statute surplusage; by way of a hypothetical, it would be entirely redundant to read a statutory provision as separately criminalizing both "striking a dog" and "striking a Dalmatian" as Class B felonies. Because Mr. Patton's preferred reading is both contrary to the statute's plain language and renders one of the statute's provisions into surplusage, we hold that the indictment alleging Mr. Patton's attempted bribery of Jane in violation of N.C. Gen. Stat. § 14-226 was sufficient to vest the trial court with subject matter jurisdiction.

B. Motion to Dismiss

[2] As an alternative to his first argument, Mr. Patton argues that the trial court erred in denying his motion to dismiss the interfering with a witness charge because the State failed to offer sufficient evidence of bribery with the specific intent to deter Jane from testifying. But, contrary to Mr. Patton's argument, the record contains sufficient circumstantial evidence from which a jury could reasonably infer that Mr. Patton intended to dissuade Jane from acting as a witness. We therefore hold that the trial court properly denied Mr. Patton's motion.

1. Standard of Review

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied

> if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Teague, 216 N.C. App. 100, 105, 715 S.E.2d 919, 923 (2011) (cleaned up).

2. Evidence of Intent

Intent is seldom provable by direct evidence; as such, circumstantial evidence is commonly—if not necessarily—relied upon to prove state of mind. *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963). Thus, the State was not required to introduce evidence of Mr. Patton explicitly offering Jane $1,000 for the express purpose of dissuading her from testifying. And the circumstantial evidence that the State did introduce in this case supports a reasonable inference that Mr. Patton acted with just that intent given the context in which he made the offer. *See*, *e.g.*, *State v. Taylor*, 379 N.C. 589, 609, 866 S.E.2d 740, 756 (2021) (noting on review of a true threats conviction that, in discerning the defendant's subjective intent in the light most favorable to the State, "[d]efendant's statements should not be read in isolation and are more properly considered in context.").

The context of Mr. Patton's offer is of paramount importance—one can reasonably infer that a motorist who knowingly slips a State Trooper a $100 bill with his license and registration during a traffic stop for speeding is attempting to bribe the officer notwithstanding the lack of an express statement of such intent. Similarly, Mr. Patton's call to his known accuser with an unsolicited offer of $1,000, prior to trial and for no other discernable reason, is inherently suspect.

Other evidence solidifies the reasonable inference of intent to interfere, namely: (1) his attempt to disguise his identity in calling Jane by using another inmate's telephone account, suggesting an improper motive; (2) his offer of $1,000 immediately after Jane said "you're not supposed to be talking to me," showing that the offer was made with full awareness that he was not to be in contact with Jane and in direct contravention of those concerns; (3) Jane plainly sounds distressed on the

recoding once Mr. Patton identified himself, yet he continued to go forward with his offer despite her obvious discomfort; (4) a second attempt to contact Jane after she hung up on him, again demonstrating his disregard for prohibitions against contacting Jane and the distress under which it placed her; (5) Mr. Patton's admitted past conduct of threatening and intimidating Jane in order to influence her behavior for his benefit; and, (6) Jane's own understanding of the conversation, derived from her shared and involved history with Mr. Patton, that the offer was intended as a bribe to prevent her from testifying.[2]

All of this evidence, coupled with a lack of other evidence indicating why Mr. Patton would gratuitously, surreptitiously, and spontaneously offer his alleged victim $1,000,[3] is sufficient to support a reasonable inference that the offer was made with the intent to interfere with Jane's testimony. The State introduced sufficient competent evidence of the requisite intent and, by extension, the trial court did not err in denying Mr. Patton's motion to dismiss.

C. Jury Instructions

[3] Mr. Patton next asserts that the trial court: (1) plainly erred in failing to instruct the jury that it must find he threatened Jane to convict him of interfering with a witness; (2) prejudicially erred in failing to instruct on the requirement that his intent be to deter Jane *from testifying* specifically; (3) prejudicially erred in giving the disjunctive instruction that included offering Jane $1,000; and (4) violated his right to a unanimous jury verdict by giving said disjunctive instruction. On review of the relevant facts and law, none of these arguments is convincing.

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2. Mr. Patton argues that Jane's subjective understanding of his offer is irrelevant because, by analogy to the crime of true threats, "a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats." *Taylor*, 379 N.C. at 605, 866 S.E.2d at 753. Mr. Patton overstates the relevance of that observation to his argument, as *Taylor* likewise recognized Supreme Court precedent holding that, "in order to determine whether a defendant's particular statements contain a true threat, a court must consider . . . the reaction of the listeners upon hearing the statement." *Id.* at 600-01, 866 S.E.2d at 750 (citing *Watts v. United States*, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 667 (1969)).

3. On appeal, Mr. Patton points out his trial testimony that Jane falsely accused him of rape because he refused to pay her $300 in exchange for sex. From there, he argues that this evidence supports an inference that he offered Jane $1,000 to encourage her to "tell the truth" and rescind her allegations against him. But this explanation of his conduct does not arise on the face of the evidence introduced at trial; Mr. Patton never testified, either on direct or cross-examination, as to why he called Jane from jail. And, in any event, our standard of review requires us to draw all reasonable inferences in the light most favorable to the State, not the defendant.

1. Standards of Review

We review preserved challenges to the trial court's jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Omission of a necessary element from the jury instruction is reviewed under the harmless error standard. *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). Adequate prejudice under this standard necessitates some "reasonable probability that [the] outcome would have been different" absent the alleged error. *Id.* at 849, 689 S.E.2d at 871. In undertaking such review, the instructions are to be viewed contextually within the entire jury charge. *Id.* at 847, 689 S.E.2d at 870. A challenged instruction is sufficient "as long as [it] adequately explains each essential element of an offense." *Id.* at 846, 689 S.E.2d at 870 (citation omitted).

Unpreserved challenges to instructions given to the entire jury are reviewed for plain error when distinctly asserted in the appellant's brief. *State v. May*, 368 N.C. 112, 118, 772 S.E.2d 458, 462 (2015). "Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007) (citation omitted).

2. Instructions on Threat and Intent

Mr. Patton's first asserted error in the jury instructions—that the trial court plainly erred in failing to instruct the jury that any conviction for interfering with a witness required a threat—is precluded by our earlier holding here that a defendant may violate N.C. Gen. Stat. § 14-226 through bribery and without threats. His second argument—that the trial court's instruction failed to properly convey the requisite intent to the jury—is likewise unavailing; the trial court gave the pattern instruction for the offense, which this Court has previously held to be consistent with the statute. *Clagon*, 279 N.C. App. at 434, 865 S.E.2d at 349. Further, the pattern instruction given by the trial court makes clear, through context, that the jury was being asked whether Mr. Patton acted with the intent to interfere in Jane's testimony. The meaning of jury instructions is to be derived from the instructions' totality:

> It is well established in North Carolina that courts will not find prejudicial error in jury instructions where, taken as a whole, they present the law fairly and clearly to the jury. Isolated expressions of the trial court, standing alone, will not warrant reversal when the charge as a whole is correct.

State v. Graham, 287 N.C. App. 477, 486-87, 882 S.E.2d 719, 727 (2023) (cleaned up). It is evident from the name of the charge as told to the jury, "interfering with *a witness*," and the elements of the charge as instructed—including "that the defendant attempted to deter any person who was summoned *as a witness in the defendant's case*"—that the attempt to deter referenced in the instructions related to Jane's service *as a testifying witness*. *See*, *e.g.*, *Witness*, *Black's Law Dictionary* (11th ed. 2019) ("Someone who gives testimony under oath or affirmation").

3. Instruction on $1,000

As with his first two arguments on alleged error in the jury instructions, we see no merit in Mr. Patton's assertion that the trial court's mention of offering $1,000 in the elements of the charge erroneously permitted the jury to convict him of legal conduct. To be sure, offering someone $1,000 is not, in the abstract, illegal. But such conduct *is* unlawful if made with the intent to "prevent or deter, or attempt to prevent or deter any person summoned or acting as [a] witness from attendance upon such court." N.C. Gen. Stat. § 14-226(a). When viewed in context, that is precisely what the trial court instructed the jury:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date a person was acting as a witness in the defendant's case in a court of this state, and that the defendant . . . *intentionally attempted to deter . . . by calling the victim before his trial and stating he had $1,000 for her*, it would be your duty to return a verdict of guilty.

The trial court thus informed the jury that it could convict Mr. Patton for offering Jane $1,000 only if it amounted to an "intentional[] attempt[] to deter" her from testifying, not for the mere act of offering her money itself. Mr. Patton has therefore failed to show the asserted error in the trial court's instruction.

4. Disjunctive Instruction and Unanimity

In his final argument, Mr. Patton contends that the disjunctive jury instruction given by the trial court violated his right to a unanimous jury verdict, allowing jurors to convict him for either bribery or the offer of $1,000. He presents this argument under the fatal ambiguity identified in *State v. Lyons*:

> [A] disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*,

> is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis in original). But not all disjunctive instructions run afoul of the constitutional requirement for unanimous verdicts. *Id.* For example, in cases involving indecent liberties:

> The risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive . . . . [The statute] proscribes simply "any immoral improper, or indecent liberties." Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

State v. Hartness, 326 N.C. 561, 564-65, 391 S.E.2d 177, 179 (1990).

The statutory crime of interfering with a witness falls within the same category as the indecent liberties statute discussed in *Hartness*. This Court has previously recognized that the statute does not enumerate distinct criminal acts that disjunctively establish discrete offenses; instead, intimidating, threatening, or interfering with a witness are considered "undistinguished parts of a single offense under N.C. Gen. Stat. § 14-226." *Clagon*, 279 N.C. App. at 434, 865 S.E.2d at 349 (citing *Neely*, 4 N.C. App. at 476, 166 S.E.2d at 879). Further, there is no suggestion from the evidence or verdict that Mr. Patton violated N.C. Gen. Stat. § 14-226 in any manner other than attempting to deter Jane from testifying by offering her a $1,000 bribe over the phone. *See Lyons*, 330 N.C. at 307, 412 S.E.2d at 315 (observing that, "[i]n some cases, an examination of the verdict, the charge, the initial instructions by the trial judge to the jury, and the evidence may remove any ambiguity created by the charge" (cleaned up)). Because the disjunctive instruction did not raise the potential for a fatal ambiguity in the jury's guilty verdict, and the evidence and verdict eliminate any potential ambiguity, we hold that Mr. Patton has failed to demonstrate error in the trial court's disjunctive instruction.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court had jurisdiction over the charge of interfering with a witness and that Mr. Patton received a fair trial, free from error.

NO ERROR.

Judges TYSON and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 AUGUST 2023)

CAMPBELL v. A1A ARC OF DUNN, LLC No. 23-58	Harnett (22CVS234)	Dismissed
ICENHOUR v. ICENHOUR No. 23-26	Caldwell (11CVD1624)	Vacated and Remanded
IN RE A.M.H. No. 23-89	Cabarrus (21JT64) (21JT65) (21JT66)	Affirmed
IN RE B.A.G. No. 23-184	Ashe (20JT30) (20JT31) (20JT32)	Affirmed
IN RE E.M.E. No. 22-924	Guilford (21JT469) (21JT470)	Affirmed
IN RE K.M. No. 23-32	Union (21JT36) (21JT37)	Affirmed
IN RE L.D.M. No. 22-739	Harnett (19JA103)	Affirmed
IN RE L.S. No. 22-818	Lenoir (21JA94) (21JA95) (21JA96)	Affirmed
IN RE W.H.F. No. 22-947	New Hanover (21JT213)	Affirmed
IN RE D.W. No. 22-991	New Hanover (20JT192)	Affirmed
KAPLAN v. KAPLAN No. 22-923	Union (15CVD305)	Reversed in Part, Vacated in Part and Remanded
KAPLAN v. KAPLAN No. 23-1	Union (15CVD305)	Reversed in part, vacated in part and remanded

N.C. CITIZENS FOR TRANSPARENT GOV'T, INC. v. VILL. OF PINEHURST No. 23-69	Moore (22CVS515)	Reversed and Remanded
N.C. STATE BAR v. IREK No. 22-667	N.C. State Bar (92DHC17)	Affirmed
OLSCHNER v. GOINES No. 22-944	Carteret (20CVS21)	Affirmed
STATE v. JORDAN No. 22-533	Guilford (19CRS89600)	No plain error
STATE v. LYTLE No. 22-968	McDowell (20CRS353-355) (21CRS123)	Affirmed
US ACQUISITION, LLC v. MOUSER No. 22-973	Johnston (22CVS1315)	Affirmed

ALISON ARTER, PETITIONER
v.
ORANGE COUNTY, STEPHEN M. BURT, SHARON C. BURT, JODI BAKST, AND REAL ESTATE EXPERTS, RESPONDENTS

No. COA23-86

Filed 15 August 2023

Zoning—unified development ordinance—land use buffer—zoning districts versus land use designations

The trial court utilized the correct standard of review and did not err when it upheld the decision of a county board of adjustment (BOA) regarding whether land use buffer regulations in the county's Unified Development Ordinance (UDO) applied to a gravel road between petitioner's property and an adjacent residential subdivision. The BOA properly interpreted the UDO provisions as requiring buffers based on zoning districts and not on land use designations; therefore, although petitioner claimed to operate an "active farm" on her property, no buffer was required because both properties were zoned rural residential.

Judge CARPENTER dissenting.

Appeal by petitioner from order entered 23 June 2022 by Judge R. Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 6 June 2023.

Petesch Law, by Andrew J. Petesch, for petitioner-appellant.

James C. Bryan and Joseph Herrin for respondent-appellee Orange County.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr., for respondents-appellees Stephen M. Burt, Sharon C. Burt, Jodi Bakst, and Real Estate Experts.

GORE, Judge.

Petitioner, Alison Arter, appeals from the superior court's Order affirming the decision of the Orange County Board of Adjustment ("BOA"). The trial court's order upheld a written determination that land use buffer regulations found in Section 6.8.6 of the Orange County

Unified Development Ordinance ("UDO") did not apply to a gravel road which divides petitioner's property from the adjacent subdivision at issue. Petitioner asserts, among other things, that the superior court: (i) misinterpreted various provisions of the Orange County UDO and (ii) erred in determining that the BOA's decision was supported by competent, material, and substantial evidence in the record.

Petitioner appeals as a matter of right from a final judgment of superior court pursuant to N.C. Gen. Stat. section 7A-27. Upon review, we affirm.

I.

Petitioner owns and resides on her property (the "Arter Property") located in Orange County, North Carolina. Petitioner purchased the property from respondents Stephen Burt and Sharon Burt in 2007. As of February 2021, the Burts still owned the adjoining property—an approximately 55-acre tract of land—which respondent Jodi Bakst eventually developed into a 12-lot residential subdivision (the "Array Subdivision").

Orange County implements zoning, subdivision, and other land use regulations in their UDO. Both the Arter Property and the Array Subdivision are zoned R-1 (Rural Residential) pursuant to the UDO. Petitioner has continuously used the Arter Property for the operation and management of equine facilities. The Array Subdivision is a low intensity "flexible" residential subdivision.

The primary concern petitioner expressed regarding the Array Subdivision is that the gravel road entrance into the subdivision—Array Drive—runs generally parallel in some areas to the common boundary line between the Arter Property and Array Subdivision. Petitioner claimed that the proximity of Array Drive to her horse stable would be injurious to her horses, and that a buffer should have been required between her property and the road. Petitioner claims to operate an "active farm" on her property, that the UDO requires a 30-foot wide, Type B vegetated buffer along the common boundary line, and that the Table of Land Use Buffers found at UDO section 6.8.6(D) requires such a buffer. Petitioner's concerns led her to review proposed subdivision plans, attend the developer's neighborhood meeting, and consult with County Planning Staff.

After learning that Planning Staff were not going to implement a land buffer under the provisions of the UDO, petitioner submitted letters through counsel to Planning Supervisor Michael Harvey requesting an administrative determination on whether a land use buffer was required between the Arter Property and Array Subdivision. Harvey

determined that the UDO does not require the establishment of a land use buffer when parcels have the same or similar general use designations. In Harvey's view, the question of whether a property was used for "Active Farm/Agriculture" was irrelevant and of no effect.

Petitioner appealed Harvey's 2021 determination to the Orange County BOA. The BOA upheld Harvey's determination by written decision dated 20 July 2021. Petitioner timely filed a Petition for Writ of Certiorari and, after a hearing on the merits, the Orange County Superior Court affirmed the BOA's decision by written order filed 23 June 2022. Petitioner timely filed notice of appeal to this Court on 22 July 2022.

II.

> When an appellate court reviews a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002) (cleaned up).

III.

It is evident from the record that the superior court applied the appropriate standard of review. The dispositive issue on appeal is whether the superior court erred in concluding that the Orange County BOA properly interpreted the provisions of the Orange County UDO. "Because issues concerning the interpretation of zoning ordinances are questions of law, we likewise review the issues *de novo*." *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App. 204, 208, 747 S.E.2d 338, 342 (2013).

> In general, municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature. The basic rule is to ascertain and effectuate the intention of the municipal legislative body. We must therefore consider this section of the ordinance as a whole, and the provisions *in pari materia* must be construed together.

George v. Edenton, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978) (cleaned up). "Where the language of a[n] [ordinance] is clear, the courts must give the [ordinance] its plain meaning; however, where the [ordinance]

is ambiguous or unclear as to its meaning, the courts must interpret the [ordinance] to give effect to the [municipal] legislative intent." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citation omitted).

In this case, it is undisputed that ambiguity exists between Orange County UDO sections 6.8.6(B) and 6.8.6(D). Section 6.8.6(B) is entitled "Applicability" and states, "Land use buffers will be required based on the *zoning district* of the proposed use and the *zoning district* of the adjacent uses." In contrast, the heading of the "Land Use Buffer Table" found at section 6.8.6(D) refers to "Zoning *or Use* of Adjacent Properties." When determining buffer requirements based on zoning districts, both the Arter Property and the Array Subdivision are zoned R-1. Adjacent R-1 properties do not require a buffer under section 6.8.6.(D). However, if the Arter Property qualifies as an "active farm," then a 30-foot-wide buffer would be required under section 6.8.6(D) based on land use designation.

As noted by the trial court, the BOA, and the Orange County Planning Department, Article 1 of the Orange County UDO also includes various provisions intended to assist in the interpretation of the UDO and resolve ambiguity. Section 1.1.12 provides:

> 1.1.12 Headings and Illustrations
>
> Headings and illustrations contained herein are provided for convenience and reference only and do not define or limit the scope of any provision of this Ordinance. *In case of any difference between meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls.*

Thus, when sections 6.8.6(B) and 6.8.6(D) are construed *in pari materia* with section 1.1.12, it is evident that the plain text of section 6.8.6(B) controls over the table in section 6.8.6(D). Accordingly, we conclude that the BOA properly interpreted the UDO as requiring buffers based on zoning districts. Any issue of fact regarding land use is inconsequential where the text of the ordinance controls. The superior court properly upheld the BOA's determination on this basis.

IV.

For the foregoing reasons, we determine that the superior court applied the appropriate standard of review and did so properly. Considering our resolution of this matter above, it is unnecessary to reach the remainder of petitioner's arguments.

AFFIRMED.

Judge RIGGS concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

I respectfully dissent from the majority opinion, in which the majority concludes the Orange County Board of Adjustment (the "Board") and the Orange County Superior Court "properly interpreted the [Orange County Unified Development Ordinance ("UDO")] as requiring buffers based on zoning districts." I disagree with the majority's interpretation of UDO § 6.8.6 and write separately to explain my reading of the ordinance. After careful consideration of the provisions of the UDO, I conclude UDO § 6.8.6 requires land use buffers according to zoning districts *or* land uses, as depicted in Table 6.8.6.D (the "Land Use Buffer Table"). Accordingly, I would reverse and remand the matter to the superior court with instructions to determine whether Alison Arter's ("Petitioner") property (the "Arter Property") constitutes an "active farm/agriculture" within the meaning of UDO § 6.8.6, and thus, necessitates a buffer to separate it from an adjacent subdivision.

On appeal, Petitioner argues the Board and the superior court erred by incorrectly interpreting UDO § 6.8.6 and by failing to consider whether the Arter Property constitutes "active farm/agriculture" for the purposes of applying the Land Use Buffer Table.

As the majority properly acknowledges, our review of this matter is limited to determining: (1) whether the superior court applied the correct standard of review; and (2) whether the superior court correctly applied that standard. *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App 809, 810, 610 S.E.2d 795–96, *disc. rev. denied*, 359 N.C. 634, 616 S.E.2d 540 (2005).

In considering an appeal from a decision of a zoning board, the reviewing court's standard of review depends on the nature of the issue or issues presented on appeal. *Myers Park Homeowners Ass'n v. City of Charlotte*, 229 N.C. App 204, 207, 747 S.E.2d 338, 341 (2013). When the issue is whether the board erred in interpreting an ordinance, a question of law, the reviewing court reviews the issue de novo. *Id.* at 207, 747 S.E.2d at 342. Under de novo review, the reviewing court may consider the interpretation of the board, but is not bound by that interpretation,

and may freely substitute its judgment as appropriate. *Id.* at 208, 747 S.E.2d at 342.

Here, in its 22 June 2022 Order ("the Order"), the superior court affirmed the Board's decision. As the majority notes, it appears from the Order that the superior court properly reviewed the Board's interpretation of the UDO de novo. *See MCC Outdoor, LLC*, 169 N.C. App at 810, 610 S.E.2d at 795–96. Thus, the next step is considering whether the superior court *correctly applied* the de novo standard. *See id.* at 810, 610 S.E.2d at 796.

Generally, "municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature." *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978). Statutory interpretation begins with an examination of the plain words of a statute, or in this case, an ordinance. *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 155, 731 S.E.2d 800, 810 (2012); *see George*, 294 N.C. at 684, 242 S.E.2d at 880. Similar to statutes, "[i]f the language of the [ordinance] is clear and is not ambiguous, [this Court] must conclude that the legislat[ive body] intended the [ordinance] to be implemented according to the plain meaning of its terms." *Lanvale Props., LLC*, 366 N.C. at 155, 731 S.E.2d at 810 (citation omitted). If, however, the language is ambiguous, "courts [may] resort to canons of judicial construction to interpret meaning." *Jeffries v. Cnty. of Harnett*, 259 N.C. App. 473, 488, 817 S.E.2d 36, 47 (2018). "In interpreting a municipal ordinance, the basic rule is to ascertain and effectuate the intent of the legislative body." *Four Seasons Mgmt. Servs. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 77, 695 S.E.2d 456, 463 (2010) (citations and quotation marks omitted).

"Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the [o]rdinance as a whole." *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation omitted). An ambiguous zoning ordinance "should be resolved in favor of the free use of property." *Id.* at 266, 150 S.E.2d at 443 (citation omitted).

In determining the meaning of UDO § 6.8.6, we should first examine the plain language of the ordinance. *See Lanvale Props., LLC*, 366 N.C. at 155, 731 S.E.2d at 810. Here, the relevant ordinance, UDO § 6.8.6(B), states: "[l]and use buffers [are] required based on the zoning district of the proposed use and the zoning district of the adjacent uses." In light of the plain language, it is unclear whether, and in what manner, "the zoning district of the proposed use" or "the zoning district of the adjacent

uses" dictates the applicability of land use buffers; thus, it requires referencing the related Land Use Buffer Table. Unlike UDO § 6.8.6(B), the Land Use Buffer Table indicates the application of land use buffers is determined using the zoning district *or* use of the subject and adjacent properties. Furthermore, the Land Use Buffer Table specifies the buffer type that is required, based upon the particular zoning districts or uses of the subject and adjacent properties. The language in UDO § 6.8.6(B), coupled with the conflicting Land Use Buffer Table, creates ambiguity as to whether the buffers apply to the zoning districts of subject and adjacent properties and/or land uses of subject and adjacent properties. Since there is ambiguity, rules of construction should be utilized to interpret the meaning of UDO § 6.8.6. *See Jeffries*, 259 N.C. App. at 488, 817 S.E.2d at 47.

"[W]hen interpreting provisions of a law that are all part of the same regulatory scheme, [this Court] should strive to find a reasonable interpretation so as to harmonize them rather than interpreting them to create irreconcilable conflict." *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 750, 876 S.E.2d 804, 810 (2022) (citation and quotation marks omitted). "Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In addition, [this Court] avoid[s] interpretations that create absurd or illogical results." *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (citations omitted).

In this case, the UDO contains a pertinent rule of construction in section 1.1.12, which provides:

> [h]eadings and illustrations contained [in the UDO] are provided for convenience and reference only and do not define or limit the scope of any provision of this Ordinance. In case of any difference of meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls.

In other words, in the event of a conflict between the plain language of the UDO and a table, the text controls.

In this case, a conflict exists between the text of UDO § 6.8.6(B) and the Land Use Buffer Table because the text suggests the requirement of land use buffers is based on "zoning districts of proposed/adjacent uses;" however, the Land Use Buffer Table indicates it is based on "zoning *or* uses." (Emphasis added). If the difference in language is resolved pursuant to UDO § 1.1.12, the applicability of land use buffers should be

based *solely* on the zoning districts of the proposed and adjacent uses. Yet, the Land Use Buffer Table does not indicate which columns or rows pertain to zoning districts and which pertain to land uses. Furthermore, this interpretation would disregard the columns in the Land Use Buffer Table that are not apparent zoning districts—including "active farm/agriculture," "interstate highway," "arterial street," and "collector street"—rendering an illogical result. *See Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201. For example, under this construction, Orange County's 100-foot-wide buffer requirement between any zoning district and an interstate highway would be extinguished. For these reasons, UDO § 1.1.12 does not resolve the apparent conflict in UDO § 6.8.6 because the text of UDO § 6.8.6(B) does not, on its own, state when or how land use buffers are required.

The final step of this analysis is to consider the intent of the local legislative body and interpret UDO § 6.8.6 as to harmonize its various sections and eliminate internal conflict, which in this case, means recognizing and giving meaning to each column and row in the Land Use Buffer Table. *See Jeffries*, 259 N.C. App. at 488, 817 S.E.2d at 47. Here, the Land Use Buffer Table specifically includes an "active farm/agriculture" column, which is not labeled as either a zoning-district type or a land-use type. Moreover, the plain language of the Land Use Buffer Table, "zoning districts or uses," and the use of the term "land use" throughout UDO § 6.8.6 supports the interpretation that UDO § 6.8.6 applies to zoning districts or land uses. *See Lanvale Props., LLC*, 366 N.C. at 155, 731 S.E.2d at 810. This interpretation is further supported by the express purpose of the buffer requirement under the UDO. *See Yancey*, 268 N.C. at 266, 150 S.E.2d at 443. According to UDO § 6.8.6(A), a land use buffer is used to "buffer lower intensity *uses* from incompatible higher intensity/density land *uses*." (Emphasis added). Finally, the goals of the Comprehensive Plan emphasize the desire to preserve agricultural areas from incompatible uses as well as to recognize and support the right to farm. By specifically including zoning districts and land uses in the Land Use Buffer Table, when viewed in the context of the entire UDO and Comprehensive Plan, the intent of including UDO § 6.8.6 was, in part, to establish land buffers based on zoning districts *or* land uses in an effort to protect agriculture. *See id.* at 266, 150 S.E.2d at 443. As a result, I would conclude the superior court erred by affirming the Board's incorrect interpretation that UDO § 6.8.6 solely applies to zoning districts. Hence, in my view, the superior court's interpretation of UDO § 6.8.6 was incorrect. *See MCC Outdoor, LLC*, 169 N.C. App. at 810, 610 S.E.2d at 796.

The majority correctly notes that "if the Arter Property qualifies as an 'active farm,' then a 30-foot-wide buffer would be required under section 6.8.6(D) based on land use designation." Nevertheless, UDO § 6.8.6(D) does not define an "active farm" as a land use or a zoning district. Because there exists a question of fact as to whether the Arter Property constitutes "active farm/agriculture" under the UDO, I would remand to the superior court to make a finding as to that issue.

Although I agree with the majority's conclusion that the superior court used the proper standard of review when evaluating Petitioner's issues on appeal, I disagree with the majority's holding that the superior court correctly applied de novo review in interpretating UDO § 6.8.6. After reviewing the UDO in accordance with the principles of statutory construction, in my view, UDO § 6.8.6 requires land use buffers based on the zoning districts *or* land uses of the subject and adjacent properties. Accordingly, I would reverse and remand to determine whether the Arter Property constitutes "active farm/agriculture" for the purpose of applying UDO § 6.8.6 and requiring a 30-foot-wide buffer.

DEBORAH NASH EDWARDS, ROBERT W. COOPER, TIFFANY PATTERSON, WILLIAM H. RIGGAN, III, ZACHERY MYERS, MARTHA MILLER, EARL OLDHAM, DONALD K. DRIVER, DEBRA B. POLEO, PAULA WALTERS, NATALIE PETERSON AND ANITA M. DRIVER, PLAINTIFFS

v.

TOWN OF LOUISBURG, NORTH CAROLINA, A BODY POLITIC, DEFENDANT

No. COA22-688

Filed 15 August 2023

1. Declaratory Judgments—standing—removal of Confederate monument—ownership stake not alleged

The trial court properly granted summary judgment to a town on plaintiffs' claims seeking a temporary restraining order, preliminary injunction, and declaratory judgment—which plaintiffs filed to challenge the town's decision to remove from public property a monument commemorating Confederate soldiers—where plaintiffs not only failed to allege they had any proprietary or contractual interest in the monument but also either denied having or admitted to not having an ownership interest in various discovery responses and therefore lacked standing to pursue a claim for declaratory relief.

2. Appeal and Error—mootness—public meeting notice requirements—emergency decision ratified at regular meeting—regular meeting not challenged

In an action for declaratory relief arising from a town's decision to remove from public property a monument commemorating Confederate soldiers, although plaintiffs alleged that the town's initial emergency meeting did not comply with notice requirements under the open meetings law, plaintiffs' notice argument was moot where plaintiffs did not independently challenge the town's subsequent regular meeting, at which the town unanimously ratified its prior decision from the emergency meeting to remove the monument.

Judge TYSON dissenting.

Appeal by plaintiffs from order entered 28 March 2022 by Judge Michael O'Foghludha in Franklin County Superior Court. Heard in the Court of Appeals 7 February 2023.

Larry E. Norman Attorney, PLLC, by Larry E. Norman, for plaintiffs-appellants.

Cauley Pridgen, P.A., by James P. Cauley, III, and Emily C. Cauley-Schulken, for defendant-appellee.

GORE, Judge.

Plaintiffs appeal the trial court's order granting summary judgment in favor of defendant Town of Louisburg. Plaintiffs lack standing to bring a claim for declaratory relief under N.C. Gen. Stat. § 100-2.1, and their claim under North Carolina's Open Meetings Law (§§ 143-318.9 – 143-318.18) is moot. We affirm.

I.

A.

On 13 May 1914, the Joseph J. Davis Chapter of the United Daughters of the Confederacy dedicated the monument of a Confederate soldier (the "Monument") in memory of Franklin's Confederate dead. The Monument was located on North Main Street in Louisburg, North Carolina, on a right-of-way owned by the State. The State does not claim

ownership of the Monument itself. In an order denying plaintiffs' motion for preliminary injunction filed 20 July 2020, the trial court found that:

> 4. Rising tensions and demonstrations have recently surrounded similar monuments across North Carolina and the United States, resulting in citizens removing similar monuments on their own and resulting in injuries to citizens, law enforcement officers and property.
>
> 5. Based on similar protests and demonstrations and rising tensions in the Town of Louisburg during the month of June, 2020, the Louisburg Police Chief considered the situation around the Monument to constitute a police and public safety emergency and the Police Chief advised Town officials of his concerns.
>
> 6. On June 22, 2020, an emergency meeting of the Louisburg Town Council was held using the Zoom video conferencing platform, wherein the Town Council voted to remove and relocate the Monument.
>
> 7. The Town Council meeting was well attended and citizens were permitted to participate by submitting comments via Zoom and via email on the issue of the Monument.

Following the Council's decision at the 22 June 2020 emergency meeting, protests diminished. The soldier on top of the Monument was removed and put into storage while the Town investigated a suitable location to relocate the Monument base. At a subsequent regular meeting held on 20 July 2020, the Town Council voted to ratify its prior decision to remove and relocate the Monument. The Monument was later moved to a section of the Town's cemetery where Confederate veterans are buried.

B.

Plaintiffs commenced this action on 23 June 2020 in Franklin County Superior Court seeking a temporary restraining order, preliminary injunction, and declaratory judgment regarding the respective rights and obligations of the parties concerning the Monument. Plaintiffs alleged the Town failed to comply with the terms and provisions of N.C. Gen. Stat. § 100-2.1 (Protection of monuments, memorials, and works of art) and Article 33C of the North Carolina General Statutes concerning "Meetings of Public Bodies." Plaintiffs also argued defendant

violated the notice requirements for special meetings under the Town of Louisburg Code of Ordinances. As written in their complaint, plaintiffs sought a "[d]eclaratory judgment declaring that the actions of the Town of Louisburg ordering the removal or relocation of the Confederate Monument be declared void and of no effect."

The trial court did not issue a temporary restraining order. Defendant Town of Louisburg filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, which the trial court denied by written order entered 28 July 2020. The trial court entered a separate order denying plaintiffs' motion for preliminary injunction the same day.

On 9 April 2021, defendant filed a motion for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. On 28 March 2022, the trial court entered an order granting summary judgment in favor of defendant on all claims.

C.

Plaintiffs timely filed written notice of appeal on 12 April 2022. The trial court's order granting defendant's motion for summary judgment is immediately appealable on grounds that such ruling is a final adjudication on the merits of all issues in controversy.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). "An issue is genuine if it may be maintained by substantial evidence." *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E.2d 405, 409 (1982) (quotation marks and citation omitted). "[A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense." *Id.* (alteration in original) (citation omitted). "In ruling on a summary judgment motion, we consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 563, 853 S.E.2d 698, 714 (2021) (quotation marks and citation omitted). "We review a trial court's order granting or denying summary judgment de novo." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation omitted).

III.

A.

[1] Defendant raised several arguments in support of summary judgment on plaintiffs' claim for declaratory relief under N.C. Gen. Stat. § 100-2.1. The trial court granted defendant's motion but did not state the basis for its rationale. While there are several possible reasons for its ruling, "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citations omitted). We first consider whether the trial court's order should be affirmed because plaintiffs lack standing to pursue a claim for declaratory judgment under § 100-2.1.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823, 611 S.E.2d 191, 193 (2005) (citations omitted). "The North Carolina Constitution confers standing to sue in our courts on those who suffer *the infringement of a legal right* . . . ." *Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 733 (emphasis added). "A plaintiff must establish standing in order to assert a claim for relief." *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 625, 881 S.E.2d 32, 44 (2022) (citation omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and standing is required to seek a declaratory judgment . . . ." *Id.* at 652, 881 S.E.2d at 61 (Newby, C.J., concurring) (internal citation omitted).

Under North Carolina's Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 – 1-267, "an action is maintainable . . . only in so far as it affects the civil rights, status and other relations in the present actual controversy between parties." *Chadwick v. Salter*, 254 N.C. 389, 395, 119 S.E.2d 158, 162 (1961) (internal quotation marks omitted) (quoting *Calcutt v. McGeachy*, 213 N.C. 1, 4, 195 S.E. 49, 51 (1938)). However, "[t]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing . . . ." *United Daughters of the Confederacy*, 383 N.C. at 629, 881 S.E.2d at 46 (alteration in original) (internal citation and quotation marks omitted). "In other words, plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action." *Id.* at 629, 881 S.E.2d at 46-47.

Plaintiffs assert "ownership of the Monument itself" is a disputed issue of material fact precluding summary judgment. They offer various and conflicting positions about who owns the Monument—whether it be Franklin County, a specific County commissioner, the town of Louisburg, or the Daughters of the Confederacy. In any event, disputed ownership is not a genuine issue of material fact precluding summary judgment in this case. Plaintiffs fail to show some "proprietary or contractual interest in the monument . . .", *id.* at 629, 881 S.E.2d at 57, i.e., "a legally protected interest invaded by defendants' conduct." *Soc'y for the Hist. Pres. of the Twentysixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 701, 704, 872 S.E.2d 134, 138-39, *rev. or reh'g granted and stay granted by* 383 N.C. 680, 880 S.E.2d 679 (2022). Through their responses to requests for admissions and in their depositions, each plaintiff party to this action either denies they have an ownership interest in the Monument or admits they do not own the Monument. Plaintiffs offer no alternative argument that they maintain the requisite standing to pursue a claim for declaratory relief on this basis.

Moreover, in addressing a substantially similar issue in *United Daughters of the Confederacy*, our Supreme Court observed that nothing "in N.C.G.S. § 100-2.1 . . . explicitly authorizes the assertion of a private cause of action for the purpose of enforcing that statutory provision." 383 N.C. at 638, 881 S.E.2d at 52. Here, like in *United Daughters of the Confederacy*, "even if N.C.G.S. § 100-2.1 could be interpreted to implicitly authorize the assertion of a private right of action, nothing in the relevant statutory language or the allegations contained in the . . . complaint suggests that plaintiff[s] would be 'in the class of persons on which the statute confers the right[.]' " *Id.* (second alteration in original) (quoting *Comm. to Elect Dan Forest*, 376 N.C. at 597, 853 S.E.2d at 726).

Unlike *United Daughters of the Confederacy*, the instant appeal arises from an order granting defendant's motion for summary judgment, not a dismissal for lack of subject matter jurisdiction. "Matters determined by a summary judgment, just as by any other judgment, are res judicata in a subsequent action." *T.A. Loving Co. v. Latham*, 15 N.C. App. 441, 444, 190 S.E.2d 248, 250-51 (1972) (quotation marks and citation omitted). By contrast, a dismissal under N.C. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction "is not on the merits and thus is not given res judicata effect." *Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988) (emphasis omitted) (citation omitted). Under our precedent, "[s]ummary judgment is proper if the plaintiff lacks standing to bring suit." *Morris v. Thomas*, 161 N.C. App. 680, 683, 589 S.E.2d 419, 421 (2003) (citation omitted). Having determined that defendant is "entitled to summary judgment on the ground [p]laintiff[s] lacked

standing, we need not address [p]laintiff[s'] additional assignments of error." *Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 278, 545 S.E.2d 768, 772, *disc. rev. denied*, 353 N.C. 526, 549 S.E.2d 220 (2001).

B.

[2] Plaintiffs also alleged "that the Defendant failed to provide proper notice of the meeting of the Town Council conducted on June 22, 2020[,] . . ." and "that such actions of the Defendant violated the terms and provisions of Article 33C of the North Carolina General Statutes concerning the 'Meetings of Public Bodies' " and local ordinances. Under North Carolina's Open Meetings Law (§§ 143-318.9 – 143-318.18):

> Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large.

N.C. Gen. Stat. § 143-318.16A(a) (2022).

Defendant raised several arguments in support of summary judgment on this issue, and the trial court did not specify the basis for its ruling. We first address defendant's argument that "[a]ny deficiency in the procedures around the Council's actions at the meeting on June 22, 2020[,] were cured and made moot by the Council's unanimous decision at its regular meeting held on July 20, 2020."

> [A]ctions filed under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through -267 (2005), are subject to traditional mootness analysis. A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Typically, courts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law.

Citizens Addressing Reassignment & Educ., Inc. v. Wake Cnty. Bd. of Educ., 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (cleaned up).

At a regular meeting held on 20 July 2020, the Town Council voted unanimously to ratify the prior action taken regarding relocation of the

Monument. Plaintiffs never brought an independent challenge to the 20 July 2020 meeting, and they never amended their complaint to challenge the Town Council's actions at the 20 July 2020 meeting. Even if plaintiffs had obtained their requested relief, a declaration that the actions of the Town Council taken on 22 June 2020 were null and void, this ruling could not "have any practical effect on the existing controversy." *Id.* (quotation marks and citation omitted). Thus, "[t]his issue presents only an abstract proposition of law for determination and is, therefore, also moot." *Id.* at 246, 641 S.E.2d at 828.

IV.

For the foregoing reasons, we affirm the trial court's 28 March 2022 order granting summary judgment in favor of defendant on all claims.

AFFIRMED.

Judge ZACHARY concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The proper mandate is to reverse and remand with instructions for the trial court to enter dismissal of Plaintiffs' complaint or summary judgment for lack of standing without prejudice. *United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem*, 383 N.C. 612, 650, 881 S.E.2d 32, 60 (2022). I respectfully dissent.

I. Background

Defendant filed a stand-alone motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, prior to filing an answer. The trial court denied the motion by written order entered 28 July 2020. Defendant later filed a Rule 56 motion for summary judgment on 9 April 2021. The trial court entered an order granting summary judgment in favor of Defendant on both claims of declaratory judgment and under N.C. Gen. Stat. § 100 on 28 March 2022. The trial court failed to neither make or enter findings nor state its reasoning for granting Defendant's motion, other than "no genuine issues as to any material facts" under either N.C. Gen. Stat. § 100-2.1 or under the "open meeting laws." *See* N.C. Gen. Stat. §§ 100-2.1; 143-318.9–143-318.18 (2021).

II. Standard of Review

This Court has held: "As with other issues of subject matter jurisdiction, standing is a question of law. Where, as here, the trial court decided the standing question without making jurisdictional findings of fact, we review the legal question of standing *de novo* based on the record before the trial court." *Shearon Farms Townhome Owners Ass'n II v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 649, 847 S.E.2d 229, 234 (2020) (internal citations omitted).

III. Standing

A. *Committee to Elect Dan Forest*

Our Supreme Court extensively discussed the development of our State's standing doctrine as it applies to statutorily-granted rights in the case of *Committee to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021) ("*Dan Forest*"):

> In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. *In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute.* There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. *See, e.g.*, *Stanley* [*v. Department of Conservation and Development*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973)]. *The existence of the legal right is enough.*
>
> Having surveyed the relevant English, American, and North Carolina law of standing, we are finally in a position to determine whether ... the North Carolina Constitution imposes an "injury-in-fact" requirement, as under the federal constitution. While our Court of Appeals has previously come to that conclusion, which was followed by numerous panels of that court, *see, e.g.*, *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113-15, 574 S.E.2d 48 (2002) (holding North Carolina law requires "injury in fact" for standing and applying *Lujan* [*v. Defenders of Wildlife*, 504 U.S. 555, 119

> L. Ed. 2d 351 (1992)]), we are not bound by those decisions and conclude our Constitution *does not include* such a requirement.

Id. at 599, 853 S.E.2d at 727-28 (emphasis supplied).

The Supreme Court also held the language unrelated to standing in *Stanley v. Department of Conservation and Development* cited above was "an aberration and must be considered dictum" in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 645-48, 386 S.E.2d 200, 207-08 (1989). In *Dan Forest*, the Supreme Court also expressly abrogated any portion of this Court's opinion in *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.* that was inconsistent with their analysis in *Dan Forest*. *Dan Forest*, 376 N.C. at 601 n.44, 853 S.E.2d at 729 n.44.

The Court held North Carolina's Constitution does not impose a requirement for a plaintiff or petitioner to allege an "injury in fact" when challenging the validity of or asserting the applicability of a statute, and particularly against disturbing a war grave marker or monument. N.C. Gen. Stat. § 100-2.1. Instead, the limits on standing imposed is "a rule of prudential self-restraint" in cases challenging the constitutionality of governmental action, to ensure our courts only address actual controversies. *Id.* at 608, 853 S.E.2d at 733.

Our Supreme Court clarified the requirements for a party to establish a specific claim under a statute:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, *the legal injury itself gives rise to standing*. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, *because* "*every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law*." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, *the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action*.

Id. at 608, 853 S.E.2d at 733 (emphasis supplied).

B. *United Daughters of the Confederacy*

More recently, in *United Daughters of the Confederacy*, our Supreme Court reviewed and stated the specific requirements needed to establish standing to challenge under similar facts, and the Court held the proper remedy for lack of jurisdictional standing issues is to dismiss without prejudice:

> A careful analysis of the amended complaint satisfies us that plaintiff has failed to identify any legal right conferred by the common law, state or federal statute, or the state or federal constitutions of which they have been deprived by defendants' conduct. . . .
>
> Although the amended complaint claims that the local chapter was involved in raising funds to erect the monument and that it received permission from the County to place the monument outside the old county courthouse building in 1905, plaintiff does not allege that the local chapter or any of its members retained an ownership interest in the monument or had executed a contract with the County providing that the monument would remain upon the old courthouse property in perpetuity. As a result, even construing plaintiff's allegations concerning the funding for and erection of the monument as true, the mere fact that the local chapter "funded and erected the [monument]" does not suffice to establish standing in the absence of an affirmative claim to have some sort of proprietary or contractual interest in the monument. This is particularly true given that the plaintiff's allegations that the City's actions violated various state and federal laws, which we address in further detail below, assume that the *County*, rather than plaintiff, owns the monument.
>
> In addition, our taxpayer standing jurisprudence makes it clear that, "where a plaintiff undertakes to bring a taxpayer's suit on behalf of a public agency or political subdivision, his complaint must disclose that he is a taxpayer of the agency [or] subdivision," *Branch v. Bd. of Ed. of Robeson Cnty.*, 233 N.C. 623, 626 (1951) (citing *Hughes v. Teaster*, 203 N.C. 651 (1932)); *see also Fuller*, 145 N.C. App. at 395–96, and "allege facts sufficient to establish" either that "there has been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political

subdivision" or that "a demand on such authorities would be useless." *Id.* Although plaintiff has included such assertions in its brief before this Court, no such allegations appear in the amended complaint. *See Davis v. Rigsby*, 261 N.C. 684, 686 (1964) (noting that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader"). . . .

In the same vein, we hold that the amended complaint fails to allege sufficient facts necessary to establish associational standing. Although plaintiff argues that it is a "legacy organization whose purposes include 'historical, benevolent, memorial, [In addition, given that plaintiff did not advance this argument before the Court of Appeals, it is not permitted do so for the first time before this Court. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309 (2001) (noting the long-standing rule that "issues and theories of a case not raised below will not be considered on appeal;" see also N.C. R. App. P. 10(a) (providing that issues not raised in a party's brief are deemed abandoned).] educational and patriotic programs;' " that its charter "clearly and [un]equivocally gives it an articulated interest in the status and preservation of objects of remembrance such as the [m]onument;" that it "has succeeded to the interests of those deceased members of an affiliated chapter who were responsible for designing, funding, and erecting the [monument];" and that it has "a specific requirement for membership . . . that one is a lineal descendant of an individual who served in the government or the armed forces of the Confederacy," none of these factual allegations are raised in the amended complaint. In addition, the amended complaint does not identify any of plaintiff's individual members or describe how the legal rights of any of plaintiff's individual members have been violated. As a result, the amended complaint fails to allege facts sufficient to show that "the interests [plaintiff] seeks to protect are germane to the organization's purpose" or that its members "would otherwise have standing to sue in their own right." *River Birch Assocs.*, 326 N.C. at 130.

United Daughters of the Confederacy, 383 N.C. at 629-33, 881 S.E.2d at 47-49.

Taking all the above under consideration and after the Supreme Court's decision *Dan Forest*, a two-step test is used to determine whether a plaintiff has standing to challenge a legislative action. First, as set forth by *Dan Forest*, we must first determine if the relevant statute, here the Declaratory Judgment Act ("DJA"), confers on Plaintiff a cause of action. Plaintiff must show the DJA confers a cause of action generally and Plaintiff is among the class of persons upon whom the cause of action was conferred. *See id.* at 607-09, 853 S.E.2d at 733-34.

The second question becomes whether Plaintiff has satisfied the statutory requirements under the DJA or other statute to bring a claim. *See id.* at 599, 608 n.51, 853 S.E.2d at 727-28, 733 n.51. Any alleged infringement of a legal right is sufficient to establish standing. Under *Dan Forest*, Plaintiff need not allege any "injury in fact." *Id.* at 599, 853 S.E.2d at 728. "[T]o the extent it implicates the doctrine of standing, our [Constitutional] remedy clause should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed." *Id.* at 607, 853 S.E.2d at 733 (emphasis original), *see* N.C. Const. art. I, § 18.

C. *Cmty. Success Initiative v. Moore*

Our Supreme Court more recently applied both *Dan Forest* and *United Daughters of the Confederacy* in *Cmty. Success Initiative v. Moore*, holding:

> The standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution. *See Comm. To Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 853 S.E.2d 698, 728 (2021) ("[T]he 'judicial power' provision [in Article IV] of our Constitution imposes no particular requirement regarding 'standing' at all."). This Court has developed standing requirements out of a "prudential self-restraint" that respects the separation of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches. *Id.*
>
> . . .
>
> To ensure the requisite concrete adverseness, "a party must show they suffered a 'direct injury.' The personal or 'direct injury' required in this context could be, but is not necessarily limited to, 'deprivation of a constitutionally guaranteed personal right or an invasion of his property

> rights.' " *Forest*, 376 N.C. at 607-08, 853 S.E.2d at 733 (citations omitted).
>
> . . .
>
> The direct injury criterion applies even where, as here, a plaintiff assails the constitutionality of a statute through a declaratory judgment action. *See United Daughters*, 383 N.C. at 629, 881 S.E.2d at 46-47 ([P]laintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action.").

Cmty. Success Initiative v. Moore, 384 N.C. 194, 206-07, 886 S.E.2d 16, 28-29, (2023).

IV. Summary Judgment

"Jurisdiction is [t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (citation and internal quotation marks omitted). "The court must have personal jurisdiction and . . . subject matter jurisdiction [, which is] [j]urisdiction over the nature of the case *and* the type of relief sought, in order to decide a case." *Catawba Cty. v. Loggins*, 370 N.C. 83, 88, 804 S.E.2d 474, 478 (2017) (citation omitted) (emphasis supplied).

In *United Daughters of the Confederacy*, the trial court had granted the defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) (2021) with prejudice. 383 N.C. at 650, 2022-NCSC-143, 881 S.E.2d at 60.

The superior court here entered conflicting orders in initially denying Defendant's Rule 12(b)(1) motion where Plaintiffs had maintained the burden to establish standing, while later allowing Defendant's Rule 56 motion for summary judgment presumably for lack of jurisdictional standing. *See* N.C. Gen. Stat. § 1A-1, Rule 56 (2021). Our Supreme Court previously held subject matter jurisdiction challenges are properly asserted under Rule 12(b)(1), instead of Rule 12(b)(6). *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60 (citations omitted).

While there may be purported conflicting caselaw from this Court regarding issues of jurisdictional or subject matter standing being disposed of by summary judgment, the Supreme Court of North Carolina reviews challenges to subject matter jurisdiction through a

Rule 12(b)(1) motion to dismiss, instead of under either a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. *Id.*

V. Without Prejudice

Our Supreme Court has held under similar facts: "when a complaint is dismissed for lack of subject matter jurisdiction, that decision does *not* result in a final judgment on the merits and does not bar further action by the plaintiff on the same claim." *Id.* (citations omitted).

In *United Daughters of the Confederacy*, the Supreme Court addressed a defendant's motion to dismiss for lack of subject matter jurisdiction. *Id.* The majority's opinion asserts the posture in the instant case on a motion for summary judgment pursuant to Rule 56 is factually distinguishable from *United Daughters of the Confederacy*, citing *Landfall Grp. Against Paid Transferability v. Landfall Club*, 117 N.C. App. 270, 273, 450 S.E.2d 513, 515-16 (1994), where the "defendant met its summary judgment burden by showing that there is no genuine issue of material fact due to the lack of standing, [and] the burden shifted to [the] plaintiff to show that [a litigant] is a member of [the] defendant" group.

This presumption and conclusion mis-states binding precedent from our Supreme Court. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the Court of Appeals "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court" when it abolished two tort causes of action).

"[S]tanding is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]' " and is not a merits adjudication. *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (citation omitted). The trial court's dismissal and entry of summary judgment for lack of subject matter jurisdiction is not a "final judgment on the merits." *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60 (citations omitted).

VI. Conclusion

The trial court's order on summary judgment on standing jurisdiction is properly reversed and remanded to the trial court with instructions to enter the order without prejudice. *Willowmere Cmty. Ass'n*, 370 N.C. at 561, 809 S.E.2d at 563; *Dan Forest*, 376 N.C. at 607-08, 853 S.E.2d at 733; *United Daughters of the Confederacy*, 383 N.C. at 650, 2022-NCSC-143, 881 S.E.2d at 60; *Cmty. Success Initiative*, 384 N.C. at 240, 886 S.E.2d at 49-50. I respectfully dissent.

IN RE A.N.B.

[290 N.C. App. 151 (2023)]

IN THE MATTER OF A.N.B.

No. COA22-934

Filed 15 August 2023

1. Appeal and Error—notice of appeal—service—failure to serve guardian ad litem—non-jurisdictional defect

In a termination of parental rights case, respondent-father's failure to serve his notice of appeal on his daughter's appointed guardian ad litem (GAL) was a non-jurisdictional defect and not a substantial or gross violation of the appellate rules, especially in light of the GAL's actual notice of the appeal and lack of any objection in any of the filings before the appellate court. Therefore, respondent-father's petition for writ of certiorari as an alternative ground for review was denied as superfluous.

2. Appeal and Error—preservation of issues—failure to object—child's guardian ad litem and lack of attorney—termination of parental rights

In a termination of parental rights case, the appellate court declined to review respondent-father's arguments regarding his daughter's guardian ad litem (GAL) and his daughter's lack of attorney because the father failed to object at trial and the alleged errors were not automatically preserved for appellate review. The appellate court also declined to invoke Appellate Rule 2 because the case did not present exceptional circumstances meriting Rule 2 review.

3. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—no attempts to contact child

The trial court did not err in concluding that grounds existed to terminate respondent-father's parental rights in his daughter based on willful abandonment where the court's findings of fact were sufficient to support its conclusions of law. The father's specific challenges to the findings regarding his lack of gifts for his daughter and lack of effort to contact her lacked merit, especially in light of other, unchallenged findings establishing that he never sent gifts or attempted to contact her. Furthermore, the trial court was not required to make findings on every piece of evidence presented, and on the issue of whether the mother intentionally obstructed access to the daughter, the trial court made detailed findings and ultimately found that the mother's testimony was more credible than the father's.

IN RE A.N.B.

[290 N.C. App. 151 (2023)]

Appeal by respondent-father from order entered 5 August 2022 by Judge Paul J. Delamar in District Court, Craven County. Heard in the Court of Appeals 17 July 2023.

W. Michael Spivey for appellant-respondent-father.

Peacock Family Law, by Carolyn T. Peacock, for appellee-petitioner-mother.

No brief for appellee guardian ad litem.

STROUD, Chief Judge.

Respondent-father appeals from an order terminating his parental rights to his minor child, asserting the trial court erred by failing to appoint an attorney for the minor child and failing to make sufficient findings of fact to support its conclusions. We decline to review Respondent-father's first argument because he failed to preserve it by raising it before the trial court. Further, because the trial court's findings of fact were sufficient to support its conclusions of law, we affirm.

I. Background

Alice[1] was born to Respondent-father and Petitioner-mother in January 2015 while Father and Mother were both residents of New Hanover County. Father and Mother were never married. Shortly after Alice's birth, Mother started a Chapter 50 custody proceeding in New Hanover County.[2] In or about October 2015, the District Court, New Hanover County, entered a consent order ("2015 Custody Order") granting Mother primary physical custody of Alice. Mother and Father were granted joint legal custody of Alice and Father was granted visitation.[3]

About two years later, in December 2017, Father "was arrested for Driving While Impaired and Misdemeanor Child Abuse." Father and his brother were found passed out from a heroin overdose in a car, stopped at a red light, with Alice and her half-sibling in the back seat without any child seats or restraints. Bystanders called emergency services to assist and emergency responders had to break the window of Father's

1. We use the pseudonym for the juvenile stipulated to by the parties.

2. The record indicates Mother initiated the custody proceeding, but the record is unclear on when Mother filed a complaint in the custody action.

3. The date on the file stamp of the 2015 Custody Order is illegible but it was signed 7 October 2015.

vehicle to help Father, his brother, and the two children. Father and his brother were revived with Narcan and survived the incident. The New Hanover County Department of Social Services ("DSS") contacted Mother and Mother was reunited with Alice at the scene of the incident. Because of Father's overdose, DSS later substantiated neglect against Father in February 2018 and sent Mother a letter stating "[t]here was sufficient information found during the Investigative Assessment [into the December 2017 incident] to Substantiate . . . [n]eglect in the form of Injurious Environment against [Father]." DSS recommended all contact between Father and Alice be supervised until Father could make "significant progress" on his sobriety and left supervision arrangements to Mother's discretion.

Mother then filed a motion in District Court, New Hanover County, to modify the 2015 Custody Order. Father did not appear at the May 2018 hearing on the motion to modify because he was incarcerated, and although he "was provided with information on how to writ himself to court" for the modification hearing, he had "chosen not to do so." The district court entered an order on 14 May 2018 ("2018 Custody Order") granting Mother's motion and awarding Mother sole legal and physical custody of Alice. Mother also got married in May 2018.

In June 2018, Father filed a Rule 60 motion for relief from the 2018 Custody Order. Father's motion was heard in December 2018. In January 2019,[4] the district court entered an order granting Father's motion, determining it was in Alice's "best interest . . . for each parent to participate in custody hearings," and ordering a new trial.

On 29 August 2019, the district court entered a consent order allowing Alice's paternal Grandparents to intervene in the custody proceeding. A subsequent consent order regarding custody was filed 11 March 2020 ("2020 Custody Order"). The 2020 Custody Order found:

> 22. [Mother] is fit and proper to exercise temporary sole custody.
>
> 23. [Father] is not fit and proper to exercise secondary custody by visitation as [Father] has issues regarding his sobriety, recent relapse, and pending criminal charges.
>
> 24. The [paternal grandparents] are fit and proper persons to have visitation with [Alice] and it is in the best interests and welfare of [Alice] that [her paternal grandparents] be granted liberal visitation with [Alice].

4. The file stamp on this order is illegible, but the order was signed 4 January 2019.

Mother was granted sole custody of Alice and Grandparents were granted visitation. Father was "restricted from all visitations set forth [in the 2020 Custody Order], unless the parties mutually agree[d] otherwise." Mother, Father, and Grandparents all consented to entry of the 2020 Custody Order. Later, in November 2020, venue for the Chapter 50 custody proceeding was transferred to Craven County. Due to restrictions imposed because of the COVID-19 pandemic, Grandparents did not start their visitation with Alice until December 2020.

On 6 July 2021, Mother filed a petition in Craven County to terminate Father's parental rights ("Petition"). Mother alleged two grounds for termination of Father's parental rights: (1) Father willfully abandoned Alice for the six months preceding the Petition, and (2) Father had "willfully failed and refused to pay child support" as ordered by the District Court, New Hanover County, in a prior child support action.[5] Father filed a response on 14 September 2021, generally denying the allegations of the Petition.

On 19 November 2021, the trial court entered a pre-trial order concluding an appointment of a guardian *ad litem* ("GAL") was appropriate and appointing the public defender's office as Alice's GAL. Pursuant to local rules the public defender's office delegated the GAL duties to Mr. Barnhill, a licensed attorney. The trial court calendared Mother's Petition for hearing on 13 July 2022.

Mr. Barnhill completed an investigation and prepared a GAL court report in May 2022.[6] The GAL court report found Father had never sought review of the 2020 Custody Order, although the 2020 Custody Order was intended to be temporary. The GAL court report also found "Respondent Father admitted last seeing [Alice] on . . . December 21, 2017, when [Respondent Father] as driver, along with his brother, passed out in traffic while transporting his two children." The GAL court report found Alice had lived with Mother and her husband since Alice was three months old, Alice had "a loving and bonded relationship" with her younger half-sibling born of Mother and her husband, and it was Mother's husband's intention to adopt Alice and raise her as his own.

The GAL court report initially noted "that the . . . issue of grounds for termination [of Father's parental rights] [was] beyond the scope of [Mr. Barnhill's] task. If not, Respondent Father's self-inflicted absence

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5. Documents from the child support proceeding were not included in the record on appeal.

6. The GAL court report is not file stamped but was signed 12 May 2022.

from [Alice] for five years serves as a substantial ground." The GAL court report also found, consistent with other evidence in the record, that Father had in fact paid child support but due to a computer error by Child Support Enforcement, Mother had not received these payments. Ultimately, the GAL court report recommended termination of Father's parental rights due to his absence and because Mother's husband was about to be deployed overseas for an extended period for military service, and "[h]e should be able to take the family he has committed to without the interference of someone whose right to do so is based entirely on biology."

Mother's Petition was heard 13 July 2022 and 15 July 2022. The hearing was bifurcated into adjudication and disposition phases; the parties first addressed the grounds for termination of Father's parental rights then addressed Alice's best interests. During the adjudicatory phase, Mother testified that she had never been served with any notices or documents requesting a review of the 2020 Custody Order granting her sole custody and denying Father visitation. Mother also testified that Father had never tried to call her, text her, or email her regarding Alice, and Father had never sent Alice any gifts. Mother presented as evidence a timeline from May 2020 to July 2022, including her records of all communications with Father. The timeline contains three communications preceding the filing of the Petition:

- **25 June 2021:** Mother asked for Father's phone number from Alice's Grandparents. Mother texted Father and they met face-to-face over Zoom. Mother asked Father whether he would consent to Mother's husband adopting Alice and Father refused.
- **28 June 2021:** Mother texted Father after Father asked for contact with Mother through Alice's paternal grandmother. Father asked Mother whether he needed to "go through the courts to see [Alice] or if he would work with" Mother. Mother told Father they would discuss visitation more on a scheduled Zoom call on 1 July 2021.
- **1 July 2021:** Mother, her husband, and Father met on Zoom. The parties agreed that Mother and Father would stay in contact so that Father could show he had improved his life since the 2017 incident. The parties created a group text chat with Mother, her husband, and Father to keep in contact. Mother then sent

> a photo to Father through the group chat of Alice's "responsibility chart" and Father responded with a single message. The record does not show the content of this message.

Mother then filed the Petition after these communications transpired. Mother testified that these messages were the only communications between her and Father in the six months preceding her filing of the Petition. Mother then testified regarding post-Petition communications between her and Father. There were few communications between the parties, and Father missed the only two Zoom calls the parties scheduled.

Father's attorney cross-examined Mother and called Alice's Grandparents to testify. The testimony elicited at the termination hearing by Father's attorney largely addressed Grandparents' visitation with Alice, which is not relevant to this appeal.[7] Relevant to the grounds for termination, Father's attorney attempted to show that Father tried to visit with Alice but Mother had obstructed Father's attempts to communicate with Alice. Grandfather testified about a meeting at Mother's attorney's office where Mother set rules for visitation, which Grandfather recalled as:

> Rule number one, we could not speak [Father's] name when we came to her house. His name was not to be spoken. Rule number two, no one could have [Mother's] phone number, not even myself. The only one that could have the phone number was [Grandmother]. And the only one that could call [Mother] was [Grandmother].

Grandfather also testified about attempts Father made to set up visitation with Alice. Grandfather testified Father "told [Grandfather] that he had called [Mother] on several occasions and asked to speak with [Alice] or set up some kind of time" for visitation, but Mother did not allow visitation. Grandfather testified these requests for visitation would have occurred "around 2021" because the calls occurred after the Grandparents had started visitation with Alice in December 2020, but Grandfather was not aware of any specific dates that Father tried to call Mother to coordinate a visit.

Grandfather also testified Father had "given [Grandparents] a lot of money" to buy Christmas gifts, clothes, and toys for Alice. Grandfather

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7. During the hearing, the trial court had to repeatedly redirect the examination and witnesses' testimony back toward the grounds for termination of Father's parental rights, and away from visitation issues between the Grandparents and Alice after entry of the 2020 Custody Order.

estimated that about a third of Alice's gifts were generally paid for by Father and that Father had bought specific gifts for Grandfather to take and give to Alice. However, Grandfather testified he never told Mother that Father was paying for the gifts, and the only time Grandfather told Mother that Father had given Grandparents money for gifts was in June 2022, after the Petition was filed. There was no documentation admitted into evidence to prove any gifts had come from Father. Grandfather testified he did not want to identify any gifts as coming from Father because he thought Mother would stop visitation. Grandfather also testified no party attempted to file any motion to modify the 2020 Custody Order on the advice of Father's attorney because Father was waiting to resolve a pending criminal charge before seeking visitation. At the termination hearing, the trial court also stated it had reviewed the court file and confirmed no motions had been filed by any party to modify the 2020 Custody Order.

Father also testified he had been trying to visit with Alice since 2017, but Mother would not let Father directly speak with herself or Alice; Mother directed Father to contact Mother's attorney. However, Father did not identify any specific attempts he made to begin visiting with Alice. Father testified that until July 2021 he simply paid his child support and that his attempts to begin visiting Alice were made between 2018 and entry of the 2020 Custody Order.

On cross-examination, Father again confirmed that he had no documentation to show he requested visitation between entry of the 2020 Consent Order and the first Zoom call on 25 June 2021. Between March 2020 and June 2021, Father provided no information to Mother, did not call Mother to ask for visitation, did not send emails, did not send mail, and generally made no efforts to contact Mother to see Alice.

Alice's Grandmother also testified Mother tried to prevent Father from visiting Alice. Grandmother first testified Mother established rules to limit references to Father during the Grandparents' visitation; Grandmother testified that she was not allowed to say Father's name, share Mother's new phone number, or share Mother's address. Although Father asked Grandmother for Mother's phone number and address, Grandmother did not share that information with Father. Grandmother testified Father did not have contact information for Mother until 25 June 2021, when Mother reached out for Father's contact information through the Grandparents to contact Father and ask for his consent to Alice's adoption.

Grandmother also testified Father bought gifts and gave the Grandparents money to buy gifts for Alice from 2020 through July 2021.

However, Grandmother testified she had no record of any attempts by Father to contact Mother to visit Alice. Grandmother additionally testified that, to her knowledge, Father did not seek legal counsel in Craven County until after the Petition was filed.

In rebuttal, Mother testified that she did not limit Father's access to Alice. As to Mother's phone number, Mother testified "the phone number was directed to [Grandfather]. I told [Grandmother] that I would like to have communication solely through her because of previous harassment from [Grandfather], but I did not say that she could not give my phone number to [Father]." Mother also testified that she and Grandparents did not speak about sharing her physical address. As to not referring to Father during the Grandparents' visitation with Alice, Mother testified "the boundary was to please not discuss or bring up [Father] during their visits because [Alice] had been so traumatized. And [Alice] – the visits [were] for [Grandparents] to be with [Alice]. To be grandparents with her and just spend time with her as her grandparents."

At the close of the adjudicatory phase of the termination hearing, the trial court found "by clear, cogent, and convincing evidence that [Mother] met her burden and proved grounds" to terminate Father's parental rights for willfully abandoning Alice because "there was a period of six months . . . preceding the filing of the petition during which [Father] made no efforts to have visitation with" Alice.

The trial court then moved on to the dispositional phase. Mr. Barnhill testified during the dispositional phase of the hearing. However, because Father does not challenge the dispositional stage of the hearing on appeal, we do not discuss the specifics of Mr. Barnhill's testimony. For purposes of this appeal we simply note that Father did not object to Mr. Barnhill's role as GAL for Alice or raise any question regarding any need for separate legal representation for Alice.

On 5 August 2022, the trial court entered a written order ("Termination Order") finding grounds existed to terminate Father's parental rights:

> 43. The Court makes the following additional Findings of Fact to support the grounds of abandonment by clear cogent and convincing evidence in this matter:
>
> a. The Respondent Father has had the ability to call and text [Mother] regarding [Alice] since March 11, 2020.
>
> b. The Respondent Father made no efforts to call [Mother] to set up visitation with [Alice] from March 11, 2020 until the Petition was filed in this matter.

c. The Respondent Father made no efforts to text [Mother] to set up visitation with [Alice] from March 11, 2020 until the filing of the Petition in this matter.

d. The Respondent Father did not send any text messages to [Mother] from March 11, 2020 until the filing of the Petition in this matter to make inquiries about [Alice]'s health, education or welfare.

e. The Respondent Father did not email [Mother] and request visitation at any time from March 11, 2020 until the filing of the Petition in this matter.

f. The Respondent Father did not email [Mother] and make inquiries as to the health, education and welfare of [Alice] from March 11, 2020 until the filing of the Petition in this matter.

g. The Respondent Father did not send any mail to [Mother] from March 11, 2020 until the filing of the Petition in this matter requesting visitation.

h. The Respondent Father did not send any mail to [Mother] inquiring about the health, education or welfare of [Alice] from March 11, 2020 until the filing of the Petition in this matter.

i. The Respondent Father was represented by counsel from March 11, 2020 through November 17, 2020. The Respondent Father did not file any pleadings with the Court requesting a review of the Temporary Order entered on March 11, 2020, by consent which suspended all of the Respondent Father's visitation with [Alice].

j. After the case was transferred from New Hanover County to Craven County, the Respondent Father did not file any requests for review, either *pro se* or with the assistance of an attorney, requesting a review and/or visitation with [Alice] from November 17, 2020 through the filing of the Petition in this matter.

k. [Mother] has had absolutely no contact with the Respondent Father since March 11, 2020, until she initiated a phone call with the [Father] on June 24, 2021, requesting the [Father] sign a step-parent Consent to Adopt.

> l. The Respondent Father's parents have regularly visited with [Alice] since December 2020. They have been allowed by [Mother] to bring the Respondent Father's other child to the visitations in [Mother]'s home. At no time did the Respondent Father's parents request [Mother] to allow the Respondent Father to have contact or visitation with [Alice] from December 2020 until the filing of the Petition in this matter.
>
> m. The Respondent Father's parents brought gifts to [Mother] for [Alice] for holidays and birthdays. At no time did any of the gifts have any cards or tags signifying that the gifts were, in fact, from the Respondent Father. Instead, the gifts were offered to [Alice] as gifts from the paternal grandparents. However, at trial the [Father] testified that he contributed to the payment of some of these gifts, although no other evidence was offered to support this testimony, such as a card or tag on any of the gifts signifying that the gift was from anyone other than the [Grandparents].
>
> n. The Respondent Father has provided no gifts, cards or letters of endearment for [Alice] to [Mother] from March 11, 2020, until the filing of the Petition in this matter.
>
> o. The Respondent Father has made no efforts of any type, either direct or indirect, to have any contact with [Alice] from March 11, 2020 until the filing of the Petition in this matter.
>
> p. The Respondent Father has sent no cards, gifts or any other tokens of affection for [Alice] from March 11, 2020 to the filing of the Petition in this matter.
>
> q. The Respondent Father's last in-person contact with [Alice] was December 2017.
>
> r. The Respondent Father was aware of [Mother]'s cell phone number, email and physical address and failed [to] act as a normal parent would in requesting contact or visitation with [Alice] at any time from March 11, 2020 until the filing of the Petition in this matter.

(Formatting altered.) The trial court then concluded it was in Alice's best interests to terminate Father's parental rights for "willfully abandon[ing]

the minor child for at least six months preceding the filing of the Petition," and ordered Father's parental rights terminated as to Alice. Father appealed 26 August 2022.

On 8 November 2022, after filing his notice of appeal, Father filed a post-trial "Motion for Relief from Judgment Pursuant to Rule 60(b)" ("Rule 60 motion"). (Capitalization altered.) Father's Rule 60 motion was heard 8 December 2022. The Rule 60 motion and hearing are discussed in greater detail below when discussing Father's arguments based on this motion.

II. Jurisdiction

[1] Father filed a petition for writ of certiorari ("PWC") in this Court acknowledging Father's notice of appeal was not served on Mr. Barnhill, Alice's appointed GAL. Father's PWC is verified, and Father asserts his appellate counsel discussed the appeal with Mr. Barnhill, and Mr. Barnhill was present at the hearing on Father's Rule 60 motion. Also attached to the PWC is an affidavit by Father's trial counsel attesting: (1) Father's trial counsel notified Mr. Barnhill that Father had appealed the Termination Order; (2) trial counsel was informed by Father's appellate counsel that Father's appellate counsel discussed Father's appeal with Mr. Barnhill; and (3) Mr. Barnhill was aware of and present for the hearing on Father's Rule 60 motion related to the appeal while the appeal was pending before this Court.

Father asserts failing to serve the notice of appeal on Mr. Barnhill is a non-jurisdictional defect, and Mr. Barnhill also waived any error in service by attending the Rule 60 hearing. Thus, Father filed his PWC as an alternative ground for review in case this Court deems the potential lack of service to the GAL as a jurisdictional issue. Neither Mr. Barnhill nor Mother filed a response to Father's PWC. Nor did Mr. Barnhill file an appellee brief.

Rule of Appellate Procedure 3.1 governs service of Father's notice of appeal and states in relevant part:

> Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) may take appeal by filing notice of appeal with the clerk of superior court in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c) and *by serving copies of the notice of appeal on all other parties*.

N.C. R. App. P. 3.1(b) (emphasis added).

We cannot locate a published case from this Court interpreting the service provision of Rule 3.1(b). However, there is a line of cases

from our appellate courts holding a party's failure to serve their notice of appeal on all parties in technical compliance with Rule of Appellate Procedure 3 is a non-jurisdictional defect, and the party's noncompliance with the Rules of Appellate Procedure must instead be assessed for whether the party's noncompliance is a "substantial or gross violation of the appellate rules." *MNC Holdings, LLC v. Town of Matthews*, 223 N.C. App. 442, 445-47, 735 S.E.2d 364, 366-67 (2012) (summarizing the line of cases leading to the conclusion failure to serve notice of appeal under Rule 3 is a non-jurisdictional defect). We also note that the same rule has been applied in the criminal context, under Rule of Appellate Procedure 4. In *State v. Golder*, this Court saw no need to grant a defendant's petition for writ of *certiorari* because "[i]t is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal." *State v. Golder*, 257 N.C. App. 803, 804, 809 S.E.2d 502, 504 (2018), *aff'd as modified*, 374 N.C. 238, 839 S.E.2d 782 (2020) (emphasis in original). In coming to this conclusion, this Court cited the same line of cases discussed in *MNC Holdings*. *See id.* (citing *Lee v. Winget Road, LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010); *Hale v. Afro-American Arts Intern., Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993)).

Mr. Barnhill appears to have actual notice of Father's appeal; Mr. Barnhill has not raised any issue before this Court regarding service of Father's notice of appeal in an appellee brief, response to Father's PWC, or motion to dismiss the appeal; and thus there is no indication in the record before us that any party would be prejudiced should we hear Father's appeal. Consistent with this Court's discussion in *MNC Holdings* regarding service under Rule of Appellate Procedure 3, and this Court's adoption of the same rule in *Golder* as to Rule of Appellate Procedure 4, we see no reason why the same standard should not apply under Rule of Appellate Procedure 3.1. We therefore conclude "that any error in service made by [Father] is non-jurisdictional and is not a substantial or gross violation of the appellate rules." *MNC Holdings*, 223 N.C. App. at 447, 735 S.E.2d at 367. We deny Father's PWC because it is superfluous.

III. Rule 60 Motion

[2] Father first directs us to his Rule 60 motion. Even if we generously assume Father properly made a Rule 60 motion regarding violations of North Carolina General Statute § 7B-1108, he did not preserve this argument due to his failure to object at trial regarding Mr. Barnhill's role as a GAL or the fact that Alice did not have an attorney. Indeed, Mr. Barnhill was present at the hearing on Father's motion but he did not ask to be

heard and neither party asked him to testify or make a statement. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). This Court has specifically held violations of North Carolina General Statute § 7B-1108 are not automatically preserved for appellate review. *See In re A.D.N.*, 231 N.C. App. 54, 65-66, 752 S.E.2d 201, 208-09 (2013).

Father alternatively requests we invoke North Carolina Rule of Appellate Procedure 2 to hear his arguments regarding his Rule 60 motion and the trial court's noncompliance with North Carolina General Statute § 7B-1108. Rule of Appellate Procedure 2 states that "[t]o prevent manifest injustice to a party . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of" the Rules of Appellate Procedure. N.C. R. App. P. 2. "Rule 2, however, must be invoked cautiously" and only in "exceptional circumstances." *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citation and quotation marks omitted). We conclude no "exceptional circumstances" exist in this case and decline to invoke Rule 2. Thus, we do not consider Father's arguments as to Mr. Barnhill's role as GAL.

IV. Termination Order

[3] Father next challenges the trial court's findings of fact in the Termination Order and also asserts "the trial court erred by failing to make findings resolving conflicting evidence about facts relevant and material to whether Father willfully abandoned" Alice. (Capitalization altered.) Father does not challenge the dispositional portion of the trial court's Termination Order.

A. Standard of Review

At the adjudicatory stage, "[t]he standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re C.M.P.*, 254 N.C. App. 647, 654, 803 S.E.2d 853, 858 (2017) (citation and quotation marks omitted). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* (citation and quotation marks omitted). "Unchallenged findings of fact are conclusive on appeal and binding on

this Court." *Id.* (citation and quotation marks omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.*

B. Abandonment of a Juvenile

The trial court terminated Father's parental rights under North Carolina General Statute § 7B-1111(a)(7) for willfully abandoning Alice during the requisite six-month period preceding the filing of the Petition. North Carolina General Statute § 7B-1111(a)(7) provides that:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]

N.C. Gen. Stat. § 7B-1111(a)(7) (2021).

Our Supreme Court has further defined willful abandonment:

> In the context of a termination of parental rights proceeding, the ground of "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511 (1986)). Where "a parent withholds [his] presence, [his] love, [his] care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, (1962). Although a parent's acts and omissions, which are at times outside of the statutorily provided period, may be relevant in assessing a parent's intent and willfulness in determining the potential existence of the ground of abandonment, the dispositive time period is the six months preceding the filing of the petition for termination of parental rights.

In re A.A., 381 N.C. 325, 335, 873 S.E.2d 496, 505 (2022). "In this context, the word [']willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be

determined from the evidence." *In re A.K.D.*, 227 N.C. App. 58, 61, 745 S.E.2d 7, 9 (2013) (citation and quotation marks omitted). Here, because the Petition was filed 6 July 2021, the relevant six-month period for purposes of North Carolina General Statute § 7B-1111(a)(7) was 6 January 2021 to 6 July 2021. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

1. Finding of Fact 43(m)

Father specifically challenges finding 43(m), asserting the trial court only recited Father's testimony, failed to find the credibility of the parties as to this finding, and the record evidence was insufficient to support the finding. Finding 43(m) states:

> m. The Respondent Father's parents brought gifts to [Mother] for [Alice] for holidays and birthdays. At no time did any of the gifts have any cards or tags signifying that the gifts were, in fact, from the Respondent Father. Instead, the gifts were offered to [Alice] as gifts from the paternal grandparents. *However*, *at trial the Respondent [Father] testified that he contributed to the payment of some of these gifts*, although no other evidence was offered to support this testimony, such as a card or tag on any of the gifts signifying that the gift was from anyone other than the [Grandparents].

(Emphasis added.) This finding is supported by competent evidence.

Mother, Father, Grandfather, and Grandmother all testified that the Grandparents brought gifts to Alice. Mother testified Father never sent gifts, but that the Grandparents "came to our house with gifts, but that's from -- that's it." Grandfather testified Father provided funds for gifts or would provide a gift for the Grandparents to take to Alice, but before the Petition he never made Mother aware any gift was from Father. Grandmother testified the Grandparents brought gifts to Alice and that Father bought some, but there was no evidence Father had actually bought the gifts or contributed to the Grandparents' gifts. Father testified that he purchased some gifts and gave money to Grandparents for gifts, but did not testify that he told Mother or Alice the gifts were from him.

Mother, Father, Grandfather, and Grandmother all also testified that the gifts were never marked as if Father was sending the gift. Mother testified there was no indication that gifts were from Father. Grandfather testified that there was no documentary evidence, such as a tag, card, or bank record that the gift came from Father. Grandmother testified the gifts were never marked as coming from Father. Father testified that he never told Mother he had purchased the gifts.

We also note Father does not challenge finding 43(n), which states "Respondent Father has provided no gifts, cards or letters of endearment for [Alice] to [Mother] from March 11, 2020 until the filing of the Petition in this matter." This unchallenged finding is binding on appeal and establishes that Father never sent Alice gifts. *See In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858.

Finding 43(m) is supported by competent evidence. As a whole, the parties agreed the Grandparents brought gifts to Alice and these gifts were never identified as having come from Father. The gifts were always treated as if they were given by the Grandparents. Although a portion of finding 43(m) notes Father's testimony, the reference to Father's testimony is immediately followed by an actual finding of fact that "no other evidence was offered to support this testimony, such as a card or tag on any of the gifts signifying that the gift was from anyone other than the [Grandparents]." *See In re A.C.*, 378 N.C. 377, 384-85, 861 S.E.2d 858, 867-68 (2021) (discussing findings that make references to testimony and also resolve conflicts in the evidence). The trial court specifically noted the conflict in the evidence and resolved the conflict in its finding of fact. Father's challenge to finding 43(m) is overruled.

2. Finding of Fact 43(o)

Father also challenges finding 43(o) as unsupported by competent evidence. Finding 43(o) states:

> o. The Respondent Father has made no efforts of any type, either direct or indirect, to have any contact with the minor child from March 11, 2020 until the filing of the Petition in this matter.

But Father fails to challenge other findings of fact that would result in the same conclusion of abandonment.

The trial court's unchallenged findings show that between 11 March 2020 and 6 July 2021, including the determinative period under § 7B-1111(a)(7): (1) Father had "the ability to call and text" Mother regarding visitation with Alice but chose not to; (2) Father had the ability to email Mother regarding visitation with Alice but chose not to; (3) Father had the ability to email Mother about Alice's "health, education and welfare" but chose not to; (4) Father did not send physical mail to Mother "inquiring about the health, education or welfare" of Alice; (5) Father did not attempt to seek review or modify the 2020 Custody Order or otherwise attempt to begin visitation with Alice through judicial process; (6) Father had no contact with Mother until Mother

initiated an attempt to seek his consent to a step-parent adoption; (7) the Grandparents never requested on Father's behalf that Mother allow Father to visit or have contact with Alice; (8) Father never sent gifts to Alice, although he testified that he gave financial support for the purchase of gifts; (9) "[t]he Respondent Father's last in-person contact with [Alice] was December 2017[;]" and (10):

> [t]he Respondent Father was aware of [Mother's] cell phone number, email and physical address and failed [to] act as a normal parent would in requesting contact or visitation with the minor child at any time from March 11, 2020 until the filing of the Petition [on 6 July 2021] in this matter.

Thus, the trial court made findings that Father "was aware of the actions he could take, [and] the evidence and the findings of fact indicate that he was unwilling to take any action whatsoever to indicate that he had any interest in preserving his parental connection with" Alice. *In re J.A.J.*, 381 N.C. at 776, 874 S.E.2d at 574 (citation and quotation marks omitted). We need not consider finding 43(o) due to the numerous unchallenged and binding findings of fact that establish his abandonment of Alice.

3. Lack of Findings

Aside from the two specific challenges to the trial court's findings of fact, Father generally challenged the trial court's findings as insufficient because the trial court did not resolve every conflict in the evidence or make a finding on every piece of evidence presented, particularly as to Mother blocking his access to Alice. Father specifically asserts the trial court did not resolve the conflict in the evidence regarding Mother's "years-long effort . . . to terminate Father's parental rights during ongoing custody litigation." But, "[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered." *See In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

Here, the trial court made extensive findings of fact resolving many conflicts in the evidence. Father's main contention at the termination hearing was that Mother intentionally obstructed his access to Alice, and Mother presented evidence that Father could have taken action to contact her or establish contact with Alice but he simply failed to do so between March 2020 and July 2021. The trial court reviewed both parties' evidence and made detailed findings resolving the factual issues presented at the termination hearing, and these findings reveal the trial court ultimately concluded that Mother's version of events was more

credible. "While the record contains conflicting evidence concerning the nature and extent of [Father's] attempts to contact [Alice] and the extent to which [Mother] successfully interposed obstacles to any efforts that [Father] might have made to contact his [daughter], it is not the role of this Court, rather than the trial court, to resolve such disputed factual issues" and make findings of fact on the conflicted evidence. *In re D.T.H.*, 378 N.C. 576, 585, 862 S.E.2d 651, 658 (2021). Even where there is evidence in the record to the contrary, "[i]f the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal[.]" *In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858. And here, the trial court resolved the conflicting evidence and made extensive findings on the evidence it found most credible when it found Father had made no efforts to contact Mother or Alice between 11 March 2020 and 6 July 2021.

We also note this Court and the North Carolina Supreme Court have both rejected arguments like Father's. In *In re A.L.S.*, the respondent-mother argued she was subject to a 2016 custody order which granted the petitioners, the mother's cousin and her husband, sole custody and did not allow the mother visitation, like the 2020 Custody Order here. *See In re A.L.S.*, 374 N.C. 515, 521-22, 843 S.E.2d 89, 93-94 (2020). The mother's cousin also testified that she would actively avoid the mother and try to prevent contact between the mother and minor child. *See id.* The mother asserted "this evidence provides an alternative explanation for her own conduct that is 'inconsistent with a willful intent to abandon [the minor child].' " *Id.* at 521, 843 S.E.2d at 93.

The Supreme Court found "respondent-mother's argument unpersuasive. While there was evidence of ill will between petitioners and respondent-mother, this Court has held that a parent *will not be excused from showing interest in [the] child's welfare by whatever means available*." *Id.* at 522, 843 S.E.2d at 93-94 (emphasis in original) (citation and quotation marks omitted). Even though her cousin testified she would obstruct the mother's access to the minor child, the "[r]espondent-mother's failure to even attempt any form of contact or communication with [the minor child] gives rise to an inference that she acted willfully in abdicating her parental role, notwithstanding any personal animus between her and petitioners." *Id.* at 522, 843 S.E.2d at 94. And "[a]lthough the 2016 custody order did not give respondent-mother a right to visitation, the order in no way prohibited respondent-mother from contacting [the minor child]," again, like the 2020 Custody Order. *Id.* "Moreover, as the trial court found, respondent-mother 'never sought to modify that custody order' in order to gain visitation rights." *Id.*; *see also In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785-86 (2009) (rejecting

the father's argument before this Court that "the 'biggest factor' leading to his status as an absentee parent was the successful efforts of [the] [p]etitioner-[m]other, motivated by a number of factors, 'to shut him out of the children's lives[,]' " because the father had the means and ability to inquire after his children but failed to do so). As noted in *In re A.L.S.*, even if there is evidence that a petitioner has attempted to prevent the respondent from having access to the minor child, if the respondent still has some means available to contact the child or establish access, the trial court may find evidence of the respondent's willful intent to abandon the child by remaining absentee and not trying to contact the child by any means necessary. *See In re A.L.S.*, 374 N.C. at 521-22, 843 S.E.2d at 93-94; *see also In re M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785-86.

While the 2020 Custody Order prohibited Father from engaging in visitation it did not prohibit contact entirely between Father, Alice, and Mother. Father also had the option to seek modification of the 2020 Custody Order to reinstate specific visitation, but he failed to take any action to do so. The findings overall demonstrate the trial court simply found Father's argument that Mother prevented him from having any contact or access not to be credible, and Father's argument was merely an excuse for why he did not attempt to contact Mother or Alice or seek visitation with Alice within the determinative period under North Carolina General Statute § 7B-1111(a)(7). Father's argument is overruled.

4. Conclusion of Law

The trial court's findings support its conclusion that Mother "has shown by clear cogent and convincing evidence that the Respondent Father has willfully abandoned the minor child for at least six months preceding the filing of the Petition" as required by North Carolina General Statute § 7B-1111(a)(7), and that Father's rights may be terminated. *See In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858; *see also* N.C. Gen. Stat. § 7B-1111(a)(7).

V. Conclusion

The Termination Order is affirmed.

AFFIRMED.

Judges ARROWOOD and FLOOD concur.

IN RE INHABER

[290 N.C. App. 170 (2023)]

IN THE MATTER OF ERIC R. INHABER

No. COA22-927

Filed 15 August 2023

Attorneys—disciplinary hearing—sanctions—sufficiency of notice—limited record of proceeding

An order suspending an attorney from practicing law for one year was vacated on appeal where the limited record pertaining to the attorney's disciplinary hearing—which consisted solely of the suspension order itself and the attorney's written narrative describing his recollections of the proceeding—did not show that the attorney had received sufficient prior notice of the hearing. The attorney's narrative, which went unchallenged on appeal, stated that he was not provided notice of the hearing. In contrast, the suspension order did state that the attorney had received prior notice; however, the order did not indicate whether the notice identified the charges against the attorney and the possible sanctions that may be imposed—both of which needed to be provided to the attorney to meet the constitutional due process requirements for notice.

Appeal by Respondent from Order entered 25 July 2022 by Judge Thomas R. Young in Iredell County District Court. Heard in the Court of Appeals 9 May 2023.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford for Appellant.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, court-appointed amicus curiae.

RIGGS, Judge.

Respondent Eric R. Inhaber appeals an order entered in Iredell County District Court suspending Mr. Inhaber from practicing law in Judicial District 22A for a period of one year. The court entered the order under its inherent authority to conduct disciplinary hearings. On appeal, Mr. Inhaber argues he did not have proper notice of the hearing and the lack of a *verbatim* transcript deprived him of the ability to appeal the findings of fact in the suspension order. After careful review, we hold Mr. Inhaber did not receive proper notice of the hearing and vacate the

order. Because we vacate the order on the first issue he raises, we do not reach any additional issues on appeal.

I. FACTS & PROCEDURAL HISTORY

Mr. Inhaber is an attorney licensed in the State of North Carolina since 1995. His law practice primarily focuses on representing people charged with traffic violations in Mecklenburg County and the surrounding counties.

On or about 8 July 2022, Mr. Inhaber was in Iredell County District Court representing several clients on traffic infractions. He asked Assistant District Attorney Autumn Rushton ("ADA Rushton") to re-calendar several matters and withdraw the motions for arrest based upon defendant's failure to appear in these cases. ADA Rushton opposed re-calendaring and withdrawing the orders for arrest because she alleged that Mr. Inhaber had failed to appear at the relevant administrative court session in a timely manner. Mr. Inhaber indicated he was unfamiliar with the procedure in this district court, and it was difficult for him to arrive at the administrative sessions in a timely fashion because he represented clients in multiple counties. ADA Rushton advised Mr. Inhaber of the appropriate procedure and protocol for Iredell County District Court.

Two weeks later, on 18 July 2022, Mr. Inhaber approached ADA Rushton about a continuance on one case and withdrawing a failure to show arrest order and re-calendaring for another case; ADA Rushton granted both requests.

During the morning session on 20 July 2022, either in open court or outside the courtroom,[1] a dispute arose between ADA Rushton and Mr. Inhaber. ADA Rushton believed Mr. Inhaber had secured agreement to re-calendar the two cases by falsely representing they were both on the present day's calendar. ADA Rushton rescinded her agreement to re-calendar when she learned that both matters were not on the calendar.

During the dispute, Mr. Inhaber purportedly raised his voice and acted unprofessionally. The dispute supposedly created a delay of approximately ten minutes to the court's proceedings. Although Mr. Inhaber apologized for his actions, he maintained that he had not misrepresented that the cases were on the current docket. Assistant District Attorney Megan Powell ("ADA Powell") indicated she overheard a

1. The order is unclear whether the "heated" portion of the dispute occurred in the courtroom or outside of the courtroom.

portion of the interaction between ADA Rushton and Mr. Inhaber and that Mr. Inhaber led ADA Rushton to believe both cases were calendared for 20 July 2022.

Mr. Inhaber was instructed by an assistant district attorney to return to court for the afternoon session—he believed he was being summoned to address a client's traffic citation. However, at the conclusion of the afternoon session, the trial court held a disciplinary hearing regarding the events which occurred in the morning session and earlier that month. This disciplinary hearing was not transcribed; the record of this proceeding is based upon Mr. Inhaber's transcriptive narrative ("Narrative") made pursuant to N.C. R. App. P. 9(c) (2023) and the suspension order. In the prefatory clause of the order, the trial court indicated Mr. Inhaber was provided notice of a disciplinary hearing, without indicating whether the notice identified the conduct subject to sanctions and the proposed sanctions. The Narrative does not indicate that Mr. Inhaber objected to lack of notice at the hearing.

During the hearing, ADA Rushton and ADA Powell testified and a third Assistant District Attorney Reagan Hill ("ADA Hill") was in attendance. The Narrative indicates the trial court may not have taken sworn testimony from witnesses. According to the Narrative, Mr. Inhaber was not allowed to cross-examine witnesses during the hearing.

Three days after the hearing, on 25 July 2022, the trial court entered an order suspending Mr. Inhaber's license to practice law in Judicial District 22A for one year and required him to "petition for reinstatement of his ability to practice law in Judicial District 22A by filing appropriate pleading with the Clerk of the Superior Court of Iredell County, and by giving notice to the district attorney presiding in said judicial district." (Capitalization altered) Mr. Inhaber filed a timely notice of appeal on 22 August 2022.

Because the disciplinary hearing on 20 July 2022 was not transcribed or recorded, Mr. Inhaber attempted to reconstruct a record of the hearing for this appeal as allowed under Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 9(c)(1) (2023). To assist him in creating a record of the disciplinary hearing, Mr. Inhaber attempted to consult with the three assistant district attorneys who had participated in the hearing. Mr. Inhaber contacted District Attorney Sarah Kirkman ("DA Kirkman") for District 32 and requested affidavits and notes from the hearing from ADA Powell, ADA Rushton, and ADA Hill. The district attorney indicated requesting affidavits from her staff was outside the scope of her duties and declined any involvement in this matter.

Mr. Inhaber also reached out to the trial court and requested responses to a series of questions about the hearing. The trial court responded with a copy of the order indicating the order tracked the court's recollection of the events.

Mr. Inhaber wrote a two-and-a-half-page undated Narrative of his recollections of the hearing. The Narrative did not identify any objections made during the hearing, provide a summary of each witness and their testimony, identify if any evidence was introduced, outline the judgment reached by the trial court, or identify instructions given to the parties.

Although the district attorney's office is not a party to this appeal, Mr. Inhaber provided them with the proposed record on appeal. The District attorney's office did not object to the Narrative and indicated it did not desire to be part of the proceeding. Neither Mr. Inhaber's Narrative nor the order itself indicates whether any objections were made during the hearing. Neither document definitively indicated whether the court took sworn testimony. Finally, neither document indicates if the trial court rendered a judgment or gave instructions at the close of the hearing.

II. Standard of Review

Exercise of a trial court's inherent authority is discretionary in nature—when reviewing the trial court's conclusions of law, "we need determine only whether they are the result of a reasoned decision[.]" *In re Botros*, 265 N.C. App. 422, 427, 828 S.E.2d 696, 701 (2019). *See also In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) (stating the proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

III. ANALYSIS

A. Notice for the Hearing Was Insufficient

On appeal, Mr. Inhaber argues the trial court failed to provide appropriate notice for the hearing. We agree.

Trial courts possess inherent authority to ensure courts are run efficiently and properly and that litigants are treated fairly. *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). "Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the

proper administration of justice in the court, are within [the court's] discretion." *State v. Smith*, 320 N.C. 404, 415, 358 S.E. 2d 329, 335 (1987) (quoting *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E. 2d 631, 635 (1976)). The North Carolina Supreme Court has affirmed that our trial courts have the inherent power and duty to discipline attorneys, as officers of the court, for unprofessional conduct. *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (citing Canon 3B(3), N.C. Code of Judicial Conduct ("A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.")).

Generally, when a trial court uses its inherent power to discipline an attorney, it either does so immediately or the trial court issues a show cause order to provide notice of the hearing. *Compare State v. Land*, 273 N.C. App. 384, 399-93, 848 S.E.2d 564, 570 (2020) (holding no error where the trial court acted in summary fashion to maintain control of the courtroom by holding *pro se* defendant in contempt for repeated interruptions of courtroom proceedings) *with In re: Botros*, 265 N.C. App at 439, 828 S.E.2d at 708 (holding an attorney received due process when he was personally served with a show cause order which detailed the allegations against him seventeen days before the hearing).

"Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). A party is entitled to notice when sanctions are imposed pursuant to the court's inherent power to discipline attorneys. *Williams v. Hinton*, 127 N.C. App. 421, 426, 490 S.E.2d 239, 242 (1997). Specifically, prior to the imposition of sanctions, "a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." *In re Appeal of Small*, 201 N.C. App. 390, 395, 689 S.E.2d 482, 486 (2009).

Generally, a party entitled to notice of a hearing waives notice when they appear at the hearing and participate in the hearing unless they object or otherwise request a continuance at the hearing. *McNair Construction Co. v. Fogle Bros. Co.*, 64 N.C. App. 282, 289, 307 S.E.2d 200, 204 (1983). However, our Supreme Court has held where sanctions may be imposed, the parties must be notified in advance of the charges against them. *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998). Participation in the hearing, without prior notice of the charges and proposed sanctions, does not waive the notice requirements. *Id.*

In this case, whether Mr. Inhaber had notice of the specific charges against him or the sanctions which may be imposed is disputed and the meager record does not provide any clarity. The suspension order simply indicates it was entered "[a]fter giving notice to the Respondent and after affording the Respondent an opportunity to be heard." Mr. Inhaber's narrative, however, states he "was not provided notice of the hearing that would eventually lead to his discipline by the Court."

Although the District Attorney's office is not a party to this appeal, Mr. Inhaber provided that office with a copy of the Narrative. The District Attorney's office did not object to the Narrative nor provide documentation or a counternarrative showing that Mr. Inhaber had received notice identifying the charges against him and the possible sanctions in this case. To comply with the constitutional requirement for notice, the trial court must have given Mr. Inhaber notice of the charges against him and the sanction(s) that may be imposed. *Griffin*, 348 N.C. at 289, 500 S.E.2d at 439. Because the order does not demonstrate Mr. Inhaber has proper prior notice of the charges and possible sanctions, we hold notice was not proper and vacate the order.

B. Mr. Inhaber's Burden in Reconstructing the Transcript

On appeal, Mr. Inhaber argues he was prejudiced by the lack of a transcript of the hearing, in that the lack of a transcript kept him from being able to present issues on appeal. Because we held Mr. Inhaber did not receive proper notice of the hearing and vacate the order, we do not reach the issue of whether Mr. Inhaber met the burden to reconstruct the transcript or whether he was prejudiced by the lack of a transcript.

IV. Conclusion

After review of the record, we hold the notice of the disciplinary hearing against Mr. Inhaber was insufficient because it did not identify the charges against him or the possible sanctions. Accordingly, we vacate the order.

VACATED.

Judges TYSON and ARROWOOD concur.

IN RE P.L.E.

[290 N.C. App. 176 (2023)]

IN THE MATTER OF P.L.E.

No. COA22-793

Filed 15 August 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—legal significance—lack of evidence

In a case involving a child who had been adjudicated neglected, the trial court's order awarding guardianship of the child to her foster parents was vacated where the court's findings and conclusions that the foster parents understood the legal significance of guardianship and their responsibilities were not supported by any evidence; an unsigned financial "affidavit" regarding the parties' finances was insufficient evidence for this purpose.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—parental visitation denied—lack of mandatory findings

In a case involving a child who had been adjudicated neglected, the trial court erred in its order awarding guardianship to the child's foster parents by denying visitation to the child's mother without making mandatory findings in accordance with N.C.G.S. § 7B-906.1(d) and (e) regarding whether reports on visitation had been made and whether there was a need to create, modify, or enforce an appropriate visitation plan.

Appeal by respondent-mother from order entered 7 June 2022 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 31 July 2023.

Sherryl Roten West for petitioner-appellee Wilkes County Department of Social Services.

Schell Bray PLLC, by Christina Freeman Pearsall, for guardian ad litem.

Garron T. Michael, Esq., for respondent-appellant mother.

TYSON, Judge.

Respondent-mother ("Respondent") appeals from a permanency planning order, which awarded guardianship of her minor child, P.L.E.

("Phoebe") to Phoebe's foster parents ("Mr. and Mrs. M.") and denied Respondent any visitation with Phoebe. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minor). We vacate the order and award of guardianship and remand for further proceedings.

I. Background

Wilkes County Department of Social Services ("DSS") filed a petition on 23 September 2020 alleging Phoebe was a neglected juvenile. DSS stated it had received two reports regarding Phoebe's younger brother, "Blake," almost two years old, who was taken and admitted into the hospital by Respondent with significant bruising on 19 August 2020. Blake had sustained several injuries, including a broken clavicle, torn frenulum, and extensive bruising to his throat and other protected areas. The injuries were non-accidental. A subsequent skeletal survey conducted on 14 September 2020 showed Blake had suffered other bone breaks on the ulna and radius of his right arm and a distal portion of his left arm.

Due to Blake's extensive and unexplained injuries, which purportedly occurred while Phoebe, age three, was living inside the family home, and the parents' inability to identify the perpetrator, DSS alleged Phoebe was neglected. DSS asserted she did not receive proper care, supervision, or discipline and lived in an environment injurious to her welfare, where she was also at risk for abuse. No physical injuries to Phoebe were ever documented by DSS. Phoebe and Blake were placed with kinship, their maternal great-aunt, as a safety placement.

The district court held the adjudication and disposition hearing on 26 October 2020, yet failed to enter orders until over six months later on 8 June 2021. The trial court's order adjudicated Phoebe as neglected, based upon facts stipulated to by the parties. The same day, the district court entered a disposition order, which kept Phoebe in DSS' custody and approved her placement with Mr. and Mrs. M. after the maternal great-aunt stated she was unwilling or unable to continue caring for her. Blake was also placed with Mr. and Mrs. M. at this time. Respondent was denied any visitation with Phoebe "during the pendency of the investigation pertaining to the abuse allegations related to [Blake]."

The initial review hearing was held on 25 January 2021. Three and one-half months later, on 10 May 2021, the trial court entered an order, which found Respondent had signed a case plan on 12 November 2020. The court found her substantial progress on that plan, including she: (1) was in consistent contact with DSS; (2) was employed; (3) was residing in a stable home; (4) had started parenting classes; but, (5)

had not scheduled her mental health or substance abuse assessments. Respondent had also been charged with misdemeanor child abuse based on the injuries allegedly sustained by Blake. While that charge remained pending, visitation with Blake was not permitted, unless visitation was "therapeutically recommended." As required by statute, DSS was ordered to continue reasonable efforts towards reunification. N.C. Gen. Stat. § 7B- 901(c) (2021).

The trial court next conducted a permanency planning hearing on 26 July 2021. In its 10 August 2021 order, the court found Phoebe was attending therapy to address her "diagnosis" of "Unspecified Trauma and Stressor Related Disorder due to her reported and observed behaviors." The trial court found Respondent's continued progress, including she: (1) was attending parenting classes inconsistently; (2) had weekly contact with a DSS social worker; (3) had completed her mental health assessment; (4) had completed a substance abuse assessment; (5) had tested positive for cannabinoids; (6) had inappropriate housing; (7) was not currently employed; and, (8) was attending all scheduled court dates and meetings with DSS.

The court also found Respondent had allowed another woman and her one-year-old twins, who had an active DSS case, to reside with Respondent in her mobile home, which purportedly "smelled of marijuana." During a visit to Respondent's home, children who were present purportedly reported "the adults in the home smoked 'weed' via a bong or rolling it up in weird paper" and "snorted white stuff into their noses through a metal tube."

The court changed the plan and established a primary permanent plan of adoption with a secondary plan of guardianship. DSS was relieved from its obligation to assist the parents to make reasonable efforts towards reunification. Respondent's misdemeanor child abuse case remained pending, and she continued to be denied any visitation with Blake and Phoebe.

The next permanency planning hearing was held on 22 November 2021. The trial court again made findings regarding Respondent's progress, which had worsened. Respondent had completed four of sixteen parenting classes, was in arrears in child support, had not complied with the recommendation that she attend virtual group therapy, had not been employed since March 2021, and had a new criminal charge pending for misdemeanor larceny.

The court found Respondent had remained in contact with the social worker, had obtained housing, and was regularly attending court

hearings and meetings with DSS. The court also found Phoebe's therapy had been suspended "due to her progress in meeting all of her treatment goals." No changes were made to the primary and secondary permanent plans, and reunification efforts remained ceased. Respondent was restored with "limited telephone and video visits" with Phoebe, but DSS retained "the discretion to cease these visits if they appear detrimental to the wellbeing of the child."

The permanency planning hearing at issue in this appeal was held on 18 April 2022. The trial court entered an order seven weeks later on 7 June 2022, which found: Phoebe had resumed therapy based on "regressive behaviors" following the initial video visits with Respondent; Respondent was not in full compliance with her case plan; DSS recommended the primary permanent plan be changed from adoption to guardianship. Mr. M. was present in court and provided the court with a financial affidavit, which demonstrated Mr. and Mrs. M. had adequate resources to take care of Phoebe and understood the legal significance of being appointed as Phoebe's guardians. The court found by clear and convincing evidence Respondent and Phoebe's father had "acted inconsistently with their constitutional rights to parent the minor child."

The trial court changed the primary plan to guardianship with a secondary plan of adoption and awarded guardianship of Phoebe to Mr. and Mrs. M. Due to the therapist's report of Phoebe's negative reaction to her initial video visit with Respondent, no visitation was ordered. The court determined DSS had achieved the permanent plan for Phoebe and ordered no further review hearings were necessary. Respondent appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27 and 7B-1001(4) (2021).

III. Verification of Guardianship

A. Standard of Review

Appellate "review of a permanency planning review order 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' " *In re H.A.J.*, 377 N.C. 43, 49, 855 S.E.2d 464, 469 (2021) (quotation omitted). At a permanency planning hearing, any evidence may be considered, "including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to

determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c) (2021).

"The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re H.A.J.*, 377 N.C. at 49, 855 S.E.2d at 469. Unchallenged findings of fact are "deemed to be supported by the evidence and are binding on appeal." *In re J.C.M.J.C.*, 268 N.C. App. 47, 51, 834 S.E.2d 670, 673-74 (2019) (citation omitted). This Court reviews conclusions of law *de novo*. *Id.*

B. Analysis

[1] Respondent challenges the trial court's award of joint guardianship to Mr. and Mrs. M. She contends insufficient evidence shows they understood the legal significance of being appointed as guardians for her children. Under the Juvenile Code, before placing a juvenile in a guardianship, the trial court is mandated to determine whether the proposed guardian "understands the legal significance of the appointment" and "will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. §§ 7B-600(c), 7B-906.1(j) (2021).

To satisfy the requirement that the guardians understand the legal significance and responsibilities of the appointment, "the record must contain competent evidence demonstrating the guardian's awareness of [his and] her legal obligations[.]" *In re K.B.*, 249 N.C. App. 263, 266, 803 S.E.2d 628, 630 (2016) (citation omitted). This Court has explained that various types of evidence can satisfy this standard:

> Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship.

In re E.M., 249 N.C. App. 44, 54, 790 S.E.2d 863, 872 (2016).

When two people are awarded joint guardianship, there must be sufficient evidence before the trial court that both persons understand the legal significance of the appointment. *See In re L.M.*, 238 N.C. App. 345, 348-49, 767 S.E.2d 430, 433 (2014) (vacating an order for guardianship where "there was no evidence that the foster mother accepted responsibility" for the juvenile and affirming the order in part because the record tended to show the foster father's desire to take guardianship of the minor child).

In awarding guardianship jointly to Mr. and Mrs. M., the trial court found:

> 23. [Mr. M.] was present in court. He provided a financial affidavit to the Court. Per the affidavit, and evidenced by the fact that [Mr. and Mrs. M.] have provided for the minor child for more than six consecutive months, they have adequate resources to care appropriately for the minor child, and are able and willing to provide proper care and supervision of the minor child in a safe home. [Mr. and Mrs. M.] understand the legal significance of being appointed the minor child's legal custodians.
>
> 24. The minor child has been placed with [Mr. and Mrs. M.] since October 28, 2020, and it is in the minor child's best interest that she be placed in guardianship with [Mr. and Mrs. M.]. [Mr. and Mrs. M.] are committed to caring for the minor child and providing guardianship.

Respondent first contends the trial court's findings and conclusions are erroneous because they state Mr. and Mrs. M. "understand the legal significance of being appointed the minor child's legal *custodians*," rather than being appointed Phoebe's guardians. This error may be a misnomer and clerical in nature. *See In re R.S.M*, 257 N.C. App. 21, 23, 809 S.E.2d 134, 136 (2017) ("A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." (citations, alterations, and quotation marks omitted)). The remainder of the order uses the term "guardianship" repeatedly, including in the trial court's final decree that "guardianship of the minor child, [Phoebe], is hereby granted to [Mr. and Mrs. M.]" This error may be addressed and corrected upon remand.

Respondent next argues the trial court's finding of fact that Mr. and Mrs. M. understood the legal significance and accepted the responsibilities of guardianship was not supported by any competent evidence, noting that "at no point in any of the testimony [at the permanency planning hearing], or contained within either admitted court report is there any direct evidence regarding the foster parent's understanding of the guardianship appointment."

DSS and the guardian *ad litem* dispute Respondent's characterization of the evidence before the trial court. They point to a "Financial Affidavit of [Mr. and Mrs. M.] for Custody/Guardianship" purportedly filled out prior to the permanency planning hearing, which allegedly included the following section:

> **Part 5: RIGHTS AND RESPONSIBILITIES OF A CUSTODIAN/GUARDIAN**
>
> I understand the legal rights and responsibilities that will be bestowed upon me as the legal custodian/guardian for the above-named child(ren). I understand that this includes, but is not limited to, the responsibility to provide the child(ren) with food, shelter, care, and education until the child(ren) reach the age of majority. I understand that this includes, but is not limited to, the right to make all major decisions about the child's health, education, and religious upbringing.

The affidavit provided in the record to this Court is not signed by either Mr. or Mrs. M., and the portion of the affidavit containing a notary's affirmation is also blank. The unsigned "affidavit" itself is not competent or self-proving evidence of Mr. and Mrs. M.'s understanding of the legal significance and responsibilities of guardianship.

At the permanency planning hearing, Mr. M. offered the following testimony regarding the purported affidavit on direct examination from the GAL attorney advocate:

> Q. Sir, you filled out a financial affidavit earlier – earlier this week *indicating your finances*; is that correct?
>
> A. Yes, sir.
>
> Q. And everything on that affidavit is true to the best of your knowledge?
>
> A. Yes, sir.
>
> Q. And you and your significant other *have the financial means and ability* to care financially and emotionally for both [Phoebe] and [Blake]?
>
> A. That's correct.

The affidavit was purportedly entered into evidence during Mr. M.'s subsequent questioning by DSS:

> Q. Sir, you said you filled out *a financial affidavit*?
>
> A. Yes, ma'am.
>
> . . .
>
> [DSS Attorney]: May I approach again, your Honor?

> THE COURT: Sure.
>
> Q. And this is *the financial affidavit* that you filled out?
>
> A. Yes, ma'am.
>
> Q. And you and [Mrs. M.], you have been caring for both children for quite a while now?
>
> A. Yes, since October of 2020.
>
> Q. And – since October of 2020?
>
> A. Yes, ma'am.
>
> Q. Okay. So over a year-and-a-half?
>
> A. Yes, ma'am.
>
> Q. Okay.
>
> [DSS Attorney]: Your Honor, and we'll admit [sic] this as Department's 2.
>
> THE COURT: Okay. All right. Very well. Allow this being introduced into evidence without objection as Petitioner's Exhibit No. 2.

Mr. M.'s testimony does not cure the issues with the unsigned financial affidavit before us nor satisfy the joint requirements and acceptance for Mrs. M. *In re L.M.*, 238 N.C. App. at 348-89, 767 S.E.2d at 433. Mr. M. only acknowledges "filling out" the financial affidavit, and the only information that was "filled out" had to do with the couple's finances. Part 5 of the affidavit, which sets out the legal rights and responsibilities of a custodian/guardian, did not include any space to acknowledge it was read and understood, and there are no markings near it.

Mr. M.'s testimony did not discuss Part 5 nor otherwise address the legal obligations and responsibilities associated with guardianship. Mr. M.'s testimony did not provide any evidence that Mrs. M. was involved with filling out the affidavit or that he had discussed its contents with her, or that she understood and was in agreement with her joint responsibilities. *Id.*

Neither the unsigned financial affidavit nor Mr. M.'s testimony provides the evidence necessary to support the trial court's findings and conclusions that Mr. and Mrs. M. understood the legal significance and responsibilities of being appointed as Phoebe's guardians. No other witnesses offered testimony on the issue, and no other information

is included in either the DSS or GAL court report to support the trial court's findings.

The trial court erred by finding and concluding the foster parents jointly understood the legal significance and responsibilities of guardianship. *See In re E.M.*, 249 N.C. App. 44, 55, 790 S.E.2d 863, 872 (2016) (vacating and remanding an award of legal custody when one member of the custodial couple did not testify and there was no evidence he understood the legal significance of taking custody, the testimony from the other member of the couple did not address her understanding of the legal relationship, and the DSS court report did not reflect that "either of the custodians understood the legal significance of guardianship"); *In re J.D.M.-J.*, 260 N.C. App. 56, 59-61, 817 S.E.2d 755, 758-59 (2018) (vacating and remanding an award of legal custody when neither of the prospective custodians testified, no testimony was offered by DSS that the custodians were aware of the legal significance of assuming custody of the juveniles, and the custodians did not "sign a guardianship agreement acknowledging their understanding of the legal relationship"). We vacate the trial court's award of guardianship to Mr. and Mrs. M. and remand for further proceedings.

IV. Visitation

A. Standard of Review

"This Court reviews an order disallowing visitation for abuse of discretion." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted). A trial court has no discretion to fail to recognize, follow, or to correctly apply the law, or to commit an error of law. *See In re R.P.*, 276 N.C. App. 195, 198, 856 S.E.2d 868, 870 (2021) ("An abuse of discretion occurs when the trial court acts under a misapprehension of the law or its ruling is 'so arbitrary that it could not have been the result of a reasoned decision.' " (citation omitted)).

B. Analysis

[2] Respondent argues the trial court abused its discretion and erred when it denied her all visitation with Phoebe without adequately considering the totality of the circumstances of her parental rights and Phoebe's best interests.

N.C. Gen. Stat. § 7B-906.1(d) governs review and permanency planning hearings, provides a list of criteria the trial court "shall consider," and states the trial court must "make written findings" regarding

visitation. One of the items highlighted in the list is: "(2) Reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C. Gen. Stat. §] 7B-905.1." N.C. Gen. Stat. § 7B- 906.1(d)(2).

Under N.C. Gen. Stat. § 7B-905.1 (2021),

> [a]n order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home *shall provide for visitation* that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. § 7B-905.1(a) (emphasis supplied).

Another subsection of N.C. Gen. Stat. § 7B-906.1 mandates the criteria the trial court "shall additionally consider" and "make written findings regarding" after "any permanency planning hearing where the juvenile is not placed with a parent." N.C. Gen. Stat. § 7B-906.1(e). The list includes the following criteria:

> (1) Whether it is possible for *the juvenile to be placed with a parent within the next six months and, if not, why* such placement is not in the juvenile's best interests.
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, *whether legal guardianship or custody with a relative* or some other suitable person should be established *and, if so, the rights and responsibilities that should remain with the parents.*
>
> (3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption, including when and if termination of parental rights should be considered.
>
> (4) Where the juvenile's placement with a parent is unlikely within six months, *whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why.*
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made

> reasonable efforts to implement the permanent plan for the juvenile.
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e)(1)-(6) (emphasis supplied).

This Court has vacated and remanded permanency planning orders for failure to make written findings and conclusions of law pursuant to the criteria listed in N.C. Gen. Stat. § 7B-906.1. *See In re L.G.*, 274 N.C. App. 292, 851 S.E.2d 681 (2020). In *In re L.G.*, the trial court "ma[de] no mention of the possibility of [the child's] placement with either parent within the next six months" in the permanency planning order. *Id.* at 299, 851 S.E.2d at 687. Although the trial court "included *findings of fact* in the permanency planning order that *could support* a potential conclusion it was not possible for [the child] to be placed with [either parent] within six months, it *failed* to make that conclusion of law in the permanency planning *order*." *Id.* at 302, 851 S.E.2d at 689 (emphasis supplied). This Court remanded the matter to the trial court for "consideration of this issue and if the trial court so concludes, to include specific language regarding the possibility of [the child] being placed with a parent within six months in the permanency planning order." *Id.*

The record only reflects Phoebe's DSS-paid therapist's opinion of her behavior following a video call visitation with Respondent after a long state-enforced absence of visitation with Respondent. The sole finding of fact reflecting visitation is:

> Therapist Bailey wrote a letter following the beginning of video call visitation between [Phoebe] and her mother, [Respondent]. When visits were started, [Phoebe] would become nervous and hesitant to be in the same room as the video call. She was upset by the calls and continued to show inappropriate behavior following each of the calls that were made. Due to this, the therapist's letter documented concerns of regressive behaviors following the visit that the therapist felt were harmful for [Phoebe] and that the video visitation should cease. Due to these behaviors, the therapist felt that it was necessary for [Phoebe] to resume regular sessions.

Here, the facts are similar to those in *In re L.G.*, because the trial court failed to include language consistent with the mandated statutory criteria in N.C. Gen. Stat. § 7B-906.1(d)-(e). *Id.* "[W]hile the trial court included findings of fact in the permanency planning order [which may] *support* a potential conclusion it was not possible for [Phoebe] to be placed with

[Respondent] within six months, it *failed* to make that conclusion of law in the permanency planning *order*." *Id.* (emphasis supplied).

This matter is remanded to the trial court for further consideration and to make written and supported findings of fact as mandated and consistent with Respondent's parental rights and the criteria outlined in N.C. Gen. Stat. § 7B-906.1(d)-(e), including "[r]eports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C. Gen. Stat. §] 7B-905.1." N.C. Gen. Stat. § 7B-906.1(d)(2); *In re L.G.*, 274 N.C. App. at 302, 851 S.E.2d at 689.

V. Conclusion

The trial court's conclusion that Mr. and Mrs. M. understood the legal significance of guardianship is not supported by findings based upon competent evidence in the record. The trial court's award of guardianship to Mr. and Mrs. M. is vacated and remanded for further proceedings.

The trial court's denial of Respondent's visitation with her children is vacated and remanded to the trial court for further consideration of the mandates of the statutes and this opinion. *See* N.C. Gen. Stat. §§ 7B-905.1 and 7B-906.1(d)-(e). *It is so ordered.*

VACATED AND REMANDED.

Judges FLOOD and RIGGS concur.

SHEPENYUK v. ABDELILAH

[290 N.C. App. 188 (2023)]

GANNA SHEPENYUK, PLAINTIFF
v.
YOUSSEF ABDELILAH, DEFENDANT

No. COA22-702

Filed 15 August 2023

Husband and Wife—marriage—without license—invalid

Plaintiff's action against her former romantic partner for post-separation support, alimony, equitable distribution, interim distribution, and attorney fees was properly dismissed where, although plaintiff and her partner participated in a religious wedding ceremony in Virginia years earlier, their marriage was invalid because they never obtained a marriage license as required by Virginia law and where there was no basis for treating the partnership as a marriage by presumption or by estoppel.

Appeal by Plaintiff from an order entered 27 May 2022 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 25 January 2023.

The Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for the Plaintiff-Appellant.

Hatch, Little & Bunn, L.L.P., by Justin R. Apple, for the Defendant-Appellee.

WOOD, Judge.

Ganna Shepenyuk ("Plaintiff") appeals an order granting Youssef Abdelilah's ("Defendant") Rule 12(b)(6) motion to dismiss and dismissing her complaint for postseparation support, alimony, equitable distribution, interim distribution, and attorney fees. After careful review of the record and applicable law, we affirm the order of the trial court.

I. Factual and Procedural Background

Plaintiff and Defendant are former romantic partners who lived together. On 22 August 2015, the parties participated in a religious wedding ceremony in Virginia officiated by Defendant's brother, Mr. Kamal Abdelilah ("K. Abdelilah"). There is no evidence K. Abdelilah was ordained or legally authorized by law to officiate the ceremony. The parties never obtained a marriage license prior to or after the ceremony.

On 30 September 2021, Plaintiff filed a "Complaint and Motion for Domestic Violence Protective Order" ("DVPO Complaint") seeking an *ex parte* Domestic Violence Protective Order, as well as possession of the parties' residence. Plaintiff alleged she and Defendant are "persons of the opposite sex who are not married but live together or have lived together." In a statement attached to her DVPO Complaint, Plaintiff stated that she and Defendant "are not legally married, but [Defendant] does file taxes as jointly married . . . and uses the child support payments of [her] daughter to pay the bills." On 30 September 2021, Plaintiff obtained an *ex parte* DVPO against Defendant.

At the hearing on the DVPO on 14 October 2021, Plaintiff testified she and her "husband met back in 2013," and were "married on 22 August 2015." She further testified she and Defendant "were living for six plus years as husband and wife," called each other husband and wife, were known by "all [their] relatives, family, coworkers, [and] everybody . . . as a married couple," and "were raising four children together." Defendant testified he recently had found out they were not legally married.

That same day, district court Judge Eagles entered a DVPO order finding the "parties had a religious marriage ceremony in Virginia several years ago. Both parties found out years later that their marriage was not considered a legal marriage by the State of Virginia. This has caused conflict regarding distribution of property and possession of the house." The court further found that "[m]any of Plaintiff's allegations appear to be false, based on testimony and evidence introduced, including allegations regarding finances, name calling, and controlling behavior" and that "Plaintiff's testimony lacks credibility." The court concluded Plaintiff "has failed to prove grounds for issuance of a domestic violence protective order" and dismissed the DVPO Complaint.

On 19 November 2021, Plaintiff filed a Petition for Partition of Real Property ("Petition for Partition") seeking a partition by sale of the residence where the parties lived pursuant to N.C. Gen. Stat. § 46A-1. In this petition, Plaintiff stated she "is not currently legally married"; her marriage to Defendant "was void because the marriage license was never properly obtained"; and "the marriage ceremony took place in a State, where the minister may have lacked authority to hold the marriage ceremony." On 3 December 2021, Defendant filed an answer in which he admitted the parties "are not married and were never validly married."

On 11 January 2022, Plaintiff filed a verified complaint asserting equitable distribution and alimony claims, alleging the parties had an "implied partnership" and "constructive marriage." Plaintiff further alleged she

"has never seen a marriage license" and is "unsure whether [K.] Abdelilah was authorized to conduct the marriage ceremony in question."

On 9 February 2022, Plaintiff filed an amended complaint requesting that the parties be "presumptively treated as husband and wife" because a "marriage ceremony took place on 22 August 2015 at the Defendant's brother [K.] Abdelilah's, house in Virginia" and "after the marriage ceremony was performed, both parties believed that they were married to one another." Plaintiff again stated she "has never seen a marriage license" and remains "unsure whether [K.] Abdelilah was authorized to conduct the marriage ceremony in question." Plaintiff requested that the court deem "Plaintiff and Defendant married for the purpose of this action."

On 29 March 2022, Defendant filed a motion to dismiss Plaintiff's amended complaint pursuant to Rule 12(b)(6). Defendant alleged Plaintiff has actual knowledge that she and Defendant are not legally married. Furthermore, the motion alleged Plaintiff's own filings assert that the parties are not legally married, and thus, has failed to state a claim on which relief can be granted.

On 11 April 2022, Defendant filed an answer in response to Plaintiff's amended complaint and argued the doctrine of equitable estoppel bars Plaintiff from claiming the parties entered into a legal marriage because she previously alleged in court documents that she is not legally married to Defendant. Furthermore, Defendant claimed *res judicata* bars Plaintiff from relitigating her complaint because a North Carolina court previously ruled on the issue of whether she and Defendant are legally married.

On 14 April 2022, the trial court heard Defendant's motion to dismiss. Plaintiff's counsel argued the principle of marriage by estoppel applied, asserting "as far as the complaint on its four corners, it alleges that there was a marriage ceremony, and alternatively it alleges that even if a marriage is void, the [c]ourt should still consider the marriage under – a marriage in estoppel, which is recognized in North Carolina." Plaintiff's counsel conceded a "marriage license was never filed in Virginia, and because [they believed] there might have been some improprieties of the way the marriage ceremony was conducted, they were not married." Plaintiff's counsel further acknowledged that in the DVPO order, "Judge Eagles made a finding that she doesn't believe they were married but she believes there was a marriage -- a religious marriage ceremony that occurred." Additionally, Plaintiff's counsel argued Defendant needed to file an annulment action in Virginia instead of a court in North Carolina because it's "not this [c]ourt's job to interpret Virginia law and the validity of something that occurred in Virginia." Plaintiff's counsel conceded

his client did not dispute the trial court's previous finding that the parties did not have a legal marriage in Virginia.

On 27 May 2022, the trial court entered an "Order Dismissing Plaintiff's Complaint for Postseparation Support, Alimony, Equitable Distribution, Interim Distribution and Attorney's Fees." The trial court took judicial notice of previous court documents and found Plaintiff pleaded in the DVPO action, "the parties are, in fact, not married," and the trial court dismissed the DVPO action and noted the parties' marriage was not considered legal by the state of Virginia in its October 2021 order. The May 2022 order determined Plaintiff's complaint only alleged the date of the marriage ceremony, not the date of a legal marriage, so that the trial court was unable to grant relief based upon an equitable marriage theory.

On 1 June 2022, Plaintiff gave written notice of appeal, and filed an amended notice of appeal on 8 June 2022. Thus, the matter is properly before us on appeal.

II. Analysis

A. Standard of Review

A trial court's order granting a Rule 12(b)(6) motion to dismiss is reviewed *de novo*. *Locklear v. Lanuti*, 176 N.C. App. 380, 384, 626 S.E.2d 711, 714 (2006). In our review of an order allowing a motion to dismiss we consider whether, as a matter of law, "the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *New Bar P'ship v. Martin*, 221 N.C. App. 302, 306, 729 S.E.2d 675, 680 (2012) (citation omitted). A motion to dismiss under Rule 12(b)(6) tests the complaint's legal sufficiency. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Plaintiff's complaint is to be liberally construed, and "the court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *New Bar P'ship*, 221 N.C. at 306, 729 S.E.2d at 680 (citation omitted).

A complaint may be dismissed if it is clearly without merit. *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337, 337 S.E.2d 132, 134 (1985) (citation omitted). A complaint is without merit if 1) there is an absence of law to support a claim of the sort made; 2) there is an absence of fact sufficient to make a good claim; or 3) there is the disclosure of some fact which will defeat a claim. *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.*, 86 N.C. App. 540, 542, 358

S.E.2d 539, 540 (1987) (citation omitted). In ruling on a motion to dismiss, the trial court may take judicial notice of its own records in a prior or contemporaneous case without converting the motion to dismiss into a motion for summary judgment. *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 420, 775 S.E.2d 1, 4 (2015) (citation omitted).

B. The sufficiency of Plaintiff's complaint

Plaintiff first argues she sufficiently alleged claims of equitable distribution, alimony, and attorney's fees in her verified amended complaint to the trial court. Plaintiff contends she and Defendant should be presumptively treated as husband and wife due to a "marriage ceremony" which took place on 22 August 2015 in Virginia. Plaintiff cites to the trial court's previous finding that a religious marriage ceremony occurred between the parties and infers the principle of marriage by estoppel is applicable. Looking to Plaintiff's complaint, she alleges "after the marriage ceremony was performed, both parties believed that they were married to one another." Plaintiff's complaint also claims the trial court previously determined the parties "had a religious marriage ceremony in Virginia several years ago. Both parties found out later that their marriage was not considered a legal marriage by [the] State of Virginia." Plaintiff's complaint further alleges, "the Plaintiff has never seen a marriage license" and that she is "still unsure whether [K.] Abdelilah was authorized to conduct the marriage ceremony in question."

The issue of the validity of a marriage under state law is generally governed by the law of the place of the celebration of the marriage. *See Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982) (citations omitted); *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 279, 280 S.E.2d 787, 793 (1981) ("[A] marriage valid where contracted is valid everywhere.") (citation omitted). We give full faith and credit to an out of state marriage if the union was valid in the state where the marriage ceremony took place. Therefore, we look to Virginia law in our determination of whether a valid marital relationship exists between the parties.

Marriage is a creation of state law. As such, it is in the power of the state to give the requirements of marriage. The United States Supreme Court has expressed:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and

> obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Maynard v. Hill, 125 U.S. 190, 205, 8 S. Ct. 723, 726, 31 L. Ed. 654, 657 (1888). Under Virginia law, marriage is a status involving public welfare; it is not merely a contract between two people. The Virginia Supreme Court has described the marriage institution as a relationship among three parties: the husband, the wife, and the Commonwealth. *Cramer v. Commonwealth*, 214 Va. 561, 202 S.E.2d 911, 914 (Va. 1974).

In determining the requirements for marriage, Virginia's General Assembly codified that "every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided." Va. Code Ann. § 20-13. Consistent with the plain language of the statute, the Supreme Court of Virginia previously has held "no marriage or attempted marriage, if it took place in this State, can be held valid here, unless it has been shown to have been under a license, and solemnized according to our statutes." *Offield v. Davis*, 100 Va. 250, 40 S.E. 910, 912 (Va. 1902). In *Offield*, when deciding the validity of common law marriages, Virginia's Supreme Court considered the legislative intent and reasons of public policy behind the statutory requirements of solemnization and a license. *Id.* at 40 S.E. at 913. The Court held it significant that the revisers of the legislative code included a note that these statutory requirements were intended to dissuade from common law marriages. *Id.* at 40 S.E. at 911.

The intent and purpose of the legislature regarding the requirements for a valid marriage plainly state that a marriage license is required. In the present case, Plaintiff's complaint alleges no valid marriage license exists, thereby making the marriage between Plaintiff and Defendant, on its face, invalid. Notwithstanding the parties' failure to obtain a marriage license, Plaintiff contends she and Defendant should be treated presumptively as husband and wife because a "marriage ceremony" took place in Virginia, on 22 August 2015. We decline to extend this presumption to the parties or apply the doctrine of equitable estoppel.

Virginia public policy "has been to uphold the validity of the marriage status for the best interest of society." *Needam v. Needam*, 183 Va. 681, 33 S.E.2d 288, 290 (Va. 1945). Thus, the presumption of the validity of a marriage ranks as "one of the strongest presumptions known to the law." *Eldred v. Eldred*, 97 Va. 606, 34 S.E. 477, 484 (Va. 1899). However, the presumption of marriage cannot be extended to these present circumstances. Plaintiff's conflicting statements in her court filings regarding her relationship with Defendant, and any presumption to be drawn

therefrom, is refuted by the undisputed evidence of the nonexistence of a valid Virginia marriage license.

While the parties cohabitated, comingled their assets, held themselves out as married to the community, and filed joint tax returns, this evidence is insufficient to overcome Virginia's statutory requirements. The veracity of the evidence is in question where both parties have asserted repeatedly in their verified complaints and answers, conflicting statements as to whether they are married. Additionally, Plaintiff concedes the officiant may not have had legal authority to officiate the wedding and neither party attempted to meet the legal requirements for their marriage under Va. Code Ann. § 20-13 or cure their mistake once notified of the requirements. We cannot presume to be true what Plaintiff herself does not profess true. There simply is not enough evidence to "create a foundation for the presumption of marriage." *Id.*

Next, Plaintiff requests we apply estoppel and estop Defendant from refuting the marriage. On appeal, Plaintiff contends she is lawfully married and acted in good faith on this belief. She changed her position in life to become a "homemaker," so as to take care of the home they lived in together and to care for Defendant's biological children, his mother, as well as his brother for nearly five years. While we recognize and are sympathetic to Plaintiff's circumstance, we do not find sufficient basis in Virginia's legal precedent to apply the theory of estoppel to marriage. Consequently, we decline to expand its application here.

In *Levick v. MacDougal*, a couple were married without a license, but were aware of the licensure requirement and, in fact, acquired a license several days after their marriage ceremony. 294 Va. 283, 805 S.E.2d 775, 777-78 (Va. 2017). The Virginia Supreme Court upheld the marriage after determining that the parties' intent to get a license was satisfactory since it is true that "every marriage in Virginia . . . be licensed and solemnized" according to Va. Code Ann. § 20-13. *Id.* at. 805 S.E.2d at 779. Further, the Court's holding declined to address several contentions related to the validity of marriages and left such scenarios unanswered. The Court stated:

> Our holding also renders moot a myriad of debates in this case on various other subjects, including:
>
> • whether Code § 20–13, if violated under this sequence of events, provides a mandatory, as opposed to a mere directory, statutory requirement;
>
> • whether a violation of Code § 20–13, if proven, could be cured by Code § 20–31;

> • whether an allegedly completed marriage, if found to be invalid and incurable, would be declared void ab initio, as the circuit court held, or merely voidable, as the Court of Appeals held;
>
> • whether a party in Levick's position would be precluded by the doctrines of equitable estoppel or laches from challenging the validity of his marriage; and
>
> •whether the marital agreement should be enforced despite a mistaken assumption by the parties at the time of executing it that their marriage was lawful.

Id. at 805 S.E.2d at 785-86. The Court further clarified that its "silence on these underlying questions of law leaves them open for future debate and, thus, allows them to be addressed in later cases in which they are ripe for decision." *Id.* at 805 S.E.2d at 786.

Although the Virginia Supreme Court has left situations like the present case open for "future debate," we decline to apply legal principles that neither the Virginia courts have interpreted, nor the Virginia legislature has addressed. Accordingly, based upon the plain language of Va. Code Ann. § 20-13, the parties never entered into a valid marriage under Virginia law. The parties did not meet the basic statutory requirements for obtaining a valid marriage, nor did the parties at any point attempt to comply with the statute by curing their failure to obtain a license. They simply never got one. Further, as Plaintiff notes, we are unaware whether the individual who officiated the religious ceremony was even authorized to do so. Because the parties did not adhere to Virginia's statute, their marriage is not valid in Virginia and consequently, not valid here. Therefore, we hold the trial court properly dismissed Plaintiff's complaint for postseparation support, alimony, equitable distribution, interim distribution, and attorney fees. We need not consider Plaintiff's other issues on appeal.

III. Conclusion

For the above stated reasons, we affirm the trial court's order granting Defendant's motion to dismiss. The parties' marriage ceremony in Virginia did not result in a valid marriage because the parties failed to meet Virginia's statutory requirements. We decline to apply presumption of marriage or estoppel theories to the facts as presented in the record before us.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
RYAN PIERRE BROWN, DEFENDANT

No. COA22-525

Filed 15 August 2023

Appeal and Error—denial of motion for appropriate relief—guilty plea—recanted testimony—pure question of law—certiorari denied

In a case in which defendant had entered an *Alford* plea to second-degree murder and robbery with a dangerous weapon, defendant's appeal from the denial of his motion for appropriate relief (MAR) was dismissed, and his petition for a writ of certiorari denied, where the trial court properly determined that there was no recanted testimony for purposes of N.C.G.S. § 15A-1415(c) because a witness's statement to police identifying defendant as the person who shot and killed the victim, which she later recanted, was not made under oath or affirmation at a trial or in an affidavit or deposition and therefore did not constitute testimony. The trial court was not required to hold an evidentiary hearing where the basis for the MAR involved a pure question of law and not one of fact.

Judge RIGGS dissenting.

Appeal by defendant from order entered 22 April 2022 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Dobson Law Firm, PLLC, by Miranda Dues, for the Defendant-Appellant.

STADING, Judge.

Ryan Pierre Brown ("defendant") petitions for a writ of *certiorari*, claiming the trial court erred in summarily denying his motion for appropriate relief ("MAR"). Defendant asserts the trial court improperly denied his MAR because an evidentiary hearing was not held to make the ultimate legal determination at issue in this matter. For the reasons

set forth below, we deny defendant's petition for a writ of *certiorari* and dismiss his appeal.

I. Factual and Procedural History

On 11 August 2015, officers from the Greensboro Police Department responded to a report of "shots being fired" at an apartment complex. Upon arrival, they observed the victim, Jermaine Hayes, suffering from a gunshot wound. Mr. Hayes later died at the hospital. Kelsey Bell, the tenant of the apartment and girlfriend of the victim, sold Xanax to another woman named Brenda Goins. On her outing to buy the drug, Ms. Goins was accompanied by defendant and Demario Danzy. While Ms. Bell and Ms. Goins conducted the drug transaction inside the apartment, Mr. Hayes walked outside of his girlfriend's residence to where defendant and Mr. Danzy were located. Subsequently, Ms. Goins exited the apartment while Ms. Bell remained inside of her residence. Shortly thereafter, Ms. Bell heard gunshots and witnessed Mr. Hayes hastily re-enter the apartment and subsequently collapse on the floor.

Ms. Bell was acquainted with Ms. Goins and identified her as well as the vehicle at the crime scene. Police officers obtained a surveillance video showing defendant, Mr. Danzy, and Ms. Goins together. Later, Mr. Danzy was arrested and told investigators that he was the driver of the vehicle that transported defendant and Ms. Goins to Ms. Bell's apartment. Additionally, Mr. Danzy admitted that he and defendant had a common gang association and Mr. Hayes was involved in a rival gang. Mr. Danzy reported that after some discussion between the three males outside of the apartment, Ms. Goins exited the apartment and Mr. Hayes turned to walk away. Mr. Danzy recounted that defendant then pulled out a handgun and fired a number of shots at Mr. Hayes. Mr. Danzy claims this action by defendant startled him and he drove away with Ms. Goins and defendant in the vehicle.

Ms. Goins provided a statement to law enforcement that was "pretty similar to Mr. Danzy's [statement]." The information provided by Ms. Goins was different from Mr. Danzy's statement in that "[s]he did indicate that Mr. Danzy apparently was a little bit more involved with . . . egging on [defendant]." When Ms. Goins returned to the vehicle, she heard defendant say he would shoot Mr. Hayes, and Mr. Danzy encouraged him to go ahead and do it. She then reported that defendant pulled out a handgun and started firing, that it shocked everybody in the car, including Mr. Danzy, and they drove off.

On 28 September 2015, defendant was indicted for one count of first-degree murder and one count of robbery with a dangerous

weapon.[1] On 4 October 2017, defendant pled guilty to second-degree murder and robbery with a dangerous weapon pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). The trial court judge entered a consolidated sentence of 192 to 243 months imprisonment.

On 11 April 2022, defendant filed a MAR pursuant to N.C.G.S. § 15A-1415(c), purporting that Ms. Goins had "recant[ed] her previous testimony and identification of Defendant as the shooter." The basis for defendant's motion was an affidavit signed by Ms. Goins on 6 January 2022, claiming that her statement made in 2015 to law enforcement identifying defendant as the shooter was incorrect. She now maintains that the co-defendant, Mr. Danzy, shot and killed Mr. Hayes.

On 22 April 2022, "[u]pon a review of the motion, the court file, the applicable statutory and case law," the trial court denied defendant's MAR without holding an evidentiary hearing since "the claim alleged involves only legal issues." The order contained findings noting, among other things, that "[t]here was no testimony[,] the case never went to trial[,] [and] defendant chose to plead guilty." Moreover, the trial court found there was "no recanted testimony[,]" as "Brenda Goins never gave any testimony or any statement under oath." Accordingly, the trial court concluded that defendant "entered a voluntary plea," and Ms. Goins's proffer was not testimony as anticipated by N.C.G.S. § 15A-1415(c). Defendant entered a notice of appeal with the trial court on 4 May 2022 and petitioned this Court to issue a writ of *certiorari* on 21 July 2022.

II. Analysis

In this matter, defendant claims that there are meritorious issues for our consideration such that we should grant his petition for writ of *certiorari*. Under N.C. Gen. Stat. § 15A-1422, "the court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C. Gen. Stat. § 15A-1422(c)(3) (2021). "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit . . . review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21. "A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (internal citations omitted). For

1. This robbery charge is unrelated to the present case.

the reasons discussed below, defendant's petition for the writ does not "show merit or that error was probably committed below." *Id.*

First, defendant contests the trial court's determination that "[t]here is no recanted testimony." N.C. Gen. Stat. § 15A-1415(c) provides in relevant part that "a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable . . . at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted *testimony*. . . ." N.C. Gen. Stat. § 15A-1415(c) (2021) (emphasis added). Since we are presented with a question of statutory interpretation, this inquiry is a question of law, subject to *de novo* review. *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). Our "primary endeavor . . . in construing a statute is to give effect to legislative intent. . . . If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276–77 (2005) (citations omitted).

As a preliminary matter, we note that our Supreme Court has analyzed the word *verdict* in the context of a separate statute involving postconviction DNA testing. *See State v. Alexander*, 380 N.C. 572, 587-89, 606, 869 S.E.2d 215, 227-28, 239 (2022) (Newby, C.J., concurring in the result). In any event, considering the matter before us, the operative word at issue is *testimony*—which is defined as "[e]vidence that a competent witness under oath or affirmation gives at a trial or in an affidavit or deposition." *Testimony*, *Black's Law Dictionary* (7th ed. 1999). Evident from the plain meaning of the text of the statute, as a precondition to prevail pursuant to defendant's claims made in his petition, this matter would have required that a witness previously provided *testimony* in some form, which was subsequently recanted. Comparatively, the unsworn statement given to law enforcement—upon which defendant purports reliance for his guilty plea—does not properly align with the definition of *testimony*. Consequently, defendant's claims contained in his petition fall outside of the parameters of N.C. Gen. Stat. § 15A-1415(c).

Defendant's reliance upon *State v. Nickerson*, 320 N.C. 603, 359 S.E.2d 760 (1987), and *State v. Britt*, 320 N.C. 705, 260 S.E.2d 660 (1987), is misplaced as the logic of each case involves the subsequent recanting of sworn testimony provided by a witness during a jury trial. Additionally, defendant and the dissent cite *State v. Howard*, 247 N.C. App. 193, 783 S.E.2d 786 (2016), and *State v. Brigman*, 178 N.C. App. 78, 632 S.E.2d 498 (2006), as a basis to grant defendant's petition for writ

of *certiorari* and vacate the ruling of the trial court. Unlike the present matter, in *State v. Howard*, a witness provided an affidavit repudiating a statement that defendant alleged "rendered his trial testimony false"—after providing sworn testimony at trial. 247 N.C. App. at 210, 783 S.E.2d at 797. Furthermore, the effort to analogize *State v. Brigman* fails for similar reasons—the witness testified at the defendant's trial. 178 N.C. App. at 83–84, 623 S.E.2d at 502.

The dissent would have us employ the jurisprudence of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), to resolve the issue before us. In *Crawford*, the United States Supreme Court recounted an extensive historical basis, including the trial of Sir Walter Raleigh, underpinning its analysis specific to the Sixth Amendment's Confrontation Clause. 541 U.S. at 43–50, 124 S. Ct. at 1359–63; U.S. Const. amend. VI. The Court's detailed account aimed to highlight that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50, 124 S. Ct. at 1363.

In stark contrast, here, defendant was confronted with no such evil and could have availed himself of rights afforded under the Constitution. The record shows that defendant pled guilty pursuant to *North Carolina v. Alford* and swore to his transcript of plea that contained an understanding that his decision forfeited his right to trial in which he could "confront and cross examine witnesses against" him. Had defendant's case proceeded to trial and the same statement was admitted in furtherance of a conviction, without an opportunity to confront the witness, *Crawford*'s analysis and definitional application would be relevant. 541 U.S. at 68–69, 124 S. Ct. at 1374. Moreover, had defendant's case proceeded to trial and the witnesses testified in conformity with this statement, but later recanted the testimony that led to a conviction, an evidentiary hearing would be appropriate under N.C. Gen. Stat. § 15A-1415(c). However, neither of these scenarios occurred here and defendant was not deprived of his constitutional or statutory rights. Defendant was provided those rights but elected to forego them in favor of a plea bargain to a lesser-included offense consolidated with another unrelated felony offense for sentencing. It would be a leap of logic for this Court to hold that the jurisprudence carefully crafted to prevent deprivation of the constitutional right to confront witnesses—fundamental to our system of justice—should be extended to the specific legal issue presented in this matter. Thus, we decline to conflate the Supreme Court's logic applied to Confrontation Clause jurisprudence to the concerns sought to be addressed by N.C. Gen. Stat. § 15A-1415(c) in determining the meaning of *testimony*.

Defendant's final argument, that the trial court erred in failing to hold an evidentiary hearing, points to the language in N.C. Gen. Stat. § 15A-1420, which states that "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." N.C. Gen. Stat. § 15A-1420(c)(1) (2021). However, this subsection of the statute also requires that "[t]he court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact." *Id.* Furthermore, N.C. Gen. Stat. § 15A-1420 requires that "[t]he court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law." N.C. Gen. Stat. § 15A-1420(c)(3). As noted in defendant's cited case, *State v. Howard*:

> An evidentiary hearing is not automatically required before a trial court grants a defendant's MAR, but such a hearing is the general procedure rather than the exception. Indeed . . . an evidentiary hearing is mandatory *unless* summary denial of an MAR is proper, or *the motion presents a pure question of law*.

247 N.C. App. at 207, 783 S.E.2d at 796 (emphasis added). Indeed, here, the trial court was faced with a determination of law rather than an issue of fact. Therefore, in this matter, the trial court's summary denial of the MAR was proper.

III. Conclusion

For these reasons, defendant's petition for a writ of *certiorari* is denied and his appeal is dismissed.

DISMISSED.

Judge GORE concurs.

Judge RIGGS dissents by separate opinion.

RIGGS, Judge, dissenting.

Mr. Brown entered an *Alford* plea to the murder of Mr. Hayes, meaning he denied guilt but acknowledged "there [was] sufficient *evidence* to convince the judge or jury of [his] guilt." *State v. Guinn*, 281 N.C. App.

446, 447 n.1, 868 S.E.2d 672, 674 n.1 (2022) (emphasis added) (citations omitted). Among the evidence undergirding Mr. Brown's guilty plea were two statements that were the only indicia of his identity as the murderer: (1) a written statement from Mr. Danzy that Mr. Brown was the shooter; and (2) a proffer from Ms. Goins corroborating Mr. Danzy's statement and confirming, based on her eyewitness account, that Mr. Brown killed Mr. Hayes. Mr. Brown was not alone in relying on this evidence in making his *Alford* plea; the State agreed to the plea and premised its statement of the facts on this evidence at the plea hearing, and the trial court likewise depended on that evidence[1] in "first determining that there is a factual basis for the plea" before accepting it. N.C. Gen. Stat. § 15A-1022(c) (2021).

Almost five years later, Ms. Goins—by sworn affidavit—recanted her evidentiary statements relied upon by Mr. Brown, the State, and the trial court in the entry of his *Alford* plea. Ms. Goins' affidavit calls into substantial doubt the only two pieces of evidence establishing Mr. Brown as the shooter to the exclusion of all others; it both impeaches Mr. Danzy's testimony *and* serves as positive evidence that he, and not Mr. Brown, committed the murder.[2] Mr. Brown, justifiably relying on the statutory scheme designed to afford defendants—even those who plead guilty—with post-conviction relief, filed an MAR and requested an evidentiary hearing in light of Ms. Goins' recanting affidavit. The trial court denied the MAR without an evidentiary hearing on the basis that Ms. Goins' "affidavit is not recanted testimony or newly discovered evidence."

The majority dismisses Mr. Brown's appeal at the *certiorari* stage for lack of merit, reasoning that relief on the basis of newly discovered evidence is wholly unavailable to defendants who plead guilty or enter *Alford* pleas when they are convicted without receipt of sworn "testimony."[3] Because I believe the majority's holding is premised on an

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1. That Ms. Goins' proffer was considered evidentiary by the parties and the trial court is disclosed by his transcript of plea "consent[ing] to the Court hearing a summary of the evidence" and the proffer's subsequent inclusion in the State's recitation thereof.

2. The State's recitation of the facts at the plea hearing expressly recognized that Ms. Goins' statement was critical to its murder case and in shoring up Mr. Danzy's credibility: "[T]hat is the factual basis for the murder charge. . . . [I]f it had gone to trial, it would have been basically two against one on that. And so, of course, none of the State's witnesses would have been, you know, saints, but then again we've got two folks whose proffers are very, very consistent[.]"

3. Notably, "[s]worn testimony" may provide the necessary factual basis for a trial court's acceptance of an *Alford* or guilty plea. N.C. Gen. Stat. § 15A-1022(c)(4) (2021). The majority's analysis does not appear to bar an MAR challenging an *Alford* plea entered on sworn testimony should the testifying witness later recant those statements. Nor is it

inappropriately narrow reading of the relevant statute and leads to outcomes contrary to the legislature's intent both as to MARs and the basis required for entry of *Alford* and guilty pleas, I would vacate and remand the trial court's order for an evidentiary hearing. I respectfully dissent.

I. ANALYSIS

Section 15A-1415(c) of our General Statutes provides that:

> Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c) (2021). The majority seizes on the term "testimony" to hold that where no *sworn* witness statements appear of record, newly discovered evidence may not serve as a basis for post-conviction relief by MAR.[4] But the majority's narrow reading of "testimony" is not in keeping with the term's use in the law, nor is it consistent with the remedial nature of the statute. *See Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977) ("The Court will not adopt an interpretation which results in injustice when

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legally or logically apparent why a defendant who entered an *Alford* plea on sworn testimony may pursue an MAR based on recanted testimony while Mr. Brown may not; in both instances, the factual basis for the trial court's acceptance of the plea would be cast into doubt.

4. To the extent that the word "verdict" bears upon the applicability of the statute, I would construe it consistent with our Supreme Court's holding in *State v. Alexander*, 380 N.C. 572, 587-89, 869 S.E.2d 215, 227-28 (2022), which addressed the availability of post-conviction DNA testing to defendants who were convicted following *Alford* or guilty pleas. As discussed in greater detail *infra*, doing so is consistent with the remedial purposes of the MAR statutes, *cf. id.* at 587, 869 S.E.2d at 226-27, and avoids absurd results, *cf. State v. Alexander*, 271 N.C. App. 77, 80, 843 S.E.2d 294, 296 (2020) (noting that "to read 'verdict' in a strict, legal sense [in the post-conviction DNA testing statute] would lead to an absurd result, clearly not intended by the General Assembly," in that defendants who were convicted after a bench trial would not benefit), *aff'd*, 380 N.C. 572, 869 S.E.2d 215 (2022). Relatedly, construing the statute to require a trial would run afoul of these same concerns; a defendant who loses at a pretrial motion to suppress hearing based on perjured testimony and subsequently enters a guilty plea could not have the conviction set aside under that reading, as the perjured testimony and plea both occurred prior to any trial. This Court has implicitly rejected such a reading in at least one decision addressing this precise scenario. *State v. Hulse*, 214 N.C. App. 194, 714 S.E.2d 531, 2011 WL 3276757, at *2 (2011) (unpublished).

the statute may reasonably be otherwise consistently construed with the intent of the act." (citation omitted)); *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) ("[T]his statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals, for which it is enacted and which brings within it all cases fairly falling within its intended scope." (citations omitted)).

The word "testimony" has a broader definition in the law than the majority ascribes. For example, in the context of the Confrontation Clause of the Sixth Amendment and related jurisprudence:

> [T]estimonial evidence refers to statements that "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use *at a later trial*." Testimonial evidence includes affidavits, depositions, *or statements given to police officers during an interrogation*. " 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "

State v. Ferebee, 177 N.C. App. 785, 788, 630 S.E.2d 460, 462-63 (2006) (emphasis added) (cleaned up) (quoting *Crawford v. Washington*, 541 U.S. 36, 51-52, 158 L. Ed. 2d 177, 192-93 (2004)). As such, "testimony" is not strictly understood as an in-court statement given under oath; instead, "*[a]n accuser who makes a formal statement to government officers bears testimony* . . . . The constitutional text [of the Sixth Amendment] . . . thus reflects an especially acute concern with a specific type of *out-of-court statement*." *Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 192-93 (emphasis added).[5] This broader understanding of the word "testimony," particularly in the context of unsworn statements given to law enforcement, is deeply rooted in history:

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive.

Id. at 52, 158 L. Ed. 2d at 193. The criminal law of this State makes numerous references to the clear concept of "unsworn testimony" outside the

5. In *Davis v. Washington*, the Supreme Court quoted this language from *Crawford* as "testimony . . . thus defined." 547 U.S. 813, 824, 165 L. Ed. 2d 224, 238 (2006).

context of the Sixth Amendment. *See*, *e.g.*, *State v. Gee*, 92 N.C. 756, 762 (1885) (observing that when a witness testifies at trial without taking an oath, "it is as much the duty of counsel to see that no unsworn testimony is received against the client . . . ."); *State v. Hendricks*, 138 N.C. App. 668, 671, 531 S.E.2d 896, 899 (2000) (holding that a defendant waived his argument that the trial court impermissibly allowed a victim to address the trial court during sentencing because "[d]efendant never objected at the hearing to [the victim's] unsworn testimony").[6]

Reading N.C. Gen. Stat. § 15A-1415(c) together with the statutory requirements of N.C. Gen. Stat. § 15A-1022(c) further leads me to conclude that Mr. Brown may seek relief by MAR following his tender—and the State and trial court's acceptance—of an *Alford* plea. Under that latter statute, "[t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1022(c).

While it is true that "[t]he statute does not require the trial judge to elicit evidence from each, any or all of the [statutorily] enumerated sources . . . [and] may consider any information properly brought to his attention," *State v. Sinclair*, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980) (cleaned up), our Supreme Court has also observed that, "in enumerating these five sources, the statute contemplates that some substantive material independent of the plea itself appear of record which tends to show that defendant *is*, *in fact*, *guilty*." *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) (emphasis added) (cleaned up). Thus, while a guilty plea absolves the State of establishing the defendant's guilt beyond a reasonable doubt, *State v. Hart*, 287 N.C. 76, 83, 213 S.E.2d 291, 296 (1975), the statute requires the trial court to accept the plea on an independent factual basis to try and ensure that the pleading defendant *is actually guilty*. *Agnew*, 361 N.C. at 336, 643 S.E.2d at 583. And while the factual summary by the prosecutor may sometimes support this independent factual basis for the plea, that summary must nonetheless contain information *of evidentiary value*. *See State v. Robinson*, 381 N.C. 207, 219, 872 S.E.2d 28, 37 (2022) ("Without *evidence* of a distinct interruption in the assault, the trial court did not have a sufficient factual basis

6. This concept of "unsworn testimony" also exists in Sixth Amendment jurisprudence. *See Davis*, 547 U.S. at 826, 165 L. Ed. 2d at 239 (noting that the Sixth Amendment would prohibit "having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."). But as the above North Carolina caselaw demonstrates, the idea of "unsworn testimony" is not unique to that context.

upon which to sentence defendant to separate and consecutive assault sentences [pursuant to the guilty plea]." (emphasis added)).

In short, the independent factual basis required by N.C. Gen. Stat. § 15A-1022(c) serves to satisfy the trial court's, the State's, and the wider public's interest in convicting the person that actually committed the crime as disclosed by some evidentiary information indicating the defendant's guilt. The MAR statute, in turn, likewise seeks to ensure that only guilty parties are punished by allowing defendants to challenge their convictions based on newly discovered evidence, "including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence." N.C. Gen. Stat. § 15A-1415(c). These aligned purposes, considered in *pari materia*, lead me to disagree with the majority (and by extension the trial court) that Mr. Brown is not entitled to an evidentiary hearing by MAR based upon a sworn affidavit from an eyewitness recanting a testimonial statement that established the independent factual basis for the plea. *Cf. State v. Brigman*, 178 N.C. App. 78, 94-95, 632 S.E.2d 498, 508-09 (2006) (holding an MAR premised on a witness's recanted testimony required resolution by evidentiary hearing); *State v. Howard*, 247 N.C. App. 193, 211, 783 S.E.2d 786, 798 (2016) (vacating and remanding an MAR order under that same rationale).

Of course, none of this is to say that Mr. Brown is truly guilty or innocent, that Ms. Goins' recanting affidavit is true or false, or that Mr. Danzy was or was not the shooter. We are not a fact-finding court, and those are factual questions for resolution by a finder of fact through the weighing of evidence and determinations of credibility. But the MAR statute, through N.C. Gen. Stat. § 15A-1415(c), affords Mr. Brown just such a procedure in the trial court, and I respectfully dissent from my colleagues' determination to the contrary.

II. CONCLUSION

Consistent with the above, I do not believe that N.C. Gen. Stat. § 15A-1415(c)'s reference to "testimony," as a remedial statute with intentions that fairly encompass Mr. Brown's circumstance, necessarily precludes him from raising an MAR in this context. The word is not exclusively subject to the narrow definition provided by the majority, and in keeping with the clear intent of the General Assembly in enacting the MAR statute and N.C. Gen. Stat. § 15A-1022(c), I would allow Mr. Brown's petition for writ of *certioriari*, deny the State's motion to dismiss, and vacate and remand the trial court's order with instructions to conduct an evidentiary hearing concerning Ms. Goins' recanted testimonial statements.

STATE OF NORTH CAROLINA
v.
JOHN LOUIS SPERA, DEFENDANT

No. COA22-814

Filed 15 August 2023

1. Identification of Defendants—in-court—improper testimony —motion for mistrial—negation of prejudicial impact

In a trial for misdemeanor larceny of a vehicle and robbery with a dangerous weapon, where the victim of an armed robbery emphatically identified defendant as the perpetrator throughout his testimony, the trial court did not commit a gross abuse of discretion when it denied defendant's motion for a mistrial after ruling that the victim's identification testimony was inadmissible. The court's curative instruction—that the jury "disregard totally" and "give no weight" to the victim's identification of defendant—was, on its own, insufficient to negate the prejudicial impact of the victim's testimony. However, where another witness at trial—who knew defendant personally and was present during the armed robbery—also identified defendant as the perpetrator during her testimony, and where defendant's counsel successfully impeached the victim's improper identification when cross-examining him, the combination of the court's jury instruction, the cumulative testimony, and defense counsel's cross-examination negated the sort of "substantial and irreparable prejudice" required for granting a mistrial.

2. Larceny—misdemeanor larceny of a vehicle—sufficiency of evidence—felonious intent—permanent deprivation of property

The trial court erred in denying defendant's motion to dismiss a charge of misdemeanor larceny of a vehicle where the State failed to present sufficient evidence supporting the element of felonious intent. According to the evidence, the victim and his friend, a drug dealer, went to a mobile home for a social visit when defendant, accompanied by another man, burst into the home, approached the victim while holding a hammer and demanding "powder" (implying an intent to steal drugs, which he ultimately did not find), seized the keys to the victim's truck from the victim's person, and took the truck for a joyride, after which defendant voluntarily returned the truck, handed the keys back to the victim, and released the victim unharmed. Apart from the taking itself, there were no additional facts present to support an inference that defendant intended to

permanently deprive the victim of his truck. Further, evidence of defendant's threatened force against the victim and use of force to seize the victim's keys did not overcome the uncontradicted evidence that defendant intended only a temporary deprivation of the truck.

Appeal by Defendant from judgment entered 10 March 2022 by Judge Nathan H. Gwyn, III in Union County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for Defendant-Appellant.

RIGGS, Judge.

Defendant John Louis Spera appeals from a judgment following a jury trial, which found him guilty of misdemeanor larceny of a vehicle and robbery with a dangerous weapon. On appeal, Mr. Spera argues that the trial court: (1) abused its discretion by denying his motion for a mistrial after the testifying victim's identification of him as the perpetrator was ruled inadmissible; (2) erred in denying his motion to dismiss the misdemeanor larceny charge for insufficient evidence of intent to permanently deprive the victim of the property taken; and (3) committed plain error by failing to instruct the jury on the concept of temporary deprivation. After careful review, we hold that the trial court did not err in denying his motion for mistrial but did err in denying his motion to dismiss the misdemeanor larceny charge. As a result, we vacate the misdemeanor larceny conviction in File No. 17CRS052233 and remand for entry of judgment on the lesser-included offense of unauthorized use of a motor vehicle. We leave the remaining conviction undisturbed.

I. FACTUAL AND PROCEDURAL HISTORY

On 4 April 2017, recent high school graduate Dustin Perry was invited by his friend and drug dealer, Zackary Phifer, to hang out with two women, Hannah Tarleton and Charity Sharon, at a mobile home in Union County. Mr. Perry picked up Mr. Phifer at his mother's house around 10:00 PM and the two drove in Mr. Perry's pickup truck to the home where Ms. Tarleton and Ms. Sharon were spending the evening. On arrival, Mr. Phifer exited the truck, met with someone at the door, and waved for Mr. Perry to join him. The men headed inside together.

Mr. Perry and Mr. Phifer entered through the living room before heading into a room at the rear of the home. Ms. Tarleton and Ms. Sharon met Mr. Perry and Mr. Phifer in that room; a few minutes later, three or four other men burst into the room. Two of the men were armed, one with a knife and the other with a hammer. Mr. Perry knew the man with the knife as Luther Weathers, but he did not recognize the man with the hammer.

The unknown man with the hammer began shouting "where's the powder, where's the powder," at Mr. Perry and Mr. Phifer. The men then searched Mr. Perry and Mr. Phifer, rifling through the former's wallet and taking his phone and the keys to his truck. The armed robbers then left the room, and Mr. Perry heard them start up his truck and drive away for what Mr. Perry presumed was a joyride. The remaining men, along with Ms. Tarleton and Ms. Sharon, stayed behind with Mr. Perry and Mr. Phifer to ensure that they did not leave the back room.

Roughly thirty minutes after the robbery, the two armed robbers returned to the mobile home, escorted Mr. Perry and Mr. Phifer outside, returned the keys to Mr. Perry, and allowed them to leave unharmed. The man with the hammer did, however, threaten Mr. Perry with harm if he told the police about what had occurred. Mr. Perry found that unspecified "documentation" relating to the truck had been destroyed and a roadside safety kit was missing from the vehicle. Mr. Perry later reported the incident to law enforcement.

Detective James Maye with the Union County Sheriff's Office met and interviewed Mr. Perry about the night in question in May of 2017. Mr. Perry told Detective Maye that the man with the hammer was Black, about 5 feet tall, and bald. Roughly four years later, in 2021, the district attorney showed Mr. Perry a picture of Mr. Spera—who is white, 5'9", and has long hair—and Mr. Perry affirmatively identified him as the robber with the hammer.

Mr. Spera was subsequently indicted on one count of felony larceny of a motor vehicle and two counts each of second-degree kidnapping, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Trial commenced on 7 March 2022, and Mr. Perry testified to his recollection of the robbery. During his testimony, Mr. Perry repeatedly identified Mr. Spera as the robber with the hammer; however, after it was revealed that Mr. Perry had initially identified Mr. Spera through a photograph that had not been previously disclosed to the defense, Mr. Spera objected to any identification by Mr. Perry and moved for a mistrial. Following *voir dire* and argument—which included assertions by the State that Ms. Tarleton would also be testifying and providing an identification of Mr. Spera—the trial court

sustained Mr. Spera's objection, struck Mr. Perry's identification of Mr. Spera, and denied the motion for mistrial. Consistent with the State's argument, Ms. Tarleton did testify and identify Mr. Spera as one of the robbers while also acknowledging that she knew him socially and had previously engaged in sexual relations with him.

At the close of the State's evidence, Mr. Spera moved to dismiss the charges against him. The trial court dismissed the robbery and kidnapping charges that related to Mr. Phifer, as well as both conspiracy charges. It also reduced the felony larceny of a motor vehicle charge to a misdemeanor, as the State had not put in any evidence as to the truck's value. The trial court denied Mr. Spera's motion to dismiss the remaining charges involving Mr. Perry.

After the charge conference, the trial court instructed the jury on the remaining counts. For misdemeanor larceny of a motor vehicle, the trial court instructed the jury that a conviction required the jury to find "that at the time the Defendant intended to deprive the victim of its use permanently." After deliberation, the jury found Mr. Spera guilty of robbery with a dangerous weapon and misdemeanor larceny of a motor vehicle, acquitting Mr. Spera of second-degree kidnapping. The trial court sentenced Mr. Spera to 84 to 113 months' imprisonment for robbery with a dangerous weapon, followed by a consecutive sentence of 120 days for misdemeanor larceny. Mr. Spera gave oral notice of appeal at sentencing.

II. ANALYSIS

Mr. Spera's three principal arguments identify error in: (1) the denial of his motion for mistrial; (2) the denial of his motion to dismiss the misdemeanor larceny charge for insufficient evidence of the requisite intent; and (3) the trial court's failure to *sua sponte* instruct the jury regarding temporary deprivation. We disagree with Mr. Spera as to his first argument; however, because we hold the evidence was insufficient to show the requisite intent for misdemeanor larceny, we vacate that conviction and remand for entry of judgment on the lesser-included offense of unauthorized use of a motor vehicle. Finally, because our second holding is dispositive as to the larceny conviction, we decline to address Mr. Spera's third argument.

A. Mistrial

1. Standard of Review

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Bradley*, 279 N.C. App. 389, 406, 864 S.E.2d 850, 864

(2021). This is a highly deferential standard, as the trial court's "ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion." *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (1972).

2. Analysis

[1] A mistrial is proper "when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (citation and quotation marks omitted). A motion for mistrial necessitates demonstration of harm "beyond a reasonable doubt." *State v. Nolen*, 144 N.C. App. 172, 178, 550 S.E.2d 783, 787 (2001) (citation omitted). In many instances, a curative instruction issued promptly by the trial court can effectively neutralize such prejudice. *State v. McDougald*, 279 N.C. App. 25, 30, 862 S.E.2d 877, 881 (2021). Additionally, any prejudicial impact can be negated by the admission of cumulative evidence establishing the same fact. *Nolen*, 144 N.C. App. at 179, 550 S.E.2d at 787-88.

Here, Mr. Perry emphatically identified Mr. Spera as one of the armed men that robbed him, and repeatedly referred to Mr. Spera throughout his testimony. Partway through that incriminating testimony, Mr. Spera's counsel learned that Mr. Perry had given an out-of-court identification to the prosecution, leading counsel to lodge an immediate objection "based on a highly improper photo" identification and lack of disclosure to the defense. The trial court—after hearing *voir dire* testimony, arguments from the parties, and the forecast from the State of Ms. Tarleton's anticipated identification testimony—sustained the objection and provided the following curative instruction:

> For the record the motion to suppress the identification of the Defendant is granted. I am instructing, ladies and gentlemen of the jury, that you are to disregard totally and to give no weight to the last witness's identification of the Defendant, that being Mr. Perry. Is that understood? You are to strike that entirely. Next witness.

Immediately following this instruction, Mr. Spera's counsel cross-examined Mr. Perry on the substantial discrepancies between Mr. Spera as he appeared in court and Mr. Perry's testimonial description of the perpetrator.

Mr. Spera acknowledges that curative instructions are usually sufficient to preclude a mistrial, but asserts this case is different based on the specific instruction given and the evidence presented, noting that

the sufficiency of a curative instruction is a fact-intensive inquiry dependent on the circumstances of each individual trial. *State v. Aldridge*, 254 N.C. 297, 300, 118 S.E.2d 766, 768 (1961). He argues—and we agree—that the trial court's curative instruction here was likely too vague, standing alone, to adequately dispel the prejudice of Mr. Perry's repeated and emphatic identifications of Mr. Spera. Where we part from Mr. Spera's logic, however, is in the import of Ms. Tarleton's testimony, and we ultimately hold that her cumulative testimony, coupled with the curative instruction, albeit inadequate standing alone, and his counsel's able cross-examination of Mr. Perry, defeats Mr. Spera's claim of a gross abuse of discretion by the trial judge in denying his mistrial motion.

In opposing Mr. Spera's mistrial motion, the State explicitly directed the trial court to Ms. Tarleton's anticipated testimony identifying Mr. Spera as one of the perpetrators of the alleged larceny. After she took the stand, Ms. Tarleton affirmatively identified Mr. Spera as such, and testified that "Spera stepped in and started demanding [the victims'] stuff. . . . He just started demanding their stuff, all they had. The weed, they had phones, everything. Whatever goods they may have had on them." She subsequently confirmed that Mr. Spera left the mobile home with the other robber, Mr. Weathers, and only recalled seeing Mr. Spera again after Mr. Perry's truck returned to the mobile home. As for her familiarity with the alleged perpetrators, she testified that she knew both Mr. Spera and Mr. Weathers intimately, which lent credence to her identification. And, though Mr. Spera's counsel elicited testimony from Ms. Tarleton that she was testifying pursuant to a plea arrangement, any evaluation as to her credibility—consistent with the standard credibility and interested witness instructions given by the trial court—was within the exclusive province of the jury. *State v. Hoff*, 224 N.C. App. 155, 160, 736 S.E.2d 204, 208 (2012). We cannot say that the trial court's decision to leave that credibility determination to the jury, made in light of those proper instructions, amounts to a manifest abuse of discretion.

Beyond Ms. Tarleton's cumulative testimony, any prejudice resulting from Mr. Perry's improper identification was further ameliorated by defense counsel's cross-examination. Immediately following the curative instruction, Mr. Spera's counsel elicited in testimony Mr. Perry's initial identification of the second robber, first described as a five-foot-tall bald Black man with a goatee—a description that clearly did not match Mr. Spera's appearance in the courtroom. Such evident discrepancies were probative to impeach any improper identification by Mr. Perry. *See, e.g.*, *State v. Joyner*, 33 N.C. App. 361, 365, 235 S.E.2d 107, 110 (1977) (holding trial counsel's cross-examination and impeachment of a witness concerning allegedly improper testimony negated any prejudice

from said testimony). In sum, trial counsel's cross-examination, Ms. Tarleton's cumulative testimony identifying Mr. Spera as the perpetrator of the alleged crime, and the trial court's curative instruction—however insufficient on its own—preclude us from holding that there was "substantial and irreparable prejudice to the defendant's case," N.C. Gen. Stat. § 15A-1061 (2021), such that the trial court's denial was "a gross abuse of . . . discretion," *State v. Bidgood*, 144 N.C. App. 267, 273, 550 S.E.2d 198, 202 (2001) (citation omitted).

Mr. Spera urges us to reach a different result based on *Aldridge*, where the Supreme Court reversed a trial court's denial of a mistrial for improperly admitted evidence notwithstanding a curative instruction and cumulative testimony from additional witnesses. 254 N.C. at 301, 118 S.E.2d at 768. The facts of *Aldridge*, a half-century old criminal child support case, render it inapposite to the case at bench. There, a married woman was seeking child support from a man who was not her husband, alleging he fathered her child. In an attempt to prove that the defendant was the child's father, the woman impermissibly (under the common law in effect at the time) testified before the jury that her husband could not have sired the child because she had not seen him for two years. *Id.* at 298, 118 S.E.2d at 767. Though a curative instruction was given and other witnesses gave "much less probative" testimony suggesting the woman's nonaccess to her husband, the Supreme Court ultimately held that the improper testimony was so prejudicial that a mistrial should have been declared. *Id.* at 299, 118 S.E.2d at 767.

But the prejudice identified in *Aldridge* stemmed from antiquated evidentiary concepts found in the common law of child support cases involving "illegitimate" children. Under the common law of that era, "[t]he wife [wa]s not a competent witness to prove the nonaccess of the husband . . . . Her testimony and declarations [were] excluded not only as violative of the confidential relations existing between husband and wife but pursuant to a sound public policy which prohibits the parent from bastardizing her own issue." *Ray v. Ray*, 219 N.C. 217, 219, 13 S.E.2d 224, 226 (1941). Thus, whether a wife had "access" to her husband was presumed to be private information within the marital relationship. *Id.* And, lacking DNA evidence, the testimony of the wife was presumed to be the most probative evidence of her sexual activities. *Cf. id.* ("[S]he is permitted to testify as to the illicit relations in actions directly involving the parentage of the child, for in such cases, proof thereof frequently would be an impossibility except through the testimony of the woman." (citations omitted)).

We decline to analogize the prejudice stemming from caselaw: (1) grounded in the patent sexism of the past; and (2) predating the modern

rules of evidence on paternity and DNA testing. *See* N.C. Gen. Stat. § 8-57.2 (2021) (abrogating the common law rule discussed in *Aldridge* and explicitly authorizing the mother in any action involving paternity of a child born during a marriage to testify to nonaccess); N.C. Gen. Stat. § 8-50.1(a) (2021) (requiring the trial court to order blood testing to determine parentage, "regardless of any presumptions with respect to parentage," upon motion of the State or defendant). Moreover, Mr. Spera's identity is not so intimate a fact as whether a spouse had "nonaccess" to their partner such that Mr. Perry's identification was inherently more probative than one from another witness; Ms. Tarleton was in the room at the time of the robbery, knew both Mr. Spera and Mr. Weathers well, and could thus provide an identification of equal—if not altogether greater—probative value.[1]

The case before us is also different for several additional reasons, namely: (1) Mr. Spera's counsel ably cross-examined Mr. Perry on the differences between his initial identification and Mr. Spera's in-court appearance, substantially undercutting the improper identification's probative value;[2] (2) Ms. Tarleton's identification of Mr. Spera was highly probative given her intimate familiarity with both Mr. Spera and Mr. Weathers; and (3) Mr. Spera's identity—unlike the details of the wife's sexual activities in *Aldridge*—was not intimate and private knowledge such that Mr. Perry was the best and most credible source for that information. Thus, *Aldridge*'s context and ruling do not align sufficiently with our case, and we find it inapposite to the appeal before us.

B. Motion to Dismiss

[2] Mr. Spera next challenges the trial court's denial of his motion to dismiss the larceny charge, arguing that the evidence presented does not sufficiently demonstrate his intention to permanently deprive Mr. Perry of his vehicle. He highlights that the evidence, at best, implies only an intended temporary deprivation. We agree with Mr. Spera, vacate his misdemeanor larceny conviction on this basis, and remand for entry of a judgment convicting him of the lesser-included offense of unauthorized use of a motor vehicle.

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1. Indeed, given that Ms. Tarleton's description of Mr. Spera's appearance at the time of the robbery lacked the glaring inconsistencies between Mr. Spera's actual appearance and Mr. Perry's initial description of the man with the hammer, Ms. Tarleton's identification could reasonably be afforded greater weight than Mr. Perry's.

2. Of note, the Supreme Court stated in *Aldridge* that the defendant's counsel "undertook, *with indifferent success*, to impeach [the woman's] testimony as to nonaccess." 254 N.C. at 299, 118 S.E.2d at 767-68 (emphasis added).

1. Standard of Review

A trial court's ruling on a motion to dismiss is subject to *de novo* review. *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013). When considering the denial of a motion to dismiss, we assess "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation and quotation marks omitted). In other words, the State must present "more than a mere scintilla" of evidence to establish each and every element of the charge. *State v. Smith*, 40 N.C. App. 72, 77-78, 252 S.E.2d 535, 539 (1979) (citations and quotation marks omitted). We grant "the State the benefit of every reasonable inference and resolv[e] any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). The presented evidence and inferences must go beyond "rais[ing] suspicion or conjecture." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (citation omitted).

2. Analysis

Larceny is a common law crime with the essential elements "that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Sisk*, 285 N.C. App. 637, 641, 878 S.E.2d 183, 186 (2022) (citations and quotation marks omitted). "The statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same." *State v. Smith*, 66 N.C. App. 570, 576, 312 S.E.2d 222, 226 (1984).

The final element—intent—is often inferred from circumstantial evidence rather than direct proof. *State v. Harlow*, 16 N.C. App. 312, 315, 191 S.E.2d 900, 902 (1972). However, our Supreme Court recognized long ago that "[s]omething more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the [defendant's] intent." *State v. Foy*, 131 N.C. 804, 805, 42 S.E. 934, 935 (1902). This "felonious intent" is multifaceted and includes more than just an intent of permanent deprivation:

> Felonious intent as applied to the crime of larceny is the intent which exists where a person knowingly takes and

> carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property.

State v. Perry, 21 N.C. App. 478, 481-82, 204 S.E.2d 889, 891 (1974) (citation and quotation marks omitted). Thus, a defendant who takes another's property on an honestly mistaken belief that it belongs to them has not committed larceny. *See*, *e.g.*, *State v. Gaither*, 72 N.C. 458, 460 (1875) (holding, on appeal from a larceny conviction for taking and eating the alleged victim's chickens, that "it cannot be maintained, that if one takes the property of another and eats it, that he is guilty of larceny. It may be trespass, or mistake, or larceny, according to circumstances; it is not *necessarily* larceny." (emphasis in original)). Similarly, a defendant who knowingly and dishonestly takes another's property for only a temporary purpose lacks "felonious intent" necessary for larceny and has instead merely committed a trespass. *State v. Rogers*, 255 N.C. App. 413, 415, 805 S.E.2d 172, 174 (2017). Thus, proving felonious intent for larceny requires showing two distinct aspects of intent: (1) an intentionally wrongful taking of another's property, *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968); and (2) an intent to permanently deprive the victim of possession, *Rogers*, 255 N.C. App. at 415, 805 S.E.2d at 174.

Different facts may circumstantially demonstrate an intent to accomplish a wrongful taking, "inconsistent with an honest purpose, such as when done clandestinely, or, when charged with, denies, the fact; or secretly, or forcibly; or by artifice." *Foy*, 131 N.C. at 805-06, 42 S.E. at 935 (citations omitted). By contrast, intent to permanently deprive the owner of possession "may, generally speaking, be deemed proved if it appears he kept the goods as his own 'til his apprehension, or that he gave them away, or sold or exchanged or destroyed them." *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966) (citation and quotation marks omitted). In summary, apart from the act of taking itself, additional facts must be present to support an inference of the requisite criminal intent, including both the intent to wrongfully take *and* the intent to permanently deprive the owner of possession. And while force goes to an intent to wrongfully take, *Foy*, 131 N.C. at 805-06, 42 S.E. at 935, no case cited by the State has held that it also demonstrates an intent to permanently deprive; to the contrary, courts have looked to other factors besides force to show intent to permanently deprive, even in cases where force was used, *Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200 (holding intent to permanently deprive the owner of a rifle taken in an armed robbery was shown by the abandonment of the rifle after the taking rather than the death threats, use of a firearm, and firing of a warning shot at the victim's feet in the robbery itself).

Consistent with *Smith*, intent to permanently deprive the victim of possession has been shown in a number of factual circumstances, though the use of force does not appear to be among them. In *State v. Osborne*, a larceny case involving the theft of numerous personal articles from the victim's apartment, we held that the discovery of the items "in the defendant's bags and among his own possessions [was] sufficient evidence from which a reasonable jury could conclude defendant had the necessary intent to permanently deprive [the victim] of [his] property." 149 N.C. App. 235, 243, 562 S.E.2d 528, 534 (2002). That is, the stolen materials were kept until discovered, not voluntarily returned after a short period. Similarly, apprehension of missing money, in the defendants' possession and alongside other unrelated stolen items, was sufficient to show the requisite criminal intent to permanently deprive the rightful owner of possession in *State v. Jones*, 57 N.C. App. 460, 464, 291 S.E.2d 869, 872 (1982). In *State v. Hager*, we held that a jewelry thief's intent to permanently deprive the owner of possession was shown from the "defendant's exchanging the [stolen] items for cash" at several pawnshops. 203 N.C. App. 704, 708, 692 S.E.2d 404, 407 (2010). We likewise held that intent to permanently deprive was shown in an automobile theft in *State v. Jackson*; because the stolen car in that case was never recovered, "[t]he fact that the car ha[d] not yet been returned or even located by the police [was] sufficient to raise an inference in favor of the State that the defendant did in fact intend to keep the car permanently when he took it." 75 N.C. App. 294, 297-98, 330 S.E.2d 668, 670 (1985). Finally, abandonment of a car was similarly deemed sufficient evidence of intent of permanent deprivation in *State v. Allen*, where the "[d]efendant's abandonment of the vehicle . . . placed the vehicle beyond his power to return it to [the victim] and showed his indifference as to whether [the victim] ever recovered it." 193 N.C. App. 375, 381, 667 S.E.2d 295, 299 (2008).

These illustrative cases demonstrate that some additional facts beyond the taking itself must exist to prove an intent to permanently deprive the owner of possession. *Foy*, 131 N.C. at 805, 42 S.E. at 935; *Smith*, 268 N.C. at 173, 150 S.E.2d at 200. And, importantly, those decisions did not rely on force to show that particular form of intent; indeed, courts looked to other factors even in cases where force was present. *See Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200; *see also Jones*, 57 N.C. App. at 464, 291 S.E.2d at 872 (discovery of missing money stolen in an armed bank robbery alongside other unrelated stolen goods served to establish intent to permanently deprive, rather than use of weapons in robbery); *State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (2002) (abandonment of vehicle, rather than use of a weapon in the armed robbery, showed intent to permanently deprive owner of possession).

In contrast to the above cases, other precedents demonstrate that where the uncontroverted evidence contradicts the intent of permanent deprivation, dismissal of the larceny charge is proper. We applied this principle in *Matter of Raynor* to reverse the denial of a motion to dismiss a larceny charge, as all the evidence showed the juvenile defendant picked up a watch with the intention to play with it before voluntarily returning it when asked by its owner. 64 N.C. App. 376, 378-79, 307 S.E.2d 219, 221 (1983). *State v. Watts*, 25 N.C. App. 194, 212 S.E.2d 557 (1975), is even more compelling. There, after being threatened with a hammer and scissors, the victim gave the defendant his wallet and some credit cards. *Id.* at 195, 212 S.E.2d at 557. When the defendant demanded more money, the victim replied that he would be receiving his $150 paycheck later that morning. *Id.* The defendant responded by "agree[ing] that he would take the money but forced [the victim] to get his television set and place it and other items in a paper bag, which defendant would hold as security until [the victim] could get the money." *Id.* at 195, 212 S.E.2d at 557-58. We held that these facts were insufficient to show larceny of the television set, as "[a]ll of the evidence tends to show that [the defendant] took the set for the purpose of coercing the owner to pay him $150," rather than with an intent to permanently deprive the victim of the TV. *Id.* at 198, 212 S.E.2d at 559. Thus, in *Watts*, the use of force and the taking of other items were insufficient to show intent to permanently deprive the owner of possession of the TV when all the other uncontradicted evidence established the taking was for a temporary purpose only. *Id.*

We have not identified—and the State has not provided—any precedent upholding a denial of a motion to dismiss a larceny charge where: (1) the only alleged evidence of intent of permanent deprivation was the taking itself; and (2) all additional evidence disclosed an intent to accomplish only a temporary deprivation.[3] Indeed, such precedent

3. The State relies primarily on *State v. Walker*, where a jewelry thief was caught putting rings into his pocket on the salesroom floor. 6 N.C. App. 740, 742, 171 S.E.2d 91, 92 (1969). When the thief was confronted by an owner of the store, the thief dropped the rings, offered to be searched and, when told the police would be searching him, fled the premises before he was apprehended a few blocks away. *Id.* The central issue in *Walker* was not intent, but "the question of asportation," *id.* at 743, 171 S.E.2d at 93, which is an entirely different element than intent. *See State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (discussing "asportation, or carrying away" as an element of larceny (citation and quotation marks omitted)). Regardless, the defendant in *Walker* was initially apprehended and confronted by the store owner with the stolen goods in his possession, 6 N.C. App. at 742, 171 S.E.2d at 92, which is a well-recognized means of circumstantially demonstrating an intended permanent deprivation. *Smith*, 268 N.C. at 173, 150 S.E.2d at 200. Finally, unlike a truck—which is useful for innumerable purposes, both temporary and permanent—it is difficult to conceive of a reason for temporarily and illicitly taking a handful of rings and shoving them in one's pocket.

would be at odds with both our longstanding common law, *Foy*, 131 N.C. at 805-06, 42 S.E. at 935, and the logical notion that the lone act of taking does not indicate, one way or the other, whether the deprivation is intended to be permanent or temporary. The State's claim that Mr. Spera "took Mr. Perry's keys, without his consent, and permanently deprived Mr. Perry of his truck for some period of time," is internally inconsistent because "some period of time" essentially and logically concedes non-permanence. To hold that inferences drawn from the taking alone, with no other evidence related to the permanence of the taking, would permit the State to send larceny cases to the jury where only a lesser crime had been proven, eliminating the State's burden of proving the elements of the greater larceny offense. *See, e.g.*, *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980) (recognizing unauthorized use of a motor vehicle as a lesser-included offense of larceny that does not require showing intent of permanent deprivation).

Nor do threats of violence and the taking of some other objects of lesser value—not alleged in the larceny indictment—amount to sufficient evidence to support such an inference when the remaining uncontroverted facts show an intent to only accomplish a temporary deprivation. *See Watts*, 25 N.C. App. at 198, 212 S.E.2d at 559; *Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200. Again, consistent with logic and the absence of any caselaw to the contrary from the State, the use of force to accomplish a theft reveals an intent to wrongfully take an item, but it says nothing about the intended duration of the taking. *Compare Foy*, 131 N.C. at 805-06, 42 S.E. at 935 (noting use of force as circumstantial evidence showing an intent to wrongfully take possession of another's property), *with Smith*, 268 N.C. at 173, 150 S.E.2d at 200 (enumerating, without mention of force, facts that are generally considered sufficient to circumstantially show intent of permanent deprivation).

Turning to the specific evidence introduced in this case, there was insufficient evidence of an intent of permanent deprivation to send the misdemeanor larceny charge to the jury. Mr. Perry testified that Mr. Spera took the car on a "joy rid[e]," and Ms. Tarleton testified, without objection, that she "underst[ood] . . . [Mr. Perry and Mr. Taylor] were waiting until Luther [Weathers] came back with the truck so they could leave." And both witnesses testified that Mr. Spera returned the vehicle voluntarily, handed back the keys to Mr. Perry, and released him without harm. Mr. Perry also testified that Mr. Spera began the robbery by demanding "powder" and "must have assumed we were selling cocaine or something," suggesting Mr. Spera initially intended to steal drugs rather than permanently steal a truck. All of this uncontroverted evidence supports

only an inference of a temporary deprivation. *See Raynor*, 64 N.C. App. at 379, 307 S.E.2d at 221 (holding there was "*no* evidence whatsoever" of intent of permanent deprivation notwithstanding evidence that the item was initially recovered in the defendant's possession, as the defendant's testimony disclaimed such intent and uncontradicted evidence showed the item was voluntarily returned at the request of the purported victim (emphasis in original)).

No other facts support a contrary inference under the caselaw cited to this Court and reviewed above. While it is true that Mr. Spera threatened force and took the phone and keys from Mr. Perry, those facts do not overcome other uncontradicted evidence establishing a temporary deprivation only. *Watts*, 25 N.C. App. at 195, 212 S.E.2d 557-58; *Smith*, 268 N.C. at 172-73, 150 S.E.2d at 200; *cf. Raynor*, 64 N.C. App. at 379, 307 S.E.2d at 221. Any inference of a permanent deprivation from these facts amounts to mere conjecture and speculation insufficient to survive a motion to dismiss.

Having held that the trial court erred in denying Mr. Spera's motion to dismiss the larceny charge, we turn to the appropriate remedy. Mr. Spera argues that pure vacatur without remand is required, asserting that he was charged by indictment with larceny of property in excess of $1,000 and that unauthorized use of a motor vehicle is only a lesser-included offense of "larceny of a motor vehicle."[4] But our precedents establish that "[a]ll of the essential elements of the crime of unauthorized use of a conveyance, N.C.G.S. 14-72.2(a), *are included in larceny*, N.C.G.S. 14-72, and we hold that it may be a *lesser included offense of larceny* where there is evidence to support the charge." *Ross*, 46 N.C. App. at 339, 264 S.E.2d at 743 (emphasis added) (citation omitted); *see also State v. Hole*, 240 N.C. App. 537, 540, 770 S.E.2d 760, 763 (2015) (recognizing unauthorized use of a motor vehicle as a lesser-included offense of larceny but not possession of stolen goods). "Larceny of a motor vehicle" is not a separate or distinct offense from "larceny" under either our common law or statutes. *See, e.g.*, *State v. Allen*, 193 N.C. App. 375, 380, 667 S.E.2d 295, 299 (2008) (applying the common law elements of larceny and the related offense classification statute for larceny generally, N.C. Gen. Stat. § 14-72, to a conviction for "felonious larceny of a motor vehicle").

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4. We note that the indictment in this case did specifically assert "larceny of a motor vehicle," alleging Mr. Spera "did steal, take and carry away a motor vehicle, to wit, a 1984 Chevrolet truck . . . having a value of more than $1,000.00."

Nothing in *Ross* or related precedents limits unauthorized use of a motor vehicle as a lesser-included offense to indictments for "larceny of a motor vehicle" alone. Consistent with this caselaw, we vacate Mr. Spera's conviction for misdemeanor larceny and remand for entry of a judgment on the lesser-included offense of unauthorized use of a motor vehicle. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (holding that the proper remedy for an improperly denied motion to dismiss where the only unproved element was the element elevating the offense to the greater crime is vacatur of the judgment and remand for entry of judgment on the lesser-included offense, as "in finding defendant guilty of [the greater crime], the jury necessarily had to find facts establishing the [lesser] offense").

III. CONCLUSION

For the foregoing reasons, we vacate Mr. Spera's conviction for misdemeanor larceny in 17CRS052233 and remand for entry of a judgment on the lesser-included offense of unauthorized use of a motor vehicle. Beyond that, we find no error in his remaining convictions.

VACATED IN PART AND REMANDED.

Judges HAMPSON and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TERRELL WILEY

No. COA22-899

Filed 15 August 2023

Jury—juror qualifications—residency—split between two counties—relocation prior to reporting for jury service

The trial court in a murder prosecution did not abuse its discretion in excusing a juror from service after discovering that the juror was no longer a resident of the county where the proceedings were taking place (and therefore was unqualified per N.C.G.S. § 9-3 to serve as a juror). The juror informed the trial court that, at the time of trial, he was splitting his residence between the county where the court sat and a different county; however, because the juror admitted to moving to the different county one week before reporting

for jury service, it was within the court's discretion under N.C.G.S. § 15A-1211(d) to excuse the juror and replace him with an alternate.

Appeal by Defendant from Judgment entered 31 March 2022 by Judge William D. Wolfe in Person County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Terrell Wiley (Defendant) appeals from Judgment entered 31 March 2022 upon a jury verdict finding him guilty of First-Degree Murder. The Record before us tends to reflect the following:

On 10 September 2018, Defendant was indicted for First-Degree Murder. The matter came on for trial on 28 March 2022 in Person County Superior Court. On the third day of trial, 30 March 2022, the trial court noted a residency discrepancy with one of the jurors:

> THE COURT: All right. Let the record reflect the jury is not in the courtroom. This morning the Court was informed that one of our jurors -- and which juror is it, Mr. Clerk? Joshua Buchanan, number 4?
>
> THE CLERK: Yes. That's correct.
>
> THE COURT: All right. I was informed by the clerk that juror number 4 was having car trouble and was going to be significantly late. After consultation with counsel for both sides, I directed the sheriff to deploy to his location to bring him here. The sheriff has informed the Court that he did so, and that the juror was not present, that the people who were reported that he did not actually reside at that address, but instead lived in Durham County. I'm told that the juror actually pulled up to that location sometime while the sheriff was still there on -- on scene and confirmed that he did, in fact, live in Durham County and not in Person County. So what I'm going to do is I'm going to make inquiry of the individual juror as to whether or

not that is true. And if it is true, then I'm going to replace him with an alternate. Would you bring me juror number 4 only, please, Mr. Sheriff?

THE BAILIFF: Yes, sir.

THE COURT: All right. For the record, juror number 4, Mr. Joshua Buchanan, and only Mr. Buchanan, is now in the courtroom from the jury. Mr. Buchanan, I understand you had an issue getting here today?

JUROR BUCHANAN (4): Yes, sir. I had car trouble this morning.

THE COURT: Okay. There's nothing wrong with that, of course. That's outside of your control. But the sheriff told me that -- I sent him to go pick you up.

JUROR BUCHANAN (4): Yes, sir.

THE COURT: And he told me that when he got there that the people who were -- you weren't there, and the people who were said that you lived in Durham County.

JUROR BUCHANAN (4): Yes, sir. Just last week I moved to Durham County. But I don't currently have any mail going there or any way to prove I live in Durham County, so I didn't bring that up to the Court. I've been a resident of Roxboro for all my life. I just literally moved to Durham.

THE COURT: When was that?

JUROR BUCHANAN (4): I still don't -- last week. I still don't even have all my stuff moved in. Like half of my stuff is still at my mom's house versus where the sheriff showed up at. I'm still currently living in between both places because I currently work in Roxboro. So some nights I stay here and some nights I stay in Durham. I don't stay all the way -- I don't stay in Durham completely yet. I still haven't moved all my stuff there.

THE COURT: All right. Can I see counsel at the bench.

After a bench conference, the trial court dismissed Juror Buchanan to the jury room. The trial court then heard from both the State and defense counsel. The State asked the trial court to remove Juror Buchanan based on his statements—indicating he had moved and resided in Durham County—and replace him with one of the alternate

jurors. Defense counsel asked that Juror Buchanan remain on the jury, arguing Juror Buchanan had not established a residence in Durham County and had not terminated his residency in Person County.

The trial court then excused Juror Buchanan from the jury and replaced him with one of the alternate jurors. In excusing Juror Buchanan, the trial court and Juror Buchanan engaged in the following colloquy:

> THE COURT: All right. Mr. Buchanan, what I'm going to do is I'm going to excuse you from the jury and replace you with one of the alternates. Residency is one of the requirements to be a juror. All right. And that is something that if it has changed that you need to let the Court know as soon as possible if your -- yes, sir.
>
> JUROR BUCHANAN (4): I still live half in Roxboro.
>
> THE COURT: I understand.
>
> JUROR BUCHANAN (4): I'm not a full Durham County resident as of right now.
>
> THE COURT: I understand.
>
> JUROR BUCHANAN (4): I'm still staying here.
>
> THE COURT: I understand there was some -- some gray matter about it. It was a gray area for you. I get that. But it is of vital importance that you let the Court know that kind of thing. I'm not going to impose any sanction on you for that, you understand.
>
> JUROR BUCHANAN (4): Yes, sir.
>
> THE COURT: But that is one of the foundational things that you have to have to be a juror. So that's something, for example, when you were being asked about it -- because all the jurors were during jury selection -- what part of the county do you live in, that's the kind of answer you should have given. So what I'm going to do is I'm going to replace you with one of the alternates. Mr. Clerk, I'm going to direct that Mr. B[uchanan] not be paid for his jury service here this week. That's not based on any kind of contempt finding. It's based on the fact that he was never a proper juror for Person County because he's moved to Durham. Even though I realize you do split your residence right now, Mr. B[uchanan]. Okay. So you're excused.

On 31 March 2022, Defendant was found guilty of First-Degree Murder. Defendant was sentenced to life imprisonment without parole. On 5 April 2022, Defendant timely filed written Notice of Appeal.

Issue

The sole issue on appeal is whether the trial court abused its discretion in excusing a juror from service upon discovery the juror was no longer a resident of Person County.

Analysis

Defendant contends the trial court erred in removing Juror Buchanan from jury service upon discovery Juror Buchanan moved to Durham County. We disagree.

With respect to the qualification of jurors, N.C. Gen. Stat. § 9-3 provides: "All persons are qualified to serve as jurors and to be included on the master jury list who are citizens of the State and residents of the county . . . Persons not qualified under this section are subject to challenge for cause." N.C. Gen. Stat. § 9-3 (2021). Further, N.C. Gen. Stat. § 15A-1211(d) provides the trial court: "may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present." N.C. Gen. Stat. § 15A-1211(d) (2021). Such a determination is reviewed for an abuse of discretion. *State v. Nobles*, 350 N.C. 483, 513, 515 S.E.2d 885, 903 (1999).

In *State v. Tirado*, our Supreme Court noted that the trial court properly executed its authority under N.C. Gen. Stat. § 15A-1211 when determining an individual failed to meet the statutory requirements to serve as a juror when the individual admitted she was not a resident of the county where the trial took place. 358 N.C. 551, 574, 599 S.E.2d 515, 531 (2004). There, the prospective juror informed the trial court that she moved to Wake County, but her "permanent address" remained in Cumberland County "with [her] mom", where the trial was taking place. *Id.* at 573, 599 S.E.2d at 531. The trial court excused the prospective juror from service, concluding she was no longer a resident of Cumberland County. *Id.* at 574, 599 S.E.2d at 531.

Similarly, here, Juror Buchanan admitted he moved to Durham County prior to reporting for jury service. However, Juror Buchanan also informed the trial court he was living between both Durham County and Person County, noting "half of [his] stuff is still at [his] mom's house". In excusing Juror Buchanan, the trial court acknowledged Juror Buchanan "split" his residence, but ultimately concluded he was "never a proper juror for Person County because he's moved to Durham." This

conclusion is consistent with the Supreme Court's decision in *Tirado*. Because Juror Buchanan, like the prospective juror in *Tirado*, admitted to moving to a different county prior to reporting for jury service, it was within the trial court's discretion to excuse Juror Buchanan from further jury service. *Id.* Thus, the Record before us adequately establishes the trial court properly executed its discretionary authority under N.C. Gen. Stat. § 15A-1211(d) in determining Juror Buchanan failed to meet the statutory requirements to sit as a Person County juror. Therefore, the trial court did not abuse its discretion in excusing Juror Buchanan from jury service. Consequently, the trial court did not err in entering Judgment against Defendant.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the trial court's Judgment entered 31 March 2022.

NO ERROR.

Judges CARPENTER and STADING concur.

WILSON COUNTY BOARD OF EDUCATION, PETITIONER
v.
RETIREMENT SYSTEMS DIVISION, DEPARTMENT OF STATE TREASURER, TSERS BOARD OF TRUSTEES; TIM MOORE, NORTH CAROLINA SPEAKER OF THE HOUSE; AND PHILIP E. BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, RESPONDENTS

No. COA22-1027

Filed 15 August 2023

1. Jurisdiction—superior court—petition for judicial review—contested case—constitutional challenges to anti-pension-spiking statute

After an administrative law judge granted summary judgment for a county board of education (petitioner) in a contested case challenging anti-pension-spiking legislation, the superior court had jurisdiction to hear petitioner's as-applied constitutional challenges against the legislation on a petition for judicial review. The jurisdictional requirements under N.C.G.S. § 150B-43 were met where: petitioner was "aggrieved" by a final agency decision from the Retirement Systems Division of the Department of the State Treasurer (respondent),

which required petitioner to pay an additional pension contribution to a state employee pursuant to the legislation; the litigation stemmed from a contested case; and the administrative law judge's decision constituted a final agency decision that left petitioner without an administrative remedy and without any other adequate statutory procedure for judicial review.

2. Constitutional Law—Contracts Clause—anti-pension-spiking legislation—impairment of employment contract—impairment of contract between employer and retirement system

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), where the Retirement Systems Division of the Department of the State Treasurer (respondent) issued a final agency decision requiring petitioner to pay an additional contribution to one of its cap-exempt employees, the trial court erred in concluding that the statute violated the Contract Clause of the federal constitution. Petitioner failed to establish that the statute substantially impaired its employment contract with the employee where there was no record evidence showing that the additional contribution was significant in relation to all of the contributions petitioner made to the employee's pension throughout that employee's career, and where there was no evidence showing that the employee's salary increase toward the end of her career affected how the statute's benefit cap analysis applied to her. Further, petitioner failed to establish that it had an implied contract with respondent that gave petitioner a vested right in keeping constant the amounts it contributed to the state pension fund.

3. Constitutional Law—North Carolina—county school fund provision—challenge to anti-pension-spiking statute

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), the trial court erred in concluding that the statute violated Article IX, Section 7(a) of the state constitution, which requires county school

funds to be used exclusively for maintaining free public schools. In its as-applied challenge to the statute, petitioner failed to present any facts showing that the additional contributions required under the statute would undermine its ability to provide a sound basic education to children in the county or that such payments did not constitute a use that maintained free public schools.

4. Pensions and Retirement—anti-pension-spiking legislation—benefit cap on pensions—for state employees retiring after specific date—presumption against retroactive application

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), where the Retirement Systems Division of the Department of the State Treasurer (respondent) issued a final agency decision requiring petitioner to pay an additional contribution to one of its cap-exempt employees, the trial court erred in concluding that the statute violated the common law prohibition against applying statutes retroactively. Because the employee in this case retired in January 2018, and the statute's plain language indicated that it applied only to employees retiring on or after January 2015, the statute was not retroactively applied to the employee.

5. Parties—joinder—legislative officials—action challenging state statute—as-applied challenge

In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, where petitioner named the North Carolina Speaker of the House and the President Pro Tempore of the North Carolina Senate (respondents) as parties, the trial court erred in denying respondents' motion to dismiss the action against them because they were not proper parties to the action. Although Civil Procedure Rule 19 would have required joining respondents as defendants to a civil action challenging the facial validity of a North Carolina statute, petitioner's lawsuit only challenged the statute as it applied to petitioner.

Appeal by Respondents from orders entered 18 March 2022 and 13 June 2022 by Judge William D. Wolfe in Wilson County Superior Court. Heard in the Court of Appeals 7 June 2023.

Poyner Spruill LLP, by Laura E. Crumpler and Katie G. Cornetto, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for Respondents-Appellants.

COLLINS, Judge.

This case involves legislation passed by the General Assembly which established a contribution-based benefit cap on retirement benefits for certain State employees who retire on or after 1 January 2015. *See* N.C. Gen. Stat. § 135-5 (2022). The legislation is designed to control the practice of "pension spiking," where an employee's compensation substantially increases to create a retirement benefit that is significantly greater than the employee's contributions would fund. The Retirement Systems Division of the Department of the State Treasurer; the Teachers' and State Employees' Retirement System Board of Trustees; Tim Moore, North Carolina Speaker of the House; and Philip Berger, President Pro Tempore of the North Carolina Senate (collectively, "Respondents") appeal from the superior court's orders entered 18 March 2022 denying their Rule 12(b)(1), (2), and (6) motion to dismiss the Wilson County Board of Education's ("Petitioner") petition for judicial review and 13 June 2022 reversing the administrative law judge's grant of summary judgment in Respondents' favor and granting summary judgment in Petitioner's favor.

We hold that the superior court erred by concluding that N.C. Gen. Stat. § 135-5(a3) violates Article I, Section 10, of the United States Constitution; violates Article IX, Section 7(a), of the North Carolina Constitution; and was impermissibly retroactively applied to Petitioner. Furthermore, the superior court erred by denying Respondents' Rule 12(b)(6) motion to dismiss the action against Speaker Moore and President Pro Tempore Berger. Accordingly, we reverse.

I. Background

A. Statutory Background

The Teachers' and State Employees' Retirement System ("TSERS") provides retirement allowances, or pensions, for teachers and other types of employees of the State of North Carolina. N.C. Gen. Stat. § 135-2 (2022). Any member of TSERS who has vested in the system is entitled to receive a lifetime pension once eligible to retire, and the amount an employee is entitled to receive is determined by a statutory formula. *See id.* § 135-5.

The TSERS pension fund is funded by a combination of employee and employer contributions. *Id.* §§ 135-8(b), (d). The employee contribution rate is statutorily set at 6% of the employee's compensation and is automatically deducted from the employee's paycheck. *Id.* § 135-8(b)(1). An employer is required to contribute "a certain percentage of the actual compensation of each member[,]" known as the "normal contribution," and "an additional amount equal to a percentage of the member's actual compensation[,]" known as the "accrued liability contribution." *Id.* § 135-8(d)(1). The employer contribution rate fluctuates and is "calculated annually by the actuary using assumptions and a cost method . . . selected by the Board of Trustees." *Id.* § 135-8(d)(2a).

In 2014, the General Assembly enacted An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap (the "Act"), 2014 N.C. Sess. Laws 88, which is codified in relevant part by N.C. Gen. Stat. § 135-5(a3). The Act establishes a retirement benefit cap applicable to employees with an average final compensation greater than $100,000 whose pension would otherwise be significantly greater than the accumulated contributions[1] made by that employee during their employment with the State. N.C. Gen. Stat. § 135-5(a3). "Average final compensation" is defined as "the average annual compensation of a member during the four consecutive calendar years of membership service producing the highest such average[.]" *Id.* § 135-1(5).

The Act directs the TSERS Board of Trustees to establish a "contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped." *Id.* § 135-5(a3). For every member retiring on or after 1 January 2015, the TSERS Board of Trustees is required to perform the following analysis: (1) determine the amount of the employee's accumulated contributions to TSERS; (2) determine the amount of a single life annuity[2] that is the actuarial equivalent of the employee's accumulated contributions; (3) multiply the annuity by the contribution-based cap factor; and (4) calculate the employee's expected pension based upon the employee's membership service. *Id.*

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1. "Accumulated contributions" is defined as "the sum of all the amounts deducted from the compensation of a member and accredited to his individual account in the annuity savings fund[.]" N.C. Gen. Stat. § 135-1(1) (2022).

2. "Annuity" is defined as "payments for life derived from that 'accumulated contribution' of a member." N.C. Gen. Stat. § 135-1(3) (2022). "Actuarial equivalent" is defined as "a benefit of equal value when computed upon the basis of actuarial assumptions as shall be adopted by the Board of Trustees." *Id.* § 135-1(2).

If the employee's expected pension exceeds the calculated contribution-based benefit cap, the employee's pension will be capped. *Id.* If, however, an employee became a member of TSERS before 1 January 2015, the employee's pension will not be capped; instead, the employee's last employer must contribute the amount "that would have been necessary in order for the retirement system to restore the member's retirement allowance to the pre cap amount." *Id.* §§ 135-5(a3), 135-8(f)(2)(f).

B. Adoption of the Cap Factor

During a 23 October 2014 meeting, the TSERS Board of Trustees adopted a cap factor of 4.8 for retirements that became effective on or after 1 January 2015. During a 22 October 2015 meeting, the TSERS Board of Trustees adopted a cap factor of 4.5 for retirements that became effective on or after 1 January 2016. In late 2016, the Cabarrus County Board of Education requested a declaratory ruling from the Retirement Systems Division that the cap factor was invalid because the TSERS Board of Trustees did not adopt the cap factor through rulemaking pursuant to the Administrative Procedure Act ("APA"), and that an invoice sent by the Retirement Systems Division for an additional contribution was consequently void.[3] *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 328, 821 S.E.2d 196, 200 (2018). The Retirement Systems Division denied the requested ruling. *Id.* On judicial review, the superior court granted summary judgment in the school board's favor and this Court affirmed, holding that "[t]he Division erred in invoicing . . . [the Cabarrus County Board of Education] for any additional contributions pursuant to N.C.G.S. § 135-5(a3) because the cap factor adopted by the Board . . . was not properly adopted" through APA rulemaking. *Id.* at 328, 345, 821 S.E.2d at 200, 210. While the Retirement Systems Division's appeal to the appellate division was pending, the TSERS Board of Trustees engaged in rulemaking and established a cap factor of 4.5, the same value it had adopted during its 22 October 2015 meeting. *See* 20 N.C.A.C. 2B.0405. The rule adopting the cap factor became effective on 21 March 2019. *Id.*

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3. The Johnston County Board of Education, Wilkes County Board of Education, and Union County Board of Education also filed requests for declaratory rulings. *See Johnston Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 537, 817 S.E.2d 918 (2018) (unpublished); *Wilkes Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 540, 818 S.E.2d 199 (2018) (unpublished); *Union Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 539, 817 S.E.2d 919 (2018) (unpublished).

Our Supreme Court subsequently affirmed this Court's decision, holding that the TSERS Board of Trustees "was required to adopt the statutorily mandated cap factor utilizing the rulemaking procedures required by the Administrative Procedure Act[.]" *Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 374 N.C. 3, 25, 839 S.E.2d 814, 828 (2020). Shortly after the Supreme Court issued its decision, the General Assembly amended the APA to exempt the adoption of a contribution-based benefit cap factor from rulemaking. 2020 N.C. Sess. Law 48, sect. 4.1(c); N.C. Gen. Stat. § 150B-1(d)(30)(i) (2022).

C. The Instant Litigation

Petitioner first hired Susan Bullock (the "employee") in 1985. The employee had an average final compensation greater than $100,000 when she applied to retire effective 1 January 2018. After performing the calculations required by N.C. Gen. Stat. § 135-5(a3) and determining that Petitioner owed an additional contribution of $407,292.39 on behalf of the employee, the Retirement Systems Division sent Petitioner a notice of liability on 1 November 2017. Petitioner did not pay the additional contribution.

The Retirement Systems Division notified Petitioner on 21 May 2018 that it had recalculated the employee's pension based upon additional information and that Petitioner instead owed $401,763.96 on behalf of the employee. The Retirement Systems Division again notified Petitioner of the outstanding contribution on 8 March 2019. Petitioner sent a letter of appeal to the Retirement Systems Division on 6 May 2019, requesting that the notice of liability be withdrawn on the grounds that "the cap factor is unconstitutional" and the recently adopted cap factor rule was impermissibly retroactively applied to Petitioner. The Retirement Systems Division issued a final agency decision by letter dated 16 May 2019, concluding that "the assessment described in the March 8, 2019, letter is required by the laws governing TSERS, and will not be withdrawn."

Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings against the Retirement Systems Division and the TSERS Board of Trustees, alleging:

> [W]hen the invoice was sent to Petitioner here, the cap factor was not yet valid and any attempt to collect monies under a nonexistent rule cannot be enforced. Even if the rule had been in effect, it would not legally apply to a contract entered into prior to the statute's being enacted, and a retirement that occurred prior to the rule's adoption.

Petitioner alleged the following in its Prehearing Statement:

> Petitioner maintains that the rule cannot be applied to validate an invoice sent prior to the rule's effective date. Petitioner also maintains that the rule, effective March 21, 2019, cannot be applied to any retirement that occurred prior to the effective date of the rule. . . .
>
> Finally, Petitioner Wilson County Schools contends that the rule, and the statute upon which it is based, are both in violation of State and federal constitutional provisions.

The parties filed competing motions for summary judgment on 30 August 2021. On 29 September 2021, the administrative law judge ("ALJ") issued a final decision, denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment.

Petitioner filed a petition for judicial review in Wilson County Superior Court and added Tim Moore, North Carolina Speaker of the House, and Philip Berger, President Pro Tempore of the North Carolina Senate, as respondents. Petitioner alleged that the ALJ's final decision was erroneous because the Act is unconstitutional and impermissibly retroactive. Respondents moved to dismiss the petition for judicial review under Rules 12(b)(1), (2), and (6), asserting that the superior court lacked jurisdiction to hear constitutional challenges to the Act and seeking to dismiss the action against Speaker Moore and President Pro Tempore Berger for failure to state a claim against them. The superior court denied the motion to dismiss by written order entered 18 March 2022.

After a hearing on 19 May 2022, the superior court entered an order on 13 June 2022 reversing the ALJ's grant of summary judgment in Respondents' favor and granting summary judgment in Petitioner's favor. The superior court concluded, in relevant part:

> 9. Where the Petition raised issues as to the constitutionality of NCGS 135-(5)(a)(3), this [c]ourt considered those arguments only 'as applied' to Petitioner, and not as facial constitutional challenges to the statute.
>
> . . . .
>
> 11. NCGS 135-(5)(a)(3), as applied to Petitioner on these facts, is an unconstitutional impairment of an existing contract in violation of Article I, Section 10 of the US Constitution, within the reasoning and ambit of the holding in Bailey v. State, 348 NC 130 (1998).

> 12. NCGS 135-(5)(a)(3), as applied to Petitioner on these facts, operates in violation of the common law prohibition against retroactive statutes and rules, within the reasoning and ambit of the holdings in Hicks v. Kearney, 189 NC 316 (1925) and Pinehurst v. Derby, 218 NC 653 (1940).
>
> 13. NCGS 135-(5)(a)(3), as applied to Petitioner on these facts, violates Article IX, Section 7(a) of the North Carolina Constitution, providing in part "all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, *shall belong to and remain in the several counties*, and shall be faithfully appropriated and used exclusively for maintaining free public schools." (Emphasis added).
>
> 14. The Final Decision of the ALJ in this matter is in violation of constitutional provisions and affected by errors of law.

Respondents timely appealed.

II. Discussion

A. Jurisdiction

[1] Respondents first argue that the superior court lacked jurisdiction to hear Petitioner's constitutional challenges to the Act on a petition for judicial review. Petitioner insists that the superior court had jurisdiction to hear the constitutional issues. Following the precedent set by the North Carolina Supreme Court in *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998), we hold that the trial court had jurisdiction to hear Petitioner's constitutional challenges.

Under N.C. Gen. Stat. § 150B-43,

> Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute . . . .

N.C. Gen. Stat. § 150B-43 (2022). According to *Meads*,

> that statute sets forth five requirements that a party must satisfy before seeking review of an adverse administrative

> determination: "(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute."

349 N.C. at 669, 509 S.E.2d at 174 (quoting *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992)).

Here, Petitioner satisfied all five requirements. First, Petitioner was aggrieved by the Retirement Systems Division's final agency decision concluding that "the [$401,763.96] assessment described in the March 8, 2019, letter is required by the laws governing TSERS, and will not be withdrawn." *See* N.C. Gen. Stat. § 150B-2(6) (2022) (defining "[p]erson aggrieved" as "[a]ny person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision"). Second, this is a contested case involving an administrative proceeding to resolve a dispute between the Retirement Systems Division and Petitioner regarding Petitioner's rights and duties under the Act. *See id.* § 150B-2(2) (defining "[c]ontested case" as "[a]n administrative proceeding pursuant to [the APA] to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges"). Furthermore, under the Supreme Court's analysis in *Meads*, the final three requirements are met because the ALJ's decision constituted a final agency decision which left Petitioner without an administrative remedy and no other adequate statutory procedure for judicial review. *See Meads*, 349 N.C. at 670, 509 S.E.2d at 174 (addressing the constitutionality of an administrative rule where the superior court addressed the constitutional challenge on a petition for judicial review from the Pesticide Board, an administrative agency subject to the APA); *see also In re Civil Penalty*, 92 N.C. App. 1, 7, 373 S.E.2d 572, 576 (1988) (reviewing the constitutionality of a statute on a petition for judicial review where the trial court addressed it sua sponte), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989); *see also*, *e.g.*, *In re Redmond*, 369 N.C. 490, 497, 797 S.E.2d 275, 280 (2017) (holding that the Court of Appeals had jurisdiction to review the constitutionality of a statute on appeal from the Industrial Commission as "the first destination for the dispute in the General Court of Justice").

Respondents argue that a superior court has limited jurisdiction on a petition for judicial review and therefore may not determine the constitutionality of a statute. This argument, however, is contrary to well-settled law that the judiciary may determine the constitutionality

of a statute, but an administrative board may not. *See Meads*, 349 N.C. at 670, 509 S.E.2d at 174; *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961). Because it is the province of the judiciary to determine constitutional issues, any effort made by Petitioner to have the constitutionality of the Act determined by the ALJ would have been unsuccessful. Accordingly, following *Meads*, as Petitioner satisfied the requirements under N.C. Gen. Stat. § 150B-43, Petitioner was entitled to judicial review of its constitutional challenges to the Act.

B. Substantive Challenges to the Superior Court's Order

Respondents argue that the superior court erred by concluding that the Act violates Article I, Section 10, of the United States Constitution and Article IX, Section 7(a), of the North Carolina Constitution. Respondents also argue that the trial court erred by concluding that the statute was impermissibly retroactively applied to Petitioner.

1. Standard of Review

On a petition for judicial review, the superior court reviews de novo whether a final agency decision is "in violation of constitutional provisions" or "affected by other error of law[.]" N.C. Gen. Stat. §§ 150B-51(b), (c) (2022). Under de novo review, the court "considers the matter anew[] and freely substitutes its own judgment for the agency's." *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 121, 619 S.E.2d 862, 864 (2005) (quotation marks and citation omitted). An appellate court reviewing a superior court's order regarding a final agency decision must determine whether the superior court exercised the appropriate scope of review and, if appropriate, determine whether the trial court did so properly. *EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018).

2. Article I, Section 10, of the United States Constitution

[2] Respondents argue that the superior court erred by concluding that the Act "is an unconstitutional impairment of an existing contract in violation of Article I, Section 10 of the US Constitution[.]"

The Contract Clause states, in relevant part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const. art. I, § 10. "[T]he Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (citations omitted). "In determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust*[.]" *Bailey v. State*, 348 N.C. 130, 140-41, 500 S.E.2d 54, 60 (1998).

"The *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141, 500 S.E.2d at 60 (citation omitted).

Petitioner argues that "there were two contracts in existence that suffered impairment by the [Act]": the employment contract between Petitioner and the employee and "an implied contract" between Petitioner and the Retirement Systems Division.

a. Alleged Contract between Petitioner and the Employee

There is no employment contract between Petitioner and the employee in the record. Nonetheless, even assuming such contract exists, there is no evidence in the record that the contract has been unconstitutionally impaired by the Act. "When examining whether a contract has been unconstitutionally impaired, the inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. . . . Minimal alteration of contractual obligations may end the inquiry at [this] stage." *Id.* at 151, 500 S.E.2d at 66 (quotation marks and citation omitted).

The record contains an affidavit from Dr. Lane Mills, Superintendent of Wilson County Schools. Mills averred that the employee was first employed by Petitioner in 1985 and served in various roles through 2013. Petitioner entered into an employment contract with the employee on 1 July 2013 to serve as Assistant Superintendent of Instructional Services for $130,000. The employee's salary was increased by 5% pursuant to an amendment to the contract in 2014. The employee retired effective 1 January 2018.

Aside from the $401,763.96 invoice, there is no record evidence of Petitioner's contributions to TSERS during the employee's approximately 33 years of employment. Thus, there is no record evidence that the additional contribution was significant in relation to Petitioner's contributions to TSERS during the employee's career. Furthermore, there is no record evidence showing how the employee's salary increase affected the outcome of the contribution-based benefit cap analysis. The employee's salary was increased by 5% pursuant to an amendment to her employment contract in 2014, but Mills' affidavit does not state when the salary increase became effective. If the employee's salary increase took effect after the Act was enacted on 30 July 2014 and resulted in the contribution-based benefit cap factor analysis concluding that an additional contribution was required, then the Act did not impair the

employment contract. Accordingly, Petitioner has failed to establish that the Act substantially impaired its employment contract with the employee. As such, we need not analyze whether the impairment was reasonable and necessary to serve an important public purpose.

b. Alleged Implied Contract between Petitioner and the Retirement Systems Division

Petitioner argues that an implied contract "assumed that, in exchange for [Petitioner's] compliance with expected contributions on behalf of this [e]mployee, [Petitioner] had met its obligation under the law and there would not be a penalty down the road pursuant to legislation not in existence at the time [Petitioner] contracted to be bound for those contributions." However, Petitioner cites no authority to support its proposition that such an implied contract existed, or that it has a vested right in keeping constant its amount of contribution to the TSERS pension fund.

N.C. Gen. Stat. § 135-8(d)(1) provides that an employer is required to contribute "a certain percentage of the actual compensation of each member[,]" known as the "normal contribution," and "an additional amount equal to a percentage of the member's actual compensation[,]" known as the "accrued liability contribution." N.C. Gen. Stat. § 135-8(d)(1). By statute, the employer contribution rate fluctuates annually based upon an actuarial valuation, *see id.* § 135-8(d)(2a), and in recent years has steadily increased.[4] For an employee who became a member of TSERS before 1 January 2015, the employee's last employer must make an additional contribution "to restore the member's retirement allowance to the pre cap amount." *Id.* §§ 135-5(a3), 135-8(f)(2)(f). There is no set rate that an employer must contribute, but rather it fluctuates to remedy gaps in the pension fund. Petitioner has therefore failed to show that the General Assembly manifested a clear intention to be contractually bound to keep constant the amount an employer is required to contribute to the pension fund. *See N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786-87, 786 S.E.2d 255, 262-63 (2016). Accordingly, Petitioner has failed to show that a contractual obligation was present. As such, we need not analyze whether the Act impaired a contract or whether

4. The employer contribution rate has increased from 10.78% of compensation for the fiscal year ending 30 June 2018, 2017 N.C. Sess. Laws 57, sect. 35.19(b); to 12.29% in the fiscal year ending 30 June 2019, 2018 N.C. Sess. Laws 5, sect. 35.27; to 12.97% in the fiscal year ending 30 June 2020, 2019 N.C. Sess. Laws 209, sect. 3.15(b); to 14.78% in the fiscal year ending 30 June 2021, 2020 N.C. Sess. Laws 41, sect. 1(a); to 16.38% in the fiscal year ending 30 June 2022, 2021 N.C. Sess. Laws 180, sect. 39.22(b); and to 17.38% for the fiscal year ending 30 June 2023, 2022 N.C. Sess. Laws 74, sect. 39.19.

the impairment was reasonable and necessary to serve an important public purpose.

Accordingly, the superior court erred by concluding that the Act violated Article I, Section 10 of the United States Constitution.

3. Article IX, Section 7(a), of the North Carolina Constitution

[3] Respondents argue that the superior court erred by concluding that the Act impaired the ability of Petitioner to provide a sound basic education, in violation of Article IX, Section 7(a), of the North Carolina Constitution.

Article IX, Section 7(a), of the North Carolina Constitution states:

> [A]ll moneys, stocks, bonds, and other property belonging to a county school fund . . . shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7(a).

Petitioner has failed to present in its as-applied challenge any facts in the form of affidavits, testimony, or otherwise that the payment at issue in this case would undermine its ability to provide a sound basic education to Wilson County children. Furthermore, Petitioner has failed to show that paying its employees the deferred compensation to which they are entitled is not a use that maintains free public schools.

Accordingly, the superior court erred by concluding that the Act violates Article IX, Section 7(a), of the North Carolina Constitution.

4. Retroactivity

[4] Respondents argue that the superior court erred by concluding that the Act "operates in violation of the common law prohibition against retroactive statutes and rules, within the reasoning and ambit of the holdings in Hicks v. Kearney, 189 NC 316 (1925) and Pinehurst v. Derby, 218 NC 653 (1940)" because the Act applies prospectively to this retirement.

In *Bank of Pinehurst v. Derby*, our Supreme Court set forth the general proposition that a statute must be construed as prospective unless it specifically states otherwise:

> There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to

> them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action, only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operations will be to destroy a vested right or to render the statute unconstitutional.

Bank of Pinehurst v. Derby, 218 N.C. 653, 658, 12 S.E.2d 260, 263-64 (1940) (quoting *Hicks v. Kearney*, 189 N.C. 316, 319, 127 S.E. 205, 207 (1925)).

Here, the Act provides that "every service retirement allowance . . . for members who retire on or after January 1, 2015, is subject to adjustment pursuant to a contribution-based benefit cap[.]" N.C. Gen. Stat. § 135-5(a3). The Act further provides that "the retirement allowance of a member who became a member before January 1, 2015 . . . shall not be reduced; however, the member's last employer . . . shall be required to make an additional contribution[.]" *Id.* The plain language of the Act indicates that it applies to any retirement allowance for a member who retires on or after 1 January 2015. Because the employee in this case retired on 1 January 2018, three years after Act took effect, the statute was not retroactively applied to Petitioner.

Petitioner argues that "the retroactivity of which Petitioner complains is the application of this statute and Rule to the rights that vested at the time these parties entered into employment contracts." However, as discussed above, Petitioner does not have a vested right in keeping constant its contributions to the TSERS pension fund.

Because the employee in this case retired on 1 January 2018 and the Act applies to retirements that occur on or after 1 January 2015, the superior court erred by concluding that the Act was impermissibly retroactively applied to Petitioner.

C. Dismissal of Action against Speaker Moore and President Pro Tempore Berger

[5] Respondents argue that the superior court erred by denying their Rule 12(b)(6) motion to dismiss because Speaker Moore and President Pro Tempore Berger "are not proper parties to this administrative action[.]" (capitalization altered).

North Carolina Rule of Civil Procedure 19 states, "The Speaker of the House of Representatives and the President Pro Tempore of the

Senate . . . must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." N.C. Gen. Stat. § 1A-1, R. 19(d) (2022). "There is a difference between a challenge to the facial validity of a statute as opposed to a challenge to the statute as applied to a specific party." *State v. Shackelford*, 264 N.C. App. 542, 550, 825 S.E.2d 689, 695 (2018) (brackets and citations omitted). "The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Id.* (citations omitted). "Only in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant." *Id.* (citations omitted).

Here, Petitioner acknowledges that, although it did not challenge the facial validity of the Act, it added Speaker Moore and President Pro Tempore Berger as parties to its petition for judicial review "in an abundance of caution." Although Petitioner asserted as-applied constitutional challenges in its petition for judicial review, this alone did not convert it into a "civil action challenging the validity of a North Carolina statute[.]" N.C. Gen. Stat. § 1A-1, R. 19(d); *see also M.E. v. T.J.*, 380 N.C. 539, 564, 869 S.E.2d 624, 640 (2022). Because Petitioner did not challenge the facial validity of a North Carolina statute, Speaker Moore and President Pro Tempore Berger were not proper parties to the petition for judicial review and the superior court therefore erred by denying Respondents' Rule 12(b)(6) motion to dismiss.

III. Conclusion

We reverse the superior court's 13 June 2022 order reversing the ALJ's grant of summary judgment in Respondents' favor and granting summary judgment in Petitioner's favor because the Act does not violate Article I, Section 10, of the United States Constitution; does not violate Article IX, Section 7(a), of the North Carolina Constitution; and is not retroactively applied to Petitioner. Furthermore, we reverse the superior court's 18 March 2022 order denying Respondents' Rule 12(b)(6) motion to dismiss because Speaker Moore and President Pro Tempore Berger were not proper parties to the petition for judicial review.

REVERSED.

Judges DILLON and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 AUGUST 2023)

ABBOTT v. ABERNATHY No. 22-901	Mecklenburg (19CVS16593)	Affirmed.
IN RE B.R.C. No. 23-34	Robeson (21JT132)	Reversed
IN RE CAMPBELL No. 22-842	Orange (22CVS19)	Dismissed
IN RE D.A. No. 23-15	Forsyth (19JT208-210)	Affirmed
IN RE G.P.C. No. 22-913	Wake (20JT91)	Affirmed
IN RE I.J.M. No. 22-1021	Vance (18JT15) (18JT16) (18JT17)	Reversed
IN RE K.H. No. 22-738	Durham (22SPC50027)	Affirmed in Part; Reversed and Remanded in part
IN RE M.G.G. No. 23-84	Chatham (21JT3)	Affirmed
IN RE P.W. No. 22-912	Forsyth (20JT205)	Affirmed
IN RE R.D. No. 22-826	Forsyth (14JT211)	Affirmed
IN RE R.L.R. No. 22-995	Iredell (22JT46)	AMENDED ORDER: VACATED. INITIAL ORDER: REVERSED.
LANGTREE DEV. CO., LLC v. JRN DEV., LLC No. 22-1016	Iredell (20CVS107)	No Error
LOWREY v. CHOICE HOTELS INT'L, INC. No. 22-837	Durham (19CVS3400)	Vacated and Remanded.

McLAUGHLIN v. ROYAL HOMES REALTY OF NC, LLC No. 22-941	Guilford (19CVS5691)	Affirmed
McMURRAY v. McMURRAY No. 22-904	Wake (21CVD5867)	Affirmed
MONELL v. HUBBARD No. 22-1071	Mecklenburg (22CVD600957)	Affirmed
OXFORD HOUS. AUTH. v. GLENN No. 22-841	Granville (21CVD799)	Reversed
SAVAGE v. N.C. DEP'T OF TRANSP. No. 22-673	Office of Admin. Hearings (20OSP01641)	Reversed
STATE v. BEATTY No. 22-948	Lincoln (20CRS51449)	Affirmed
STATE v. BRYANT No. 22-876	Bladen (20CRS50381)	No Error
STATE v. CONNELLY No. 22-789	Mecklenburg (19CRS231598-99) (19CRS28353)	No Error
STATE v. GRISSETT No. 22-200	Vance (17CRS51798)	No Error
STATE v. MARTIN No. 22-963	Wilkes (20CRS51076-77)	No Error; Remand on Attorney's fees
STATE v. RICHARD No. 22-357	Randolph (19CRS52463)	No Error
STATE v. RODGERS No. 22-632	Mecklenburg (19CRS236872-74)	No Error
TRULL v. CHAVEZ No. 22-729	Mecklenburg (19CVS19809)	Affirmed

B & D INTEGRATED HEALTH SERVICES, PETITIONER
v.
NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, AND ITS AGENT ALLIANCE HEALTH, RESPONDENT

No. COA23-44

Filed 5 September 2023

1. Jurisdiction—Office of Administrative Hearings—contested case—termination of Medicaid contract—adverse determination

The Office of Administrative Hearings (OAH) had subject matter jurisdiction to hear a contested case regarding the partial termination of a contract for the provision of mental health services to Medicaid beneficiaries because respondent—which, as a legally authorized agent of the state agency charged with administering the Medicaid program in North Carolina, was a "Department" as defined by statute—had initiated an "adverse determination," as defined by statute, against petitioner—a healthcare provider contracted by respondent to provide certain mental health services to respondent's plan members—by terminating three services provided by petitioner and seeking to recover a Medicaid overpayment.

2. Administrative Law—petition for judicial review—termination of Medicaid contract—post hoc rationalization

In a contested case hearing initiated by petitioner challenging the partial termination of its contract for the provision of mental health services to Medicaid beneficiaries, the trial court did not err when it affirmed the decision of the Office of Administrative Hearings (OAH) upholding the termination of the contract by respondent (a Local Management Entity/Managed Care Organization contracted by the State to coordinate certain healthcare under the Medicaid program). The trial court did not engage in impermissible post hoc rationalization by reviewing other contract provisions than the ones referenced by respondent, which had terminated services for cause based on allegations of petitioner's poor performance, since, even if those allegations were false, the contract allowed respondent to terminate for any reason, whether for cause or for convenience.

3. Administrative Law—contested case—termination of Medicaid contract—state agency's motion to dismiss

In a contested case initiated by petitioner—a healthcare provider, challenging the partial termination of its contract with a Local

Management Entity/Managed Care Organization (LME/MCO) to provide certain mental health services to Medicaid beneficiaries—against the state agency charged with administering the Medicaid program in this state and against the LME/MCO contracted by the state to coordinate the provision of certain healthcare, the Office of Administrative Hearings did not err by denying the state agency's motion to dismiss, and the trial court properly affirmed that decision. Despite the agency's argument that it had no authority to overturn the decision of the LME/MCO to terminate some of petitioner's services, any discretion or authority of the LME/MCO—which operated as an agent of the State—regarding the contract with petitioner flowed directly from the agency.

Appeal by defendant from judgment entered 10 August 2022 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 9 August 2023.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for the petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General, by Dylan C. Sugar, for the respondent-appellee.

Alliance Health, by Assistant General Counsel Jacqueline M. Perez, and John A. Parris, for the respondent-appellee.

TYSON, Judge.

B & D Integrated Health Services ("B & D Health") appeals from an order entered on 10 August 2022 denying its petition for judicial review. The petition sought review to reverse, vacate, or modify an Office of Administrative Hearings' ("OAH") decision entered on 22 December 2021, which upheld Alliance Health's ("Alliance") termination for three healthcare services B & D Health had provided to Alliance's plan members and assessed an $86,459.67 overpayment. We affirm.

I. Background

This dispute arises from a contractual agreement between B & D Health and Alliance. The contract outlined the mental health services B & D Health was permitted and obligated to provide to Alliance's plan members, who are Medicaid beneficiaries.

A complex set of statutory and regulatory provisions, enacted and promulgated by both the federal and state governments, govern Medicaid agreements. *See Friedman v. Berger*, 409 F. Supp. 1225, 1225-26 (S.D.N.Y. 1976) ("The Medicaid statute (as is true of other parts of the Social Security Act) is an aggravated assault on the English language, resistant to attempts to understand it. The statute is complicated and murky, not only difficult to administer and to interpret but a poor example to those who would like to use plain and simple expressions.").

Medicaid is a taxpayer-funded insurance program, which provides healthcare coverage and benefits to individuals and families whose income fall below certain thresholds. *Arkansas Dep't. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 164 L. Ed. 2d 459 (2006). The North Carolina Department of Health and Human Services ("NC DHHS") is the state agency responsible for administering North Carolina's Medicaid program. N.C. Gen. Stat. § 108A-54 (2021); State Plans for Medical Assistance, 42 U.S.C. § 1396a(a)(5) (requiring each state to have an "establishment or designation of a single State agency to administer or to supervise the administration" of its Medicaid program).

NC DHHS contracts with organizations to coordinate and manage mental health services for Medicaid beneficiaries, instead of directly administering services or contracting with providers. Those organizations are referred to as a Local Management Entity/Managed Care Organization ("LME/MCO"). LMEs/MCOs are private organizations, which are paid a flat fee per plan member by the state to manage mental healthcare services for its members.

Alliance is an LME/MCO and is required to enroll, monitor, credential, and compensate providers to provide Medicaid mental health services. N.C. Gen. Stat. §§ 122C-115.4, 122C-3(20c) (2021). Alliance contracted with B & D Health to provide certain medically-necessary mental health services, as were provided in the contract.

Alliance issued a Notice of Termination of Services, Probation, and Overpayment to B & D Health on 21 April 2021. B & D Health requested a reconsideration hearing, which was held on 7 June 2021. Alliance partially overturned its original decision and reduced the overpayment amount due from $88,708.91 to $86,459.67, but the termination of three services and probationary period remained unchanged and in effect. Alliance again conducted a second-level consideration at B & D Health's request. Alliance upheld its termination of the contract and notified B & D Health the second decision was final.

B & D Health filed a Petition for a Contested Case in the OAH on 23 July 2021, contesting Alliance's termination of the contract under N.C.

Gen. Stat. § 108C-12 (2021) and seeking various remedies. B & D Health named Alliance and NC DHHS as respondents in its OAH petition.

Alliance filed a Motion for Summary Judgment on 29 November 2021. The OAH granted Alliance summary judgment regarding all issues on 22 December 2021.

B & D Health petitioned the Wake County Superior Court for judicial review on 20 January 2022. The Superior Court adopted the findings of fact and conclusions of law contained in the OAH decision and held B & D Health's arguments were without merit on 10 August 2022. B & D timely appeals.

II. Jurisdiction

Judicial review of the final decision of an administrative agency in a contested case is governed by N.C. Gen. Stat. § 150B-51 (2021), which "governs both trial and appellate court review of administrative agency decisions." *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995). *See also* N.C. Gen. Stat. § 150B-43 (2021).

Additionally, N.C. Gen. Stat. § 150B-45(a) (2021) provides any party wishing to appeal the final decision of an Administrative Law Judge ("ALJ") made pursuant to the NCAPA "must file a petition [in Superior Court] within 30 days after the person is served with a written copy of the decision." *See also* North Carolina Administrative Procedure Act ("NCAPA"), N.C. Gen. Stat. §§ 150B-1 to -52 (2021). This Court possesses jurisdiction over a final decision of the Superior Court. N.C. Gen. Stat. § 7A-27 (2021).

III. Issues

B & D Health argues the OAH lacked subject matter jurisdiction and the decision entered on 10 December 2021 should be vacated. B & D Health also asserts the Superior Court engaged in an impermissible *post hoc* rationalization to support the OAH' decision.

NC DHHS argues it was not a necessary party to the appeal, and the Wake County Superior Court properly held OAH erred by denying NC DHHS' motion to dismiss pursuant to N.C. Gen. Stat. § 122C-3(20c). NC DHHS asserts the portion of the Superior Court's order reversing OAH' decision to deny NC DHHS' motion to dismiss should be affirmed.

IV. Subject Matter Jurisdiction

[1] B & D Health argues the OAH lacked subject matter jurisdiction to hear its petition and the ALJ's decision to grant Alliance's motion for summary judgment and the superior court's affirmance thereof must be vacated.

A. Standard of Review

"The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (quotation omitted).

"Subject matter jurisdiction is a question of law that this Court reviews *de novo*." *Tillett v. Town of Kill Devil Hills*, 257 N.C. App. 223, 224, 809 S.E.2d 145, 147 (2017).

B. Analysis

B & D Health's intentional decision to file a contested case in the OAH, to actively seek a decision from OAH, and to argue in its filings the OAH possessed subject matter jurisdiction over the matter pursuant to N.C. Gen. Stat. § 108C-12 does not waive any defects in subject matter jurisdiction. "Lack of subject matter jurisdiction cannot be waived and can be raised at any time, including for the first time on appeal to this Court." *Water Tower Office Assocs. v. Town of Cary Bd. of Adjust.*, 131 N.C. App. 696, 698, 507 S.E.2d 589, 591 (1998) (citation omitted).

Likewise, a forum selection clause does not determine whether a tribunal has subject matter jurisdiction. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143-44, 423 S.E.2d 780, 782-83 (1992). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, i.e., as if it had never happened." *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013) (citation omitted).

N.C. Gen. Stat. § 108C-12(b) governs the requirements for providers participating in the Medicaid Program: "(b) Appeals.—Except as provided by this section, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes." The plain reading of this statute grants Providers the right to use the contested case procedures under the NCAPA to request a hearing before the OAH for any "adverse determination." *See* NCAPA, N.C. Gen. Stat. §§ 150B-1 to -52. "Adverse determination" is a term of art that incorporates two other definitions, "department" and "applicant," which are defined in Chapter 108C.

"Department" is a defined term in N.C. Gen. Stat. § 108C-2(3) (2021). Alliance is included in the definition of a "Department", as Alliance is a "legally authorized agent[ ], contractor[ ], or vendor[ ]" who "assess[es], authorize[s], manage[s], review[s], audit[s], monitor[s], or provide[s] services pursuant to . . . any waivers of the federal Medicaid Act granted by the United States Department of Health and Human Services." *Id.*

Alliance operates under "the combined Medicaid Waiver program authorized under Section 1915(b) and Section 1915(c) of the Social Security Act or to operate a BH IDD tailored plan." N.C. Gen. Stat. § 122C-3(20c). *See* Compliance with State Plan and Payment Provisions, 42 U.S.C. § 1396n(b)-(c) (outlining § 1915(b) and § 1915(c) waivers for certain components of § 1915 of the Social Security Act).

"Applicant" is also a defined term under N.C. Gen. Stat. § 108C-2(2). B & D Health qualifies as an "applicant" under this definition because it is a "partnership, group, association, corporation, institution, or entity that applies to the Department for enrollment as a provider in the North Carolina Medical Assistance Program." *Id.*

An "adverse determination" encompasses any "final decision by the *Department*," including Alliance, "to deny, terminate, suspend, reduce, or recoup a *Medicaid payment* or to *deny, terminate, or suspend a provider's or applicant's* participation in the Medical Assistance Program." N.C. Gen. Stat. § 108C-2(1) (emphasis supplied).

Here, Alliance, a statutorily-defined "Department", sought to reduce or recoup a Medicaid overpayment of taxpayer funds. Alliance also sought to deny, terminate, or suspend the ability of an "applicant", B & D Health, to provide certain services. *Id.* B & D Health argues the OAH' decision was not an "adverse determination" because its providers were still allowed to participate in the Medicaid program. Nevertheless, Alliance's termination and suspension of three of those services prevented B & D Health from providing those services to *all* Medicaid beneficiaries its providers could treat. Alliance is the sole LME/MCO for the region where B & D Health is located. Only providers, who contract with Alliance, can provide those services to Medicaid beneficiaries in that region.

The OAH possesses subject matter jurisdiction over this matter. N.C. Gen. Stat. §§ 108C-2(1)-(3), 108C-12. B & D Health was allowed to seek judicial review under the NCAPA from the Wake County Superior Court and further review from this Court. N.C. Gen. Stat. §§ 150B-45, 7A-27.

As the OAH possesses subject matter jurisdiction over the issues and the parties pursuant to the NCAPA, this matter is properly before us as a final judgment from review by the Superior Court. N.C. Gen. Stat. §§ 150B-1 to -52, 108C-2(1)-(3), 108C-12, 7A-27.

V. *Post Hoc* Rationalization

[2] B & D Health argues the Superior Court engaged in impermissible *post hoc* rationalization by examining other contract provisions

contained within the contract between B & D Health and Alliance, which allows either party to terminate the agreement at any time as long as proper prior notice was given. B & D Health asserts the OAH was prohibited from looking at any other contract provisions allowing Alliance to terminate the contract for "convenience," as Alliance had purportedly terminated the three mental health services for "cause."

A. Standard of Review

"We review a trial court's order granting or denying summary judgment *de novo*." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

B. Analysis

The OAH' decision granting summary judgment in favor of Alliance concluded:

> 50. Petitioner has raised the issue that Alliance purports to terminate the contract not for *convenience*, but for *cause* – Petitioner's alleged, and to date unproven, poor performance.
>
> . . .
>
> Put summarily, even if Petitioner proves that Alliance's allegations regarding its performance were inaccurate or even false, Alliance had the right to terminate the contract on 30 days' notice for any reason at all, or for no reason. Thus, as in *Family Innovations*, whether Alliance's allegations of poor performance are accurate is ultimately immaterial.

The OAH concluded, even if Alliance's allegations that B & D Health had poor performance on those three mental health services were false, B & D Health could not assert a successful claim. The contract permitted Alliance to terminate the contract for convenience or for any reason as long as 30 days' prior notice was given. *See* 10A N.C. Admin. Code 27A.0106(b)(6) (providing the mandatory contract provisions required between LMEs/MCOs and providers). This contractual agreement for termination is standard in all LME/MCO contracts and is required by state law. *See* N.C. Gen. Stat. § 122C-142(a) (2021). B & D Health could not show any genuine issue of material fact exists, and Alliance's motion for summary judgment was properly granted.

This Court has recently decided two factually similar, though non-precedential, cases. As cited by the ALJ, in *Family Innovations*, a provider disputed another LME's/MCO's decision to terminate certain mental health services that received a below-target score. *Fam. Innovations, LLC v. Cardinal Innovations Healthcare Sols.*, 277 N.C. App. 659, 858 S.E.2d 144, 2021 N.C. App. LEXIS 262, 2021 WL 2201606, at *1 (2021) (unpublished). This Court held:

> Under the unambiguous terms of the Contract, Cardinal [the LME/MCO] was expressly permitted to terminate a service with Family Innovations for "no reason or any reason." Cardinal was permitted to terminate a service from the Contract for no reason at all, and Family Innovations understood it was bound by these terms. Accordingly, it is immaterial whether Cardinal was mistaken in its evaluation of Family Innovations' performance.
>
> In a previous unpublished case from our Court, we reached the same conclusion. *See Serenity Counseling & Res. Ctr. v. Cardinal Innovations Healthcare Sols.*, 256 N.C. App. 399, 806 S.E.2d 74, 2017 N.C. App. LEXIS 927, 2017 WL 5146374 (2017) (unpublished). The case involved an almost identical contract between Cardinal and another provider, with whom Cardinal canceled a service. *Id.* at *2-4. Although the *Serenity Counseling* case involved more issues, our Court used the same reasoning to affirm the lower court's motion to dismiss. *Id.* at *7. We find the case persuasive here.

Id. at *2.

The facts at bar are similar to those in *Family Innovation*s. Even if Alliance's allegations regarding B & D Health's performance were shown to be false, Alliance was contractually allowed to terminate the contract without cause or any reason. No genuine issue of material fact exists. The trial court did not err by granting Alliance's motion for summary judgment. The Superior Court's order upholding the OAH' decision and to grant summary judgment in favor of Alliance is affirmed. *Id.*; *Craig*, 363 N.C. at 337, 678 S.E.2d at 354.

VI. NC DHHS' Motion to Dismiss

[3] NC DHHS filed a motion to dismiss on 4 August 2021, seeking dismissal from the matter initiated by B & D Health pending before the OAH. The OAH denied NC DHHS' motion to dismiss in a separate written order on 20 August 2021.

NC DHHS responded to B & D Health's petition to the Superior Court for judicial review on 24 February 2022. In its response, NC DHHS sought "review of the Final Decision and Order of Dismissal entered by the North Carolina Office of Administrative Hearings ("OAH") on December 22, 2021[.]" NC DHHS argued: (1) the OAH lacked subject matter jurisdiction over NC DHHS, and (2) it was "neither a proper or necessary party at OAH nor to the matter presently before [the Superior] Court."

In NC DHHS' appeal before this Court, the department purports to argue the Superior Court reversed the OAH' separate order, which had denied NC DHHS' motion to dismiss: "DHHS also contends that on alternative grounds, the Superior Court's decision should be affirmed as to DHHS because OAH erred when it denied DHHS' Motion to Dismiss." The record before us, however, does not include any written order reversing the OAH' separate decision, entered on 20 August 2021, to deny NC DHHS' motion to dismiss. The record on appeal only includes the Superior Court's order upholding the OAH' 22 December 2021 decision in all respects. The OAH decision entered on 22 December 2021, which is the subject of this appeal and was affirmed in all respects by the Superior Court on 10 August 2022, included NC DHHS as a party to the decision.

On appeal, NC DHHS argues the OAH improperly denied NC DHHS' motion to dismiss. The agency argues Alliance's conduct amounted to a discretionary decision, because Alliance, as the LME/MCO, has the discretion to enter into and terminate provider contracts. NC DHHS argues they do not have the authority to overturn Alliance's independent decision to terminate the contract with B & D Health for the three mental health services.

Upon a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, "[d]ismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *State Employees Ass'n of N.C., Inc. v. N.C. Dep't. of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (citation omitted); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021).

In implementing the requirement of 42 U.S.C. § 1396a(a)(5), which charges each state with a Medicaid program to designate a single agency in charge of administering the program, the U.S. Department of Health and Human Services ("US DHHS") has set forth the following regulation: "Authority of the single State agency. The Medicaid agency may not

delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters." 42 C.F.R. § 431.10(e)(3); *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 112 (4th Cir. 2013) ("As implemented through this rule, the single state agency requirement reflects two important values: an efficiency rationale and an accountability rationale. From an efficiency perspective, the requirement ensures that final authority to make the many complex decisions governing a state's Medicaid program is vested in one (and only one) agency. The requirement thereby avoids the disarray that would result if multiple state or even local entities were free to render conflicting determinations about the rights and obligations of beneficiaries and providers.").

The OAH did not err as a matter of law by declining to dismiss NC DHHS, and the Superior Court did not err as a matter of law by affirming the OAH' decision. Because Alliance is an agent of NC DHHS, any discretion or authority Alliance exercises flows directly from NC DHHS as the "single State agency." 42 U.S.C. § 1396a(a)(5). *See also* N.C. Gen. Stat. § 108C-2(3); 42 C.F.R. § 431.10(e)(3); *Shipman*, 716 F.3d 107, 114-15 ("Put simply, by directing states to designate a single Medicaid agency the decisions of which may not be overridden by other state and local actors, the requirement prohibits precisely what PBH aims to achieve in this appeal: to place itself in the driver's seat and call the shots on how the state's Medicaid program is to be administered[.]"); *McCartney ex rel. McCartney v. Cansler*, 608 F.Supp.2d 694, 701 (E.D.N.C. 2009) (explaining NC DHHS, as North Carolina's "single state agency" in charge of the Medicaid program, "may not disclaim its responsibilities under federal law by simply contracting away its duties"). NC DHHS' argument is overruled.

VII. Conclusion

The OAH possessed subject matter jurisdiction, because Alliance initiated an "adverse determination" against B & D Health. N.C. Gen. Stat. §§ 108C-2(1)-(3), 108C-12(b) (explaining "a [provider's] request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of" the NCAPA promulgated in N.C. Gen. Stat. §§ 150B-1 to -52).

Alliance was contractually allowed to terminate the contract, with or without cause or for any reason, upon 30 days' prior notice. *Fam. Innovations*, 277 N.C. App. 659, 858 S.E.2d 144, 2021 N.C. App. LEXIS 262, 2021 WL 2201606, at *1. The Superior Court correctly affirmed the OAH' decision to grant Alliance's motion for summary judgment. The

record does not show whether the OAH' separate order denying NC DHHS' motion to dismiss, entered on 20 August 2021, was properly before nor ruled on by the Superior Court. The 10 August 2022 Superior Court order B & D Health appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges CARPENTER and FLOOD concur.

JAMES BROWN, PLAINTIFF
v.
TIFFANY BROWN, DEFENDANT

No. COA22-870

Filed 5 September 2023

1. Divorce—equitable distribution—claim requirements—filing of equitable distribution affidavits in custody case insufficient

In the course of a marital dissolution, in which the husband filed a complaint for custody of the parties' two children, and the wife later initiated a separate action in which she obtained an absolute divorce, where neither party included a claim of equitable distribution (ED) in their initial pleadings, the filing by each party of ED affidavits during discovery in the custody matter did not constitute an "application of a party" for ED as required by statute (N.C.G.S. § 50-20(a)), and, therefore, the trial court properly concluded that there were no pending ED claims in the matter.

2. Appeal and Error—preservation of issues—different theory of estoppel asserted on appeal—argument waived

In a marital dissolution matter, in which the wife appealed from the trial court's determination that no equitable distribution (ED) claims were pending (because, although both parties filed ED affidavits during discovery in the child custody action, neither party had properly applied for ED pursuant to N.C.G.S. § 50-20(a)), the wife's argument on appeal that the husband should be estopped from denying the existence of an ED claim on the bases of judicial estoppel and quasi-estoppel principles was not properly preserved, and was waived, where she had argued a different theory (based on equitable estoppel) in the trial court.

Appeal by defendant from order entered 25 March 2022 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2023.

No brief filed on behalf of plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

ZACHARY, Judge.

Defendant Tiffany Brown ("Wife") appeals from the trial court's order dismissing any equitable distribution claims between her and her former husband, Plaintiff James Brown ("Husband"). After careful review, we affirm.

I. Background

Husband and Wife married in April 2007 and had two children. Their relationship deteriorated, and on 19 June 2017, Husband filed a complaint for custody of the children. Husband and Wife then separated on 30 June 2017. On 17 July 2017, Wife filed her answer, which raised a counterclaim for child custody. Neither Husband's complaint nor Wife's answer advanced any claim for or raised the issue of equitable distribution of the parties' marital estate.

On 9 January 2018, the trial court entered a temporary parenting arrangement order. On 28 March 2018, Husband filed a notice of pretrial conference, to be held on 11 May 2018. On 6 April 2018, Wife served Husband with a request for production of documents together with a set of interrogatories, both of which included several requests regarding the parties' property and finances. Wife filed her equitable distribution affidavit on 27 April 2018. On 1 May 2018, Husband filed his equitable distribution affidavit, and also served Wife with a set of interrogatories and a request for production of documents.

The equitable distribution matter came on for pretrial conference in Mecklenburg County District Court on 11 May 2018, and the trial court entered an "Initial Pretrial Conference, Scheduling, and Discovery Order in Equitable Distribution Matter" later that day. That order reflects, *inter alia*, that the parties had served their equitable distribution affidavits upon each other and would attend a mediated settlement conference with a court-appointed mediator. On 12 July 2018, the parties attended mediation, but the resulting report of the mediator filed on 23 July 2018 reflects that the parties reached an impasse.

In December 2018, in a separate proceeding, Wife obtained a judgment for absolute divorce from Husband. Nearly three years later, on 9 June 2021, Wife filed notice of hearing for a status conference in the equitable distribution matter.[1] After the status conference, the trial court entered a "Status Conference Checklist and Order for Equitable Distribution Matter" on 28 July 2021.

On 2 December 2021, the matter came on for calendar call. At the calendar call, Husband asserted that no equitable distribution claims were actually pending before the court; the trial court scheduled a hearing for 28 January 2022 to resolve that issue. On the day of the hearing, Wife filed a memorandum of law in support of her contentions that (1) an equitable distribution claim was pending, in that the parties' equitable distribution affidavits acted as applications for equitable distribution under N.C. Gen. Stat. § 50-20(a) (2021) and Rule 7(b)(1) of the North Carolina Rules of Civil Procedure, and (2) Husband should be equitably estopped from denying the existence of an equitable distribution claim.

On 25 March 2022, the trial court entered an order in which it made the following pertinent findings of fact:

> 23. The Court finds that it is undisputed that there is not, nor ever was, a claim or cross claim, by either party pending for Equitable Distribution.
>
> 24. The Court finds that both parties were represented by counsel at critical points during which a claim/cross claim could have been made and that both participated as if a claim was pending such that [Husband] did not intentionally misrepresent that a claim was pending and was apparently under the same false assumption, therefore, [Wife] cannot claim she depended on his representation.

Consequently, the trial court concluded and ordered, simply: "Equitable Distribution shall be dismissed." Wife timely filed notice of appeal.

II. Discussion

Wife raises similar arguments on appeal as she did before the trial court. Wife first argues that the trial court erred by concluding that no equitable distribution claim was pending "[b]ecause the parties had properly applied to the court for an equitable distribution through the

1. In her appellate brief, Wife notes that the record is silent as to "why it was nearly three years after mediation was concluded that the matter again began to move forward in the court system."

filing of their equitable distribution affidavits[.]" Then, Wife alleges that "[t]he trial court acted under a misapprehension of the law and so abused its discretion when it declined to estop [Husband] from denying the existence of an equitable distribution claim."

A. Application for Equitable Distribution

[1] Although Wife acknowledges that neither she nor Husband ever "filed a paper captioned as a complaint for equitable distribution, a counterclaim for equitable distribution, or a motion for equitable distribution," she nonetheless argues that she "sufficiently asserted a claim for equitable distribution through her pleadings which, when construed liberally, meet the statutory requirements for bringing an equitable distribution action by motion."

1. Standard of Review

Wife "presents an argument regarding the proper method for asserting an equitable distribution claim based upon an interpretation of [N.C. Gen. Stat.] § 50-11 and thus raises an issue of statutory construction." *Bradford v. Bradford*, 279 N.C. App. 109, 112, 864 S.E.2d 783, 786 (2021). We conduct de novo review of statutory construction issues. *Id.* "Pursuant to the de novo standard of review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (citation omitted).

2. Analysis

In this case, it is undisputed that neither Husband nor Wife raised an equitable distribution claim in their initial pleadings; he did not raise it as a claim in his original complaint, nor did she raise it as a counterclaim in her answer. Instead, Wife contends that "the documents that they did file and sign were equivalent to filing a motion for equitable distribution." We disagree.

The basic procedure for properly raising a claim for equitable distribution is prescribed by statute. N.C. Gen. Stat. § 50-20(a) provides: "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a). Section 50-21(a) provides, in pertinent part:

> At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant

> to Chapter 50 of the General Statutes, or as a motion in the cause as provided by [N.C. Gen. Stat. §] 50-11(e) or (f).

Id. § 50-21(a).

Notably, our General Statutes also provide: "An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under [N.C. Gen. Stat. §] 50-20 unless the right is asserted prior to judgment of absolute divorce . . . ." *Id.* § 50-11(e). As Wife obtained an absolute divorce during the pendency of this supposed equitable distribution claim, her right to equitable distribution is entirely reliant on whether she asserted that right prior to her absolute divorce.

"Equitable distribution is a property right. Therefore, a married person is entitled to maintain an action for equitable distribution upon divorce if it is properly applied for and not otherwise waived." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (citations omitted). However, our Supreme Court has recognized that "equitable distribution is not automatic. The statute provides that *a party seeking equitable distribution must specifically apply for it*." *Id.* (emphasis added). The question thus arises: does the filing of an equitable distribution affidavit in an ongoing child-custody action constitute an "application of a party" for equitable distribution? We conclude that it does not.

Wife relies in part upon our recent opinion in *Bradford*, in which this Court recognized that "[n]one of the statutes addressing equitable distribution limit the particular type of pleading for 'filing' (N.C. Gen. Stat. § 50-21) or 'asserting' (N.C. Gen. Stat. § 50-11) an equitable distribution claim." 279 N.C. App. at 121, 864 S.E.2d at 792. Wife reads our *Bradford* decision in tandem with the principle of broad construction of pleadings found in the North Carolina Rules of Civil Procedure, *see*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 8(f) ("All pleadings shall be so construed as to do substantial justice."), to claim that, "[s]o long as the party has made assertions sufficient to put the other party on notice that an equitable distribution is being sought and the basis for that requested relief, the party has sufficiently applied for an equitable distribution."

However, in *Bradford* and each of the cases upon which Wife relies, the issue was whether a party sufficiently asserted an equitable distribution claim in the party's complaint, answer, or motion in the cause. *See Bradford*, 279 N.C. App. at 121, 864 S.E.2d at 792 (concluding that a wife's motion in the cause asserting a claim for equitable distribution in her husband's absolute divorce action was proper); *see also*, *e.g.*, *Coleman v. Coleman*, 182 N.C. App. 25, 29, 641 S.E.2d 332, 336 (2007) (concluding that a wife's " 'request' for 'equitable distribution' [in her

counterclaim] was sufficient to put [her husband] on notice that [the wife] was asking the court to equitably distribute the parties' marital and divisible property"); *Hunt v. Hunt*, 117 N.C. App. 280, 283, 450 S.E.2d 558, 561 (1994) (concluding that the husband, in his answer, "raised the issue of distribution of the parties' marital property and prayed for the affirmative relief of 'an order requiring [the husband] and [the wife] to distribute any and all assets in an equitable manner', in effect asserting a counterclaim for equitable distribution").

None of these cases, however, involved a supposed "application of a party" for equitable distribution, N.C. Gen. Stat. § 50-20(a), by means of filing an equitable distribution affidavit rather than raising an equitable distribution claim in "a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by [N.C. Gen. Stat. §] 50-11(e) or (f)." *Id.* § 50-21(a).

Moreover, N.C. Gen. Stat. § 50-21(a) provides that "the party who first asserts the [equitable distribution] claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit" and that this affidavit must be filed "[w]ithin 90 days after service of a claim for equitable distribution[.]" N.C. Gen. Stat. § 50-21(a). Adopting Wife's argument would require us to accept the facially absurd position that an equitable distribution affidavit, by which a party may "first assert[ ] the claim[,]" must be filed "[w]ithin 90 days after service" of itself. *Id.* "It is well settled that in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences . . . ." *Romulus v. Romulus*, 216 N.C. App. 28, 34, 715 S.E.2d 889, 893 (2011). Accordingly, we decline to accept Wife's argument, and affirm the trial court's conclusion that "there is not, nor ever was, a claim or cross claim, by either party pending for Equitable Distribution."

B. Estoppel

[2] Alternatively, Wife argues that "[t]he trial court acted under a misapprehension of the law and so abused its discretion when it declined to estop [Husband] from denying the existence of an equitable distribution claim." However, in her appellate brief, Wife relies upon arguments not made before the trial court below; accordingly, this argument is not properly before us.

At the 28 January 2022 hearing, Wife's counsel argued that Husband "should be equitably estopped from asserting that there's no valid [equitable distribution] claim." Wife's counsel further explained: "It's not fair for a litigant to notice a hearing, file the appropriate documents,

participate in it for four years, and then say, oh, there's nothing there, sorry. That's not fair."

On appeal, Wife challenges the trial court's conclusion of law #24, which states, *inter alia*, that both parties "participated as if a claim was pending such that [Husband] did not intentionally misrepresent that a claim was pending and was apparently under the same false assumption, therefore, [Wife] cannot claim she depended on his representation." In so deciding, the trial court clearly was referencing the elements of equitable estoppel, consonant with Wife's argument below.

To invoke the doctrine of equitable estoppel, a party must prove the following elements:

> (1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon;
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped; [and]
>
> (6) Action based thereon of such a character as to change his position prejudicially.

Beck v. Beck, 175 N.C. App. 519, 527, 624 S.E.2d 411, 416 (2006) (citation and emphasis omitted).

On appeal, however, Wife casts a broader net across several other estoppel doctrines. As our Supreme Court has explained: " 'Estoppel' is not a single coherent doctrine, but a complex body of interrelated rules, including estoppel by record, estoppel by deed, collateral estoppel, equitable estoppel, promissory estoppel, and judicial estoppel." *Whitacre*

P'ship v. Biosignia, Inc., 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004). "North Carolina has also adopted the doctrine of quasi-estoppel." *Snow Enter., LLC v. Bankers Ins. Co.*, 282 N.C. App. 132, 142, 870 S.E.2d 616, 624, *disc. review denied*, 382 N.C. 720, 878 S.E.2d 806 (2022).

Wife abandons the doctrine of equitable estoppel as a defense on appeal. Instead, from this roster of other estoppel doctrines, she has selected the doctrines of judicial estoppel and quasi-estoppel. Wife seeks to benefit from the fact that, unlike equitable estoppel, both judicial estoppel and quasi-estoppel lack the "requirement of detrimental reliance on the part of the party invoking the estoppel." *Whitacre*, 358 N.C. at 19, 591 S.E.2d at 882.

It is well settled that "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Accordingly, where a party "impermissibly presents a different theory on appeal than argued at trial," the argument "is not properly preserved and is waived" on appeal. *Angarita v. Edwards*, 278 N.C. App. 621, 625, 863 S.E.2d 796, 800 (citation, brackets, and internal quotation marks omitted), *appeal dismissed*, 379 N.C. 159, 863 S.E.2d 601 (2021). Wife has impermissibly presented a pair of different theories on appeal than she argued at trial, theories which the trial court did not have opportunity or reason to consider below. As such, this argument is not properly preserved, and is waived on appeal. *See id.*

Moreover, assuming, *arguendo*, that Wife properly preserved her quasi-estoppel argument, she has not established that Husband should be estopped under that doctrine. Our Supreme Court has described quasi-estoppel as a "branch of equitable estoppel"—albeit one that "may be more closely related to judicial estoppel than any other equitable doctrine." *Whitacre*, 358 N.C. at 17, 18, 591 S.E.2d at 881, 882. "Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Id.* at 18, 591 S.E.2d at 881–82. Wife has not shown here that Husband "accept[ed] a transaction or instrument" by responding to her equitable distribution affidavit, or that he has accepted a "benefit under" that affidavit. *Id.* Thus, Wife's reliance on the doctrine of quasi-estoppel is misplaced.

III. Conclusion

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

AFFIRMED.

Judges COLLINS and RIGGS concur.

IAN COWPERTHWAIT, WILLIAM COWPERTHWAIT,
AND CATHERINE COWPERTHWAIT, PLAINTIFFS
v.
SALEM BAPTIST CHURCH, INC., DEFENDANT

No. COA22-374

Filed 5 September 2023

Civil Procedure—voluntary dismissal—attempted after adverse ruling—involuntary dismissal as sanction—abuse of discretion

In an action filed by two parents and their son (plaintiffs) against a church (defendant) to recover for injuries the son suffered as a child at defendant's summer camp, the trial court properly vacated plaintiffs' Rule 41(a)(1) voluntary dismissal without prejudice where, at a hearing on defendant's motion to dismiss for failure to prosecute, plaintiffs expressed a contingent desire to voluntarily dismiss the action if the court were to grant defendant's motion, but they did not attempt to take a voluntary dismissal until after the court had rendered its oral ruling granting the motion. However, the court abused its discretion by selecting involuntary dismissal with prejudice under Rule 41(b) as plaintiffs' sanction for failing to prosecute, where its reasons for doing so (unavailability and diminished memory of witnesses, along with the logistical burden on the court) related primarily to the eleven years that had passed since the son's injuries rather than the thirteen months that had elapsed between the filing of plaintiffs' complaint and the court's ruling on defendant's motion to dismiss.

Chief Judge STROUD concurring in result only in part and dissenting in part.

Appeal by Defendant from order entered 24 September 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 4 October 2022.

Fox Rothschild LLP, by Troy D. Shelton and Elizabeth Brooks Scherer, and Smith Law Group, PLLC, by Steven D. Smith and Jonathan M. Holt, for plaintiffs-appellants.

Bovis, Kyle, Burch & Medlin, LLC, by Brian H. Alligood, for defendant-appellee.

MURPHY, Judge.

This appeal concerns Plaintiffs' attempt to take a voluntary dismissal without prejudice in accordance with Rule 41(a)(1) after the trial court had announced its ruling involuntarily dismissing the action under Rule 41(b). During the hearing, Plaintiffs had expressed a contingent desire to take a voluntary dismissal if the trial court were to allow Defendant's dismissal for failure to prosecute, but they did not actually attempt to take a voluntary dismissal until after an adverse ruling was rendered. Under these circumstances, we hold that the trial court correctly vacated Plaintiffs' attempted Rule 41(a)(1) voluntary dismissal.

However, the trial court could not impose dismissal with prejudice as a sanction under Rule 41(b) without explaining the prejudice Plaintiffs' failure to prosecute caused Defendant and the reason why sanctions short of dismissal would not suffice. Although we review the trial court's selection of sanction only for an abuse of discretion, we hold that the trial court's explanations for its selection of dismissal with prejudice as a sanction were manifestly unsupported by reason. Accordingly, we vacate the portion of the trial court's order dismissing the case with prejudice and remand for the trial court's consideration of which sanction short of dismissal with prejudice is appropriate.

BACKGROUND

On 9 July 2020, Plaintiffs Ian Cowperthwait and his parents, William and Catherine Cowperthwait, filed a complaint against Defendant for personal injuries Ian suffered as a child at Defendant's summer camp in June 2011. The relevant background concerns Plaintiffs' alleged failure to prosecute.

Two weeks before filing the lawsuit, Plaintiffs' counsel promised Defendant's liability insurance carrier he would try to produce copies of Ian's medical records as soon as possible. Six weeks later, on 19 August 2020, Defendant's insurer asked Plaintiffs' counsel again for the medical records. On 10 November 2020, after Defendant's insurer received an administrative session notice from the trial court, the claims handler reiterated the medical records request.

On 9 December 2020, Defendant's insurer retained counsel which, again, requested production of the medical records and proposed a joint request to remove the case from the approaching administrative session calendar. Plaintiffs' counsel agreed to remove the case from the court's administrative calendar and again said he would try to get the medical

records sent over as soon as possible. On 4 January 2021, Defendant's counsel served a request for statement of monetary relief sought, formal interrogatories, and requests for production of documents.

Defendant filed its answer, along with interrogatories and document requests, on 7 January 2021. Plaintiffs requested an extension of time to respond to the discovery requests on 26 January 2021; and, on 2 February 2021, Defendant's counsel again asked Plaintiffs' counsel to send the medical records. On 12 March 2021, Defendant's counsel wrote Plaintiffs' counsel about the discovery responses—by then a week overdue, even with the 30-day extension they requested—and said that, if a response wasn't given by 19 March 2021, Defendant's counsel would "understand the matter to be ripe for a motion to compel and possible additional relief." On 19 March 2021, Plaintiffs' counsel responded via email apologizing for the delay and saying he would have responses to Defendant's counsel by 24 March 2021.

On 16 June 2021, still having not received responses to discovery requests, Defendant moved to dismiss the case for failure to prosecute, or, in the alternative, to compel discovery responses. Plaintiffs eventually responded to the discovery requests on 15 July 2021, noting numerous objections throughout; however, Plaintiffs failed to serve a response to Defendant's request for statement of monetary relief sought.

On 10 August 2021, the trial court heard Defendant's *Motion to Dismiss or, in the alternative, Motion to Compel Discovery*. At the hearing, Plaintiffs' counsel offered to take a voluntary dismissal without prejudice if the court were inclined to dismiss for failure to prosecute and agreed to have Plaintiffs' discovery objections struck if the court deemed them untimely. The court orally announced it would grant Defendant's motion and asked Defendant's counsel to draft a proposed order. The court did not comment on a second offer by Plaintiffs to take a voluntary dismissal, nor did the court explicitly state whether the dismissal would be with or without prejudice.

After the hearing and before any written order was entered, Plaintiffs' counsel filed a *Notice of Voluntary Dismissal Without Prejudice*. Defendant moved to set aside the voluntary dismissal, and the trial court held a hearing on the motion on 8 September 2021. The trial court orally granted Defendant's motion to set aside and, again, asked Defendant's counsel to prepare the order. Subsequently, the trial court entered a written order dismissing the case with prejudice for failure to prosecute, and Plaintiffs timely appealed.

ANALYSIS

On appeal, Plaintiffs make two arguments: (A) that the trial court erred in vacating their Rule 41(a)(1) voluntary dismissal without prejudice; and (B) that the trial court abused its discretion in selecting an involuntary dismissal with prejudice as Plaintiffs' sanction under Rule 41(b) of our Rules of Civil Procedure.[1] *See Meabon v. Elliott*, 278 N.C. App. 77, 80 ("[I]n reviewing the appropriateness of the particular sanction imposed [under Rule 41(b)], an abuse of discretion standard is proper . . . ."), *disc. rev. denied*, 379 N.C. 151 (2021).

A. Vacating Rule 41(a)(1) Voluntary Dismissal

As to Plaintiffs' argument that the trial court erred in vacating their voluntary dismissal, we disagree. While it is true that Rule 41(a) generally allows a plaintiff to take voluntary dismissal "without order of court [] by filing a notice of dismissal at any time before the plaintiff rests his case," N.C.G.S. § 1A-1, Rule 41(a)(1) (2021), this general rule is subject to the "limitations [] that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing [the] plaintiff's claim or otherwise ruling against [the] plaintiff . . . ." *Brisson v. Santoriello*, 351 N.C. 589, 597 (2000) (emphasis added).

We have expressly held that "[t]aking a voluntary dismissal based on concerns about the *potential* for a future adverse ruling by the [trial court] is permissible." *Market America, Inc. v. Lee*, 257 N.C. App. 98, 106 (2017). However,

> [d]ismissing an action after such a ruling has actually been announced by the court is not. Once the trial court has informed the parties of its ruling against the plaintiff on the defendant's dispositive motion, Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court's ruling is memorialized in

1. In addition to these issues, Defendant argues in its brief that William and Catherine Cowperthwait's claims are barred by statute of limitations, seemingly as an alternative ground for upholding the trial court's order in accordance with N.C. R. App. P. 28(c) as to William and Catherine Cowperthwait's claims. While we agree that the applicable statute of limitations in all likelihood applies as to William and Catherine's claims, we devote no further discussion to this argument because the applicability of any statute of limitations was not the subject of the trial court's order, nor was it the basis of the motion to which that order responded; rather, the order on appeal solely concerned the propriety of the trial court's previous oral ruling on Defendant's motion to dismiss for failure to prosecute under Rule 41 and its vacation of Plaintiffs' motion for voluntary dismissal.

> a written order and filed with the clerk of court. To hold otherwise would make a mockery of the court's ruling.

Id. at 106-07 (marks omitted).[2]

Here, *Market America* is directly on point. During the hearing on Defendant's motion to dismiss, Plaintiffs' counsel stated the following: "[I]f for some reason Your Honor said that you were going to lean toward taking a dismissal on this, we would then dismiss without prejudice and have an opportunity to re-file." This was clearly a contingent statement, not an expression that Plaintiffs were, at that time, taking a Rule 41(a)(1) voluntary dismissal. Indeed, Plaintiffs' counsel later acknowledged the contingent nature of the earlier statement by remarking just after the trial court granted Defendant's motion to dismiss that "[he] asked the Court, if they were doing that, [Plaintiffs] would take a [voluntary] dismissal."

This is precisely the type of situation in which the principles discussed in *Market America* are designed to prohibit an attempt to take an untimely voluntary dismissal. If Plaintiffs had been concerned about the prospect of an adverse ruling, they were entitled to take a voluntary dismissal at any earlier point in the litigation. *Market America*, 257 N.C. App. at 106. They were *not* entitled to wait until the adverse ruling occurred, then use a voluntary dismissal as a proverbial escape hatch from whatever consequences that ruling may entail. "To hold otherwise would make a mockery of the [trial] court's ruling." *Id.* at 106-07 (marks omitted).

B. Trial Court's Selection of Rule 41(b) Sanction

As to Plaintiffs' next argument—that the trial court improperly selected dismissal with prejudice as its sanction under Rule 41(b)—we agree that the trial court abused its discretion. *See Egelhof v. Szulik*, 193 N.C. App. 612, 619 (2008) (citing *Turner v. Duke Univ.*, 325 N.C. 152, 165 (1989)) ("[I]n reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper . . . ."). In relevant part, Rule 41(b) permits an involuntary dismissal "[f]or failure of the plaintiff to prosecute . . . ." N.C.G.S. § 1A-1, Rule 41(b) (2021). However, "dismissal with prejudice is the most severe sanction available to the court in a civil case, and thus, it should not be readily granted." *Lauziere v. Stanley Martin Communities, LLC*, 271 N.C. App. 220, 223 (2020), *aff'd*, 376 N.C. 789 (2021). "In general," then, "a trial court is required

2. While our research reveals no occasion on which either we or our Supreme Court have commented on the standard of review for issues such as these, we infer from the scope of the analysis in *Market America* that our standard of review in determining whether Plaintiffs' voluntary dismissal falls within one of these exceptions is de novo. *Id.* at 102-08.

to 'consider lesser sanctions before dismissing an action under Rule 41(b).' " *Wilder v. Wilder*, 146 N.C. App. 574, 575 (2001) (quoting *Goss v. Battle*, 111 N.C. App. 173, 176 (1993)). Moreover, in particular, we have held "that the trial court must [] consider lesser sanctions when dismissing a case pursuant to Rule 41(b) for failure to prosecute." *Id.* at 576 (emphasis omitted).

Three factors must inform a trial court's decision to impose dismissal or some other sanction under Rule 41(b): "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* at 578. Here, in compliance with *Wilder*, the trial court offered the following conclusions of law in support of its ruling:

> 1. Rule 41(b) of the North Carolina Rules of Civil Procedure authorizes a court to dismiss an action for failure to prosecute or failure to comply with the Rules of Civil Procedure or any order of court. Before dismissing an action for failure to prosecute, Courts are to determine the following three factors: (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.
>
> 2. The Court finds that the Plaintiffs have unreasonably delayed this matter. Although Ian Cowperthwait has been admitted to treatment facilities since April of 2021, no explanation was given for the more than eight months that passed since the filing of the complaint before April of 2021. Moreover, the Court notes that Ian's parents, William and Catherine Cowperthwait are named Plaintiffs. No explanation has been offered for their failure to prosecute the action.
>
> 3. The Court finds that the delay has prejudiced the Defendant. The case is already unusually old by virtue of the tolling of the statute of limitations applicable to Ian Cowperthwait due to his minor status (age 11) at the time of the incident. That incident occurred more than ten (10) years ago. The additional year-long delay in prosecuting this action has prejudiced the Defendant by exacerbating the inordinate amount of time since the incident, during

> which witnesses have moved and witness memories have inevitably faded.
>
> 4. Sanctions short of dismissal would be insufficient because the adverse effects of witness unavailability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Additionally, the Court should not be expected to carry a personal injury action over multiple terms due to failure in prosecution.

While we are cognizant of the great deference owed to the trial court under an abuse of discretion standard, we are confident in this case that such an abuse of discretion occurred. *See Briley v. Farabow*, 348 N.C. 537, 547 (1998) ("An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision."). Although the trial court adequately and reasonably answered whether Plaintiffs acted in a manner which unreasonably delayed the matter, its rationale for the conclusions that Defendant suffered prejudice and that sanctions short of dismissal would be insufficient were based exclusively on the projected impact on witness availability and memory and the logistical burden on the court. However, no explanation is offered as to why the marginal impact on witness availability and memory would have been significant relative to the filing of the complaint, and we fail to see how the case's "unusual" age relative to the underlying injury would render the additional time elapsed since the filing of the complaint especially problematic.[3]

In substance, the reasons offered by the trial court appear to relate primarily to the total length of time elapsed since the events giving rise to the claims, concerning the eleven years since the injury rather than the thirteen months that had elapsed between the filing of Plaintiffs' complaint and the trial court's oral ruling on Defendant's Rule 41 motion. However, ten years being available to Ian to file his complaint after the events giving rise to his claims is a policy decision that has already been made by the General Assembly through its enactment of N.C.G.S. § 1-17(a)(1), not a valid discretionary basis on which the trial court may dismiss the action for failure to prosecute. *See* N.C.G.S. § 1-17(a)(1) (2021) ("A person entitled to commence an action who is

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3. If anything, the logical tendency of the case already being old would be to *lessen* the marginal impact of further time having elapsed, not increase it. Common sense and experience dictate that that the level of detail lost in an eleven-year-old memory relative to a ten-year-old memory is far less than the level of detail lost in, for example, a one-month-old memory relative to a thirteen-month-old memory.

under a disability at the time the cause of action accrued may bring his or her action . . . within three years next after the removal of the disability[.]"). Finally, to the extent the trial court also incurred a logistical burden from the delay, the trial court has offered no rationale or citation to authority explaining why that reason, standing alone, requires the extreme sanction of dismissal with prejudice. *Cf. Green v. Eure*, 18 N.C. App. 671, 672 (1973) ("Expedition for its own sake is not the goal.").

CONCLUSION

The trial court's selection of dismissal with prejudice as the Rule 41(b) sanction was "manifestly unsupported by reason . . . ." *Briley*, 348 N.C. at 547. While we affirm the portion of the trial court's order vacating Plaintiffs' Rule 41(a)(1) voluntary dismissal, we reverse the portion of the trial court's order dismissing the case with prejudice and remand for the trial court to further consider which sanction short of dismissal with prejudice is appropriate for Plaintiffs' failure to prosecute. *See Lauziere*, 271 N.C. App. at 228 (reversing and remanding for further proceedings where dismissing with prejudice for a failure to prosecute was predicated on an abuse of discretion).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge GORE concurs.

Chief Judge STROUD concurs in result only in part and dissents in part.

STROUD, Chief Judge, concurring in result only in part, dissenting in part.

I concur with the Majority Opinion in the result only as to the first issue and agree the trial court did not err in vacating Plaintiffs' notice of voluntary dismissal without prejudice, although I specifically dissent from Footnote 1 of the Majority Opinion. I also dissent as to the second issue. The trial court did not abuse its discretion by dismissing Plaintiffs' claim with prejudice under Rule 41(b).

As to Footnote 1, the claims of William and Catherine Cowperthwait were clearly barred by the statute of limitations. Their claims were for "medical bills and expenses" for their son's treatment for his injuries allegedly caused by Defendant's negligence, and these claims were not

tolled. Defendant properly pled the defense of expiration of the statute of limitations on their claims, and in the context of this case, which deals with delay and the failure to bring claims until ten years after the incident giving rise to the claim, the expiration of the statute of limitation on their claims, as opposed to Ian's claim, is certainly a factor the trial court might properly consider, but I will not address the issue further.

Turning to the Rule 41(b) issue, the Majority Opinion notes four of the trial court's conclusions of law provided to support its ruling as to dismissal with prejudice as a sanction. But the Majority Opinion overlooks the trial court's four pages of detailed findings of fact regarding the relevant procedural history of the case.

The trial court's findings of fact are not challenged on appeal and are thus binding on this court. *See Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) ("Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." (citations and quotation marks omitted)). In summary, these findings address the Plaintiffs' repeated promises to produce medical records supporting the claim and failures to provide these records as well as Plaintiffs' failures to respond to formal discovery requests for the records. The trial court found Defendant had been attempting to obtain the medical records from Plaintiffs for *over seven years* as of the date of the hearing on Defendant's motion to dismiss or to compel discovery in 2021. Although some records were produced, the Plaintiffs never produced a full response to the discovery. The trial court also made findings regarding Ian Cowperthwait's arrests on various criminal charges in 2020 and 2021 and his admissions to treatment facilities in 2021 and addressed why these circumstances did not justify the Plaintiffs' failure to act during various periods of time. The trial court made findings regarding Plaintiffs' failure to produce: "complete medical records[;]" "any of his [Ian's] school records[;]" records from "recovery facilities[;]" "expert witness identification(s)[;]" and "social media content[.]"

We know the trial court was well-aware of the factors it must consider in determining the appropriate sanction, as the trial court's first conclusion of law notes that under Rule 41(b) "[c]ourts are to determine the following three factors:"

> (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice. *Wilder v. Wilder*, 146 N.C. App. 574, [578], 553 S.E.2d 425, 428 (2001).

The trial court's order then clearly addresses all these factors. Specifically, the trial court concluded that Plaintiffs provided "no explanation" for the delay of "more than eight months that passed since the filing of the Complaint before April of 2021." The trial court concluded "the delay has prejudiced the Defendant" because the "case is already unusually old by virtue of the tolling of the statute of limitations" based on Ian's status as a minor child "at the time of the incident" over "ten (10) years ago." The additional year of delay in prosecuting the case "exacerbat[ed] the inordinate amount of time since the incident, during which witnesses have moved and witness memories have inevitably faded."

The Majority rejects these reasons on the grounds they "primarily" relate to the period of time when the statute of limitations as to Ian's claim was tolled rather than the period of time between the filing of the complaint and the ruling on Defendant's Rule 41 motion. But a plain reading of the conclusions of law refutes the Majority's interpretation. The trial court's discussion of Plaintiffs' unreasonable delay focuses on how "no explanation was given for the more than eight months that passed *since the filing of the complaint*[.]" (Emphasis added.) Similarly, in its conclusion on prejudice, the trial court noted "[t]he *additional year-long delay* in prosecuting this action has prejudiced the Defendant[.]" (Emphasis added.) As a result, the trial court properly relied on the period of time between the filing of the complaint and the ruling on Defendant's Rule 41 motion.

Finally, the trial court addressed "the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. The trial court concluded, based on all the unchallenged findings of fact, sanctions short of dismissal would not suffice because "the adverse effects of witness availability and faded memories that inevitably accompany lengthy periods of time cannot be reversed." Nor should the trial court "be expected to carry a personal injury action over multiple terms due to failure in prosecution."

The trial court adequately addressed the *Wilder* factors. The trial court is not required to list each potential sanction short of dismissal and explain why it rejected each one. *See Batlle v. Sabates*, 198 N.C. App. 407, 421, 681 S.E.2d 788, 798 (2009) ("[T]he trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." (quoting *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911 (2006)).

This court is required to review the trial court's ruling for abuse of discretion. *See Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) ("An abuse of discretion is a decision manifestly unsupported by

reason or one so arbitrary that it could not have been the result of a reasoned decision."). The trial court made detailed findings of fact, clearly addressed all three *Wilder* factors, and in its discretion concluded that "[s]anctions short of dismissal would be insufficient" based on the facts and factors the trial court had already addressed. The Majority, had it been in the place of the trial court, might have made a different discretionary evaluation of the various factors in this case. But this sort of evaluation is actually *de novo* review, not a review for abuse of discretion.

> The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision "is manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

The trial court's decision is clearly supported by reason and is not arbitrary in any way. I concur in result only as to the Majority Opinion's affirming the trial court's order vacating the Plaintiffs' voluntary dismissal, dissent as to Footnote 1, and dissent as to the Majority Opinion's ruling on the portion of the trial court's order dismissing the case with prejudice.

AMANDA L. DIENER, PLAINTIFF
v.
ROBERT BROWN, DEFENDANT

No. COA23-66

Filed 5 September 2023

Contracts—breach—separation agreement—payments from ex-husband's military pension—specific performance

In an action regarding a separation agreement between a retired Marine (defendant) and his ex-wife (plaintiff), where the agreement provided that plaintiff would receive fifteen percent of defendant's monthly military pension for the remainder of defendant's life, the trial court did not err in ruling that defendant breached the agreement by refusing to pay plaintiff her portion of his pension after learning that plaintiff was statutorily barred from receiving the payments through the Defense Finance and Accounting Service (DFAS). Although the agreement stated that plaintiff was responsible for coordinating with DFAS to have the payments come to her, the parties' clear intention was that plaintiff receive the agreed-upon portion of defendant's pension regardless of how the payments were delivered. Furthermore, the trial court did not abuse its discretion in ordering specific performance as plaintiff's remedy, since damages would be inadequate (because plaintiff would have to repeatedly sue to secure her monthly payments), defendant testified that he was capable of directly paying plaintiff, and plaintiff had already performed her obligations under the agreement.

Appeal by Defendant from order entered 5 July 2022 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2023.

Epperson Law Group, PLLC, by Steven B. Ockerman and Lauren E. R. Watkins, for Plaintiff-Appellee.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for Defendant-Appellant.

COLLINS, Judge.

Defendant Robert Brown appeals from the trial court's order concluding that Defendant had breached the terms of a separation

agreement between himself and Plaintiff Amanda Diener and ordering that Defendant specifically perform the agreement by paying Plaintiff 15% of his monthly military retirement pay for the remainder of his life and $8,550 in arrearages. Defendant argues that, because the separation agreement states that Plaintiff is to receive her portion of his monthly military pension directly from the Defense Finance and Accounting Service ("DFAS"), and because she is statutorily barred from receiving these payments directly from DFAS as the parties were not married for at least ten years, Plaintiff is no longer entitled to her portion of his monthly military pension. Defendant's argument is perilously close to being frivolous, and we affirm.

I. Background

Plaintiff and Defendant were married on 17 April 2011. Defendant served in the United States Marine Corps during their marriage and retired in March 2016 after 15 years of service. The parties separated on 15 March 2018 and were divorced on 8 May 2019. Prior to their divorce, the parties attended mediation on 22 January 2019 and stipulated, inter alia, that Plaintiff was entitled to 15% of Defendant's monthly military retirement.

The parties entered into a separation agreement (the "Agreement") on 28 February 2019, which provided, in pertinent part, as follows:

> By this Agreement, the parties acknowledge that [Defendant] has military retirement and that [Defendant] did participate in this account prior to the marriage of the parties, making there a premarital component to the account. [Plaintiff] shall receive fifteen percent (15%) of [Defendant's] monthly military retirement for the remainder of his life. [Plaintiff's] attorney shall be responsible for preparing the documents necessary for her to receive this monthly allotment and [Defendant's] attorney shall have an opportunity to review the document prior to its submission to the military and the [c]ourt. In the event [Defendant's] signature is required for the distribution to take place, he shall execute any and all necessary documents within fifteen (15) days of receipt from [Plaintiff's] attorney. [Plaintiff] shall begin receiving the 15% of the military retirement effective February 1, 2019. [Defendant] shall monitor the monthly statements related to the retirement each month. Upon [Plaintiff's] retirement being deducted directly from the retirement, [Defendant] shall pay a make up payment for any months that were not

> deducted. Thereafter, [Plaintiff] shall be responsible for coordinating with DFAS for payments to come to her.

Plaintiff's counsel notified Defendant's counsel on 19 November 2019 that Plaintiff was unable to receive payments directly from the Defense Finance and Accounting Service ("DFAS") because the parties were not married for ten years or more, as required by 10 U.S.C. § 1408(d)(2).[1] Plaintiff's counsel suggested that Defendant set up automatic payments to Plaintiff so that he would not have to communicate directly with her. Defendant refused; Plaintiff did not receive any payments from Defendant's military pension.

Plaintiff filed suit for breach of contract and specific performance on 14 February 2020, alleging that Defendant had "failed to provide the military pension payments to Plaintiff as required by the Agreement." Defendant filed a motion to dismiss and an answer; the trial court denied the motion to dismiss on 8 March 2021. Plaintiff moved for summary judgment; the trial court denied the motion on 28 October 2021.

After a hearing on the division and payment of Defendant's military retirement pay, the trial court entered a consent order on 16 November 2021, concluding that "[Plaintiff] qualifies for direct payment from the appropriate military finance center for her monthly share of military retired pay attributable to [Defendant's] military service under Title 10, United States Code § 1408(d)(2)[.]" Plaintiff submitted to DFAS an Application for Former Spouse Payments from Retired Pay in December 2021. DFAS denied Plaintiff's application by letter dated 3 January 2022, confirming that it could not honor her request for direct payment because the parties were not married for 10 years or more, as required by 10 U.S.C. § 1408(d)(2).

After a bench trial on 24 March 2022, the trial court entered a written order on 5 July 2022 concluding that Defendant had breached the Agreement and ordering Defendant to specifically perform the Agreement by paying directly to Plaintiff 15% of his monthly military retirement pay for the remainder of his life and $8,550 in arrearages. Defendant timely appealed.

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1. "If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court . . . of disposable retired pay of the member as property of the member or property of the member and his spouse." 10 U.S.C. § 1408(d)(2).

II. Discussion

A. Breach of Agreement

Defendant argues that the trial court erred by concluding that "Defendant willfully violated and continues to violate the terms of the Agreement."

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether those findings support the conclusions of law and ensuing judgment." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (citation omitted). A trial court's conclusions of law are reviewable de novo. *Donnell-Smith v. McLean*, 264 N.C. App. 164, 168, 825 S.E.2d 672, 675 (2019). Furthermore, where the trial court labels as a finding of fact what is in substance a conclusion of law, we treat that finding as a conclusion and review it de novo. *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

"Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally." *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). "Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Id.* at 409-10, 200 S.E.2d at 624 (citations omitted). "Our Supreme Court has long recognized that the heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Jones v. Jones*, 263 N.C. App. 606, 620, 824 S.E.2d 185, 195 (2019) (quotation marks, brackets, and citation omitted).

Here, the Agreement provides as follows:

> **Intangible Property.** Except as specifically provided for herein, the parties have divided to their satisfaction all intangible property owned by them, individually or jointly, including, but not limited to, checking and savings accounts, stocks, bonds, mutual funds, trusts, interest in pension and profit sharing plans, retirement benefits, promissory notes, IRA accounts, interest in businesses, partnerships, choses in action, certificates of deposit, money market accounts, cash management accounts, life insurance policies (including any cash values) and the like.

> By this Agreement, [Plaintiff] conveys and releases to [Defendant] any and all interest, marital or otherwise, which she may have in his Bank of America 401(k).
>
> By this Agreement, the parties acknowledge that [Defendant] has military retirement and that [Defendant] did participate in this account prior to the marriage of the parties, making there a premarital component to the account. [Plaintiff] shall receive fifteen percent (15%) of [Defendant's] monthly military retirement for the remainder of his life. [Plaintiff's] attorney shall be responsible for preparing the documents necessary for her to receive this monthly allotment and [Defendant's] attorney shall have an opportunity to review the document prior to its submission to the military and the [c]ourt. In the event [Defendant's] signature is required for the distribution to take place, he shall execute any and all necessary documents within fifteen (15) days of receipt from [Plaintiff's] attorney. [Plaintiff] shall begin receiving the 15% of the military retirement effective February 1, 2019. [Defendant] shall monitor the monthly statements related to the retirement each month. Upon [Plaintiff's] retirement being deducted directly from the retirement, [Defendant] shall pay a make up payment for any months that were not deducted. Thereafter, [Plaintiff] shall be responsible for coordinating with DFAS for payments to come to her.

The Agreement establishes that the intention of the parties at the moment of its execution was that, in exchange for releasing any interest in other intangible property, Plaintiff would be entitled to 15% of Defendant's monthly military retirement for the remainder of his life. Because Plaintiff has not received any payments from Defendant's military pension, the trial court did not err by concluding that Defendant had breached the Agreement.

B. Specific Performance

Defendant argues that the trial court erred by ordering specific performance because Defendant "had not breached the terms of the separation agreement[.]" (capitalization altered).

"The remedy of specific performance rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Crews v. Crews*, 264 N.C. App. 152, 154, 826 S.E.2d 194, 196 (2019) (quotation marks and citation omitted). An abuse

of discretion results where the trial court's order is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020).

A separation agreement may be enforced through the equitable remedy of specific performance. *Reeder v. Carter*, 226 N.C. App. 270, 275, 740 S.E.2d 913, 917 (2013). Specific performance is appropriate if the remedy at law is inadequate, the obligor can perform, and the obligee has performed her obligations. *Crews*, 264 N.C. App. at 154, 826 S.E.2d at 196. Our Supreme Court has established that damages are usually an inadequate remedy in the context of separation agreements. *See Moore v. Moore*, 297 N.C. 14, 17, 252 S.E.2d 735, 738 (1979) ("[W]hen the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident.").

Here, Plaintiff's remedy at law is inadequate because she would have to repeatedly sue to secure her portion of Defendant's monthly military pension that she is entitled to under the Agreement. *See id.* Furthermore, despite Defendant's testimony at trial that he was capable of paying Plaintiff through a check or direct deposit, Plaintiff has not received a single payment from Defendant's military pension. Finally, Plaintiff performed her obligations under the Agreement because she submitted to DFAS an Application for Former Spouse Payments from Retired Pay in December 2021, but her application was denied because the parties were not married for 10 years or more.

Accordingly, the trial court did not abuse its discretion by granting Plaintiff's claim for specific performance.

III. Conclusion

The trial court did not err by concluding that Defendant had breached the Agreement and ordering that Defendant specifically perform the Agreement by paying Plaintiff 15% of his monthly military retirement pay for the remainder of his life and $8,550 in arrearages. Accordingly, we affirm.

AFFIRMED.

Judges ZACHARY and RIGGS concur.

GANTT v. CITY OF HICKORY

[290 N.C. App. 279 (2023)]

GARY GANTT D/B/A GANTT CONSTRUCTION, PLAINTIFF
v.
CITY OF HICKORY, DEFENDANT

No. COA21-767-2

Filed 5 September 2023

Pleadings—complaint—refiled after voluntary dismissal—amended to identify correct plaintiff—no relation back

In a putative class action filed against defendant city for imposing allegedly ultra vires water capacity fees, where plaintiff—an individual running a construction business as a sole proprietorship—mistakenly named a Texas corporation with no interest in the lawsuit's subject matter as the plaintiff in both his original complaint, which he voluntarily dismissed without prejudice pursuant to Civil Procedure Rule 41, and his refiled complaint, which was later amended to correct plaintiff's mistake, the trial court properly granted summary judgment to defendant because plaintiff's claims were time-barred under the applicable statute of limitations. Plaintiff could not benefit from the one-year extension for refiling a voluntarily dismissed action under Rule 41(a), since the (amended) refiled complaint did not relate back to the original complaint where: firstly, the original complaint was a legal nullity because the named plaintiff lacked standing to bring the suit, and thus there was no valid complaint for the refiled complaint to relate back to; and secondly, the refiled action did not involve the "same parties" as those in identified in the original complaint.

Appeal by Plaintiff from judgment entered 15 July 2021 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Originally heard in the Court of Appeals 10 August 2022. Petition for Rehearing allowed 6 March 2023.

Milberg Coleman Bryson Phillips Grossman, PLLC, by James R. DeMay, Daniel K. Bryson, Scott C. Harris, and John Hunter Bryson, for Plaintiff-Appellant.

Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper and Timothy D. Swanson, for Defendant-Appellee.

CARPENTER, Judge.

On 29 December 2022, this Court filed an opinion in *Gantt v. City of Hickory*, 287 N.C. App. 393, 881 S.E.2d 760 (Dec. 29, 2022) (unpublished) ("*Gantt I*"), in which we affirmed the trial court's order granting summary judgment for the City of Hickory ("Defendant") and dismissing the claims brought by Gary Gantt d/b/a Gantt Construction ("Plaintiff"). On 2 February 2023, Plaintiff filed a petition for rehearing (the "Petition") pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. In the Petition, Plaintiff contends our holding in *Gantt I* "conflicts with the longstanding principle of relation back and a prior panel's published opinion." Due to the gravity of Plaintiff's contentions and the dearth of binding precedent concerning whether a plaintiff may benefit from the doctrine of relation back when an action is initiated under the name of a different, out-of-state entity that had no interest in the subject matter, and therefore lacked standing to bring the lawsuit, we allowed the Petition and supplemental briefing on 6 March 2023. After careful consideration of the Petition and the supplemental briefs, we again affirm the order of the trial court with a more robust explanation of our reasoning.

I. Factual and Procedural Background

The facts of this case are set out in *Gantt I*, and we will not fully restate them here. The relevant procedural history is as follows: This action commenced with the filing of a complaint in Catawba County under file number 19-CVS-106, with Gantt Construction Co. identified as the plaintiff, seeking a refund, on behalf of Plaintiff and a putative class of all natural persons, corporations, and other entities who at any time from 11 January 2016 through 30 June 2018 paid capacity charges to Defendant pursuant to the schedule of fees and/or Code of Ordinances adopted by Defendant. The complaint in the 19-CVS-106 action ("Original Complaint") was filed on 11 January 2019, within three years of the payment on 14 November 2016, the date Plaintiff alleges his injury occurred and his claim arose. On 18 February 2020, the Original Complaint was voluntarily dismissed without prejudice, and the complaint was refiled on or about 28 April 2020 ("Second Complaint") asserting identical claims.

Gantt Construction Co., a "corporation organized and existing under the laws of the State of Texas with its principal place of business in Texas[,]" was the named plaintiff in both the Original Complaint and the Second Complaint. Gary Gantt's 18 February 2020 affidavit indicated Gantt Construction Co. maintained a physical office in Hickory, North Carolina. Evidently, a Texas corporation named Gantt Construction Co. does exist; however, it is not owned, operated, or otherwise affiliated with the individual, Gary Gantt. Gary Gantt operates his construction

business as a sole proprietorship in North Carolina—filing tax returns for his business under his individual name—not a corporate entity. Deposition testimony also established that Gary Gantt had not filed an assumed business name certificate to transact business in North Carolina as Gantt Construction.

On 11 December 2020, after Gary Gantt's deposition testimony revealed the Texas corporation did not pay the capacity fees in question, a motion was filed seeking to amend the Second Complaint to substitute the name of the plaintiff to "Gary Gantt d/b/a Gantt Construction." The trial court granted the motion by order entered on 12 January 2021, and Plaintiff filed an amended complaint on 13 January 2021 ("Amended Complaint"), marking the first appearance of Gary Gantt d/b/a Gantt Construction as a party to the action and simultaneously removing the Texas corporation (Gantt Construction Co.) as a named plaintiff. Also on 11 December 2020, Gantt Construction Co. purported to file a motion for class certification, which was amended on 29 January 2021, heard on 15 February 2021, and granted in part on 22 February 2021.

Plaintiff, now Gary Gantt d/b/a Gantt Construction, filed a motion for summary judgment on 30 April 2021, which Defendant simultaneously opposed and moved that judgment be entered in its favor as the non-moving party per Rule 56(c). The trial court entered an order granting summary judgment for Defendant on 15 July 2021. On 19 July 2021, Plaintiff filed timely notice of appeal.

II. Analysis

A. Purported Conflict with Precedent

On rehearing, Plaintiff argues *Gantt I* conflicts with and alters precedent and established principles regarding the doctrine of relation back. Specifically, Plaintiff contends the initial opinion is inconsistent with *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982) and *Estate of Tallman ex rel. Tallman v. City of Gastonia*, 200 N.C. App. 13, 682 S.E.2d 428 (2009). According to Plaintiff, the holdings of *Burcl* and *Tallman* compel this Court to hold that the Amended Complaint relates back to both the Original Complaint and the Second Complaint because each pleading gave Defendant full notice of the transactions and occurrences upon which Plaintiff's claim is based. We disagree.

In *Burcl*, the North Carolina Supreme Court held that where "the original pleading gives notice of the transactions and occurrences upon which the claim is based, a[n amended] pleading that merely changes

the capacity in which the plaintiff sues[,] relates back to the commencement of the action pursuant to Rule 15(c)." 306 N.C. at 228, 293 S.E.2d at 94. In *Tallman*, this Court held the appointment of the plaintiff as administratrix of her deceased husband's estate after the statute of limitations had run, related back to the filing of the summons pursuant to Rules 15(c) and 17(a) because the defendant had full notice of the transactions and occurrences upon which the claim was based. 200 N.C. App. at 22, 682 S.E.2d at 434.

This case is distinguishable from both *Burcl* and *Tallman* because those cases required amendments to alter a party's legal capacity to sue, and neither involved a voluntary dismissal under Rule 41. *See Burcl*, 306 N.C. at 216, 293 S.E.2d at 87; *Tallman*, 200 N.C. App. at 22, 682 S.E.2d at 434. Although notice may be the relevant inquiry under *Burcl* and *Tallman*, those cases only address relation back under Rules 15 and 17. *See Burcl*, 306 N.C. at 224, 293 S.E.2d at 91; *Tallman*, 200 N.C. App. at 23, 682 S.E.2d at 434–35.

Rule 41 does not pertain to amendments but instead concerns new filings of pleadings that have been voluntarily dismissed. N.C. R. Civ. P. 41(a). Plaintiff is incorrect in asserting that notice is also the determinative inquiry for the relation-back analysis under Rule 41. *See Cherokee Ins. Co. By & Through Weed v. R/I, Inc.*, 97 N.C. App. 295, 297, 288 S.E.2d 239, 240 (1990) (rejecting the plaintiff's argument that—although the two complaints named two separate and distinct legal entities, which shared an address and officers, as defendants—the plaintiff was entitled to relation back under Rule 41 because the initial filing and the surrounding circumstances provided actual notice to the correct defendant), *disc. review denied*, 326 N.C. 594, 393 S.E.2d 875 (1990).

Because the complaints in this case involve two separate and distinct legal entities as party plaintiffs—one of which lacked standing to bring the initial suit—rather than one party whose capacity to sue has changed, *Gantt I* neither conflicts with nor disrupts the precedent set forth in *Burcl* and *Tallman*.

B. Relation Back Under Rule 41(a)

Plaintiff's theory of this case requires us to read Rules 41, 15, and 17 of the North Carolina Rules of Civil Procedure in conjunction, and we must agree with Plaintiff's interpretation of each Rule as applied to this case for Plaintiff to prevail on appeal. For the reasons stated below, we conclude Plaintiff cannot clear the first of these procedural hurdles because he is not entitled to relation back under Rule 41.

The record is clear that the Original Complaint was filed with a corporation organized under the laws of Texas as the named plaintiff. The record is similarly clear that the Second Complaint was brought with the same Texas corporation as the named plaintiff in the action. It further appears from the record that Plaintiff's first purported appearance in the action came after the Original Complaint was dismissed, after the Second Complaint had been filed, and after the trial court granted a motion to amend the Second Complaint.

Plaintiff argues that under Rule 41, the Second Complaint, filed on or about 28 April 2020 and amended with leave of court on 13 January 2021, relates back to the Original Complaint, filed on 11 January 2019 and voluntarily dismissed on 18 February 2020, because the Original Complaint: (1) complied with all Rules governing its form and content,[1] (2) was filed prior to the expiration of the statute of limitations for the claims asserted, and (3) gave Defendant full notice of the transactions and occurrences that formed the basis of Plaintiff's claim in this action. Defendant avers Rule 41 may be invoked where a subsequent complaint relates back to an action previously dismissed without prejudice but argues Rule 41 may only be utilized if the second action involves the same parties. We agree with Defendant because where an initial action, as here, involves a plaintiff who lacked standing to bring suit, the initial complaint is a nullity, and thus, there is no valid complaint to which an amended complaint may relate back.

North Carolina Rule of Civil Procedure 41(a) provides, in relevant part:

> (a) Voluntary dismissal; effect thereof.--
>
> (1) By Plaintiff; by Stipulation. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, R. 41(a) (2021).

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1. To benefit from the Rule 41 extension, "the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10, and 11 of the North Carolina Rules of Civil Procedure." *Murphy v. Hinton*, 242 N.C. App. 95, 100, 773 S.E.2d 355, 359 (2015). Rule 10 provides that a complaint "shall include the names of all the parties[.]" N.C. R. Civ. P. 10(a). Because a separate and distinct legal entity filed the initial pleadings as the named plaintiff in this case, the Original Complaint did not "conform in all respects" to the rules of pleading. *See Murphy*, 242 N.C. App at 100, 773 S.E.2d at 359.

"To benefit from the one[-]year extension of the statute of limitation [in Rule 41], the second action must be substantially the same, involving the same parties, the same cause of action, and the same right . . . ." *Cherokee*, 97 N.C. App. at 297, 388 S.E.2d at 240 (citations and internal quotations omitted); *see Royster v. McNamara*, 218 N.C. App. 520, 531, 723 S.E.2d 122, 130 (2012) (quoting *Holley v. Hercules, Inc.*, 86 N.C. App. 624, 628, 359 S.E.2d 47, 50 (1987) ("Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action.")).

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 786 (2012) (quoting *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006)). "A party has standing to initiate a lawsuit if he is a real party in interest." *Green Tree Servicing LLC v. Locklear*, 236 N.C. App. 514, 519, 763 S.E.2d 523, 526 (2014) (internal quotations and citation omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 786–87 (internal citations and quotations omitted). "The question of subject matter jurisdiction may be raised at any time," even for the first time on appeal. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986) (internal citation omitted).

Furthermore, where a plaintiff lacked standing to file the initial complaint, that complaint is a "nullity" leaving "no valid complaint to which [an] amended complaint could relate back." *See Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787 (holding that where a shareholder of a corporation filed suit for breach of a contract to which he was not a party, the lack of standing rendered the initial complaint a nullity such that the amended complaint, adding the corporation as a plaintiff, could not relate back to the initial complaint to prevent the claim from being time-barred); *see also WLAE, LLC v. Edwards*, 257 N.C. App. 251, 260, 809 S.E.2d 176, 182–83 (2017) (holding where the trial court did not have subject matter jurisdiction over the proceeding at the time of filing, the court did not have authority to order substitution of the parties under Rule 17(a), and any attempt to do so would have been a nullity because no valid action existed for the real party in interest to ratify).

Plaintiff asserts this Court "erred in concluding that *Cherokee*, *Royster*, and *Holley* compelled it to deny relation back to Plaintiff's claims to the date the [Original Complaint] was filed." Specifically,

Plaintiff argues this case is distinguishable from those cases because "none of them involved the amendment of the capacity of the plaintiff when the defendant otherwise had full notice of the transactions and occurrences that formed the basis for the claims." We disagree.

Here, there is not a problem with the *capacity* of the correct plaintiff to sue. Rather, a wholly distinct, disinterested, and incorrect entity brought the action as the named plaintiff in both the Original Complaint and the Second Complaint. Although *Cherokee* involves a case where the plaintiff sought to amend the name of the defendant, the plain language of *Cherokee* is not limited to substitutions of a defendant. *See Cherokee*, 97 N.C. App. 295, 388 S.E.2d 239. As Defendant correctly notes, had the *Cherokee* Court intended for the rule to apply only to situations where the plaintiff seeks to change the name of the defendant, it would have specified the defendants must be the same rather than the *parties* must be the same. Indeed, the *Cherokee* opinion notes, "here the allegations and the plaintiff in both complaints are substantially the same" before holding that the plaintiff was not entitled to relation back under Rule 41 because the defendants were two separate and distinct entities. *See id.* at 299, 388 S.E.2d at 241.

Furthermore, this Court has suggested that to benefit from the one-year extension afforded by Rule 41(a), subsequent complaints must be filed by the same plaintiff. *See Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 277 N.C. App. 102, 111, 744 S.E.2d 130, 136 (2013) (holding the trial court correctly concluded that where the original plaintiff RCI-NC merged with RCI-NV after taking a voluntary dismissal pursuant to Rule 41(a), "any claims RCI-NV acquired from RCI-NC by virtue of the merger had to be filed either by post-merger RCI-NV, identifying itself as the surviving entity . . . or by RCI-NC."). As discussed in subsection A, Plaintiff's reliance on the principle of notice is misguided; notice is not the determinative inquiry for relation back under Rule 41. *See Cherokee*, 97 N.C. App. at 297, 388 S.E.2d at 240.

We agree with Plaintiff that at all relevant times, "Gary Gantt d/b/a Gantt Construction" was the real party in interest in this matter.[2] Unfortunately for Plaintiff, "Gary Gantt d/b/a Gantt Construction" is not the entity that timely filed suit in 2019. Therefore, we reject Plaintiff's

2. On 12 January 2021, the trial court granted Plaintiff's motion to amend the Second Complaint allowing a substitution of the real party in interest pursuant to Rules 15 and 17 of the North Carolina Rules of Civil Procedure. Although Defendant did not cross-appeal from that order, we note the issue of a defect in subject matter jurisdiction may be raised at any time. *See Lemmerman*, 318 N.C. at 580, 350 S.E.2d at 85; *see also WLAE*, 257 N.C. App. at 260, 809 S.E.2d at 182–83.

argument that "as a practical matter the 2019 and 2020 actions [ ] involve the same parties" because the original named plaintiff lacked standing. In the instant case, two separate and distinct legal entities filed pleadings as the named plaintiff: "Gantt Construction Company[,] . . . a corporation organized and existing under the laws of the State of Texas with its principal place of business in Texas[,]" filed complaints on 11 January 2019 and on or about 28 April 2020; meanwhile, "Gary Gantt d/b/a Gantt Construction" filed the Amended Complaint with leave of court on 13 January 2021. It is "well established" under the law that to benefit from the one-year extension provided by Rule 41, following the first and only voluntary dismissal, the refiled suit must involve the "same parties[.]" *Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 84, 549 S.E.2d 227, 232 (2001) (citing *Cherokee Ins. Co.*, 97 N.C. App. at 297, 388 S.E.2d at 240). "Gary Gantt d/b/a Gantt Construction" is neither a corporation nor incorporated under the laws of Texas and is therefore not the same party as Gantt Construction Co., the named plaintiff that initiated this action.

Here, Gantt Construction Co. was not a real party in interest because it neither owned the property subject to the capacity fees nor paid the capacity fees, and therefore had no standing to bring the initial claim. *See Locklear*, 236 N.C. App. at 519, 763 S.E.2d at 526. Gantt Construction Co. did not have standing to bring the Original Complaint; hence, the trial court lacked subject matter jurisdiction. *See Woodring*, 180 N.C. App. at 366, 637 S.E.2d at 274. The trial court's lack of subject matter jurisdiction rendered the Original Complaint a nullity. *See Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787. Because the Original Complaint was a nullity, there is no valid action to which Plaintiff's Amended Complaint could relate back under Rule 41(a). *See id.* at 457, 736 S.E.2d at 787. Accordingly, we conclude that Plaintiff cannot avail himself of relation back under Rule 41(a), because the second action does not involve the "same parties" as the first, and the named plaintiff in the first action lacked standing to bring suit against Defendant for assessing allegedly *ultra vires* water capacity fees. *See Cherokee Ins. Co.*, 97 N.C. App. at 297, 388 S.E.2d at 240; *see also Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787.

Since the Second Complaint was not filed until on or about 28 April 2020, after 14 November 2019—the last date Plaintiff could have timely brought his action—and Plaintiff may not benefit from relation back under Rule 41, Plaintiff's claims are barred by the statute of limitations. *See* N.C. Gen. Stat. § 1-52(15). Therefore, the trial court did not err in granting summary judgment for Defendant.

III. Conclusion

Based on the foregoing, we conclude *Gantt I* is not inconsistent with the holdings of *Burcl* and *Tallman* and was properly decided; Plaintiff is not entitled to relation back under Rule 41, and the party filing the Original Complaint and Second Complaint had no standing to bring the suit. Therefore, we again affirm the trial court's order granting summary judgment to Defendant.

AFFIRMED.

Judges MURPHY and STADING concur.

TIFFANY HOWELL; ET AL., PLAINTIFFS
v.
ROY COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR; ET AL., DEFENDANTS

No. COA22-571

Filed 5 September 2023

1. Appeal and Error—interlocutory order—denying motion to dismiss constitutional challenges—sovereign immunity defense—substantial right

In a case brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders issued in response to COVID-19 violated their rights under the state constitution, an interlocutory order denying legislative defendants' motion to dismiss under Civil Procedure Rule 12(b)(6) was immediately appealable, since the motion was at least partially based on a sovereign immunity defense and therefore affected a substantial right. Additionally, the trial court's denial of legislative defendants' Rule 12(b)(2) motion was also immediately appealable to the extent that it relied upon a sovereign immunity defense. Conversely, the denial of legislative defendants' Rule 12(b)(1) motion to dismiss based on sovereign immunity did not affect a substantial right and therefore was not immediately appealable.

2. Constitutional Law—North Carolina—right to earn a living—executive orders—closing bars during global pandemic—sovereign immunity

In an action brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders—which, in

response to COVID-19, initially closed bars and then repeatedly extended those closures—violated their rights under the state constitution to "the enjoyment of the fruits of their own labor" and to substantive due process under "the law of the land," the trial court properly denied legislative defendants' Rule 12(b)(6) motion to dismiss, which asserted a sovereign immunity defense. According to a landmark case, sovereign immunity cannot be used as a defense against alleged violations of constitutional rights guaranteed under the Declaration of Rights. Contrary to legislative defendants' argument, plaintiffs were not required to seek injunctive relief before stating a claim for monetary damages on grounds that the former remedy constituted the "least intrusive remedy available"; rather, the obligation to seek the "least intrusive remedy available" refers to the judiciary's duty to formulate remedies for constitutional violations in a way that minimizes its encroachment upon other branches of government. Further, legislative defendants could not rely on a sovereign immunity defense because plaintiffs stated colorable constitutional claims where they alleged that a blanket prohibition against conducting their bar businesses violated their right to earn a living—a right protected under both the "fruits of labor" clause and the "law of the land" clause.

Judge ARROWOOD dissenting.

Appeal by Defendant from an Order entered 16 February 2022 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 10 January 2023.

Kitchen Law, PLLC, by S. C. Kitchen, for Plaintiffs-Appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Matthew Tulchin and Michael T. Wood, for Roy A. Cooper, III, in his official capacity as Governor, and the State of North Carolina, Defendants-Appellants.

No brief filed for Tim Moore, in his official capacity as Speaker of the House of Representatives, and Phil Berger, in his official capacity as President Pro Tempore of the Senate, Defendants-Appellants.

WOOD, Judge.

Governor Roy Cooper (the "Governor"), the State of North Carolina (the "State"), and Speaker of the House Tim Moore and President Pro Tempore of the Senate Phil Berger ("Defendants Moore and Berger"), collectively referred to as "Defendants," appeal the trial court's denial of a motion to dismiss a complaint brought by individuals and incorporated entities owning or operating bars ("Plaintiffs"). Plaintiffs' complaint alleged causes of action under N.C. Const. art. 1, §§ 1, 19, regarding North Carolinians' right to "the enjoyment of the fruits of their own labor" and to substantive due process under "the law of the land." We hold sovereign immunity does not bar Plaintiffs' claims and Plaintiffs state colorable constitutional claims.

I. Factual and Procedural History

After the Governor declared a state of emergency in March 2020 in response to COVID-19 and issued a series of executive orders initially closing bars and repeatedly extending the closure, Plaintiffs filed their original complaint on 22 December 2020. In it, Plaintiffs alleged the executive orders made their businesses "unprofitable to operate" and caused "financial damages due to the closing of their respective businesses, or the severe restrictions placed on their respective businesses." Plaintiffs put forward five causes of action, alleging the following violations of their constitutional rights: (1) their right to earn a living ("the enjoyment of the fruits of their own labor") under N.C. Const. art. I, § 1 (the "fruits of labor clause"); (2) a purported as-applied challenge to N.C. Gen. Stat. § 166A-19.31(b)(2) (2020); (3) their substantive due process rights under N.C. Const. art. I, § 19 (the "law of the land clause"); (4) their right to equal protection of the laws under N.C. Const. art. I, § 19; and (5) a facial challenge to N.C. Gen. Stat. § 166A-19.30(c) (2020). Plaintiffs claimed damages "in excess of $25,000" and requested a permanent injunction preventing any further impairment on Plaintiffs' businesses.

On 29 January 2021, the Governor and the State filed a motion to dismiss Plaintiffs' complaint pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6) and noted any facial challenges to statutes would need to be heard by a three-judge panel of the superior court pursuant to N.C. Gen. Stat. § 1-267.1(a1) (2022). Accordingly, on 15 March 2021, the trial court transferred Plaintiffs' fifth cause of action, a facial challenge to the operative statute, to a three-judge panel.

On 11 May 2021, Plaintiffs filed an amended complaint adding Defendants Moore and Berger. On 12 July 2021, the Governor and the State filed a motion to dismiss Plaintiffs' amended complaint pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6). On 19 July 2021,

Defendants Moore and Berger answered Plaintiffs' amended complaint. On 28 January 2022, the trial court held a hearing on Defendants' motion to dismiss.

On 16 February 2022, the trial court entered an order denying Defendants' motion to dismiss as to Plaintiffs' first and third causes of action pursuant to the fruits of labor clause and law of the land clause of our Constitution. The trial court transferred the second cause of action, a constitutional challenge to the operative statute, to a three-judge panel of the superior court as it had done with Plaintiffs' fifth cause of action. Finally, the trial court dismissed Plaintiff's fourth cause of action relating to equal protection and determined Plaintiffs' request for permanent injunctive relief was moot due to the lifting of restrictions on businesses by the time the matter had been heard.

II. Jurisdiction

[1] N.C. Gen. Stat. § 1-277 allows an appeal from a determination of a superior court affecting a party's substantial rights. N.C. Gen. Stat. § 1-277 (2022).

> According to well-established North Carolina law, governmental immunity is an immunity from suit rather than a mere defense to liability. For that reason, this Court has held that denial of dispositive motions such as motions to dismiss that are grounded on governmental immunity affect a substantial right and are immediately appealable.

Doe v. Charlotte-Mecklenburg Bd. of Educ., 222 N.C. App. 359, 363, 731 S.E.2d 245, 248 (2012) (cleaned up). Specifically, the denial of a motion to "dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6) . . . affects a substantial right and is immediately appealable under" N.C. Gen. Stat. § 1-277. *Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 92, 782 S.E.2d 531, 535 (2016). A party actually must rely on sovereign immunity in its motion to dismiss, and it may do so in its written motion or orally at the hearing on the motion to dismiss. *Id.*, 246 N.C. App. at 93, 782 S.E.2d at 536 ("[S]ince neither defendant's written motion nor its oral argument at the hearing relied on Rule 12(b)(6) in connection with the sovereign immunity defense, the case law authorizing interlocutory appeals for a denial of a Rule 12(b)(6) motion based on sovereign immunity does not apply").

Here, Defendants did not mention sovereign immunity in their original motion to dismiss or in their motion to dismiss Plaintiffs' amended complaint. However, Defendants' counsel raised sovereign immunity in the hearing on the motion to dismiss:

> [T]he plaintiffs' amended complaint fails to state a claim and must be dismissed for a couple of reasons . . . . The second reason . . . is that the plaintiffs are seeking damages in this case, and we would contend that the damages claims are barred by sovereign immunity.

Defendants' counsel's reference here indicates Defendants' motion to dismiss pursuant to Rule 12(b)(6) is based, at least partially, on a sovereign immunity defense. Accordingly, at a minimum, the trial court's denial of Defendants' Rule 12(b)(6) motion based on sovereign immunity affected Defendants' substantial rights, and therefore, their interlocutory appeal is properly before us. *Murray*, 246 N.C. App. at 92, 782 S.E.2d at 535.

We note that a "denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right [and] is therefore not immediately appealable under" N.C. Gen. Stat. § 1-277. *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014). Therefore, the trial court's denial of Defendants' motion to dismiss pursuant to Rule 12(b)(1) is not properly before us as an interlocutory appeal. As for Defendants' motion to dismiss pursuant to Rule 12(b)(2), "to the extent [D]efendant[s] relied on Rule 12(b)([2]) in moving to dismiss on sovereign immunity grounds," that component of their motion to dismiss would support an immediate appeal. *Murray*, 246 N.C. App. at 92–93, 782 S.E.2d at 536.

Accordingly, Defendants' interlocutory appeal is proper pursuant to the trial court's denial of their Rule 12(b)(6) motion to dismiss.

III. Analysis

Defendants argue sovereign immunity bars Plaintiffs' claims, and Plaintiffs fail to state colorable constitutional claims. We disagree.

A. Sovereign Immunity

[2] We review "a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review. Questions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." *Lannan v. Bd. of Governors of Univ. of N. Carolina*, 285 N.C. App. 574, 587, 879 S.E.2d 290, 301 (2022) (cleaned up).

We begin with a review of sovereign immunity:

> As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state,

> its counties, and its public officials sued in their official capacity. The doctrine applies when the entity is being sued for the performance of a governmental function. But it does not apply when the entity is performing a ministerial or proprietary function.

Herring ex rel. Marshall v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (citations omitted). Sovereign immunity, at its core, immunizes the state when it is "exercising its judicial, discretionary, or legislative authority . . . or is discharging a duty, imposed solely for the benefit of the public," from "liability for the negligence of its officers . . . unless some statute" provides otherwise. *Steelman v. City of New Bern*, 279 N.C. 589, 593, 184 S.E.2d 239, 241–42 (1971).

The doctrine of sovereign immunity is

> firmly established in the law of our State today and has been recognized by the General Assembly as the public policy of the State. The doctrine of sovereign immunity has been modified, but never abolished. It has been said that the present day doctrine seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity.

Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992).

Still, North Carolina courts have a sacred duty to safeguard the constitutional rights of her citizens. "[I]t is the judiciary's responsibility to guard and protect those rights" enumerated in the Declaration of Rights. *Id.* at 785, 413 S.E.2d at 291. "The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.* at 785-86, 413 S.E.2d at 291. And because "rights protected under the Declaration of Rights from violation by the State are constitutional rights," whereas the doctrine of sovereign immunity "is a common law theory or defense established by" our Supreme Court, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

In *Corum*, a landmark sovereign immunity case, our Supreme Court stated:

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, . . . the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government -- in appearance and in fact -- *by seeking the least intrusive remedy available and necessary to right the wrong.*

330 N.C. at 784, 413 S.E.2d at 291 (emphasis added). Defendants argue sovereign immunity bars Plaintiffs' claims because in seeking monetary damages, Plaintiffs did not seek the least intrusive remedy. Specifically, Defendants argue the mandate to "seek the least intrusive remedy available" applies at the pleading stage, and therefore requires a plaintiff to seek injunctive relief before the party may state a claim for damages. The *Corum* court specifically referred to the judiciary's responsibilities in formulating a remedy, however, not a party's obligations at the pleading stage: "It will be a matter for the trial judge to craft the necessary relief." *Id.* at 784, 413 S.E.2d at 290. Accordingly, *Corum* requires the judiciary to shape the remedy, not a plaintiff to seek injunctive relief as a prerequisite to reaching trial. When a constitutional violation occurs, and no statute provides redress for the violation, the constitutional provision "is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955). We further conclude that any failure by Plaintiffs to seek injunctive relief prior to damages does not stand as a bar at the pleading stage to their claim for damages.

B. Stating a Constitutional Claim

"When reviewing a motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 412, 858 S.E.2d 788, 793–94 (2021).

Also relevant to whether Plaintiffs can survive Defendants' immunity defense is whether Plaintiffs have stated constitutional claims. The doctrine of sovereign immunity shall not operate to deprive North Carolinians of an opportunity to redress alleged constitutional

violations. *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 356 (2009). Our Supreme Court has "carved out an express exception to sovereign immunity for constitutional injuries." *Town of Apex v. Rubin*, 277 N.C. App. 328, 352, 858 S.E.2d 387, 403 (2021). Specifically, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. *Corum* specifically held sovereign immunity will not bar North Carolinians from seeking to remedy alleged violations guaranteed by the Declaration of Rights of our Constitution. *Id.* at 783, 413 S.E.2d at 290; *see also Bunch v. Britton*, 253 N.C. App. 659, 667, 802 S.E.2d 462, 469 (2017).

The very first Article of our Constitution reads: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor, and the pursuit of happiness*." N.C. Const. art. I, § 1 (emphasis added). Later, our Declaration of Rights states:

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

N.C. Const. art. I, § 19.

A plaintiff's complaint must sufficiently allege: (1) a state actor violated an individual's constitutional rights, (2) the claim is a colorable constitutional claim ("the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution"), and (3) there is no adequate state remedy apart from a direct claim under the Constitution. *Deminski*, 377 N.C. at 413–14, 858 S.E.2d at 793–94.

Here, first, we must determine whether the Complaint sufficiently alleges violations of Plaintiffs' constitutional rights. Regarding Plaintiffs' fruits of labor claim, their complaint states:

> 42. The Plaintiffs are each owners and operators of bars located in the State of North Carolina.
>
> 43. By his issuance of various Executive Orders . . . Defendant Cooper has ordered that the facilities of the

> Plaintiffs be closed, or so severely restricted as to make the facilities of the Plaintiffs unprofitable to operate. . . .
>
> 45. [The] Executive Orders . . . deprive the Plaintiffs of their inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution. . . .
>
> 48. [The] Executive Orders . . . are or were unconstitutional as applied to owners and operators of bars as neither the State of North Carolina nor the Governor of the State possess the authority to deprive the Plaintiffs of their right to earn a living.
>
> 49. Due to the unconstitutional executive orders, the Plaintiffs have been damaged in a sum in excess of $25,000.

Regarding Plaintiffs' substantive due process claim, their complaint states:

> 57. Plaintiffs have the fundamental right to earn a living.
>
> 58. Article I, sec. 19 of the North Carolina Constitution guaranties that the State does not issue orders that are unreasonable, arbitrary or capricious, and the law be substantially related to the valid object sought to be obtained. . . .
>
> 60. There is no rational basis for allowing restaurants, private clubs, breweries, wineries, and distilleries to reopen indoors while requiring the Plaintiffs' businesses to remain closed or only operating outdoors. Nor is there a rational basis for limiting alcohol sales between the hours of 9:00 pm and 7:00 am.
>
> 61. [The] Executive Orders . . . thus violate the substantive due process rights of the Plaintiffs and are invalid.

We conclude the Complaint sufficiently alleges state violations of Plaintiffs' constitutional rights because it coherently pleaded the Governor's orders violated their constitutional right to earn a living. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793.

Second, we must determine whether the Complaint sufficiently alleges a colorable constitutional claim pursuant to theories under the fruits of labor and law of the land clauses of our Constitution. We begin with determining whether Plaintiffs state a claim under the fruits of labor clause. We have held the "provision creates a right to conduct a lawful business or to earn a livelihood that is 'fundamental' for purposes of

state constitutional analysis." *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986). "[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. When this field has been reached, the police power is severely curtailed." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) (citations omitted). The *Harris* court held licensing requirements applicable to the dry cleaning industry were unconstitutional under the fruits of labor clause (among other constitutional provisions) for their "invasion of personal liberty and the freedom to choose and pursue one of the ordinary harmless callings of life—a right which we conceive to be guaranteed by the Constitution." *Id.* at 751, 753, 765, 6 S.E.2d at 858–59, 866.

The thrust of the fruits of labor clause is that the state "may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Cheek v. Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (licensing requirements unconstitutionally targeted massage parlors). Although this State's courts often have analyzed the fruits of labor clause in the context of legislative licensing requirements, that context is not its only application. *See King v. Town of Chapel Hill*, 367 N.C. 400, 408–09, 758 S.E.2d 364, 371 (2014) (town council's fee schedule for vehicle towing services "implicates the fundamental right to earn a livelihood" under the fruits of labor clause) (quotation marks omitted); *see also Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018) ("Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees").

Here, Plaintiffs have a fundamental right to earn a living from the operation of their respective bar businesses. The constitutional right to produce a living from the income of one's business is a protected right under the fruits of labor clause. Where, as here, the complaint alleges that the blanket prohibition—rather than regulation—of an entire economic sector violates one's right to earn a living, that complaint states a colorable constitutional claim. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793.

Next, we turn to whether Plaintiffs state a claim under the law of the land clause. Our Supreme Court has held that the "law of the land" clause is North Carolina's version of the federal substantive due process clause. *McNeill v. Harnett Cnty.*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). Therefore, that clause protects those "fundamental rights

and liberties which are, objectively, deeply rooted in [this State's] history and tradition and implicit in the concept of ordered liberty." *State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 457, (1971); *Matter of Bethea*, 255 N.C. App. 749, 754, 806 S.E.2d 677, 680–81 (2017). Our Supreme Court has described the right to enjoy the fruits of one's own labors as the inalienable right to earn a living as long as the business is not "within the category of social and economic ills." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d at 854, 863 (1940). "The right to conduct a lawful business or to earn a living is regarded as fundamental." *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957).

Here, Plaintiffs have a fundamental right to earn a living from the operation of their respective bar businesses. Accordingly, we conclude Plaintiffs' allegations that the executive orders violated their right to earn a living sufficiently pleaded a constitutional claim under the law of the land clause. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793–94.

Finally, Plaintiffs pleaded they do not have an adequate state remedy: "The Emergency Management Act under which the Defendants are operating does not provide for a plain, speedy, or adequate remedy at law. The [Plaintiffs] therefore do not have an adequate state remedy." We agree there is no other adequate state remedy now that any claim for injunction is moot as the executive orders are no longer in effect. Accordingly, we conclude Plaintiffs adequately pleaded lack of an adequate state remedy. *Deminski*, 377 N.C. at 413, 858 S.E.2d at 793–94.

In conclusion, we hold the trial court did not err in denying the Motion to Dismiss as to Plaintiffs' first and third causes of action for failure to state a claim upon which relief can be granted.

We do not address the validity of the Governor's actions under the Emergency Management Act, as the constitutionality of those statutes has yet to be determined. Two of Plaintiff's causes of action challenge the constitutionality of the statutes under which the Governor purported to act. The trial court transferred Plaintiffs' constitutional challenges to N.C. Gen. Stat. § 166A-19.30(c) and N.C. Gen. Stat. § 166A-19.31(b)(2) to a three-judge panel as required. Defendants did not appeal the trial court's transfer of Plaintiffs' second and fifth causes of action, thus, those matters remain pending before the three-judge panel. Therefore, we do not reach a determination of the validity of the Governor's actions under those statutes.

IV. Conclusion

We are tasked with determining whether sovereign immunity bars Plaintiff's claims at the pleading stage and whether Plaintiffs allege

colorable constitutional claims. We do not address the validity of the statutes being contested nor decide the merits of Plaintiffs' claims as those issues are not before us. To that end, we hold any alleged failure on the part of Plaintiffs to seek injunctive relief prior to damages does not bar their claims at the pleading stage under the theory of sovereign immunity. We further hold Plaintiffs have stated colorable constitutional claims where they allege a blanket prohibition against conducting their bar businesses violated both their right to earn a living and their substantive due process rights under N.C. Const. art. 1, §§ 1, 19. We affirm the trial court's denial of Defendants' Motion to Dismiss.

AFFIRMED.

Judge GORE concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the trial court properly denied defendants' motion to dismiss. Accordingly, I would hold the trial court erred in denying defendants' motion to dismiss under Rule 12(b)(6) because plaintiffs failed to allege a colorable constitutional claim.

In order "to prevent the spread of COVID-19[,]" on 10 March 2020, Governor Roy Cooper ("Governor Cooper") declared a State of Emergency.[1] Following the State of Emergency, Governor Cooper entered several additional executive orders, pursuant to his authority under N.C. Gen. Stat. § 166A-19.30.

Under N.C. Gen. Stat. § 166A-19.30, during a "declared state of emergency, the Governor" has the authority:

> (1) To utilize all available State resources as reasonably necessary to cope with an emergency, including the transfer and direction of personnel or functions of State agencies or units thereof for the purpose of performing or facilitating emergency services.

1. Office of Governor Roy Cooper, Exec. Order No. 116, (Mar. 16, 2020), https://files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf.

(2) To take such action and give such directions to State and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this Article and with the orders, rules, and regulations made pursuant thereto.

(3) To take steps to assure that measures, including the installation of public utilities, are taken when necessary to qualify for temporary housing assistance from the federal government when that assistance is required to protect the public health, welfare, and safety.

. . . .

(b) . . .

(2) To establish a system of economic controls over all resources, materials, and services to include food, clothing, shelter, fuel, rents, and wages, including the administration and enforcement of any rationing, price freezing, or similar federal order or regulation.

(3) To regulate and control the flow of vehicular and pedestrian traffic, the congregation of persons in public places or buildings, lights and noises of all kinds, and the maintenance, extension, and operation of public utility and transportation services and facilities.

. . . .

(5) To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

N.C. Gen. Stat. § 166A-19.30(a)–(b) (2022). After executive orders affecting their business operations were put into place to slow the spread of COVID-19, plaintiffs filed a complaint, contending the orders violated their constitutional rights under Article I, Sections 1 and 19 of our Constitution.

Our Constitution states: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness." N.C. Const. art. I, § 1 (emphasis added). Furthermore, Article I, Section 19 holds that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

These rights, though highly important and fiercely protected, are not impenetrable. *See Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957); *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (citation omitted) (explaining Article I, Section 19 "serves to limit the state's police power *to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare*") (emphasis added).

It has long been understood that "[t]he right to work and to earn a livelihood is a property right that cannot be taken away *except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare*." *Roller*, 245 N.C. at 518, 96 S.E.2d at 854 (emphasis added) (citation omitted). As the majority recognizes, this right cannot be curtailed "under the guise of protecting the public interest[;]" however, the government can interfere with business operations as long as it is not done so "arbitrarily" and does not "impose unusual and unnecessary restrictions upon lawful occupations." *Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (citation and internal quotation marks omitted).

"These constitutional protections have been consistently interpreted to permit the [S]tate, through the exercise of its police power, to regulate economic enterprises provided the regulation is *rationally related to a proper governmental purpose*. This is the test used in determining the validity of state regulation of business *under both* Article I, Section 1, and Article I, Section 19." *Poor Richard's, Inc.*, 322 N.C. at 64, 366 S.E.2d at 699 (emphasis added) (citation omitted); *Shipman v. N.C. Priv. Protective Servs. Bd.*, 82 N.C. App. 441, 443, 346 S.E.2d 295, 296 (citations omitted) ("For a statute to be within the limits set by the federal due process clause and the North Carolina 'law of the land' provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose."), *appeal dismissed and disc. review denied*, 318 N.C. 509, 349 S.E.2d 866 (mem.) (1986). This analysis is "twofold" and requires us

to consider both: (1) whether the governmental action is for "a proper governmental purpose"; and (2) whether "the means chosen to affect that purpose [are] reasonable[.]" *Poor Richard's, Inc.*, 322 N.C. at 64, 366 S.E.2d at 699.

In determining the legitimacy of the government interest for the rational basis test, "it is not necessary for courts to determine the actual goal or purpose of the government action at issue; instead, any conceivable legitimate purpose is sufficient." *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008) (brackets, citation, and internal quotation marks omitted). Furthermore, "in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity." *White v. Pate*, 308 N.C. 759, 767, 304 S.E.2d 199, 204 (1983) (citation omitted).

Here, the majority states that they did not recognize Governor Cooper's statutory authority under the State of Emergency statute because "the constitutionality of those statutes has yet to be determined[,]" given the plaintiffs challenges to those statutes "remain pending before the three-judge panel." Yet, "this Court must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears." *State v. Anderson*, 275 N.C. 168, 171, 166 S.E.2d 49, 50 (1969) (citations omitted); *see also Holmes v. Moore*, 384 N.C. 426, 435, 886 S.E.2d 120, 129 (2023) (citation omitted) ("The presumption of constitutionality is a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our Constitution and the legislature's role as the voice through which the people exercise their ultimate power.").

By ignoring the presumption of constitutionality, the majority sidesteps the rational basis analysis, which is necessary to determine whether the actions complained of were appropriate and therefore whether the plaintiffs' claims were colorable. *See Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (citing *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) ("A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint.")); *see also Sutton*, 277 N.C. at 102–03, 176 S.E.2d 161, 166 (citation and internal quotation marks omitted) ("A (complaint) may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim[.]").

Failing the rational basis test is undoubtedly an insurmountable bar. Because there is no question that issuing the executive orders was

rationally related to a legitimate government purpose—here, combatting the spread of the COVID-19 virus and protecting the public's health and safety—Governor Cooper's action under the statute clearly satisfies the rational basis standard. Certainly, orders to combat a virus and protect the health and safety of the public during a pandemic cannot be considered "arbitrary."

I would hold Governor Cooper had the statutory authority to issue the executive orders in question and his actions during the pandemic easily meet the rational basis standard. Therefore, the complaint did not state a colorable claim. However, it is also of the utmost importance to consider the practical implications of the majority's holding. The COVID-19 pandemic was an unprecedented event that caused the death of over 29,000 North Carolina citizens.[2] It was a novel occurrence in modern times and put our national and state leaders in the position to have to make tough, effective choices to swiftly protect the health and safety of their constituents. Those actions are entitled to the presumption of validity which standard both the majority and the trial court failed to afford them, plaintiff's complaint, fails to clear this bar.

If and when we face such a crisis again, the Governor must be able to make rationally related choices to stem the effects of that emergency quickly, without concern that those hard choices will subject them or the State to protracted litigation. Curtailing the ability of our Governor to issue executive orders during a state of emergency sets a deadly precedent that will prove to have grave consequences in the future. While clearly arbitrary and capricious regulations that have no rational basis in fact would be actionable, the actions complained of here do not fall within that gambit; they are permitted under N.C. Gen. Stat. § 166A-19.30 to protect the public health by controlling the congregation of people in areas where such actions were known to spread the COVID-19 virus. Because they are rationally related to this purpose, they are entitled to the presumption of validity which the allegation on the face of this complaint cannot overcome.

For the foregoing reasons, I would reverse the trial court's order denying defendant's motion to dismiss. Therefore, I dissent.

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2. The North Carolina Department of Health and Human Services states that of the 3,501,404 cases of COVID since March 2020, 29,059 North Carolina citizens died due to the virus as of May 2023. https://covid19.ncdhhs.gov/dashboard/cases-and-deaths#COVID-19CasesandDeaths-7876.

IN RE C.J.B.

[290 N.C. App. 303 (2023)]

IN THE MATTER OF C.J.B.

No. COA22-853

Filed 5 September 2023

Termination of Parental Rights—grounds for termination—willful abandonment—lack of contact with child—restrictive parole conditions

The trial court erred by terminating respondent-father's parental rights to his daughter based on willful abandonment where the court's findings were insufficient to establish willfulness. During the determinative six-month period immediately preceding the filing of the petition by the child's mother, respondent was subject to restrictive parole conditions in another state that prohibited him from engaging in any form of communication with his daughter, but his actions during that time period—including submitting several applications to modify the conditions of his parole, fulfilling certain precursor conditions in furtherance of those requests, and remaining current on his child support obligations—were not consistent with a willful determination to forego all parental duties or to relinquish all parental claims to his child.

Appeal by Respondent-Father from order entered 27 July 2022 by Judge Marcus A. Shields in Guilford County District Court. Heard in the Court of Appeals 23 May 2023.

Garron T. Michael for Respondent-Appellant.

Spidell Family Law, by Megan E. Spidell, for Petitioner-Appellee.

CARPENTER, Judge.

Respondent-Father appeals from the trial court's 27 July 2022 Order Terminating Parental Rights ("Order"), which terminated his parental rights to the minor child, C.J.B. ("Crystal").[1] After careful review, we conclude the trial court erred by determining Respondent-Father willfully abandoned Crystal while Respondent-Father was subject to restrictive Indiana parole conditions, which barred him from any contact with

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

Crystal. Accordingly, we reverse the Order and remand the matter to the trial court.

I. Factual and Procedural Background

In 2010, Crystal was born to Petitioner and Respondent-Father during their marriage, and she was twelve years old at the time of the termination hearing. The couple separated in December of 2010, and by May of 2011, Petitioner and Respondent-Father executed a Consent Order by which the parties agreed to share joint custody of Crystal, with Petitioner having primary physical custody. Under the terms of this Consent Order, Respondent-Father was required to pay child support of $400 each month. Between May of 2011 and March of 2014, Respondent-Father exercised weekend visitations with Crystal and remained current on his monthly child-support obligation.

In May of 2014, Respondent-Father was convicted of two felonies related to sexual misconduct with a fourteen-year-old minor in Indiana. As a result of his conviction, Respondent-Father was incarcerated from 1 May 2014 until 3 July 2017. During his incarceration, Petitioner answered Respondent-Father's calls on one occasion, and she did not allow him to speak to Crystal. Upon Respondent-Father's release from prison, Indiana authorities placed him on parole through spring 2024, subject to restrictive conditions based on the nature of his conviction. Among the restrictions was an absolute bar to any form of communication with any minor child, including his biological child. Specifically, Respondent-Father's parole conditions provided as follows:

> [Y]ou shall not touch, photograph (still or moving), correspond with (via letter, email, text message or internet based communication or otherwise), and/or engage in any 'small talk' or unnecessary conversation with any child, including your biological or adopted children, either directly or via third-party, or an attempt to do any of the preceding without written approval in advance by your parole agent in consultation with your treatment provider. You must never be in a vehicle or any residence with any child, including your biological or adopted children, even if other adult(s) are present, without written approval in advance by your parole agent in consultation with your treatment provider. You must report any inadvertent contact with children, including your biological or adopted children, to your parole agent within 24 hours of contact. *If you have biological or adopted children, you may not*

> *have contact with them due to the nature and circumstances of your criminal convictions without advance written approval from the Indiana Parole Board in consultation with your parole agent and treatment provider*. 'Contact' includes, but not limited to, possessing photographs of children, writing and internet-based communicating, done either directly or through third parties. (emphasis added).

Following his release on 3 July 2017, Respondent-Father completed and passed the Abel Assessment and a lie-detector test, both of which were required by Indiana authorities before any modifications to his parole conditions would be considered. Respondent-Father first sought to modify his parole conditions in December of 2017, less than six months after his release, and his request was denied. Respondent-Father next petitioned for modifications to his parole conditions in 2019 and again shortly after Petitioner filed the termination petition in 2021. All three of Respondent-Father's requests—two before the filing of the petition and one after—were denied by the State of Indiana Parole Board.

Petitioner filed the termination petition on 2 June 2021, alleging Respondent-Father willfully abandoned Crystal pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) (2021). Respondent-Father filed an answer opposing the allegations on 20 August 2021. The termination hearing commenced on 1 July 2022. Respondent-Father appeared at the hearing despite being incarcerated in Guilford County on a charge of First-Degree Sexual Offense. The only witnesses during adjudication were Petitioner and Respondent-Father.

In her testimony, Petitioner acknowledged Respondent-Father was current on his child-support obligation and had no past-due arrearages. Counsel for Respondent-Father presented no evidence on adjudication but moved to dismiss at the close of Petitioner's evidence and at the close of all evidence, both of which were denied. Thereafter, Petitioner moved to recall Respondent-Father to testify further regarding the specific language of his parole restrictions and conditions. Without objection, the trial court briefly heard additional testimony from Respondent-Father.

At the close of evidence on adjudication, the court heard argument from counsel for Petitioner and counsel for Respondent-Father. Although the trial court afforded the Guardian ad Litem ("GAL") an opportunity to be heard, she declined, explaining: "Your Honor, in full candor to the Court, I'm being torn between what I believe the law is and what my wishes are on behalf of [Crystal], and as a result, I'm going to stay silent at this stage."

Having heard from all parties on adjudication, the trial court ruled Petitioner had met her burden by clear, cogent, and convincing evidence as to the asserted termination ground, N.C. Gen. Stat. § 7B-1111(a)(7). The trial court's findings as to willful abandonment provided, in relevant part:

> 10(d). Respondent[-Father] had avenues pursuant to his parole conditions that would allow him to seek approval for contact with [Crystal]. However, Respondent[-Father] only took affirmative actions to seek approval to allow contact with [Crystal] sometime in 2017, 2019 and after the filing [of] the Petition to Terminate Parental Rights.
>
> 10(e). Respondent[-Father] demonstrated familiarity with said avenues through his attempts to seek approval in 2017 and again in 2019. Respondent[-Father] failed to make any attempts to seek approval from the Indiana Parole Board during the relevant period of time.
>
> 10(f). Respondent[-Father] failed to make reasonable efforts, even annually, to request approval from the Parole Board to allow contact with the juvenile since his release from prison in July 2017.
>
> 10(g). During the relevant period of time, Respondent [-Father] failed to send any cards, letters, gifts or tokens of affection, nor did he send any birthday or Christmas gifts or otherwise acknowledge any of these events for [Crystal].

The trial court proceeded to the dispositional stage where Petitioner and her husband served as the only witnesses on the best interests of Crystal. The GAL submitted a report on disposition and provided the trial court with a summary of her report for the record. Counsel for Respondent-Father presented no evidence on disposition but argued against termination. After considering the dispositional evidence, the trial court determined termination of Respondent-Father's parental rights was in Crystal's best interest. The trial court's oral findings were reduced to writing, and the Order was formally filed on 27 July 2022. On 1 August 2022, Respondent-Father filed timely, written notice of appeal.

II. Jurisdiction

The Order terminating Respondent-Father's parental rights is appealable pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2021).

III. Issue

The sole issue on appeal is whether the trial court erred in adjudicating Crystal willfully abandoned by Respondent-Father within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7) under the facts and circumstances of this case.

IV. Standard of Review

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796 (2020); *see* N.C. Gen. Stat. §§ 7B-1109(e), -1110(a) (2021). "[A]n adjudication of any single ground in [N.C. Gen. Stat.] § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019); *see also* N.C. Gen. Stat. § 7B-1110(a).

"We review a trial court's adjudication that a ground exists to terminate parental rights under [N.C. Gen. Stat.] § 7B-1111 to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re A.M.*, 377 N.C. 220, 225, 856 S.E.2d 801, 806 (2021) (citations and quotation marks omitted). "Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate [the] respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) (citations omitted).

"A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 400, 862 S.E.2d 163, 166 (2021) (citation omitted). "A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding [of fact]." *In re G.C.*, 384 N.C. 62, 65, 884 S.E.2d 658, 661 (2023) (citation omitted) (alteration in original).

"[W]hether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights . . . is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 641, 862 S.E.2d 758, 761–62 (2021) (citation omitted). "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 T.M.L.*, 377 N.C. 369, 375, 856 S.E.2d 785, 790 (2021) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530, 843 S.E.2d 202, 205 (2020) (alteration in original)).

V. Analysis

On appeal, Respondent-Father challenges two findings of fact as unsupported by the evidence and argues that the remaining, supported findings of fact fail to support the trial court's conclusion that Respondent-Father willfully abandoned Crystal. Petitioner disagrees, asserting it is undisputed Respondent-Father did not attempt to contact Crystal in the determinative six-month period preceding the filing of the petition, and his prior efforts were not sufficient to obviate a finding of willfulness. After careful consideration, we tend to agree with Respondent-Father.

Our statutes are clear that before terminating parental rights on the ground of willful abandonment, a trial court must find that the petitioner has presented clear, cogent, and convincing evidence the respondent-parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C. Gen. Stat. § 7B-1111(a)(7); *see* N.C. Gen. Stat. § 7B-1103(a)(1) (either parent is authorized to petition for the termination of parental rights of the other parent). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021) (citation omitted).

A. Findings of Fact

In this case, the determinative six-month period was 2 December 2020 through 2 June 2021. First, Respondent-Father asserts that findings 10(f) and 10(g) are not supported by clear, cogent, and convincing evidence. We agree, in part.

Finding 10(f) provides: "Respondent[-Father] failed to make reasonable efforts, even annually, to request approval from the Parole Board to allow contact with [Crystal] since his release from prison in July 2017." We first note that because finding 10(f) contains a value judgment regarding the reasonableness of Respondent-Father's efforts reached by a process of natural reasoning, finding 10(f) is more properly considered an ultimate finding and will be reviewed as such. *See In re G.C.*, 384 N.C. at 66 n.3, 884 S.E.2d at 661 n.3 ("[A]n ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning.").

As this ultimate finding looks beyond the determinative six-month period, the trial court was either assessing Respondent-Father's credibility or intentions. *See In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767.

Because ultimate finding 10(f) and the balance of the Order contain no credibility findings, adverse or favorable, our analysis presumes the trial court was discussing Respondent-Father's intentions regarding contact with Crystal. In reviewing the evidentiary facts contained within finding 10 and giving due deference to the trial court's fact-finding role, we conclude the trial court's evidentiary facts "reasonably support" its ultimate finding that Respondent-Father's efforts were not sufficiently reasonable to demonstrate his intent to reacquire the right to contact Crystal. *See In re G.C.*, 384 N.C. at 65, 884 S.E.2d at 661. Therefore, ultimate finding 10(f) is conclusive on appeal. *See id.* at 65, 884 S.E.2d at 661.

Next, finding 10(g) provides: "During the relevant period of time, Respondent[-Father] failed to send any cards, letters, gifts or tokens of affection, nor did he send any birthday or Christmas gifts or otherwise acknowledge any of these events for [Crystal]." Based on the testimony before the trial court, there appears to be no dispute this is a factually accurate statement. Nevertheless, this finding fails to address Respondent-Father's proffered explanation—he was barred from contacting his biological child "due to the nature and circumstances of [his] criminal convictions without advance written approval from the Indiana Parole Board[.]"[2] Therefore, to the extent this finding implies Respondent-Father possessed the ability to contact Crystal without subjecting himself to a real and significant risk of criminal prosecution, we disregard finding 10(g) on appeal. *See In re A.N.H.*, 381 N.C. 30, 44, 871 S.E.2d 792, 804 (2022).

B. Willful Abandonment

Second, we must determine whether the trial court's findings of fact support its conclusion of law that Respondent-Father willfully abandoned Crystal within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7). For the reasons discussed below, the findings are inadequate to sustain the conclusion that the abandonment in this case was willful, despite there being no dispute Respondent-Father failed to contact Crystal during the determinative period.

"Abandonment implies conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." *In re B.S.O.*, 234 N.C. App. 706, 710, 760 S.E.2d 59, 63 (2014). In this context, "[w]illfulness is more than an intention to do a thing; there must also be purpose and deliberation[,]" and the trial court's "findings must clearly show that the parent's

2. Petitioner appears to concede this on appeal.

actions are wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. 79, 84, 87, 671 S.E.2d 47, 51, 53 (2009) (citation omitted).

"While the question of willful intent is a factual one for the trial court to decide based on the evidence presented, and while the trial court's factual determination is owed deference, it remains our responsibility as the reviewing court to examine whether the evidence in the case supports the trial court's findings and whether, as a legal matter, the trial court's factual findings support its conclusions of law." *In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767 (citing *In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 751 (2020); *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see In re T.M.H.*, 186 N.C. App. 451, 452, 652 S.E.2d 1, 1 (2007) (remanding after "the trial court failed to make findings of fact and conclusions of law concerning the willfulness of respondent's conduct").

Under a de novo review, we cannot conclude the trial court's adjudicatory findings of fact support its conclusion that Respondent-Father *willfully* abandoned Crystal. *See In re M.R.F.*, 378 N.C. at 641, 862 S.E.2d at 761–62. At all times relevant to this case, Respondent-Father was subject to highly restrictive parole conditions due to his conviction in Indiana. Violation of Respondent-Father's parole conditions would pose a real and significant risk of criminal prosecution. Although there is no dispute that there was no contact during the determinative period, we attribute this to Respondent-Father's restrictive parole conditions, consistent with his testimony.

It is undisputed that Respondent-Father completed the Abel Assessment and a lie-detector test promptly upon his release. Respondent-Father then promptly submitted his initial request to modify his parole conditions in December of 2017 through his first probation officer, Officer Mounts, which was denied. Respondent-Father filed a second request some time in 2019, through an Officer Foster, which was denied. Upon receiving the termination petition, Respondent-Father filed a third request in 2021, through an Officer Harris, which was similarly denied. Furthermore, Respondent-Father remained current on his modified child-support obligation during the determinative period. Such conduct is not consistent with a parent who has manifested a willful determination to forgo all parental duties and relinquish all parental claims to the child. *See In re B.S.O.*, 234 N.C. App. at 710, 760 S.E.2d at 63. Similarly, the findings do not establish purpose or deliberation, and are insufficient to demonstrate Respondent-Father's actions were wholly inconsistent with a desire to maintain custody of Crystal. *See In re S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

Juvenile and termination proceedings implicate significant constitutionally protected rights, including the right to the care, custody, and control of a parent's child. *In re B.R.W.*, 381 N.C. 61, 77, 871 S.E.2d 764, 775 (2022). In this arena, we must tread carefully to avoid diluting the protections guaranteed by our state and federal Constitutions.

In its Order, the trial court accurately noted Respondent-Father's efforts to modify his parole conditions, yet it concluded Respondent-Father had not tried reasonably—that is, frequently or earnestly—enough. To affirm such an Order runs contrary to binding precedent and risks undue infringement upon a fundamental constitutional right. The GAL's remarks in declining to give closing argument on adjudication are instructive of the problem in this case. Indeed, Respondent-Father's conduct in Indiana, and more recently in this state, if true, is reprehensible. Nevertheless, reprehensibility is not tantamount to willful abandonment, which is the sole ground before us on appeal. We do not speculate upon the result if Petitioner had alleged additional ground(s) for termination, and our holding today does not abridge Petitioner's right to bring a new petition in the future. *See In re Adoption of Maynor*, 38 N.C. App. 724, 727, 248 S.E.2d 875, 877 (1978) ("The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a settled purpose to forego all parental duties.") (citation and internal quotations omitted); *see also B.S.O.*, 234 N.C. App. at 710, 760 S.E.2d at 63; *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

VI. Conclusion

Because the trial court's findings are insufficient to support the conclusion that Respondent-Father's abandonment of Crystal was willful, as defined in our Juvenile statutes and precedent, we are constrained to reverse the Order.

REVERSED AND REMANDED.

Chief Judge STROUD and Judge DILLON concur.

IN THE MATTER OF S.C.

No. COA22-965

Filed 5 September 2023

Juveniles—privilege against self-incrimination—court's failure to advise

In an adjudicatory hearing on a juvenile petition alleging that respondent committed misdemeanor assault, the trial court erred by failing to have any colloquy with respondent to advise her of her privilege against self-incrimination before she testified. As the State conceded, this violation of N.C.G.S. § 7B-2405(4) was prejudicial because respondent's testimony was self-incriminating and allowed the State to secure a simple assault adjudication.

Appeal by Juvenile-appellant from order entered 23 June 2022 by Judge James L. Moore Jr. in Onslow County District Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General, Janelle E. Varley, for the State.

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

MURPHY, Judge.

Juvenile-appellant, Karen,[1] appeals the trial court's adjudication and disposition orders sentencing her to eight months' probation. Under N.C.G.S. § 7B-2405(4), a trial court must advise a juvenile of her right to remain silent against prejudicial self-incrimination during an adjudicatory hearing. We hold, as the State concedes, that Karen's statutory right under N.C.G.S. § 7B-2405(4) was violated when she testified without the trial court first conducting a colloquy regarding her right to avoid self-incrimination. Accordingly, we vacate the adjudication and disposition orders and remand for a new hearing.

BACKGROUND

On 10 November 2021, the State filed a juvenile petition alleging that Karen committed misdemeanor assault against Iris in violation of

1. We use pseudonyms to protect the identity of all juveniles and for ease of reading.

N.C.G.S. § 14-33(c)(1). At the 24 March 2022 adjudicatory hearing, Karen denied the allegation. Karen's attorney made a motion to dismiss after the close of the State's evidence, which the trial court denied. Karen's attorney then called her to the witness stand to testify. The trial court did not ask Karen any questions or engage in a colloquy with her before she testified about the assault allegation. Nor did the trial court inform Karen of her right to remain silent; that her testimony could be used against her; or that she was entitled to invoke her constitutional privilege against self-incrimination.

The contested adjudicatory hearing concluded in the trial court finding Karen responsible for the lesser included offense of simple assault. Karen's attorney gave notice of appeal from the trial court's adjudication, and no formal disposition order was entered until 23 June 2022. Karen was sentenced to probation for the simple assault and appealed. On 1 June 2023, we allowed Karen's *Motion for Peremptory Setting and Motion to Expedite Consideration*.

ANALYSIS

Karen argues that the trial court violated N.C.G.S. § 7B-2405(4) by allowing her to testify without first advising her regarding her privilege against self-incrimination. Additionally, Karen contends that the error was prejudicial because her testimony was self-incriminating.[2] We agree.

"Our courts have consistently recognized that the State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *In re J.R.V.*, 212 N.C. App. 205, 207 (2011), *disc. rev. improvidentially allowed*, 365 N.C. 416 (2012) (quoting *In re T.E.F.*, 359 N.C. 570, 575 (2005)). N.C.G.S. § 7B-2405 provides, in pertinent part, that "the court *shall* protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law," including "[t]he privilege against self-incrimination." N.C.G.S. § 7B-2405(4) (2022) (emphasis added). "[B]y stating that the trial court *shall* protect a juvenile's delineated rights, [the General Assembly] places an affirmative duty on the trial court to protect . . . a juvenile's right against self-incrimination." *In re J.R.V.*, 212 N.C. App. at 208 (emphasis added). "The plain language of N.C.G.S. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.B.*, 261 N.C. App. 371, 373 (2018), *disc. rev. denied*, 372 N.C. 104 (2019).

2. The State agrees with Karen that the trial court did not comply with N.C.G.S. § 7B-2405(4) and thus did not properly adjudicate Karen. Further, the State does not dispute Karen's argument that the testimony was self-incriminatory and therefore prejudicial.

While N.C.G.S. § 7B-2405 "does not provide the explicit steps a trial court must follow when advising a juvenile of [her] rights, the statute requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands [her] right against self-incrimination before choosing to testify at [her] adjudication hearing." *In re J.R.V.*, 212 N.C. App. at 208-209. Here, the trial court did not, at any time, discuss with, or inquire from, Karen whether she understood the implications of testifying. Karen incriminated herself when she testified to assaulting Iris both on direct and cross examination. On direct examination, Karen incriminated herself by giving the following testimony:

> [COUNSEL]: Based on her demeanor at the time did you believe that there was a chance she may strike you?
>
> [KAREN]: Yeah. That she might try to beat me?
>
> . . .
>
> [COUNSEL]: Did you ever hit her in the back of the head?
>
> [KAREN]: No. I just punched her face.

After the initial questioning by her attorney, Karen again incriminated herself by admitting on cross-examination that she "pushed" Iris:

> [STATE]: Yes, [Karen], just one—one question. You said before that "after she called me daddy long legs I"—something her. Did you say punched her or pushed?
>
> [KAREN]: Pushed.
>
> [STATE]: Pushed. Thank you.

The State also benefited from re-eliciting Karen's admission on cross-examination to secure a simple assault adjudication instead of an assault inflicting serious injury. The State's closing argument relied on Karen's incriminatory testimony:

> Your Honor, as to the facts that aren't in dispute that there was some kind of verbal negative interactions like an argument, cursing, shouting match, insults being thrown around, but by [Karen's] own admission "after she called me daddy long legs, I pushed her," so there's—there's no dispute per the testimony that the—that [Karen] put hands on [Iris] first. So because of that I would ask you to find her guilty.

After the State's closing argument, the trial court adjudicated Karen responsible for the simple assault, which Karen admitted to during her responses to the State's inquiries.

We held in *J.B.* that "failure to follow the statutory mandate when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt." *In re J.B.*, 261 N.C. App. at 373–74 (citing *In re J.R.V.*, 212 N.C. App. at 209). Likewise, in *J.R.V.*, where "there was absolutely no colloquy between the juvenile and the trial court," it was determined that "the trial court's failure to follow its statutory mandate" was error. *In re J.R.V.*, 212 N.C. App. at 209. Nevertheless, we found harmless error beyond a reasonable doubt in *J.R.V.* because "the juvenile's eventual testimony was not incriminating[] [as] it was either consistent with the evidence presented by the State or favorable to the juvenile[.]" *Id.* at 210. The State has the burden of proving that a violation of a constitutional right is harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44 (1990). Here, the State concedes reversible error.

In *J.B.*, "the State offered [the complaining party's] testimony to establish the basis of the assault charge that [the juvenile] threw the milk carton hitting [the complaining party] in the face." *In re J.B.*, 261 N.C. App. at 374. Later, when "[the juvenile] made incriminating statements as he admitted to throwing the milk carton out of frustration . . . the State used the admission to further support" its assertion against the juvenile. *Id.* We held that "[the juvenile's] testimony and the manner in which the State attempted to use the testimony was prejudicial." *Id.* Like in *J.B.*, here, Karen's testimony was undoubtedly incriminatory as she admitted having either "pushed" or "punched" Iris during their altercation. The State's re-eliciting of Karen's admission on cross-examination to secure a simple assault adjudication against her was prejudicial.

The trial court did not conduct the colloquy as required by statute, which violated Karen's rights, and rendered her testimony inadmissible and prejudicial. N.C.G.S. § 7B-2405(4) (2023). As the trial court failed in its duty to protect [Karen's] constitutional right against self-incrimination, we vacate the adjudication order and remand for rehearing.

CONCLUSION

The trial court erred by failing to comply with N.C.G.S. § 7B-2405(4). The trial court failed to have a colloquy with Karen to advise her of her privilege against self-incrimination before she testified. Further, Karen's self-incriminating testimony was not harmless beyond a reasonable doubt. We vacate the trial court's adjudication and disposition orders and remand for a new adjudicatory hearing on simple assault.

VACATED AND REMANDED.

Judges HAMPSON and WOOD concur.

DANIEL JONES, PLAINTIFF
v.
J. KIM HATCHER INSURANCE AGENCIES INC.; HXS HOLDINGS, INC.; GEOVERA SPECIALTY INSURANCE COMPANY, AND GEOVERA ADVANTAGE INSURANCE SERVICES, INC., DEFENDANTS

No. COA22-1030

Filed 5 September 2023

1. Fraud—proximate cause—no causal connection—procurement of homeowner's insurance—cancellation of policy

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claims against his insurance agency and the insurance broker who together obtained the policy for him (together, defendants) as to plaintiff's claims for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices. Plaintiff alleged that defendants wrongfully failed to disclose the insurer's status as not licensed to do business in North Carolina (which meant that the insurer was not subject to the State's supervision and, in the event the insurer became insolvent, losses would not be paid by any State guaranty or solvency fund); however, the insurance policy noted the insurer's nonadmitted status, and persons entering contracts of insurance are charged with knowledge of their contents. Furthermore, even assuming plaintiff's ignorance was excusable, the insurer's status as a nonadmitted insurer bore no causal connection to plaintiff's alleged injuries (the uncompensated damage to his property and related losses).

2. Unfair Trade Practices—motion to dismiss—allegations in complaint—insurance agency—answering questions on clients' applications

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claim against his insurance agency (defendant)

for unfair and deceptive trade practices. Plaintiff's general allegation that defendant violated N.C.G.S. § 75-1.1 by engaging in the practice of answering application questions without the insured's knowledge or consent was defeated by other allegations in the complaint, which demonstrated that plaintiff knowingly consented to defendant's practice of answering application questions.

3. Fiduciary Relationship—breach of fiduciary duty—constructive fraud—insurance agent—incorrect answers on insurance application

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), the trial court did not err by dismissing, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's claims against his insurance agent (defendant)—who had filled out plaintiff's insurance application—for constructive fraud and breach of fiduciary duty where the exhibits attached to plaintiff's complaint contradicted any allegation that defendant breached its legally imposed fiduciary duty as plaintiff's insurance agent, and where plaintiff did not allege facts and circumstances which created a relation of trust and confidence between himself and defendant in which defendant "held all the cards."

4. Conspiracy—civil—acting in concert—real property insurance agencies—claims dismissed as to one defendant

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), plaintiff's claim for civil conspiracy necessarily failed because plaintiff failed to state a legally viable claim against one of the defendants, leaving one claim against one defendant.

5. Negligence—insurance agent—inaccurate information on insurance application—contributory negligence

In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), plaintiff's allegations were sufficient to state a claim for negligence against

his insurance agent (defendant), who had filled out the insurance application on plaintiff's behalf, where plaintiff alleged, among other things, that defendant acted as plaintiff's agent, that plaintiff provided accurate information to defendant for the application process, that defendant assured plaintiff that the new policy would provide the same coverage as his existing policy, that defendant told plaintiff he need only sign the signature page of the multi-page application, that defendant provided inaccurate information regarding plaintiff's property on the application (including its acreage and the presence of a pond), and that defendant breached his duty of care and proximately caused injury to plaintiff. Plaintiff's alleged failure to read the other pages of the insurance application before signing did not establish, as a matter of law, that plaintiff was contributorily negligent; rather, that was a question for a jury to determine. As for the issue of punitive damages, plaintiff's complaint failed to allege facts showing he was entitled to punitive damages based on the allegations concerning defendant's conduct in filling out the insurance application.

Judge COLLINS concurring in result in part and dissenting in part as to Part II.

Appeal by Plaintiff from order entered by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 10 May 2023.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for Plaintiff-Appellant.

McAngus Goudelock & Courie, PLLC, by John T. Jeffries and Jared M. Becker, for Defendant-Appellee J. Kim Hatcher Insurance Agencies, Inc.

Martineau King PLLC, by Joseph W. Fulton and Je'vonne V. Knox, for Defendant-Appellee HXS Holdings, Inc.

STADING, Judge delivers the opinion of the Court in part II and announces the judgment of the Court, in which Judge DILLON concurs and Judge COLLINS concurs in result in part and dissents in part by separate opinion. COLLINS, Judge delivers the opinion of the Court in part I in which Judges DILLON and STADING concur.

This appeal arises out of a real property insurance dispute. Daniel Jones ("Plaintiff") appeals from an order dismissing his claims against

J. Kim Hatcher Insurance Agencies, Inc. ("Hatcher") and HXS Holdings, Inc. ("HXS") (collectively "Defendants")[1] pursuant to civil procedure rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court affirms the dismissal order as to the claims against HXS and affirms the dismissal order as to all but the negligence claim against Hatcher. A majority of the Court concludes, however, that the trial court erred by dismissing Plaintiff's negligence claim against Hatcher and thus reverses the order as to that claim and remands the case to the trial court. By dissent, Judge Collins would hold that any negligence on Hatcher's part was defeated by Plaintiff's contributory negligence as a matter of law and thus would affirm the order in its entirety.

I.

COLLINS, Judge.

A. Factual and Legal Background

The facts of this case, as Plaintiff alleged, are as follows: Plaintiff is a Pender County resident who lived on a five-acre property that included a half-acre pond directly in front of his home. Plaintiff maintained homeowner's insurance through North Carolina Farm Bureau until 2016, when Hatcher, an insurance agency licensed to do business in North Carolina, worked with Plaintiff to procure a homeowner's policy through Nationwide. Hatcher advised Plaintiff of the Nationwide policy's coverage limits and premium costs, then asked Plaintiff to sign a single page application form. Hatcher then inspected and photographed Plaintiff's property and has maintained Plaintiff's information in its files since 2016. In early 2017, Plaintiff returned to North Carolina Farm Bureau for homeowner's insurance.

In August 2017, Hatcher again worked with Plaintiff to procure a homeowner's insurance policy, this time through GeoVera. At all relevant times, GeoVera was not licensed to do business in North Carolina, and thus was subject to the Surplus Lines Act as a nonadmitted insurer. *See* N.C. Gen. Stat. § 58-21-10(5) (2018). Pursuant to the Surplus Lines Act, nonadmitted insurers are not subject to the State's supervision and, in the event the insurer who issued the policy becomes insolvent, losses will not be paid by any State guaranty or solvency fund. *Id.* § 58-21-50 (2018). Moreover, nonadmitted insurers may only issue policies in North Carolina through surplus lines brokers. *See id.* § 58-21-65(a)

1. Defendants GeoVera Specialty Insurance Company and GeoVera Advantage Insurance Services, Inc., are not parties to this appeal.

(2018). Though Hatcher was licensed to do business in North Carolina, Hatcher did not hold a surplus lines license and consequently could not directly sell GeoVera's homeowner's policies. Accordingly, Hatcher procured the GeoVera policy through HXS, who was a licensed surplus lines insurance broker.

Hatcher advised Plaintiff that the GeoVera policy provided the same coverage as Plaintiff's existing policy but at a lower premium. Without sharing any additional information about GeoVera, its status as a non-admitted insurer, or HXS's involvement, Hatcher presented Plaintiff a single page insurance application to sign, which included the statement, "I have read the above application and any attachments and declare that the information is true and complete." The single page did not include any questions regarding Plaintiff's home or property, and Hatcher did not ask Plaintiff any questions. Plaintiff, trusting that Hatcher had the information it needed to apply for the GeoVera policy, signed the page.

Through HXS and Hatcher, GeoVera issued Plaintiff a homeowner's policy effective 18 August 2017 until 18 August 2018. Plaintiff renewed this policy in August 2018. Plaintiff received a copy of the renewed policy, which detailed the policy's coverage, liability limits, and applicable deductibles. The policy also noted:

> The insurance company with which this coverage has been placed is not licensed by the State of North Carolina and is not subject to its supervision. In the event of the insolvency of the insurance company, losses under this policy will not be paid by any State insurance guaranty or solvency fund.

In September 2018, Hurricane Florence made landfall in North Carolina causing substantial damage to Plaintiff's home and personal belongings. Plaintiff filed a claim with GeoVera, who evaluated the damage and initially advised Plaintiff that the damage was covered by his homeowner's policy. However, on 23 October 2018, GeoVera cancelled Plaintiff's policy stating that Plaintiff's application for insurance contained material misrepresentations because it did not disclose Plaintiff's pond or that his property spanned five acres. GeoVera stated that, had this information been disclosed, it would not have issued Plaintiff's policy.

B. Procedural History

On 31 July 2020, Plaintiff filed a complaint in New Hanover County Superior Court naming Hatcher, HXS, and GeoVera as defendants. Plaintiff alleged that Defendants conspired together to sell GeoVera policies in North Carolina without disclosing that GeoVera was not licensed

in North Carolina as part of a "Bait & Switch Scheme" to obtain premiums Defendants otherwise would not have obtained had GeoVera's nonadmitted status been fully disclosed. The complaint included claims for breach of contract and unfair and deceptive trade practices against GeoVera; negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices against HXS; negligent misrepresentation, fraudulent concealment, unfair and deceptive trade practices, negligence, constructive fraud/breach of fiduciary duty, and punitive damages against Hatcher; and civil conspiracy against all Defendants. Plaintiff attached a picture of his property, the signature page from his insurance application, and a partial copy of his August 2018 homeowner's policy denoting GeoVera's nonadmitted status to the complaint.

HXS moved to dismiss Plaintiff's complaint on 16 October 2020 pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Hatcher answered on 21 October 2020, denying the material allegations against it, and also moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6). Plaintiff discovered that he had named the incorrect GeoVera entity in his initial complaint and filed an amended complaint on 11 December 2020, which was the same in all respects except that it named the correct GeoVera entity.

After hearing argument from the parties, the trial court entered an order on 22 February 2021, dismissing all of Plaintiff's claims against each defendant except for Plaintiff's breach of contract claim against GeoVera and stating, "This Order is a final judgment as to one or more but fewer than all of the claims or parties, and that there is no just reason for delay of an appeal." On 23 February 2021, the trial court entered an amended order removing the statement that there is no just reason for delay of an appeal. On 15 September 2022, Plaintiff voluntarily dismissed his breach of contract claim against GeoVera with prejudice and, on 27 September 2022, filed notice of appeal from the trial court's 23 February 2021 order.

C. Standard of Review

In ruling on a Rule 12(b)(6) motion to dismiss, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted."

Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). "When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion . . . ." *Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citation omitted). "Although it is true that the allegations of [the] complaint are liberally construed and generally treated as true," the court may "reject allegations that are contradicted by documents attached, specifically referred to, or incorporated by reference in the complaint." *Id.* (citations omitted).

Dismissal under Rule 12(b)(6) is proper when, "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). We review de novo a trial court's order allowing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, 377 N.C. 384, 387, 858 S.E.2d 795, 798 (2021) (citation omitted).

D. Claims against HXS

[1] Plaintiff argues that he stated valid claims against HXS for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices. Specifically, Plaintiff argues that HXS wrongfully failed to disclose GeoVera's status as a nonadmitted insurer, and that the failure to disclose GeoVera's status proximately caused his injury.[2]

As an initial matter, "[p]ersons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents." *Baggett v. Summerlin Ins. & Realty, Inc.*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J. dissenting), *rev'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the dissenting opinion). Plaintiff attached to his complaint a partial copy of the homeowner's policy that was in effect when Hurricane Florence made landfall. The first page of the policy noted:

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2. Plaintiff makes several additional arguments in his brief based on allegations that were not included in his complaint, including that HXS fraudulently concealed its involvement. We disregard those arguments as our review of a motion to dismiss is limited to the allegations appearing in the complaint. *See Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 ("In ruling on the motion [to dismiss] the allegations of the complaint must be viewed as admitted, and *on that basis* the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." (emphasis added) (citation omitted)).

> The insurance company with which this coverage has been placed is not licensed by the State of North Carolina and is not subject to its supervision. In the event of the insolvency of the insurance company, losses under this policy will not be paid by any State insurance guaranty or solvency fund.

Accordingly, Plaintiff was charged with the knowledge of GeoVera's status whether HXS disclosed it or not. Even assuming arguendo that Plaintiff's ignorance was excusable, GeoVera's status as a nonadmitted insurer was not the proximate cause of Plaintiff's alleged injuries.

To state a claim for negligent representation, a plaintiff must allege that they "justifiably relie[d] to [their] detriment on information prepared without reasonable care by one who owed the [plaintiff] a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citation omitted).

To state a claim for fraudulent concealment, a plaintiff must allege (1) concealment of a past or existing material fact, (2) that is reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) which results in damage to the plaintiff. *Hardin v. KCS Intern., Inc.*, 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009) (citations omitted).

To state a claim for unfair and deceptive trade practices, a plaintiff must allege "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff[.]" *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991) (citations omitted).

Although the elements of each claim differ, each requires that the defendant's conduct proximately caused the plaintiff's injury. *See Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 40, 626 S.E.2d 315, 322 (2006) (affirming dismissal of negligent misrepresentation claim that lacked allegation of proximate cause); *Jay Grp., Ltd. v. Glasgow*, 139 N.C. App. 595, 599-601, 534 S.E.2d 233, 236-37 (2000) (noting that a fraud claim "requires that plaintiff establish the element of proximate causation"); *Spartan Leasing*, 101 N.C. App. at 460-61, 400 S.E.2d at 482 (including proximate cause as an element of an unfair and deceptive trade practices claim). Ordinarily, when a complaint "adequately recites the element of causation . . . plaintiff has made a sufficient pleading of causation under Rule 12(b)(6)." *Estate of Long ex rel. Long v. Fowler*, 270 N.C. App. 241, 252, 841 S.E.2d 290, 299 (2020) (citation omitted).

However, dismissal is appropriate as a matter of law when it "appears affirmatively from the complaint that there was no causal connection between the alleged [misconduct] and the injury." *Reynolds v. Murph*, 241 N.C. 60, 64, 84 S.E.2d 273, 275-76 (1954).

Here, Plaintiff alleged:

> 82. In September 2018, Hurricane Florence slammed eastern North Carolina with high winds and torrential rain (Hurricane Florence).
>
> 83. Hurricane Florence caused substantial damage to [Plaintiff's] home and personal belongings inside the home.
>
> . . . .
>
> 96. After Hurricane Florence, [Plaintiff] promptly filed a claim with GeoVera Insurance through Hatcher.
>
> 97. GeoVera Insurance . . . evaluated the damage to [Plaintiff's] home and personal belongings.
>
> 98. GeoVera Insurance . . . initially advised [Plaintiff] that the damage to his home was covered.
>
> . . . .
>
> 102. [On 23 October 2018], GeoVera Insurance . . . cancelled [Plaintiff's] policy on the alleged basis that [Plaintiff's] application, which did not list his pond or that his property was five (5) acres, contained "material misrepresentations."
>
> 103. GeoVera Insurance . . . contended that if these answers on the application had identified the pond and the acreage, GeoVera Insurance would not under its underwriting guidelines have issued the policy.
>
> 104. As a proximate result of defendants' conduct, [Plaintiff] has been injured and damage by the uncompensated cost of repair of his home, the uncompensated loss of his personal belongings, the loss of use of his home and personal belongings, his physical injuries, and his mental and emotional distress, anxiety, insecurity, fear, humiliation, and depression caused these losses.

In his claims against HXS, Plaintiff also alleged:

> 141. HXS had a duty to disclose to [Plaintiff] that GeoVera Insurance did not have a Certificate of Authority to do

business in North Carolina, was not licensed to sell insurance in North Carolina, was not subject to North Carolina's supervision, and that losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

142. HXS breached its duty by failing to disclose [these facts to Plaintiff].

. . . .

148. As a proximate result of the HXS's[] negligent failure to disclose, [Plaintiff] has been damaged and is entitled to recover from HXS in excess of $25,000.

. . . .

150. As part of Defendants' Bait & Switch Scheme:

a. HXS intentionally concealed that GeoVera Insurance was not licensed to sell insurance in North Carolina.

b. HXS intentionally concealed that GeoVera Insurance was not subject to North Carolina's supervision.

c. HXS intentionally concealed that because GeoVera Insurance was a surplus line, losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

d. HXS intentionally concealed that GeoVera Insurance did not have a certificate of authority to do business in North Carolina.

151. HXS's intentional concealment of GeoVera Insurance's status as a licensed insurer described above constitutes fraudulent concealment.

. . . .

157. As a proximate result of HXS's intentional concealment, [Plaintiff] has been damaged and is entitled to recover from HXS in excess of $25,000.

. . . .

163. HXS's conduct in the Bait & Switch Scheme including its fraudulent concealment described above violated N.C.

> Gen. Stat. § 75-1.1, in that its acts were unfair, deceptive, immoral, unethical, oppressive, unscrupulous, and substantially injurious to [Plaintiff].
>
> . . . .
>
> 168. As a proximate result of HXS's wrongful conduct, [Plaintiff] has been injured and damaged and is entitled to recover from HXS in excess of $25,000.

Plaintiff alleged that HXS's failure to disclose GeoVera's status as a nonadmitted insurer was the proximate cause of his injury. However, Plaintiff's alleged injury was "the uncompensated cost of repair of his home, the uncompensated loss of his personal belongings, the loss of use of his home and personal belongings, his physical injuries, and his mental and emotional distress, anxiety, insecurity, fear, humiliation, and depression[.]" Plaintiff did not allege that GeoVera was insolvent, or that GeoVera otherwise failed to compensate Plaintiff for his losses due to its status as a nonadmitted insurer. Indeed, GeoVera's status as a nonadmitted insurer bore no causal connection to these losses. Thus, it appears affirmatively from the complaint that there was no causal connection between HXS's failure to disclose GeoVera's status and Plaintiff's injury. Accordingly, Plaintiff's claims against HXS were properly dismissed. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 275-76.

E. Claims against Hatcher

Plaintiff repeats his claims for negligent misrepresentation, fraudulent concealment, and unfair and deceptive trade practices against Hatcher. Plaintiff additionally argues that Hatcher's actions constituted a breach of fiduciary duty and negligence and entitled Plaintiff to punitive damages.[3]

1. Negligent Misrepresentation and Fraudulent Concealment

Plaintiff's claims for negligent misrepresentation and fraudulent concealment against Hatcher mirror his claims against HXS. Specifically, Plaintiff argues that Hatcher wrongfully failed to disclose GeoVera's status as a nonadmitted insurer, and that the failure to disclose GeoVera's status proximately caused his injury. In his complaint Plaintiff alleged:

> 171. Hatcher had a duty to disclose to [Plaintiff] that GeoVera Insurance did not have a Certificate of Authority

3. Plaintiff's negligence and punitive damages claims are addressed in part II and the dissent.

to do business in North Carolina, was not licensed to sell insurance in North Carolina, was not subject to North Carolina's supervision, and that losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

172. Hatcher breached its duty by failing to disclose [these facts to Plaintiff].

. . . .

178. As a proximate result of Hatcher's negligent failure to disclose, [Plaintiff] has been damaged and is entitled to recover from Hatcher in excess of $25,000.

. . . .

180. As part of Defendants' Bait & Switch Scheme:

a. Hatcher intentionally concealed that GeoVera Insurance was not licensed to sell insurance in North Carolina.

b. Hatcher intentionally concealed that GeoVera Insurance was not subject to North Carolina's supervision.

c. Hatcher intentionally concealed that because GeoVera Insurance was a surplus line, losses (due to insolvency) would not be paid by any state insurance guaranty or solvency fund.

d. Hatcher intentionally concealed that GeoVera Insurance did not have a certificate of authority to do business in North Carolina.

181. Hatcher's intentional concealment of GeoVera Insurance's status as a licensed insurer described above constitutes fraudulent concealment.

. . . .

187. As a proximate result of Hatcher's intentional concealment, [Plaintiff] has been damaged and is entitled to recover from Hatcher in excess of $25,000.

As with Plaintiff's claims against HXS, Plaintiff was charged with the knowledge of GeoVera's status whether Hatcher disclosed it or not. Additionally, although Plaintiff alleged that Hatcher's failure to disclose

GeoVera's status as a nonadmitted insurer was the proximate cause of his injury, Plaintiff's alleged injury was "the uncompensated cost of repair of his home, the uncompensated loss of his personal belongings, the loss of use of his home and personal belongings, his physical injuries, and his mental and emotional distress, anxiety, insecurity, fear, humiliation, and depression[.]" Plaintiff did not allege that GeoVera was insolvent, or that GeoVera otherwise failed to compensate Plaintiff for his losses due to its status as a nonadmitted insurer. Indeed, GeoVera's status as a nonadmitted insurer bore no causal connection to these losses. Thus, it appears affirmatively from the complaint that there was no causal connection between Hatcher's failure to disclose GeoVera's status and Plaintiff's injury. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 275-76.

2. Unfair and Deceptive Trade Practices

Plaintiff argues that Hatcher violated N.C. Gen. Stat. § 75-1.1 by fraudulently concealing GeoVera's status as a nonadmitted insurer and by "unfairly or deceptively provid[ing] false information on the insurance application, contrary to Jones' consent and reliance on Hatcher to provide correct information."

To state a claim for unfair and deceptive trade practices, a plaintiff must allege "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff." *Spartan Leasing*, 101 N.C. App. at 460-61, 400 S.E.2d at 482 (citations omitted).

Here, Plaintiff alleged:

> 193. Hatcher's conduct in the Bait & Switch Scheme including its fraudulent concealment as well as its practice to answer application questions without the insured's knowledge or consent described above violated N.C. Gen. Stat. § 75-1.1, in that its acts were unfair, deceptive, immoral, unethical, oppressive, unscrupulous, and substantially injurious to [Plaintiff].
>
> . . . .
>
> 195. Hatcher's unfair and deceptive acts or practices were in or affecting commerce and were accomplished in the regular course of their business of selling insurance, and as such, had a substantial impact on the marketplace.
>
> . . . .

> 198. As a proximate result of Hatcher's wrongful conduct, [Plaintiff] has been injured and damaged and is entitled to recover from Hatcher in excess of $25,000.

a. Fraudulent Concealment

As discussed above, GeoVera's status as a nonadmitted insurer lacks a causal nexus to Plaintiff's injury. Thus, even if Hatcher's failure to disclose GeoVera's status constituted unfair and deceptive trade practices, it appears affirmatively from the complaint that there was no causal connection between Hatcher's failure to disclose GeoVera's status and Plaintiff's injury. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 275-76.

b. Incorrect Insurance Application Information

[2] In addition to Plaintiff's general allegation that Hatcher's "practice to answer application questions without the insured's knowledge or consent . . . violated N.C. Gen. Stat. § 75-1.1," Plaintiff alleged:

> 72. Hatcher presented [Plaintiff] with a single page document with a signature line. . . .
>
> 73. The signature page did not include the rest of the application, any factual questions for [Plaintiff] to answer regarding [his] home or property, or any answers to such questions . . . .
>
> 74. Hatcher did not ask [Plaintiff] any of the application questions relating to [his] home or property.
>
> 75. Based on Hatcher's prior inspection, photographing and knowledge of [Plaintiff's] property, [Plaintiff] reasonably trusted that Hatcher had all the information sufficient to apply for the GeoVera Insurance coverage.
>
> 76. [Plaintiff] trusted that Hatcher would accurately reflect its knowledge on the application to the extent necessary.
>
> 77. Based on Hatcher's instruction to sign and [Plaintiff's] trust that Hatcher would accurately complete the application, [Plaintiff] signed the blank application.

These allegations, taken as true, demonstrate that Plaintiff knowingly consented to Hatcher's practice of answering application questions. Accordingly, the complaint discloses a fact that necessarily defeats Plaintiff's claim that it was Hatcher's practice to answer application questions without the insured's knowledge or consent. *See Wood*, 355 N.C. at 166, 558 S.E.2d at 494.

3. Breach of Fiduciary Duty/Constructive Fraud

[3] Plaintiff argues that Hatcher owed him a fiduciary duty and breached that duty by failing to disclose all material facts regarding the insurance policy. Plaintiff also argues that Hatcher's conduct amounted to constructive fraud because Hatcher wrongfully benefitted from its breach.

Breach of fiduciary duty and constructive fraud are related, though distinct, causes of action. *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004) (citation omitted). Each requires the existence and subsequent breach of a fiduciary duty resulting in the plaintiff's injury. *See id.* at 293-94, 603 S.E.2d at 155-56. Constructive fraud requires the additional element that the defendant benefit himself from the breach. *Id.* at 294, 603 S.E.2d at 156.

Fiduciary duties may arise by operation of law or based on the facts and circumstances of the relationship between the parties. *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 635-36, 794 S.E.2d 346, 351 (2016) (citation omitted). By operation of law, "[a]n insurance agent acts as a fiduciary with respect to procuring insurance for an insured, correctly naming the insured in the policy, and correctly advising the insured about the nature and extent of his coverage." *Phillips ex rel. Phillips v. St. Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (citation omitted). An insurance agent's legally imposed fiduciary duty does not extend to properly answering the questions on the insured's application for insurance, particularly when the insured has asserted that the answers are accurate. That duty rests with the insured, and the insured is only excused from their duty in limited circumstances. *See Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 413, 119 S.E.2d 215, 220 (1961) ("[T]he rule that the insured is not responsible for false answers in the application where they have been inserted by the agent . . . applies only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud." (citation omitted)); *Goodwin v. Inv'rs Life Ins. Co. of N. Am.*, 332 N.C. 326, 330-31, 419 S.E.2d 766, 768-69 (1992) (holding that plaintiff was responsible for incorrect insurance application answers supplied by agent where plaintiff signed the application); *Cuthbertson v. N.C. Home Ins. Co.*, 96 N.C. 480, 486, 2 S.E. 258, 261 (1887) (finding no error where trial court excluded proof that plaintiff was not asked application questions before signing the application because, "[i]n the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a contract signed by him").

However, a fiduciary duty may arise from a relationship "where there has been a special confidence reposed in one who in equity and

good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Lockerman*, 250 N.C. App. at 635, 794 S.E.2d at 351 (citation omitted). The standard for such a relationship is demanding; "[o]nly when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Id.* at 636-37, 794 S.E.2d at 352 (citations omitted). To establish a fiduciary duty in this manner, a plaintiff must allege facts and circumstances which created a relation of trust and confidence. *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (citation omitted).

Here, Plaintiff alleged:

> 211. . . . Hatcher owed a fiduciary duty to [Plaintiff] to procure appropriate insurance coverage in [Plaintiff's] best interests.
>
> 212. [Plaintiff] reposed actual trust and confidence in Hatcher to procure appropriate insurance coverage as requested, which Hatcher knew and relied upon when procuring the GeoVera Insurance policy.
>
> 213. Hatcher took advantage of this confidence and position of trust to procure an insurance policy which, according to GeoVera Insurance, would never have been issued if Hatcher properly answered [Plaintiff's] application questions and/or disclosed the information Hatcher knew.
>
> 214. Hatcher used this confidence and position of trust to benefit itself by securing its portion of [Plaintiff's] premium payments (which Hatcher would not have received if it could not obtain a cheaper policy for [Plaintiff]).
>
> 215. As a proximate result of Hatcher's breach of fiduciary duty and constructive fraud, [Plaintiff] has been damaged and is entitled to recover from Hatcher in excess of $25,000.

Plaintiff did not allege that Hatcher breached its legally imposed fiduciary duty as an insurance agent, nor could he have. Exhibit 2, attached to Plaintiff's complaint, is a copy of the signature page from Plaintiff's application for insurance bearing his signature and representing that he accepts responsibility for the answers to the application questions. Exhibit 3, also attached to Plaintiff's complaint, is a partial copy of the insurance policy in question, which correctly names Plaintiff

and describes the nature and extent of his coverage under the policy. These exhibits contradict any allegation that Hatcher breached its legally imposed fiduciary duty as Plaintiff's insurance agent.

Furthermore, Plaintiff did not allege facts and circumstances which created a relation of trust and confidence between himself and Hatcher, where Hatcher figuratively held all the cards. Plaintiff had all the information available to him as demonstrated by the exhibits attached to his complaint. Thus, Plaintiff's complaint "reveals the absence of facts sufficient to make a good claim" and was properly dismissed. *Wood*, 355 N.C. at 166, 558 S.E.2d at 494.

F. Conspiracy

[4] Plaintiff argues that Defendants acted in concert, constituting civil conspiracy.

"In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (citations omitted). Thus, where a plaintiff fails to sufficiently state claims against the defendants for wrongful acts, the civil conspiracy claim must also fail. *See Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 747, 641 S.E.2d 695, 698 (2007) (affirming summary judgment for defendants on civil conspiracy claim because summary judgment for defendants on individual claims was proper).

Because Plaintiff failed to state a legally viable claim for compensatory damages against HXS, Plaintiff cannot state a legally viable claim for civil conspiracy. Accordingly, the claim was properly dismissed.

II.

STADING, Judge.

A. Negligence Claim Against Hatcher

[5] This portion of the opinion concerns the trial court's dismissal of Plaintiff's negligence claim against the insurance agent, Defendant Hatcher, for negligently completing Plaintiff's application for insurance on his behalf. Here, Plaintiff alleges that Hatcher acted as his agent; that Plaintiff provided accurate information regarding his property to Hatcher, including its acreage and the presence of a pond; that Hatcher assured Plaintiff that the policy he procured provided the same coverage as his existing homeowner's policy; that Hatcher told Plaintiff he need only sign the signature page of the multi-page insurance application; that Hatcher filled out the rest of the application for Plaintiff, including information about Plaintiff's property; that Hatcher did not provide

accurate information regarding Plaintiff's property on the application, including inaccurate information about its acreage and the presence of a pond; that Hatcher had a duty to use reasonable care when applying for and undertaking to procure insurance for Plaintiff; that Hatcher breached that duty; and, that as a proximate cause of Hatcher's negligence, Plaintiff's suffered damages.

We conclude that Plaintiff's allegations are sufficient to state a claim for negligence against Hatcher. The allegation that Plaintiff, himself, failed to read the other pages of the insurance application filled out by Hatcher before signing does not establish, as a matter of law, that Plaintiff was contributorily negligent vis-à-vis his negligence claim against Hatcher. In reaching our conclusion on this issue, we are guided by our Court's decision in *Holmes v. Sheppard*, 255 N.C. App. 739, 805 S.E.2d 371 (2017), and the cases cited therein, which held that, in some circumstances, it is a question for the jury to determine whether one is contributorily negligent for failing to read the document he is signing.

In *Holmes*, the insurer denied the insured coverage when his vacant building was damaged. *Id.* at 742, 805 S.E.2d at 373–74. Consequently, the insured sued the insurance agent for negligence because, unbeknownst to him, the procured policy did not cover damages to vacant buildings. *Id.* at 742, 805 S.E.2d at 374. In procuring the underlying policy, the insured claimed, and the insurance agent denied, that he requested a policy without a vacancy exclusion. *Id.* at 744, 805 S.E.2d at 375. We held that, if a trier of fact were to believe the evidence that the insured requested a vacancy exclusion and the agent sought to secure a policy based on this request, then the agent undertook a duty to procure such a policy. *Id.* at 745, 805 S.E.2d at 375. Therefore, summary judgment was not appropriate on the claim of negligence. *Id.*

Moreover, when addressing contributory negligence in that case, we cited our Supreme Court's holding that though a person generally has a duty to read what he signs, *id.* at 745, 805 S.E.2d at 376 (citing *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C 599, 603, 109 S.E. 632, 634 (1921)), this duty "is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard." *Id.* (citing *Elam*, 182 N.C. at 603, 109 S.E. at 634). Therefore, we reasoned that "where an agent or broker says or does something to mislead an individual or to put a person of reasonable business prudence off guard, the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out one sufficient to protect him." *Holmes*, 255 N.C. App. at 745, 805 S.E.2d at 375–76 (internal quotation marks and citation omitted).

Here, Plaintiff alleged that Hatcher—based on an assurance—was entrusted to correctly complete the application for Plaintiff with the correct information that Hatcher had been provided. Plaintiff's failure to read the application in full may be grounds to excuse the insurer from covering Plaintiff's loss on a contract claim where the application contained incorrect information about his property. But here, like *Holmes*, it is for the jury to determine whether Plaintiff was contributorily negligent in relying on the agent rather than reading the application himself before signing.

Our dissenting colleague cites five insurance cases in support of the result reached by the trial court. However, none of them are on point.

Two of the cases held essentially that an insurance agent does not have the duty to advise an insured about the contents of a policy or to advise an insured about the types of coverage the insured should seek—absent some special relationship. In one of the cases, we held that the fact an insured has purchased various insurance products through the same agent for twenty-eight years "would not put an objectively reasonable agent on notice that his advice is being sought or relied on." *Bigger v. Vista Sales & Mktg., Inc.*, 131 N.C. App. 101, 105, 505 S.E.2d 891, 893-94 (1998) (noting that an agent generally does not have any duty to procure coverage "which has not been requested"). In the other case, our Supreme Court adopted a dissent from our Court which stated that an agent has "a duty to make an application for the insurance coverage specifically requested by [the insured]" and that the insured has "a duty to read their insurance policy." *Baggett v. Summerlin*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J., dissenting), *rev'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the dissenting opinion).

The other three cases involve disputes by an insured against the insurer—and not the agent—for coverage under a policy. In two of the cases, our Supreme Court held that an insured could not recover against the insurer where the insured had provided false information in the insurance application. *Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 119 S.E.2d 215 (1961); *Goodwin v. Inv'rs Life Ins. Co. of N. Am.*, 332 N.C. 326, 419 S.E.2d 766 (1992). We note that, in *Goodwin*, the plaintiffs sued an insurance agent as well; however, the opinion expressly states that the agent was acting on behalf of the insurance company and *not* the insured. *Id.* at 327, 419 S.E.2d at 767 (stating that the agent defendant was acting as agent for the defendant insurance company). In the remaining case, we held that an insurer could avoid coverage on a policy based on a misrepresentation by the insured on the application. *Bell v. Nationwide Ins. Co.*, 146 N.C. App 725, 554 S.E.2d 399 (2001). In that

case, the agent never asked the insured about whether the insured had ever declared bankruptcy, but simply checked "no" on the application. *Id.* at 727, 554 S.E.2d at 401. The insured, however, signed the application with the incorrect information without reading the application. *Id.* Here, in contrast, Plaintiff provided the correct information to the agent, who in turn affirmatively took on a duty to accurately complete an application to procure the requested insurance policy, but inaccurately completed the application, thereby permitting a jury to find causation and harm.

In the foregoing sections of this opinion, we have already held that Plaintiff cannot recover from the insurer. Plaintiff certainly had a duty to the insurer to see to it that the application contained accurate information. And though, based on the complaint, Plaintiff may not have done anything for which he is personally negligent, he is charged with the negligence of his agent dealing with third parties on his behalf. In this matter, consistent with the ruling in *Holmes*, we are simply sustaining Plaintiff's claim against the agent, who he claims was acting as his agent. Based on the allegations, considering Plaintiff's relationship with Hatcher, Plaintiff merely had an obligation to supply Hatcher with accurate information about his property—which he did. And since Hatcher was provided with accurate information and assumed the duty to fill out the application, it was to be completed accurately—which was not done. In sum, while Plaintiff's conduct may have played a role in the denial of the claim by the insurer, we cannot say that his conduct was contributorily negligent and caused the agent to improperly complete the application for insurance.

B. Punitive Damages

Though we conclude the complaint alleges a claim for negligence against Hatcher, we agree with Hatcher that Plaintiff has failed to allege a claim for punitive damages for any alleged conduct on his part in improperly filling out Plaintiff's insurance application. To recover punitive damages under the law of our State, a claimant must prove that an aggravating factor of fraud, malice, or willful or wanton conduct is present and related to the injury subject to the compensatory damages. *See* N.C. Gen. Stat. § 1D-15(a) (2021). Here, at the end of his complaint, Plaintiff alleges that "Hatcher's conduct was aggravated and outrageous, willful and wanton, malicious and in reckless disregard of Plaintiff's rights," without reference to the conduct of Hatcher that he claims to be an aggravating factor. Plaintiff makes no allegation that Hatcher acted willfully in filling out the insurance application.

Further, as Hatcher correctly notes: "Plaintiff has failed to allege that any officer, director, or manager of Hatcher – an insurance agency – participated in or condoned any conduct that constitutes an aggravating factor giving rise to punitive damages." In North Carolina, punitive damages may be awarded if the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor that gave rise to punitive damages. *See* N.C. Gen. Stat. § 1D-15(c). The amended complaint in this matter does not provide that an officer, director, or manager of Hatcher was responsible for the negligence at the time of the alleged conduct.

Considering the foregoing reasoning, we conclude that Plaintiff has failed to allege facts showing that he is entitled to punitive damages based on the allegations concerning Hatcher's conduct in filling out the insurance application.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge DILLON concurs.

Judge COLLINS concurs in result in part and dissents in part by separate opinion.

COLLINS, Judge, concurring in result in part and dissenting in part.

I concur in the result of part II affirming the dismissal of Plaintiff's punitive damages claim. However, because I would hold that any negligence on Hatcher's part was defeated by Plaintiff's contributory negligence as a matter of law, I respectfully dissent from part II of the majority opinion concluding that Plaintiff's contributory negligence was a matter for the jury and reversing the trial court's dismissal of Plaintiff's negligence claim.

Here, Plaintiff alleged, in pertinent part, as follows:

> 72. Hatcher presented [Plaintiff] with a single page document with a signature line. (Exhibit 2) (the signature page).
>
> 73. The signature page did not include the rest of the application, any factual questions for [Plaintiff] to answer regarding [his] home or property, or any answers to such questions . . . .

> 74. Hatcher did not ask [Plaintiff] any of the application questions relating to [his] home or property.
>
> 75. Based on Hatcher's prior inspection, photographing and knowledge of [Plaintiff's] property, [Plaintiff] reasonably trusted that Hatcher had all the information sufficient to apply for the GeoVera Insurance coverage.
>
> 76. [Plaintiff] trusted that Hatcher would accurately reflect its knowledge on the application to the extent necessary.
>
> 77. Based on Hatcher's instruction to sign and [Plaintiff's] trust that Hatcher would accurately complete the application, [Plaintiff] signed the blank application.

Exhibit 2, attached to Plaintiff's amended complaint, bears Plaintiff's signature beneath the following attestation:

> I have read the above application and any attachments and declare that the information is true and complete. This information is being offered to the company as an inducement to issue the policy for which I am applying.

North Carolina recognizes the defense of contributory negligence; "thus, a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 483, 843 S.E.2d 72, 76 (2020) (citation omitted). "In order to establish contributory negligence, it must be shown (1) that the plaintiff failed to act with due care and (2) such failure proximately caused the injury." *Mohr v. Matthews*, 237 N.C. App. 448, 451, 768 S.E.2d 10, 12 (2014) (quotation marks and citation omitted). "[A] court may dismiss a complaint based on contributory negligence pursuant to Rule 12(b)(6) when the allegations of the complaint taken as true show negligence on the plaintiff's part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom." *Id.* at 451, 768 S.E.2d at 12-13 (quotation marks and citation omitted).

"Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents." *Baggett v. Summerlin Ins. & Realty, Inc.*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J., dissenting), *rev'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the dissenting opinion). This applies to applications for insurance policies as well as insurance policies themselves. *See, e.g.*, *Goodwin v. Inv'rs Life Ins. Co. of N. Am.*, 332 N.C. 326, 330-31, 419 S.E.2d 766, 768-69 (1992) (holding that plaintiff

was responsible for incorrect insurance application answers supplied by agent where plaintiff signed the application); *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 727-28, 554 S.E.2d 399, 401-02 (2001) (same). Where an insurance agent provides incorrect answers on an insurance application, the insured's ignorance is excused "only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, *and* has been guilty of no bad faith or fraud." *Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 413, 119 S.E.2d 215, 220 (1961) (citation omitted) (emphasis added).

By signing the application, Plaintiff affirmatively represented that he had read it and that the information it contained was true and accurate. Plaintiff did not allege that Hatcher said or did anything to mislead him or put him off his guard; he alleged only that Hatcher provided the signature page without the application, and that he trusted that Hatcher would accurately complete the application. Even if Plaintiff had alleged facts showing that he justifiably relied on Hatcher to answer the application questions, Plaintiff's signature on the application form shows that he had implied knowledge of the application answers. *See Jones*, 254 N.C. at 413, 119 S.E.2d at 220 (explaining that an insured's ignorance is excused "only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud"). Furthermore, Plaintiff has alleged no facts justifying his failure to read the insurance policy upon its renewal.

The majority states that "Plaintiff alleges that Hatcher acted as his agent" and suggests that Plaintiff's trust in Hatcher amounts to justified reliance because Plaintiff had trusted Hatcher once before. However, Plaintiff neither made nor incorporated such an allegation in his negligence claim, and even if he had, one instance of uninduced trust is insufficient to relieve a plaintiff of his duty to read the contracts he signs. *See, e.g.*, *Bigger v. Vista Sales & Mktg., Inc.*, 131 N.C. App. 101, 105, 505 S.E.2d 891, 893-94 (1998) (refusing to acknowledge a 28-year relationship between agent and insured as justifying the insured's reliance on the agent).

Accordingly, Plaintiff's conduct, or lack thereof, as alleged in his amended complaint constituted contributory negligence as a matter of law. Thus, I would hold that Plaintiff's complaint was properly dismissed because it "discloses some fact that necessarily defeats [his] claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Plaintiff additionally argues that Hatcher's conduct was willful and wanton, rendering Plaintiff eligible to recover punitive damages.

"Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages . . . ." N.C. Gen. Stat. § 1D-15 (2022). Because I would hold that Plaintiff's negligence claim was properly dismissed, I would also hold that Plaintiff's claim for punitive damages was properly dismissed as Plaintiff did not state a claim for compensatory damages.

For the foregoing reasons, I would hold that the trial court did not err by dismissing Plaintiff's claims against HXS and Hatcher and would affirm the order in its entirety.

KYNA K. ROSE, MICHAEL ROSE, PLAINTIFFS
v.
JENNIFER LYNN POWELL, DEFENDANT

No. COA23-163

Filed 5 September 2023

1. Child Custody and Support—custody action—between mother and grandparents—constitutionally protected status of parent

The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that defendant acted in a manner inconsistent with her constitutionally protected parental status when she made plaintiffs an integral part of the granddaughter's life. Although plaintiffs provided some financial support to defendant, had weekly phone calls with her, and sometimes went to her house to let her dog out, defendant never represented that either plaintiff would be considered a parent to the granddaughter or that they would have guaranteed visitation. Furthermore, plaintiffs made no allegations that defendant was unfit or otherwise incapable of caring for the granddaughter.

2. Child Custody and Support—custody action—between mother and grandparents—N.C.G.S. § 50-13.1—required showing

The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died,

where plaintiffs argued that they were entitled to bring a visitation claim under N.C.G.S. § 50-13.1. It is defendant's constitutionally protected right to decide with whom her daughter associates, and plaintiffs had no authority to seek visitation or custody under N.C.G.S. § 50-13.1 in the absence of a showing that defendant was unfit or had abandoned or neglected her daughter.

3. Child Custody and Support—custody action—between mother and grandparents—best interests of child

The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that it was in their granddaughter's best interests to allow plaintiffs visitation. An analysis of a child's best interests is inappropriate and offends the Due Process Clause when the parent's conduct has not been inconsistent with his or her constitutionally protected status.

Appeal by plaintiffs from judgment entered 15 August 2022 by Judge C. Ashley Gore in Brunswick County District Court. Heard in the Court of Appeals 9 August 2023.

James W. Lea, III of the LEA/SCHULTZ LAW FIRM, PC, for plaintiffs-appellants.

Matthew Geiger, for defendant-appellee.

FLOOD, Judge.

Kyna and Michael Rose (collectively, "Plaintiffs") appeal from the trial court's dismissal of their action seeking secondary custody of their granddaughter, Aubrey Rose Chandler ("Aubrey"). On appeal, Plaintiffs argue that Aubrey's mother, Jennifer Powell ("Defendant"), acted inconsistently with her constitutionally-protected status as a parent when she allowed Plaintiffs to form a close relationship with Aubrey, then suddenly ceased all communications between the parties. After careful review, we conclude the trial court did not err when it dismissed Plaintiffs' action and, accordingly, we affirm the trial court's order.

I. Factual and Procedural Background

The case before us began with tragedy when, on 27 October 2018, Plaintiffs' son, Jacob Chandler Rose, ("Jacob"), died unexpectedly. At

the time of Jacob's death, Defendant was pregnant with his child. A reprieve from grief came on 30 April 2019 when Defendant gave birth to a healthy baby—Aubrey. By all accounts, Plaintiffs delighted in becoming grandparents to Aubrey. Between Aubrey's birth in 2019 and May of 2021, Plaintiffs, Defendant, and Aubrey spent time together, had weekly dinners, went shopping, and took occasional trips to Myrtle Beach. Plaintiffs assisted Defendant with filing a social security claim related to Jacob's death, which would provide funds for Aubrey. Plaintiffs also provided financial assistance for Aubrey's baptism. In May of 2021, Defendant chose to end contact with Plaintiffs and visitation between Plaintiffs and Aubrey stopped.

On 29 November 2021, Plaintiffs initiated an action seeking secondary custody of Aubrey. On 2 February 2022, Defendant filed a motion to dismiss, an answer, and, in the alternative, counterclaims for temporary and permanent custody, and retroactive and prospective child support. The matter was heard in Brunswick County District Court and, on 15 August 2022, an order dismissing the case was entered. Plaintiffs timely appealed.

II. Jurisdiction

An appeal lies of right directly to this court from final judgment of a district court. N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

The primary question this Court must answer is whether the trial court improperly granted Defendant's motion to dismiss. Under N.C. R. Civ. P. 12(b)(6), the trial court has the discretion to dismiss a claim that, on its face, fails to allege sufficient facts upon which relief can be granted. *See* N.C. R. Civ. P. 12(b)(6) (2021). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

Plaintiffs argue the trial court erred when it dismissed their claims because: (1) Defendant acted in a manner inconsistent with her constitutionally-protected status as a parent; (2) Defendant's family being considered "intact" does not preclude Plaintiffs from asserting visitation rights; and, (3) it is in Aubrey's best interest to continue visitation with Plaintiffs. We disagree.

A. Constitutionally-Protected Status

[1] First, Plaintiffs claim that Defendant acted in a manner inconsistent with her protected parental status when she "essentially adopted Plaintiffs and their family as an integral part of [Aubrey's] life."

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child . . . is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). A parent acts inconsistently with their constitutionally-protected status when they are unfit or if they neglect or abandon the child. *See id.* at 79, 484 S.E.2d at 534. Another way in which a parent's actions may be deemed inconsistent with their constitutionally-protected interest is if he or she "brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated[.]" *Boseman v. Jarrell*, 364 N.C. 537, 550, 704 S.E.2d 494, 503 (2010).

Here, Plaintiffs allege the constitutional presumption that Defendant should have custody was overcome by "demonstrating in their [c]omplaint that Defendant[] acted inconsistently with her parental status when she brought them into the family unit and represented them as an integral part of the family unit without creating an expectation that the relationship would be terminated." Plaintiffs liken themselves to the plaintiff in *Boseman v. Jarrell*, a case in which domestic partners "intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent." *Id.* at 552, 704 S.E.2d at 505. This argument misses the mark. Unlike the plaintiff in *Boseman*, here, Defendant never had a romantic relationship with either Plaintiff nor did Defendant conceive a child with either Plaintiff. The facts in the Record show that Plaintiffs provided some financial support to Defendant, introduced Defendant to their family in Ohio, had weekly phone calls with Defendant, and for a time would come over to Defendant's house to let her dog out. At no point did Defendant represent that either Plaintiff would be considered a parent to Aubrey or that they would have guaranteed visitation with Aubrey. Further, no allegations assert Defendant was unfit or otherwise incapable of caring for Aubrey. For those reasons, we hold the trial court did not err when it dismissed Plaintiffs' claim that Defendant was acting in a manner inconsistent with her protected parental status. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534; *see also* N.C. R. Civ. P. 12(b)(6).

B. Grandparent Visitation Under N.C. Gen. Stat. § 50-13.1

[2] Next, Plaintiffs argue they are entitled to bring a visitation claim under N.C. Gen. Stat. § 50-13.1. We disagree.

As potential avenues for asserting visitation rights, Plaintiffs cite to N.C. Gen. Stat. §§ 50-13.1, 13.2(b1), 13.5(j), and 13.2(a). The majority of

these statutes, however, provide grandparents with potential visitation rights only if there is a claim pending between the parents of the minor child, when modifying a custody order, or if there has been a stepparent or relative adoption. *See* N.C. Gen. Stat. §§ 50-13.1, 13.2(b1), 13.5(j), and 13.2(a) (2021). N.C. Gen. Stat. § 50-13.1, on the other hand, allows "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child [to] institute an action or proceeding for the custody of such child[.]" N.C. Gen. Stat. § 50-13.1 (2021). Claims for grandparent custody or visitation made under N.C. Gen. Stat. § 50-13.1 are permissible only "in those situations where a parent's paramount right to custody may be overcome[—]for example, when the parent is unfit, has abandoned or neglected the child, or has died[.]" *McIntyre v. McIntyre*, 341 N.C. 629, 632, 461 S.E.2d 745, 748 (1995). Most importantly for this case, grandparents do not have the right to seek visitation "against parents whose family is intact and where no custody proceeding is ongoing." *Id.* at 635, 461 S.E.2d at 750.

Here, Plaintiffs do not claim that Defendant is unfit, nor do they claim she has abandoned or neglected Aubrey. Further, there is no ongoing custody proceeding with respect to Aubrey. Instead, Plaintiffs' claim hinges on the untimely death of their son, Jacob, and the "de facto" family created when Defendant allowed Plaintiffs to participate in Aubrey's life. Plaintiffs assert that this is a case of first impression because, unlike other cases in which this Court has held that a *surviving parent* remains entitled to a constitutional protection following the death of another parent, here it is the *grandparents* making such a claim.

While Plaintiffs' desire to be included in Aubrey's life is understandable, Defendant is not unfit, nor has she abandoned or neglected Aubrey. In fact, Defendant's family remains "intact." *See McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750. Further, given our conclusion above regarding Defendant's constitutionally-protected right to determine with whom Aubrey associates, we hold that Plaintiffs do not have any authority to seek visitation or custody under N.C. Gen. Stat. § 50-13.1, in the absence of showing Defendant is unfit, or has abandoned or neglected Aubrey. The trial court did not err when it dismissed Plaintiffs' claim. *See McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750.

C. Best Interests

[3] Finally, we turn to Plaintiffs' argument that the trial court erred in dismissing their claim because it was in Aubrey's best interests to allow them and her continued visitation. We disagree.

While the court applies the best interest of the child analysis in a custody action between parents, doing so when the custody dispute is

between a parent and a non-parent offends the Due Process Clause if the "parent's conduct has not been inconsistent with his or her constitutionally protected status[.]" *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

As we concluded above, Defendant's conduct has not been inconsistent with her constitutionally-protected status; therefore, this Court need not apply the best interest of the child analysis to the case *sub judice*. *See id.* at 79, 484 S.E.2d at 534.

IV. Conclusion

For the reasons stated above, we hold the trial court did not err when it granted Defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

AFFIRMED.

Judges TYSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
PEDRO ISAIAS CALDERON, DEFENDANT

No. COA22-822

Filed 5 September 2023

Indecent Liberties—multiple counts—three acts of kissing the victim—continuous transaction versus separate and distinct acts

In defendant's prosecution for taking indecent liberties with a thirteen-year-old girl—based on three acts of defendant kissing the victim—the trial court erred by denying defendant's motion to dismiss on one of three counts of the offense where there was sufficient evidence to support only two of the counts. The incidents of kissing, which constituted touching and were not "sexual acts" as defined by statute, were divided into two separate acts primarily divided by location: one act took place when defendant kissed the victim's neck, leaving bruising, outside of defendant's van and the other act took place when defendant kissed the victim twice on the mouth after they went into his van. Since there was no intervening act separating the two kisses inside the van, which occurred

within fifteen minutes or less of each other, defendant's actions constituted a single, continuous transaction in that location. The matter was remanded for the trial court to arrest judgment on one of defendant's convictions for indecent liberties and to hold a new sentencing hearing.

Judge STADING concurring in part and dissenting in part.

Appeal by defendant from judgments entered 8 September 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah Grace Zambon, for the State.

Leslie Rawls for Defendant-Appellant.

CARPENTER, Judge.

Pedro Isaias Calderon ("Defendant") appeals from judgments entered after a jury convicted him of three counts of indecent liberties with a child. On appeal, Defendant argues the trial court erred by: (1) denying his motions to dismiss for insufficient evidence; (2) instructing the jury on three charges of indecent liberties with a child, which were based on three acts of kissing a minor child ("Jocelyn")[1] on the same date; and (3) failing to arrest judgment on two of the three charges for indecent liberties. As to all three issues, Defendant contends the evidence of Defendant kissing Jocelyn supports only a single, continuous act rather than three separate and distinct acts. Consequently, Defendant argues the three indecent-liberties-with-a-child convictions violate his right to be free from double jeopardy. To the extent Defendant argues the evidence does not support three convictions of indecent liberties, we agree. We conclude the evidence relating to acts of kissing supports only two counts of indecent liberties. Accordingly, we remand to the trial court with instructions to arrest judgment on one of the indecent-liberties convictions and for resentencing.

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the minor child.

I. Factual & Procedural Background

The events giving rise to the charges in this case occurred on 5 July 2019. The evidence presented at trial tended to show the following: Between June and July 2019, Jocelyn was thirteen years old and lived with her mother, grandmother, and three younger siblings in a townhome located in Raleigh, North Carolina. Jocelyn's grandmother took care of Jocelyn and her siblings, while Jocelyn's mother worked to support the family. During June and July, Jocelyn attended church services and youth church events, which were held about once per month at "Mary's" home.

"Marvin" and Defendant both rented a room in Mary's home. Marvin sometimes worked with Defendant, and the two became friends. Marvin was an "old friend" of Jocelyn's grandmother and family and was like "an older brother" to Jocelyn. Marvin would take Jocelyn and her sister to the store to "buy stuff for the house."

In June 2019, Jocelyn first met Defendant after a church service in Mary's home. Defendant approached Jocelyn while she was eating, sat next to her, and asked her if she "liked [Marvin]." Defendant also asked Jocelyn "if [she] was 18 [years old]," to which she responded, "no." Outside Jocelyn's presence, Defendant told Marvin that Jocelyn "had a big ass," and Marvin told Defendant "not to joke around that way because [Jocelyn] was young." Nothing else happened that day between Defendant and Jocelyn.

Jocelyn next saw Defendant about four days later at a church-run youth pool party at Mary's house, following a Sunday church service. Defendant had a conversation with Jocelyn and "asked for [her] Instagram." He also asked for her Facebook profile, and they "be[came] friends" on the social media platform. Defendant and Jocelyn messaged daily through Facebook Messenger for "a week or two." Through these messages, Defendant asked Jocelyn if they could go to the movies together, sent her photos, and told Jocelyn he wanted to touch her.

On the morning of 5 July 2019, Jocelyn saw Defendant in person for a third time when he came to her home. Prior to Defendant's arrival, Jocelyn's grandmother had left their home in a taxi, taking Jocelyn's oldest sibling to a dental appointment, and leaving Jocelyn and her younger siblings asleep in the home. Jocelyn, and her neighbors who witnessed Defendant in the parking lot of Jocelyn's home, testified for the State and recalled the events that transpired on 5 July 2019. Defendant also took the stand and testified on his own behalf. Jocelyn's version of events differed from those of Defendant and the neighbors.

Jocelyn testified that on the morning of 5 July 2019, she went outside to take out the trash and saw an old, dark-blue van parked in front of her home. Jocelyn saw someone in the van and recognized that person as Defendant. According to Jocelyn, she started to walk back to her home, and Defendant got out of the van, "grabb[ing]" her. She told Defendant that her "grandmother was going to come back any second . . . ." Defendant "started kissing [her] neck," which left bruising, or "hickeys," on her neck.

Defendant pulled Jocelyn in the driver's seat, lifted her shirt, and licked her breasts. Jocelyn tried to push Defendant off her, but he would not let her go. Defendant "got on top" of Jocelyn to close the passenger door. He then pulled down her pants, licked her vagina, and "put his two fingers in." Defendant moved to the passenger seat where he asked Jocelyn if she "wanted to get on top of him" or perform oral sex on him; Jocelyn responded "no" to both questions. Defendant kissed her again on the neck while inside the van. A taxi pulled up beside Defendant's van, carrying Jocelyn's grandmother and sister. Jocelyn got out of the van and went to the home of her next-door neighbors, "Natalie" and "Danielle," who were standing outside. Jocelyn admitted she had never spoken to these neighbors before this date, and she did not tell them what happened in the van.

Natalie witnessed Jocelyn and Defendant together on 5 July 2019 and testified to the following: Natalie was standing on her porch, about ten steps away from a blue van, when she noticed Jocelyn was inside the vehicle with an older man. Jocelyn and the man were "laying in the car, kind of cuddled up," laughing, and "holding a conversation." She witnessed Jocelyn and Defendant kiss twice; "six to seven minutes" passed between the two kisses. Natalie did not observe: (1) any sexual act take place, (2) Defendant touching Jocelyn's chest, (3) Jocelyn sitting on Defendant's lap, or (4) Jocelyn attempt to push or kick Defendant. Defendant and Jocelyn remained in the vehicle for a total of forty-five minutes, until a taxi pulled up carrying members of Jocelyn's family. Jocelyn quickly crawled over Defendant's lap and stepped outside the van from the front passenger door. Jocelyn approached Natalie, Danielle, and their young nephew, and began to speak with them, although Jocelyn had never interacted with them before. Defendant drove away.

Natalie's sister, Danielle, who was seventeen years old at the time, also witnessed Jocelyn with Defendant on 5 July 2019. Danielle testified she had not spoken to Jocelyn before the 5 July incident but was aware of Jocelyn's approximate age because Danielle observed Jocelyn "getting off the middle school bus" with Danielle's younger brother. Danielle

witnessed Defendant kiss Jocelyn "at least once or twice." She believed Jocelyn was in the van for ten or fifteen minutes.

Lastly, Defendant recollected the events of 5 July 2019. Defendant testified Jocelyn sent him a message stating, "[c]ome save your girlfriend," before he left for her townhome on the morning of 5 July 2019. Defendant went to the address Jocelyn gave him, and he texted her when he arrived. Jocelyn responded, "I'll be right out." Defendant waited outside of the van for about a minute before Jocelyn came out of the home, "came right straight to [Defendant], threw her arms around [Defendant], and . . . starting kissing [him]." Jocelyn asked Defendant to "[k]iss [her] on the neck" while they were in the parking lot outside the van, and he did so. Defendant admitted to kissing Jocelyn on the lips as well as on the neck, and that the bruising on Jocelyn's neck was "probably from [him] kissing her . . . ."

Defendant could see a man looking out the window of Jocelyn's home, and Jocelyn stated it was her uncle, whom she did not want Defendant to meet at that time. Defendant and Jocelyn entered the van through the driver's side door at Jocelyn's request because she did not want her grandmother to see her outside, and they kissed again once inside. Defendant took a photo of himself with Jocelyn as they sat in the front seat of the van. Defendant and Jocelyn's meeting came to an end when Jocelyn's grandmother arrived home. Defendant asked if could meet Jocelyn's grandmother, to which Joycelyn responded, "[n]ot yet." Jocelyn got out of the van and went towards her neighbors who were standing outside.

Defendant further testified he did not: (1) try to pull off Jocelyn's pants; (2) perform oral sex on Jocelyn; (3) digitally penetrate Jocelyn's vagina; (4) lick or touch Jocelyn's breasts; or (5) try to have sexual contact with Jocelyn. Defendant believed Jocelyn was twenty years old because "she looked like she was 20 and she told [him that]." He also believed Jocelyn had children because he saw Jocelyn taking care of children at a prior church service. Defendant admitted asking Marvin at the church service where Defendant first met Jocelyn, if Jocelyn was married or had children; Marvin explained the children were Jocelyn's siblings, and Marvin told Defendant not to get involved with Jocelyn.

On 5 July 2019, Jocelyn's grandmother, Jocelyn's mother, and Marvin discovered Defendant's relationship with Jocelyn. Marvin and Jocelyn's grandmother arrived at Mary's home to confront Defendant. Defendant "took off running" and drove away; he did not return to Mary's home. Defendant was reported to the police.

On 29 August 2019, a Wake County grand jury indicted Defendant on three counts of indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1(a)(2), and one count of second-degree kidnapping, in violation of N.C. Gen. Stat. § 14-39. On 21 October 2019, a Wake County grand jury indicted Defendant on two additional counts of indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1(a)(2). Both indictments alleged that the offenses charged were committed on 5 July 2019.

On 17 September 2019, two arrest warrants were issued against Defendant. The first warrant was based on two counts of statutory sex offense with a child, and the second warrant was based on two counts of indecent liberties with a child. On 30 September 2020, Defendant was arraigned in open court and pled not guilty to all counts.

On 30 August 2021, a jury trial began before the Honorable Keith O. Gregory in Wake County Superior Court. The trial court instructed the jury on five counts of indecent liberties with a child, one count of second-degree kidnapping, and two counts of statutory sex offenses.

The jury found Defendant guilty of three counts of indecent liberties with a child. The jury's verdicts specified they found: (1) "that [D]efendant kissed the alleged victim on the neck, outside of the van," (2) "that [D]efendant kissed the alleged victim on the mouth, inside of the van," and (3) "that [D]efendant kissed the alleged victim on the mouth for a second time, inside of the van." The jury found Defendant not guilty of: (1) one count of second-degree kidnapping, (2) two counts of statutory sex offense, and (3) two counts of indecent liberties with a child based on the actions of "pull[ing] up the alleged victim's bra and lick[ing] and kiss[ing] her breast" and "ask[ing] the alleged victim to perform oral sex[.]"

The trial court sentenced Defendant to three consecutive active sentences of imprisonment for a minimum of sixteen months and a maximum of twenty-nine months each (counts one and two in file number 19 CRS 212773 and count three in file number 19 CRS 217371). Defendant gave notice of appeal in open court following the entry of judgment.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

The issues before this Court are whether the trial court erred in: (1) denying Defendant's motions to dismiss on the basis the evidence established a single, continuous act that could not support three separate

counts of indecent liberties; (2) instructing the jury on three indecent liberties charges—all based on the acts of kissing; and (3) failing to arrest judgment on any of the three counts of indecent liberties.

IV. Motion to Dismiss

We first consider Defendant's argument as to his motions to dismiss the charges. As a preliminary matter, we consider Defendant's preservation of this issue. Here, at the close of the State's evidence, Defendant moved to dismiss based on insufficient evidence and alleged the charges violated his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendant renewed his motion to dismiss at the close of all evidence. We conclude Defendant properly preserved his argument for appeal. *See* N.C. R. App. P. 10(a)(1).

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

B. Analysis

Defendant maintains the evidence to support the indecent-liberties charges establishes "a single, continuous act" because he kissed Jocelyn three times "in a very brief period," and his conduct only constituted a single type of act: kissing. The State counters that it "provided substantial evidence to support three counts of indecent liberties with a child that are at issue in this appeal." The State points to Jocelyn's testimony that Defendant kissed her neck and left bruising; Natalie's and Danielle's testimonies, which showed Defendant kissed Jocelyn once or twice in the van; and Defendant's brief on appeal in which he admits to kissing Jocelyn three times. For the reasons explained below, we agree with Defendant that the evidence does not support three separate and distinct acts for purposes of determining counts of indecent liberties.

North Carolina General Statute Section 14-202.1 provides:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2021). "[T]he State must present substantial evidence of each of the following elements: (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (citation omitted); *see also* N.C. Gen. Stat. § 14-202.1(a).

Here, the uncontested evidence shows Defendant was forty years old, and Jocelyn was thirteen years old at all relevant times. Thus, Defendant was older than sixteen years of age and "at least five years older" than Jocelyn, and Jocelyn was "under the age of [sixteen] years." *See* N.C. Gen. Stat. § 14-202.1(a). Defendant does not dispute that he took indecent liberties with Jocelyn or that the action was "for the purpose of arousing or gratifying sexual desire." *See Every*, 157 N.C. App. at 205, 578 S.E.2d at 647; *see also* N.C. Gen. Stat. § 14-202.1(a). Instead, Defendant only contests the number of indecent-liberties counts with which he was charged and convicted. With respect to the three indecent-liberties counts at issue on appeal, there was testimony from Jocelyn, two neighbors of Jocelyn, and Defendant, which tended to show that Defendant kissed: (1) Jocelyn's neck, leaving bruising; and (2) Jocelyn on the mouth twice, while inside the van.

1. No Sexual Acts

As a threshold issue, we must consider whether the kissing in this case was a "touching" or a "sexual act." Because Defendant's conduct falls outside the statutory definition of "sexual act," we conclude

Defendant's acts underlying his convictions for indecent liberties constitute non-sexual acts.

In indecent-liberties cases in North Carolina, our Appellate Courts have utilized a different analytical approach when considering acts of touching as opposed to sexual acts. *State v. Williams*, 201 N.C. App. 161, 185, 689 S.E.2d 412, 425 (2009). We note a physical touching is not a required element of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1. *State v. Nesbitt*, 133 N.C. App. 420, 423, 515 S.E.2d 503, 506 (1999). Furthermore, Section 14-202.1 neither defines nor requires a "sexual act," although the North Carolina General Statutes define "sexual act" under Chapter 14, Article 7B – Rape and other Sex Offenses. *See* N.C. Gen. Stat. § 14-27.20(4) (2021) (A "sexual act" means "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body").

Hence, an act taken "for the purpose of arousing or gratifying sexual desire," *see* N.C. Gen. Stat. § 14-202.1(a)(1), is not necessarily a "sexual act," as defined by N.C. Gen. Stat. § 14-27.20(4). *See* N.C. Gen. Stat. § 14-27.20(4); *see also State v. James*, 182 N.C. App. 698, 705, 643 S.E.2d 34, 38 (2007) (acknowledging the defendant's act of fondling the victim's breast was a "touching," whereas the defendant's acts of oral sex and intercourse with the child were "sexual acts"). A sexual act may concurrently support charges for both a first-degree sexual offense and an indecent-liberties offense. *State v. Manley*, 95 N.C. App. 213, 217, 381 S.E.2d 900, 902 (holding "the definitional elements of first-degree sex offense [under Section 14-27.4(a)(1)] and indecent liberties are different," and therefore, concurrent convictions do not violate double jeopardy principles), *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 467 (1989).

The State relies on numerous cases involving sexual acts in arguing that there is "overwhelming evidence" in the instant case of three indecent liberties counts because "the kissing was not continuous and was broken up by talking[and] hugging[.]" *See, e.g.*, *James*, 182 N.C. App. at 704–05, 643 S.E.2d at 38 (characterizing the defendant's conduct as sexual acts where the defendant performed oral sex on the victim and forced sexual intercourse upon her); *State v. Midyette*, 87 N.C. App. 199, 202, 360 S.E.2d 507, 509 (1987) ("[T]he evidence showed [the] defendant penetrated the victim's vagina with his penis on three distinct occasions . . . ."); *State v. Small*, 31 N.C. App. 556, 558, 230 S.E.2d 425, 426 (1976) (holding the trial court did not err in denying the defendant's motion for nonsuit on a charge of rape); *State v. Coleman*, 200 N.C. App. 696, 706, 684 S.E.2d 513, 520 (2009) (concluding the defendant completed two

separate acts: touching the victim's breasts and "watching and facilitating" the victim engage in sexual intercourse with a third person). After careful examination of the cases upon which the State relies, we find the State's argument unpersuasive in light of the issues before this Court involving a "touching" as opposed to a "sexual act." Although there may be overlap between indecent liberties cases involving touching and cases concerning sexual acts, we note the challenged convictions in the instant case exclusively involve touching. Therefore, our analysis falls in line with our jurisprudence regarding acts of touching in the context of an indecent-liberties offense. *See Williams*, 201 N.C. App. at 185, 689 S.E.2d at 425.

2. Separate & Distinct Acts

Having concluded the three kisses were not sexual acts, we now must determine whether the three acts were separate and distinct occurrences, or one continuous occurrence, with respect to the charges for indecent liberties under N.C. Gen. Stat. § 14-202.1. In doing so, this Court must examine the facts underlying each charge. *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995). It is well established that "a defendant may be found guilty of multiple crimes arising from the same conduct so long as each crime requires proof of an additional or separate fact." *James*, 182 N.C. App. at 704, 643 S.E.2d at 38 (citation omitted); *see also State v. Lawrence*, 360 N.C. 368, 374, 627 S.E.2d 609, 612–13 (2006) (affirming three indecent-liberties convictions where the jury heard testimony regarding at least three specific acts on three separate occasions, and the jury returned a guilty verdict for each count of indecent liberties). In interpreting criminal statutes, our Court "must . . . strictly construe[the statutes] against the State." *State v. Smith*, 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988) (citations omitted).

Generally, "a single act [of taking indecent liberties] can support only one conviction." *State v. Jones*, 172 N.C. App. 308, 315, 616 S.E.2d 15, 20 (2005). Nonetheless, this Court has held "multiple *sexual acts* even in a single encounter, may form the basis for multiple [counts] of indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38 (emphasis added). Similarly, we have held rape is generally "not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *Small*, 31 N.C. App. at 559, 230 S.E.2d at 427. "A continuing offense . . . is a breach of the criminal law *not terminated by a single act or fact*, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 230 S.E. 319, 322 (1937) (emphasis added).

In *State v. James*, the defendant touched the victim's breasts, performed oral sex on the victim, and then had sexual intercourse with her. *James*, 182 N.C. App. at 704, 643 S.E.2d at 38. Even though we concluded the act of touching the victim occurred within the "same transaction" as the two sexual acts upon the victim, we upheld the defendant's three convictions of indecent liberties with a child, counting the touching act and the two sexual acts each as additional or separate facts for purposes of charging the defendant. *Id.* at 705, 643 S.E.2d at 38.

This Court has yet to annunciate specific factors the trial court should consider in determining whether multiple, non-sexual acts constitute separate and distinct acts for purposes of an indecent-liberties prosecution. Rather, we have focused on the temporal proximity of the acts and any intervening events. *See State v. Laney*, 178 N.C. App. 337, 341, 631 S.E.2d 522, 525 (2006). In *Laney*, the defendant touched the victim's breasts while she slept in her bed. *Id.* at 338, 631 S.E.2d at 523. After the victim pushed the defendant's hand away, the defendant touched the victim under the waistband of her pants. *Id.* at 338, 631 S.E.2d at 523. On appeal, this Court analyzed the trial court's denial of the defendant's motion to dismiss. *Id.* at 339–41, 631 S.E.2d at 523–25. We held that two acts of touching, where "there was *no gap in time* between two incidents of touching," constituted a single act that could only support one conviction. *Id.* at 341, 631 S.E.2d at 525 (emphasis added). In vacating one judgment for an indecent liberties conviction, we reasoned that "[t]he sole act [supporting the conviction] was touching—not two distinct *sexual acts*." *Id.* at 341, 631 S.E.2d at 525 (emphasis added).

Our Supreme Court considered the question of what constitutes a continuous transaction, as opposed to three separate and distinct acts, in the context of analyzing three counts of discharging a firearm, which we believe is relevant to our analysis in the case *sub judice*. *Rambert*, 341 N.C. at 176–77, 459 S.E.2d at 513. The Court examined the defendant's firing of three shots from a non-automatic weapon and explained: (1) the defendant "*employ[ed] his thought processes* each time he fired the weapon," (2) each firing of the gun was "*distinct in time*," and (3) each bullet hit the vehicle in a "*different place*." *Id.* at 177, 459 S.E.2d at 513 (emphasis added). Based on these facts, the Court "conclude[d] that [the] defendant's conviction and sentencing on three counts of discharging a firearm into [an] occupied property did not violate double jeopardy principles." *Id.* at 177, 459 S.E.2d at 513.

Similarly, the Kansas Supreme Court has set out "four guiding factors" in determining whether convictions arise from the same conduct, which we believe consolidate the relevant factors set forth by the

Rambert Court with the factors this Court has previously used in indecent liberties cases where no sexual act is at issue:

> (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.

State v. Sellers, 292 Kan. 346, 357, 253 P.3d 20, 28 (2011) (citation omitted). We believe the "fresh impulse" factor closely aligns with the *Rambert* factor concerning a defendant's employing his thought process and making a conscious decision to act. *See Rambert*, 341 N.C. at 177, 459 S.E.2d at 513. Likewise, the temporal and location factors mirror the *Rambert* factors applied to the discharging-of-a-firearm offense. Finally, our line of indecent liberties cases involving touching has previously considered gaps in time and the presence of intervening events, or lack thereof. *See Laney*, 178 N.C. App. at 341, 631 S.E.2d at 525 (concluding "there was no gap in time between two incidents of touching"); *see also State v. Ramos*, No. COA05-1109, 2006 N.C. App. LEXIS 671, *9 (N.C. Ct. App. 2006) (unpublished) (concluding "arrest of judgment was not warranted as the evidence shows an intervening event"—the child sleeping—"between the initial acts of kissing and the subsequent acts of kissing and touching of the child's breast"); *State v. Crosby*, No. COA16-172, 2016 N.C. App. LEXIS 1182, *10 (N.C. Ct. App. 2016) (unpublished) (distinguishing the facts from *Laney* on the grounds the State's evidence tended to show "at least three separate and distinct indecent liberties taken by [the] defendant, separated by gaps of time"). We therefore adopt these four factors annunciated in *Sellers* with respect to our analytical framework for indecent liberties offenses involving multiple, non-sexual acts.

In *Sellers*, the defendant touched the victim on the breast while lying next to her in her bed. *Sellers*, 292 Kan. at 358, 253 P.3d at 29. The defendant got up from the bed and left the room to check on a barking dog. *Id.* at 358, 253 P.3d at 29. About thirty to ninety seconds later, the defendant returned to the bed and touched the victim's vagina with his fingers. *Id.* at 358, 253 P.3d at 29. The *Sellers* court reasoned that the defendant "had to make a second conscious decision to touch [the victim]"; thus, both counts of indecent liberties were supported by separate and distinct acts by the defendant. *Id.* at 360, 253 P.3d at 29–30.

Here, viewing the evidence in the light most favorable to the State, Defendant kissed Jocelyn on her neck, leaving bruising, when they were

outside of the van. Shortly thereafter, Defendant and Jocelyn climbed into the van, where they remained for up to forty-five minutes. In the van, they talked, cuddled, and kissed twice on the mouth—the two kisses occurring within a timeframe of fifteen minutes or less. Based on this evidence, the acts of Defendant kissing Jocelyn on the neck and kissing Jocelyn on the mouth occurred in two separate locations. *See Sellers*, 292 Kan. at 357, 253 P.3d at 28. After Defendant got into the van, Defendant had an opportunity to consider his conduct—and leave the scene—yet chose to kiss Jocelyn again. Like the defendant in *Sellers*, Defendant made a conscious decision—after an intervening event, i.e., relocating inside the private area of the van—to take indecent liberties again. *See id.* at 357, 253 P.3d at 28. Thus, there is substantial evidence to support one count of indecent liberties based on kissing outside the van and one count of indecent liberties based on kissing inside the van. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Nevertheless, because the two kisses that occurred inside the van took place in fifteen minutes or less and were not separated by any intervening act, we conclude these actions by Defendant constituted a single, "continuing offense." *See Johnson*, 212 N.C. at 570, 230 S.E. at 322; *Sellers*, 292 Kan. at 357, 253 P.3d at 28. Accordingly, there was not substantial evidence of two counts of indecent liberties with a child occurring inside the van. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. Therefore, we conclude the trial court erred by denying Defendant's motions to dismiss as to one charge. *See id.* at 378, 526 S.E.2d at 455. We remand to the trial court with instructions to arrest judgment upon one of Defendant's convictions for indecent liberties with a child under file number 19 CRS 212773 and for a new sentencing hearing. *See State v. Posner*, 277 N.C. App. 117, 123, 857 S.E.2d 870, 873 (2021) (remanding to the superior court for arrest of judgment and resentencing where the defendant's two larceny convictions were based on the same transaction); *see also State v. Fields*, 374 N.C. 629, 636, 843 S.E.2d 186, 191 (2020) (quoting *State v. Pakulski*, 326 N.C. 434, 439–40, 390 S.E.2d 129, 131–32 (1990) ("While we agree in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, we find that in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact.")).

V. Conclusion

We conclude the trial court erred by denying Defendant's motion to dismiss because there was not substantial evidence of three counts of indecent liberties with a child; rather, the evidence supported only two counts. We therefore remand the matter to the trial court with

instructions to arrest judgment upon one of Defendant's convictions for indecent liberties and conduct a new sentencing hearing.

NO ERROR IN PART; REMANDED FOR ARRESTING JUDGMENT AND RESENTENCING.

Judge HAMPSON concurs.

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

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

Being bound by the decisions of this Court in *State v. Laney*, 178 N.C. App. 337, 631 S.E.2d 522 (2006), *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), and *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), I accept as presently authoritative the majority's position that there is a different analytical path applied to "sexual acts" and "touching" in the context of charges of indecent liberties. This being so, I concur in the majority's conclusion that the adopted test is imperative to distinguish between multiple acts of touching. However, I would note that panels of this Court and future litigants could benefit from the guidance of our Supreme Court concerning whether the judicially-constructed distinction between "sexual acts" and "touching," not found in the statute, is appropriate. I respectfully dissent from the ultimate holding of the majority opinion and would find that there are three separate and distinct acts when applying the adopted test.

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Therefore, we are required to remain on the trail first blazed in *State v. Laney*, in which a panel of our Court decided that a "defendant's acts of touching the victim's breasts and putting his hand inside the waistband of her pants were part of one transaction" and "[t]he sole act involved was touching—not two distinct sexual acts." 178 N.C. App. at 341, 631 S.E.2d at 525. The Court also noted that "there was no gap in time between two incidents of touching, and the two acts combined were for the purpose of arousing or gratifying defendant's sexual desire." *Id*. While the Court's consideration of "no gap in time" between

the two incidents merits weight, the emphasis on "touching" may have been improvident. *Id.*

A year later, in *State v. James*, this trajectory continued when a panel of our Court wrestled with "a fact pattern similar to" *State v. Laney*. *James*, 182 N.C. App. at 704, 643 S.E.2d at 38. Although, the facts of *State v. James* were different in that "[h]ere, there was both touching and two distinct sexual acts in a single encounter." *Id.* at 705, 643 S.E.2d at 38. The Court upheld the defendant's conviction of three counts of indecent liberties and distinguished the case in "that the *Laney* Court emphasized the sole act alleged was touching, and 'not two distinct sexual acts' " and "[t]his language indicates that multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties." *Id.* (quoting *Laney*, 178 N.C. App. at 341, 631 S.E.2d at 524). While the panel of this Court in *State v. James* was required to reconcile *Laney* with their decision, it continued the legacy of delineation between "touching" and "sexual acts." *Id.*

Shortly thereafter, in *State v. Williams*, another panel of our Court was faced with deciding whether the result of *State v. Laney* permitted a defendant's "conviction of, and punishment for, two counts of [a] first degree sexual offense . . . during a single incident" or "violate[d] his double jeopardy rights." *Williams*, 201 N.C. App. at 184, 689 S.E.2d at 425. There, this Court quoted the language of *State v. James* differentiating "mere touching" and "sexual acts." *Id.* at 185, 689 S.E.2d at 425 (quoting *James*, 178 N.C. App at 705, 643 S.E.2d at 38). Further continuing down the path of its quoted predecessor panels, the opinion ordained "that a different analytical path should be applied when dealing with 'sexual acts' as opposed to touching in the context of indecent liberties." *Id.*

Going forward under the existing paradigm presents a concerning requirement for the appellate courts to distinguish between "touching" and "sexual acts" when applying the indecent liberties statute. As the facts present in this case—a 40-year-old man kissing a 13-year-old-child in this context—is the exact type of perverse, criminal behavior anticipated by the statute. As recognized by the panel in *State v. James*:

> The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

182 N.C. App. at 704, 643 S.E.2d at 38 (quoting *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990)). Here, after determining that the acts are covered by the statute, the only remaining question should be whether the acts are distinct for purposes of double jeopardy. However, existing jurisprudence from the Court of Appeals forces current and future panels to draw lines between the types of acts to reach a result. And, absent the analysis required by our Court's precedent, such distinction between "touching" and "sexual acts" is not necessary—if acts occur within a single encounter, then such acts form the basis for a separate conviction if: (1) "the indictments each spell[ ] out a separate and distinct fact . . . to be proven by the State[,]" or (2) the same act ends and begins as determined by the test adopted in this opinion. *James*, 182 N.C. App. at 705, 643 S.E.2d at 38. Therefore, to prevent confusion for future courts and litigants, clarification from above would be beneficial.

Nonetheless, at the present time, we must analyze the case *sub judice* in accordance with existing precedent. To reach its conclusion, the majority prudentially applies an analytical framework adopted from *State v. Sellers*, 292 Kan. 346, 357, 253 P.3d 20, 28 (2011). In doing so, the majority weighs the four guiding factors and reaches the conclusion that defendant committed two separate and distinct acts of indecent liberties with a minor. While I agree that the test adopted by the majority is appropriate for determining when the same act ends and begins, I would find that defendant committed three separate and distinct acts.

In the matter before us, in a light most favorable to the State, defendant kissed Jocelyn on her neck outside of the van once and then inside of the van "twice, and it was not back to back." *See State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981) (citations omitted). There was a "break in between" the kisses in the van of "six to seven minutes." In applying the guiding factors from *Sellers* to the particular facts presented by this case, I would conclude that the separation of six to seven minutes is distinct in time, permitting defendant to employ his thought process and make a conscious decision to engage in the same act a second time. *See State v. Sellers*, 292 Kan. at 357, 253 P.3d at 28; *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995). This conclusion squares with the demands of double jeopardy as well as the result of *State v. Laney*, in which "there was no gap in time between two incidents of touching. . . ." 178 N.C. App. at 341, 631 S.E.2d at 525. Accordingly, I would find that the trial court did not err by denying defendant's motion to dismiss, by instructing the jury on three charges of indecent liberties with a child, nor by declining to arrest judgment upon one of the three convictions for indecent liberties.

STATE OF NORTH CAROLINA
v.
JON ROSS ROBERTSON

No. COA23-24

Filed 5 September 2023

Criminal Law—guilty plea—motion to withdraw—denied—deviation from plea arrangement

Where defendant entered a plea arrangement with the State and the trial court accepted the plea—but subsequently announced it would impose a sentence other than the one in the plea arrangement—the trial court erred by denying defendant's motion to withdraw his guilty plea. To the extent that the terms of the plea arrangement may have been unclear, the trial court should have sought clarification from the parties.

Appeal by Defendant from judgment entered 23 August 2022 by Judge Gregory R. Hayes in Cabarrus County Superior Court. Heard in the Court of Appeals 8 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alan D. McInnes, for the State-Appellee.

Richard Croutharmel for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon his guilty plea pursuant to a plea arrangement. Defendant argues, and the State concedes, that the trial court erred by denying Defendant's motion to withdraw his guilty plea when the trial court accepted the plea and subsequently announced that it would impose a sentence other than the one agreed to by the State and Defendant in the plea arrangement. Because the trial court erred by denying Defendant's motion to withdraw his guilty plea, the judgment is vacated, and the matter is remanded for further proceedings.

I. Background

On 13 September 2021, Defendant was indicted for felony fleeing to elude arrest with a motor vehicle. Defendant entered a plea arrangement with the State on 23 August 2022, which stated, "Defendant will

plea as charged to Felony Flee/Elude Arrest w/ a Motor Vehicle and receive a suspended sentence in the presumptive range." At Defendant's plea hearing, the trial court questioned Defendant, in relevant part, as follows:

> THE COURT: Are you pleading guilty as a result of a plea bargain or plea arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And that says, Defendant will plead guilty as charged to felony fee to elude arrest with a motor vehicle, receive a suspended sentence in the presumptive range.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is that correct as being your full plea arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you now personally accept that arrangement?
>
> THE DEFENDANT: Yes, sir.

The trial court accepted the plea arrangement, then announced:

> THE COURT: Class H felony, zero points, prior record level one. A presumptive sentence, presumptive sentence of 6 to 17, 6 to 17 months, suspended. Special supervised probation for 24 months, 24 months on these conditions. That he pay the cost, that he pay the costs, that he serve a split sentence of 30 days, 30 days in the Cabarrus County jail, pay fees for that.
>
> Comply with all the regular conditions of probation. Surender his driver's license pursuant to this felony fleeing to elude arrest conviction. And the case will transfer to Mecklenburg County for supervision.

Defense Counsel immediately sought clarification that the trial court intended to impose 24 months of probation with a 30-day split sentence and the trial court confirmed that it did. The following exchange then took place:

> [DEFENSE COUNSEL]: Our understanding of what the agreement was with the State was just plead to supervised.

> THE COURT: Wasn't on here. I looked. There's nothing tieing (sic) my hands. I could have given a longer split than that. That's the sentence.
>
> [THE STATE]: Your Honor, the agreement was for --
>
> [DEFENSE COUNSEL]: It's for a suspended sentence.
>
> THE COURT: It is, I gave him a suspended. I gave him a 24-month suspended sentence. Did I not? Did I give him a suspended sentence?
>
> THE CLERK: Yes, sir.
>
> THE COURT: I thought I did.
>
> [DEFENSE COUNSEL]: I'd ask to strike the plea, Your Honor?
>
> THE COURT: Denied.

After a brief discussion with the clerk, the trial court announced that "[t]he 30-day split is effective now" and that any credit for pretrial incarceration "can go towards . . . the suspended sentence when it's activated."[1]

Based on Defendant's prior record level of one, the trial court entered written judgment imposing a sentence of 6 to 17 months' imprisonment, suspended subject to 24 months' supervised probation. In addition, the judgment imposed an active sentence of 30 days in the county sheriff's custody as a special condition of probation. Defendant appealed.

II. Discussion

Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1024 when it denied Defendant's motion to withdraw his guilty plea after the trial court accepted the plea and subsequently announced that it would impose a sentence other than the one agreed to by the State and Defendant in the plea arrangement.

"Whether a trial court violated a statutory mandate is a question of law, subject to de novo review on appeal." *State v. Hood*, 273 N.C. App. 348, 351, 848 S.E.2d 515, 518 (2020) (citation omitted).

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1. The trial court misspoke here as any credit for pretrial incarceration would go towards the suspended sentence *if* the sentence is activated. We do not presume that a defendant will violate probation.

The State and a defendant may agree to a plea arrangement wherein the prosecutor agrees to recommend a particular sentence in exchange for the defendant's guilty plea. *See* N.C. Gen. Stat. § 15A-1021(a) (2022). A plea arrangement is contractual in nature but differs from an ordinary commercial contract "as it involves the waiver of fundamental constitutional rights, including the right to a jury trial." *State v. Wentz*, 284 N.C. App. 736, 739, 876 S.E.2d 814, 816-17 (2022) (citations omitted). Because a plea arrangement involves the waiver of fundamental constitutional rights, when the trial court accepts a defendant's plea pursuant to a plea arrangement, "the right to due process and basic contract principles require strict adherence" to the terms of the arrangement. *Id.* at 740, 876 S.E.2d at 817 (citation omitted).

"Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly." N.C. Gen. Stat. § 15A-1023(b) (2022).

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

Id. § 15A-1024 (2022). "Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *State v. Williams*, 291 N.C. 442, 446-47, 230 S.E.2d 515, 518 (1976). "[A]ny change by the trial judge in the sentence that was agreed upon by the defendant and the State . . . requires the judge to give the defendant an opportunity to withdraw his guilty plea." *State v. Marsh*, 265 N.C. App. 652, 655, 829 S.E.2d 245, 247 (2019) (emphasis omitted).

Here, Defendant entered a plea arrangement with the State wherein the prosecutor agreed to recommend that Defendant "receive a suspended sentence in the presumptive range" in exchange for Defendant's guilty plea. The trial court accepted Defendant's guilty plea and, pursuant to the arrangement, entered a suspended sentence within the presumptive range for the offense and Defendant's prior record level. However, the trial court imposed an additional active sentence of 30 days in the county sheriff's custody as a special condition of probation. This additional sentence deviates from the sentence that was

agreed upon by Defendant and the State; thus, Defendant was entitled to withdraw his plea and have his case continued until the next term. *See id.*; *Williams*, 291 N.C. at 446-47, 230 S.E.2d at 518.

The trial court's justification for the sentence it imposed was that supervised probation "[w]asn't on [the arrangement]. I looked. There's nothing tieing (sic) my hands. I could have given a longer split than that. That's the sentence." This justification misconstrues the meaning of "strict adherence." Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. *See, e.g.*, *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (vacating sentence where the trial court required defendant to surrender her nursing license, which was not contemplated in defendant's plea arrangement); *State v. Wall*, 167 N.C. App. 312, 317, 605 S.E.2d 205, 209 (2004) (vacating sentence where trial court entered a shorter sentence than agreed upon by the parties); *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248 (vacating sentence where trial court imposed two concurrent sentences when the plea arrangement recommended only one).

To the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate. This is especially true as both the State and Defendant objected to the trial court's understanding of the arrangement.

Accordingly, because the sentence imposed by the trial court deviates from the sentence that was agreed upon by Defendant and the State, the trial court erred by denying Defendant's motion to withdraw his guilty plea.

III. Conclusion

Because the trial court erred by denying Defendant's motion to withdraw his guilty plea, the judgment is vacated, and the matter is remanded for further proceedings.

VACATED AND REMANDED.

Judges ZACHARY and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 SEPTEMBER 2023)

BANK OF AM., N.A. v. LEMAGNI No. 22-1019	Mecklenburg (21CVD2062)	Affirmed
BURNS v. LUTH No. 23-251	Mecklenburg (20CVS6930)	Reversed and Remanded
CASA ADVISORS, LLC v. SHEETS No. 22-1039	Iredell (22CVS201)	Dismissed
COLONIAL PLAZA PHASE TWO, LLC v. CHERRY'S ELEC. TAX SERVS., LLC No. 23-159	Edgecombe (15CVD51)	Dismissed
DeATLEY v. DeATLEY No. 22-1070	Mecklenburg (19CVD3065)	Affirmed in Part, Vacated In Part and Remanded
HOLMES v. BLACKMON No. 23-119	Mecklenburg (20CVS12782)	Affirmed
IN RE B.C. No. 23-75	Union (18JT154)	Affirmed
IN RE B.C.B. No. 23-79	Chatham (20JT61)	Affirmed
IN RE E.I.H. No. 22-928	Catawba (21JA63)	Affirmed
IN RE I.M. No. 22-966	Durham (17JT1433) (17JT144)	Affirmed
IN RE S.R.A. No. 22-1009	Onslow (19JT19)	Affirmed
IN RE Z.H.T. No. 22-979	Alamance (21JT104) (21JT45)	Affirmed
LAKEMPER v. N.C. DEP'T OF PUB. SAFETY No. 23-87	N.C. Industrial Commission (TA-29116)	Affirmed
LATHAM-HALL TECHS. v. VECOPLAN, LLC No. 23-286	Davidson (22CVS2161)	Dismissed

ROBERTS v. ROBERTS No. 23-54	Durham (22CVS2251)	Dismissed In Part; Affirmed In Part.
ROSEWOOD ESTS. I, LP v. DRUMMOND No. 23-118	Bladen (22CVD60)	Reversed
SEYMORE v. HARTMAN No. 23-144	Mecklenburg (19CVS8071)	Affirmed
SHOOK v. N.C. DEP'T OF PUB. SAFETY No. 22-755	Office of Admin. Hearings (21OSP4777) (21OSP4783)	Affirmed
STATE v. BACOT No. 23-172	Davidson (22CRS50813)	Affirmed
STATE v. CARVER No. 22-1040	Cleveland (20CRS55158) (21CRS50126)	No Error
STATE v. GATLING No. 22-821	Wilson (20CRS52052)	New Trial
STATE v. GILL No. 23-50	Cleveland (20CRS53451)	Dismissed
STATE v. GOINGS No. 23-128	Surry (19CRS53071)	No Error
STATE v. GONZALEZ No. 22-1022	Johnston (21CRS1333) (21CRS53519) (21CRS53521)	No Error
STATE v. HAIRSTON No. 22-939	Forsyth (20CRS62383-87) (20CRS62389-94) (20CRS62396)	No Prejudicial Error
STATE v. JOHNSON No. 23-52	Jackson (21CRS481) (21CRS50374-75)	No Error
STATE v. JORDAN No. 23-2	Wake (14CR215561)	Affirmed
STATE v. MARLER No. 22-964	Buncombe (18CRS92717-18)	No error in part; remanded for resentencing.

STATE v. MOORER No. 23-281	Buncombe (19CRS81058)	No Plain Error
STATE v. PARKER No. 22-764	Haywood (21CRS51192)	No Error
STATE v. PARRY No. 23-292	Cherokee (17CRS50777)	Remanded
STATE v. PRATT No. 22-937	Randolph (21CRS51083)	No Error
STATE v. PRITCHETT No. 22-805	Pitt (19CRS55325)	No Error
STATE v. RECTOR No. 22-803	Columbus (20CRS408) (20CRS50740)	No Error
STATE v. SUMMERS No. 22-980	Forsyth (18CRS51677-78) (18CRS53397)	No prejudicial error in part; no plain error in part; dismissed in part
STATE v. THOMPSON No. 23-61	Lincoln (20CRS52458) (20CRS657)	Affirmed
STATE v. WHITCHER No. 22-871	Brunswick (19CRS163)	No Error
STATE v. WILLIAMS No. 22-1015	Buncombe (19CRS86220)	No Error
TOWN OF RURAL HALL v. GARNER No. 23-185	Forsyth (21CVS5345)	Affirmed
WR IMAGING, LLC v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 22-1008	Office of Admin. Hearings (22DHR415)	Affirmed

CLUTE v. GOSNEY

[290 N.C. App. 368 (2023)]

VIRGINIA CLUTE (F/K/A VIRGINIA GOSNEY), PLAINTIFF
v.
CHRISTOPHER P. GOSNEY, DEFENDANT

No. COA22-1074

Filed 12 September 2023

1. Contracts—separation agreement—breach of contract—anticipatory breach—pleading

In a legal dispute between separated spouses, the trial court erred in dismissing plaintiff wife's complaint for failure to state a claim where she adequately pleaded the elements of a breach of contract claim (thereby entitling her to the remedy of specific performance), alleging that defendant husband breached the terms of the parties' separation agreement by failing to pay monthly child support, provide health insurance for the parties' two children, and pay part of the children's uninsured medical expenses. However, plaintiff's claim of anticipatory breach by repudiation was properly dismissed where, rather than alleging that defendant refused to perform the "whole contract" or "a covenant going to the whole consideration," plaintiff alleged that defendant threatened to breach a specific provision of the separation agreement obligating him to pay part of their son's future college expenses.

2. Statutes of Limitation and Repose—limitations period—breach of contract—separation agreement—executed under seal

In a legal dispute between separated spouses, plaintiff wife's claim for breach of contract and specific performance in relation to the parties' separation agreement—which they executed under seal before a notary public—was not time-barred, and therefore the trial court erred in dismissing it. Although breach of contract actions are typically subject to a three-year limitations period, an action upon a sealed instrument is subject to a ten-year statute of limitations, and plaintiff's complaint alleged that defendant husband breached the separation agreement within the applicable ten-year period.

3. Child Custody and Support—separation agreement—breach of child support provisions—independent claim for child support under Child Support Guidelines—improper dismissal

In a legal dispute between separated spouses, where the trial court erred in dismissing plaintiff wife's claim for breach of contract

alleging that defendant husband breached the child support provisions of the parties' separation agreement, the court also erred in dismissing plaintiff's separate, alternative claim for child support under the Child Support Guidelines where, if upon reviewing the breach of contract claim on remand, the trial court were to decide that defendant's child support obligations under the separation agreement were unreasonable (and therefore required modification pursuant to the Guidelines), plaintiff's claim for ongoing child support under the Guidelines would not be time-barred under the applicable statute of limitations.

4. Attorney Fees—separation agreement—breach of child support provisions—child support under Child Support Guidelines—issues not yet determined

In a legal dispute between separated spouses, where the trial court's order dismissing plaintiff wife's claims for breach of contract (alleging that defendant husband breached the child support provisions of the parties' separation agreement) and for child support pursuant to the Child Support Guidelines was reversed on appeal, the issue of whether plaintiff was entitled to attorney fees pursuant to the separation agreement or under N.C.G.S. § 50-13.6 was left for the trial court to decide on remand, since it remained to be determined whether defendant did breach the agreement or was otherwise obligated to pay child support under the Guidelines.

Appeal by plaintiff from order entered 31 August 2022 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2023.

The Blain Law Firm, P.C., by Sabrina Blain, for plaintiff-appellant.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Virginia Clute ("Wife") appeals from an order granting the motion to dismiss filed by Defendant Christopher P. Gosney ("Husband"), denying Wife's motion for attorney's fees, and dismissing her amended complaint with prejudice pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm in part, reverse in part, and remand.

I. Background

Wife and Husband married in 1994. They had two children during their marriage; however, "as a result of certain irreconcilable differences and disagreements," Wife and Husband separated in 2006.

On 5 April 2006, the parties entered into a separation agreement ("the Agreement"), by which the parties intended to effectuate a "final settlement of all marital and property rights." As relevant to this appeal, Section 4.3 of the Agreement provides for Husband's contribution to the support of the parties' children; Section 6.12 provides that "[e]ither party shall have the right to compel the performance of the provisions of this Agreement by suing for specific performance in the courts where jurisdiction of the parties and subject matter exists"; and Section 6.1 provides that the Agreement will "not be incorporated, by reference or otherwise, into any final judgment of divorce." Husband and Wife signed the Agreement under seal before a notary public.

Wife filed an amended complaint in Mecklenburg County District Court on 1 April 2022, advancing claims for breach of contract and for ongoing and retroactive child support pursuant to the North Carolina Child Support Guidelines. In her amended complaint, Wife alleged that Husband had violated the terms of the Agreement governing his support obligations "[s]tarting in August of 2017" when "Husband unilaterally reduced his child support payment from $908.00 to $600.00"; "in June of 2021, [when] Husband unilaterally reduced his child support payment to $150.00 per month; and as of December 2021, [when] Husband . . . stopped paying monthly child support all together[.]" Wife also alleged that Husband had failed and refused to comply with additional terms of the Agreement: Namely, Wife alleged that Husband had failed to contribute his share of the children's uninsured medical expenses; to provide the children with "[h]ospital, [m]edical and [d]ental [i]nsurance" coverage; or to contribute toward the payment of the parties' son's college education expenses, should the son choose to attend college. In her prayer for relief, Wife asked the trial court to award her (1) specific performance on her breach of contract claim; (2) attorney's fees pursuant to the provisions of the Agreement, or alternatively, N.C. Gen. Stat. § 50-13.6; and (3) the entry of "an Order of Child Support, including an award of retroactive child support[.]"

On 27 May 2022, Husband filed a motion to dismiss "pursuant to Rules 12(b)(1) and/or 12(b)(6) of the North Carolina Rules of Civil Procedure." By order entered 31 August 2022, the trial court granted Husband's motion to dismiss pursuant to Rule 12(b)(6); denied Wife's "motion for attorney's fees pursuant to Rule 11 of the North Carolina

Rules of Civil Procedure and the terms of the parties' separation agreement"; and dismissed Wife's amended complaint with prejudice. From this order, Wife timely filed written notice of appeal.

II. Discussion

A. Standard of Review

The question for the court when considering a motion to dismiss pursuant to Rule 12(b)(6) "is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Leary v. N.C. Forest Prods. Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (citation omitted), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "The Court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Id.* (cleaned up).

The statute of limitations, however, "may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action." *Laster v. Francis*, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861 (2009). On appeal, this Court reviews the pleadings de novo "to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

B. Breach of Contract and Specific Performance

[1] On appeal, Wife argues that her amended complaint "contained sufficient allegations to proceed on her claims" because she "plead[ed] the elements of a claim for [b]reach of [c]ontract" and advanced sufficient allegations to entitle her to the remedy of specific performance of the parties' Agreement.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002). "A marital separation agreement which has not been incorporated into a court order is generally subject to the same rules of law with respect to its enforcement as any other contract." *Condellone v. Condellone*, 129 N.C. App. 675, 681, 501 S.E.2d 690, 695 (cleaned up), *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998). Thus, as a contract, "a separation agreement not incorporated into a final divorce decree may be enforced through the equitable remedy of specific performance." *Reeder v. Carter*, 226 N.C. App. 270, 275, 740 S.E.2d 913, 917

(2013) (cleaned up). To bring a claim for breach of contract and specific performance, "[t]he party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (emphasis omitted).

Here, Wife alleges in her amended complaint that "[o]n April 5, 2006, the parties entered into a Contract of Separation, Property Settlement, Waiver of Alimony, Child Custody, and Child Support Agreement[.]" Pursuant to the terms of the Agreement, Husband is obligated to "pay to . . . Wife as child support the sum of $908.00 per month[.]" Husband must also "maintain in full force and effect the policies of . . . insurance covering the children of the marriage" until "such child graduates from college . . . or as long as his insurance carrier will allow him to provide such coverage if it takes longer than 4 years for the child to graduate from college"; "in the event coverage is no longer afforded through [Husband's] employment, then . . . he shall provide policies of . . . insurance coverage comparable to that presently maintained." Additionally, the Agreement provides that Husband shall pay a portion of the children's uninsured medical expenses and college education expenses. Finally, Wife alleges that "Husband is capable of complying with the terms of the Agreement but has simply decided not to"; that his "breaches of the Agreement are willful and intentional"; and that "Wife has complied and performed pursuant to the Agreement." For these alleged breaches, Wife seeks specific performance of the Agreement.

After careful review in the appropriate light mandated by our standard of review, we conclude that Wife has sufficiently alleged the elements of breach of contract as it relates to Husband's obligations for monthly child support, health insurance, and uninsured medical expenses under the Agreement. Wife has "show[n] the existence of a valid contract, its terms, and either full performance on [her] part or that [s]he is ready, willing and able to perform" sufficient to raise a claim for breach of contract seeking the remedy of specific performance. *Id.*

We further conclude, however, that Wife has failed to allege a breach with regard to the son's future college expenses. Unlike the issues of support, health insurance, and uninsured medical expenses, as regards the son's future college expenses, Wife does not allege that Husband has yet breached this provision of the Agreement, merely that he has threatened to do so. But Wife's claim of anticipatory breach is inapt.

It is true that, as a general matter, "breach may occur by repudiation. Repudiation is a positive statement by one party to the other party

indicating that he will not or cannot substantially perform his contractual duties." *Profile Invs. No. 25, LLC v. Ammons E. Corp.*, 207 N.C. App. 232, 236, 700 S.E.2d 232, 235 (2010) (cleaned up), *disc. review denied*, 365 N.C. 192, 707 S.E.2d 240 (2011). "When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises." *Id.* Yet "[f]or repudiation to result in a breach of contract, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute." *D.G. II, LLC v. Nix*, 211 N.C. App. 332, 338, 712 S.E.2d 335, 340 (2011) (cleaned up).

Upon review of the amended complaint, Plaintiff has not alleged that Defendant's "refusal to perform" was of the "whole contract, or of a covenant going to the whole consideration[.]" *Id.* Plaintiff's allegation of anticipatory breach pertains to one discrete part of one section of the Agreement, Section 4.4, which provides for "College Education for the Parties' Children." Therefore, we conclude that Wife has failed to state a claim for anticipatory breach of the Agreement and the trial court properly dismissed her claim for the son's future college expenses. *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

C. Statute of Limitations

[2] We now determine whether the statute of limitations bars Wife's claim regarding Husband's obligations concerning monthly child support, health insurance, and uninsured medical expenses.

In his answer to the amended complaint, Husband asserts that

> [N.C. Gen. Stat. § 1-52(1)] sets the applicable statute of limitations at three years for actions arising out of contract. [Wife] has alleged [Husband] breached the contract with [Wife] in August of 2017. This action was not filed until [9 March 2022], some five years following [Husband]'s alleged breach. Thus, on the face of the [amended] complaint, Plaintiff has alleged facts that defeat her claims founded upon the parties' alleged contract.

Generally, "[t]he statute of limitations for a breach of contract action is three years[,]" pursuant to N.C. Gen. Stat. § 1-52(1). *Ludlum v. State*, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013); *see also* N.C. Gen. Stat. § 1-52(1) (2021) (stating that an action "[u]pon a contract" is subject to a three-year statute of limitations). However, an action "[u]pon a sealed instrument" is subject to a ten-year statute of limitations.

N.C. Gen. Stat. § 1-47(2) (2021). Accordingly, when a "[s]eparation [a]greement [i]s executed under seal, a ten-year statute of limitations, rather than the three-year statute of limitations, is applicable to [the] plaintiff's breach of contract claim." *Crogan v. Crogan*, 236 N.C. App. 272, 277, 763 S.E.2d 163, 166 (2014); *see also Harris v. Harris*, 50 N.C. App. 305, 314, 274 S.E.2d 489, 494 (applying the ten-year statute of limitations to an unincorporated separation agreement signed under seal), *disc. review denied and appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981).

In the case at bar, the contracting parties—Wife and Husband—signed the Agreement under seal before a notary public. The Agreement plainly states that "the parties hereto have hereunto set their hands and seals to this Agreement"; the word "SEAL" appears in parentheses immediately adjacent to both Wife's and Husband's signatures on the final page of the Agreement. "Because the Separation Agreement was executed under seal, a ten-year statute of limitations, rather than the three-year statute of limitations is applicable to [Wife]'s breach of contract" claim. *Crogan*, 236 N.C. App. at 277, 763 S.E.2d at 166.

It is well settled that a "cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985). In her amended complaint, Wife alleges that Husband "ha[d] failed to comply with the terms of the Agreement . . . [s]tarting in August of 2017," when he "unilaterally reduced his child support payment from $908.00 to $600.00." She further alleges that "in June of 2021, Husband unilaterally reduced his child support payment to $150.00 per month[,] and as of December 2021, Husband ha[d] stopped paying monthly child support all together, in violation of the Agreement." Moreover, Wife alleges that Husband has ceased payment of his share of the children's uninsured medical expenses for an indeterminate period and has not provided health insurance coverage since 2021 or reimbursed her for providing coverage since 2022.

The dates on which Husband is alleged to have breached the Agreement with regard to his obligations for child support, health insurance, and uninsured medical expenses are well within the ten-year statute of limitations applicable to a separation agreement executed under seal. Thus, "there is no bar to recovery of unpaid child support payments[,]" health insurance, and uninsured medical expenses pursuant to the Agreement "which came due during the ten years immediately prior to the filing of [Wife's] claim" on 1 April 2022. *Belcher v. Averette*, 136 N.C. App. 803, 806, 526 S.E.2d 663, 665 (2000) (citation omitted).

For the foregoing reasons, we conclude that the allegations of Wife's amended complaint, taken as true, are sufficient to state a claim upon which relief may be granted. Wife's claim for breach of contract—for which she requests specific performance of Husband's obligations as to child support, health insurance, and uninsured medical expenses under the Agreement—is not tolled by the statute of limitations. Accordingly, the trial court erred in dismissing Wife's amended complaint for breach of contract and specific performance pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We therefore reverse this portion of the trial court's order.

D. Child Support Pursuant to the NC Child Support Guidelines

[3] We next address Wife's claim for child support pursuant to the North Carolina Child Support Guidelines, which she advances independent of her claim under the Agreement. Wife contends that, like her claim for child support under the Agreement, the trial court similarly erred by dismissing her alternative claim for support under the Guidelines. We agree.

It is axiomatic that the trial court cannot modify the terms of an unincorporated separation agreement, which stands as a contract between the parties. *See Lasecki v. Lasecki*, 257 N.C. App. 24, 43, 809 S.E.2d 296, 310 (2017) (explaining that a "separation agreement is a contract between the parties and the court is without power to modify it except . . . to provide for adequate support for minor children, and . . . with the mutual consent of the parties thereto" (citation and emphases omitted)). Moreover, to "accord sufficient weight to parties' separation agreements, as our common law directs[,]" when the parties "have executed a separation agreement that includes [a] provision for child support, the court must apply a rebuttable presumption that the amount set forth is just and reasonable[.]" *Pataky v. Pataky*, 160 N.C. App. 289, 302–03, 585 S.E.2d 404, 412–13 (2003), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004).

If, however, the trial court "determines by the greater weight of the evidence that the presumption of reasonableness afforded the separation agreement allowance is rebutted . . . the court then looks to the presumptive guidelines" to determine whether "application of the guidelines would not meet or would exceed the needs of the child[.]" *Id.* at 305, 585 S.E.2d at 415.

"[T]he three-year statute of limitations under Section 1-52(2) bars the recovery of child support expenditures incurred more than three years before the date the action for child support is filed." *Napowsa*

v. Langston, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989). Therefore, the applicable statute of limitations for an action for support of a minor child pursuant to N.C. Gen. Stat. § 50-13.4(c) is three years from the "filing of the action." N.C. Gen. Stat. § 1-52(2) (2021); *see also Smith v. Smith*, 247 N.C. App. 135, 150, 786 S.E.2d 12, 24 (2016) (noting that the cause of action "only limits reimbursement to three years prior to the filing of the action").

In the present case, should the trial court determine that the parties' Agreement does not adequately provide for the children's needs, Wife's claim for ongoing child support (independent of the child support provisions of the Agreement) is not barred by the statute of limitations. However, the Guidelines prohibit the award of retroactive child support when the parties have an unincorporated separation agreement that contains provisions for child support, absent a showing of an emergency:

> [I]f a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement.

North Carolina Child Support Guidelines at 2 (2019); *see also Carson v. Carson*, 199 N.C. App. 101, 111, 680 S.E.2d 885, 892 (2009) ("Absent an emergency situation, the Agreement was binding, and the trial court had no authority to award retroactive child support in excess of the terms of the Agreement.").

E. Attorney's Fees

[4] Wife also maintains that the trial court erred in dismissing her claim for attorney's fees pursuant to the terms of the Agreement, or in the alternative, pursuant to N.C. Gen. Stat § 50-13.6.

Section 6.15 of the Agreement provides, *inter alia*, that "[i]n the event it becomes necessary to institute legal action to enforce compliance with the terms of this Agreement . . . the parties agree that at the conclusion of such legal proceeding the losing party shall be solely responsible for all legal fees and costs incurred[.]" In the alternative, Wife seeks statutory relief under N.C. Gen. Stat. § 50-13.6, which provides that "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit" in "actions for custody and support of minor children." N.C. Gen. Stat. § 50-13.6 (2021).

It remains to be determined whether Husband has breached the Agreement or is obligated to pay child support independent of the child support provisions of the Agreement. Thus, the issue of attorney's fees shall be addressed by the trial court on remand.

III. Conclusion

The trial court properly dismissed Wife's claim for breach of contract as concerns the son's future college expenses; accordingly, we affirm the court's order as to this provision. Regarding the issues of child support, health insurance, and uninsured medical expenses, however, the trial court erred in dismissing Wife's claim for breach of contract because "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted[,]" *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4, and the claim is not barred by the applicable statute of limitations, *Laster*, 199 N.C. App. at 576, 681 S.E.2d at 861. If the trial court determines that the Husband's child support obligation under the Agreement is not reasonable, the statute of limitations has not tolled Wife's claim for ongoing child support independent of the child support provisions of the Agreement. Thus, the trial court erred by dismissing this claim as well.

For the foregoing reasons, the trial court's order is affirmed in part, reversed in part, and remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges COLLINS and RIGGS concur.

GREGORY COHANE, PLAINTIFF
v.
THE HOME MISSIONERS OF AMERICA D/B/A GLENMARY HOME MISSIONERS, ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, AND AL BEHM, DEFENDANTS

No. COA22-143

Filed 12 September 2023

Civil Procedure—motion to dismiss—SAFE Child Act—revival of previously time-barred sexual abuse claims

In plaintiff's action utilizing the revival provision of the SAFE Child Act to file sexual abuse claims against two religious organizations and the alleged abuser for acts that occurred when plaintiff was a child, the trial court erred by dismissing with prejudice plaintiff's claims against the two organizations (for negligence and negligent assignment, supervision, and retention) on the basis that those claims fell outside the scope of the revival provision. Since the plain language of the Act in allowing previously time-barred claims consisting of "any civil action for child sexual abuse" to be revived during a specified window of time was not limited to claims against the perpetrator of the abuse, the trial court's interpretation was too narrow.

Judge CARPENTER dissenting.

Appeal by plaintiff from order entered 27 October 2021 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2023.

White & Stradley, PLLC, by Leto Copeley and J. David Stradley, for plaintiff-appellant.

Poyner & Spruill, LLP, by Steven B. Epstein, for defendant-appellee The Home Missioners of America, et al.

Troutman Pepper Hamilton Sanders, LLP, by Joshua D. Davey and Mary K. Grob, for defendant-appellee Roman Catholic Diocese of Charlotte, NC.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Orlando L. Rodriguez, for the North Carolina Attorney General's Office, amicus curiae.

Tin, Fulton, Owen, & Walker, by Sam McGee, for Child USA, amicus curiae.

Skye Alexandria David, for the North Carolina Coalition Against Sexual Assault, amicus curiae.

GORE, Judge.

Plaintiff, Gregory Cohane, appeals the trial court's interlocutory Order Denying in Part and Granting in Part Defendants' Motions to Dismiss and Denying as Moot Plaintiff's Motion to Transfer. The trial court certified the Order as a final judgment pursuant to Rule 54(b), as it determined there was "no just reason for delay in entry of final judgment on Plaintiff's claims against [defendant] Glenmary and [defendant] the Diocese." Upon review of the parties' briefs and the record, we reverse and remand for further proceedings.

I.

In 1972, defendant Al Behm met plaintiff while Behm was assigned by defendant, Glenmary Home Missioners ("Glenmary"), to a Roman Catholic parish in Connecticut. Behm befriended plaintiff, who was nine years old at the time, and became his "loving, kind and supportive adult presence" compared to plaintiff's emotionally and verbally abusive parents. Behm regularly visited plaintiff's home and eventually invited plaintiff for overnight stays and for overnight trips, which plaintiff's parents consented to. During these times, Behm began grooming plaintiff.

Glenmary reassigned Behm to a parish in Kentucky but Behm maintained connection with plaintiff through mail and phone calls. While in Kentucky, Behm was accused of child sexual abuse, but this was never reported to authorities; instead, Behm was transferred to Cincinnati. While Behm pursued a degree in human sexuality, financed by Glenmary, Behm invited plaintiff and a friend to visit. During this visit, Behm performed sexual acts on plaintiff. Behm was later assigned by Glenmary and defendant Roman Catholic Diocese of Charlotte ("Diocese") to be the campus clergy at Western Carolina University ("WCU") campus. Glenmary and the Diocese did not give any information about the prior child sexual abuse allegations to staff at WCU. Behm continued to sexually abuse plaintiff through phone calls and overnight visits to North Carolina. Behm introduced plaintiff to alcohol, marijuana, and amyl nitrates, and convinced both plaintiff and his parents that plaintiff should go to college at WCU.

While plaintiff attended WCU, Behm continued to sexually abuse him. During this time, Behm was required to travel to a "support group" to meet with other Glenmary clergy who had been accused of child sexual abuse but were still employed. In 1983, according to plaintiff, the Diocese reassigned Behm to Tennessee because of his sexual misconduct with plaintiff. In Tennessee, Behm was accused yet again of child sexual abuse.

On 6 July 2021, plaintiff filed this lawsuit at the age of 57, in reliance upon the passage of Session Law 2019-245 (the "SAFE Child Act"), and specifically, the revival provision in section 4.2(b) of the Act that revived previous civil claims for child sexual abuse barred by the statute of limitations in Section 1-52. Plaintiff brought civil claims against Glenmary and the Diocese for negligence, negligent assignment, supervision, and retention. Plaintiff brought civil claims against Behm for assault, battery, negligent infliction of emotional distress, and intentional infliction of emotional distress. Glenmary and the Diocese filed motions to dismiss and amended motions to dismiss under Rules 12(b)(1), 12(b)(6) and 9(k). They specifically argued plaintiff's claims were time-barred because the SAFE Child Act did not apply to these claims. Plaintiff filed a motion to transfer the 12(b)(6) motions to a three-judge panel because defendants also facially challenged the constitutional validity of the revival provision.

The trial court set the motions to dismiss for hearing on 27 September 2021. The trial court determined plaintiff's claims did not fall within the revival provision's scope. Accordingly, the trial court granted defendants' motions to dismiss in part because it determined plaintiff's claims were time-barred, denied defendants' motion to dismiss in part for lack of subject matter jurisdiction, and denied plaintiff's motion to transfer as moot. Further the trial court certified the order as final for defendants Glenmary and the Diocese pursuant to Rule 54(b). Plaintiff timely appealed this order.

II.

Plaintiff appeals of right pursuant to N.C. R. Civ. P. 54(b) and section 7A-27(b). Plaintiff argues the trial court erred by granting the Rule 12(b)(6) motions on the basis plaintiff's claims are time-barred by section 1-52. Plaintiff argues the trial court erroneously interpreted section 4.2(b), within the SAFE Child Act, narrowly to exclude claims for negligence, negligent retention, assignment, and supervision. We agree.

We review challenges to Rule 12(b)(6) motions to dismiss de novo. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014). "Issues of statutory interpretation are also subject to [de

novo] review." *Swauger v. Univ. of N.C. at Charlotte*, 259 N.C. App. 727, 728, 817 S.E.2d 434, 435 (2018).

In November 2019, the General Assembly unanimously adopted the SAFE Child Act, which was signed into law by Governor Cooper, to protect children from sexual abuse and to strengthen and modernize sexual assault laws. SAFE Child Act, 2019 N.C. Sess. Laws 1231, ch. 245 (2019). Within the Act, the General Assembly included a part to "Extend Civil Statute of Limitations and Require Training" in which it amended sections 1-17 and 1-52 of the North Carolina General Statutes. 2019 N.C. Sess. Laws 1231, 1234–35, ch. 245. It amended section 1-17 to include the following provision: "(d) Notwithstanding the provisions of subsections (a), (b), (c), and (e) of this section, a plaintiff may file a civil action against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age until the plaintiff attains 28 years of age." 2019 N.C. Sess. Laws 1231, 1234, ch. 245, sec. 4.1(d). Within its amendment to section 1-52, it included the following provision, "Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act." 2019 N.C. Sess. Laws 1231, 1235, ch. 245, sec. 4.2(b).

Plaintiff initiated his lawsuit within the window of time set by section 4.2(b) with claims of negligence, negligent supervision, assignment, and retention against Glenmary and the Diocese. The trial court granted defendants' motions to dismiss because it determined plaintiff's lawsuit was time-barred under section 1-52. It reasoned the phrase "any civil action for child sexual abuse" only included claims against the perpetrator of the sexual abuse, and therefore, the claims brought against Glenmary and the Diocese fell outside the scope of section 4.2(b). It determined this phrase was "narrow and limited" due to the "broader language" within section 4.1(d) that states "a plaintiff may file a civil action against a defendant for claims *related to* sexual abuse." The trial court made this comparison to ascertain the intent of the legislature. In essence, the trial court narrowed the scope of section 4.2(b) through its comparison of the words "related to" and "for," because it determined the differing language in each provision represented legislative intent.

Our Supreme Court applies the following rules to interpret statutes:

> In construing this statutory language, we are guided by long-standing rules of statutory interpretation. First, if a statute is clear and unambiguous, no construction of the legislative intent is required and the words are applied in their

> normal and usual meaning. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Additionally, if a statute is remedial in nature, seeking to advance the remedy and repress the evil it must be liberally construed to effectuate the intent of the legislature.

Misenheimer v. Burris, 360 N.C. 620, 623, 637 S.E.2d 173, 175 (2006) (cleaned up).

We recently addressed this revival statutory provision in *Doe v. Roman Catholic Diocese of Charlotte*, 283 N.C. App. 177, 872 S.E.2d 810 (2022) ("*Doe* 2022"). The plaintiff had previously filed a lawsuit in 2011 against the Diocese alleging the following claims: constructive fraud, breach of fiduciary duty, fraud and fraudulent concealment, negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, intentional infliction of emotional distress, and equitable estoppel. *Id.* at 178, 872 S.E.2d at 812.[1] These claims were time-barred under the statute of limitations. *Doe* 2015, 242 N.C. App. at 545, 775 S.E.2d at 923. In *Doe* 2022, plaintiff filed the second lawsuit against the Diocese after the passage of the SAFE Child Act, and in reliance on the section 4.2(b) revival provision. 283 N.C. App. at 178, 872 S.E.2d at 812. The plaintiff asserted the following claims in the second lawsuit: assault and battery, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, breach of fiduciary duty, constructive fraud, and misrepresentation and fraud. *Id.*

We ultimately ruled that the plaintiff's claims were precluded under the doctrine of res judicata. *Id.* at 181, 872 S.E.2d at 814. However, we noted in that case the revival provision "revive[d] only civil actions for child sexual abuse otherwise time-barred and does not revive civil actions . . . barred by disposition of a previous action." *Id.* at 180, 872 S.E.2d at 813. We also suggested in dicta that plaintiff's claims would have been viable under the revival provision if not for the prejudicial dismissal in *Doe* 2015. *Id.* at 181, 872 S.E.2d at 814.

We discuss *Doe* 2015 and *Doe* 2022 at length, because within these cases lie the subtle recognition that section 4.2(b) may be interpreted through its plain language as there is no ambiguity in the legislature's word usage. Nor does the language "related to" and "for" need to be

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1. We noted the plaintiff "abandoned" his negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, and intentional infliction of emotional distress claims prior to summary judgment. *Doe v. Roman Catholic Diocese of Charlotte, NC*, 242 N.C. App. 538, 542 n.2, 775 S.E.2d 918, 921 n.2 (2015) ("*Doe* 2015").

distinguished. The trial court appears to have bypassed the plain language of the statute, and immediately sought to discern legislative intent through the use of pari materia foregoing the "longstanding rules of statutory interpretation." *Misenheimer*, 360 N.C. at 623, 637 S.E.2d at 175. In so doing, the trial court had to add language to the revival provision to make the provision fit within its opinion of the legislature's intent. Treading beyond the well-trodden path of methodical statutory interpretation is what leads to such tortured results, which are unnecessary when the plain language provides the courts with direction.

The legislature marked out the broad nature of section 4.2(b) by using the term "any" as a modifier of civil action, and including section 1-52, which includes the civil claims raised by plaintiff. The only limit, based upon the plain language, is that the civil actions concern child sexual abuse allegations. Interpreting section 4.2(b) in this manner does not detract from the language in section 4.1(d). Had the legislature intended to limit the revival provision to torts by the perpetrator, as defendants suggest, the legislature could have specified the subsections within section 1-52, but it did not specify any subsections. Accordingly, what was previously suggested in dicta we now hold, that the plain language of section 4.2(b) includes the civil claims brought by plaintiff for his childhood sexual abuse allegations. Therefore, the trial court erred by interpreting section 4.2(b) narrowly and dismissing plaintiff's claims as outside the scope of the revival provision.

Defendants also raise issues of constitutionality and that the claims were alternatively dismissed for failure to state a claim upon which relief may be granted. We decline to consider these issues, as we only address the issues raised by plaintiff on appeal and expressly determined by the trial court.

III.

For the foregoing reasons, we conclude the trial court erred in dismissing plaintiff's claims with prejudice on the basis they were not revived by section 4.2(b) and were therefore time-barred. Accordingly, we reverse the trial court's order granting defendant's motions for failure to file a complaint within the statutory limitations and denying as moot plaintiff's motion to transfer.

REVERSED AND REMANDED.

Judge RIGGS concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

I respectfully dissent from the Majority's opinion. For the same reasons I detailed in my dissent in *McKinney v. Goins*, COA22-261, 290 N.C. App. 403, 892 S.E.2d 460 (2023), I believe the Revival Window of the SAFE Child Act is unconstitutional. Thus, regardless of the asserted scope of the Window, I believe the lower court appropriately dismissed this case. Therefore, I respectfully dissent.

GRAY MEDIA GROUP, INC., D/B/A WBTV, PLAINTIFF
v.
CITY OF CHARLOTTE, THROUGH THE CITY COUNCIL, DEFENDANT

No. COA23-154

Filed 12 September 2023

1. Appeal and Error—declaratory judgment action—request under Public Records Act—mootness—capable of repetition yet evading review

In an action filed by a media group (plaintiff) against a city (defendant), where a private consulting firm—pursuant to a contract with defendant—had developed a public leadership survey for city council members, the trial court erred in granting summary judgment for defendant on plaintiff's request for a declaratory judgment that the survey form and responses constituted "public records" subject to disclosure under the Public Records Act. Although defendant eventually produced the survey materials before the summary judgment hearing, it did so without conceding that those documents constituted "public records," and therefore the main issue at stake—whether those documents and any other records created by public officials but possessed solely by a third party are "public records" under the Act—was not moot. At any rate, this issue would have fallen under the mootness exception for cases that are "capable of repetition yet evading review," where there was a reasonable likelihood that plaintiff would continue to request similar types of records from defendant and that defendant could evade review of the "public records" issue by producing the records during discovery.

2. Public Records—Public Records Act request—electronic survey form and responses—records created or owned by public

officials—in sole physical custody of third party—subject to disclosure

Under the plain language of the Public Records Act, documents created or owned by public officials but possessed solely by a third party constitute "public records." Therefore, in an action filed by a media group (plaintiff) against a city (defendant), where a private consulting firm—pursuant to a contract with defendant—had developed a public leadership survey for city council members, emailed the survey to each council member in the form of a unique hyperlink, and then stored the responses in the firm's own server, the trial court erred in granting summary judgment for defendant on plaintiff's request for a declaratory judgment that the survey form and responses constituted "public records" subject to disclosure under the Act.

3. Attorney Fees—declaratory judgment action—Public Records Act request—substantially prevailing in compelling disclosure—unreasonable reliance on prior precedent

In an action filed by a media group (plaintiff) against a city (defendant), where plaintiff sought a declaratory judgment that certain documents created by city council members but physically possessed by a private consulting firm constituted "public records" subject to disclosure under the Public Records Act, plaintiff was entitled to attorney fees under N.C.G.S. § 132-9 where: plaintiff substantially prevailed in compelling disclosure of those documents through its initial records request under the Act and then through its litigation efforts, and where defendant unreasonably relied on inapplicable case law when denying the initial records request.

Appeal by Plaintiff from Order entered 11 October 2022 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2023.

Flannery | Georgalis, LLC, by Elizabeth F. Greene, and Ballard Spahr LLP, by Lauren P. Russell and Kaitlin M. Gurney (pro hac vice), for Plaintiff-Appellant.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, for Defendant-Appellee.

Stevens Martin Vaughn & Tadych, PLLC, by Elizabeth J. Soja and Michael J. Tadych, for Amici Curiae.

RIGGS, Judge.

"Government agencies and officials exist for the benefit of the people, and 'an informed citizenry [is] vital to the functioning of a democratic society.' " *State Employees Ass'n of N.C. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L. Ed. 2d 159, 178 (1978)). Fundamentally, "public records and public information compiled by the agencies of North Carolina Government, or its subdivisions are *the property of the people*." N.C. Gen. Stat. § 132-1(b) (2021) (emphasis added). For that reason, the North Carolina General Assembly provided a means for fostering transparency and accountability in government through the Public Records Act, which provides broad access to public records. *State Employees Ass'n of N.C.*, 364 N.C. at 211, 695 S.E.2d at 95. The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257–58 (2020)

In this appeal, Gray Media, LLC ("Gray Media") asks this Court to consider whether records held by a third party are subject to the Public Records Act. The trial court declared the issue moot and granted summary judgment to Defendant, City of Charlotte ("the City"), because the City voluntarily produced the documents. However, Gray Media requests that this Court provide declaratory relief related to this public records request made pursuant to the Public Records Act, N.C. Gen. Stat. §§ 132, *et seq*. (2021). Additionally, Gray Media appeals the trial court's denial of attorneys' fees associated with its Public Records request.

Upon review, we hold that Gray Media's request for declaratory relief is not moot, and the requested records are public records as defined by N.C. Gen. Stat. § 132-1(a). Further, because we hold that the litigation compelled the release of the documents, Gray Media is entitled to reasonable attorneys' fees. Therefore, we remand for summary judgment in favor of Gray Media and additional factfinding to determine the fee award pursuant to N.C. Gen. Stat. § 132-9(c).

I. FACTS & PROCEDURAL HISTORY

In April of 2020, the City executed a one-year contract ("Contract") with Ernst and Young ("EY") to advance more streamlined and effective local government operations. The contract included two (2) one-year renewal options to extend until March of 2023; the City exercised at least one of these renewal options and extended the contract to March

2022. The contract provided that the City would "have exclusive ownership of all reports, documents, designs, ideas, materials, concepts, plans, creative works, software, data, programming code, and other work product developed for or provided to the City in connection with this Contract, and all patent rights, copyrights, trade secret rights and other intellectual property rights relating thereto (collectively the 'Intellectual Property')." In the same paragraph of the contract, EY retained its ownership rights in "Preexisting IP," which it defined as "proprietary data, methodologies, processes, know-how, and trade services that [EY] owns in performing services under this Contract[.]"

The Contract also gave the City exclusive ownership of "Contract Data" defined as: "(a) all data produced or generated under this Contract for the benefit of the City and its customers; and (b) all data provided by, accessed through, or processed for the City under this Contract." The Contract gave the City access to Contract data through language requiring EY to "promptly provide the Contract data to the City in machine readable format upon the City's request at any time while the contract is in effect or within three years from when the contract terminates." The Contract states that work product, excluding confidential information of EY, shall be treated as public records under North Carolina law. Pursuant to the terms of the contract, EY agreed to treat Contract Data as Confidential Information and "not reproduce, copy, duplicate, disclose, or use the Contract Data in any manner except as authorized by the City in writing or expressly permitted by this Contract."

On 24 November 2020, the City and EY signed a statement of work ("SOW") under the Contract, which included having EY develop and deploy a survey focused on transformative leadership and high-performing council topics for the City Council members. In December 2020, EY deployed this survey by sending an email to each City Council member's work email address with a unique hyperlink to access and fill out the survey.

On 2 March 2021, WBTV reporter David Hodges, an employee of Gray Media, requested and received the contract and SOW as part of a public information request made pursuant to N.C. Gen. Stat. § 132-6. Mr. Hodges followed up on the same day, requesting the EY survey form and City Council member responses. The City immediately denied his request via email saying that "[w]e are not in possession of those surveys and EY used those surveys solely for the purpose of developing their recommendations." The City clarified its stance on 9 March 2021 in a letter stating the City Attorney's Office had "determined that documents that are solely in EY's possession are not subject to the Public Records

Law." During April and May, the parties exchanged correspondence on the topic of whether the survey and responses were public records subject to disclosure. On 1 June 2021, the City sent Gray Media the final report that EY developed based in part on the survey information; however, the final report did not include the survey or survey responses.

Gray Media filed a complaint and petition for writ of mandamus on 29 June 2021. The City responded with a motion to dismiss, motion to strike, and request for a protective order on 27 August 2021. After a hearing on the issues, the trial court entered an order on 12 November 2021 granted the City's motion to dismiss in part and denied the motion in part; the trial court also directed Gray Media to amend its complaint in accordance with the order.

Gray Media filed an amended complaint on 23 November 2021 requesting relief declaring the documents were public records and a writ of mandamus requiring the City to comply with the Public Record Act. The City responded to the amended complaint on 24 January 2022 arguing *inter alia* that the requested records were not public records. As part of the discovery process following the amendment of the complaint, the City served EY with a subpoena *duces tecum* on 27 May 2022 requesting that EY produce the survey questions and responses no later than 3 June 2022. The City extended this deadline to 10 June 2022 in exchange for EY's agreement to accept service by email. Nine working days later, EY timely produced the requested material to the City on 10 June 2022; the City turned the survey questions and responses over to Gray Media on the same day. During oral argument on appeal, the City confirmed that this subpoena *duces tecum* was the first time the City requested the survey and responses from EY.

Prior to the production of the requested survey and responses, Gray Media filed a motion for summary judgment in April 2022. After production of the survey and responses, the City filed a motion for summary judgment in July 2022.

The trial court held a hearing on 18 August 2022 on the motions for summary judgment and entered an order on 11 October 2022 granting the City's motion for summary judgment and denying Gray Media's motion for summary judgment. The trial court found that:

> (i) there is no genuine issue of material fact precluding entry of summary judgment; (ii) no genuine present controversy exists between the parties; (iii) as the Defendant has produced the records, Plaintiff's request for declaratory and injunctive relief is moot; (iv) there is no applicable

> exception to the mootness doctrine because while there is reasonable possibility that the Plaintiff may be subjected to the same action again, such action is capable of being fully litigated at that time.

Further, the trial court denied Gray Media's motion for attorneys' fees. Gray Media timely appealed the order on 7 November 2022.

II. ANALYSIS

A. The Issue Is Not Moot

[1] The trial court found that because the City had produced the requested records, the issue was moot and granted summary judgment for the City. On appeal Gray Media argues its request for a declaratory judgment that the requested documents are public records is not moot and is, in fact, "ripe for judicial review." In the alternative, Gray Media argues, even if the issue is moot, the issue is capable of repetition but evading review and, therefore, an exception to the doctrine of mootness. The City argues that this request for declaratory judgment is moot because, if rendered, such judgment could not have any practical effect on the existing controversy. We hold that the issue is not moot.

1. Standard of Review

While the trial court granted summary judgment based upon a finding of mootness, the North Carolina Supreme Court has held that "the proper procedure for a court to take upon a determination that a case has become moot is dismissal of the action rather than entry of summary judgment." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). The issue of whether a trial court properly dismissed a case as moot is reviewed *de novo*. *Alexander v. N.C. State Bd. of Elections*, 281 N.C. App. 495, 499, 869 S.E.2d 765, 769 (2022) *appeal dismissed*, *review denied*, 383 N.C. 679, 880 S.E.2d 689-90 (2022). "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. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

2. Plaintiff's Request for Declaratory Judgment Is Not Moot

Actions filed under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253–267 (2021), are subject to traditional mootness analysis. *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007). This is the case because "jurisdiction does not extend to questions that are

altogether moot." *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 554, 680 S.E.2d 738, 743 (2009) (quoting *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 498 (1987). Mootness arises "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue." *News and Observer Publishing Co. v. Coble*, 128 N.C. App. 307, 309–10, 494 S.E.2d 784, 786 *aff'd*, 349 N.C. 350, 507 S.E.2d 272 (1998) (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). Understood another way, a case is considered moot when a "determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (internal citation omitted).

The Public Records Act specifically authorizes requesting parties that have been denied access to records to initiate judicial action, including seeking declaratory judgment. *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 461, 515 S.E.2d 675, 684 (1999) (noting a declaratory judgment action represents one of several legal methods by which questions of public access to courts and their records are most frequently and successfully raised). A declaratory judgment should be granted when it will: (1) "serve a useful purpose in clarifying and settling the legal relations at issue, and (2) [] terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002). Declaratory judgments should not be made "in the abstract, i.e. without definite concrete application to a particular state of facts which the court can by the declaration control and relieve and thereby settle the controversy." *Id.* The purpose of the Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (internal citations omitted). Under the Declaratory Judgment Act, any person whose rights are affected by a statute may request a determination of rights arising out of the statute, and our trial courts have the jurisdiction to issue a declaratory judgment to define rights, status, and other legal relations, even if other relief is or could be claimed. N.C. Gen. Stat. § 1-253. *See Insurance Co.*, 261 N.C. at 287, 134 S.E.2d at 656-57 (recognizing that trial courts have jurisdiction to render a declaratory judgment when there is a genuine controversy as to legal rights and liabilities related to, *inter alia*, contracts, and statutes). The North Carolina Supreme Court has emphasized that the Declaratory Judgment Act should be liberally construed and administered. *Id.* at 287, 134 S.E.2d at 657.

Here, Gray Media asked the trial court to declare Gray Media's right, and by extension, the public's right, to access the survey and survey responses. Specifically, Gray Media asked the trial court to confirm that the documents are public records as defined in N.C. Gen. Stat § 132-1(a) even if the documents are solely in the possession of a third party. The City only turned over the requested documents to Gray Media after Gray Media filed for summary judgment but before the summary judgment hearing, without conceding that the records were public records when they were in the possession of EY. Indeed, the City still vigorously contends that the requested documents were not public records when in EY's physical possession.

Because the trial court did not reach the merits of the declaratory judgment action and thus did not afford the precise relief request by Gray Media—that the Court declare that the records were public records even when solely in the physical possession of EY, the issue is not moot. Where there is still outstanding requested relief that could alter the legal relationship between the parties and have a practical effect on the dispute between the parties, the case is not moot. *Cf. In re Hamilton*, 220 N.C. App. 350, 353, 725 S.E.2d 393, 396 (2012) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.")

One need not look further than the terms of the Contract to identify the practical import of this declaration of rights under the Public Records Act. The disclosed survey and the responses are a small piece in a much larger contract between the City and EY; the surveys represented only $46,500 of a multi-year Contract between the City and EY with a total value not to exceed $400,000. It is reasonable to anticipate that EY gathered additional information under this Contract that was created by City Officials utilizing hyperlinks or other cloud technology that remains solely in EY's physical possession. A declaratory judgment on the merits has the practical implication of defining the public's right to access records created by a public official but possessed solely by a third party (and this specific third party, EY, given how much work may still be done under the Contract) and would remove any uncertainty on that issue. *Lide v. Mears*, 231 N.C. 111, 117–18, 56 S.E.2d 404, 409 (1949) ("The [Declaratory Judgment] Act recognizes the need of society 'for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the *status quo*.' "). Therefore, we hold that this issue is not moot.

3. Applicable Exception to the Doctrine of Mootness

While we hold that the issue in this matter is not moot, we also note, in the alternative, that we would reach the merits of this case because of an exception to the doctrine of mootness. Although the general rule is that an appeal presenting a question that has become moot will be dismissed, a court may consider moot cases falling within one of several limited exceptions to the doctrine. *Anderson v. N.C. State Bd. of Elections*, 248 N.C. App. 1, 7, 788 S.E.2d 179, 184 (2016).[1] One such exception is that this Court may consider otherwise-moot issues capable of repetition but evading review. *In re Jackson*, 84 N.C. App. 167, 171, 352 S.E.2d 449, 452 (1987) (citing *Moore v. Ogilvie*, 394 U.S. 814, 816, 23 L. Ed. 2d 1, 4 (1969)). For an issue to be capable of repetition yet evading review, the challenged action must (1) have a duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the complaining party would be subject to the same action again. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002) (citing *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989)). The controversy in this matter satisfies both elements for an issue to be capable of repetition yet evading review.

First, there is a reasonable likelihood that these same parties will find themselves in this same dispute in the future. The trial court acknowledged that there is a reasonable possibility that the Plaintiff may be subjected to the same action again if it requested similar information. The City conceded at oral argument that this is a scenario that could occur in the future. Additionally, with the ever-increasing role that online data storage plays in our modern world, more governmental agencies are storing data and records using cloud-based technology, often to aid in compliance with public records laws by allowing easier access to the public. D'Onfro, Danielle, *The New Bailments*, 97 Wash. L. Rev. 97, 99 (2022); David A. Lawrence, *Public Records Law* 94-5 (2nd ed. 2009). This Court has held that where there is a "reasonable likelihood

1. *See e.g.*, *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 293, 517 S.E.2d 401, 405 (1999) (noting that voluntary cessation of a challenged action does not deprive a court of jurisdiction to determine the legality of the practice); *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam) (concerning the public duty exception); *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) (explaining "capable of repetition, yet evading review" exception); *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (recognizing exception where there exists "collateral legal consequences of an adverse nature"); *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 867 (1994) (noting appeal was reviewable where the claims of unnamed class members are not mooted by the termination of the class representative's claim).

that defendants . . . could repeat the conduct, which is at issue here, subjecting the plaintiff to the same action," this Court should consider the issues raised on appeal as an exception to the mootness doctrine. *Boney Publishers*, 151 N.C. App. at 654, 566 S.E.2d at 705. We note, though, that for an issue to be capable of repetition, it is not necessary that a future dispute involve the exact same parties and circumstances. *See In re Jackson*, 84 N.C. App. at 171, 352 S.E.2d at 452 (explaining the issue was capable of repetition yet evading review because it is not improbable that the Board of Education or other local school boards will be repeatedly subject to similar orders). Here, given the City's position that the Public Records Act does not apply to documents in the physical custody of a third party and Gray Media's interest in timely news coverage of city government activity, it is likely that these parties will end up in our courts again.

Second, the challenged action has a duration too short to be fully litigated prior to cessation or expiration. The trial court stated, and the City argues on appeal, that the statutory procedure for expedited hearings allows for timely review. N.C. Gen. Stat. § 132-9. However, the City omits the fact that in future challenges, it can exercise its ownership rights, demand production from the third party, and turn the documents over to the requesting party long after the initial request but before the hearing date, thereby frustrating the intent of the Public Record Act, while still evading review. *In re Jackson*, 84 N.C. App. at 171, 352 S.E.2d at 452 (holding that a case involving the school system's right to suspend students for misconduct was capable of repetition yet evading review because a suspension could never be longer than the balance of the school year.) *Cf. Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 9, 639 S.E.2d 96, 102 (2007) (recognizing that the "capable of repetition yet evading review" mootness exception was not applicable where the governmental entity attempting to withhold the documents was the appealing party, and in the future, that entity could simply withhold the disputed documents and avoid mootness).

Thus, although the controversy is not moot, we are, alternatively, justified in exercising our discretion to consider the question because the issue is capable of repetition yet evading review. Accordingly, we turn to the merits of Gray Media's request for declaratory judgment.

B. The Requested Documents Are Public Records and the City Had an Obligation to Produce the Documents Promptly.

[2] At the center of this dispute is whether the requested documents are, in fact, public records subject to public disclosure when they were

solely held by a third party. Put another way, can a government agency place public records solely in the possession of a third party or otherwise ensure that only the third party has immediate access to what would undoubtedly be public records if in the possession of the government agency and then assert that the documents are not subject to disclosure under the Public Records Act? We hold that it cannot.

We first consider the plain language of the statute and statutory exceptions to ascertain whether the requested records are public records under the statute. Second, we consider the City's argument regarding whether physical possession is a statutory requirement of the Public Records Act. Finally, we evaluate whether the test established in *Womack* for documents held by a third party is applicable to the facts of this case. Ultimately, we hold that under the plain language of the statute, the requested documents are public records not subject to any exception. The Public Records Act does not require actual possession as a requirement for disclosure. Finally, the test used in *Womack* is not applicable because the documents at issue in this case were created by public officials.

1. The Documents Are Public Records Under the Plain Language of the Statute

The principles governing statutory construction are well established: when the language of a statute is clear and unambiguous, there is no room for judicial construction, and courts must give the statute its plain meaning. *News and Observer v. State*, 312 N.C. 276, 282, 322 S.E.2d 133, 137 (1984). In the construction of any statute, "words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974). The goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. *DTH Media Corp.*, 374 N.C. at 299, 841 S.E.2d at 257.

Here, the General Assembly specifically defined a public record as a document, regardless of physical form, made or received by a public official:

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, *regardless of physical form or characteristics*, *made or received* pursuant to law or ordinance in connection with the transaction of public business *by* any agency of North Carolina government or

> its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, *public officer or official* (State or local, *elected or appointed*), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

N.C. Gen. Stat. § 132-1(a) (emphasis added).

The parties agree that the survey and survey responses are not physical documents; rather, they are electronic records created through the City Council member's use of a hyperlink to create a record on EY's servers. The City contends that it is of legal significance that Council members were never emailed these surveys as, for example, an attachment to an email. Rather, because they were sent hyperlinks to EY webspace, we should not view the responses, developed by Council members in their governmental capacity, on taxpayer-funded time, as public records. At oral argument, the City conceded that if the issue was an email stored on a third-party server, the record would be a public record.

To accept the argument that a hyperlinked survey instead of an attached survey removes the document from the universe of public records requires us to read the statutory language much too narrowly. Such a reading would defeat the purpose of the statute, creating a clear path to hide huge swaths of governmental work from public scrutiny. Instead, we note that the statute includes broad language including "all documents . . . electronic data-processing records . . . *regardless of physical form or characteristics*." N.C. Gen. Stat. § 132-1(a) (emphasis added). Further, the Public Records Act has been repeatedly interpreted to provide liberal access to public records. *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685. *See also News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (recognizing that "[b]y enacting the Public Records Act, the legislature intended to provide that, as a general rule, the public would have liberal access to public records." (internal quotation marks omitted)). Therefore, we decline to adopt the City's narrow interpretation that a hyperlink to EY webspace does not constitute a "document or electronic data processing record."

Having determined that the survey responses are public records under the Public Records Act, we turn to the City's arguments that the requested documents fall under an exception to disclosure because a portion of the information may be the propriety information of EY. In the Public Records Act, the General Assembly identified specific exceptions

to general access for inspection or disclosure. N.C. Gen. Stat. § 132-1.1–1.14. However, those exceptions and exemptions to the Public Records Act must be construed narrowly. *See News and Observer Publishing Co.*, 330 N.C. at 486, 412 S.E.2d at 19 (holding that in the absence of clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Act must be made available for public inspection).

Here, the City does not cite any specific statutory exception and only asserts that third-party EY may consider the records to be EY's Pre-existing IP, which, under the contract terms, EY owns. However, EY disclosed both the survey and the survey responses to the City without making a claim that any of the requested survey questions or responses contained Pre-existing IP. EY did mark the documents disclosed under the subpoena as "Confidential," however, the Contract mandates that EY treat all contract data as confidential.

Even assuming *arguendo* that some information was confidential as defined in N.C. Gen. Stat. § 132-1.2(1), which the City does not argue, the Public Records Act specifically addresses the issue of confidential information comingled with nonconfidential information and prohibits the denial of a request to inspect, examine, or obtain public records on the ground that confidential information is commingled with the non-confidential information. N.C. Gen. Stat. § 132-6(c). If it is necessary to separate confidential information from nonconfidential information, the burden is upon the public agency to arrange such separation and to assume the cost of separation. *Id. See Ochsner v. N.C. Dep't of Revenue*, 268 N.C. App. 391, 400, 835 S.E.2d 491, 498 (2019) (recognizing that denial of access to public records is improper on the basis that the public record contains nonpublic information).

Therefore, we hold that the documents created using the hyperlinked survey and solely held by a third party are public records subject to disclosure and that, on the facts here, no confidentiality arguments prevent disclosure.

2. Actual Possession Is Not a Requirement of the Public Records Act

On appeal, the City argues that it did not have actual possession of the records or "substantial control" over EY to demand the records. The City also argues that it does not have an obligation to retrieve records from its contractors or consultants to comply with the Public Records Act. Finally, the City argues that this Court's holding in *State Employee Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer* creates a possession

requirement for documents to be considered public records. 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010). Therefore, the City argues, it did not have an obligation to disclose the records. We disagree.

The Public Records Act provides a procedure to inspect, review or copy documents in the custodian's *custody* by requesting access from the custodian of the public records. N.C. Gen. Stat. § 132-6 (emphasis added). Custody is defined as "care and control of a thing or person for inspection, preservation, or security." *Custody*, *Black Law Dictionary* (11th ed. 2019). Because custody encompasses control of a thing, actual or constructive possession is sufficient to meet the requirement for custody. *See Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) ("Constructive possession is a legal fiction existing when there is no actual possession, but there is title granting an immediate right to actual possession.")[2]

Notably, the phrase "actual possession" does not appear in the section. Adding the words "actual possession" into the statute would add new substantive language that meaningfully alters the statute's scope, and we may not "insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't. of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citations and quotation marks omitted).

When the issue of whether the custodian has custody of a record is disputed, it is the role of the court to ensure that public records are properly shared with the public—it is not the role of the state agencies to self-regulate compliance with the Public Records Act. In *State Employees Ass'n of N.C.*, the North Carolina Supreme Court said:

> The final determination of *possession or custody* of the public records requested is not properly conducted by the state agency itself. The approach that the state agency has the burden of compliance, subject to judicial oversight,

2. We find it informative that other states with similar public records acts have held that the public's right to access public records should not depend on where the records are physically located at the time of the request. *See Evertson v. City of Kimball*, 767 N.W.2d 751, 759 (Neb. 2009) ("The public's right of access should not depend on where the requested records are physically located."); *Tribune Review v. Westmoreland Hous. Auth.*, 833 A.2d 112, 118 (Pa. 2003) (recognizing that the lack of possession of existing writing by the public entity at the time of the request is not, by itself, determinative of the question of whether the writing is a public record subject to disclosure); *NCAA v. Associated Press*, 18 So.3d 1201, 1207 (Fla. App. 1 Dist. 2009) (explaining that the term "received" in the Florida Public Records Act refers not only to a situation "in which a public agent takes physical delivery of a document but also to one in which a public agent uses documents residing on a remote computer" for public business).

> is entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that, as noted above, public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010) (emphasis added). Therefore, any dispute regarding whether the City was properly in *possession or custody* of the documents is one that only our courts can resolve.

In this case, the Contract is unequivocal that the surveys and responses—*i.e.*, Contract data as defined in the Contract—are exclusively owned by the City. The contractual language plainly indicates that EY must "promptly provide the Contract data to the City in machine-readable format upon the City's request at any time while the contract is in effect or within three years from when the contract terminates." Therefore, the City maintained custody through constructive possession of the records and was required under the Public Records Act to have exercised its right to demand the records from EY when Gray Media made the public records request.

Accordingly, we hold that the City had custody of the records by virtue of its constructive possession of the records and that physical, actual custody is not a requirement of the statute. The City was obligated to request the document from EY to comply with the public records request made by Gray Media.[3]

3. Womack *Is Not Applicable*

The City argues that the two-part analysis that this Court used in *Womack*, 181 N.C. App. at 12, 639 S.E.2d at 104, should be applied in this

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3. The City's argument that Gray Media was required to request the documents directly from EY is in painful tension with the terms of the Contract. The Contract specifically requires that EY "will not reproduce, copy, duplicate, disclose, or use the Contract Data in any manner *except as authorized by the City in writing or expressly permitted by the Contract*." (Emphasis added). The City may not pass off the burden of complying with the Public Records Act to a third party, and it cannot credibly advance an argument that a requesting party should go to a third party when it knows that the third party would be contractually prevented from replying to such a request.

case to support the City's argument that it has no obligation to retrieve documents from contractors or consultants to comply with the Public Records Act.[4] However, a careful reading of the case that established the two-part analysis, *Durham Herald Co., Inc.*, clarifies that this analysis applies to "records *made by contractors* and subcontractors (contractors) of the Authority, *kept by the contractors* and *not actually received* by the Authority." *Durham Herald Co. v. Low-Level Radioactive Waste Mgmt. Auth.*, 110 N.C. App. 607, 610–11, 430 S.E.2d 441, 444 (1993) (emphasis added). This *Womack* analysis is not applicable here because the requested records were not made by contractors.

The surveys were received by the City Council members on 11 December 2020 when the email with the unique hyperlink to the survey was sent to the Council members' email accounts. The survey responses were created by the City Council members, who are public officials. As discussed *supra*, when the Council member received the email with the unique hyperlink, accessed the hyperlink, and began filling out the survey, the records were public records subject to disclosure under the Public Records Act. *News Reporter Co., Inc. v. Columbus Cty.*, 184 N.C. App. 512, 514, 646 S.E.2d 390, 392 (2007) (holding that a letter written by a county employee and received by the County Board in connection with its decision to hire a medical director was a public record).

Accordingly, we hold that the trial court erred in entering summary judgment for the City. Records created or received by a government entity, even when stored or held by a third party, are subject to disclosure under the Public Records Act and the government agency must exercise its right to possession of the records to allow the requestor to inspect or examine the records. We reverse the order of the trial court and remand for entry of summary judgment in favor of Gray Media.

C. Plaintiff Is Entitled to Attorneys' Fees for Compelling Production.

[3] Finally, Gray Media argues it substantially prevailed in compelling the production of the records and, therefore, is entitled to attorneys' fees pursuant to N.C. Gen. Stat. § 132-9. The City argues that Gray Media should not be awarded attorneys' fees for two reasons: (1) Gray Media did not *substantially prevail* in compelling the disclosure of public records,

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4. The two-part test requires, first, a determination of whether the contractor is an " '[a]gency of North Carolina government or its subdivisions'; then, if a contractor is found to be an agency, inquiring whether its records are 'public records' that were 'made or received pursuant to law or ordinance in connection with the transaction of public business . . . .' " *Womack Newspapers*, 181 N.C. App. at 12, 639 S.E.2d at 104.

and (2) the City acted in reasonable reliance on opinions from this Court including *Womack* and *Durham Herald*. We hold that Gray Media did substantially prevail in compelling disclosure and the City did not act in reasonable reliance on *Womack* and *Durham Herald*.

North Carolina General Statute § 132-9 requires the award of attorneys' fees to a party whose litigation efforts substantially compel the disclosure of public records. The statute, however, directs a denial of a fee award if the losing party relied on established precedent, specifically:

> The court may not assess attorneys' fees against the governmental body or governmental unit if the court finds that the governmental body or governmental unit acted in reasonable reliance on any of the following:
>
> (1) A judgment or an order of a court applicable to the governmental unit or governmental body.
>
> (2) The published opinion of an appellate court, an order of the North Carolina Business Court, or a final order of the Trial Division of the General Court of Justice.
>
> (3) A written opinion, decision, or letter of the Attorney General.

N.C. Gen. Stat. § 132-9.

The General Assembly modified the Public Records Act in 2010 to award attorneys' fees to the party that "substantially prevails" rather than simply the prevailing party. 2010 N.C. Sess. Laws 638, 660 ch. 169, sec. 132-9. The parties do not provide caselaw and we have not found North Carolina caselaw interpreting what "substantially prevails" means under this statute. "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." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). "[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words[.]" *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Thus, we understand that by adding the word substantially to the language of the statute, the Legislature expanded the class of parties entitled to attorneys' fees under the Public Records Act. This expansion includes entitling to attorneys' fees parties that may not receive all requested relief but do obtain relief, such as that resulting from the change in position of the opposing party during the litigation.

Here, Gray Media pursued production of the requested document under the Public Records Act and, when that was not successful, through

statutorily-authorized litigation. Gray Media and the City exchanged correspondence on this public records request for three months between March and May of 2021. After almost four months of negotiation after the initial records request, Gray Media filed the complaint under the Public Records Act. Even after the complaint was filed, the City did not request the documents from EY until after Gray Media filed for summary judgment on 19 April 2022. Because the City only moved to obtain the documents, which it contractually owned, sixteen months after the original request, after litigation was commenced, and, indeed, after Gray Media sought summary judgment in its favor, this sequence of events compels a conclusion that Gray Media's actions substantially precipitated the ultimate disclosure of the records.

Additionally, this result finds support in the statutory definition of "substantially prevails" in the Federal Freedom of Information Act ("FOIA"), which uses similar language to determine when an award of attorneys' fee is appropriate. 5 U.S.C. § 552 (a)(4)(E)(ii) (2018). Under FOIA, "substantially prevails" is defined by statute as obtaining relief through either a judicial order, an enforceable written agreement, a consent decree, or a voluntary or unilateral change in position by the agency if the complainant's claim is not insubstantial. *Id.* Federal courts have held that an important factor in determining whether a plaintiff has substantially prevailed is whether litigation was reasonably necessary to induce the agency to release the information. *See, e.g.*, *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 525 (D.C. Cir. 2011) (recognizing that the OPEN Government Act of 2007 redefined "substantially prevailing" to include obtaining relief through a voluntary or unilateral change in position by the agency if the complaint's claim was not insubstantial; substantially prevailing does not require winning court-ordered relief on the merits of the FOIA claim); *Batton v. I.R.S.*, 718 F.3d 522, 526 (5th Cir. 2013) (holding appellant "substantially prevailed" when the IRS only began producing documents one year after the initial request and after the appellant filed a lawsuit); *Cf. Weishaupt-Smith v. Town of Banner Elk*, 264 N.C. App. 618, 623, 826 S.E.2d 734, 738 (2019) (recognizing that although this Court is not bound by federal caselaw, we may find its analysis and holdings persuasive in interpreting analogous federal rules).

Finding that Gray Media successfully compelled the disclosure of the records, we turn our attention to whether the City reasonably relied upon *Womack* or *Durham Herald* in its denial of the Public Records Request. Section 132-9 of the Public Records Acts provides the trial court "may not assess attorneys' fees against the governmental body or governmental unit if the court finds that the governmental body or

governmental unit acted in reasonable reliance on . . . [a] published opinion of an appellate court . . . ." N.C. Gen. Stat. § 132-9. In the hearing for summary judgment, the City claimed that it relied upon the two-part test in *Womack*, arguing that because EY was not a government agency, the City was not obligated to produce documents.

Because neither *Durham Herald* nor *Womack* stand for the City's proposition that documents created by City Council members but held by third parties are not subject to the Public Records Act, the City could not have reasonably relied on either *Durham Herald* or *Womack* for the purposes of avoiding attorneys' fees. As discussed *supra*, the two-prong test used in *Womack* came from *Durham Herald* and specifically applied to documents created by a third party that have not been received by the government agency. *Durham Herald*, 110 N.C. App. at 610–11, 430 S.E.2d at 444 ("This case presents a question of first impression here—whether records *made by contractors and subcontractors* (contractors) of the Authority, *kept by* the contractors and *not actually received* by the Authority are public records, as defined under [N.C. Gen. Stat.] § 132–1, requiring disclosure under North Carolina's public records law." (emphasis added)). *Womack* held that because the result in *Durham Herald* that the requested documents were not public records turned on the specificity of the North Carolina Low-Level Radioactive Waste Act, its logic was unpersuasive in that later case. *Womack*, 181 N.C. App. at 12, 639 S.E.2d at 103.

Here, it is undisputed that the email with the hyperlink was received by the City Council members and the City Council members created the survey responses in the course of City business. While the City needed to request the survey responses from EY, the City was obliged to do so under the plain language of the statute and was not excused from that obligation by any decision from our appellate courts. We do not suggest that the City acted in bad faith by arguing that *Womack* and *Durham Herald* supports their position, but an erroneous legal interpretation of those cases cannot excuse a governmental entity from its financial obligations to parties authorized to claim attorneys' fees by statute. Significantly, in *Womack*, this Court signaled that it would reject the precise argument offered by the City here, noting that "permitting [a public agency] to place documents such as these in the hands of a so-called independent contractor in order to escape the public records requirements[]" would allow government agencies to skirt the public records disclosure requirement and shield records from public scrutiny. *Womack*, 181 N.C. App. at 14, 639 S.E.2d at 105. That same admonition applies equally here—public records are "*the property of the people*." N.C. Gen. Stat. § 132-1(b).

Therefore, we hold that attorneys' fees are warranted and remand for an award of attorneys' fees with the amount to be determined by the trial court.

III. CONCLUSION

We hold that the question of whether the records held solely by EY as part of the contract between the City and EY are subject to the Public Record Act is not moot. Accordingly, we reverse the order of summary judgment in favor of the City. We remand for entry of an order granting summary judgment in favor of Gray Media declaring the documents created by City Council members and stored on EY servers to be public records subject to disclosure under the Public Records Act. We further remand for entry of an award of attorneys' fees to Gray Media, with the amount to be determined by the trial court after further hearing.

REVERSED AND REMANDED.

Judges ZACHARY and COLLINS concur.

DUSTIN MICHAEL MCKINNEY, GEORGE JEREMY MCKINNEY AND JAMES ROBERT TATE, PLAINTIFFS
v.
GARY SCOTT GOINS AND THE GASTON COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA22-261

Filed 12 September 2023

Constitutional Law—North Carolina—Law of the Land clause—statute of limitations defense—retrospective claim revival

The divided decision of a three judge panel dismissing plaintiffs' claims against a county board of education—for allegedly failing to protect them from sexual abuse committed by a school employee when they were in high school—was reversed where the dismissal was based on the majority's erroneous determination that the SAFE Child Act, under which plaintiffs' claims were filed and which allowed them to revive previously time-barred claims, was facially unconstitutional. Although the majority concluded that the revival provision of the Act violated due process rights protected by the Law of the Land clause by retroactively taking away defendant's statute of limitations defense, and thus interfered with a vested right,

nothing in the North Carolina Constitution prohibits the revival of statutes of limitation and, therefore, the Act was constitutional and plaintiffs' claims were dismissed in error.

Judge GORE concurring in result only.

Judge CARPENTER dissenting.

Appeal by Plaintiffs and Intervenor State of North Carolina from an order entered 20 December 2021 by Judges R. Gregory Horne and Imelda J. Pate, with Judge Martin B. McGee dissenting, in Wake County Superior Court. Heard in the Court of Appeals 6 June 2023.

Lanier Law Group, P.A., by Donald S. Higley, II, Robert O. Jenkins, and Lisa Lanier, for Plaintiffs-Appellants.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, Deputy Solicitor General Nicholas S. Brod, Solicitor General Fellow Zachary W. Ezor, and Special Deputy Attorney General Orlando L. Rodriguez, for Intervenor-Appellant State of North Carolina.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth Lea Troutman, Robert J. King, III, Jill R. Wilson, and Lindsey S. Barber, for Defendant-Appellee Gaston County Board of Education.

No brief filed by Defendant-Appellee Gary Scott Goins.

Fox Rothschild LLP, by Troy D. Shelton, for Amici Curiae Student Victims of Sexual Abuse.

Troutman Pepper Hamilton Sanders LLP, by Joshua D. Davey and Mary K. Grob, for Amicus Curiae Roman Catholic Diocese of Charlotte, North Carolina.

Wilder Pantazis Law Group, by Sam McGee, for Amicus Curiae CHILD USA.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for Amicus Curiae North Carolina School Boards Association.

Nelson Mullins Riley & Scarborough, LLP, by Lorin J. Lapidus, G. Gray Wilson, Denise M. Gunter, and Martin M. Warf, and Bell, Davis & Pitt, P.A., by Kevin G. Williams, for Amicus Curiae Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA.

RIGGS, Judge.

Plaintiffs Dustin Michael McKinney, George Jeremy McKinney, and James Robert Tate, along with Intervenor-Appellant State of North Carolina, appeal from an order entered by a divided three-judge panel in Wake County dismissing Plaintiffs' complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The majority below dismissed Plaintiffs' complaint on the rationale that the Sexual Assault Fast reporting and Enforcement Act (the "SAFE Child Act")—which revived Plaintiffs' civil claims for child sexual abuse after expiration of the statute of limitations—was facially unconstitutional as violating due process rights protected by the "Law of the Land" clause in Article I, Section 19 of the North Carolina Constitution. *See* 2019 N.C. Sess. Laws 1231, 1235, ch. 245, sec. 4.2.(b) ("Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act."); N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.").

Defendant Gaston County Board of Education (the "Board")—who, per the complaint in this case, failed to protect the children in its care from a sexually abusive employee over a period of years—asks us to elevate a purely procedural statute of limitations defense into an inviolable constitutional right to be free from any civil liability for whatever misdeeds would be provable at trial. But affording all statutes of limitation that exceptional status is nowhere required by the constitutional text, nor is it mandated by the precedents of our Supreme Court. Because adopting the Board's position would require us to strike down as unconstitutional a duly enacted statute of our General Assembly and disregard the narrowly crafted legislation designed to address a stunningly pressing problem affecting vulnerable children across the state, we decline to convert an affirmative defense into a free pass for those who engaged in and covered up atrocious child sexual abuse. After careful review, we reverse the trial court and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

A. Underlying Abuse of Plaintiffs

The allegations of the complaint, taken as true for purposes of review at the 12(b)(6) stage, establish the following:

Plaintiffs were all high school students and members of the East Gaston High School wrestling team at different times during the mid-1990s and early 2000s. All were coached by Defendant Gary Scott Goins, who physically and sexually assaulted each of the boys during their pre-teen and/or teenage years. Defendant Goins desensitized his victims to sex, used foul language, and exposed them to vulgarity and pornography. He further engaged in acts of physical violence, psychological harm, and sexual abuse. On trips to tournaments and other team events, Defendant Goins precluded Plaintiffs from travelling or rooming with their parents so that he could sexually assault them without raising suspicion. Plaintiffs suffered lasting psychological harm—including post-traumatic stress disorder, anxiety, depression, and/or substance abuse issues—as a result of Defendant Goins' illegal acts.

The Board, Defendant Goins' employer, received numerous complaints concerning his physical abuse of wrestlers under his tutelage. The Board, however, made no corrective action in response to these reports, electing instead to dismiss them after minimal investigation. Nor did the Board properly supervise Defendant Goins' activities to protect Plaintiffs from his abuse, including while in school facilities, travelling on school vehicles, and during overnight trips sanctioned by the Board.

In 2014, Defendant Goins was convicted of the following offenses in connection with his sexual abuse of wrestlers on the East Gaston High School wrestling team: (1) two counts of statutory sexual offense; (2) six counts of taking indecent liberties with a minor; (3) four counts of taking indecent liberties with a student; (4) three counts of sexual activity with a student; and (5) two counts of crimes against nature. *State v. Goins*, 244 N.C. App. 499, 511, 781 S.E.2d 45, 54 (2015). He was sentenced to a collective minimum term of 34.5 years for his crimes, and his conviction and sentences were upheld on appeal. *Id.*

B. Statute of Limitations and the SAFE Child Act

Under the statute of limitations then in effect, Plaintiffs had three years from their eighteenth birthdays to bring civil suits against Defendants for the torts arising out of their sexual abuse. *See* N.C. Gen. Stat. § 1-17 (2007) (providing that persons under the age of eighteen may generally pursue claims "within the time limited in this Subchapter"

upon reaching the age of majority); N.C. Gen. Stat. § 1-52 (2007) (establishing a three-year statute of limitations for assault, battery, and false imprisonment). None of Plaintiffs brought civil suits against Defendants for these torts within three years of their eighteenth birthdays, with the latest of the claims expiring in 2008.

The North Carolina General Assembly passed the SAFE Child Act unanimously on 31 October 2019, and it was signed by the Governor a week later. 2019 N.C. Sess. Laws 1231, 1239, ch. 245, sec. 9(c). Among the many substantial statutory changes in the SAFE Child Act were revisions to the statute of limitations governing Plaintiffs' claims against Defendants, including the following "Revival Window" provision: "Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act." *Id.*, 1235, ch. 245, sec. 4.2(b). This change by the legislature mirrored scientific developments and greater understanding by lawmakers from 2000 to the present[1] that child sex abuse victims frequently delayed disclosure of their traumas well into adulthood and suffer lifelong impacts to their physical, mental, and behavioral health. *See* Melissa Hall & Joshua Hall, *The Long-Term Effects of Childhood Sexual Abuse: Counseling Implications*, Am. Counseling Ass'n VISTAS Online, 2-5 (2011), https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf; Ramona Alaggia et al., *Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000-2016)*, 20(2) Trauma, Violence, & Abuse 260, 276 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1524838017697312; CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, 4 (March 2020), https://childusa.org/wp-content/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf; Ctrs. for Disease Control, *Preventing Child Sexual Abuse*, 1 (2021), https://www.cdc.gov/violenceprevention/pdf/can/CSA-Factsheet_508.pdf (collecting research from the late 1990s through the late 2010s).

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1. Connecticut, California, and Delaware were the first three states to revive civil claims under expired statutes of limitations for child sexual abuse in 2002, 2003, and 2007, respectively. *2023 SOL Tracker*, CHILD USA, https://childusa.org/2023sol/ (last visited June 27, 2023). Twenty-three states and three territories followed suit between 2010 and 2023. *Id. See also* Brief of *Amicus Curiae* CHILD USA in Support of Plaintiffs-Appellants Urging Reversal of the Decision Below, 17-22, *McKinney v. Goins*, COA22-261 (N.C. Ct. App. Apr. 19, 2023).

C. Plaintiffs' Suit and the Board's Facial Constitutional Challenge

Relying on the SAFE Child Act's Revival Window, Plaintiffs filed suit against Defendants on 2 November 2020 in Gaston County Superior Court for: (1) assault/battery; (2) negligent hiring, retention, and supervision; (3) negligent infliction of emotional distress; (4) intentional infliction of emotional distress; (5) constructive fraud; (6) false imprisonment; and (7) punitive damages.[2] The Board filed an answer and counterclaim on 27 January 2021, specifically asserting that the complaint must be dismissed because the Revival Window "is facially unconstitutional" and the claims were time-barred by the applicable statute of limitations. The Board later filed a 12(b)(6) motion to dismiss on this same basis, as well as a motion to transfer the action to a three-judge panel of the Superior Court of Wake County. *See* N.C. Gen. Stat. § 1-267.1(a1) (2021) ("[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]").

Plaintiffs and the Board subsequently filed a joint motion to transfer and stay the remainder of the action, and the Gaston County Superior Court granted that motion on 17 May 2021. Chief Justice Paul Newby of the Supreme Court of North Carolina subsequently appointed Superior Court Judges Martin B. McGee, R. Gregory Horne, and Imelda J. Pate to hear the Board's facial challenge to the Revival Window. Shortly after their appointment, the State filed a motion to intervene to defend the constitutionality of the SAFE Child Act's Revival Window, and the panel unanimously granted that motion.

D. Dismissal of Plaintiffs' Suit

The three-judge panel heard the Board's motion to dismiss on 21 October 2021. After taking the matter under advisement, the panel entered a divided decision granting the Board's motion to dismiss on the basis that the Revival Window facially violated due process protections provided by the Law of the Land Clause. The majority concluded, based on several decisions from the Supreme Court of North Carolina and this Court, that a statute of limitations defense is a constitutionally protected vested right. *See Wilkes County v. Forester*, 204 N.C. 163, 169, 167 S.E. 691, 695 (1933); *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d

2. Defendant Goins was later dismissed from the lawsuit without prejudice and is therefore omitted from further discussion in this opinion.

263, 265 (1949); *Stereo Center v. Hodson*, 39 N.C. App. 591, 595, 251 S.E.2d 673, 675 (1979); *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (1984). The majority further held that, because retroactive interference with a vested right is violative of the Law of the Land Clause's constitutional due process protections, the Revival Window's dissolution of the Board's statute of limitations defense was *per se* unconstitutional. *See Lester Brothers v. Insurance Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) (noting that a *plaintiff's* vested right to hold a defendant individually liable for business debts could not be extinguished by a later statute eliminating that individual liability because "[a] retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void" (citation omitted)).

Judge McGee respectfully dissented from the majority's determination. In his dissent, Judge McGee found the caselaw and constitutional history surrounding retrospective laws, statutes of limitations, and vested rights less clear-cut than the majority, noting that: (1) Article I, Section 16 of the North Carolina Constitution only explicitly prohibits retrospective *criminal* laws and taxes, N.C. Const. art. I, § 16; (2) the North Carolina Constitution nowhere describes a statute of limitations defense as a vested property right; (3) the cases relied upon by the majority did not anchor their vested rights and statute of limitations analyses to any constitutional provisions; and (4) at least two decisions from our Supreme Court recognize that retrospective laws are not *per se* prohibited by our State Constitution, *see State v.* — , 2 N.C. 28, 39-40 (1794) (upholding judgments against delinquent receivers of public money after hearing the Attorney General's argument that "[s]ection 24 of our Bill of Rights . . . prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but leaves the Legislature free to pass all others[.]"); *State v. Bell*, 61 N.C. 76, 83 (1867) (holding, prior to amendment of N.C. Const. art. I, § 16 prohibiting retrospective taxes, that a retrospective tax was constitutional because "[t]he omission of any such prohibition [against retrospective laws beyond *ex post facto* criminal statutes] in the Constitution of the United States, and also of the State, is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden").

Judge McGee viewed the above history in light of the maxim that laws are presumed constitutional and are not to be invalidated "unless [the reviewing court] determine[s] that it is unconstitutional beyond reasonable doubt." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). Concluding that a vested right in

a statute of limitations defense is never described as a fundamental right in our State and Federal Constitutions and related caselaw, Judge McGee examined the Revival Window under the rational basis test. *See Rhyme v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("[I]f the statute impacts neither a fundamental right nor a suspect class, we employ the rational basis test."). He then identified the State's interest in "providing an avenue in our civil courts for victims of child sexual abuse to hold accountable child abusers, and their enablers, for past actions" as a rational basis for the Revival Window and would have rejected the Board's facial challenge. *See id.* at 181, 594 S.E.2d at 15 ("As long as there could be some rational basis for enacting the statute at issue, this Court may not invoke principles of due process to disturb the statute." (cleaned up)).

Judge McGee further concluded that, even if the vested right in a statute of limitations defense amounted to a fundamental right because it impacted a property interest, the Revival Window survived heightened strict scrutiny analysis. *See Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002) ("If [the impacted] liberty or property interest is a fundamental right under the Constitution, the government action may be subjected to strict scrutiny." (citation omitted)). Turning to that test, Judge McGee believed several compelling state interests were served by the Revival Window: namely "protecting children from physical and psychological harm, the legislators' determination that many incidents of sexual abuse involved delayed disclosure, and supplying civil remedies to victims of childhood sexual abuse." He then reasoned that the Revival Window—limited to a two-year period and civil actions for child sexual abuse—was narrowly tailored to advance those compelling state interests. As a result, Judge McGee would have denied the Board's motion under this more stringent standard. *See Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) ("Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.").

Plaintiffs and the State both timely appealed from the majority's order.[3]

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3. Plaintiffs and the State initially sought and were granted discretionary review by our Supreme Court prior to a determination by this Court. After briefing, the Supreme Court rescinded its grant of discretionary review and remanded the matter to this Court, directing us to "accept the parties' briefs previously filed in [the Supreme] Court as the basis for review in the Court of Appeals." Order, *McKinney v. Goins*, 109PA22 (N.C. March 1, 2023). We subsequently ordered supplemental briefing and authorized *amici* who filed briefs before the Supreme Court to file the same with this Court. Order, *McKinney v. Goins*, COA22-261 (N.C. Ct. App. March 22, 2023). Thus, our consideration of this appeal

II. ANALYSIS

The central constitutional question raised by the parties, as appropriately considered by the three-judge panel, is whether a retroactive statute resuscitating a claim previously barred by a statute of limitations runs afoul of the North Carolina Constitution regardless of the circumstances. Recognizing that our precedents related to this issue may not provide the most clear-cut answer, we ultimately hold that our Constitution does not *per se* prohibit such an act by our legislature and, regardless of the degree of scrutiny applicable, the Revival Window passes constitutional muster. We therefore reverse the trial court's order dismissing Plaintiffs' complaint on the basis that the Revival Window is facially unconstitutional.

A. Standards of Review

Whether the trial court properly granted a motion to dismiss pursuant to Rule 12(b)(6) is reviewed *de novo* on appeal. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). We take the allegations in the non-movant's pleading as true for purposes of this analysis. *Id.* at 606, 659 S.E.2d at 448. Dismissal is proper under the Rule only when "it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (citation omitted).

Similarly, whether a statutory provision is unconstitutional presents a question of law subject to that same *de novo* standard. *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017). Constitutional challenges generally take two forms: (1) facial challenges, which "maintain[ ] that no constitutional applications of [a] statute exist, prohibiting its enforcement in any context," *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, *Packingham v. North Carolina*, 582 U.S. 98, 198 L. Ed. 2d 273 (2017); and (2) as-applied challenges, which ask if a statute "can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *Id.* There is no dispute amongst the parties that the instant appeal solely involves a facial challenge.

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is on: (1) the briefs filed with our Supreme Court; (2) the parties' supplemental briefs; (3) *amici* briefs properly filed with this Court in accordance with our order, Rule 28(i) of the North Carolina Rules of Appellate Procedure, and relevant caselaw; (4) the record on appeal; and (5) the parties' oral arguments.

Several core principles govern the exercise of *de novo* review over facial challenges like the one before us. We are obliged to recognize that "the North Carolina Constitution is not a grant of power, but a limit on the otherwise plenary police power of the State. We therefore presume that a statute is constitutional, and we will not declare it invalid unless its unconstitutionality is demonstrated beyond reasonable doubt." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 287 (2015) (citations omitted). Moreover, "a facial challenge to the constitutionality of an act . . . is the most difficult challenge to mount successfully." *Id.* at 131, 774 S.E.2d at 288 (citation omitted). The challenger must therefore "meet the high bar of showing that there are no circumstances under which the statute might be constitutional." *Id.* (citation and quotation marks omitted).

B. The Law of the Land Clause and Federal Due Process

The Law of the Land Clause found in Article I, Section 19 of the North Carolina Constitution provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. It is generally equivalent to—but *not* coterminous with—the Fourteenth Amendment's Due Process Clause in the Constitution of the United States. *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 284 N.C. App. 104, 112-13, 874 S.E.2d 669, 676-77 (2022). As such, "a decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C. App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Law of the Land Clause is thus principally subject to independent interpretation under the particular laws of this state, so long as that interpretation does not contravene the baseline protections provided by the Constitution of the United States. *See, e.g.*, *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998) ("[T]he United States Constitution is binding on the states . . . , so no citizen will be accorded lesser rights no matter how we construe the state Constitution. . . . [T]he United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States[.]" (quotation marks omitted)).

The Supreme Court of the United States has held that the Fourteenth Amendment's Due Process Clause does not prohibit states from reviving civil claims otherwise barred by a lapsed statute of limitations. *See, e.g.*, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-16, 89 L. Ed. 2d 1628, 1636 (1945) ("[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.").

Resolution of this appeal turns, then, on whether the Law of the Land Clause provides such protection above and beyond the Fourteenth Amendment. This analysis consists of two questions: (1) are acts reviving expired statutes of limitations *per se* unconstitutional as interfering with vested rights under the text of the North Carolina Constitution, its history, and interpretive judicial decisions from this state?; and (2) if not, is the Revival Window otherwise unconstitutional under the modern due process framework applicable to the Law of the Land Clause?

C. Interpretive Principles Applicable to the North Carolina Constitution

Every facial constitutional challenge under the Constitution of North Carolina begins with "the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252. Our Supreme Court recently reiterated both the difficulty faced by and the high burden imposed upon litigants asserting that a legislative enactment plainly and clearly violates an express provision of the State Constitution. *See generally Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023).

D. The Law of the Land Clause, *Ex Post Facto* Laws, and Retrospective Laws Through Reconstruction

An examination of the history of this state's jurisprudence on the Law of the Land Clause and retrospective laws through Reconstruction is illuminating to the instant analysis because of these cases' temporal proximity to the Founding of this State and because of their discussion of constitutional provisions that were retained through subsequent constitutional revisions. Specific provisions of the North Carolina Constitution impose express limitations on the General Assembly's ability to pass legislation of retroactive effect. Our Constitution, as originally ratified at the time of the Founding, provided that "retrospective Laws, punishing facts committed before the Existence of such Laws, and by them only declared criminal, are oppressive, unjust, and incompatible with Liberty; wherefore no ex post facto law ought to be made." N.C. Const. of 1776, Declaration of Rights, § XXIV. Two decades later, our state's Founding-era appellate court[4] considered whether this provision

4. Under the Judicial Act of 1777, and prior to the formal establishment of our Supreme Court as a distinct judicial body, a single superior court judge could hold trials, while two or more superior court judges could convene "to sit as an appellate or Supreme Court." Hon. Kemp P. Battle, President, Univ. of N.C., An Address on the History of the Supreme Court, 103 N.C. 339, 353 (1889).

of our original constitution precluded the State from pursuing judgments against delinquent receivers of public money pursuant to a statute retroactively authorizing such collection. *State v.* —, 2 N.C. at 28-29. Although the Court resolved *State v.* — , without issuance of a formal opinion, it is both illuminating of and relevant to a historical understanding of the Law of the Land Clause as originally ratified and enforced in connection with retroactive claims for monetary relief.

In *State v.* —, the trial judge initially ruled that the Attorney General could not pursue such judgments under several state constitutional provisions, including the Law of the Land Clause. *Id.* at 29-30. The Attorney General subsequently revisited the issue with the trial judge, arguing as follows:

> It has been said, amongst other objections to the clause now in question, that this is a retrospective law. Does any part of our constitution prohibit the passing of a retrospective law? It certainly does not. The objection is grounded upon section 24 of our Bill of Rights, which prohibits the passing of an *ex post facto law*. This prohibition is essential to freedom and the safety of individuals. . . . [T]his clause, I admit, is in restraint of legislative power in this particular. This indeed prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but leaves the Legislature free to pass all others, and without such a power no government could exist for any considerable length of time, without experiencing great mischiefs. The exercise of such power has been found frequently necessary here since the Revolution, and divers[e] retrospective acts, which the Legislature have passed[,] have been carried into execution and sanctioned by the judiciary. . . . The Convention foresaw the necessity there would be for sometimes enacting such laws, and therefore they have been careful to word section 24 so as not to exclude the power of passing a retrospective law, not falling within the description of an *ex post facto* law. The Convention meant to leave it with the legislature to pass such laws when the public convenience required it.

Id. at 39. When the trial judge was unmoved by the explained necessity of retroactive legislation, the Attorney General raised the issue and presented the same argument to a two-judge panel, who overruled the trial judge. *Id.* at 40. While no formal opinion was provided by the Court, the ruling likely—if not necessarily—involved an inherent determination

that the Attorney General's actions to enforce a retrospective law were constitutional.[5]

This understanding of due process and retrospective laws under the North Carolina Constitution—that is, that an overly broad prohibition on retrospective laws interferes with the ability of a legislative body to effectively represent its people in a changing era—appears to have prevailed through the Civil War, as evidenced by *State v. Bell*, 61 N.C. 76, 80 (1867). There, our Supreme Court was tasked with determining whether the North Carolina Constitution barred a retrospective tax. In resolving the issue, the Court observed that:

> Whenever a retrospective statute applies to crimes and penalties, it is an *ex post facto* law, and as such is prohibited by the Constitution of the United States, not only to the States, as we have already seen, but to Congress. The omission of any such prohibition in the Constitution of the United States, and also of the State, is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden. It furnishes an instance for the application of the maxim *expressio unius est exclusion alterius*.[6] We know that retrospective statutes have been enforced in our courts[.]

Bell, 61 N.C. at 82-83. Then, with this understanding, the Supreme Court upheld the retroactive tax as constitutional in light of the "well established right to pass a retrospective law which is not in its nature criminal[.]" *Id.* at 86.

The following year, the Supreme Court again had an opportunity to consider whether other kinds of retrospective laws—and specifically, laws reviving claims previously barred by a statute of limitations—violated the State Constitution. In *Hinton v. Hinton*, 61 N.C. 410 (1868), the Court was tasked with determining whether a law reviving the rights of widows to claim dower[7] that had expired under a statute of limitations

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5. Indeed, that Court had been the first judicial body in the nation to recognize judicial review seven years earlier, holding in *Bayard v. Singleton* that statutes in violation of the North Carolina Constitution were unenforceable. 1 N.C. 5, 7 (1787).

6. "Under the doctrine of *expressio unius est exclusion alterius*, when a [law] lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (citation omitted).

7. Dower is "[t]he portion of or interest in the real estate of a deceased husband that is given by law to his widow during her life[.]" *Yount v. Yount*, 258 N.C. 236, 241-42, 128 S.E.2d 613, 618 (1962).

was an unconstitutional retrospective law. It first observed that the right of dower "existed at common law, and was not created by the act of 1784 [that imposed time limitations on dower claims.] . . . [T]he act . . . is a 'statute of limitations,' which in such cases bars the right to a writ of dower, but does not extinguish the preexisting common-law right of dower." *Hinton*, 61 N.C. at 412. When asked, "[d]id the Legislature have power to pass the act [reviving barred dower claims]," *id.* at 415, the Supreme Court held that it did.

First, the Supreme Court noted that revival of a claim barred by the statute of limitations does not inherently affect any particular property of the defendant, and thus does not necessarily implicate any vested rights:

> It is said the Legislature has not the power to interfere with "vested rights," and take property from one and give it to another! That is true[.] . . . There is in this case no interference with vested rights. The effect of the statute is not to take from the devisee his property and give it to the widow, but merely to take from him *a right conferred by the former statute*[.]

Id. Stated simply, no claim to or interest in property invariably stems from a defendant's reliance on the procedural bar provided by the statute of limitations, and thus no vested right is impacted when that bar is lifted.

The Supreme Court then went on to explain why this is so, reasoning that removing a procedural bar imposed by a statute of limitations affects the *plaintiff's* claim rather than any interest of the defendant, as "it affects the *remedy* and not the [defendant's] right of property." *Id.* (emphasis in original). In other words, a statute of limitations, as a general proposition, simply serves to procedurally bar recovery by a plaintiff and does not, by contrast, create a property right in the defendant by extinguishing any underlying liability.[8] The Supreme Court then recognized that retrospective legislation posed no inherent constitutional

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8. This distinction persists today. *See, e.g.*, *Williams v. Thompson*, 227 N.C. 166, 168, 41 S.E.2d 359, 360 (1947) ("The lapse of time [under a statute of limitations] does not discharge the liability. It merely bars recovery." (citations omitted)). It also separates statutes of limitation from statutes of repose. *See, e.g.*, *Boudreau v. Baughman*, 322 N.C. 331, 340-41, 368 S.E.2d 849, 856 (1988) ("Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. The statute of repose, on the other hand, acts as a condition precedent to the action itself. . . . For this reason we have previously characterized the statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights." (citations omitted)).

problem in this circumstance, as "[t]he power of the Legislature to pass retroactive statutes affecting remedies is settled." *Id.* Finally, the Supreme Court made explicit, by example, that this holding extended beyond the context of dower and reached even ordinary claims for money owed:

> Suppose a simple contract debt created in 1859. In 1862, the right of action was barred by the general statute of limitations, which did not *extinguish the debt*, but simply barred the right of action. Then comes the act of 1863, providing that the time from 20 May, 1861, shall not be counted. Can the debtor object that this deprives him of a vested right? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

Id. (emphasis in original).

The Board contends that *Hinton* is of no application here because it involved law particular to the vested right of dower. But, as the Supreme Court's debt collection example recounted above plainly illustrates, the Court did not intend the holding and rationale of *Hinton* to be so limited. And Plaintiffs' substantive claims are not entirely dissimilar, insofar as they likewise sound in the common law of torts rather than any statutorily created right of action. Further, "[a] vested right of action is property. The statute may change the remedies, but cannot defeat or modify a right of action that has already accrued." *Mizell v. R.R.*, 181 N.C. 36, 39, 106 S.E. 133, 135 (1921). We therefore reject the Board's attempt to cast *Hinton*'s substantive holdings as inapposite.

Hinton's pertinent substantive holdings, then, are threefold: (1) a statute of limitations only inherently affects the availability of a plaintiff's remedy, *Hinton*, 61 N.C. at 415; (2) the procedural bar imposed by a lapsed statute of limitations does not intrinsically or inevitably create a vested right in the defendant, as it does not eliminate liability for the underlying claim or otherwise necessarily implicate property rights, *id.* at 415-16; and (3) the General Assembly is not constitutionally constrained from lifting such a procedural bar in these circumstances, *id.* at 415. In brief, under *Hinton*, revival of a statute of limitations does not *per se* violate the North Carolina Constitution, as the procedural bar created by those statutes is not a vested claim to land, goods, currency, or any incorporeal interest in the same. *Id.* at 415-16.

Within a year of both *Bell* and *Hinton*, the people of North Carolina saw fit to further restrict the ability of the General Assembly to pass

retrospective laws when they ratified a new constitution in 1868.[9] In addition to restricting *ex post facto* criminal laws, Article I, Section 32 of the 1868 Constitution newly provided that "[n]o law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed." N.C. Const. of 1868, art. I, § 32. But, beyond restricting *ex post facto* criminal laws and retrospective taxation—the latter in apparent reaction to *Bell*—the people ratified no other express provisions further restricting retrospective acts specifically, let alone those deemed constitutional by *Hinton*. Both the language of the Law of the Land Clause and the *Ex Post Facto* Clause of the 1868 Constitution survive in our current state Constitution. *Compare* N.C. Const. of 1868, art. I, §§ 17 & 32, *with* N.C. Const. art. I, §§ 16 & 19 (containing the same language, with added clauses in the current Section 19 providing for equal protection of the laws and prohibiting discrimination on the basis of race, color, religion, or national origin).

This history plainly demonstrates that retroactive civil laws, including ones reviving statutes of limitation, are not inherently unconstitutional; they do not unerringly violate either the Law of the Land Clause or the express provisions of the *Ex Post Facto* Clause of our state Constitution as understood and enacted from the Founding through Reconstruction. *State v. —*, 2 N.C. at 39-40; *Bell*, 61 N.C. at 86; *Hinton*, 61 N.C. at 415-16. And though phrased in antiquated language, the core holdings of *Hinton* ring as clearly today as they did centuries ago: a procedural bar to a plaintiff's claim imposed by an expired statute of limitations does not, standing alone, create any property right in the defendant, and said bar may be retroactively lifted without interfering with a defendant's vested rights. *Hinton*, 61 N.C. at 415-16. Inviolable vested rights affecting real or personal property are not equivalent to the fungible benefits of statutory procedure affecting remedies. *Id.* Even more simply, a right of a *plaintiff* to a *potential recovery* does not bear upon a right of a *defendant* to be free from *liability*. *Id. See also Colony Hill Condominium I Assoc.*, 70 N.C. App. at 394, 320 S.E.2d at 276 (recognizing that, unlike statutes of limitation, a statute of repose may not be retroactively suspended to revive a cause of action because it "gives the defendant a vested right not to be sued" (citation omitted)). While the Board points us to several decisions and authorities from other jurisdictions to the contrary, they cannot, by their very nature, control this state's historical understanding, interpretation, and application of its own Constitution. *See McCrory*, 368 N.C. at 639, 781 S.E.2d at 252.

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9. *Bell* was decided in 1867 and *Hinton* at the January term of 1868. The 1868 Constitution was subsequently ratified in April 1868.

In urging us to read this history differently, the Board relies principally on *University v. Foy*, 5 N.C. 58 (1804). But *Foy* involved a narrow legal question—whether the General Assembly could retroactively rescind a prior grant of *title to real property* consistent with the Law of the Land Clause's explicit prohibition against deprivations of "property." 5 N.C. at 84, N.C. Const. art. I, § 19. *Foy*'s resolution of that limited issue by declaring such a revocation of real property rights unconstitutional, *Foy*, 5 N.C. at 88-89, thus cannot overrule the much broader recognition in *State v.* — that, as a general matter, retroactive civil laws are not always unconstitutional. *State v.* —, 2 N.C. at 39-40. Nor did *Foy*—unlike *Hinton*—purport to decide whether vested property rights necessarily flow from an expired statute of limitations such that a retroactive revival of expired claims implicates the Law of the Land Clause. Finally, *Foy* could in no way deprive the later decisions in *Bell* and *Hinton*—as well as the limited change to the *Ex Post Facto* Clause in the 1868 Constitution—of force of law or relevant historical context.

Indeed, other decisions from this time period confirm, consistent with both *Foy* and *Hinton*, that: (1) where a retroactive statute interferes with an established right to property, it violates the Law of the Land Clause as implicating vested rights, *Foy*, 5 N.C. at 87-89; and (2) where a retrospective statute affects only a party's reliance on a procedural statute, no vested rights are affected, *Hinton*, 61 N.C. at 415-16.

For example, in *Hoke v. Henderson*, 15 N.C. 1, 17 (1833), *overruled by Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903), the Supreme Court was tasked with deciding whether a position of public office constituted a vested right that could not be retrospectively abridged. The Court first observed that constitutionally protected vested rights, in accord with the plain text of the Law of the Land Clause, generally sounded in "every species of *corporeal property*, real and personal." *Hoke*, 15 N.C. at 16 (emphasis added). It then extended the concept of vested rights to incorporeal property rights, such as "the right to exercise a[n] . . . employment, and to take the fees and emoluments thereunto belonging." *Id.* at 17. Thus, because public office includes the right to "secure the possession of it and its emoluments," retrospective interference with that office violated the Law of the Land Clause as abridging vested incorporeal property rights. *Id.* at 19.[10]

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10. Importantly, as the later decisions of *Bell* and *Hinton* would demonstrate, the fact that a retroactive statute implicates a defendant's monetary interests does not invariably render it as unconstitutionally affecting a vested property right. *Bell*, 61 N.C. at 86; *Hinton*, 61 N.C. at 415-16. And *Mial* would later overrule *Hoke* on the basis that its definition of "property" in connection with public office was unworkable when taken "to its logical

Hoke's implicit holding—and *Hinton*'s explicit one—that constitutionally vested rights sound in corporeal or incorporeal property interests rather than procedure is seen throughout other cases of the era. *Compare Robinson v. Barfield*, 6 N.C. 391, 422 (1818) (holding a statute retrospectively validating deeds improperly executed under prior law was unconstitutional as violating vested rights), *Scales v. Fewell*, 10 N.C. 18, 18-20 (1824) (holding liens on real property create a vested right), *Pratt v. Kitterell*, 15 N.C. 168, 168-71 (1833) (holding a right to claim, control, and possess an estate as administrator is a vested right), *Battle v. Speight*, 31 N.C. 288, 292 (1848) (holding devises of property by will create a vested right), *and Green v. Cole*, 35 N.C. 425, 428 (1852) ("The legislature cannot interfere with vested rights of property." (citing *Hoke*)), *with Oats v. Darden*, 5 N.C. 500, 501 (1810) ("[W]hen an act of Assembly takes away from a citizen a vested right, its constitutionality may be inquired into; but when it alters the remedy or mode of proceeding as to rights previously vested, it certainly, in that respect, runs in a constitutional channel."), *Harrison v. Burgess*, 8 N.C. 384, 391-92 (1821) (holding a law authorizing the Supreme Court to order new trials for errors of law did not affect vested rights when applied to cases pending appeal at the time of enactment), *and Phillips v. Cameron*, 48 N.C. 390, 392 (1856) (stating "[w]e admit, that the Act of 1852, applying as it does to the remedy and not to the rights of the parties, might have been made retrospective in its operation," before opining that such intent could have been made clear by entitling the statute "[a]n act to encourage litigation, by reviving stale claims").

E. Modern Jurisprudence Addressing Statutes of Limitation, Vested Rights, and Due Process

Of course, as all parties acknowledge, our history did not terminate in 1868, and later decisions would elucidate certain principles that make the question of the Revival Window's constitutionality still a searching one. Understandably, the Board relies heavily on a line of cases from the Reconstruction era and the early twentieth century to argue, essentially, that *Hinton* is no longer good law. Our careful review of those cases leads us to conclude that they are inapposite to the dispute before us, and respecting our role as an intermediate court, we decline to hold that *Hinton* is no longer good law absent any explicit overruling of it.

In 1869, in *Johnson v. Winslow*, the Supreme Court addressed a slightly different question than that presented here: namely, whether the

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conclusion," 134 N.C. at 154, 46 S.E. at 969, and was uniformly contrary to the law in other state and federal jurisdictions, *id.* at 156, 46 S.E. at 970.

General Assembly could suspend statutes of limitation for claims that had not yet run. 63 N.C. 552, 553 (1869). In *dicta*, the Supreme Court cited a legal treatise for the proposition that "the Legislature has no power to revive a right of action after it has been barred, *i.e.*, to suspend the operation of the Statute of Limitations retrospectively, after it has operated." *Id.* (citation omitted). Its decision did not however, turn on that general principle, nor did it purport to abrogate or overrule *Hinton*—a decision that *did* squarely address the legal question of reviving an *expired* statute of limitations. In fact, in 1880, our Supreme Court would reaffirm *Hinton*. *See Tabor v. Ward*, 83 N.C. 291, 294 (1880) ("Retroactive laws are not only not forbidden by the state constitution but they have been sustained by numerous decisions in our own state. See . . . *Hinton v. Hinton*, Phil., 410, where it was expressly held 'that retroactive legislation is not unconstitutional, and that retroactive legislation is competent to affect remedies not rights.' " (other citations omitted)).

A few years later, in *Whitehurst v. Dey*, the Supreme Court would once more, in *dicta*, cite a treatise for the proposition that " '[s]tatutes of limitation relate only to the remedy and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action.' " 90 N.C. 542, 545-46 (1884). But that decision on contract rights also expressly distinguished *Hinton*—again, in *dicta*, and without expressly overruling it—on an understanding that such statutes are "an impairment of vested rights and . . . fall[ ] within the inhibition of the *federal* constitution[.]" *Id.* at 545 (emphasis added). The Supreme Court of the United States would subsequently show *Whitehurst*'s reading of the federal constitution to be erroneous less than a year later. *See Campbell v. Holt*, 115 U.S. 620, 628, 29 L. Ed. 483, 487 (1885) (holding that the Fourteenth Amendment does not bar a state legislature from reviving civil claims after a statute of limitations has run because "no right is destroyed when the law restores a remedy which had been lost").

This pattern of discussing statutes of limitation as vested rights in *dicta* returned after the turn of the century in *Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). There, Wilkes County sought to foreclose on tax liens filed against the defendants' property for unpaid taxes in 1924 and 1925, relying on tax sale certificates obtained in 1928. *Id.* at 165-66, 167 S.E. at 692-93. However, Wilkes County delayed filing its action until 1930—well after the 18-month filing period allowed by statute. *Id.* at 166, 167 S.E. at 693. The defendants pled that statute of limitations, and Wilkes County sought to counter that defense on a revival act passed during the pendency of the suit in 1931 which extended the statute of limitations for tax certificates through December of that year.

Id. at 166, 167 S.E. at 692-93. The trial court dismissed Wilkes County's claim, and it appealed to the Supreme Court, arguing that the extension statute applied to save the tax certificates in question. *Id.*

The Supreme Court ultimately disagreed with Wilkes County, concluding that the revival act did not apply to the case. The relevant revival act, enacted in 1931 *after* Wilkes County had filed its foreclosure action, stated as follows:

> Any . . . *board of commissioners of any county* . . . holding a certificate of sale on which an action to foreclose has not been brought . . . shall have until the first day of December, one thousand nine hundred and thirty-one, to institute such action. *This section and extension shall include all* certificates executed for the sales prior to and including sales for the tax levy of the year one thousand nine hundred twenty-eight. . . . *Provided, however, that where any action to foreclose has heretofore been instituted or brought for the collection of any tax certificate, prior to the ratification of this act, under the then existing laws, nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action.*

Id. at 166, 167 S.E. at 693 (citation omitted) (emphasis in original). The plain language of the revival statute—limiting its applicability to actions filed after enactment and disclaiming any effect on foreclosures already instituted—thus rendered it of no application to the controversy, as the foreclosure action had been filed *before* the revival act was passed. *Id.* at 168, 167 S.E. at 693-94. And, because the statute of limitations had run at the time of the foreclosure action's filing and the revival act did not apply, Wilkes County's claim was time-barred under applicable law. *Id.*

Despite having settled the dispute with the foregoing holding, the Supreme Court nonetheless went on to consider another question not necessary to its decision: whether the 1931 act could revive previously barred claims had it applied to the foreclosure action. *Id.* at 168, 167 S.E. at 694. It proceeded to analyze *dicta* from various North Carolina decisions, provisions of various legal treatises, and holdings from other jurisdictions, before opining:

> Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail. . . . It

> cannot be resuscitated. . . . It takes away vested rights of defendants and therefore is unconstitutional.

Id. at 170, 167 S.E. at 695 (citing *Booth v. Hairston*, 193 N.C. 278, 286, 136 S.E. 879, 883 (1927) (holding an enabling act purporting to retroactively validate late-filed *deeds to real property* in probate that would otherwise be void was inoperative to cure and save such a late-filed deed)). This is *dicta*.

Even if the above language is not considered *dicta*, the rationale and reasoning of *Wilkes County* show—consistent with the property vs. procedural distinctions drawn from *Foy*, *Hinton*, *etc.*—that the above discussion is addressing cases in which expired statutes of limitation affect vested *property* rights, not a procedural defense. In keeping with Wilkes County's attempt to foreclose on real property in the action at hand, virtually all the decisions cited by the Supreme Court in *Wilkes County* discussed the unconstitutionality of revival statutes where the expired claim was explicitly for *title* to property. *Id.* at 168-70, 167 S.E. at 694-95. For example, in addition to relying on the real property dispute resolved in *Booth*, the Supreme Court favorably quoted *Campbell*'s statement that "[i]t may . . . very well be held that, in an action to recover *real or personal property*, where the question is as to the removal of the bar of the statute of limitations by legislative act passed after the bar has become perfect[,] such act deprives the party of his property without due process of law." *Id.* at 168, 167 S.E. at 694 (quoting *Campbell*, 115 U.S. at 623, 29 L. Ed. at 483) (emphasis added). It then cited several treatises, two of which stated as follows:

> There appears to be no divergence of opinion as to the full applicability of the principle that the Legislature cannot divest a vested right to a defense under the statute of limitations, whether the case involves the title to real estate or personal property. . . . Where title to property has vested under a statute of limitations it is not possible by any enactment to extend the statute or revive the remedy since this would impair a vested right in the property."

Id. at 169, 167 S.E. at 694 (emphasis added) (citations and quotation marks omitted). Critically, the Supreme Court did not purport to overrule *Hinton* based on any controlling holding that the revival of expired actions involving claims unrelated to real or personal property offend the Law of the Land Clause or some other express provision of the North Carolina Constitution. And, notwithstanding any debate over the controlling effect of *dicta* or the significance of the property vs. procedure distinction, the

Supreme Court immediately reaffirmed that the revival statute *did not apply* to the controversy at issue. *Id.* at 170, 167 S.E. at 695.

In an attempt to read *Wilkes County* more broadly, the Board cites to numerous cases repeating *Wilkes County*'s vested rights commentary in subsequent *dicta*. *See Sutton v. Davis*, 205 N.C. 464, 467-69, 171 S.E. 738, 739-40 (1933) (holding an amendment to a statute that barred recovery for debts discharged in bankruptcy to subsequently allow for recovery did not have retroactive effect and thus did not apply to the case at bar, while also citing *Wilkes County* to note that *if* the amendment did have retroactive effect, such retroactivity would be unconstitutional); *Waldrop v. Hodges*, 230 N.C. 370, 373-74, 53 S.E.2d 263, 265 (1949) (observing, based on *Johnson*, *Whitehurst*, and *Wilkes County*, that the General Assembly may not revive an expired statute of limitations before holding that issue did not arise in the case before the Court because the relevant statute extended the limitations period prior to expiration); *Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965) (holding a non-retroactive amendment to the statute of limitations after filing of the plaintiffs' suit was not applicable while citing *Waldrop*, *Wilkes County* and related cases for their discussions of revival statutes);[11] *Stereo Center*, 39 N.C. App. at 595, 251 S.E.2d at 675 (citing *Waldrop* for the proposition that expired statutes of limitations may not be revived in violation of a vested right, but resolving the appeal on a different question because the appellant conceded the amended statute of limitations extending his time to bring suit did not apply).[12] But *dicta* upon *dicta* does not the law make. *See Hayes v. Wilmington*, 243 N.C.

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11. We read *Jewell* as addressing the same factual and legal circumstances raised in *Wilkes County*: a statute of limitations expired, the plaintiff filed suit, and the General Assembly later enlarged the statute of limitations *non-retroactively*. *Wilkes County*, 204 N.C. at 168, 167 S.E. at 693-94; *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3. The session law cited in *Jewell* enlarging the statute of limitations at issue unambiguously disclaimed any retroactive effect. *See* 1963 N.C. Sess. Laws 1300, 1301, ch. 1050, sec. 3 ("This Act shall be in full force and effect *from and after its ratification*." (emphasis added)). Moreover, statutes are prohibited from retroactive effect unless such intent is manifest in the statute. *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 718-19, 401 S.E.2d. 85, 87 (1991). The plaintiff in *Jewell* thus rightly conceded—and the Supreme Court accepted—that the session law extending the session law revising the statute of limitations after plaintiff had filed suit "ha[d] no application." 264 N.C. at 461, 142 S.E.2d at 3. As noted *supra*, the Revival Window at issue here materially differs from the statutes in *Wilkes County* and *Jewell* in that it unambiguously applies retroactively, and Plaintiffs filed suit after the Revival Window's enactment. Thus, we do not read *Jewell* as controlling precedent on the facts of this case.

12. To the extent that any decisions of this Court purported to announce that expiration of a statute of limitations creates a vested right in all civil actions, we could not do so in conflict with the undisturbed holding of *Hinton. Emp't Staffing Grp., Inc. v. Little*, 243 N.C. App. 266, 271 n.3, 777 S.E.2d 309, 313 n.3 (2015).

525, 539, 91 S.E.2d 673, 684 (1956) (declining to follow "double *dicta*"). Nor can *dicta* in subsequent decisions serve to expand or modify earlier holdings, as *dicta* is itself without legal effect. *Id.* at 538, 91 S.E.2d at 684. Finally, *dicta* does not empower us to reach beyond our limited role as an intermediate appellate court and announce a new constitutional rule in contravention of undisturbed precedent from our Supreme Court. *Compare State ex rel. Utilities Comm. v. Central Telephone Co.*, 60 N.C. App. 393, 395, 299 S.E.2d 264, 266 (1983) (holding this Court is not bound by *dicta* from our Supreme Court), *with State v. Fowler*, 159 N.C. App. 504, 516, 583 S.E.2d 637, 645 (2003) ("This Court is bound by decisions of the North Carolina Supreme Court." (citations omitted)).

F. *Wilkes County* and Its Progeny Do Not Establish the Revival Window's Facial Unconstitutionality Beyond a Reasonable Doubt

With the benefit of the above pilgrimage through our constitutional jurisprudence—necessary to a thorough understanding of these seemingly contradictory precedents that we ultimately conclude weigh against the facial constitutional challenge to the Revival Window—we revisit our initial question: does the "text of the constitution, the historical context in which the people of North Carolina adopted [the Law of the Land Clause], and our precedents," *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252, make "plain and clear," *id.*, that the General Assembly may not revive a tort claim—as opposed to one sounding in property or contract—after the relevant statute of limitations has expired? More specifically, is *Wilkes County* "clear and dispositive," as the Board claims, in establishing that such an exercise of the General Assembly's otherwise plenary powers "*directly* conflicts with an *express* provision of the constitution"? *Harper*, 384 N.C. at 325, 886 S.E.2d at 415 (emphases added). Under the applicable standard of review and burden of proof borne by the Board, we answer these questions in the negative.

As forecast above, the language in *Wilkes County* controlling the outcome of that case does not clearly answer the question posed here. First, its ultimate holding did not turn on the question of whether revival of a statute of limitations violates the state Constitution, as the Supreme Court instead held that the purported revival statute in that case did not, by its own language, apply to the subject action filed pre-enactment. *Wilkes County*, 204 N.C. at 168, 167 S.E. at 693-94. Second, despite the Board's assertions, *Wilkes County did* directly implicate property rights, and only property rights, because the county's claim was a foreclosure of "[a] lien *upon real estate for taxes or assessments due thereon*," *id.* at 167, 167 S.E. at 693 (emphasis added) (citation and quotation marks

omitted); indeed, many of the treatises and decisions cited in *Wilkes County* likewise related to property.[13] Third, *Wilkes County* did not elucidate "an express provision of the [state] constitution" limiting such an exercise of legislative power. *Harper*, 384 N.C. at 325, 886 S.E.2d at 415. Finally, *Wilkes County* did not purport to overrule *Hinton*, a decision that *did* squarely address and resolve whether the revival of statutes of limitation *per se* violates the state Constitution and ultimately holding that they did not where no property rights were at issue.

On balance, *Hinton* thus resolves—with more direct applicability than *Wilkes*—whether the Revival Window is *per se* unconstitutional.[14] As *State v.* — and *Bell* had previously elucidated, the only provision of the state Constitution expressly concerning retrospective statutes is found in the *Ex Post Facto* Clause, and the omission of any provision either describing retrospective protections for "vested rights" strongly suggests that statutes reviving claims barred by statutes of limitation "were not intended to be forbidden." *Bell*, 61 N.C. at 83. The ratification of a new Constitution in 1868—abrogating *Bell* but leaving *Hinton* untouched—furthers the point that statutes reviving barred claims under expired statutes of limitation are "no interference with vested rights" in all cases and are not *per se* unconstitutional on that basis. *Hinton*, 61 N.C. at 415. That *Hinton* does not appear to have ever been overruled, and instead was merely mentioned in *Wilkes County*'s discussion of an issue on which its holding did not ultimately turn, further weighs in its favor.

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13. Of note, in stating that "we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail," *id.* at 170, 167 S.E. at 695, the Supreme Court cited only to *Booth*. There, the Supreme Court held that an enabling act purporting to retroactively validate late-filed *deeds to real property* in probate that would otherwise be void was inoperative to cure and save such a late-filed deed. *Booth*, 193 N.C. at 286, 136 S.E. at 883.

14. To be clear, we do not purport to overrule *Wilkes County* in excess of our authority as an intermediate appellate court. To the contrary, we recognize that *Wilkes County does* apply with precedential force to those legally and factually analogous cases governed by its substantive holding. We simply disagree with our respected colleague that this case counts among them. *See Howard v. Boyce*, 254 N.C. 255, 265, 118 S.E.2d 897, 905 (1961) (noting, in reconciliation of arguably conflicting North Carolina Supreme Court precedents, that "[d]ecided cases should be examined more from the standpoint of the total factual situations presented than the exact language used. A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case."); *In re Civil Penalty*, 324 N.C. 373, 378, 379 S.E.2d 30, 33 (1989) (holding this Court erred in reading a Supreme Court decision too broadly and reversing our decision on that basis); *State ex rel. Utils. Comm'n v. Virginia Elec.*, 381 N.C. 499, 523 n.4, 873 S.E.2d 608, 624 n.4 (2022) ("[W]e note that the concept of stare decisis requires, in essence, that a court identify certain material differences between the case that is currently before the court and potentially-relevant precedent before declining to follow that precedent[.]").

Our understanding of this constitutional history is reaffirmed by the similarities evident in *Hinton* and the United States Supreme Court's decision in *Campbell*. *See Evans*, 132 N.C. App. at 6, 510 S.E.2d at 174 ("[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." (citation omitted)). Both *Hinton* and *Campbell* recognized that the expiration of a statute of limitations bars a right of action and thus "affects the *remedy* and not the right of property." *Hinton*, 61 N.C. at 415 (emphasis in original). *See also Campbell*, 115 U.S. at 628, 29 L. Ed. at 487 ("[N]o right is destroyed when the law restores a remedy which had been lost."). This understanding of statutes of limitation as bars to remedies—not underlying claims—persists in our modern jurisprudence. *See*, *e.g.*, *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014) ("[S]tatutes of limitation are procedural, not substantive, and determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury." (citation omitted)).[15] Thus, just as the revival statute in *Hinton* "t[ook] from [defendant] the privilege of claiming the benefit of a former statute" rather than any property interest or vested right under the North Carolina Constitution, 61 N.C. at 415, the Supreme Court of the United States recognized that, under the federal constitution, there is "no right which the [defendant] has in the law which permits him to plead lapse of time . . . [and] which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations." *Campbell*, 115 U.S. at 629, 29 L. Ed. at 487.

In sum, the Law of the Land Clause does not, either in its plain text or through further elucidation in the *Ex Post Facto* Clause, "limit legislative power [to pass the Revival Window of the SAFE Child Act]

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15. The Board asserts that Plaintiffs' claims also violate the purported ten-year statute of repose found in N.C. Gen. Stat. § 1-52(16) (2023), which provides that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." This issue was not considered by the three-judge panel below, and their ruling does not address it. Nonetheless, because there is no contention that Plaintiffs suffered latent injuries—and given that the Board repeatedly asserts that the Plaintiffs' claims accrued prior to their eighteenth birthdays—we hold that the purported statute of repose cited by the Board does not apply. *See Wilder v. Amatex Corp.*, 314 N.C. 550, 555, 336 S.E.2d 66, 69 (1985) ("[N.C. Gen. Stat. § 1-52(16)] added a ten-year statute of repose . . . which applies only to latent injury claims."); *Boudreau*, 322 N.C. at 334 n.2, 368 S.E.2dat 853 n.2 (holding N.C. Gen. Stat. § 1-52(16) "was intended to apply to plaintiffs with latent injuries. It is undisputed that plaintiff was aware of his injury as soon as it occurred. Thus the statute is inapplicable on the facts of this case." (citations omitted)); *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) (holding a sexual assault victim's injuries were not latent, accrued and were barred by the three-year statute of limitations, and, "thus, § 1-52(16) is inapplicable to the facts of this case").

by *express* constitutional restriction[s]." *Harper*, 384 N.C. at 322, 886 S.E.2d at 414 (emphasis added) (citation omitted). Precedents from the Founding through Reconstruction and the ratification of the 1868 Constitution further undercut the Board's argument to the contrary. *See State v. —*, 2 N.C. at 40; *Bell*, 61 N.C. at 82-83; *Hinton*, 61 N.C. at 415; *Tabor*, 83 N.C. at 294. And while *Wilkes County*'s discussion of the question, ancillary to its ultimate holding, is relevant, it does not establish a "plain and clear" constitutional violation, *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252, particularly when *Hinton* has not been overruled, is on all fours, and comports with the persuasive authority found in the United States Supreme Court's interpretation of the Fourteenth Amendment. Stated briefly, and for those reasons, the Board has not shown, by reliance on *Wilkes County* and similar *dicta* in some subsequent cases, that the Revival Window "is unconstitutional beyond reasonable doubt." *Id.* at 639, 781 S.E.2d at 252.

G. The Revival Window Satisfies Due Process

Having held that the Board has failed to show beyond a reasonable doubt—and based on our constitutional text, unique state history, and related jurisprudence—that resuscitations of claims under expired statutes of limitation are *per se* violative of the express text of the Law of the Land Clause, we now turn to whether the Revival Window violates constitutional due process under the present law of this State, *i.e.*, the modern substantive due process analysis. *See*, *e.g.*, *Bunch v. Britton*, 253 N.C. App. 659, 674-75, 802 S.E.2d 462, 473-74 (2017) (reviewing the substantive and procedural due process tests applicable under the state and federal constitutions); *Affordable Care*, *Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535-36, 571 S.E.2d 52, 59 (2002) (holding substantive due process challenges under the Law of the Land Clause asserting infringements of fundamental rights are subject to strict scrutiny, while other rights are subject to rational basis review).

Substantive due process, derived by the United States Supreme Court from the Fourteenth Amendment to the United States Constitution—the Law of the Land Clause's federal complement—originally subjected *all* statutes restricting protected property interests to the highest level of judicial scrutiny. *See*, *e.g.*, *Lochner v. New York*, 198 U.S. 45, 64, 49 L. Ed. 937, 944 (1905) (invalidating a workplace regulation that did not involve conduct "dangerous in any degree to morals, or in any real and substantial degree to the health of the employees"). Nonetheless, some legislative concerns were so pressing as to allow impingement of property and contract interests under even this exacting standard. *See Holden v. Hardy*, 169 U.S. 366, 392, 42 L. Ed. 780, 791 (1898) (upholding a state

statute regulating mine work hours because regulations restricting property interests "may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances" (citation omitted)).

The law of substantive due process has not been static. Only a few years after our Supreme Court's 1933 decision in *Wilkes County*, the United States Supreme Court recognized that not all life, liberty, and property interests under the Fourteenth Amendment are automatically subjected to the highest form of judicial inquiry. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 81 L. Ed. 703, 708 (1937) (upholding a state minimum wage statute as "reasonable in relation to its subject and . . . adopted in the interests of the community"); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, 82 L. Ed. 1234, 1241 n.4 (1938) (announcing a rational basis test for regulations restricting economic activity, but stricter scrutiny for those that, *inter alia*, discriminate against minorities). Under this modern formulation, such a claim is now subject to either strict scrutiny or the more permissive "rational basis" review. *Bunch*, 253 N.C. App. at 674-75, 802 S.E.2d at 473-74. Currently, "[n]ot every deprivation of liberty or property constitutes a violation of substantive due process granted under article I, section 19. Generally, any such deprivation is only unconstitutional where the challenged law bears no rational relation to a valid state objective." *Affordable Care, Inc.*, 183 N.C. App. at 535, 571 S.E.2d at 59 (citation omitted).

Whether to apply strict scrutiny or rational basis review to a statute challenged under both the federal Constitution and the Law of the Land Clause of the North Carolina Constitution is determined by our precedents according to the following principles:

> Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained. Thus, substantive due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.
>
> . . . .
>
> In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the

> law must demonstrate that it serves a compelling state interest. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.

State v. Fowler, 197 N.C. App. 1, 20-21, 676 S.E.2d 523, 540-41 (2009) (cleaned up).

Assuming, *arguendo*, that an affirmative defense based on a statute of limitations implicates a fundamental right—which we do not think is a likely conclusion, as discussed above—we hold that the Revival Window passes constitutional muster even under the more stringent strict scrutiny test. This test imposes two requirements on the challenged statute: (1) it must advance "a compelling state interest," *id.* at 21, 676 S.E.2d at 540 (citation and quotation marks omitted); and (2) it must be "narrowly drawn to express only the legitimate interests at stake," *M.E. v. T.J.*, 275 N.C. App. 528, 546, 854 S.E.2d 74, 93 (2020) (citation and quotation marks omitted), *aff'd as modified on separate grounds*, 380 N.C. 539, 869 S.E.2d 624 (2022).

As detailed s*upra* Part I.B., the General Assembly's unanimous enactment of the SAFE Child Act and its Revival Window was a united response to developing science that, by the 2010s, had solidified an understanding that child sex abuse victims suffer lifelong injuries and delay disclosure well into adulthood. Vindication of the rights of child victims of sexual abuse—and ensuring abusers and their enablers are justly held to account to their victims for the trauma inflicted—are unquestionably compelling state interests. *Cf.*, *e.g.*, N.C. Gen. Stat. § 14-208.5 (2021) ("[T]he protection of [sexually abused] children is of great governmental interest."); *Packingham*, 368 N.C. at 388, 777 S.E.2d at 746 ("[P]rotecting children from sexual abuse is a substantial governmental interest."). Moreover, encouraging entities—trusted by parents to care and protect their children—to guard against abusive employees or agents through civil penalties is likewise a compelling interest. *Cf. State v. Bishop*, 368 N.C. 869, 877, 787 S.E.2d 814, 820 (2016) (recognizing, in applying strict scrutiny review to an anti-cyberbullying statute, that "the General Assembly has a compelling interest in protecting the physical and psychological well-being of minors"). So, too, is ensuring that the law—when premised on an outdated and inaccurate understanding of child sexual abuse—does not frustrate the ability of child victims to pursue their common law remedies.

The SAFE Child Act's Revival Window is also so narrowly tailored as to satisfy strict scrutiny review. The revival period is limited to only

two years and, at the time of this opinion's filing, has long expired. 2019 N.C. Sess. Laws 1231, 1234, ch. 245, sec. 4.2(b). It likewise restricts the category of claims revived to: (1) "civil actions," for (2) "child sexual abuse." *Id.* Finally, it limits itself to a procedural change only—it in no way lowers the burden of proof that a plaintiff must meet, creates new claims for which a defendant may be held liable, or invalidates any of a defendant's substantive defenses to liability on the merits. The Revival Window's lifting of a procedural bar goes no further than necessary to satisfy the compelling state interests identified above: namely, that child victims of sexual abuse, injured before science and society reached a full and complete understanding of the nature of their trauma, have a fair and just opportunity to hold their abusers to account for their injuries.

The Board advances several policy arguments to contend that the Revival Window is ineffective to accomplish its goals. Specifically, the Board notes numerous hardships stemming from stale or unpreserved evidence. "[T]hese arguments are more properly directed to the legislature." *State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 325 (2000). To the extent they are proper for this Court to consider, these contentions do not support an argument that the Revival Window is *facially*, *i.e.*, in all cases, unconstitutional. As the Board acknowledges, there is no statute of limitations for felony child sex abuse, and the State, facing the highest possible burden of proof, was nonetheless able to convict Plaintiffs' abuser. Moreover, any staleness of evidence was not so significant as to interfere with the ability of a trial court to accept a child sex abuser's guilty plea upon an independent factual basis in a related appeal decided contemporaneously with this decision. *Taylor v. Piney Grove Vol. Fire and Rescue Dept.*, COA22-259, slip op. at 3 (N.C. Ct. App. Sept. 12, 2023) (unpublished); *see also Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 570, 887 S.E.2d 848, 850 (2023) (discussing the guilty plea entered by the abuser in *Taylor*). These policy arguments' limited relevance does not support the Board's assertion that the Revival Window is unconstitutional in *all* contexts beyond a reasonable doubt.

III. CONCLUSION

Evaluating a facial constitutional challenge to an enactment of our General Assembly is perhaps the single most solemn duty of this Court. It represents an "important and momentous subject," *Bayard*, 1 N.C. at 2, and is conducted "with great deliberation and firmness," *id.* Given our courts' "great reluctance . . . [to] involv[e] themselves in a dispute with the Legislature of the State," *id.* at 2-3, a party challenging the facial constitutionality of a statute is faced with a particularly heavy burden: "a

claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that a statute is unconstitutional beyond a reasonable doubt." *Harper*, 384 N.C. at 324, 886 S.E.2d at 414-15 (citation omitted). On review of the text of the North Carolina Constitution, its history, and our jurisprudence interpreting it, we hold that the Board has failed to show beyond a reasonable doubt that an express provision of that supreme document prohibits revivals of statutes of limitation. Similarly, we hold that, under even the highest level of scrutiny, the SAFE Child Act's Revival Window passes constitutional muster. The divided order of the three-judge panel reaching the contrary conclusion is reversed, and this matter is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge GORE concurs in result only.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

I respectfully dissent from the Majority's opinion. I will start by noting our common ground. I completely agree: Sexual abuse of children is vile. I agree that striking down legislation as facially unconstitutional is strong medicine, only suitable for clear constitutional violations. I also agree that the prohibition of reviving time-barred claims is not a textual one; the text of the North Carolina Constitution lacks such a provision.

But that is where our common ground ends. We are bound by the precedents of this Court and the North Carolina Supreme Court. Stare decisis is not limited to decisions this Court deems well-reasoned. Stare decisis is not limited to decisions that produce desirable results. And stare decisis is not limited to decisions tethered to textualism—indeed, stare decisis is often an exception to textualism. The stability and predictability of our justice system requires that we adhere to the precedents of our Court and the North Carolina Supreme Court.

We lack the authority to overrule the North Carolina Supreme Court, and it appears that my colleagues and I disagree on this point. *Wilkes County* and its progeny control this case. Regardless of whether *Wilkes* produces a desirable outcome or whether it is a bastion of

textualism, *Wilkes* is an opinion from the highest court in our state, and it exceeds our power to overrule it. In my view, the Majority is overruling several binding cases from this Court, and the Majority effectively overrules *Wilkes*, itself. Because we are bound by stare decisis, I would affirm the majority order entered by the three-judge panel. Therefore, I respectfully dissent.

I. Standard of Review & Stare Decisis

The Majority correctly notes that "[w]e review constitutional questions de novo." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016).

Stare decisis binds us beyond a reasonable doubt. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (stating this Court must follow North Carolina Supreme Court decisions). Stare decisis means "that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). Stare decisis supports the age-old axiom: "the law must be characterized by stability." *Id.* at 767, 51 S.E.2d at 733.

But of course, the North Carolina Supreme Court may overrule flawed cases. *See, e.g.*, *State v. Elder*, 383 N.C. 578, 603, 881 S.E.2d 227, 245 (2022) (overruling a portion of *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982)); *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't Health & Hum. Servs.*, 383 N.C. 31, 56–57, 881 S.E.2d 558, 576–77 (2022) (overruling *Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't Health & Hum. Servs.*, 264 N.C. App. 71, 825 S.E.2d 34 (2019)). This is because "stare decisis will not be applied in any event to preserve and perpetuate error and grievous wrong." *Ballance*, 229 N.C. at 767, 51 S.E.2d at 733.

We, however, are not the Supreme Court, and notwithstanding the Majority's desire to do so, we lack authority to overrule decisions from our Supreme Court. *Dunn*, 334 N.C. at 118, 431 S.E.2d at 180. Nor can we overrule a previous case decided by this Court, "unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (explaining that stare decisis binds courts of the same or lower level). We are undeniably bound by our precedents, even if we do not like the outcomes they produce, and in my view, our

precedents hold revival statutes are unconstitutional. Thus, the Revival Window is unconstitutional beyond a reasonable doubt. *See, e.g.*, *Wilkes Cnty. v. Forester*, 204 N.C. 163, 170, 167 S.E. 691, 695 (1933).

II. Law of the Land Clause & Vested Rights

The Law of the Land Clause of the North Carolina Constitution provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

The Law of the Land Clause is similar to the United States Constitution's Due Process Clause, found in the Fourteenth Amendment; both provide procedural and substantive protections. *See Bentley v. N.C. Ins. Guar. Ass'n*, 107 N.C. App. 1, 9, 418 S.E.2d 705, 712 (1992) (" 'Law of the land' is synonymous with 'due process of law' under the Fourteenth Amendment . . . ."). One of the substantive protections of the Law of the Land Clause is the protection of "vested rights." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986) (stating the vested-rights doctrine "is rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions"). A vested right is "a right which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 718–19, 268 S.E.2d 468, 471 (1980).

The Law of the Land Clause protects vested rights against retroactive legislation. *Id.* at 719, 268 S.E.2d at 471 (" 'Vested' rights may not be retroactively impaired by statute; a right is 'vested' when it is so far perfected as to permit no statutory interference."); *Armstrong v. Armstrong*, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988) (quoting *Godfrey v. State*, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975)) ("A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it *must have become a title*, legal or equitable, *to the present or future enjoyment of property, a demand, or legal exemption from a demand by another*.").

III. Statutes of Limitations as Vested Rights

Our appellate courts have repeatedly recognized a vested right to rely on a statute-of-limitations defense. *See, e.g.*, *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949) (citing *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695) ("A right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly.");

Troy's Stereo Ctr., Inc. v. Hodson, 39 N.C. App. 591, 595, 251 S.E.2d 673, 675 (1979) ("While the General Assembly may extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute, an action already barred by a statute of limitations may not be revived by an act of the legislature."); *Congleton v. Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970) ("It is equally clear that the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense."). The root of this right is in *Wilkes*. *See Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695.

A. *Wilkes County*

In *Wilkes*, the county owned "certificates of tax sales," and the county tried to foreclose on the defendant's real property to satisfy the certificates after the applicable statute of limitations lapsed. *Id.* at 167–68, 167 S.E. at 693–94. The General Assembly, however, passed a law that revived the period in which counties could foreclose on these certificates. *Id.* at 168, 167 S.E. at 694. One of the issues before the North Carolina Supreme Court was whether this attempted revival was constitutional, and the Court held that it was not. *Id.* at 170, 167 S.E. at 695. Indeed, after explicitly recognizing federal caselaw on the subject, the Court said: "Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail." *Id.* at 170, 167 S.E. at 695.

1. *Wilkes* Is Not Limited to Real Property

The Majority concludes that even if *Wilkes* is binding, it only applies to cases involving real property. In my view, *Wilkes* applies to all statutes of limitations, not merely those relating to real property. *See id.* at 170, 167 S.E. at 695. I do not dispute, however, that in *Wilkes*, the General Assembly attempted to revive a claim that affected the defendant's real property. *Id.* at 167–68, 167 S.E. 693–94. And I concede that judicial language must be read in the context of the case. *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001). The *Wilkes* holding, then, could plausibly be read to prohibit only revival statutes affecting real property. *See Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. But our appellate courts have not read *Wilkes* that way, and neither should we. *See, e.g.*, *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265; *Troy's Stereo*, 39 N.C. App. at 595, 251 S.E.2d at 675; *Congleton*, 8 N.C. App. at 573, 174 S.E.2d at 872.

For example, in *Jewell v. Price*, the plaintiffs sued the defendants for negligence, and the defendants asserted a statute-of-limitations defense.

264 N.C. 459, 460–61, 142 S.E.2d 1, 3 (1965). In analyzing the defense, the Court cited *Wilkes* and said: "If this action was already barred when it was brought . . . it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute." *Id.* at 461, 142 S.E.2d at 3. In other words, *Jewell* shows that the prohibition of revival statutes applies to tort claims, too. *See id.* at 461, 142 S.E.2d at 3.

Therefore, *Jewell* illustrates that our Supreme Court has not limited the application of its holding in *Wilkes* to vested rights in real property. *See id.* at 461, 142 S.E.2d at 3. *Wilkes* established a broad vested right against revival legislation; real property was merely the vessel that brought the issue before the Court. *See id.* at 461, 142 S.E.2d at 3; *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695.

2. *Wilkes* Applied the Law of the Land Clause

The Majority also suggests that we are not bound by *Wilkes* because the *Wilkes* Court did not explicitly cite the Law of the Land Clause. I disagree. Granted, the Court in *Wilkes* did not cite the Law of the Land Clause, *see Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695, but deductive reasoning, however, shows the Court was indeed interpreting the Law of the Land Clause.

The *Wilkes* Court repeatedly analyzed the term "vested right." *See id.* at 168–70, 167 S.E. at 693–95. Our jurisprudence shows that the vested-rights doctrine is nested in either the Law of the Land Clause or the federal Due Process Clause. *See Godfrey*, 317 N.C. at 62, 344 S.E.2d 272 at 279. It is not found anywhere else.

The *Wilkes* Court was necessarily interpreting the Law of the Land Clause because the Court expressly stated it was *not* interpreting federal cases or the Due Process Clause. *See Wilkes Cnty.*, 204 N.C. at 168–70, 167 S.E. at 693–95. Rather, the *Wilkes* Court stated: "*Whatever may be the holdings in other jurisdictions*, we think *this jurisdiction* is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail." *Id.* at 170, 167 S.E. at 695 (emphasis added).

Because the North Carolina Supreme Court is the final arbiter of the Law of the Land Clause—"[w]hatever may be the holdings in other jurisdictions"—we are bound by *Wilkes* and its Law of the Land interpretation. *See id.* at 170, 167 S.E. at 695. *Wilkes* is no less binding because the Court did not explicitly cite the constitutional clause in question.

B. Dicta Discussion

The Majority also dismisses *Wilkes* and its progeny as spouting dicta. The Majority, however, casts its dicta net too wide. Because I believe *Wilkes*, coupled with *Jewell*, controls this case, I will only address the binding nature of those two decisions. I will discuss why their revival-statute discussions are not dicta, and thus why they control this case.

Dicta is language "not essential to a decision." *State v. Cope*, 240 N.C. 244, 246, 81 S.E.2d 773, 776 (1954). In other words, dicta is "not determinative of the issue before [a court]." *Jackson*, 353 N.C. at 500, 546 S.E.2d at 573. Only parties that have standing in a live case or controversy, however, can get issues before *federal* courts. *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 2317, 138 L. Ed. 2d 849, 857 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

But unlike federal courts, our state Supreme Court is not bound to live cases or controversies; it can issue advisory opinions. *See e.g.*, *In re Separation of Powers*, 305 N.C. 767, 775, 295 S.E.2d 589, 594 (1982) (opining, in an advisory opinion, that statutes authorizing a joint legislative commission to make budget decisions exceeded legislative power and interfered with the governor's duty to administer the budget); *Cooper v. Berger*, 376 N.C. 22, 29–30, 852 S.E.2d 46, 54 (2020) (citing *In re Separation of Powers*, 305 N.C. at 772, 295 S.E.2d at 592); *State ex rel. Martin v. Melott*, 320 N.C. 518, 523, 359 S.E.2d 783, 787 (1987) (citing *In re Separation of Powers*, 305 N.C. at 774, 295 S.E.2d at 593). So naturally, our Supreme Court opinions can address a wider range of issues, and so long as Court language helps resolve an "issue before [it]," the language is not dicta. *See Jackson*, 353 N.C. at 500, 546 S.E.2d at 573.

The *Wilkes* Court explicitly addressed two issues: "(1) The first question involved: Is plaintiff barred by the eighteen months statute of limitations, which is properly pleaded, where it attempted to foreclose certain certificates of tax sales?" *Wilkes Cnty.*, 204 N.C. at 167, 167 S.E. at 693. And "(2) [t]he second question involved: Public Laws, 1931, chap. 260, sec. 3; at p. 320." *Id.* at 168, 167 S.E. at 694. In other words, the Court explicitly addressed (1) whether Wilkes County was time barred, and (2) whether the challenged revival provision was constitutional. *Id.* at 167–68, 167 S.E. at 693–94. The Court held the county's foreclosure effort was time barred, and the revival provision was unconstitutional. *Id.* at 167–70, 167 S.E. at 693–95.

The Majority thinks the Court's answer to the second question was dicta because it was unnecessary to answer the first question. If the first question was the only one presented to the Court, I would agree. But it was not, and I do not. True, if *Wilkes* was heard in federal court, the plaintiff may have lacked standing to present the second question. But *Wilkes* was not in federal court, and our Supreme Court does not require live cases or controversies. *See In re Separation of Powers*, 305 N.C. at 775, 295 S.E.2d at 594. Because the constitutionality of the revival provision was expressly presented to the *Wilkes* Court, *see Wilkes Cnty.*, 204 N.C. at 167, 167 S.E. at 694, the Court properly decided its constitutionality, *see Jackson*, 353 N.C. at 500, 546 S.E.2d at 573. In other words—*Wilkes*' revival-provision language was not dicta.

In *Jewell*, "[t]he critical question [was] whether plaintiffs have offered any evidence tending to show that they instituted this action within three years from the date it accrued." *Jewell*, 264 N.C. at 460–61, 142 S.E.2d at 3. In other words, the "critical question" was whether the case was barred by a statute of limitations. *See id.* at 460–61, 142 S.E.2d at 3. To answer that question, the *Jewell* Court correctly held that a revamped statute of limitations, passed after the case commenced, could not revive a lapsed negligence claim. *Id.* at 461–62, 142 S.E.2d at 3–4. Such a determination was "essential to [the] decision," *see Cope*, 240 N.C. at 246, 81 S.E.2d at 776, because if the lapsed negligence claim could have been revived, the statute-of-limitations defense would have failed, *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3. But the lapsed claim could not be revived, and the defense did not fail. *Id.* at 461, 142 S.E.2d at 3. Therefore, the revival discussion in *Jewell* was necessary, not dicta. *See Cope*, 240 N.C. at 246, 81 S.E.2d at 776.

In sum, I do not read the applicable language from *Wilkes* and *Jewell* as dicta. *See id.* at 246, 81 S.E.2d at 776. Thus, because *Wilkes* established a vested right against revival statutes, *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695, and because *Jewell* established that *Wilkes* is not limited to real-property rights, *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3, we must apply those principles to this case, *see Musi*, 200 N.C. App. at 383, 684 S.E.2d at 896.

C. *Hinton*

The Majority relies heavily on *Hinton v. Hinton*, 61 N.C. 410 (1868), and the Majority believes *Hinton* controls this case. I disagree with the Majority, but *Hinton* certainly deserves discussion.

In *Hinton*, there was a six-month statute of limitations for widows to exercise their common-law rights of dower. *Id.* at 413. In 1863, because

of the Civil War, the General Assembly decided to retroactively toll the running of this statute from May 1861. *Id.* at 414. As to whether the General Assembly could do so under the North Carolina Constitution, the *Hinton* Court answered: "The power of the Legislature to do so is unquestionable." *Id.* at 415. One could read *Hinton* merely to hold this: The legislature can *toll* a statute, rather than revive lapsed claims. We have acknowledged as much. *See Troy's Stereo*, 39 N.C. App. at 595, 251 S.E.2d at 675 ("[T]he General Assembly may extend at will the time within which a right may be asserted . . . ."). But it is hard to square that reading with the following language from *Hinton*, which illustrates the Court's logic:

> Suppose a simple contract debt created in 1859. In 1862 the right of action was barred by the general statute of limitations, which did not *extinguish the debt*, but simply barred the right of action. Then comes the act of 1863, providing that the time from 20 May, 1861, shall not be counted. Can the debtor object that this deprives him of a vested right? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

Hinton, 61 N.C. at 415–16.

I tend to agree with the Majority's understanding of *Hinton*: Contrary to *Wilkes*, the *Hinton* Court held that a statute-of-limitations defense is not a vested right.

D. Reconciling *Wilkes* & *Hinton*

The Majority tries to reconcile *Hinton* and *Wilkes* in several ways—by limiting *Wilkes* to real-property cases, dismissing *Wilkes* as vague, and dismissing *Wilkes* as dicta. As discussed above, I disagree with the Majority on those fronts, but I agree with the Majority's reading of *Hinton*. Thus, because I agree with the Majority on *Hinton*, and because I read *Wilkes* to authoritatively hold the opposite of *Hinton*, I cannot read the two in harmony. My reconciliation is simpler than the Majority's: In my view, *Wilkes* overruled *Hinton*.

The North Carolina Supreme Court often overrules cases by implication; it need not do so explicitly. *See, e.g.*, *McAuley v. N.C. A&T State Univ.*, 383 N.C. 343, 355, 881 S.E.2d 141, 149 (2022) (Barringer, J., dissenting) (noting that the majority opinion "refuse[d] to follow . . . [ninety] years of this Court's precedent" established in *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782, 783, 172 S.E. 487, 488 (1934)); *State*

v. Styles, 362 N.C. 412, 415–16, 665 S.E.2d 438, 440–41 (2008) (abrogating *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006)).

I read *Hinton* to hold that the General Assembly can revive lapsed claims, *Hinton*, 61 N.C. at 415, and I read *Wilkes* to hold that the General Assembly cannot revive lapsed claims, *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. These are opposite conclusions. The Court decided *Hinton* in 1868. *See Hinton*, 61 N.C. at 410. And the Court decided *Wilkes* in 1933. *See Wilkes Cnty.*, 204 N.C. at 163, 167 S.E. at 691. Thus, our state Supreme Court overruled *Hinton* when it decided *Wilkes*. *See Styles*, 362 N.C. at 415–16, 665 S.E.2d at 440–41; *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. Further, our subsequent caselaw follows *Wilkes*, not *Hinton*; this supports the proposition that *Wilkes* overruled *Hinton*. *See*, *e.g.*, *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265.

Therefore, *Wilkes* controls this case, not *Hinton*. This follows from the two cases themselves and from the subsequent caselaw. *See Hinton*, 61 N.C. at 415; *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695; *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265. Accordingly, I would follow *Wilkes* and affirm the majority decision of the three-judge panel below.

IV. Tiers of Scrutiny

The Majority also holds that, even if *Wilkes* applies to the Revival Window, the window is constitutional because it passes both the relaxed rational-basis test and the exacting strict-scrutiny test. I disagree with the Majority's testing premise: I do not think we should analyze this case through a tiers-of-scrutiny scheme.

I acknowledge that we analyze certain Law of the Land cases under a tiers-of-scrutiny framework. But those cases involve "fundamental rights." *See*, *e.g.*, *Affordable Care*, *Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 535, 571 S.E.2d 52, 59 (2002) (stating that fundamental rights are subject to strict scrutiny); *Bunch v. Britton*, 253 N.C. App. 659, 674, 802 S.E.2d 462, 473–74 (2017) (discussing the tiers-of-scrutiny framework for fundamental rights).

Under our jurisprudence, similar to our federal counterpart, fundamental rights include those enumerated in the North Carolina Constitution. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 432, 879 S.E.2d 193, 222–23 (2022) (discussing, among others, the fundamental rights to free elections, free speech, and education). We also find fundamental rights beyond the text of our state's Constitution. *Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999) ("A fundamental right is a right explicitly *or implicitly* guaranteed to individuals by the United States Constitution or a state constitution.") (emphasis

added). Typically, these implied fundamental rights are nestled in the Law of the Land Clause. *See*, *e.g.*, *N.C. Dep't of Transp. v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) (finding a right to "just compensation" in the Law of the Land Clause).

Vested rights, however, are distinct. "Without question, vested rights of action are property, just as tangible things are property." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004) (citing *Duckworth v. Mull*, 143 N.C. 461, 466–67, 55 S.E. 850, 852 (1906). Like the fundamental rights mentioned in tiered-scrutiny cases, vested rights are grounded in due process. *Godfrey*, 317 N.C. at 62, 344 S.E.2d at 279. But vested rights are paramount—protected from *any* legislative attack. *See*, *e.g.*, *See Lester Bros.*, *Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) ("[A] retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void."). Fundamental rights, on the other hand, can be taken by legislation—so long as the legislation passes "strict scrutiny." *See Affordable Care*, 153 N.C. App. at 535, 571 S.E.2d at 59.

It is admittedly difficult to mesh the vested-rights doctrine with the fundamental-rights doctrine. But the idea of vested rights predates fundamental rights, and in my reading of the cases, vested rights are a special species of fundamental rights. In other words, all vested rights are fundamental, but not all fundamental rights are vested. Vested rights are treated like property, *Rhyne*, 358 N.C. at 176, 594 S.E.2d at 12, and they are so "fundamental" that *no* legislation can take them away, *Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266.

Adopting the Majority's view of this area would erase our vested-rights doctrine. Under the Majority's approach, fundamental rights would swallow vested rights, and our vested-rights doctrine would be consumed by the adopted federal framework. *See Affordable Care*, *Inc.*, 153 N.C. App. at 535, 571 S.E.2d at 59. But our vested-rights doctrine is distinct—predating any tiered scrutiny approach—and our courts have developed the doctrine for decades. *See*, *e.g.*, *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695; *Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266.

The vested-rights doctrine is ill-suited for the tiers-of-scrutiny approach. Indeed, if vested, a right is *beyond* legislative encroachment; if not vested, a right is only as protected as the level of scrutiny allows. *See Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266; *Gardner*, 300 N.C. at 718–19, 268 S.E.2d at 471 (stating that a vested right is "a right which is otherwise secured, established, and *immune from further legal metamorphosis*") (emphasis added).

The issue before us is a state constitutional issue—not a federal one, and the North Carolina Supreme Court is the final arbiter of the North Carolina Constitution. If our state Supreme Court decides to lockstep with the federal Supreme Court and the Due Process Clause, then so be it. But concerning vested rights, our Supreme Court has not done so. *See Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266; *Gardner*, 300 N.C. 715, 719, 268 S.E.2d at 471 (" 'Vested' " rights may not be retroactively impaired by statute; a right is 'vested' when it is so far perfected as to permit *no statutory interference*.") (emphasis added).

Until our state Supreme Court holds that vested rights are merely fundamental and subject to the federal tiers-of-scrutiny approach, we should apply the decisive vested-rights doctrine: If legislation violates a vested right, the legislation is void. *See Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266. Thus, the "interests" and "tailoring" within the tiers-of-scrutiny approach are irrelevant to vested rights. Because I think the Revival Window violates a vested right, I think the Revival Window is void. Therefore, I would affirm the panel below.

V. Conclusion

The Majority thinks *Wilkes* should be overruled, and this Court has the authority to do so. Given its lack of support from the text of our state Constitution, perhaps *Wilkes* should be overruled. *See Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023). Although, in my view, the effects of doing so would extend far beyond this case and would carry unintended consequences and undermine a hallmark of our justice system–stability in our jurisprudence.

Regardless, whether revival statutes are good policy is not for us to decide. We cannot overrule *Wilkes*, its progeny, or our vested-rights doctrine. Only our state Supreme Court can. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Musi*, 200 N.C. App. at 383, 684 S.E.2d at 896. The *Wilkes* Court was clear: "Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail." *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. Because *Wilkes* and its progeny control this case, the Revival Window is "unconstitutional beyond reasonable doubt." *State ex rel. McCrory*, 368 N.C. at 635, 781 S.E.2d at 250. Therefore, I would affirm the majority of the panel below, and I respectfully dissent.

STATE v. DANIELS

[290 N.C. App. 443 (2023)]

STATE OF NORTH CAROLINA
v.
KENDRA MARIA DANIELS, DEFENDANT

No. COA22-756

Filed 12 September 2023

Probation and Parole—revocation—statutory basis—erroneous finding—discretion otherwise properly exercised

The trial court's order revoking defendant's probation was affirmed as modified where, although the court made an erroneous written finding that each of defendant's alleged probation violations constituted a basis for revocation (since only one of defendant's violations—a new criminal offense—could statutorily support revocation), the remainder of the judgment demonstrated that the trial court understood the appropriate basis for revocation and properly exercised its discretion.

Appeal by Defendant from judgment entered 17 February 2022 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Currie Law Offices, PC, by Patrick W. Currie, for defendant-appellant.

MURPHY, Judge.

A trial court may only revoke a defendant's probation if the defendant commits a new criminal offense, absconds, or violates any condition after previously serving two periods of confinement in response to violations. As long as one of these conditions is met, the trial court may exercise its sound discretion in determining whether revocation is appropriate. When a trial court indicates in its written order that factors outside of these three conditions constituted sufficient bases to revoke the defendant's probation and we cannot determine what weight the trial court gave to each of the relevant factors at defendant's revocation hearing, we vacate the revocation order and remand for a new revocation hearing in which the trial court properly exercises its discretion. However, when the written order improperly indicates that additional factors constituted sufficient bases to revoke probation, but we are

nevertheless able to determine that the trial court understood and exercised its discretion by weighing the appropriate bases for revocation, we modify the findings to reflect only the appropriate bases for revocation and affirm the revocation.

BACKGROUND

On 1 March 2021, Defendant pled guilty to driving while impaired based on an arrest on 8 July 2020. The trial court gave her a 12-month sentence, suspended for 36 months of supervised probation; ordered her to surrender her license; and added a condition to her probation forbidding the possession or consumption of alcohol or controlled substances and authorizing warrantless searches for such substances.

On 12 November 2021, Defendant's probation officer filed a violation report with the court, citing three positive results for marijuana drug screens, delinquency on court payments, and commission of a new criminal offense on 14 June 2021. On 13 January 2022, Defendant's probation officer filed a second violation report for a fourth positive marijuana drug screen.

On 17 February 2022, Defendant admitted to the violations contained in the two reports. During the revocation hearing, the State noted that Defendant attended her meetings with her probation officer, and, because of this partial compliance, Defendant requested the trial court exercise its discretion to order a confinement in response to violation rather than revocation. However, the trial judge stated, "I find the violations to be willful and intentional[,] and therefore I am going to revoke her probation . . . ." He subsequently activated her 12-month sentence. On 24 February 2022, the trial court amended its 17 February 2022 judgment to reflect an activated sentence of 6 months.

In both its *Impaired Driving Judgment and Commitment Upon Revocation of Probation*, form AOC-CR-343, and its amended version of this form judgment, the trial court checked boxes indicating it made the following findings:

> 4. Each of the conditions violated as set forth [in Paragraphs 1-4 of the 12 November 2021 Violation Report and Paragraph 1 of the 13 January 2022 Violation Report] is valid. The defendant violated each condition willfully and without valid excuse and each violation occurred at a time prior to the expiration or termination of the period of the defendant's probation.
>
> . . . .

5. The [trial court] may revoke defendant's probation . . .
   a. for the willful violation of the condition(s) that he/she not commit any criminal offense, [N.C.G.S. §] 15A-1343(b)(1), or abscond from supervision, [N.C.G.S. §] 15A-1343(b)(3a), as set out above.

Defendant timely appealed.

ANALYSIS

"A trial court may only revoke probation for committing a criminal offense or absconding, except as provided in N.C.G.S. § 15A-1344(d2)." *State v. Newsome*, 264 N.C. App. 659, 661 (2019) (marks omitted); *see* N.C.G.S. § 15A-1344(a) (2022). For other violations of probation, "a defendant under supervision for a felony conviction" may be subject to "a period of confinement of 90 consecutive days" and "a defendant under supervision for a misdemeanor conviction not sentenced pursuant to Article 81B[,]" such as a defendant in an impaired driving case, may be subject to "a period of confinement of *up to* 90 consecutive days." N.C.G.S. § 15A-1344(d2) (2022) (emphasis added).

We have previously held that, when a trial court makes a written finding that each violation is a sufficient basis upon which it may revoke probation, "the written order controls for purposes of appeal." *State v. Hemingway*, 278 N.C. App. 538, 544 (2021) (quoting *State v. Johnson*, 246 N.C. App. 677, 684 (2016)) (marks omitted). In *Hemingway*, although the trial court judge made a verbal finding that "the basis of [] revocation is that [the defendant] has committed a new criminal offense," *id.*, we reversed the trial court's written finding that the defendant's positive drug test was adequate to revoke his probation. However, the judgment revoking the defendant's probation in *Hemingway* was ultimately vacated and remanded on other grounds. *Id.* at 552.

In its judgment revoking Defendant's probation, the trial court checked finding box 4, which states "each violation is, in and of itself, a sufficient basis upon which [the trial court] should revoke probation and activate the suspended sentence." Defendant argues this is an "obvious[] err[or]" in violation of N.C.G.S. § 15A-1344(a) because the trial court made a finding of fact that *all* alleged violations constitute a basis for revocation. Defendant contends the trial court improperly failed to consider "that some of the alleged violations were not revocable offenses, and therefore the totality of the circumstances may not justify the ultimate punishment of revocation of probation."

Defendant further asserts the trial court's finding within box 4 reflects a failure to exercise its discretion, which resulted in prejudice to Defendant. Defendant is correct that, under N.C.G.S. § 15A-1344(a), only Defendant's commission of a new offense on 14 June 2021 would support the trial court's decision to revoke her probation. However, the trial court also checked the box for finding 5 and the box for subpart (a) within that finding. This subpart made the finding that the trial court "may revoke [D]efendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense . . . ." While Defendant contends that the written order reflects that the trial court "believed that all of the violations of probation constituted a basis of revocation, and not just [the one] authorized by statute" and therefore it "could not have properly exercised its discretion in determining the appropriate judgment for [Defendant,]" the State argues the trial court's finding in 5(a) demonstrates that "checking box number 4 was a clerical error." In *Hemingway*, we declined to hold that such an error was clerical in nature and reversed the finding; however, in *Hemingway*, we did not have an opportunity to analyze the appropriate remedy for this reversible error by the trial court. We have, however, had opportunities to address similar issues with regard to sentencing.

In *State v. Hardy*, we held the appropriate remedy "[w]hen a trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error . . . is to remand for resentencing when the appellate courts 'are *unable to determine what weight*, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant.' " *State v. Hardy*, 242 N.C. App. 146, 160 (2015) (quoting *State v. Moore*, 327 N.C. 378, 383 (1990)) (emphasis added); *see also State v. Jones*, 265 N.C. App. 644, 651 (2019) ("As we are *unable to determine what weight*, *if any*, the trial court gave to the erroneously entered assault conviction, we must remand for resentencing.") (emphasis added). Although we review an order revoking probation based upon multiple violations in this case rather than a sentencing order based upon multiple convictions, the underlying jurisprudential considerations remain the same. The principle that we remand when the trial court considered an erroneous basis in its discretionary punishment decision and we are unable to determine what weight the trial court gave to each of the violations of law, including the erroneous one, in reaching its decision ensures the trial court exercised its discretion and restrained Defendant's liberty as a conscious and fully informed decision. *See State v. Robinson*, 383 N.C. 512, 523 (2022) (holding that, if a review of the trial court's commentary and rationale underlying its sentencing decision makes apparent "that the trial court was

fully familiar with its given statutory discretion" to impose a lesser judgment if it "desired to do so[,]" an appellate court may find no abuse of discretion, despite remarks which a defendant argues may suggest the trial court's misunderstanding of its ability to exercise such discretion).

In *Hardy*, the defendant was convicted of both larceny and felonious possession of stolen goods and sentenced at the midpoint of the allowable mitigated range under the appropriate guidelines. *Hardy*, 242 N.C. App. at 160-61. Later that same day, the trial court – likely upon its recognition that a defendant cannot be convicted of both of these offenses for the same conduct – arrested judgment on the conviction for possession of stolen goods but did not alter the length of the defendant's sentence. *Id.* at 161. The trial court's initial sentence based on the two convictions remained within the allowable guidelines for larceny; however, we remanded the case to the trial court for resentencing within the trial court's discretion, as we had no way to determine "whether the trial court gave any weight to [the improper conviction] when it [originally] sentenced defendant in the middle of the mitigated range instead of at a lower point in that range." *Id.* In *Jones*, we applied *Hardy* and remanded to the trial court for resentencing where the defendant was erroneously convicted of two assault charges, rather than one, and sentenced at the high end of the presumptive range. *Jones*, 265 N.C. App. at 650-51.

Here, unlike in *Hardy* and *Jones*, we are able to ascertain that the trial court properly weighed the probation violations, as it acknowledged by checking the box for finding 5(a) that the revocation of Defendant's probation was based upon the commission of a new criminal offense.

CONCLUSION

Although the trial court improperly found that each of Defendant's probation violations constituted sufficient bases upon which to revoke her probation, it is clear from the trial court's indication in the same judgment that it properly considered and understood the statutory basis for revoking Defendant's probation and properly exercised its discretion. We affirm the trial court's judgment revoking Defendant's probation; however, we reverse the trial court's finding 4.

AFFIRMED AS MODIFIED.

Judges ARROWOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
PARIS JUJUAN TODD, DEFENDANT

No. COA22-680

Filed 12 September 2023

Constitutional Law—effective assistance of counsel—appellate —failure to raise sufficiency of evidence

The trial court properly denied defendant's motion for appropriate relief, in which defendant alleged that his appellate counsel provided ineffective assistance because he failed to raise a sufficiency of the evidence argument on direct appeal from defendant's conviction for robbery with a dangerous weapon, where defendant failed to demonstrate that his appellate counsel provided deficient performance. Although defendant contended that fingerprint evidence from the victim's backpack was the only evidence of defendant being the perpetrator of the crime and therefore should have been challenged on the basis that there was no evidence that the fingerprint could only have been impressed at the time of the robbery, any argument to that effect would have failed because the State presented other pieces of evidence linking defendant to the crime.

Appeal by writ of certiorari by Defendant from order entered 6 August 2021 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 7 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

STROUD, Chief Judge.

Defendant Paris Jujuan Todd appeals, by a previously granted writ of certiorari, from an order denying his motion for appropriate relief ("MAR") on the ground Defendant failed to show his appellate counsel provided ineffective assistance of counsel. Because Defendant cannot show his appellate counsel deficiently performed and therefore cannot demonstrate ineffective assistance of counsel, we affirm the trial court's denial of Defendant's MAR.

I. Background

On appeal from the denial of his MAR, Defendant argues his appellate counsel was ineffective for failing to raise a sufficiency of the evidence issue in his direct appeal. To determine whether appellate counsel was ineffective for failing to raise an argument the evidence at trial was insufficient, we need to consider the strength of the sufficiency argument. *See State v. Casey*, 263 N.C. App. 510, 521, 823 S.E.2d 906, 914 (2019) (stating "failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court is deficient performance" (emphasis in original) (citing *Davila v. Davis*, 582 U.S. 521, 533, 198 L. Ed. 2d 603, 615 (2017)); *see also State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837 (2017) ("*Todd III*") (indicating deficient performance and prejudice are the two requirements "for a successful ineffective assistance of counsel claim"); *State v. Blackmon*, 208 N.C. App. 397, 403, 702 S.E.2d 833, 837 (2010) (holding the defendant could not show prejudice as part of an ineffective assistance of counsel claim because the State presented sufficient evidence he was the perpetrator). Therefore, we start by recounting what the State's evidence tended to show at trial.

This Court's decision in Defendant's direct appeal, *State v. Todd*, No. COA13-67, 229 N.C. App. 197 (2013) ("*Todd I*") (unpublished), provides many of the relevant facts here, and we supplement that discussion with more facts from the trial transcript relevant to Defendant's appeal from the denial of his MAR. The *Todd I* Court recounted the basic facts of the case as follows:

> Shortly before midnight on 23 December 2011, the Raleigh Police Department responded to a report of an armed robbery at 325 Buck Jones Road. Upon arrival, George Major (the "victim") informed police that, as he was walking home from work, an unknown African-American male approached him from behind, placed his hand on his shoulder, told him to get on the ground if he did not want to be hurt, and then forced him to the ground on his stomach. Once victim was on the ground, a second unknown African-American male approached and held victim's hands while the original assailant went through victim's pockets and felt around victim's clear plastic backpack. As the assailants prepared to flee, they ordered victim to remain facedown on the ground until he counted to 200 because they "didn't want to shoot him." Victim complied until he could no longer hear the assailants' footsteps. The assailants took victim's wallet containing an identification

> card, credit cards, and a small velvet drawstring bag containing change.
>
> During the police investigation, Stacey Sneider of the City–County Identification Bureau was dispatched to assist in processing the backpack for fingerprints. During her analysis, Sneider collected two fingerprints from the backpack, one of which was later determined to be . . . [D]efendant's right middle finger. As a result, a warrant was issued for [D]efendant's arrest.

Todd I, slip op. at 2-3 (brackets altered).

"On 18 January 2012, Officer Potter of the Raleigh Police Department stopped [D]efendant for illegal tint on his car's windows near the scene of the robbery. During the stop, Officer Potter came across [D]efendant's outstanding warrant and arrested [D]efendant." *Id.*, slip op. at 3. Specifically, Defendant was arrested as he went into a dead end about 300 yards from the scene of the robbery. The arrest location was also in the same direction that one assailant ran after the robbery.

Following his arrest, Officer Potter brought Defendant for an interview with the officer investigating the robbery, Detective Codrington. During this interview, Defendant denied he lived at an address on the same street on which he was arrested, which was only 300 yards from the robbery, and Defendant instead said he lived in a different town.

Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 8 April 2012. *Todd I*, slip op. at 3. Following a continuance, Defendant's trial was set to begin on 12 June 2012. *Id.* The day before trial, "the State received a copy of the fingerprints" and "provided them to defense counsel that same day." *Id.* The State had already provided defense counsel with its forensic report showing "[D]efendant's fingerprints were located at the scene of the crime" in January 2012. *Id.* After receiving a copy of the fingerprints the day before trial, "defense counsel stated that she was prepared to go to trial," but "she requested a continuance in order for her to obtain an expert to analyze the fingerprints." *Id.* "No affidavit was attached to counsel's unsigned motion, which neither indicated the expert she planned to call nor what testimony the expert would offer." *Id.*, slip op. at 3-4. The trial court denied Defendant's motion for a continuance. *Id.*, slip op. at 4.

At trial, the State's witnesses included: the victim of the robbery; an officer who spoke with the victim the night of the robbery; Agent Sneider who collected the fingerprints off the backpack; a "fingerprint

expert[,]" *id.*, slip op. at 4; Officer Potter who arrested Defendant, *id.*, slip op. at 3; and Detective Codrington who investigated the robbery and interviewed Defendant. As relevant to the denied continuance motion, "Defendant's counsel was prepared to rebut the State's expert's testimony, and she cross-examined [the fingerprint expert] on various weaknesses in the fingerprint identification." *Id.*, slip op. at 4. At the close of the State's evidence, Defendant moved to dismiss on the grounds the State had "not proven their case." The trial court denied the motion to dismiss. After Defendant said he would not present any evidence and renewed his motion to dismiss at the close of all the evidence, the trial court again denied the motion to dismiss.

"On 14 June 2012, the jury found [D]efendant guilty of robbery with a dangerous weapon. The trial court entered judgment on the verdict, sentencing defendant to a term of 84 to 113 months' [sic] imprisonment. Defendant gave oral notice of appeal in open court." *Todd I*, slip op. at 4.

On appeal, Defendant's appellate counsel argued two issues: "(1) the trial court erred when it denied [D]efendant's motion for a continuance made on the first day of trial, and alternatively, (2) [Defendant] received ineffective assistance of trial counsel" because trial counsel "should have called an expert to produce testimony[.]" *See id.*, slip op. at 12-13 (describing Defendant's ineffective assistance of counsel argument as a "vague assertion"). Defendant's appellate counsel raised no argument about the sufficiency of the evidence identifying him as the perpetrator of the robbery. As to the continuance and ineffective assistance of trial counsel arguments Defendant actually raised in his direct appeal, this Court held the trial court did not err and Defendant did not receive ineffective assistance of trial counsel. *Id.*, slip op. at 13.

On or about 23 September 2014, Defendant filed a MAR alleging ineffective assistance of appellate counsel. Specifically, Defendant argued his appellate counsel was ineffective "in failing to argue that the case should have been dismissed for lack of evidence" based on *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977) and its progeny. (Capitalization altered.) Based on *Irick*, Defendant argued "for fingerprint evidence *standing alone* to withstand a motion to dismiss, there must be 'substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.' " (Emphasis in original) (Quoting *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841). Defendant contended (1) the fingerprint evidence in his case stood alone and (2) the State did not present substantial evidence the fingerprint could only have been impressed when the crime was committed. The MAR court "summarily denied" Defendant's MAR.

After granting Defendant's petition for a writ of certiorari, this Court heard an appeal of the denial of Defendant's MAR in *State v. Todd*, 249 N.C. App. 170, 790 S.E.2d 349 (2016) ("*Todd II*"), *rev'd Todd III*, 369 N.C. 707, 799 S.E.2d 834. The *Todd II* Court reversed the denial of the MAR because "the State presented insufficient evidence that [D]efendant committed the underlying offense, and if [D]efendant's appellate counsel had raised this issue in the initial appeal, [D]efendant's conviction would have been reversed." *Todd II*, 249 N.C. App. at 191, 790 S.E.2d at 364. As a result, the *Todd II* Court remanded for an order granting Defendant's MAR and vacating his conviction. *Id.* Judge Tyson dissented on the ground the State had presented sufficient evidence and thus Defendant failed to show his appellate counsel's performance was deficient. *Id.* at 193, 790 S.E.2d at 365 (Tyson, J., dissenting).

Our Supreme Court then issued an opinion, based on the State's appeal from *Todd II*, in *Todd III*. *See Todd III*, 369 N.C. at 709, 799 S.E.2d at 836 (indicating State took appeal). The *Todd III* Court reversed because it found the record was "not thoroughly developed regarding [D]efendant's appellate counsel's reasonableness, or lack thereof, in choosing not to argue sufficiency of the evidence" when reasonableness is "the proper measure of attorney performance" for ineffective assistance of counsel. *Id.* at 710, 712, 799 S.E.2d at 837-38 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 694 (1984) on the "proper measure of attorney performance") (brackets altered). Therefore, the record was "insufficient to determine whether [D]efendant received ineffective assistance of counsel." *Id.* at 712, 799 S.E.2d at 838. The *Todd III* Court directed this Court to remand to the MAR court "with instructions to fully address whether appellate counsel made a strategic decision not to raise a sufficiency of the evidence argument, and, if such a decision was strategic, to determine whether that decision was a reasonable decision." *Id.*

The matter was remanded to the MAR court on 19 July 2017. By that time, Defendant had been released from custody under an appeal bond he posted on 3 January 2017. Following the remand to the MAR Court in July 2017, "[i]nexplicably" the MAR Court did not hold further proceedings until a new judge took over the MAR proceedings and discovered that oversight on 11 February 2021.

The MAR Court then held an evidentiary hearing on 26 July 2021. The only witness at the evidentiary hearing was Defendant's appellate counsel. As summarized in the trial court's unchallenged findings of fact, appellate counsel testified he decided and "was confident in the decision to not raise the *Irick* sufficiency of the evidence argument[.]" (Quotation marks omitted.)

Following the evidentiary hearing, the MAR court entered a written order denying Defendant's MAR on 6 August 2021. After recounting the procedural history of the case, the trial court made findings of fact about the underlying trial, appellate counsel's background, and how appellate counsel decided what issues to present in Defendant's appeal. Based on that review, the MAR court found appellate counsel "made a strategic, intentional decision to put forward what he believed were the two best arguments in the [D]efendant's case[,]" which did not include "the Irick sufficiency of the evidence argument[.]"

After reviewing the applicable law and analyzing the relevant history of the case, the MAR court could not conclude Defendant's "appellate counsel was unreasonable in choosing to advance two issues on appeal . . . while foregoing the sufficiency of the evidence issue that he thought would detract from his stronger arguments." Therefore, the MAR court concluded Defendant had failed to show he had received ineffective assistance of appellate counsel, and denied his MAR. On 8 April 2022, this Court granted Defendant's petition for writ of certiorari to review the denial of the MAR.

II. Analysis

In his sole argument on appeal, Defendant contends "the MAR court erred by denying [his] MAR alleging ineffective assistance of appellate counsel." (Capitalization altered.) As a matter of due process, a criminal defendant has the right to effective assistance of counsel in their first appeal of right. *See Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 830 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). In determining whether a defendant received ineffective assistance of appellate counsel, we use the two-pronged test first articulated by the United States Supreme Court in *Strickland*. *See Todd III*, 369 N.C. at 710-11, 799 S.E.2d at 837 (2017) (stating *Strickland* standard in case about claim of ineffective assistance of appellate counsel). Thus, Defendant must show "both deficient performance and prejudice" to prevail on his "ineffective assistance of counsel claim." *Id.* at 711, 799 S.E.2d at 837.

A. Standard of Review

When the MAR court has conducted an evidentiary hearing, the reviewing appellate court determines "whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Allen*, 378 N.C. 286, 297, 861 S.E.2d 273, 282 (2021) (citations and quotation marks omitted). "The

MAR court's factual findings are binding upon the defendant if they are supported by evidence, even if the evidence is conflicting, but the MAR court's conclusions of law are always reviewed de novo[.]" *Id.* (citation and quotation marks omitted) (brackets altered).

Defendant's only argument referencing the MAR court's findings regards the alleged implication that an attendee at an appellate workshop told appellate counsel to abandon the sufficiency issue. Defendant can make this implied argument when arguing his attorney's "performance was deficient[,]" (capitalization altered) which is a prong of ineffective assistance of counsel, *see Todd III*, 369 N.C. at 711, 799 S.E.2d at 837, so we proceed straight to discussing the trial court's conclusion of law Defendant failed to show his "right to effective counsel ha[d] been violated." We discuss Defendant's challenge to this finding of fact as part of the deficiency analysis.

B. Deficient Performance Prong

We first address the deficient performance prong of the ineffective assistance of counsel standard. *See id.* (indicating the two prongs for an ineffective assistance of counsel claim are deficient performance and prejudice). To establish the deficiency prong "of an ineffective assistance of counsel claim, the defendant must show 'that his counsel's conduct fell below an objective standard of reasonableness.' " *State v. Baskins*, 260 N.C. App. 589, 600, 818 S.E.2d 381, 391 (2018) (quoting *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (in turn citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693)). This is a high bar; the deficiency prong "requires a showing that 'counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant[.]' " *Todd III*, 369 N.C. at 710, 799 S.E.2d at 837 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

In the appellate context, "[g]enerally, 'the decision not to press a claim on appeal is not an error of such magnitude that it renders counsel's performance constitutionally deficient under the test of *Strickland*[.]' " *Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391 (quoting *Smith v. Murray*, 477 U.S. 527, 535, 91 L. Ed. 2d 434, 445 (1986)) (brackets altered). This standard reflects the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith*, 477 U.S. at 536, 91 L. Ed. 2d at 445 (citation and quotation marks omitted).

"However, failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court *is* deficient performance."

Casey, 263 N.C. App. at 521, 823 S.E.2d at 914 (emphasis in original) (citing *Davila*, 582 U.S. at 533, 198 L. Ed. 2d at 615). To "eliminate the distorting effects of hindsight," courts look at the strength of the issues based on the law at the time appellate counsel submitted their opening brief. *See Smith*, 477 U.S. at 536, 91 L. Ed. 2d at 445-46 (citation and quotation marks omitted) (discussing the need to prevent the distortion of hindsight and then analyzing the decision of appellate counsel based on the "law at the time [he] submitted his opening brief").

Defendant argues his appellate counsel "made an unreasonable strategic decision to omit from [Defendant's] brief what likely would have been a winning issue and instead chose to raise two issues that were sure to lose." (Capitalization altered.) Specifically, Defendant contends the winning issue his appellate counsel should have raised was a claim the evidence was insufficient based on *Irick*.

To evaluate whether Defendant's *Irick* fingerprint evidence argument was "plainly stronger" than the arguments his appellate counsel raised, we must first evaluate the strength of the *Irick* claim. *See Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (explaining it is "deficient performance" when appellate counsel fails to raise a claim "that was plainly stronger than those presented to the appellate court"). If the *Irick* claim itself lacks sufficient strength, then Defendant has failed to carry his burden to show deficient performance and we need not evaluate the relative strength of the two claims actually raised on appeal. *See Smith*, 477 U.S. at 535-36, 91 L. Ed. 2d at 445-46 (determining a decision not to pursue an objection to certain testimony on appeal was not "an error of such magnitude that it rendered counsel's performance constitutionally deficient under" *Strickland* and not mentioning any arguments actually raised in appeal as part of that analysis); *see also Todd III*, 369 N.C. at 710, 799 S.E.2d at 837 ("*Strickland* requires that *a defendant* first establish that counsel's performance was deficient." (emphasis added)).

In *Irick*, a burglary case, the defendant argued the trial court should have granted his motion to dismiss for insufficient evidence where "[a] key piece of circumstantial evidence . . . was [a] fingerprint" of the defendant's found within the burgled home. *Irick*, 291 N.C. at 488, 490-91, 231 S.E.2d at 839-41. First, our Supreme Court stated the general test for sufficiency of the evidence, i.e., "whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *Id.* at 491, 231 S.E.2d at 841 (citation and quotation marks omitted). Our Supreme Court then explained, "Fingerprint evidence, standing alone, is sufficient to withstand a motion for nonsuit only if there is substantial evidence of circumstances from which the jury can find that the

fingerprints could only have been impressed at the time the crime was committed." *Id.* at 491-92, 231 S.E.2d at 841 (citations, quotation marks, and emphasis omitted). While *Irick* did not include any circumstances showing the fingerprint "could only have been impressed at the time the crime was committed[,]" our Supreme Court found "other circumstances tend[ed] to show that [the] defendant was the criminal actor." *Id.* at 492, 231 S.E.2d at 841. As a result, the *Irick* Court returned to the general test for sufficiency and held, "[a]ll of these circumstances, taken with the fingerprint identification, when considered in the light most favorable to the State, permit a reasonable inference that [the] defendant was the burglar[.]" *Id.* at 492, 231 S.E.2d at 842; *see also id.* at 491, 231 S.E.2d at 841 (stating the general sufficiency of the evidence test is "whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances").

Since *Irick*, our Courts have further expanded upon the law around sufficiency of the evidence and fingerprints. First, this Court has clarified when there is "some evidence other than [the] defendant's fingerprints identifying him as the perpetrator . . . the *Irick* rule is inapplicable." *State v. Hoff*, 224 N.C. App. 155, 161, 736 S.E.2d 204, 208 (2012) (citing *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841). When the fingerprint evidence does not stand alone, we apply the normal sufficiency standard of whether, "[t]aken in the light most favorable to the State" the other evidence "together" with the fingerprint evidence "constitute[s] substantial evidence identifying [the] defendant as the perpetrator." *See Hoff*, 224 N.C. App. at 157, 161, 736 S.E.2d at 206, 208 (stating this in an analysis of the evidence after laying out the sufficiency standard as requiring "substantial evidence of . . . [t]he defendant's being the perpetrator of the charged offense" when the court "consider[s] the evidence in the light most favorable to the State" and gives the State "every reasonable inference to be drawn from that evidence" (citation and quotation marks omitted)). For example, in *Hoff*, the victim's "in-court identification of [the] defendant as the intruder" was "some evidence other than [t]he defendant's fingerprints identifying him as the perpetrator[,]" so "the *Irick* rule [was] inapplicable." *Id.* at 161, 736 S.E.2d at 208. Then, combining the identification evidence with the fingerprint evidence, the *Hoff* Court found "substantial evidence identifying [the] defendant as the perpetrator[,]" so "the trial court did not err in denying [the] defendant's motion to dismiss." *Id.*

Second, our Courts have expanded upon the type of additional evidence that can mean "the *Irick* rule is inapplicable[.]" *Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208. In *State v. Cross*, our Supreme Court

found sufficient to withstand a motion to dismiss the fingerprint evidence combined with the following additional evidence:

- "the assailant abandoned the victim within blocks of where the defendant was frequently seen and where [the] defendant was eventually located and arrested[;]"
- "a pathway existed near that location which led to the back of the apartment [the] defendant was in when he was arrested[;]"
- "the defendant made efforts to change his appearance by shaving his head[;]"
- "the defendant made an effort to evade arrest[;]" and
- "the defendant repeatedly denied to police officers that his name" was his name.

See State v. Cross, 345 N.C. 713, 718-19, 483 S.E.2d 432, 435-36 (1997) (noting this Court "overlooked" the listed "additional pieces of corroborating evidence" after determining the "fingerprint evidence, standing alone, was sufficient"); *see also Cross*, 345 N.C. at 719-20, 483 S.E.2d at 436 (Frye, J., concurring) (arguing it was "unnecessary to decide" whether the fingerprint evidence standing alone was insufficient given "other evidence tending to show that [the] defendant was the perpetrator of the crimes charged in this case was introduced at trial"). Similarly, in *State v. Futrell*, this Court determined the fingerprint evidence did not stand alone because "DNA evidence as well as placement of [the] defendant near the victim's apartment at the time of the crime by numerous witnesses linked him with the offenses charged." *State v. Futrell*, 112 N.C. App. 651, 668, 436 S.E.2d 884, 893 (1993) (citing *State v. Mercer*, 317 N.C. 87, 95-99, 343 S.E.2d 885, 890-92 (1986)).

Here, to evaluate the strength of the *Irick* claim, we must first determine whether the fingerprint evidence was standing alone. *See Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208 (explaining "the *Irick* rule is inapplicable" when there is "some evidence other than [the] defendant's fingerprints identifying him as the perpetrator"). If the fingerprint evidence stands alone, the fingerprint evidence can withstand a motion to dismiss "only if there is substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed." *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841. If the fingerprint evidence does not stand alone, however, we return to a normal sufficiency of the evidence standard and determine whether, taking the evidence in the light most favorable to

the State, there is substantial evidence defendant is "the perpetrator of the charged offense." *See Hoff*, 224 N.C. App. at 157, 161, 736 S.E.2d at 206, 208 (stating traditional sufficiency of the evidence standard, concluding additional evidence meant "the *Irick* rule [was] inapplicable[,]" and then determining the fingerprint evidence, combined with additional evidence, was "substantial evidence identifying [the] defendant as the perpetrator"); *see also Irick*, 291 N.C. at 491-93, 231 S.E.2d at 841-42 (determining other circumstances showed the defendant was the perpetrator and then concluding the fingerprint and the other circumstances "permit[ted] a reasonable inference that [the] defendant was the burglar").

The fingerprint evidence does not stand alone in this case. First, the State presented evidence Defendant was arrested a month later about 300 yards from the scene of the robbery and that place of arrest was in the direction one assailant ran after the robbery. This evidence resembles the additional evidence in *Cross* that the assailant abandoned the victim blocks away from where the defendant was arrested and that the place where the assailant abandoned the victim was connected to the place the defendant was arrested via a pathway. *See Cross*, 345 N.C. at 718-19, 483 S.E.2d at 435-36.

Second, the State presented evidence Defendant denied he lived at the address that was only 300 yards from where the robbery occurred and instead stated he lived in a different town, but "all information" the police could gather indicated he lived at the address near the robbery. This evidence resembles the situation in *Cross* where the defendant denied that his name was his name when asked about it by officers. *See id.* at 719, 483 S.E.2d at 436.

Finally, the robbery victim identified his assailants as African-American men, *see Todd I*, slip op. at 2, and Defendant is an African-American man. While our Courts have not specifically said the defendant matching the perpetrator's description is an additional factor in a fingerprint case, our Supreme Court has used it as a factor in a sufficiency case. *See Mercer*, 317 N.C. at 97-98, 343 S.E.2d at 891-92 (noting the victim described the defendant as "a tall, thin [B]lack man in his twenties[,]" which was "consistent with the defendant's appearance[,]" as part of a determination jewelry was not the only evidence that "link[ed] the defendant with the commission of the offenses"). Notably, this Court cited to *Mercer* in *Futrell*, a fingerprint evidence case. *See Futrell*, 112 N.C. App. at 668, 436 S.E.2d at 893 (citing *Mercer* to support its conclusion other evidence "linked [the defendant] with the offenses charged"). This is not to suggest that describing the race of an assailant

is sufficient, standing alone, to identify an assailant; it is only noted here to show that the race of the assailant was not inconsistent with the victim's description of Defendant. *See id.* Here, other factors besides the description of Defendant, i.e., fingerprint evidence and Defendant lying about his residence, were sufficient alone without the description.

Because of this additional evidence, the fingerprint evidence here was not standing alone. So *Irick*'s special rule—requiring an inquiry about whether there is substantial evidence the fingerprint "could only have been impressed at the time the crime was committed"—is inapplicable. *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841; *Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208. Instead, we apply the typical sufficiency of the evidence standard. *See Hoff*, 224 N.C. App. at 157, 161, 736 S.E.2d at 206, 208; *see also Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841-42.

Returning to the typical sufficiency of the evidence standard, taking the evidence in the light most favorable to the State, the State presented substantial evidence Defendant is "the perpetrator of the charged offense." *See Hoff*, 224 N.C. App. at 157, 736 S.E.2d at 206 (describing this as the "well known" standard for a motion to dismiss (citation and quotation marks omitted)). Combining all the evidence, the State presented four pieces of evidence supporting Defendant was the perpetrator: (1) one of the two fingerprints on the victim's backpack was Defendant's and the victim had never let Defendant touch his bag; (2) Defendant was arrested a month later in close proximity to the robbery scene and at a location in the direction one of the assailants ran after the robbery; (3) Defendant denied to police he lived at the address in close proximity to the robbery and in the direction one of the assailants had run after the robbery despite "all information" the police could gather indicating he lived there; and (4) at least to the extent of the available evidence identifying the assailants, Defendant matched the description of the assailants. *See Todd I*, slip. op. at 2 (identifying assailants as African-American men). Taken together, and "in the light most favorable to the State," these four pieces of evidence are "substantial evidence identifying [D]efendant as the perpetrator[,]" and therefore the trial court had sufficient evidence to deny a Defendant's motion to dismiss. *Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208.

Our conclusion the trial court had sufficient evidence to deny Defendant's motion to dismiss at trial ultimately undermines Defendant's attempt to argue his appellate counsel was ineffective. Because the fingerprint evidence was not standing alone and the State presented sufficient evidence Defendant was the perpetrator of the robbery, Defendant would not have prevailed on the *Irick* issue. *See Hoff*, 224 N.C. App. at

161, 736 S.E.2d at 208 (determining the trial court did not err in denying the motion to dismiss because (1) the fingerprint evidence was not standing alone such that the *Irick* rule was "inapplicable" and (2) the fingerprint evidence and the additional evidence "together constitute[d] substantial evidence identifying [the] defendant as the perpetrator"). Because Defendant would not have prevailed on the *Irick* issue, the *Irick* issue was not "plainly stronger" than the other issues his attorney presented on appeal.[1] *See Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (explaining it is "deficient performance" when appellate counsel fails to raise a claim "that was plainly stronger than those presented to the appellate court"). Because the unraised *Irick* argument was not "plainly stronger than those presented to the appellate court[,]" Defendant has not met his burden of showing deficient performance. *Id.*; *see also Todd III*, 369 N.C. at 710-11, 799 S.E.2d at 837 (indicating the defendant carries the burden of proving deficient performance). Because Defendant cannot show deficient performance of his appellate counsel, he cannot show his appellate counsel was ineffective. *See Todd III*, 369 N.C. at 711, 799 S.E.2d at 837 ("[B]oth deficient performance and prejudice are required for a successful ineffective assistance of counsel claim."). Finally, because Defendant cannot show ineffective assistance of appellate counsel, the trial court correctly denied his MAR.

Defendant's arguments on appeal do not convince us otherwise. Defendant first argues the fingerprint evidence here was standing alone—so the *Irick* argument was plainly stronger and his appellate counsel was ineffective—by drawing comparisons to *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979) and *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001).

In *Scott*, our Supreme Court started its analysis with a determination "[t]he only evidence tending to show that [the] defendant was even in the home of" the murder victim was "a thumbprint found on a metal box in the den on the day of the murder[.]" *Scott*, 296 N.C. at 522, 251 S.E.2d at 416-17; *see also Scott*, 296 N.C. at 524, 251 S.E.2d at 418 (indicating the crime was an attempted robbery that culminated in a death). Citing a long line of cases including *Irick*, the *Scott* Court explained, "The determinative question, therefore, is whether the State offered substantial evidence that the thumbprint could only have been placed on the box at

1. Notably, this conclusion remains the same even if we accept, *arguendo*, Defendant's contention "it was impossible to win the issues raised by appellate counsel." (Capitalization altered.) As a matter of logic, one losing argument cannot be plainly stronger than two arguments that also lose.

the time of the homicide." *See id.* at 522-53, 251 S.E.2d at 417 (stating the determinative question and then listing eight cases where our Supreme Court "has considered the sufficiency of fingerprint evidence" with *Irick* as the most recent). Our Supreme Court then determined testimony from the victim's niece was the "only evidence in this case to prove when the fingerprint could have been impressed" and "to her knowledge the defendant had never visited the house" nor handled the box on which his fingerprint was found. *Id.* at 524, 251 S.E.2d at 417-18. Because the victim's niece testified she was not home " 'during the five week days' " and could not have known if the defendant could have entered before the crime, the *Scott* Court found the evidence "insufficient to withstand a motion to dismiss." *Id.* at 526, 251 S.E.2d at 419.

Similarly, in *Gilmore*, the State presented evidence the defendant's fingerprint was found on glass from a broken window following a break-in at a store. *See Gilmore*, 142 N.C. App. at 470, 542 S.E.2d at 698. The defendant argued his fingerprint was "standing alone" and the *Gilmore* Court agreed because it proceeded to consider whether any additional circumstances showed his fingerprint "was impressed at the time of the break-in." *Id.* at 469-70, 542 S.E.2d at 697-98. This Court found "no additional circumstances tending to show [the d]efendant's fingerprint was impressed at the time of the break-in" because the fingerprint could have been impressed on the outside of the glass where a customer could "access" and the State had presented evidence the defendant was a customer in the store near the time of the break-in. *Id.* at 470, 470 n.2, 542 S.E.2d at 698, 698 n.2. After determining there were no additional circumstances, the *Gilmore* Court concluded, "As the State did not present any evidence, other than the fingerprint evidence, that Defendant was the perpetrator of the break-in . . . the charges against Defendant as to the break-in . . . should have been dismissed." *Id.* at 470, 542 S.E.2d at 698.

Defendant's Second Motion to Take Judicial Notice also asks we take judicial notice of attached "portions of the printed record on appeal and excerpts from the appellant and appellee briefs filed in" *Gilmore* because he argues they "are relevant to the issue of whether the fingerprint in this case stood alone." Defendant's motion for judicial notice is unnecessary. We always can look back at materials filed with this Court in a past case without the need to take judicial notice. If the parties want to argue based on past materials filed in this Court, they can make that argument by referring us to the case name, number, and specific material this Court should review. Therefore, we deny Defendant's Second Motion to Take Judicial Notice.

Turning to the additional items from *Gilmore* we can review without the need to take judicial notice, Defendant does not explain which facts we should consider or how exactly they relate to the issue in this case. The only potential facts in the briefs not specifically included in the *Gilmore* analysis discussed above are the following from the State's brief in *Gilmore*: (1) the defendant had come into the shop the same day or the day before and "was particularly noticed because he had on a very large coat for such a warm day" and (2) after the defendant left the store, the store's assistant manager found two of his court documents in the store parking lot. *See id.* at 469-70, 542 S.E.2d at 697-98 (relying on aforementioned facts in the opinion). These facts do not change how we view the *Gilmore* Court's analysis because they simply further establish, as the *Gilmore* Court already recognized, the defendant was "lawfully present in the store prior to the break-in" and therefore could have put his fingerprint on the store glass before the time the crime was committed. *Id.* at 470, 542 S.E.2d at 698. Notably, this was part of the *Gilmore* Court's analysis about whether there was substantial evidence the defendant impressed the fingerprint at the time of the break-in, *see id.*, which is only at issue *after* a court determines the fingerprint evidence stands alone. *See Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208 (explaining because there was "some evidence other than [the] defendant's fingerprints identifying him as the perpetrator . . . the *Irick* rule is inapplicable").

Thus, neither of Defendant's case comparisons are convincing because both cases determined the fingerprint evidence was standing alone and there was not sufficient evidence the fingerprint could only have been impressed when the crime was committed. *See Scott*, 296 N.C. at 522-26, 251 S.E.2d at 416-19; *Gilmore*, 142 N.C. App. at 469-71, 542 S.E.2d at 697-98. Here, by contrast, we have explained the State presented three pieces of additional evidence, so the fingerprint does not stand alone and therefore we do not address the question of whether the fingerprint could only have been impressed when the crime was committed. *See Hoff*, 224 N.C. App. at 158, 161, 736 S.E.2d at 206, 208 (explaining *Irick* rule and then stating it is inapplicable if the fingerprint evidence does not stand alone). Therefore, we are not convinced by Defendant's comparisons to *Scott* and *Gilmore*.

Defendant also contends "to the extent the MAR court's findings of fact imply that anyone at [an] appellate workshop told appellate counsel to abandon the sufficiency issue, the findings are unsupported." (Capitalization altered.) To the extent this finding is relevant to the issue of ineffective assistance of counsel, Defendant appears to argue

the finding relates to the deficiency prong's emphasis on whether "counsel's conduct fell below an objective standard of reasonableness." *Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391. The logic of the argument Defendant is trying to refute would be if "experienced appellate attorneys" told appellate counsel to abandon the *Irick* argument, then appellate counsel made a reasonable decision. While reasonableness is the general standard for deficient performance, *see Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391, United States Supreme Court caselaw also provides a more specific rule that "failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court *is* deficient performance." *See Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (citing *Davila*, 582 U.S. at 533, 198 L. Ed. 2d at 615 for this proposition). And based on that metric, we have already determined appellate counsel's performance was not deficient because the *Irick* issue was not plainly stronger than the two issues he raised on appeal. Therefore, even assuming *arguendo* this finding is unsupported, it does not impact our determination appellate counsel was deficient because we reached such a result without relying on the challenged finding.

Finally, Defendant asserts the MAR court erred in considering that the trial judge, who the MAR Court noted was an "experienced jurist[,]" "twice denied [Defendant]'s motions to dismiss." Notably, Defendant does not challenge the other portion of the MAR court's same conclusion of law that indicates Judge Tyson, who is "also an experienced jurist," concluded the State presented sufficient evidence of Defendant's identity as the perpetrator. However, the issue of whether multiple judges rejecting Defendant's argument adds anything to the reasonability analysis need not be considered further here because, as stated above, rather than relying on the general standard of reasonableness alone, we have used the more specific deficient performance standard for appellate counsel and determined the *Irick* claim was not "plainly stronger" than the issues Defendant's appellate counsel presented. *Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914; *see also Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391 (indicating the deficiency prong generally asks whether "counsel's conduct fell below an objective standard of reasonableness").

After our *de novo* review of the trial court's conclusion Defendant failed to show his "right to effective counsel ha[d] been violated[,]" or the *Irick* issue was not plainly stronger than the issues appellate counsel raised in Defendant's direct appeal. Therefore, appellate counsel's performance was not deficient, *see Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (indicating it is deficient performance if appellate counsel failed to raise an issue that was "plainly stronger" than the issues actually

raised on appeal), so Defendant has not shown ineffective assistance of counsel. *See Todd III*, 369 N.C. at 711, 799 S.E.2d at 837 (requiring "both deficient performance and prejudice" to prevail on an ineffective assistance of counsel claim). Thus, we affirm the trial court's denial of Defendant's MAR.

C. Prejudice

Since we have already determined Defendant failed to carry his burden on the deficient performance prong of the ineffective assistance of counsel test, we need not address prejudice. *See id.* (indicating a defendant must establish "both deficient performance and prejudice . . . for a successful ineffective assistance of counsel claim"). But we briefly note because we have concluded the State presented sufficient evidence Defendant was the perpetrator of the offense as part of our determination the *Irick* issue was not plainly stronger, Defendant also cannot show prejudice. *See Blackmon*, 208 N.C. App. at 403, 702 S.E.2d at 837 (holding the defendant could not show prejudice as part of an ineffective assistance of counsel claim because the State presented sufficient evidence he was the perpetrator).

III. Conclusion

Defendant has failed to show the *Irick* issue his appellate counsel did not raise on appeal was plainly stronger than the two issues his appellate counsel raised on appeal. As a result, Defendant has not proven his appellant counsel's performance was deficient and cannot demonstrate he received ineffective assistance of counsel. Therefore, we affirm the trial court's denial of Defendant's MAR.

AFFIRMED.

Judges CARPENTER and RIGGS concur.

STATE v. WRIGHT

[290 N.C. App. 465 (2023)]

STATE OF NORTH CAROLINA
v.
ERIC WRIGHT, DEFENDANT

No. COA22-996

Filed 12 September 2023

1. Appeal and Error—criminal case—untimely notice of appeal —petition for certiorari granted

In a criminal case where defendant sought to appeal the trial court's denial of his motion to suppress, but where defendant did not file his written notice of appeal within the fourteen-day deadline established under Appellate Rule 4(a), his petition for a writ of certiorari was granted because defendant showed that his arguments on appeal had merit and that there was good cause for issuing the writ.

2. Criminal Law—order denying motion to suppress—findings of fact—unsupported by the evidence

In a criminal defendant's appeal from an order denying his motion to suppress evidence seized from his backpack following a *Terry* stop and frisk, four of the trial court's findings of fact were stricken from the order because they were unsupported by the evidence. Three of these unsupported findings stated that one of the officers observed defendant entering a pathway marked on both sides by "No Trespass" signs and that all of the officers at the scene believed defendant was trespassing at the time of the *Terry* stop. The fourth unsupported finding stated that, after asking defendant for his identification card, the officers returned the identification card to defendant prior to searching his backpack.

3. Search and Seizure—Terry stop and frisk—reasonable suspicion—reliability of tip by confidential informant—search of backpack—beyond scope of frisk

In a prosecution for crimes relating to the possession of a stolen firearm by a felon, the trial court erred in denying defendant's motion to suppress evidence seized from his backpack following a *Terry* stop and frisk. Law enforcement had reasonable suspicion to conduct the stop and to frisk defendant's person based on a confidential informant's tip, which carried sufficient "indicia of reliability" where one of the officers had known the informant for over a year and had previously corroborated information from that informant. However, the search of defendant's backpack went beyond

the lawful scope of the initial frisk, which was limited to ensuring that defendant was unarmed and posed no threat to the officers.

4. Search and Seizure—warrantless search of backpack—consent exception—voluntariness—probable cause—tip from confidential informant

In a prosecution for crimes relating to the possession of a stolen firearm by a felon, the trial court erred in denying defendant's motion to suppress evidence seized from his backpack following a *Terry* stop and frisk which, though lawful, did not justify the warrantless search of the backpack. The search did not fall under the consent exception to the warrant requirement because, although defendant did consent to the search, he did not do so voluntarily where, on a cold and dark night, multiple uniformed police officers surrounded defendant—an older homeless man—and repeatedly requested to search the backpack after he repeatedly asserted his Fourth Amendment right to decline those requests. Further, where law enforcement had received a tip from a confidential informant saying that an individual matching defendant's description was carrying a firearm at the location where defendant was stopped, that tip (though sufficiently reliable to establish reasonable suspicion to stop and frisk defendant) was insufficient to establish probable cause to search the backpack because it provided no basis for the allegation that defendant was carrying an illegal firearm.

Appeal by Defendant from amended order entered 28 July 2022 by Judge Lisa Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for Defendant-Appellant.

RIGGS, Judge.

Defendant Eric Wright appeals an order denying his motion to suppress evidence found during a stop on 29 January 2020. On appeal, Mr. Wright first argues that the officers did not have reasonable suspicion to stop Mr. Wright. Second, Mr. Wright argues that he did not consent to the search of his backpack. Finally, Mr. Wright argues that the confidential

informant's statement was not sufficient to establish probable cause for a warrantless search.

After review, we hold that law enforcement had reasonable suspicion to stop and frisk Mr. Wright based upon the informant's tip; however, Mr. Wright did not voluntarily consent to the search of his backpack, and the search was not otherwise justified by probable cause. Therefore, we reverse the trial court's order denying Mr. Wright's motion to suppress the evidence.

I. FACTS & PROCEDURAL HISTORY

On 29 January 2020, around 11:30 p.m., Officer Christopher Martin ("Officer Martin") and Officer Nicholas Krause ("Officer Krause") of the Charlotte-Mecklenburg Police Department were on routine patrol in uptown Charlotte. Officer Martin received a tip from a known informant that there was an individual carrying an illegal firearm on Phifer Avenue. The informant described the individual, who was traveling on a bicycle, as a Black male with dreadlocks wearing a dark jacket, bright orange tennis shoes and blue jeans. Shortly after receiving this tip, the officers located an individual on Phifer Avenue who matched this description and was later identified as Mr. Wright. The officers followed Mr. Wright as he walked with his bicycle down North Tryon Street.

Officer Benjamin Slauter ("Officer Slauter") followed Mr. Wright on foot as he turned onto a dirt path near the East 12th Street bridge. Officers Martin and Krause parked their vehicle close to the intersection of East 12th Street and North College Street to meet Mr. Wright as he emerged from the dirt path on North College.

Before they intercepted Mr. Wright, the officers had the following conversation in their vehicle:

> OFFICER MARTIN: That's trespass, right?
>
> OFFICER KRAUSE: Yes.
>
> OFFICER MARTIN to Officer Slauter via radio: Slauter, that area's trespassing right?
>
> OFFICER SLAUTER: Known drug area, that's all I got. Voluntary contact.

Officers Martin and Krause exited their vehicle and approached Mr. Wright on North College Street. The officers gave Mr. Wright conflicting reasons for approaching him, with Officer Krause stating that Mr. Wright was trespassing on the dirt path and Officer Martin stating that the area

was known for street-level drug sales. At the hearing on 9 November 2020, Officer Martin testified that he decided to approach Mr. Wright based on the information he received from the known informant.

The officers asked Mr. Wright for his name and identification, and they also asked whether he was homeless. Mr. Wright provided his identification, told the officers he was homeless, and said that he was headed to a storage unit on College Street. Officer Martin asked Mr. Wright to step off his bicycle and remove his backpack and Mr. Wright complied with these requests. Officer Martin asked if he could perform a pat-down of Mr. Wright's person and Mr. Wright consented to the pat-down. Officer Martin did not find any weapons on Mr. Wright during the pat-down.

Officer Martin then asked if he could search Mr. Wright's backpack to make sure that he did not have a weapon. At this point in the encounter, Officers Martin and Slauter were standing on either side of Mr. Wright and Officer Krause was in the police vehicle with Mr. Wright's identification. Initially, Mr. Wright agreed to let Officer Martin search his backpack, but then quickly, before Officer Martin started searching, said that he did not want the officers to look in the backpack. Officer Martin and Officer Slauter asked Mr. Wright four more times for permission to search his backpack, and each time, Mr. Wright said no.

Even though Mr. Wright said that he was cold and scared of the police, Officer Slauter indicated that they were "looking for somebody" and could not take Mr. Wright "off the list" because he was being "deceptive." Officer Slauter asked Mr. Wright to open the backpack so that Officer Slauter could look inside, and Mr. Wright finally did as he was directed. Mr. Wright put the backpack on the ground and showed Officer Slauter some of the items inside the backpack. Officer Slauter saw a pistol grip in the backpack and placed Mr. Wright in handcuffs.

Officer Slauter conducted a thorough search incident to arrest and found cocaine and marijuana in Mr. Wright's pockets. The officers ran the serial number of the gun and found that it was a stolen firearm.

Mr. Wright was indicted on 10 February 2020 for unlawfully carrying a concealed weapon, possession with intent to sell cocaine, possession of a stolen firearm, possession of a firearm by a felon, and obtaining habitual felon status. On 2 September 2020, Mr. Wright filed a motion to suppress the evidence obtained from the search and seizure.[1] At a hearing on the motion to suppress held on 9 November 2020, the trial court

1. Mr. Wright also filed a motion to suppress statements on 29 October 2020. That motion is not a subject of this appeal.

denied Mr. Wright's motion. The trial court found that the initial contact between Mr. Wright and the officers was voluntary, and Mr. Wright consented to the search of his backpack. The trial court also found that the information provided by the confidential informant, combined with the officers' knowledge of the area, was enough to provide reasonable articulable suspicion to engage Mr. Wright. Mr. Wright gave oral notice of intent to appeal the denial of the motion to suppress. Mr. Wright entered an *Alford* plea to all charges and was sentenced to a minimum of 87 months and a maximum of 117 months of incarceration.

Mr. Wright originally appealed the denial of the motion to suppress in November 2020. In that appeal, this Court remanded the case for further findings of fact and conclusions of law regarding trespass, including but not limited to whether law enforcement believed that Mr. Wright was trespassing, whether this belief was reasonable, and the impact this would have on reasonable suspicion. *State v. Wright*, 283 N.C. App. 471, 871 S.E.2d 879, ___ (2022) (unpublished). The Court indicated that the additional findings should be based upon the evidence presented at the 9 November 2020 hearing.

On 28 July 2021, the trial court entered an amended order denying the motion to suppress evidence ("Amended Order"). The trial court made the following additional findings of fact related to trespassing:

> 5. A "No Trespassing" sign was affixed to one of the bridge pylons and was clearly visible to a person traveling under the underpass. Defendant's path of travel took him directly by this sign.
>
> 6. Officer Slauter observed Defendant enter a pathway marked by a "No Trespassing sign" leading from North Tryon to N. College Street. The "No Trespassing" sign was posted underneath the overpass next to the pathway.
>
> 7. Another sign was on the ground next to the fence that ran along one side of the dirt path. This sign read, "Mecklenburg County Property No Trespassing Violators will be subject to arrest and conviction."
>
> 8. The dirt path the Defendant entered was marked on both sides by no trespassing signs. It was obscured by vegetation, indicating it was not a maintained path intended for the public to use.
>
> 9. Defendant traveled along this dirt path for approximately 1500 to 2000 feet.

> …
>
> 11. The officers believed the Defendant was trespassing.
>
> …
>
> 20. That Officer Martin appeared to have retuned [sic] Defendant's identification card based on the conversation between them and the actions that were visible on the BWC.

The trial court made additional conclusions of law, which stated:

> 2. Based on the presence of two "No Trespassing" signs, including one that advised "violators will be subject to arrest and conviction," along with the officers' knowledge of the area and prior experience of having issued citations in the area provided the officers with reasonable belief that the Defendant was trespassing.
>
> 3. The information provided by the confidential informant and the officer's reasonable belief that the Defendant was trespassing combined with the officers' knowledge of the area was sufficient as to provide reasonable and articulable suspicion and probable cause for the Officers to engage with the Defendant.

On 18 August 2022, Mr. Wright filed a written notice of appeal from the Amended Order. As his notice was filed more than fourteen days after the entry of the order, Mr. Wright filed a petition for a writ of *certiorari* contemporaneously with his appeal.

II. ANALYSIS

A. Writ of *Certiorari* Granted

[1] A party may appeal an order of a superior court in a criminal action by giving oral notice of appeal at trial or by filing notice of appeal within fourteen days of the entry of the order. N.C. R. App. P. 4(a) (2023). Mr. Wright did not give oral notice of appeal from the Amended Order and his written notice of appeal was filed twenty-two days after the entry of the order. However, this Court may grant a writ of *certiorari* in appropriate circumstances to permit review of an order of a trial court when, as in this case, the right to prosecute an appeal has been lost by failure to take timely action. N.C. R. App. P. 21(a) (2023). *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959).

We hold that Mr. Wright has shown good cause and that the arguments he presents on appeal have merit. Accordingly, we grant Mr. Wright's petition for *certiorari* to review the question of whether the trial court erred by denying his motion to suppress evidence.

B. Standard of Review

The scope of appellate review of an order denying a motion to suppress evidence is limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, in which case, they are binding on appeal, and whether those factual findings support the trial court's conclusions of law. *State v. Terrell*, 372 N.C. 657, 665, 831 S.E.2d 17, 22 (2019). Uncontested findings of fact are binding on appeal. *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016). The trial court's conclusions of law are reviewed *de novo*. *Terrell*, 372 N.C. at 665, 831 S.E.2d at 22.

C. Findings of Fact

[2] Mr. Wright challenges Findings of Fact 5, 6, 7, 8, 11, and 20 of the trial court's Amended Order as unsupported by competent evidence. We hold that Findings 6, 8, 11, and 20 are indeed unsupported by competent evidence. The remainder of the findings remain undisturbed.

Finding 6 states: "Officer Slauter observed Defendant enter a pathway marked by a 'No Trespassing sign' leading from North Tryon to N. College Street. The 'No Trespassing' sign was posted underneath the overpass next to the pathway." While there is evidence to support the finding that a "No Trespassing" sign was posted underneath the overpass, Officer Slauter did not testify that he observed Mr. Wright enter a pathway marked by a "No Trespassing" sign and there is no evidence that the pathway itself—as opposed to the pylon under the overpass—was marked by such a sign. To find a defendant guilty of trespassing, a court must find that there is a posting "in a manner reasonably likely to come to the attention of intruders," putting them on notice not to enter the premises. N.C. Gen. Stat. § 14-159.13 (2021). The "No Trespassing" sign is affixed to the overpass pylon a few yards from the pathway. While this sign would be reasonably likely to come to the attention of persons walking under the bridge along North Tryon Street, the positioning of the sign would reasonably give notice to a passerby to avoid trespassing on the bridge abutment directly behind the sign, rather than providing notice to avoid trespassing on a dirt path several yards to the side of the sign and barely visible in the photos provided to this Court. Because there was no competent evidence to support the finding that

Officer Slauter observed Mr. Wright enter a pathway marked by a "No Trespassing" sign, we strike Finding 6 from the Amended Order.

Finding 8 states: "The dirt path the Defendant entered was marked on both sides by no trespassing signs. It was obscured by vegetation, indicating that it was not a maintained path intended for the public to use." The first sentence is not supported by competent evidence as there is no evidence that the pathway Mr. Wright entered was marked on both sides. As discussed *supra*, the "No Trespassing" sign on the bridge pylon does not mark the dirt path. Additionally, Officer Martin testified that the "No Trespassing" sign on the ground inside the chain link fence referred to the empty lot inside the fence. The trial court's finding that these signs together marked the pathway mischaracterizes the placement and reasonably understood meaning of the signs and is not supported by competent evidence. Thus, we strike Finding 8 from the Amended Order.

Finding 11 states: "The officers believed the Defendant was trespassing." This finding is not supported by competent evidence. Prior to stopping Mr. Wright, the officers disagreed about whether Mr. Wright was trespassing on the pathway. In conversation amongst themselves before the stop, Officer Krause stated that Mr. Wright was trespassing when he was on the pathway, but Officer Martin asked Officer Slauter if it was trespass and Officer Slauter, who was walking on the pathway, indicated to the contrary that Mr. Wright was in an area known for street-level drug sales and police would have to make voluntary contact. After the fact, at the hearing, Officer Martin testified that he decided to make contact with Mr. Wright based on the tip from the confidential informant. Officer Slauter testified that he said "voluntary contact" to avoid sharing information about the confidential informant. On redirect, Officer Slauter testified somewhat equivocally that he thought "it's trespassing through the area" but he does not normally "arrest people for trespass." Officer Krause, the only officer to indicate that he suspected trespassing at the time of the encounter, did not testify. Thus, the evidence does not support the finding that the officers, at the time of the encounter, believed Mr. Wright was trespassing. Therefore, we strike Finding 11 from the Amended Order.

Finding 20 states: "Officer Martin appeared to have returned Defendant's identification card based on the conversation between them and the actions that were visible on the bodycam footage ("BWC")."[2] This

2. Neither Officer Martin nor Officer Slauter testified that they returned Mr. Wright's identification before the search, and this finding of fact appears to be based solely on the bodycam footage.

finding is not supported by the BWC. At the beginning of the encounter, Officer Martin asked Mr. Wright if he had identification. Mr. Wright gave his identification to Officer Krause, who took the identification back to the police vehicle. The videos show that Officer Krause did not return until after the officers had searched Mr. Wright's backpack, found the gun, and placed him in handcuffs. The videos also show Officer Krause holding an object that appears to be Mr. Wright's identification after Mr. Wright is handcuffed; while holding the identification, Officer Krause is asking Mr. Wright about his criminal history. The competent evidence does not support the finding that the officers returned Mr. Wright's identification prior to the search. Therefore, we strike Finding 20 from the Amended Order.

After careful review, we strike Findings 6, 8, 11, and 20 and leave the remainder of the findings of fact undisturbed.

D. The Trial Court Erred in Denying Mr. Wright's Motion to Suppress

On appeal, Mr. Wright argues that the trial court erred in denying the motion to suppress because he did not freely consent to the search of his backpack and the officers did not have probable cause to search the backpack. We hold that the officers had reasonable suspicion to stop, question, and perform a protective search of Mr. Wright based on the informant's tip. However, Mr. Wright did not voluntarily consent to the search of his backpack, and the officers did not have probable cause to search the backpack. Therefore, the trial court erred in denying Mr. Wright's motion to suppress the evidence.

1. The officers had reasonable suspicion to stop and frisk Mr. Wright, but the search of the backpack exceeded the scope of the initial justified frisk.

[3] The Fourth Amendment to the U.S. Constitution guarantees citizens the right to be secure in their person against unreasonable search and seizure. U.S. Const. amend. IV. The Fourth Amendment is applied against state governments through the Fourteenth Amendment, and comparable protection is afforded by the North Carolina Constitution. N.C. Const. Art. 1, § 20; *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). A brief investigatory detention by law enforcement constitutes a seizure under the Fourth Amendment. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994); *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893-94 (1980). However, only unreasonable investigatory stops are unconstitutional. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70. When a law enforcement officer has a reasonable suspicion

that a suspect has committed or is about to commit a crime, they may briefly seize the suspect and make reasonable inquiries aimed at confirming or dispelling the suspicion. *Minnesota v. Dickerson*, 508 U.S. 366, 373, 124 L. Ed. 2d 334, 344 (1993). An officer has a reasonable suspicion if a "reasonable, cautious officer, guided by his experience and training," would believe that criminal activity is afoot "based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (quoting *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70). The stop must be justified at its inception and reasonably related in scope to the criminal activity that the officer suspects is occurring. *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968).

An informant's tip can provide the requisite reasonable suspicion for an investigatory stop. *Alabama v. White*, 496 U.S 325, 330, 110 L. E. 2d 301, 309 (1990). Reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by police and its degree of reliability. *Id.* While the reasonable suspicion standard is less demanding than probable cause, it still requires that an informant's tip carry some "indicia of reliability." *State v. Watkins*, 120 N.C. App. 804, 809, 463 S.E.2d 802, 805 (1995) (quoting *White*, 496 U.S. at 332, 110 L. Ed. at 310). In evaluating whether an informant's tip sufficiently provides indicia of reliability, we consider the "totality-of-the-circumstances." *State v. Williams*, 209 N.C. App. 255, 263, 703 S.E.2d 905, 910 (2011) (quoting *Illinois v. Gates*, 462 U.S. 213, 233, 76 L. Ed. 2d 527, 545 (1983)). In weighing the reliability of an informant's tip, the court must consider the informant's veracity, reliability, and basis of knowledge. *Williams*, 209 N.C. App. at 262, 703 S.E.2d at 910 (quotation omitted).

Officer Martin testified at trial that he ultimately decided to stop Mr. Wright based on the tip from the confidential informant. Therefore, to determine whether the officers had the requisite reasonable suspicion to stop Mr. Wright, we must evaluate the reliability of the tip. At the hearing, Officer Martin testified that he had known the informant for about a year and had been able to corroborate information from the informant in the past; this history with the informant creates a stronger case for the reliability of the tip. *See Williams*, 209 N.C. App. at 262-63, 703 S.E.2d at 910 ("Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster first-hand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion.")

According to Officer Martin, the informant described the individual as a Black male with dreads wearing a dark jacket, bright orange tennis

shoes, and blue jeans traveling on a bicycle; however, "reasonable suspicion does not arise merely from the fact that the individual encountered met the description given to the officer." *State v. Hughes*, 353 N.C. 200, 209, 539 S.E.2d 625, 632 (2000). When considering the totality of the circumstances here, we conclude the officer's history with the informant and the testimony about his ability to corroborate prior information from this informant, provides a minimal level of objective justification to establish reasonable suspicion for the *Terry* stop and frisk. *See State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008) ("When police act on the basis of an informant's tip, the indicia of the tip's reliability are certainly among the circumstances that must be considered in determining whether reasonable suspicion exists.").

Because we hold that the officers had reasonable suspicion to believe Mr. Wright was armed, they were authorized to perform a protective search of Mr. Wright for weapons. When an officer has reason to believe an individual that they have lawfully stopped is armed and dangerous, the officer may conduct a reasonable search for weapons that may be used to harm the officer or others nearby. *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909; *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016). The scope of the search must be strictly limited to that which is necessary to determine whether an individual has a weapon on their person, and therefore consists of a pat-down of the individual's outer layer of clothing. *See State v. Smith*, 150 N.C. App. 317, 321, 562 S.E.2d 899, 902 (2002) ("A *Terry* frisk generally contemplates a limited pat-down of the outer clothing of an individual").

The pat-down of Mr. Wright's person was justified as a limited, protective search for weapons that could have been used to harm the officers. *Smith*, 150 N.C. App. at 321, 562 S.E.2d at 902 ("[A] protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.' "). The pat-down did not reveal any weapons. Once the *Terry* frisk was complete, the officers could make inquiries of Mr. Wright to confirm or dispel their suspicions without fear of harm. *Smith*, 150 N.C. App. at 321, 562 S.E.2d at 902. Any search of the backpack would be beyond the scope of a *Terry* frisk. *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 375–76 (2005) (stating the scope of the search under *Terry* is protective in nature and is limited to the person's outer clothing and to the search for weapons that may be used against the officer).

We hold that the officers had reasonable articulable suspicion to briefly detain Mr. Wright based on the tip from the confidential informant.

The officers were also justified in performing a protective *Terry* frisk for weapons on Mr. Wright's person. However, the search of the backpack was not justified as part of the frisk because it exceeded the scope of what was necessary to ensure that Mr. Wright did not have a weapon on his person and did not pose a threat to the officers.

2. The search of Mr. Wright's backpack was not lawful.

[4] Mr. Wright did not consent to the search of his backpack and the search was not otherwise justified by probable cause. Therefore, the search of Mr. Wright's backpack was not lawful.

a. Mr. Wright did not consent to the search of his backpack.

A search of private property conducted without a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement.[3] *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982); *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967). "Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment "when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 36 L. Ed. 2d 854, 860 (1973). The North Carolina General Assembly allows law enforcement officers to conduct searches without a warrant or other authorization if consent to the search is given. N.C. Gen. Stat. § 15A-222(1) (2021).

For a "warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary." *Smith*, 346 N.C. at 798, 488 S.E.2d at 213. "We treat the question of voluntariness as a conclusion of law." *State v. Cobb*, 248 N.C. App. 687, 695, 789 S.E.2d 532, 538 (2016). In determining what constitutes 'voluntary' consent, two competing concerns must be accommodated—"the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." *Schneckloth*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 863 (1973). To be voluntary, consent must be free from coercion, express or implied. *State v. Little*, 270 N.C. 234, 239,

3. Recognized exceptions to the warrant requirement include: a protective search upon reasonable suspicion as described in Section D1, *Terry*, 392 U.S. 1, 30-31, L. Ed. 2d 889, 911; seizure of suspicious items that are in plain view if the officers possess the legal authority to be on the premise, *State v. Allison*, 298 N.C. 135, 140, 257 S.E.2d 417, 420 (1979); when probable cause exists and the exigencies of the situation make a search without a warrant imperative, *Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421; and search incident to a lawful arrest, *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556 (1979).

154 S.E.2d 61, 65 (1967); *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 653 (2017).

In examining whether the consent was the product of coercion, the court must consider the possibility of subtly coercive questions from those with authority, as well as the possibly vulnerable subjective state of the person who consents. *Schneckloth*, 412 U.S. at 225-26, 36 L. Ed. 2d at 862. Whether consent is voluntary is based upon the totality of the circumstances, *Smith*, 346 N.C. at 798, 488 S.E.2d at 213, and the State has the burden of proving consent was voluntarily given. *State v. Long*, 293 N.C. 286, 293, 237 S.E.2d 728, 732 (1977); *Bumper v. North Carolina*, 391 U.S. 543, 548, 20 L. Ed. 2d 797, 802 (1968).

Based upon a review of the totality of the circumstances, Mr. Wright's consent to search the backpack was a product of coercion, albeit not ill-intentioned, and was not voluntary. Officers Martin and Slauter together asked Mr. Wright five times within a period of about one and a half minutes for permission to search the backpack, even though Mr. Wright continued to say no.[4] The officers had a duty to respect Mr. Wright's assertion of his Fourth Amendment right to say no to the request to search. *See United States v. Drayton*, 536 U.S. 194, 207, 153 L. Ed. 2d 242, 255 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.").[5] However, the officers did not act in reliance on Mr. Wright's response; instead, Officer Slauter told Mr. Wright they were "specifically looking for somebody" and they could not take Mr. Wright "off the list" because he was being "deceptive." The statement strongly communicates that Mr. Wright would not be allowed to leave unless he consented to the search. *Schneckloth*, 412 U.S. at 225-26, 36 L. Ed. 2d at 862.

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4. A sister state's intermediate court considered repeated requests for consent to search as a factor that supports the conclusion that a reasonable person would believe that compliance with the officer's request was mandatory. *See Kutzorik v. State*, 891 So.2d 645, 648 (Fla.App. 2 Dist. 2005).

5. As Justice Kennedy noted during oral argument: "It seems to me a strong world is when officers respect people's rights and—and people know what their rights are and—and assert their rights [and say to the police] I don't want to be searched. . . . I don't want to be searched. Leave me alone." Oral argument at 47:40, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01-631) https://www.oyez.org/cases/2001/01-631.

During the interaction in the middle of the night, Mr. Wright, an older homeless man, told the officers he was cold and afraid of the police. Throughout the conversation, Officers Martin and Slauter were standing on either side of Mr. Wright and Officer Krause had Mr. Wright's identification in the police vehicle. The combination of multiple uniformed police officers surrounding an older homeless man and making repeated requests to search his backpack on a cold, dark night after he repeatedly asserted his right not to be searched leads us to the conclusion that Mr. Wright's consent was the result of coercion and duress and therefore was not freely given. *Schneckloth*, 412 U.S. at 228, 36 L. Ed. 2d at 863 ("[N]o matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.").

b. The officers did not have probable cause to search the backpack.

Here, the officers needed probable cause for a warrantless search of Mr. Wright's backpack. To determine if probable cause exists based upon an informant's tip, we apply the totality-of-the-circumstances test which considers the informant's reliability and basis of knowledge. *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 598 (2014). Probable cause exists when there is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (quoting *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971)).

In this case, the informant's tip was lacking in both the reliability and basis of knowledge that would be necessary to create probable cause. Officer Martin's testimony confirmed that the informant was known to him for a year and a half; however, Officer Martin did not testify that information from the informant had led to prior arrests. *Cf. State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) ("[t]he fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants"). Although Mr. Wright matched the description provided by the informant, corroboration of mere identifying information, such as the suspect's description and location, is not enough to indicate that a tip is reliable. *State v. Johnson*, 204 N.C. App. 259, 264, 693 S.E.2d 711, 715 (2010) ("Where the detail contained in the [anonymous] tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip."). The informant said there was an individual carrying a firearm on Phifer Avenue; however, the informant did not provide any basis for his knowledge about the criminal activity—unlawful possession of a firearm. *See Florida*

v. J.L., 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000) (noting that the reliability of a tip requires reliability in the "assertion of illegality, not just in its tendency to identify a determinate person."). Put another way, neither the confidential informant, nor the officer testifying as to his relationship with the informant, provided enough information on the reliability or basis of knowledge of the tip to create more than the reasonable suspicion necessary to justify the *Terry* frisk; not to create probable cause. Additionally, the tip did not predict any future behavior; a characteristic of a tip that the U.S. Supreme Court has held can demonstrate the informant is not only honest but also well-informed. *See White*, 496 U.S. at 332, 110 L. Ed. 2d at 310 (holding that an anonymous tip can be corroborated by its accurate prediction of future activity).

Therefore, neither the informant's tip nor the *Terry* frisk provided the officers with probable cause for a warrantless search of Mr. Wright's backpack. *Terry*, 392 U.S. at 25-26, 20 L. Ed. 2d at 908. While we held that the informant's tip had an indica of reliability to establish reasonable suspicion for the stop, the tip was insufficient to establish the higher threshold of probable cause to search the backpack. *Cf. Adams v. Williams*, 407 U.S. 143, 144, 147, 32 L. Ed. 2d 612, 616, 617 (1972) (holding that the unverified tip from a known informant was sufficient for reasonable suspicion to support an investigatory stop but the Court noted that such an unverified tip may not be sufficient to support probable cause).

Because the informant's tip did not provide a basis of knowledge for the allegation that Mr. Wright had an illegal firearm, we hold that the informant's tip was insufficient to provide probable cause to search the backpack. Therefore, the warrantless search of Mr. Wright's backpack was not justified, and the evidence obtained from that illegal search must be excluded.

III. CONCLUSION

After careful review of the issues identified in Mr. Wright's brief, we hold that the trial court's Findings of Fact 6, 8, 11, and 20 were not properly supported by competent evidence. Additionally, we hold that the trial court erred in denying Mr. Wright's motion to suppress because the search that yielded the evidence was not lawful. Accordingly, we reverse the court's order denying Mr. Wright's motion to suppress the evidence and vacate the *Alford* plea.

REVERSED AND VACATED.

Judges HAMPSON and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 12 SEPTEMBER 2023)

EDWARDS v. ANDERSON No. 23-14	Pitt (21CVD2029)	Affirmed
IN RE A.E. No. 23-28	Watauga (18JT60-64)	Affirmed
IN RE A.F.F. No. 23-125	Gaston (19JT11) (19JT64)	Affirmed
MONTESSORI SCH. OF DURHAM v. FUCHS No. 22-741	Durham (21CVS1382) (21CVS1387)	Affirmed and Remanded
STATE v. GILES No. 22-1032	Buncombe (17CRS89663)	No Error in Part, Remanded in Part.
STATE v. JONES No. 23-404	Davidson (22CRS1539)	Dismissed
STATE v. NUNEZ-SARRAIOS No. 23-306	Wake (19CRS209856-64) (19CRS221220-23)	Vacated and Remanded
STATE v. PRICE No. 22-1064	Cleveland (20CRS50345) (20CRS72)	No Error.
STATE v. PUTNAM No. 23-78	Catawba (18CRS54145-47)	No Error
STATE v. RIVERS No. 23-176	Union (20CRS350) (20CRS50732)	Dismissed in Part; No Prejudicial Error in Part
STATE v. RUSSELL No. 22-1059	Orange (18CRS1574) (18CRS53431)	No Error
STATE v. SANDERS No. 20-428	Forsyth (18CRS1973) (18CRS56475)	Affirmed
STATE v. SLOAN No. 23-272	Duplin (20CRS50621)	Vacated and Remanded

STATE v. SMALLWOOD No. 23-195	Iredell (16CRS55957, 16CRS55158, 16CRS55159, 16CRS55160, 16CRS55161)	No Prejudicial Error
STATE v. TAYLOR No. 22-1020	Gaston (15CRS1557) (15CRS2945) (15CRS5353)	No Error in Part; No Plain Error in Part; Dismissed Without Prejudice in Part
STATE v. TILLMAN No. 22-630	Anson (20CRS50538) (21CRS437-438)	No Error In Part; Vacated In Part; and Remanded.
TAYLOR v. PINEY GROVE VOLUNTEER FIRE & RESCUE DEP'T, INC. No. 22-259	Wake (20CVS13487)	Reversed and Remanded

IN RE N.M.

[290 N.C. App. 482 (2023)]

IN THE MATTER OF N.M.

No. COA23-100

Filed 19 September 2023

Juveniles—disposition—statutory factors—no findings

In a juvenile action arising from a physical altercation on a school bus, the trial court erred by failing to make findings addressing the statutory factors in N.C.G.S. § 7B-2501(c) prior to determining the juvenile's disposition. Checking the boxes on the preprinted Juvenile Level 1 Disposition Order form indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment—while leaving the Other Findings section blank—was insufficient to comply with the statute's requirements.

Appeal by Defendant from an order entered 23 August 2022 by Judge William F. Southern, III in Surry County District Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa K. Walker, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for the juvenile appellant.

WOOD, Judge.

John Bailey[1] (the "juvenile") appeals the trial court's disposition order placing him on probation for twelve months following the trial court adjudicating him delinquent for simple assault. We vacate the disposition order and remand for a new disposition hearing in accordance with N.C. Gen. Stat. § 7B-2501(c).

I. Factual and Procedural History

On 3 May 2022, the juvenile and Michael Anderson ("Anderson") engaged in a physical altercation over seating on a school bus. The parties have a history of conflict over who sits where on the bus. Approximately

1. Pseudonyms are used to protect the identity of the juveniles pursuant to N.C. R. App. P. 42(b).

one week prior to the incident in this case, Anderson warned the juvenile "if [you] pull me out of the seat again, I will do something about it." At the adjudication hearing, testimony conflicted as to whether seats were assigned by the school or were considered "assigned" by the students who customarily sat in a particular seat. The juvenile testified he asked Anderson to leave his seat, but Anderson did not move. Anderson testified the juvenile just walked up to him, and Anderson assumed he was there to take his seat again. Anderson kicked the juvenile in his lower stomach or groin area. The juvenile then punched Anderson on or around his head approximately ten times.

The school resource officer reviewed the video and called Anderson into his office to have him explain what happened. Subsequently, a juvenile petition charging the juvenile with misdemeanor assault was filed on 6 May 2022. The adjudication and disposition hearings were held in immediate succession on 23 August 2022. A video of the incident recorded by the bus cameras was presented at the adjudication hearing. The trial court adjudicated the juvenile delinquent for the offense of simple assault. The trial court then proceeded to the disposition hearing wherein it entered a Level 1 Disposition placing the juvenile on probation for twelve months and ordering him to participate in and complete various programs and conditions.

The juvenile appealed pursuant to N.C. Gen. Stat. § 7B-2602.

II. Standard of Review

The juvenile argues the trial court erred in entering the disposition order and that it must be vacated because the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-2501(c). "Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*." *In re J.D.*, 267 N.C. App. 11, 19, 832 S.E.2d 484, 490 (2019). "Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court." *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012).

III. Discussion

Pursuant to N.C. Gen. Stat. § 7B-2501(c), the court is required to select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile based upon:

(1) The seriousness of the offense;

(2) The need to hold the juvenile accountable;

> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2023).

This Court has held "the trial court is required to make findings demonstrating that it considered the [N.C. Gen. Stat.] § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter." *In re V.M.*, 211 N.C. App. 389, 391–92, 712 S.E.2d 213, 215 (2011). "The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition." *In re I.W.P.*, 259 N.C. App. 254, 261, 815 S.E.2d 696, 702 (2018).

The juvenile alleges the trial court failed to properly consider and apply the five factors identified in the statute prior to determining his disposition and failed to issue a written order indicating the consideration of these factors. The juvenile argues this constitutes reversible error. We agree.

Here, the trial court received into evidence a predisposition report, risk assessment, and needs assessment from the juvenile court counselor as well as a Youth Assessment and Screening Instrument (YASI) full narrative assessment which contained much information from which the trial court could have made the necessary findings required by N.C. Gen. Stat. § 7B-2501(c). However, the trial court did not make any written finding regarding the five factors as required. The court used the preprinted Juvenile Level 1 Disposition Order form and checked the boxes finding that it received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment; however, the trial court made no independent findings. The section titled "Other Findings" was left blank. The State agrees with the juvenile—and concedes—that checking the boxes indicating the trial court received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment was insufficient under N.C. Gen. Stat. § 7B-2501(c).

This case is similar to *In re V.M.* wherein "the trial court checked boxes [on the disposition order,] indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment." 211 N.C. App. at 392, 712 S.E.2d at 215. However, the disposition order did not contain any "additional

findings of fact, including in the area designated as 'Other Findings,' " which lists the same factors contained in N.C. Gen. Stat. § 7B-2501(c). *Id.* at 392, 712 S.E.2d at 215–16. This Court "reverse[d] the trial court's dispositional order and remand[ed] th[e] matter for a new dispositional hearing." *Id.* at 392, 712 S.E.2d at 216; *see also In re J.A.D.*, 283 N.C. App. 8, 24–25, 872 S.E.2d 374, 387–88 (2022) (remanding for further findings because the trial court did not make findings addressing the N.C. Gen. Stat. § 7B-2501(c) factors).

Although the information regarding the statutory factors may be included in the reports given to the court by the juvenile court counselor and may have been considered by the trial court, the trial court is vested with the responsibility of making oral and written findings showing its consideration of the five factors contained in N.C. Gen. Stat. § 7B-2501(c). The Level 1 Juvenile Disposition Form includes a note to the trial court under "Other Findings" to remind the trial court of the findings that must be made:

> NOTE: State any findings regarding the seriousness of the offense(s); the need to hold the juvenile accountable: the importance of protecting the public, the degree of the juvenile's culpability; the juvenile's rehabilitative and treatment needs; and available and appropriate resources. Also use this space for any findings that are required to support a particular disposition, such as a finding of the juvenile's ability to pay if the Court is ordering restitution.

This section must be filled with findings made by the trial court regarding the five factors required by the statute, otherwise it is reversible error.

IV. Conclusion

Because the trial court must make findings addressing the statutory factors in N.C. Gen. Stat. § 7B-2501(c), we vacate the disposition order and remand for a new dispositional hearing and entry of an order that includes written findings showing its consideration of the five factors contained in N.C. Gen. Stat. § 7B-2501(c). *In re V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 216; *In re J.A.D.*, 183 N.C. App. at 24–25, 872 S.E.2d at 387–88.

VACATED AND REMANDED.

Judge DILLON and ZACHARY concur.

ONNIPAUPER LLC, PLAINTIFF
v.
EUGENE DUNSTON, DEFENDANT

No. COA23-151

Filed 19 September 2023

1. Consumer Protection—North Carolina Debt Collections Act—threshold elements—unfair act—landlord-tenant context—monthly fee for use of well on leased premises

An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection Act (specifically, the prohibition found in N.C.G.S. § 75-55(2) against collecting debts through "unconscionable means") by collecting a monthly fee from defendant to use a well that provided water for the leased premises. Defendant failed to establish a valid section 75-55 claim where—although he did satisfy three threshold elements, showing that he was a "consumer" who owed a "debt" to a "debt collector"—he failed to show that plaintiff committed an "unfair act" by charging him the monthly well-use fee, which was neither contrary to public policy nor prohibited by statute since it neither violated N.C.G.S. § 42-42 (which requires landlords to provide fit and habitable premises for tenants but does not require landlords to do so for free) nor violated N.C.G.S. § 42-42.1 (which provides that a lessor "may" charge lessees for water consumption based on a metered measurement, but which would not have required plaintiff to do so because of an exemption applicable to landlord-tenant relationships).

2. Consumer Protection—North Carolina Debt Collections Act—threshold elements—proximate injury—summary ejectment action—wrong amount of rent listed in complaint

An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection Act (specifically, the provision found in N.C.G.S. § 75-54(4) prohibiting debt collectors from falsely representing "in any legal proceeding" the amount of debt a consumer owes them) by incorrectly listing in its complaint the amount of rent defendant paid under the parties' lease agreement. In listing the rate of rent, plaintiff mistakenly included a washer-dryer

fee that plaintiff had waived after the parties amended the lease agreement; however, defendant was not proximately injured by plaintiff's error—a threshold element for a section 75-54(4) claim—since plaintiff did in fact waive the washer-dryer fee and defendant never argued that he paid or was misled about the fee.

Appeal by Plaintiff from order entered 13 October 2022 by Judge David Baker in Wake County District Court. Heard in the Court of Appeals 9 August 2023.

City of Oaks Law, by Hunter Blake Winstead & Jonathan W. Anderson, for Plaintiff-Appellant.

Legal Aid of North Carolina, Inc., by BreAnna VanHook, Christopher Stella, Pamela Thombs, Celia Pistolis, & Isaac W. Sturgill, for Defendant-Appellee.

CARPENTER, Judge.

Onnipauper LLC ("Plaintiff") appeals from the trial court's order dismissing its complaint in summary ejectment and granting a money judgment to Eugene Dunston ("Defendant"). On appeal, Plaintiff asserts the trial court erred by concluding Plaintiff violated the North Carolina Debt Collection Act (the "NCDCA"). After careful review, we agree with Plaintiff. Therefore, we reverse the trial court's order.

I. Factual & Procedural Background

Starting in August 2019, Plaintiff rented a Raleigh property (the "Property") to Defendant. The Property is a single-family home with a well that supplies water solely to the home. On 15 August 2019, the parties executed a rental contract (the "Lease"). Under the terms of the Lease, Plaintiff agreed to rent the Property to Defendant, and Defendant agreed to pay monthly rent of $1,175. Four days after executing the Lease, the parties signed an amendment, modifying the "[t]otal rent" to a monthly amount of $1,350. The amended Lease itemized the rent, detailing a "[b]ase rent" of $1,175, a "[w]ater utility" amount of $125, and a "[w]asher[–d]ryer" amount of $50. The water-utility amount refers to Defendant's use of the well.

Plaintiff and Defendant later excluded the $50 washer–dryer amount from Defendant's total rent because Defendant did not use the washer or dryer. Therefore, after the amendment, Defendant's total rent was

$1,300. Throughout Defendant's tenancy, a third party subsidized part of Defendant's base rent, and Defendant paid the difference plus the "[w]ater utility" amount. On 31 January 2022, Plaintiff gave Defendant a written notice to vacate the Property by 11 March 2022.

Defendant refused to leave the Property, so on 1 April 2022, Plaintiff filed a complaint for summary ejectment against Defendant in Wake County Small Claims Court. The complaint listed the "rate of rent" as $1,350. On 18 April 2022, the small-claims magistrate ordered Defendant to vacate the Property. On 22 April 2022, Defendant appealed to Wake County District Court. On 2 June 2022, Defendant answered Plaintiff's complaint, raised affirmative defenses, and asserted counterclaims for violations of the NCDCA.

After a bench trial conducted on 23 August 2022, the trial court found Plaintiff violated two provisions of the NCDCA. Specifically, the trial court found "Plaintiff violated N.C. Gen. Stat. § 75-55(2) twenty-nine (29) times by attempting to collect and collecting a fee for the provision of water that [it was] not legally entitled to collect." The trial court also found Plaintiff violated N.C. Gen. Stat. § 75-54(4) by stating in its complaint that Defendant's "rate of rent" was $1,350, rather than $1,175. In support of these violations, the trial court found:

> 56. Pursuant to North Carolina General Statute § 42-42(2) the landlord has a standing obligation to do whatever is necessary to put and keep the premises in a fit and habitable condition. Additionally, the landlord must comply with the provision of North Carolina General Statute § 42-42(4) by maintaining in good and safe working order, plumbing and other facilities provided by the landlord.
>
> 57. Access to running water is essential to the habitability of the leased premises. Thus, Landlord is not entitled to charge an additional fee to the tenant for upholding this basic statutory obligation to provide fit premises.
>
> . . . .
>
> 61. Plaintiff was not entitled to collect fees from Defendant for the provision of unmetered well water. These charges are not lawful, and tenant is entitled to a reimbursement of all payments for water and sewer.

Thus, the trial court dismissed Plaintiff's complaint with prejudice and awarded $25,876 to Defendant. Plaintiff timely appealed on 2 November 2022.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

The issues on appeal are whether the trial court erred by concluding Plaintiff violated N.C. Gen. Stat. § 75-54(4) (2021) and N.C. Gen. Stat. § 75-55(2) (2021).

IV. Standard of Review

When we review decisions from a bench trial, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). But "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). " '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. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"The label of fact put upon a conclusion of law will not defeat appellate review." *City of Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946). Thus, findings of fact that are actually conclusions of law will be reviewed as conclusions of law. *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276 (1981). And determinations reached by "application of legal principles" are conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

Here, the trial court made findings of fact asserting Plaintiff violated sections 75-54 and 75-55. These assertions, however, required an application of legal principles; specifically, these assertions required application of statutory elements. *See* N.C. Gen. Stat. §§ 75-54(4), -55(2). Because we are not bound by the trial court's labels, we will review these "findings of facts" as conclusions of law, as they were reached by an application of legal principles. *See Heath*, 226 N.C. at 755, 40 S.E.2d at 604; *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. Accordingly, we will review these conclusions of law de novo. *See Carolina Power & Light*, 358 N.C. at 517, 597 S.E.2d at 721.

V. Analysis

On appeal, Plaintiff argues the trial court erred in holding that it violated N.C. Gen. Stat. §§ 75-54, -55. After careful review, we agree with Plaintiff on both arguments. Because it is more involved, we will address section 75-55 first.

A. N.C. Gen. Stat. § 75-55(2)

[1] Chapter 75 of our General Statutes contains the NCDCA, which prohibits certain debt-collection activity. *See* N.C. Gen. Stat. §§ 75-51 to -55 (2021). Section 75-55 prohibits debt collectors from collecting debts "by unconscionable means," which includes "[c]ollecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge." *Id.* § 75-55(2).

But before diving into the specific requirements of section 75-55, we must first analyze the six threshold elements applicable to all NCDCA claims. *Reid v. Ayers*, 138 N.C. App. 261, 263–66, 531 S.E.2d 231, 233–35 (2000). All NCDCA claims require: (1) a consumer; (2) that owes a debt; (3) to a debt collector. *Id.* at 263, 531 S.E.2d at 233. Further, all NCDCA claims require: (4) the debt collector to commit an unfair act; (5) that affects commerce; and (6) that proximately injures the consumer. *Id.* at 266, 531 S.E.2d at 235. Because a section 75-55 claim is conjunctive, including the threshold elements, we will walk through each element until we reach a dead end or valid claim.

1. Consumer

A "consumer" is "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes." N.C. Gen. Stat. § 75-50(1) (2021). Here, Defendant is a natural person who incurred this alleged debt for well-water use at his home. Well-water use at one's home is a personal, household purpose. Defendant is therefore a consumer under the NCDCA. *See id.*

2. Debt

A "debt" is "any obligation owed or due or alleged to be owed or due from a consumer." *Id.* § 75-50(2). In *Friday v. United Dominion Realty Trust*, this Court said that "past due" rent is debt under section 75-50. 155 N.C. App. 671, 678, 575 S.E.2d 532, 537 (2003). Plaintiff points to *Friday* and federal-court interpretations of the NCDCA for the proposition that "debt" requires the consumer to be in default, meaning the payment must be past due. We think this is a misreading of "debt."

When examining statutes, words undefined by the General Assembly "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). "Debt" is statutorily defined, but "owed" and "due" are not. *See* N.C. Gen. Stat. § 75-50. Therefore, we look to the common meaning of "owed" and "due." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03. "Owe" is defined as "to be under obligation to pay or repay in return for something received." *Owe*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020). "Due" is defined as "owed or owing as a debt." *Due*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*. And contrary to Plaintiff's position, the *Reid* Court implied that payment timing is irrelevant to defining debt; the *Reid* Court focused on whether there was an obligation to pay, not when the payment was due. *See Reid*, 138 N.C. App. at 264, 531 S.E.2d at 234.

Here, Defendant was obliged to pay Plaintiff $125 each month to use a well. Defendant's obligation to pay accrued at the beginning of each month that Defendant occupied the Property. Regardless of the timing of his payments, Defendant was indebted to Plaintiff because Defendant was obliged to pay "in return for something received," well access. *See* N.C. Gen. Stat. § 75-50(2); MERRIAM-WEBSTER'S, *supra*. Therefore, given the "common and ordinary meaning" of "debt," Defendant owed Plaintiff a debt under the NCDCA. *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03.

3. Debt Collector

A "debt collector" is "any person engaging, directly or indirectly, in debt collection from a consumer." N.C. Gen. Stat. § 75-50(3). "Debt collector" is defined broadly: "there is no regularity or primary purpose limitation." *Reid*, 138 N.C. App. at 265, 531 S.E.2d at 234. Here, the parties do not dispute that Plaintiff collected money from Defendant, a consumer. Because we have established that the money collected was a debt, Plaintiff is therefore a debt collector under the NCDCA. *See* N.C. Gen. Stat. § 75-50(3); *Reid*, 138 N.C. App. at 265, 531 S.E.2d at 234.

4. Unfair Act

We must now determine whether Plaintiff committed an "unfair act." *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Whether an act is unfair depends on the facts of the case. *Id.* at 548, 276 S.E.2d at 403. Concerning contractual obligations, "our state's

legal landscape recognizes that, unless contrary to public policy or prohibited by statute, freedom of contract is a fundamental constitutional right." *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 243, 539 S.E.2d 274, 276 (2000).

"In the absence of statutory proscription or public policy violation, it is beyond question that parties are free to contract as they deem appropriate . . . ." *Id.* at 244, 539 S.E.2d at 277. Because parties are free to contract as they please, *see id.* at 244, 539 S.E.2d at 277, and because we are not moral arbiters—we do not deem a practice "immoral, unethical, oppressive, unscrupulous, or substantially injurious" unless the contract is prohibited by the General Assembly or other controlling authority, *see Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Therefore, we must determine whether the well-use provision is "contrary to public policy or prohibited by statute" to determine whether Plaintiff committed an unfair act under the NCDCA. *See Hlasnick*, 353 N.C. at 243, 539 S.E.2d at 276; *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

Here, in addition to the "base rent," the parties mutually agreed that Defendant would pay Plaintiff $125 each month to use the well. And for twenty-nine months, Defendant paid Plaintiff to use the well. Yet the trial court found the well-use provision "unlawful" under N.C. Gen. Stat. § 42-42 (2021). If the provision was indeed unlawful under section 42-42, it would be against public policy and therefore unfair under the NCDCA. *See Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Accordingly, we must analyze the legality of the well-use provision to determine if it was "unfair" under the NCDCA.

i. N.C. Gen. Stat. § 42-42

Under section 42-42, landlords must "provide fit premises" for tenants. *See* N.C. Gen. Stat. § 42-42. Specifically, landlords must "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition," *id.* § 42-42(2), and landlords must "[m]aintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord," *id.* § 42-42(4).

Here, the trial court found the well-use provision unlawful under subsections 42-42(2) and (4) because Plaintiff was "not entitled to charge an additional fee to the tenant for upholding this basic statutory obligation to provide fit premises." In other words, the trial court found Plaintiff violated subsections 42-42(2) and (4) because Plaintiff was not entitled to separately charge Defendant for providing a fit premises.

Nothing in our statutes or caselaw supports this proposition. Plaintiff is required to provide a fit premises; it is not required to do so for free. *See id.* § 42-42(2), (4).

As mentioned above, Defendant and Plaintiff contracted for Defendant to pay $125 per month for well access. Defendant paid, and Plaintiff provided. No evidence suggests the Property was unfit for Defendant, and no evidence suggests that a separate well-use fee is prohibited by section 42-42. Therefore, Plaintiff did not violate section 42-42 by charging Defendant a well-use fee. *See id.* § 42-42(2), (4).

ii. N.C. Gen. Stat. § 42-42.1

Defendant also asserts Plaintiff's well-use provision is unlawful under N.C. Gen. Stat. § 42-42.1 (2021) because Plaintiff is required to charge for water based on a metered measurement. So according to Defendant, the well-use provision is prohibited and therefore unfair under the NCDCA. We disagree.

Under section 42-42.1, "[f]or the purpose of encouraging water, electricity, and natural gas conservation, pursuant to a written rental agreement, a lessor *may* charge for the cost of providing water or sewer service to lessees pursuant to [N.C. Gen. Stat.] 62-110(g) . . . ." *id.* § 42-42.1(a) (emphasis added). Generally, "may" does not mandate; "may" merely permits. *Campbell v. First Baptist Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). Nonetheless, we will analyze section 62-110 to confirm the general understanding of "may" is applicable here.

Subsection 110(g)(1) of Chapter 62, titled "Public Utilities," provides that "all charges for water or sewer service shall be based on the user's metered consumption of water, which shall be determined by metered measurement of all water consumed." N.C. Gen. Stat. § 62-110(g)(1) (2021). In a preceding section, however, Chapter 62 provides:

> authority shall be vested in the North Carolina Utilities Commission to regulate *public utilities* . . . . Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Id. § 62-2(b) (2021) (emphasis added).

The General Assembly was clear: Chapter 62 governs only public utilities. *Id.* And this Court has confirmed the clarity: "Chapter 62 of the North Carolina General Statutes defines and prescribes the way public

utilities are regulated within the state." *State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC*, 279 N.C. App. 217, 220, 865 S.E.2d 323, 325 (2021); *see also*, *e.g.*, *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 255 N.C. App. 613, 616, 805 S.E.2d 712, 714 (2017) ("The Public Utilities Act, found in Chapter 62 of our General Statutes, gives the Commission the power to supervise and control the 'public utilities' in our State."); *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 163 N.C. App. 46, 48, 592 S.E.2d 221, 223 (2004) ("Chapter 62 of our statutes governs public utilities . . . .").

Concerning water use, a "public utility" is a person "owning or operating in this State equipment or facilities for . . . [d]iverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation." N.C. Gen. Stat. § 62-3(23)(a)(2) (2021). A "public utility" is not, however, a person who "furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others." *Id.* § 62-3(23)(d)(4). In other words, subsection 62-3(23)(d)(4) exempts those who solely provide water in a landlord–tenant relationship from public-utility regulation. *Cube*, 279 N.C. App. at 220, 865 S.E.2d at 326 (citing N.C. Gen. Stat. § 62-3(23)(d)(4)) (stating that "[subs]ection 62-3(23)(d) exempts from the definition of a 'public utility' an entity acting in a landlord/tenant relationship").

Here, Plaintiff is a landlord, Defendant was Plaintiff's tenant, and the Property is a single-family dwelling with a well as its water source. Plaintiff rented Defendant access to the well, and that "service or commodity [was] not resold to or used by others." *See* N.C. Gen. Stat. § 62-3(23)(d)(4). Thus, Plaintiff falls squarely within the landlord–tenant exemption and is not regulated as a public utility under Chapter 62. *See id.*; *Cube*, 279 N.C. App. at 220, 865 S.E.2d at 326. Therefore, Plaintiff is not required to charge for water consumption based on a metered measurement. *See* N.C. Gen. Stat. § 62-3(23)(d)(4); *Cube*, 279 N.C. App. at 220, 865 S.E.2d at 326.

Returning to the use of "may" in section 42-42.1: The landlord–tenant exemption supports the generally understood meaning of "may." It is permissive. *See Campbell*, 298 N.C. at 483, 259 S.E.2d at 563; N.C. Gen. Stat. § 42-42.1(a). Section 42-42.1 states lessors may comply with section 62-110, and Chapter 62 has a landlord–tenant exemption. *See* N.C. Gen. Stat. §§ 42-42.1(a), 62-3(23)(d)(4). With the exemption, Chapter 62 does not govern landlords who provide water to "tenants when such service or commodity is not resold to or used by others." *See id.* § 62-3(23)(d)(4). In other words, lessors who qualify for the landlord–tenant exemption are not regulated as public utilities under Chapter 62. *See id.*

So when section 42-42.1 states "a lessor may" choose to comply with section 62-110, the statute merely permits compliance with section 62-110. *See Campbell*, 298 N.C. at 483, 259 S.E.2d at 563; N.C. Gen. Stat. § 42-42.1(a). It does not require compliance. Otherwise, "may" would mandate metered measurement as a public utility and would clash with the landlord–tenant exemption. *See* N.C. Gen. Stat. § 62-3(23)(d)(4). Because "may" is generally understood to permit, and that general understanding supports the landlord–tenant exemption, the permissive meaning applies to section 42-42.1. *See Campbell*, 298 N.C. at 483, 259 S.E.2d at 563; N.C. Gen. Stat. § 42-42.1(a). Thus, section 42-42.1 does not require lessors to follow section 62-110, and Plaintiff's well-use provision is lawful. *See* N.C. Gen. Stat. § 42-42.1(a). But as discussed above: Even if section 42-42.1 required lessors to comply with section 62-110, Plaintiff would be exempt from compliance because of the landlord–tenant exemption, and the well-use provision would still be lawful. *See id.* § 62-3(23)(d)(4).

We conclude Plaintiff's well-water provision does not violate sections 42-42 or 42-42.1. Therefore, the well-water provision does not violate public policy and is not unfair under the NCDCA. *See Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Hence, Defendant failed to satisfy a threshold NCDCA element, and Defendant therefore failed to establish a section 75-55 claim. *See Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235; N.C. Gen. Stat. § 75-55(2). Because the elements of such a claim are conjunctive, we need not address its remaining elements.

B. N.C. Gen. Stat. § 75-54(4)

[2] Section 75-54 prohibits debt collectors from "[f]alsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding." N.C. Gen. Stat. § 75-54(4). "To prevail on a claim for violation of [section 75-54], one need not show deliberate acts of deceit or bad faith, but must nevertheless demonstrate that the act complained of 'possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Forsyth Mem'l Hosp., Inc. v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169–70 (1992) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). But like any other NCDCA claim, section 75-54 requires the threshold NCDCA elements. *See Reid*, 138 N.C. App. at 263–66, 531 S.E.2d at 233–35. For efficiency's sake, we will start with the proximate-injury element. *See id.* at 266, 531 S.E.2d at 235 (listing the final NCDCA element as an act "proximately causing injury").

Here, the Lease itemized the rent, detailing a "[b]ase rent" of $1,175, a "[w]ater utility" amount of $125, and a "[w]asher[–d]ryer" amount

of $50. Defendant suggests Plaintiff violated section 75-54 because Plaintiff's complaint listed Defendant's "rate of rent" as $1,350, which Defendant contends is inaccurate because he did not owe a washer–dryer fee, and because the well-use fee was unlawful.

We have already established the well-use provision was lawful. But as Defendant points out, Plaintiff waived the washer–dryer fee, lowering the rent to $1,300. Thus, the actual rent was $1,300, and Plaintiff's complaint listed the rent as $1,350. Defendant, however, was not proximately injured by Plaintiff's "false representation." Defendant never overpaid because of Plaintiff's error. Indeed, Defendant failed to pay any rent after Plaintiff filed its complaint. Nor did Plaintiff's error deceive Defendant. Defendant only alleged Plaintiff deceived him due to the unlawfulness of the well-use provision, but as detailed above, we conclude the provision was lawful. Further, Plaintiff agreed to waive the washer–dryer fee, and Defendant never argued that he paid, or was misled, about the fee.

Therefore, Plaintiff did not violate section 75-54 because Defendant was not proximately injured by Plaintiff's error. *See Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235. Accordingly, we conclude the trial court erred when it found Plaintiff violated section 75-54. *See id.* at 266, 531 S.E.2d at 235; N.C. Gen. Stat. § 75-54(4).

VI. Conclusion

In sum, we hold the trial court erred in concluding Plaintiff violated sections 75-54 and 75-55. Thus, we reverse the trial court's order.

REVERSED.

Judge TYSON and Judge FLOOD concur.

PINNACLE HEALTH SERVICES OF NORTH CAROLINA LLC, D/B/A CARDINAL POINTS IMAGING OF THE CAROLINAS WAKE FOREST AND OUTPATIENT IMAGING AFFILIATES LLC, PETITIONER

v.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICES REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT, AND DUKE UNIVERSITY HEALTH SYSTEM INC., RESPONDENT-INTERVENOR

No. COA22-1042

Filed 19 September 2023

1. Administrative Law—standard of appellate review—administrative law judge's final decision—reversing government agency decision—whole record test—deference to administrative law judge

In a contested case where an administrative law judge (ALJ) reversed a decision by the Department of Health and Human Services (respondent-agency) to award a certificate of need for an MRI scanner to a university healthcare system (respondent-intervenor) rather than to a medical imaging company (petitioner), and where respondents subsequently appealed from the ALJ's final decision, the appellate court reviewed the case by applying the whole record test and by giving deference to the ALJ's final decision rather than to respondent-agency's initial decision, in large part because of a 2011 amendment to the Administrative Procedure Act that gave ALJs the authority to render final decisions in challenges to agency actions (whereas, previously, ALJs would issue recommendations that the agency was then free to accept or reject in full or in part).

2. Administrative Law—appeal from administrative law judge's final decision—reversing government agency decision—appellants' failure to challenge specific findings

In a contested case where an administrative law judge (ALJ) reversed a decision by the Department of Health and Human Services (respondent-agency) to award a certificate of need for an MRI scanner to a university healthcare system (respondent-intervenor) rather than to a medical imaging company (petitioner), the appellate court declined to review the merits of respondents' appeal from the ALJ's final decision where, in advancing their arguments, respondents failed to challenge specific findings of fact made by the ALJ, and therefore all of the ALJ's findings were deemed to be supported by the evidence under the whole record test and binding on the parties.

Judge TYSON dissenting.

Appeal by North Carolina Department of Health and Human Services, Division of Health Services Regulation, Health Care Planning and Certificate of Need Section, and Duke University Health System Inc. from the final decision entered 19 July 2022 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 9 August 2023.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Matthew A. Fisher, for respondent-intervenor-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for respondent-appellant.

Fox Rothschild LLP, by Marcus C. Hewitt, for petitioner-appellee.

FLOOD, Judge.

North Carolina Department of Health and Human Services and Duke University Healthcare Systems Inc. (collectively "Respondents") appeal from the Final Decision of the Administrative Law Judge ("ALJ"). After careful review, we affirm.

I. Factual and Procedural Background

Petitioners Pinnacle Health Services of North Carolina and Outpatient Imaging Affiliates (collectively "Pinnacle") are limited liability companies authorized to conduct business in the state of North Carolina. Pinnacle operates medical imaging practices in Wake County, North Carolina. Respondent-Intervenor, Duke University Healthcare Systems ("Duke"), provides medical care, hospital care, medical education, and medical research in North Carolina. Respondent North Carolina Department of Health and Human Services (the "Agency") is the administrative body responsible for the administration of North Carolina Certificate of Need ("CON") law. A CON is required for certain "institutional health services," such as the procurement of a magnetic resonance imaging ("MRI") scanner.

On 15 April 2021, Pinnacle filed a CON application with the Agency, proposing to place one fixed MRI scanner in a diagnostic center in Wake Forest, North Carolina. On the same day, Duke filed a CON application with the Agency, proposing to place an MRI scanner in its diagnostic center in Raleigh, North Carolina. The Agency could approve only one

application. Thus, the Agency conducted a competitive review of the applications to determine which was more effective for the purposes of awarding the CON. On 24 September 2021, the Agency approved Duke's application and denied Pinnacle's application. The Agency determined Duke's application was more effective as to geographic accessibility and access to service areas for residents—two of the factors required in a competitive review.

On 22 October 2021, Pinnacle filed a Petition for Contested Case Hearing in the Office of Administrative Hearings, appealing the Agency's decision. The appeal was heard by ALJ Lassiter in a week-and-a-half-long hearing. On 19 July 2022, ALJ Lassiter entered the Final Decision awarding the CON to Pinnacle and reversing the Agency's decision to award the CON to Duke. ALJ Lassiter concluded the Agency's decision was based on material errors in the geographic accessibility analysis that led to the erroneous decision that Duke's application would be more effective. ALJ Lassiter further concluded the Agency erroneously failed to follow principles used to determine historical utilization, which would have revealed Pinnacle's as the more effective application. Finally, ALJ Lassiter concluded Pinnacle met its burden of demonstrating the Agency's decision substantially prejudiced its rights.

On 18 August 2022, Respondents filed timely notices of appeal.

II. Jurisdiction

The Final Decision issued by ALJ Lassiter is a final decision pursuant to N.C. Gen. Stat. § 131E-188 (2021). This Court, therefore, has jurisdiction to review this appeal from a final judgment entered by an ALJ pursuant to N.C. Gen. Stat. § 7A-29(a) (2021).

III. Analysis

Duke presents two arguments on appeal: (1) the ALJ erred in analyzing and changing the Agency's comparative analysis review; and (2) the Agency correctly concluded Duke's application was comparatively superior and the most effective alternative under its comparative review analysis. The Agency argues the ALJ's final decision should be reversed due to Pinnacle's failure to demonstrate substantial prejudice. Because Duke and the Agency failed to make any specific arguments challenging any specific findings of fact, we will not reach the merits of their respective arguments.

A. Standard of Review

[1] Even though Duke and the Agency adopt each other's respective arguments by reference pursuant to North Carolina Rule of Appellate

Procedure 28(f), for clarity, we will attribute the arguments made in each brief to the respective party. First, we begin with Duke's arguments regarding the appropriate standard of review.

Duke implores this Court to review this case by giving deference to the Agency's decision, and not to the Final Decision of the ALJ. To support this argument, Duke cites several of this Court's precedents that did, in fact, analyze agency decisions by giving deference to the agency's expertise and experience in the particular field. While this review would have been correct in the cases preceding the 2011 legislative session, it is not a correct application of current law. What Duke failed to note, either fortuitously or conveniently, is that our legislature amended the Administrative Procedure Act (the "APA") in 2011, "conferring upon [ALJs] the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves." *AH N.C. Owner LLC v. N.C. Dep't of Health and Hum. Servs.*, 240 N.C. App. 92, 98, 771 S.E.2d 537, 541 (2015); *see also* 2011 N.C. Sess. Laws 1678, 1685–97, ch. 398, §§ 15–55. Before the legislature amended the APA, an ALJ would issue a recommended decision to the respective agency, which the agency was then free to adopt in full or in part, or reject in full. *See id.* at 98, 771 S.E.2d at 541. Since the 2011 amendment, however, the ALJ decision is no longer a recommendation but rather is the final decision binding on parties. *See* N.C. Gen. Stat. § 150B-34(a) (2021). In reviewing an agency decision, the ALJ "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.*

As for our review of the ALJ's final decision:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat.] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2021). When reviewing a final decision under subsection five or subsection six of N.C. Gen. Stat. § 150B-51, this Court applies the whole record test. *See* N.C. Gen. Stat. § 150B-51(c) (2021). While Duke does not specify which subsections under which it challenges the Final Decision, it correctly posits that the appropriate standard of review is the whole record test.

When applying the whole record test,

> [the reviewing court] may not substitute its judgment for the [ALJ's] as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the [ALJ's] findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the [ALJ's] decision.

Brewington v. N.C. Dep't of Pub. Safety, 254 N.C. App. 1, 13, 802 S.E.2d 115, 124 (2017) (first alteration in original). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health and Hum. Servs.*, 235 N.C. App. 620, 623, 762 S.E.2d 468, 470 (2014).

Duke correctly argues we are required to give a high degree of deference, but incorrectly asserts to whom this deference is given.

> [I]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or in part the testimony of any witnesses. Our review, therefore, must be undertaken with a high degree of deference as to the credibility of witnesses and the probative value of particular testimony.

Brewington, 254 N.C. App. at 13, 802 S.E.2d at 124–25 (first alteration added) (internal quotation marks and citation omitted).

B. Failure to Challenge Specific Findings

[2] Pinnacle argues Respondents' respective failures to challenge specific findings of fact in the Final Decision render those challenges abandoned. We agree.

On appeal, the burden is on the appellant to show an error by the lower court. *See Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 351, 799 S.E.2d 378, 385 (2017) (concluding the petitioner had abandoned her argument challenging the findings of fact because the petitioner "failed to specifically raise an argument on appeal to *any* particular finding of fact, [] failed to address any particular finding of fact as not supported by the evidence, and [] failed to raise any issues with the findings of fact . . . ."). All unchallenged findings are deemed to be supported by substantial evidence and "therefore are conclusively established on appeal." *Brewington*, 254 N.C. App. at 17, 802 S.E.2d at 126 (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.")).

Our Supreme Court made this principle of judicial review crystal clear in *Brackett v. Thomas*, 371 N.C. 121, 814 S.E.2d 86 (2018) (unchallenged findings of fact in an appeal from an agency decision are binding on appeal). The dissent posits *Brackett* is inapplicable because the holding does not apply to the whole record test. The statute under review in *Brackett*, however, limited the reviewing court to determining whether there is sufficient evidence "in the record" to support the agency's decision. *Id.* at 125, 814 S.E.2d 86; *see also* N.C. Gen. Stat. § 20-15.2(e) (2021). As we have stated, the whole record test requires the reviewing court to determine whether there is substantial evidence in the record to support the ALJ's Final Decision. *See Brewington*, 254 N.C. App. at 13, 802 S.E.2d at 124.

Under *Brackett*, a reviewing court must not consider "whether the evidence in the record" supports the conclusion of the lower court, but "whether the uncontested findings of fact" support the conclusion. *Brackett*, 371 N.C. at 126, 814 S.E.2d at 89. *Brackett* is clear: "[i]t is the role of the agency, rather than a reviewing court, 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence.' " *Id.* at 126–27, 814 S.E.2d at 89 (citation omitted).

1. Duke's Arguments

Duke asserts that "[t]hroughout its brief and in its proposed issues on appeal Duke makes it clear that it is appealing the ALJ's decision to reverse the Agency's decision to award Duke a CON." This may be true; Duke, however, failed to make any specific arguments challenging any particular findings of fact. *See Rittelmeyer*, 252 N.C. App. at 349, 799 S.E.2d at 384. Most of Duke's brief is dedicated to showing why the Agency decision was correct, while failing to specifically show this Court where the ALJ's Final Decision was incorrect. Duke makes various conclusory statements including that the ALJ failed to apply the appropriate standard of review, the ALJ erred in changing the Agency's comparative analysis review, and the Agency's decision was correctly decided. Instead of challenging specific findings of fact, however, Duke cites to a range of pages within the Record. We decline Duke's apparent invitation to sift through the entire Record to find substantial evidence, or lack thereof, for all 155 findings of fact enumerated in the Final Decision. That is the job of the appellant. *See Rittelmeyer*, 252 N.C. App. at 351, 799 S.E.2d at 385.

2. The Agency's Argument

The Agency argues this Court's role is to review whether Pinnacle met its burden of showing substantial prejudice. The question before this Court, however, is "whether the whole record contains relevant evidence that a reasonable mind might accept as adequate *to support the [ALJ's] decision*" that Pinnacle showed it suffered substantial prejudice from the Agency's granting of the CON to Duke. *CaroMont Health, Inc. v. N.C. Dep't of Health and Hum. Servs.*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (emphasis added). Our review is not conducted with an eye towards whether Pinnacle met its burden of proof to the ALJ; instead, our review is focused on whether the ALJ's Final Decision concluding Pinnacle did meet its burden is supported by substantial evidence. As previously stated, without challenging specific findings of fact in the Final Decision, which the Agency failed to do, those findings are binding on appeal. *See Brewington*, 254 N.C. App. at 17, 802 S.E.2d at 126. We further decline to give the same deferential reading of the Agency's brief as the dissent does, and to interpret the Agency's arguments as challenging specific findings of fact, when no such findings are explicitly challenged.

As both Duke and the Agency failed to challenge specific findings of fact in their respective briefs, the findings of fact in the Final Decision are deemed to be supported by substantial evidence and survive the whole record test. *See Brewington*, 254 N.C. App. at 17, 802 S.E.2d at

126. Were we to review the appeal at hand without Respondents challenging specific findings of fact, as the dissent concludes we should, we would be impermissibly determining the weight and sufficiency of the evidence and drawing our own inferences from the facts. *Brackett* makes clear that this type of review is "prohibited." *Brackett*, 371 N.C. at 127, 814 S.E.2d at 89.

IV. Conclusion

For the reasons stated above, we hold the ALJ's Final Decision was supported by substantial evidence. We therefore affirm the ALJ's Final Decision awarding the CON to Pinnacle.

AFFIRMED.

Judge CARPENTER concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously affirms the Administrative Law Judge's ("ALJ") decision to reverse the agency's decision and award the Certificate of Need ("CON") to Pinnacle. I disagree with the standard of review the majority applies to review Duke's and North Carolina Department of Health and Human Services' ("NC DHHS") arguments and the ALJ's decision on appeal. I respectfully dissent.

I. The Office of Administrative Hearings' Standard of Review

Contrary to the majority's assertion that Duke did not raise or properly challenge the ALJ's decision, the first sentence of Duke's argument on appeal states: "The ALJ failed to exercise the appropriate *scope of review* in reviewing the Agency's selection of factors it used for the Comparative Analysis Review of the Duke and Pinnacle applications and how it applied those factors in this review." (emphasis supplied). Duke argues the ALJ applied the wrong statutory standard of review when examining and reversing the agency's decision to grant the CON to Duke instead of Pinnacle.

Duke further advances this argument later in its brief: "In essence, Pinnacle encouraged the ALJ to conduct a *de novo* review of the Agency's decision and the ALJ improperly did exactly that. Duke now anticipates that Pinnacle will contend that this Court also should affirm

the ALJ's erroneous application of a *de novo* standard[.]" Duke further asks this Court to apply "the legally applicable standard," i.e., the correct statutory standard of review the ALJ should have applied to the agency's decision, and hold as a matter of law "the Agency committed no error" by awarding the CON to Duke.

The ALJ's mandated standard of review of NC DHHS' decision is defined in the North Carolina Administrative Procedure Act ("NCAPA"). N.C. Gen. Stat. §§ 150B-1 to 52 (2021). The NCAPA limits the ALJ's review of an agency's decision to whether the agency: "substantially prejudiced the petitioner's rights *and* that the agency did any of the following: (1) Exceeded its authority or jurisdiction. (2) Acted erroneously. (3) Failed to use proper procedure. (4) Acted arbitrarily or capriciously. (5) Failed to act as required by law or rule." N.C. Gen. Stat. § 150B-23(a)(1)-(5) (2021) (emphasis supplied).

The standard of review this Court applies on appeal differs from the standard of review the ALJ applies to an agency's decision. Our standard of review provides two separate standards of appellate review, depending upon the appealing party's alleged errors and arguments before this Court. N.C. Gen. Stat. § 150B-51 (2021).

A *de novo* standard of review is applied if a party argues the ALJ's "findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[.]" N.C. Gen. Stat. § 150B-51(b)(1)-(4) and 51(c).

If the appealing party argues the ALJ's decision was "(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion[,]" this Court must apply the "whole record" test. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c).

The majority's opinion concludes Duke's argument asserting the ALJ applied the wrong standard of review falls under either subsections (5) and (6) of § 150B-51(b), and this Court should review Duke's argument using a "whole record" standard of review.

Duke's argument asserting the ALJ used the wrong standard of review when examining the agency's decision is properly reviewed under subsections (2), (3), or (4) of § 150B-51. Whether the ALJ applied the correct standard of review is a question of law, and any failure by the ALJ to apply the correct standard of review is best categorized as

the ALJ's decision being: "(2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[.]" N.C. Gen. Stat. § 150B-51(b)(2)-(4). On appeal, this Court should conduct a *de novo* review of whether the ALJ applied the correct standard of review. N.C. Gen. Stat. § 150B-51(c).

This Court is required, and the majority's opinion should have determined, whether the ALJ applied the appropriate standard of review set out in N.C. Gen. Stat. § 150B-23(a). While this Court lacks the authority to examine the agency's findings using the statutory standard of review *prescribed to the ALJ* in N.C. Gen. Stat. § 150B-23(a), this Court maintains the authority to remand the matter to the ALJ to comply with statute and to correctly apply the statutorily-mandated standard of review.

The ALJ's order recites the correct conjunctive standard of review from the NCAPA:

> 17. According to N.C. Gen. Stat. § 150B-23(a), an agency decision is subject to reversal if the agency substantially prejudiced Petitioner's rights *and*:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.
>
> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.

Pinnacle's argument asserts the ALJ's decision and the record before us indicate the ALJ applied the appropriate standard of review pursuant to N.C. Gen. Stat. § 150B-23(a). In reviewing an agency decision, the ALJ is mandated and "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

When the ALJ reviewed NC DHHS' comparative analysis of Duke's and Pinnacle's CON applications, the ALJ focused its findings of fact on whether the agency had "acted erroneously," which is a prong of N.C. Gen. Stat. § 150B-23(a)(2). The ALJ found: (1) "[T]he Agency acted erroneously by concluding that Duke was superior on the Geographic Accessibility comparative factor" because certain ratios had a denominator of zero, which is mathematically impossible; (2) "Pinnacle's Operating Expenses were the lowest of all three applicants, and therefore Pinnacle was more effective. By finding this factor inconclusive

and failing to find Pinnacle more effective, the Agency acted erroneously[;]" (3) "The Agency's own calculations demonstrated that Pinnacle had the highest historical utilization per existing scanner and would be more effective with respect to this factor[;]" and, (4) "Pinnacle projected the highest historical utilization per scanner and should have been found 'more effective' with respect to the historical utilization factor. The Agency's determination that this factor was inconclusive was erroneous[.]"

While the ALJ is statutorily required to give "due regard to the demonstrated knowledge and expertise of the agency" as required by N.C. Gen. Stat. § 150B-34(a), the NCAPA also permits the ALJ to examine whether the agency "acted erroneously" or "failed to use proper procedure" using the standard of review outlined in N.C. Gen. Stat. § 150B-23(a)(2)-(3). This Court should examine Duke's argument using a *de novo* standard of review and determine whether the agency followed the statutory standard of review in N.C. Gen. Stat. § 150B-23(a).

II. Challenged Findings of Fact

NC DHHS argues Pinnacle failed to demonstrate and meet its statutory burden of showing "substantial prejudice" as a result of the CON being awarded to Duke. N.C. Gen. Stat. § 150B-23(a). The agency asserts Pinnacle failed to meet its burden before the OAH, and the ALJ was prohibited from reversing the agency's decision and awarding the CON to Pinnacle.

The majority's opinion correctly notes this Court applies the whole record test to arguments challenging whether findings of fact are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c).

The majority's opinion erroneously concludes NC DHHS was required and failed to challenge specific findings of fact in the ALJ's decision. Their opinion holds the whole record test requires all of the 155 findings of facts contained in the thirty-six pages of the 19 July 2022 decision to be individually objected to, and, if not, it becomes binding upon appeal, citing *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 17, 802 S.E.2d 115, 126 (2017) and *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Under the whole record test, whether before the ALJ or this Court, the reviewing officer or court is required to look at the entirety of the evidence, the "whole record", and not individual findings to determine whether the agency's findings of fact are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c). The issue is

"whether the Agency's decision that [petitioner] failed to prove substantial prejudice is supported by substantial evidence when considering the *record as a whole*[.]" *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (emphasis supplied) (citation omitted). As such, individual evidence or even findings to the contrary are immaterial, so long as "the whole record contains relevant evidence that a reasonable mind might accept as adequate to support the Agency's conclusion[.]" *Id.*

The notion that each individual finding in the whole record must be excepted to preserve review is not supported in the NCAPA or in our CON precedents. That individual exception to each finding of fact requirement may arise in domestic relations, child custody, or other cases, but not under the whole record review of a CON before the OAH or this Court. *See Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

While our Supreme Court cited *Koufman* in *Brackett v. Thomas*, the superior court's standard of review in those cases differs from the case presently before us on appeal. *Brackett v. Thomas*, 371 N.C. 121, 122, 814 S.E.2d 86, 87 (2018). In *Brackett*, the superior court's standard of review for examining an agency decision by the Department of Motor Vehicles was governed by N.C. Gen. Stat. § 20-16.2(e), which provides the "superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." *Id.* at 125, 814 S.E.2d at 89 (quoting N.C. Gen. Stat. § 20-16.2(e)). *Brackett* does not apply in OAH administrative appeals, where this Court applies the whole record test.

Even if the majority's assertion that NC DHHS was required to object to specific findings of fact on appeal were correct, NC DHHS's brief specifically challenges several findings of fact, with specific references to the record:

> In the Final Decision, the ALJ determined that Pinnacle was substantially prejudiced for three reasons:
>
> • The Agency denied Pinnacle's otherwise approvable application; (R p. 265)
>
> • Pinnacle's denial infringes on its freedom to buy additional equipment using its own funds and the ability to compete with Duke; *Id.* and,

> • Pinnacle's denial will impact its operations, limit its capacity and its ability to meet patient's needs, prevent it from realizing approximately $400,00.00 annually in savings and prevent it from earning approximately $97,000 in additional net income annually. *Id.*

The ALJ's decision makes the following findings of fact, which mirror the contested facts in NC DHHS' brief on appeal:

> 61. The denial of its CON application infringes on Pinnacle's freedom to invest in additional equipment using its own funds, and the ability to compete with Duke on the same footing.
>
> 62. Pinnacle demonstrated it will suffer an injury in fact as a result of the Agency's decision. The denial of its application will have a significant impact on its operations, limiting its capacity and its ability to meet patients' needs, preventing it from realizing approximately $400,000.00 annually in savings, and preventing it from earning approximately $97,000 in additional net income annually.

This Court is required to " 'examine all competent evidence' " and apply the whole record test to determine whether Findings of Fact 61 and 62 were supported by sufficient evidence in the whole record before the ALJ. *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs.*, 235 N.C. App. 620, 622-23, 762 S.E.2d 468, 470 (2014) (quoting *Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010)).

The CON application and review process originates before NC DHHS and not the OAH. The OAH's review jurisdiction under the NCAPA is not original or co-existent. The ALJ is not writing on a clean slate and is statutorily constrained and mandated to "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

While the OAH and the ALJ, since the 2011 amendments to the statute, can issue a Final instead of a Recommended Decision, those amendments and the standards and constraints in the NCAPA do not allow an ALJ to merely disagree with and substitute its judgment for that of "the specialized knowledge of the agency." *Id. See* 2011 N.C. Sess. Laws 1678, 1685–97, ch. 398, §§ 15–55.

Here, both applicants, Pinnacle and Duke, submitted conforming applications. NC DHHS could approve only one application, as only one CON was authorized. There was necessarily going to be a winner and a loser, as in all competitive environments and contests. The Agency conducted an extensive and competitive review of the applications within its expertise to determine which was more effective for the purposes of awarding the CON. On 24 September 2021, the Agency approved Duke's application and denied Pinnacle's application.

The CON statute vests the decision with NC DHHS, of whether to award a CON to Duke or Pinnacle subject to *review* in the OAH under the standards, constraints, and procedures of the NCAPA. N.C. Gen. Stat. §§ 150B-23(a)(1)-(5) and 131E-177(6) (2021). This review, allowed pursuant to the NCAPA, is not a hearing *de novo* before the ALJ, and she was not free to substitute her personal preferences for the record, expertise, and knowledge of the agency merely to reach a contrary result. N.C. Gen. Stat. § 150B-34(a).

The burden of establishing "substantial prejudice" fell on Pinnacle as the petitioner before the OAH. *Parkway Urology*, 205 N.C. App. at 535-39, 696 S.E.2d at 192-95; N.C. Gen. Stat. § 150B-23(a). *See also* N.C. Gen. Stat. § 131E-188. Pinnacle was required to demonstrate it was "substantially prejudiced" by the Agency's decision to approve a competing application. N.C. Gen. Stat. § 150B-23(a).

"[H]arm from normal competition does not amount to substantial prejudice[.]" *CaroMont Health*, 231 N.C. App. at 8, 751 S.E.2d at 250 (citing *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195). *See also Blue Ridge Healthcare Hosps. Inc. v. N.C. Dep't of Health & Human Servs.*, 255 N.C. App. 451, 464, 808 S.E.2d 271, 279-80 (2017); *Surgical Care Affiliates*, 235 N.C. App. at 632, 762 S.E.2d at 476 (finding the petitioner failed to demonstrate "substantial prejudice" because "the only purported harm to Petitioners is the possibility that the Agency's decision will make it more difficult for them to expand their business").

Also, " 'economic losses [a petitioner] will suffer as a result of the Agency's decision' " generally does not amount to substantial prejudice, as it amounts to harm from normal competition. *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, 237 N.C. App. 113, 123, 764 S.E.2d 491, 498 (2014) (citing *CaroMont Health*, 231 N.C. App. at 8, 751 S.E.2d at 250).

This Court is required to apply the whole record test to determine whether Findings of Fact 61 and 62 were supported by sufficient evidence in the "whole record" before the ALJ. *Surgical Care Affiliates*, 235 N.C. App. at 622-23, 762 S.E.2d at 470 (citation omitted); *CaroMont*

Health, 231 N.C. App. at 5, 751 S.E.2d at 248. If a petitioner cannot demonstrate the threshold substantial prejudice requirement, the ALJ need not address allegations of Agency error. *Surgical Care Affiliates*, 235 N.C. App. at 629-30, 762 S.E.2d at 475 (explaining "the petitioner must establish that the Agency has deprived it of property, has ordered it to pay a fine or penalty, or has otherwise substantially prejudiced the petitioner's rights, *and*, *in addition*, the petitioner must establish that the agency's decision was erroneous in a certain, enumerated way, such as failure to follow proper procedure or act" (citation omitted)).

Pinnacle's failure to show "substantial prejudice" merely from losing the competition and its consequent economic loss condemns their case. *Id.*; N.C. Gen. Stat. § 150B-23(a)(1)-(5). The ALJ's decision is properly vacated.

III. Conclusion

The CON statute vests the award with NC DHHS, subject to *review* in the OAH by the ALJ under the standards, constraints, and procedures of the NCAPA. This review allowed in the NCAPA is not a hearing *de novo* before the ALJ, and she was not free to substitute her personal preferences for the record, expertise, and knowledge of the agency merely to reach a contrary result. N.C. Gen. Stat. § 150B-34(a).

The ALJ found "[t]he denial of its CON application infringes on Pinnacle's freedom to invest in additional equipment using its own funds, and the ability to compete with Duke on the same footing." She also found:

> Pinnacle demonstrated it will suffer an injury in fact as a result of the Agency's decision. The denial of its application will have a significant impact on its operations, limiting its capacity and its ability to meet patients' needs, preventing it from realizing approximately $400,000.00 annually in savings, and preventing it from earning approximately $97,000 in additional net income annually.

While both may be true, as between two admittedly qualified applicants and only one CON available, those findings will be equally true no matter which party is not awarded the CON. It is not up to the ALJ under the statute to make that determination, but only to review "whether the whole record contains relevant evidence that a reasonable mind might accept as adequate to support the Agency's conclusion[.]" *CaroMont Health*, 231 N.C. App. at 5, 751 S.E.2d at 248 (citation omitted). The ALJ's decision is affected with error and is properly vacated and remanded. I respectfully dissent.

ROOK v. ROOK

[290 N.C. App. 512 (2023)]

ALEXANDER N. ROOK, PLAINTIFF
v.
DEBRA ANN ROOK, DEFENDANT

No. COA22-902

Filed 19 September 2023

Child Custody and Support—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—lack of findings from out-of-state court

In a custody dispute in which the child's mother filed for custody in Utah six months after she and the child moved to that state, the trial court lacked subject matter jurisdiction to adjudicate the father's subsequently filed custody claim in this state where, as required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), there was no evidence in the record of any findings by the Utah court that North Carolina was the more appropriate forum and that it was therefore declining to exercise jurisdiction in the matter.

Appeal by defendant from judgment entered 31 March 2022 by Judge Meader W. Harriss III in Perquimans County District Court. Heard in the Court of Appeals 6 September 2023.

Melissa L. Skinner, for the plaintiff-appellee.

Woodruff Family Law Group, by Jessica S. Bullock, for the defendant-appellant.

Rose & Johnson PC, by K. Brooke Johnson, for the defendant-appellant.

TYSON, Judge.

Debra Rook ("Mother") appeals from a custody order granting joint custody to Mother and Alexander Rook ("Father") on 31 March 2022. The trial court lacked subject matter jurisdiction. We vacate the order and remand.

I. Background

Mother and Father married on 22 February 2002. Thirteen years later, Mother and Father procreated one minor child ("the Child") born

18 April 2015. Mother and Father resided in Perquimans County while they were married.

The Perquimans County Department of Social Services ("DSS") investigated Father in 2018 because the Child had allegedly been left in a locked vehicle, while Father exercised at the gym and shopped at an Ollie's Bargain Outlet. DSS determined Father had a lapse in judgment and closed the investigation.

In early 2019, Mother became concerned because Father continuously insisted upon showering with the Child. Mother purportedly observed the Child touching Father's erect penis on 7 March 2019. Four days later, Mother removed the Child and herself from the marital home and moved to Wake County.

Mother and Father entered into a Separation and Property Settlement Agreement on 28 March 2019. Mother and Father agreed for Mother to have legal and physical custody of the Child, and Father agreed to "accompanied visitation" with the Child "at times and locations agreed upon by the parties at minimum of twice a month for six (6) to ten (10) hour periods." The agreement specified neither Mother nor Father were permitted to leave North Carolina with the Child without first providing written notice to the other parent, exempting certain enumerated family members who reside in Virginia and Kentucky.

Mother filed a complaint for child custody and attorney's fees in Wake County on 11 December 2019.

Mother also filed a complaint and motion for a domestic violence protective order on 29 January 2020 in Wake County. An *ex parte* order of protection was granted that day. A domestic violence protection order was granted on 10 June 2020.

Mother filed an amended complaint for absolute divorce, breach of contract, specific performance, and attorney's fees in Wake County on 29 May 2020. Father filed his answer on 4 August 2020, counterclaiming for an absolute divorce and asking the court to incorporate the separation agreement entered into on 28 March 2019.

On the day Mother filed her amended complaint for divorce, Mother also filed a notice of voluntary dismissal of her custody claim. Without alerting Father in writing, Mother moved with the Child to Utah in May of 2020. Mother filed a petition for custody in Salt Lake County, Utah, on 30 October 2020.

Father filed a motion to change venue from Wake County to Perquimans County for the pending divorce claims on 16 November

2020. In his motion, Father stated he believed Mother had moved with the Child to Utah. The motion also acknowledged Mother had denied living in Wake County in her reply to Father's counterclaims.

Father initiated this action by filing a complaint and motion for *ex parte* temporary custody in Perquimans County on 23 November 2020. The trial court entered an order denying Father's request for an ex parte temporary custody order on 24 November 2020, but the court scheduled the matter for a 30 December 2020 hearing on the issue of temporary custody.

A summons for Mother's Utah custody action was issued on 8 December 2020. Mother was served on 21 January 2021 with Father's Perquimans County custody action, which is the subject of this appeal. On 22 January 2021, Mother filed a *pro se* motion to continue the temporary custody hearing and a "12(b)(1) Motion to Dismiss and Request for Judicial Conference" requesting that Father's Complaint be dismissed for lack of subject matter jurisdiction.

An Order was entered that directed judicial communication between the Perquimans County District Court and the Utah court on 27 January 2021. On 18 February 2021, Mother filed a notice of voluntary dismissal of her Rule 12(b)(1) motion to dismiss and request for judicial conference.

A "Consent Order on Subject Matter Jurisdiction" was entered on 25 February 2021, asserting "[t]he State of North Carolina has subject matter jurisdiction to determine custody of the minor child[.]"

A judgment of divorce was entered in Wake County on 15 March 2021, which incorporated the contents of Mother's and Father's Separation Agreement, granted primary custody of the Child to Mother, and which retained the provisions constricting interstate travel.

The trial court entered an order on 29 April 2021 requiring Mother to return the Child to North Carolina for the duration of the custody trial in Perquimans County. On 12 May 2021, Mother filed an answer, motion to consolidate, motion to modify prior custody order, and counterclaim in Perquimans County, asking for the two Perquimans County files to be consolidated regarding current custody of the Child and the custody order originally entered in Wake County on 15 March 2021.

The custody trial in Perquimans County began 18 May 2021. On 17 June 2021, the trial court entered an order granting Father supervised visitations with the Child and ordered Mother to bring the Child back to North Carolina in August when the trial was scheduled to resume.

The trial court entered another Temporary Custody Order granting the parties joint legal and physical custody on an alternating weekly basis on 2 September 2021. The order required the minor child "be enrolled immediately in either Grace Montessori School in Elizabeth City, North Carolina or the Perquimans County Public School System."

The trial court entered a custody order granting joint custody to Mother and Father on 31 March 2022. Father was given the authority to make any final decisions regarding Child's "education, health, medical and dental care, religious, athletic and extra-curricular activities" if Mother and Father disagreed. Mother was prohibited from taking the Child outside North Carolina except to visit her family in Virginia. Father was instructed to enroll the Child in Grace Montessori Academy in Elizabeth City or the Perquimans County Public School System.

Mother timely appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Subject Matter Jurisdiction

Mother argues the trial court lacked subject matter jurisdiction over the Child's custody determination.

A. Standard of Review

The issue of whether a trial court possessed subject matter jurisdiction is a matter of law, and we review questions of law *de novo*. *In re N.P.*, 376 N.C. 729, 731, 855 S.E.2d 203, 205-06 (2021) (citing *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835 (2009) and *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 556, 809 S.E.2d 558, 560 (2018)).

If a trial court's basis for whether subject matter jurisdiction exists is erroneous, this Court may review the record to determine if subject matter jurisdiction exists. *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) (citing *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000)).

B. Analysis

"Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel." *Id.* at 411-12, 576 S.E.2d at 385 (citing *In re Davis*, 114 N.C. App. 253, 256, 441 S.E.2d 696, 698 (1994)).

North Carolina has adopted the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). The UCCJEA includes

four bases for a trial court to obtain subject matter jurisdiction over a custody determination:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a) (2021). *See also* N.C. Gen. Stat. § 50A-202(a) (2021) (explaining "a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction" unless certain determinations are made).

A child's "home state" is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2021).

The UCCJEA also requires the court who possesses subject matter jurisdiction over a child custody determination to make certain findings that another state is the more appropriate forum before declining to

exercise its jurisdiction. *See* N.C. Gen. Stat. §§ 50A-207 and 208 (2021). Mother argues the Utah court failed to make such findings.

A consent order does not waive challenges to subject matter jurisdiction, "and the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes." *Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385 (citation omitted).

The comments contained in the UCCJEA's jurisdictional statute section also provide: "It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective." N.C. Gen. Stat. § 50A-201, cmt. 2.

In *Foley*, this Court determined insufficient evidence in the record existed for the trial court to establish subject matter jurisdiction pursuant to the UCCJEA. *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386. The trial court had failed to include evidence concerning "whether the minor resided in North Carolina during the six months prior to the commencement of this proceeding" to determine if North Carolina was the child's home state. *Id.* The record also contained "no evidence the West Virginia court was a court having subject matter jurisdiction but declining to exercise it on the grounds North Carolina was the more appropriate forum." *Id.* This Court vacated the trial court's custody order and remanded the matter to the trial court to determine whether it possessed subject matter jurisdiction under one of the four bases in the UCCJEA. *Id.*

Here, as in *Foley*, the record does not indicate whether North Carolina possessed subject matter jurisdiction over the custody determination of the Child. *Id.* The trial court found Mother had resided in Utah since May 2020, which is more than six months prior to the commencement of this Perquimans County child custody matter by Father in November 2020. According to the terms of the Separation Agreement, the Child was residing with Mother during that period. Further, the following colloquy occurred before the trial court regarding whether it possessed subject matter jurisdiction:

> THE COURT: So we have declared subject matter jurisdiction pursuant to a consent order in the –
>
> [FATHER'S COUNSEL]: In –
>
> THE COURT: – state of North Carolina, so that case is now –
>
> [FATHER'S COUNSEL]: That case –

[MOTHER'S COUNSEL]: That's correct.

The record is devoid of any findings from the court in Utah determining whether North Carolina is the more appropriate forum and Utah's decision to decline to exercise its jurisdiction. *See* N.C. Gen. Stat. §§ 50A-207 and 208. Without this evidence, the trial court's custody order must be vacated for lack of subject matter jurisdiction and remanded. N.C. Gen. Stat. § 50A-201(a), cmt. 2; *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386.

IV. Conclusion

The trial court's custody determination of the Child on 31 March 2022 is vacated for lack of subject matter jurisdiction. *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386. The trial court must find and resolve evidence concerning the Child's home state in the six months prior to Father filing his motion for child custody in North Carolina. N.C. Gen. Stat. §§ 50A-201(a) and 102(7). In the alternative, the trial court must include findings from the court in Utah indicating its decision to decline to exercise its jurisdiction and its determination concluding North Carolina is the more appropriate forum. *See* N.C. Gen. Stat. §§ 50A-207 and 208.

The custody order is vacated, and the matter is remanded to the trial court for hearing to determine whether it possesses subject matter jurisdiction over this custody determination. *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386; N.C. Gen. Stat. §§ 50A-102(7) and 201(a). Mother's remaining arguments concerning the vacated order are dismissed as moot. *It is so ordered.*

VACATED AND REMANDED.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
GERALD TELPHIA JACOBS, II, DEFENDANT

No. COA22-997

Filed 19 September 2023

Search and Seizure—Terry stop—reasonable suspicion—strong marijuana odor—credibility of officer's testimony

In a prosecution for multiple drug possession and trafficking offenses, the trial court properly denied defendant's motion to suppress evidence seized during a *Terry* stop, which the officer initiated on the basis that he smelled a strong odor of marijuana emanating from defendant's car. Even though the marijuana at issue was unburned, wrapped in plastic, and stored inside the center console of the car, the officer's claim about smelling the marijuana was not "inherently incredible," especially in light of prior caselaw holding that an officer's smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure. Therefore, the officer's testimony was competent evidence to support the court's finding that the officer had reasonable suspicion to initiate the *Terry* stop, since the reasonable suspicion standard is less demanding than that for probable cause.

Appeal by defendant from judgments entered 30 June 2022 by Judge R. Kent Harrell in the New Hanover County Superior Court. Heard in the Court of Appeals 22 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis Lamar, Jr., for the State.

Richard Croutharmel, for defendant-appellant.

FLOOD, Judge.

Gerald Telphia Jacobs, II ("Defendant") appeals pursuant to N.C. Gen. Stat. § 15A-979(b) (2021) from an order denying his motion to suppress evidence. Defendant argues the trial court improperly denied his motion because the arresting officer lacked reasonable suspicion to stop his vehicle, in violation of his right to be free from unreasonable searches and seizures. Defendant specifically contends the officer did not witness a traffic violation, and his claims of smelling unburnt

marijuana emanating from Defendant's vehicle were "inherently incredible." Because the trial court's findings were supported by competent evidence, we hold the trial court did not err in denying Defendant's motion to suppress.

I. Factual & Procedural Background

The evidence tends to show the following: On 29 March 2019, Officer Benjamin Galluppi ("Officer Galluppi") of the Wilmington Police Department was traveling in his patrol car on Market Street between 29th Street and Covil Avenue. Officer Galluppi turned onto Covil Avenue and noticed Defendant's car traveling in front of him. There were no other cars on Covil Avenue, and Officer Galluppi, while following Defendant, remained roughly two and a half car lengths behind him. The two cars traveled roughly fifty feet down Covil Avenue when, according to Officer Galluppi, he could "very strongly" smell the odor of marijuana emanating from Defendant's vehicle.

Officer Galluppi continued to follow Defendant for about five or six blocks down Covil Avenue and eventually pulled Defendant over after he turned left onto Broad Street. According to Officer Galluppi, he stopped Defendant solely because of the unburned marijuana smell. Officer Galluppi walked up to the driver's side of Defendant's car and noticed the driver's side window was cracked open about three inches. Defendant was holding his driver's license and a piece of paper up against the window. Upon getting closer to Defendant's car, Officer Galluppi continued to detect the odor of marijuana and testified that, at that point, the odor was "even stronger." After a discussion of the ownership of the car, Officer Galluppi asked Defendant to step out of the car.

Once Defendant was out of the car, Officer Galluppi noticed a small plastic bag of white powder "at [Defendant's] feet" and an open bottle of alcohol in the backseat. Officer Galluppi then patted Defendant down and handcuffed him for safety while Officer Galluppi waited for backup to arrive. Detective Javier Tapia ("Detective Tapia") of the Wilmington Police Department arrived at the scene roughly two minutes after Officer Galluppi stopped Defendant. Upon arrival, Detective Tapia saw Defendant sitting handcuffed on the tailgate of his car and could also smell a "very strong" odor of unburned marijuana. By this time, Officer Galluppi had opened all of Defendant's car's doors, and the driver's side window was cracked open.

Officer Galluppi and Detective Tapia conducted a frisk of Defendant and a full search of Defendant's car. In the car they found heroin, a MDMA tablet, powder cocaine, crack cocaine, and approximately sixteen grams

of marijuana. The search of Defendant's person and car were captured on Officer Galluppi's bodycam. Officer Galluppi arrested Defendant for trafficking in cocaine; possession with intent to sell or deliver cocaine; felony possession of cocaine; possession with intent to sell or deliver heroin; possession with intent to sell or deliver MDMA; possession of MDMA; and misdemeanor possession of more than one-half ounce, but less than one and one-half ounces of marijuana. The marijuana Officer Galluppi found in the car was in the center console, wrapped in twelve separate plastic bags.

On 9 September 2019, the New Hanover County grand jury returned true bills of indictment against Defendant on the following charges: trafficking in cocaine by possession of 28 grams or more but less than 200 grams of cocaine; trafficking in cocaine by transportation of 28 grams or more, but less than 200 grams of cocaine; felony possession of a Schedule II controlled substance; possession with intent to sell or deliver cocaine; possession with intent to sell or deliver heroin; possession with intent to sell or deliver MDMA; felony possession of MDMA; and misdemeanor possession of greater than one-half ounce, but less than one and one-half ounces of marijuana.

On 24 October 2019, Defendant filed a motion to suppress the evidence obtained from the search. He argued law enforcement violated his Constitutional right to be protected from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and the North Carolina Constitution. On 27 May 2021, the trial court held a suppression hearing. At the hearing, Defendant testified he was not smoking marijuana while driving, and all the windows of the vehicle were closed before he was pulled over. He testified that, about an hour before the traffic stop, he was smoking marijuana at a house on 10th Street and put the narcotics in his car when he left the house. He also testified he had put marijuana in the center console of the car.

Officer Galluppi testified he did not notice whether Defendant's driver's side window was open until he pulled Defendant over, and the back rear-view window of Defendant's car was halfway open. He admitted, however, that he did not indicate in his written police report that Defendant's back rear-view window was halfway open. Counsel for Defendant played the bodycam footage at the thirty-five-minute mark, and Officer Galluppi admitted, after watching it, that it showed the rear-view window of Defendant's car was closed.

At the close of the hearing, the trial court denied Defendant's motion to suppress, and an order reflecting the same was filed on 27 May 2021.

On 30 June 2022, Defendant's guilty plea to trafficking in cocaine, possessing with intent to sell or deliver heroin, and possessing with intent to sell or deliver MDMA was accepted. Defendant was determined to be a prior record level IV for felony sentencing purposes. For his guilty plea to trafficking cocaine, Defendant received an active sentence of thirty-five to fifty-one months. At the expiration of that sentence, Defendant was ordered to serve another active sentence of nine to twenty months for his guilty plea to possession with intent to sell or deliver heroin. And, at the expiration of that sentence, Defendant was ordered to serve another active sentence of eight to nineteen months for his guilty plea to possession with intent to sell or deliver MDMA. Additionally, he was ordered to pay a $50,000 fine and attorney's fees. Defendant gave oral notice of appeal from the judgments following their announcements in open court.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. §§ 15A-144(a1)-(a2) (2022) and 15A-979(b) (2021).

III. Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress the evidence obtained from the traffic stop. Defendant specifically contends the arresting officer lacked reasonable suspicion to initiate the stop, as his claim of smelling unburned marijuana emanating from Defendant's vehicle was "inherently incredible." We disagree.

Our standard of review of a trial court's 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." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). "Conclusions of law are reviewed de novo and are subject to full review." *Id.* at 168, 712 S.E.2d at 878. This Court, "under a *de novo* review, [ ] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878.

As an initial matter, we address the framework for evaluating the constitutionality of an ordinary traffic stop. The Fourth Amendment of the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, "protects private citizens against unreasonable searches and seizures." *State v. Johnson*, 378 N.C. 236, 244, 861 S.E.2d 474, 483 (2021); *see* N.C. Const. art. I, § 20; *see* U.S. Const. amend. IV. "Traffic stops are considered seizures subject to the strictures of these provisions and are historically reviewed under the

investigatory detention framework first articulated in *Terry v. Ohio*." *Id.* at 244, 861 S.E.2d at 483 (citation omitted). When a law enforcement officer has a "reasonable, articulable suspicion that criminal activity is afoot" he is justified in initiating a traffic stop. *Id.* at 244, 861 S.E.2d at 483 (citation omitted). Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Maready*, 362 N.C. 614, 618, 669 S.E.2d 564, 567 (2008) (citation and internal quotation marks omitted). To satisfy the reasonable suspicion standard, only "some minimal level of objective justification is required." *Id.* at 618, 669 S.E.2d at 567 (citation omitted); *see State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (providing that a justified traffic stop requires "something more than an unparticularized suspicion or hunch").

Officer testimony can establish reasonable suspicion, and "[w]e defer to the trial court's assessment of the officer's credibility . . . . Accordingly, we are bound by the trial court's finding based upon that credibility determination." *State v. Salinas*, 214 N.C. App. 408, 411, 715 S.E.2d 262, 264 (2011) (cleaned up) (citation and internal quotation marks omitted) ("[A]n appellate court affords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based on those findings, render a legal decision . . . as to whether or not a constitutional violation of some kind has occurred.") (citation omitted). This Court, as opposed to the trial court, "is much less favored [to make such decisions] because it sees only a cold, written record . . . [and as such] the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence." *Id.* at 411, 715 S.E.2d at 265 (citation omitted).

Our Supreme Court, however, has provided that there are circumstances where this Court does not defer to the trial court's assessment of witness credibility. In *State v. Miller*, for example, our Supreme Court held, "[t]his rule [of deference] does not apply . . . where the only evidence identifying the defendant as the perpetrator of the offense [was] *inherently incredible* because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967) (emphasis added) (holding that it was inherently incredible for one to observe, from a great distance, details "which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of guilty of such person to the jury").

This Court has recognized that an officer's smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure, and that an officer's smelling of such is not inherently incredible. Most notably, in *State v. Stover*, officers testified they smelled a "strong odor of marijuana" when they arrived at the defendant's home to conduct a "knock and talk" after receiving a tip that the defendant's residence was a place where marijuana could be purchased. 200 N.C. App. 506, 507, 685 S.E.2d 127, 129 (2009). When the officers arrived at the residence, they stepped out of their vehicles and immediately "perceived a 'strong odor of marijuana,' which grew stronger as they approached the house." *Id.* at 507, 685 S.E.2d at 129. The officers did not have a warrant to search the home, and their smelling of the unburned marijuana provided probable cause to conduct a warrantless entry into the defendant's home. *See id.* at 513, 685 S.E.2d at 132.

The defendant's argument on appeal in *Stover* "center[ed] on the trial court's denial of his motion to suppress the evidence seized." *Id.* at 510, 685 S.E.2d at 131. He contended "the trial court's finding of fact that the officers 'detected a strong odor of marijuana in the air' was inherently incredible, and therefore, cannot constitute competent evidence[.]" *Id.* at 510, 685 S.E.2d at 131. He specifically reasoned this finding of fact was inherently incredible because the marijuana at issue was not burning, most of it was kept in sealed containers, and what was loose was too small a quantity to be observable; therefore, the officers could not have been able to smell the marijuana from outside his residence. *Id.* at 512, 685 S.E.2d at 132. This Court held, "the simple fact that the majority of marijuana was in closed containers when the officers found it does not make the officers' smelling of the drug 'inherently incredible.' " *Id.* at 512, 685 S.E.2d at 132. Thus, "the officers' testimony that they smelled marijuana outside defendant's residence was competent evidence upon which the trial court could base its finding of fact that the officers 'detected a strong odor of marijuana in the air.' " *Id.* at 513, 685 S.E.2d at 132.

Defendant, here, makes a similar argument to that of the defendant in *Stover*: that Officer Galluppi's smelling of the unburned marijuana in Defendant's car was "inherently incredible[,]" and therefore could not have supported the trial court's finding that Officer Galluppi had reasonable suspicion to stop Defendant's car. We do not find Defendant's argument persuasive, and conclude Officer Galluppi's smelling of the unburned marijuana was not inherently incredible. In *Stover*, the marijuana was unburned, wrapped in plastic, and located within a residence, which the *Stover* officers testified they could smell from outside. *See id.* at 508, 685 S.E.2d at 130. We held the officers' smelling of the

unburned marijuana not inherently incredible, and that it provided probable cause for the officers to search the defendant's domicile. *See id*. at 508, 685 S.E.2d at130. Here, Officer Galluppi, like the officers in *Stover*, testified he smelled the odor of marijuana emanating from Defendant's vehicle "very strongly[,]" and the marijuana at issue here was unburned, wrapped in plastic, and located in the center console of Defendant's car. Thus, Officer Galluppi's claim that he smelled unburned marijuana, for the purpose of satisfying the reasonable suspicion standard—a "less demanding standard" than that for probable cause—was not inherently incredible, and his testimony was competent evidence to support the trial court's findings of fact. *See Maready*, 362 N.C. at 618, 669 S.E.2d at 567; *see Watkins*, 337 N.C. at 442, 446 S.E.2d at 70; *see Stover*, 200 N.C. App. at 508, 685 S.E.2d at 130.

As Officer Galluppi's smelling of unburned marijuana was not inherently incredible, we defer to the trial court's assessment of Officer Galluppi's testimonial credibility, which supported the factual finding that he smelled the marijuana "very strongly." *See Salinas*, 214 N.C. App. at 411, 715 S.E.2d at 265. This finding, in turn, supported the trial court's conclusion that Officer Galluppi had proper reasonable suspicion—a "minimal level of justification"—to justify the traffic stop. *See Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. We therefore conclude the trial court did not err in denying Defendant's motion to suppress.

IV. Conclusion

Defendant has failed to demonstrate Officer Galluppi lacked reasonable suspicion to initiate the stop of his vehicle. Accordingly, the trial court did not commit reversible error in denying Defendant's motion to suppress evidence obtained from the stop.

NO ERROR.

Chief Judge STROUD and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
ANTONIO DAYMONTE LIVINGSTON, DEFENDANT

No. COA22-678

Filed 19 September 2023

Firearms and Other Weapons—possession of a firearm by a felon—constructive possession—sufficiency of evidence

In a prosecution for possession of a firearm by a felon, the State presented substantial evidence from which a jury could conclude that defendant, a convicted felon, constructively possessed a gun while riding as a passenger in a car. Defendant was in close proximity to the gun, which was found in a black bag behind the passenger seat where he was sitting, and there was indicia of defendant's control over the black bag, since the gun was touching another bag inside that held a wallet with three identification cards and a credit card, all of which had defendant's name and picture on them.

Appeal by defendant from judgment entered on or about 1 July 2021 by Judge Jason C. Disbrow in Superior Court, Brunswick County. Heard in the Court of Appeals 9 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Eric R. Hunt, for the State.

Sean P. Vitrano for defendant-appellant.

STROUD, Chief Judge.

Defendant Antonio Daymonte Livingston appeals from a judgment, entered following a jury trial, for one count of possession of a firearm by a felon ("felon-in-possession"). Because the State presented sufficient evidence Defendant constructively possessed the firearm, we find no error.

I. Background

The State's evidence at trial tended to show, on 25 June 2020, deputies with the Brunswick County Sheriff's Office were conducting surveillance in a neighborhood they characterized as "a known drug area[.]" During this surveillance operation, the deputies noticed a car go into the "known drug area" for "[a]pproximately two minutes[,]" which gave them a "hunch" it was involved in "[i]llegal activities." Based on this

"hunch" the car was involved in illegal activities, the deputies continued to observe it. After seeing the car fail to stop at a stop sign and drive 70 miles per hour in a zone where the speed limit was 55 miles per hour, the deputies stopped the vehicle.

When deputies stopped the vehicle, the only two occupants were Defendant, who was in the passenger seat, and another man, who was driving. As deputies approached the vehicle, they smelled marijuana and saw marijuana "shake"[1] on both Defendant and the driver. Based on the marijuana smell and presence of marijuana shake, the deputies searched the car.

The search revealed a black bag behind the passenger seat where Defendant was sitting. Inside the black bag, one of the deputies discovered a gun, which was touching a Crown Royal bag. Inside the Crown Royal bag was a wallet that had three identification cards and one credit card, each with Defendant's name and picture on it.

After one of the deputies made this discovery of the gun and the wallet with Defendant's identification and credit cards, he informed the other two deputies on scene. After the deputy speaking with Defendant was informed the search revealed a gun, he asked Defendant about the bag with the gun and his identification and credit cards. Defendant denied the bag was his and stated he did not know how any of the identification or credit cards could be his, but Defendant admitted he was a convicted felon. Because Defendant admitted he was a convicted felon and a gun was found touching the Crown Royal bag with his cards, the deputies arrested Defendant on a felon-in-possession charge.

On or about 7 December 2020, Defendant was indicted on the felon-in-possession charge.[2] The trial began on 28 June 2021. At trial, the State had three deputies testify consistent with the facts recounted above. At the close of the State's evidence, Defendant moved to dismiss the felon-in-possession charge on the grounds the State had failed to prove Defendant possessed the gun recovered from the black bag. The trial court denied the motion to dismiss. Defendant did not present any evidence at trial. At the close of all the evidence, Defendant renewed his motion to dismiss, and the trial court again denied it.

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1. Marijuana "shake" is "small pieces of marijuana" that fall "[a]s people are rolling marijuana cigarettes[.]"

2. Defendant was also indicted as a habitual felon on or about 7 December 2020. We do not discuss habitual felon status further because it is not challenged on appeal.

The jury found Defendant guilty on the felon-in-possession charge. On or about 1 July 2021, the trial court entered judgment on the felon-in-possession charge and sentenced Defendant to 108 to 142 months in prison, as enhanced by Defendant's status as a habitual felon. Defendant gave oral notice of appeal in open court and also gave written notice of appeal on 2 July 2021.

II. Analysis

In his only argument on appeal, Defendant contends the "trial court erred in denying the motion to dismiss" the felon-in-possession charge because there was insufficient evidence to submit the charge to the jury. After discussing the standard of review, we turn to the question of whether the State presented sufficient evidence.

A. Standard of Review

Our Supreme Court has explained the standard of review in sufficiency of the evidence cases as follows:

> The standard of review for a motion to dismiss for insufficient evidence is well settled. The trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. In its analysis, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (citations, quotation marks, and brackets omitted). Then, "[a]n appellate court reviews the denial of a motion to dismiss for insufficient evidence

de novo." *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 763 (2010) (citation and quotation marks omitted).

B. Sufficiency of the Evidence

North Carolina General Statute § 14-415.1 bars convicted felons from possessing firearms: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)." N.C. Gen. Stat. § 14-415.1(a) (2019). The elements of the felon-in-possession offense are: "(1) [the] defendant was previously convicted of a felony and (2) subsequently possessed a firearm." *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347-48. Defendant concedes the previous felony conviction element "is not in dispute[;]" the State introduced a certified copy of Defendant's prior felony conviction. As a result, the only issue is whether the State presented sufficient evidence Defendant possessed the gun. *See id.*

"It is well established that possession may be actual or constructive." *Id.* at 93, 728 S.E.2d at 348. "Actual possession requires that the defendant have physical or personal custody of the firearm." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Alternately, "[a] defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348 (citations and quotation marks omitted). Here, law enforcement found the gun in a black bag in the car, so Defendant did not have actual possession. *See Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764 (requiring "physical or personal custody" for actual possession). So the State had to present sufficient evidence of constructive possession to defeat the motion to dismiss. *See Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 348 (indicating possession can be actual or constructive).

As to constructive possession, our Supreme Court has explained:

> A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. The defendant may have the power to control either alone or jointly with others. Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.

Id. at 94, 728 S.E.2d at 348 (citations and quotation marks omitted). In the context of a car, a defendant does not have exclusive possession of a car if the car has other occupants. *See State v. Bailey*, 233 N.C. App. 688,

691, 757 S.E.2d 491, 493 (2014) ("[I]t is undisputed that [the] defendant did not actually possess the rifle, nor was he the only occupant in the car where it was found. Therefore, he did not have 'exclusive possession' of the car[.]" (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001))). Here, Defendant was not the only person in the car when the gun was found, so he did not have exclusive possession of the place the gun was found. *See Bailey*, 233 N.C. App. at 691, 757 S.E.2d at 493. As a result, the State "must show other incriminating circumstances sufficient for the jury to find" Defendant "had constructive possession." *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348.

The other incriminating circumstances "inquiry is necessarily fact specific; each case will turn on the specific facts presented, and no two cases will be exactly alike." *Id.* (citation and quotation marks omitted). Our Courts "consider[] a broad range of other incriminating circumstances to determine whether an inference of constructive possession [is] appropriate[.]" *Id.* (citation and quotation marks omitted). "Two of the most common factors [of incriminating circumstances] are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.* (citation and quotation marks omitted). This Court has also termed the indicia of control factor as "evidence that the defendant had a specific or unique connection to the place where the contraband was found." *State v. Kennedy*, 276 N.C. App. 381, 384-85, 856 S.E.2d 893, 896 (2021) (citation and quotation marks omitted).

Focusing on proximity first, mere proximity alone is not sufficient. *See Bailey*, 233 N.C. App. at 692, 757 S.E.2d at 493 ("[T]his Court has found the evidence insufficient to go to the jury when there is no link between the defendant and the firearm besides mere presence."). But proximity can be sufficient when combined with other factors. *See State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (finding "the location in which the firearm was discovered" combined with other testimony was sufficient to support a felon-in-possession conviction). For example, in *Best*, this Court found the "close proximity" between the defendant, who was driving the vehicle, and the gun, which was "found on the floor next to the driver's seat," sufficiently supported a felon-in-possession conviction when combined with the defendant's admitted ownership of the gun and corroborative testimony by other witnesses. *See id.*

Turning to indicia of control, in *Kennedy*, this Court concluded the defendant had a "specific or unique connection to the place where the contraband was found" when the gun was discovered inside a backpack

the defendant owned and that also contained "drugs and drug paraphernalia belonging to" the defendant. *Kennedy*, 276 N.C. App. at 385, 856 S.E.2d at 897 (citation and quotation marks omitted). Further, in *Bradshaw*, our Supreme Court concluded the defendant "exercised dominion and control" over contraband found in a bedroom because police also found in the bedroom: bills with his name on them, a paystub with his name on it, a holiday card with a "known alias" of the defendant, and two recent photographs of the defendant. *Bradshaw*, 366 N.C. at 96-97, 728 S.E.2d at 349-50.

Here, the "[t]wo most common factors" indicating other incriminating circumstances—(1) Defendant's "proximity to the contraband and [(2)] indicia of" Defendant's "control over the place where the contraband is found"—are both present. *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348. First, as to proximity, the black bag containing the gun was placed "behind the passenger seat" where Defendant was sitting. As a result, Defendant was sitting "[l]ess than" two feet in front of the bag. This proximity resembles the situation in *Best* where the defendant was in the driver's seat and the gun was found "on the floor next to the driver's seat[.]" *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562.

Second, as to indicia of Defendant's control, the gun was found touching a Crown Royal bag that contained a wallet with three different identification cards and a credit card, which all had Defendant's name and picture on them. Similar to *Bradshaw*, these identification cards and credit card make it reasonable to infer Defendant controlled, in this case owned, the Crown Royal bag. *See Bradshaw*, 366 N.C. at 96-97, 728 S.E.2d at 349-50 (finding recent photos of the defendant and financial documents with his name on them were sufficient indicia of control for constructive possession); *see also Bradshaw*, 366 N.C. at 92-93, 728 S.E.2d at 347 (indicating we draw "all reasonable inferences" in favor of the State when reviewing a motion to dismiss for insufficient evidence). Working with the inference Defendant owned the Crown Royal bag, this case resembles *Kennedy*. *See Kennedy*, 276 N.C. App. at 385, 856 S.E.2d at 897. Like in *Kennedy*, we can reasonably infer Defendant had control over the firearm inside the black bag because he had stored it with his other possessions, *i.e.* the Crown Royal bag with his identification and credit cards. *See id.*; *see also Bradshaw*, 366 N.C. at 92-93, 728 S.E.2d at 347 (requiring drawing reasonable inferences in favor of the State for motions to dismiss). Therefore, the State presented significant evidence Defendant controlled the black bag that contained the gun.

Combined with Defendant's proximity to the firearm, the State's evidence Defendant controlled the black bag with the gun in it is sufficient

to conclude Defendant constructively possessed the gun. *See Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348 (indicating "[t]wo of the most common factors" allowing "an inference of constructive possession . . . when a defendant exercised nonexclusive control of contraband" are proximity and "indicia of the defendant's control over the place where the contraband is found"). Thus, after our *de novo* review, the State presented sufficient evidence for each of the elements of the felon-in-possession charge, and the trial court did not err in denying the motion to dismiss.

III. Conclusion

Drawing all reasonable inferences in favor of the State, the State presented sufficient evidence Defendant constructively possessed the gun. As a result, we conclude the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges WOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
DE'QUAN LAMONT LYNN, DEFENDANT

No. COA22-990

Filed 19 September 2023

1. Criminal Law—jury selection—prosecutor's voir dire statements—probation as possible sentence

During jury selection for defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property, the trial court did not abuse its discretion by allowing the prosecutor to forecast to potential jury members that probation was within the range of sentencing possibilities that defendant could receive. Even though probation would be allowed pursuant to statute only under narrow circumstances, the prosecutor's statements were technically accurate and therefore not manifestly unsupported by reason.

2. Appeal and Error—preservation of issues—substitution of alternate juror after deliberations began—failure to object

In defendant's trial for assault with a deadly weapon with intent to kill and related charges, where defendant did not object when the trial court substituted an alternate juror after jury deliberations began, defendant failed to preserve for appellate review the issue of whether the substitution was proper.

3. Constitutional Law—effective assistance of counsel—self-defense instruction—additional language unnecessary

In defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property—charges which arose from defendant having fired several gunshots during an altercation at a fast food restaurant—defendant's counsel was not ineffective for failing to ask the trial court to include in the self-defense jury instruction a requirement to consider whether other restaurant patrons had weapons. The jury was unlikely to have reached a different result where the given instruction followed the statutory language on self-defense, including the reasonable belief standard, and where there was no evidence that anyone else had brandished a gun.

4. Constitutional Law—effective assistance of counsel—failure to request jury poll—group affirmation of unanimous verdict

In defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property, defendant's counsel was not ineffective for failing to ask the trial court to conduct a jury poll. There was not a reasonable probability of a different result if the jurors had been polled individually because the jury foreman and the other jurors, as a group, affirmed in open court that their verdicts were unanimous and there was no evidence that a juror was coerced into a verdict.

Appeal by Defendant from judgment entered 14 March 2022 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals on 9 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan Richard Marx, for the State.

Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for Defendant-Appellant.

CARPENTER, Judge.

De'quan Lamont Lynn ("Defendant") appeals from judgment after a jury convicted him of assault with a deadly weapon with intent to kill, discharging a weapon into an occupied building, and four counts of discharging a weapon into a vehicle in operation. On appeal, Defendant argues: (1) the trial court erred by permitting the prosecutor to inform potential jurors that probation was within Defendant's potential sentencing range; (2) the trial court erred by substituting an alternate juror after deliberations began; and (3) he received ineffective assistance of counsel. After careful review, we disagree. We discern no prejudicial error.

I. Factual & Procedural Background

On 9 December 2019, a Mecklenburg County grand jury indicted Defendant for assault with a deadly weapon with intent to kill, discharging a firearm into occupied property, and four counts of discharging a firearm into an occupied vehicle in operation. The State tried the case before a jury in Mecklenburg County Superior Court in March 2022.

During voir dire, the prosecutor informed the potential jurors that a person convicted of four counts of discharging a weapon into an occupied vehicle "could be sentenced up to 17 years in prison," but a person "convicted of all these crimes could also be sentenced to probation." Defense counsel objected on the basis that this was an incorrect statement of the law. After a bench conference, the trial court allowed the prosecutor to proceed with his sentencing-range description.

At trial, evidence tended to show the following: On 2 December 2019 at a Cook Out restaurant located in Charlotte, Defendant had an altercation with other Cook Out patrons. During the altercation, Defendant fired several gunshots, four of which hit a car, and one of which hit the exterior wall of the Cook Out building. Defendant asserted that one of the other Cook Out patrons brandished a gun, but the police failed to find another gun during their investigation, and other witnesses denied the presence of another gun.

Before jury deliberations, the trial court instructed the jury that "if the defendant reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another, such assault would be justified by self-defense." The trial court did not expressly instruct the jury to consider whether other Cook Out patrons possessed weapons. The jury began deliberating on 11 March 2022. On the second day of deliberations, one juror reported that he was ill and would not report for jury duty. The following exchange occurred between the trial court and counsel:

> **Judge:** Essentially, what the Court will do is, I will inform the jury that Juror Number 4 is unable to continue to deliberate with them. And that Juror [N]umber 4 will be replaced with Juror Number–Alternate Number 1. And I will read the instruction from 100.4, which basically indicates that there's an alternate being replaced. They must restart the deliberations from the beginning. They are to disregard entirely any deliberations that have taken place before the alternate was substituted. They are not to be discouraged by the replacement. Then they will resume with deliberations . . . . Any concerns about that before I bring the jury panel in from the State?
>
> **Prosecutor:** No, your Honor.
>
> **Judge:** From the defendant?
>
> **Defense Counsel:** No, your Honor.

The trial court then substituted the alternate juror and instructed the jury to restart deliberations in accordance with N.C. Gen. Stat. § 15A-1215(a) (2021).

On 14 March 2022, the jury found Defendant guilty of assault with a deadly weapon with intent to kill, discharging a weapon into an occupied building, and four counts of discharging a weapon into an occupied vehicle in operation. In open court, both the jury foreman and the other jurors affirmed that the verdicts were unanimous. The trial court sentenced Defendant to serve between fifty-one and seventy-four months in prison. Defendant orally appealed in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether: (1) the trial court erred by permitting the prosecutor to inform potential jurors that probation was within Defendant's potential sentencing range; (2) the trial court erred by substituting an alternate juror after deliberations began; and (3) Defendant received ineffective assistance of counsel.

IV. Analysis

A. Voir Dire Statements

[1] In his first argument, Defendant asserts the trial court erred by permitting the prosecutor to inform potential jurors that probation was

within Defendant's potential sentencing range, as doing so was improper and misleading. After careful review, we disagree.

We review a trial court's management of jury selection for abuse of discretion. *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (1994). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). " 'The goal of jury selection is to ensure that a fair and impartial jury is empaneled.' " *State v. Ward*, 354 N.C. 231, 253, 555 S.E.2d 251, 266 (2001) (quoting *State v. Gell*, 351 N.C. 192, 200, 524 S.E.2d 332, 338 (2000)). "To that end, the trial court is vested with broad discretion to regulate the extent and manner of questioning by counsel during [voir dire]." *Id.* at 253, 555 S.E.2d at 266.

Under N.C. Gen. Stat. § 15A-1340.13(g), a probationary sentence is permitted in lieu of active punishment if the court finds: (1) "extraordinary mitigating factors of a kind significantly greater than in the normal case are present"; (2) "[t]hose factors substantially outweigh any factors in aggravation"; and (3) active punishment would be "a manifest injustice." N.C. Gen. Stat. § 15A-1340.13(g) (2021).

The wisdom of discussing probation as a possible sentence is questionable, as a probationary sentence under these facts requires the trial judge to find extraordinary mitigation. Nonetheless, the prosecutor's voir dire statements were technically accurate statements of the law because probation was a possibility under narrow circumstances. *See id.* (allowing probation instead of active punishment if the trial court makes certain findings). Thus, regardless of the likelihood of a probationary sentence, the trial court did not abuse its discretion in allowing the prosecutor to discuss the possibility of probation because doing so was not "manifestly unsupported by reason." *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Lee*, 335 N.C. at 268, 439 S.E.2d at 559.

B. Alternate Jurors

[2] In his second argument, Defendant asserts the trial court erred by substituting an alternate juror after deliberations began. Specifically, Defendant argues the "jury verdict was reached by more than twelve persons," and thus the verdict violates the North Carolina Constitution. Defendant also argues N.C. Gen. Stat. § 15A-1215(a), itself, violates the North Carolina Constitution. After careful consideration, we conclude that Defendant failed to preserve these arguments for appellate review.

A party must timely object to the trial court in order to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1). Generally, constitutional

issues not raised in the trial court are abandoned on appeal. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

Here, Defendant did not object to the alternate-juror substitution or to the constitutionality of N.C. Gen. Stat. § 15A-1215(a), the statute authorizing the substitution. In fact, when the trial court asked whether there were "[a]ny concerns" regarding the trial court's plan to substitute the alternate juror, Defendant's counsel said "[n]o."

Therefore, Defendant failed to preserve this issue for appellate review under Rule 10. *See* N.C. R. App. P. 10(a)(1); *Hunter*, 305 N.C. at 112, 286 S.E.2d at 539. Accordingly, we dismiss Defendant's arguments because the asserted alternate-juror issues are not properly before this Court.

C. Ineffective Assistance of Counsel

In his final argument, Defendant claims he received ineffective assistance of counsel for two reasons. First, Defendant asserts his trial counsel should have objected to the trial court's self-defense instruction. Second, Defendant asserts his trial counsel should have requested a jury poll. After careful review, we disagree with Defendant.

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)) (analyzing ineffective assistance of counsel under the North Carolina Constitution and adopting the federal test).

First, a defendant must show his counsel's performance was below an objective standard of reasonableness. *Id.* at 562, 324 S.E.2d at 248. Second, the defendant must show he was prejudiced by counsel's error, and there was a reasonable probability of a different result but for counsel's error. *Id.* at 562, 324 S.E.2d at 248. The probability of a different result at trial is "reasonable" if the error undercuts confidence in the result. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). There is a strong presumption that an attorney has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

1. Jury Instructions

[3] To establish ineffective assistance of counsel concerning jury instructions, "the defendant [must] prove that without the requested

jury instruction there was plain error in the charge." *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A person may use deadly force in self-defense when "[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a) (2021).

Here, the trial court instructed the jury that "if the defendant reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another, such assault would be justified by self-defense." The trial court did not explicitly direct the jury to consider whether another Cook Out patron possessed a weapon. Defendant has failed to show, however, that the "jury probably would have reached a different result" if the trial court specifically instructed the jury to consider whether other patrons had weapons. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. First, the given instruction tracks closely with the exact language of N.C. Gen. Stat. § 14-51.3(a), which details the statutory requirements of self-defense. *See* N.C. Gen. Stat. § 14-51.3(a)(1). Second, although Defendant contended that another Cook Out patron brandished a gun, the police failed to find another gun during investigation, and other witnesses denied seeing another gun.

Under these circumstances, it is unlikely that the jury would have reached a different verdict had the trial court specifically instructed the jury to consider whether another patron had a weapon. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Indeed, the trial court instructed the jury to determine "if the defendant reasonably believed that deadly force was necessary." In determining what Defendant reasonably believed, the jury needed to consider competing evidence concerning whether another patron had a weapon. Because the instructed reasonable-belief standard encompassed whether another patron had a weapon, adding a separate, specific instruction to consider whether another patron had a weapon is unlikely to have caused a different result. *See id.* at 440, 426 S.E.2d at 697. Thus, counsel's failure to object to the trial court's instruction was not ineffective assistance of counsel. *See Pratt*, 161 N.C. App. at 165, 587 S.E.2d at 440; *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

2. Jury Polling

[4] Jury polling is a procedure in which the trial court asks each individual juror to state the jury's verdict. *Davis v. State*, 273 N.C. 533, 541,

160 S.E.2d 697, 703 (1968). The purpose of polling the jury is to "enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented." *State v. Holadia*, 149 N.C. App. 248, 259–60, 561 S.E.2d 514, 522 (2002). Unless requested, a trial court is not required to poll the jury. *State v. Sturdivant*, 304 N.C. 293, 305, 283 S.E.2d 719, 728 (1981).

Here, Defendant did not request that the jury be polled, so the trial court was not required to do so. *See id.* at 305, 283 S.E.2d at 728. Even if Defendant requested a jury poll, both the jury foreman and the other jurors, as a group, affirmed—in open court—that their verdicts were unanimous. And the record lacks evidence that a juror was "coerced or induced to agree to a verdict to which he [did] not fully assent[]." *See Holadia*, 149 N.C. App. at 259–60, 561 S.E.2d at 522. Thus, because the jury affirmed "with certainty that a unanimous verdict ha[d] been in fact reached," polling each individual juror was unnecessary here. *See id.* at 259–60, 561 S.E.2d at 522. Therefore, failing to request a jury poll was not ineffective assistance of counsel because it did not create a reasonable probability of a different result. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248; *Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

V. Conclusion

In sum, the trial court did not err by permitting the prosecutor to inform potential jurors that probation was within Defendant's sentencing range, and Defendant failed to preserve his arguments concerning the substitution of an alternate juror. Lastly, Defendant did not receive ineffective assistance of counsel. Accordingly, we discern no prejudicial error.

NO PREJUDICIAL ERROR.

Judge TYSON and Judge FLOOD concur.

STATE OF NORTH CAROLINA
v.
JASMIN R. SINGLETARY

No. COA22-1068

Filed 19 September 2023

1. Probation and Parole—revocation of probation—new criminal offense—sufficiency of evidence—check fraud crimes

In defendant's probation revocation hearing, there was sufficient evidence to support the trial court's finding that it was more probable than not that defendant had committed a new criminal offense—check fraud crimes—while on probation where the State presented violation reports, the testimony of a probation officer concerning defendant's admission that she had "cashed the check to help her friends out," the arrest warrants, and still images from bank security footage showing defendant committing the new crimes.

2. Probation and Parole—revocation of probation—statutory right to confront adverse witnesses—absent probation officer—other evidence sufficient

In defendant's probation revocation hearing, the trial court did not prejudicially err when it did not make an explicit finding that good cause existed for not allowing defendant to confront (pursuant to N.C.G.S. § 15A-1345(e)) her former probation officer, who was absent due to a death in the family. The absent probation officer's testimony or cross-examination would have been superfluous because the State presented sufficient evidence—including the testimony of the new probation officer, who filed one of the probation violation reports—supporting the trial court's finding that defendant had committed new criminal offenses.

Appeal by Defendant from a judgment entered 23 May 2022 by Judge L. Lamont Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kyle Peterson, for the State.

Phoebe W. Dee, for the Defendant.

WOOD, Judge.

Jasmin Singletary ("Defendant") appeals from the trial court's revocation of her probation and activation of a sentence of ten to twenty-one months imprisonment. Defendant was placed on thirty-six months of probation for five counts of obtaining property by false pretenses. Three violation reports were subsequently filed against her for, among other things, committing criminal offenses while on probation. Probation Officer Heather Horne ("Horne"), who testified for the State at Defendant's probation revocation hearing, had replaced Probation Officer Williams ("Williams"), Defendant's prior probation officer, shortly before the revocation hearing.

First, Defendant argues there was not sufficient evidence before the trial court for it to find Defendant committed a crime while on probation where the State called no witnesses except the new probation officer to testify as to the alleged crimes. Second, Defendant argues the trial court violated her statutory confrontation rights when it proceeded with the probation revocation hearing without Williams and without making an explicit finding of good cause not to allow Defendant to confront her.

After careful review, we conclude there was sufficient evidence before the trial court to find Defendant committed a crime while on probation. We further conclude the trial court did not prejudicially err when it proceeded with the probation revocation hearing without Williams because other competent evidence established Defendant violated probation by committing a new criminal offense.

I. Background

On 7 November 2019, Jasmin Singletary pleaded guilty to five counts of obtaining property by false pretenses. The trial court entered three judgments. Defendant was sentenced to an active sentence of imprisonment for a minimum of ten months and a maximum of twenty-one months, suspended for thirty-six months of probation. Defendant also was sentenced to a minimum of ten and maximum twenty-one months imprisonment, suspended for thirty-six months of supervised probation. The probationary sentence included a condition of paying $26,563.00 restitution to the victims of the false pretenses crimes as well as the costs of court, bringing the total cost to $27,415.50. Finally, Defendant was sentenced to another ten to twenty-one months imprisonment, also suspended for thirty-six months and subject to the same terms and conditions applying to the second judgment. The trial court ordered all sentences to run consecutively.

The regular conditions of Defendant's probation, as relevant to this case, also included:

> [D]efendant shall: (1) Commit no criminal offense in any jurisdiction. . . . (6) Not abscond, by willfully avoiding supervision or by willfully making [D]efendant's whereabouts unknown to the supervising probation officer. . . . (8) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner[.]

After Defendant's release from jail, Defendant was on supervised probation in Wilson County.

On 21 January 2021, a probation officer filed a probation violation report alleging Defendant willfully failed to repay the amount ordered in restitution and court fees and failed to pay supervision fees. At a probation violation hearing held 26 July 2021, Defendant admitted to not having paid any money toward the restitution, court costs, and supervision fees, but she denied the willfulness of her failure to pay. The trial court found Defendant violated probation by her failure to pay restitution, court costs, and supervision fees. The court converted all restitution due except $5,000.00 to a civil judgment and ordered monthly payments of $50.00, with Defendant returning to court if she missed two or more payments.

Subsequently, three violation reports leading to Defendant's probation revocation hearing and the probation revocation at issue in this case were filed against Defendant: (1) a 1 November 2021 violation report alleging Defendant failed to make two $50.00 payments and committed a criminal offense as Defendant was charged on 1 September 2021 with obtaining property by false pretense and uttering a forged instrument in Johnston County; (2) a 22 December 2021 violation report alleging Defendant absconded by leaving her last known address and failing to make herself available for supervision; and (3) a 28 February 2022 violation report alleging that on 29 February 2022 Defendant was arrested and charged with uttering a forged instrument at the State Employee's Credit Union (SECU) in Wake County and violated her probation by being on the premises of a SECU on 31 August 2021, when the alleged offense was committed.

The probation violation hearing was held 23 May 2022. At the beginning of the probation revocation hearing, Defendant objected to Williams's absence, arguing Defendant had a right to cross-examine adverse witnesses unless the court found good cause for not allowing confrontation. Defendant's counsel relayed her understanding that Williams was "on leave and they did not know when she was coming back." Defendant's counsel explained there was conversation and text

messages between Defendant and Williams about which Defendant wished to cross-examine Williams. The trial court asked for the State's position on the matter, and the State explained Williams was absent due to a death in her family. The trial court then asked if Defendant acknowledged she had been served with a copy of the violation report and was on notice of the allegations contained in the reports. Defendant's counsel acknowledged both points. The court stated, "the objection is noted for the record."

The State called Officer Horne as a witness. Horne had taken over as Defendant's probation officer. Williams was "not technically with the Department" at the time because of a death in her family at the hands of someone who was "criminally charged in a homicide." Horne testified Williams made her aware of Defendant's pending probation violations and asked for her assistance with Defendant's case. Horne further testified that she was familiar with Defendant, her case, and her violations.

Regarding the first violation report, Defendant admitted she had not made the $50.00 payments for two months but denied her willfulness. Through counsel, Defendant stated she since had paid some of it. Defendant admitted to the pending charges of obtaining property by false pretense and uttering a forged instrument but not to any "independent finding behind the charge." Horne testified Defendant cashed a check in the amount of $600.00 drawn on a closed bank account and admitted during a phone conversation with both Horne and Williams that she had cashed the check "to help her friends out." The state submitted two exhibits pertaining to the Johnston County charges of obtaining property by false pretense and uttering a forged instrument. The State submitted two still images, dated 1 September 2021, from security footage captured inside the SECU showing a woman standing in front of a bank teller's counter. Horne testified the Johnston County Sheriff's Office sent her a copy of the images. The State also submitted a warrant for Defendant's arrest for obtaining property by false pretense and uttering a forged instrument. The warrant accurately stated Defendant's date of birth. It further stated Defendant tried to deposit the check, which was "from a known closed BB&T checking account belonging to the Defendant[,] into a [SECU] account belonging to Dinesha Brice[.]" Horne testified she spoke with a Johnston County detective who stated the photographic evidence confirmed Defendant was at SECU, wrote a check, cashed it, and took funds.

Regarding the second violation report, Horne testified Defendant's last known address was a 406 Englewood Drive, at the time her case was accepted for courtesy supervision in Johnson County. Horne testified

Williams went to this address on 3 October 2021, but Defendant was not there. On cross-examination, Defendant's counsel asked Horne if she was aware of a message sent by Defendant to inform Williams that Defendant had obtained a restraining order against her husband with whom she had been living at the Englewood address. Horne stated that while she could not testify as to a text message because she did not have access to Williams's cell phone, she was aware Defendant was scheduled to appear in court for a domestic violence case in December.

Horne testified Williams did not hear from Defendant until 26 October 2021, when Defendant called Williams and Horne (who were on the phone together) to explain her son had a mental health issue and she was taking him for treatment. Williams and Horne requested medical proof which Defendant did not provide. On 8 November 2021, Williams again went to the Englewood address, but family stated Defendant lived in Clayton. Defendant did not provide notice of her change of address to her probation officer, as required, nor did she make any visits to the probation office. Some time later, Defendant reported an address in Johnston County stating she lived there with her friend. However, when a Johnston County officer visited this address, the resident stated Defendant did not live there but "only came through every once in a while." After further extensive efforts by probation officers to locate Defendant, she turned herself in after absconding probation for a little over a month.

Horne replaced Williams as Defendant's probation officer in February 2022. On 28 February 2022, Horne filed the third probation violation report alleging Defendant committed a new criminal offense. The State submitted two images, provided to Horne by the Garner Police Department, purportedly of Defendant at a SECU drive-through ATM in Garner. The State also submitted a Garner Police Department arrest warrant naming Defendant and stating probable cause to believe she uttered a forged instrument. The warrant stated there was probable cause to believe Defendant delivered to SECU a forged check in the amount of $300.00 payable to Dinesha Brice by Defendant. The warrant contained Defendant's demographic information, which Horne confirmed.

The State requested the trial court to have Defendant remove the mask she wore at the probation revocation hearing for the trial court to compare Defendant's appearance to the images of the woman in the photos submitted by the State. In response, the trial court stated:

> For the record, when the State asked the Defendant to remove her mask earlier at the beginning of the proceeding for purposes of identification by the witness, the Court

> actually reviewed the court file. There was a picture of the Defendant in the court file and the Court has reviewed all the documentation and exhibits that have been presented by the State and finds that the individual in the photographs is indeed the Defendant seated in the courtroom.

After finding it more probable than not Defendant had committed a new criminal offense while on probation, the trial court found Defendant in willful violation of its terms and conditions. The trial court revoked probation and activated the prison sentences. Defendant appealed to this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2022).

II. Analysis

The issues before us are: (1) whether there was sufficient evidence before the trial court to find it more probable than not Defendant committed a new criminal offense, and (2) whether the trial court erred by not making a specific finding of good cause to proceed with the probation revocation hearing in Williams's absence.

Defendant argues Horne's testimony, the images captured at SECU locations, and the arrest warrant for alleged new crimes were insufficient evidence for the court to find it more probable than not Defendant committed a new criminal offense during probation. Defendant further argues the trial court violated her statutory right to confront Williams at the probation revocation hearing by proceeding in Williams's absence. We disagree.

A. Standard of Review

"We review a trial court's decision to revoke probation only for manifest abuse of discretion." *State v. Stephenson*, 213 N.C. App. 621, 624, 713 S.E.2d 170, 173 (2011) (quotation marks omitted). A probation revocation hearing requires evidence "to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (quotation marks omitted).

> [O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms. If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior

> sentence was suspended, it may within its sound discretion revoke the probation.

Stephenson, 213 N.C. App. at 624, 713 S.E.2d at 173 (citation and quotation marks omitted).

B. Sufficiency of the Evidence

[1] Defendant argues Horne's testimony, the still images from SECU security footage purporting to show Defendant committing the check fraud crimes, and the arrest warrants for the alleged crimes were insufficient for the court to find it more probable than not she committed those crimes. Specifically, Defendant argues the State needed to call law enforcement witnesses to present evidence about the investigations relating to the crimes, civilian victim witnesses, or SECU employees who could identify Defendant. Because the trial court specifically based its finding of a probation violation on the commitment of a new crime, we limit our review to that basis.

A trial court may revoke probation for committing a criminal offense while on probation. N.C. Gen Stat. §§ 15A-1343(b)(1), 1344(a) (2022).

> [T]he "mere fact that [a probationer is] charged with certain criminal offenses is insufficient to support a finding that he committed them. However, a defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense."

State v. Hancock, 248 N.C. App. 744, 749, 789 S.E.2d 522, 526 (2016) (citation omitted). It is sufficient that the "State . . . introduce evidence from which the trial court can independently find that the defendant committed a new offense." *Id.* at 749–50, 789 S.E.2d at 526. "The sworn violation report constitutes competent evidence sufficient to support the trial court's finding that [the] defendant committed this violation." *Id.* at 750, 789 S.E.2d at 526; *see also State v. High*, 183 N.C. App. 443, 449, 645 S.E.2d 394, 397 ("Defendant's probation officer filed a violation report that specifically stated that defendant absconded—a statement that in itself is competent evidence that he violated his probation by absconding. Defendant's suggestion that a statement in a probation violation report is nothing more than an allegation, like the notation on the arrest warrant, is contrary to established law.").

In *Hancock*, it was sufficient for the trial court to make "an independent determination that defendant committed the three offenses charged . . . by finding that defendant committed the violation alleged in

the" violation report. *Hancock*, 248 N.C. App. at 750, 789 S.E.2d at 526. The violation report itself was based on evidence of illegal drug possession found after a warrantless search of the defendant's residence. *Id.* at 750, 789 S.E.2d at 526. "Given the informal nature of a probation revocation proceeding, the trial court was entitled to infer that the discovery of" drugs in the defendant's residence "gave rise to the criminal charges" for illegal drug possession. *Id.* at 750, 789 S.E.2d at 526 (citation omitted).

In the present case, we are satisfied the trial court did not manifestly abuse its discretion in finding it was more probable than not Defendant committed a new criminal offense. The violation reports at issue were based on details provided in the arrest warrants, but not only on the arrest warrants. Horne testified she was on a phone call with Defendant and Williams in which Defendant herself stated she cashed the check to help her friends out. The trial court made detailed oral findings regarding the identity of the person in the images, finding that the person in the images was Defendant. The trial court was entitled to infer from two arrest warrants issued by two different law enforcement offices in two alleged incidences involving fraudulent checks, two sworn violation reports, and Horne's sworn testimony, that the images of Defendant depicted her committing the crimes alleged. *See Hancock*, 248 N.C. App. at 750, 789 S.E.2d at 526. Thus, the court made an independent finding based on the evidence provided at the probation revocation hearing and did not reach its determination based solely on Defendant's being charged with the crimes. *See id.* at 749–50, 789 S.E.2d at 526. A probation revocation hearing is not a trial, and the State need not present evidence sufficient to convict Defendant nor call as witnesses the investigating officers of the crimes alleged. *See id.* at 749, 789 S.E.2d at 526.

Accordingly, we conclude there was sufficient evidence before the trial court for it to find it more probable than not Defendant committed the new criminal offenses alleged in the probation violation reports.

C. Confrontation Challenge

[2] Defendant argues the trial court's decision to proceed with the probation revocation hearing in Williams's absence violated Defendant's right to confront adverse witnesses in such hearings provided in N.C. Gen. Stat. § 15A-1345(e). Specifically, Defendant argues there was no evidence Williams was actually unavailable where, although undeniably grieving, she was not ill or otherwise incapacitated, and had not moved or transferred from Wilson County. Most importantly, Defendant argues the trial court erred in failing to make a specific good cause finding when it merely noted the objection but did not address good cause.

"A proceeding to revoke probation is not a criminal prosecution[.]" *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Therefore, "a Sixth Amendment right to confrontation in a probation revocation hearing does not exist." *State v. Hemingway*, 278 N.C. App. 538, 548, 863 S.E.2d 279, 286 (2021). Instead, N.C. Gen. Stat. § 15A-1345(e) "is a codification of the probationer's right to due process under the Fourteenth Amendment" and controls the probationer's right to confrontation in a probation revocation hearing. *Jones*, 269 N.C. App. at 444, 838 S.E.2d at 689. Thus, any "constitutional argument, to the extent it sounds in due process, collapses into [a] statutory argument." *Hemingway*, 278 N.C. App. at 548, 863 S.E.2d at 286. N.C. Gen. Stat. § 15A-1345(e) provides, "At the [probation revocation] hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2022). Accordingly, "while N.C. Gen. Stat. § 15A-1345(e) confers upon a probationer a right to confrontation, it commits to the discretion of the trial court whether 'good cause exists for not allowing confrontation.' " *Jones*, 269 N.C. App. at 444, 838 S.E.2d at 689 (brackets omitted); N.C. Gen. Stat. § 15A-1345(e) (2022).

"The denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case[.]" *State v. Terry*, 149 N.C. App. 434, 438, 562 S.E.2d 537, 540 (2002) (quotation marks omitted); *see also State v. Lewis*, 361 N.C. 541, 544, 648 S.E.2d 824, 827 (2007) (violation even of Confrontation Clause rights may be harmless error in light of other evidence of defendant's guilt). The issue here, then, is whether the trial court committed prejudicial error by not making an explicit finding that good cause existed for not allowing Defendant to confront Williams.

In *Terry*, this Court held the trial court did not err in failing to require an adverse witness to testify where (1) the adverse witness's testimony would have been merely extraneous evidence in light of other competent evidence presented through the probation officer's testimony and (2) defendant failed to request the professor be subpoenaed. *Id.* at 438, 562 S.E.2d at 539 (evidence that the defendant failed to report to a detention center on its own "was sufficient to satisfy the State's burden of showing that defendant had violated an important condition of her probation" without calling the adverse witness, and "Defendant did not at any stage in the proceedings request that her professor be subpoenaed").

There are limitations on a court's decision not to allow a defendant to confront a witness at a probation revocation hearing as demonstrated in two cases where this court determined the trial court erred by failing to allow the defendant to confront a witness. In *State v. Coltrane*, the defendant appeared before the trial court upon allegations she violated a condition of her probation requiring her to obtain a job. 307 N.C. 511, 512–13, 299 S.E.2d 199, 200–01 (1983). In this extremely brief hearing, the prosecuting attorney explained to the court that she heard from the probation officer the defendant had not found a job. *Id.* at 515, 299 S.E.2d at 202. The trial court asked the defendant if she had a job, and when the defendant started to explain that she did not, the trial court immediately interrupted her and activated her sentence. *Id.* at 515, 299 S.E.2d at 202. On appeal, the *Coltrane* court held the defendant's rights to "present relevant information" and "confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation" were violated when the defendant was not allowed to confront the prosecuting attorney or the probation officer and where the defendant was not allowed to speak on her own behalf due to the hearing's extreme brevity. *Id.* at 515–16, 299 S.E.2d at 202; N.C. Gen Stat. § 15A-1345(e). Because the trial court "interrupted [the] defendant and did not permit her to offer any explanation of her failure to obtain" a job, there was "no competent evidence in the record to support the conclusion that [the] defendant violated the condition of probation willfully or without lawful excuse," and therefore, the trial court erred in revoking defendant's probation. *Id.* at 516, 299 S.E.2d at 202.

We recognize the statutory mandate under N.C. Gen. Stat. § 15A-1345(e) for a trial court to find good cause before denying a defendant's request to cross-examine an absent witness. In the present case, we also must recognize the controlling authority of *Terry* which held testimony from an absent witness may be merely extraneous in light of other sufficient evidence supporting the trial court's finding that a defendant violated her probation.

Here, the evidence supporting the trial court's finding that Defendant committed new criminal offenses was such that Williams's testimony merely would have been extraneous in light of the testimony provided by Horne. The trial court had before it arrest warrants, SECU security footage images which the court examined and found were of Defendant, and Horne's independent testimony of Defendant's admission that she cashed a check for her friends. Horne initiated and filed the third probation violation report alleging that on 29 February 2022, Defendant committed a new criminal offense, was arrested and charged

with uttering a forged instrument at the SECU in Wake County, and violated the terms of her probation by being on the premises of a SECU on 31 August 2021, when the alleged offense occurred. Furthermore, she provided testimony regarding the new offense and was available for cross-examination during the revocation hearing. The State provided evidence sufficient to support the trial court's finding that Defendant had committed new crimes even without any testimony from Williams. *Terry*, 149 N.C. App. at 438, 562 S.E.2d at 539.

Defendant specifically wished to cross-examine Williams regarding a text or texts sent by Defendant to Williams stating she obtained a restraining order against her husband. First, and most significantly, such testimony would have been relevant to the issue of absconding. The trial court, however, based its revocation of Defendant's probation on Defendant's having committed new criminal offenses, so even if Defendant had cross-examined Williams regarding the restraining order, it would not have impacted the revocation of her probation. Second, Horne conceded she was aware Defendant was scheduled to appear in court for a domestic violence case in December, allowing Defendant to develop testimony in her favor on the issue of absconding.

Defense counsel even demonstrated an awareness that Williams would be absent, stating her understanding that Williams was on leave for an unknown period of time. Yet Defendant had not subpoenaed Williams. The trial court heard from both Defendant and the State regarding Defendant's objection to Williams's absence, and the trial court noted the objection for the record. The death in Williams's family clearly would have shown good cause to proceed in her absence. The trial court was aware of the reason for Williams's absence and decided to proceed. Because the record demonstrates the trial court's awareness of the circumstances surrounding Williams's absence, we cannot say the trial court abused its discretion by allowing the hearing to proceed in her absence. *See Terry*, 149 N.C. App. at 438, 562 S.E.2d at 539.

Finally, if there were any error, Defendant was not prejudiced where the trial court had before it competent evidence without testimony from or cross-examination of Williams, and Horne, who filed the third probation violation report, testified at the probation revocation hearing. *Terry*, 149 N.C. App. at 438, 562 S.E.2d at 540; *see also Lewis*, 361 N.C. at 544, 648 S.E.2d at 827.

III. Conclusion

We hold there was sufficient evidence to support the trial court's finding Defendant committed a new criminal offense based on the arrest

warrants, still images of Defendant at two different SECU locations, the sworn violation reports, and Horne's testimony. We further hold the trial court did not prejudicially err by not making an explicit finding of good cause where sufficient evidence and testimony provided through Horne supported the trial court's finding that Defendant violated her probation, even with Williams absent from the hearing.

NO ERROR.

Judges MURPHY and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 SEPTEMBER 2023)

COURTNEY CARTER HOMES, LLC v. WYNN CONSTR., INC. No. 22-792	Onslow (19CVS3578)	Affirmed
ELWIR v. BOUNDARY, LLC No. 22-961	Wake (20CVS7911)	Affirmed
IN RE D.S.R. No. 23-344	Surry (22JT94) (22JT95) (22JT96) (22JT97)	Affirmed
IN RE H.G. No. 22-807	Guilford (19JA280)	Vacated and Remanded
IN RE J.L. No. 23-59	Jackson (20JT27)	Affirmed
IN RE K.R. No. 22-753	Cumberland (18JA128) (18JA129) (20JA205)	Affirmed
IN RE M.D.G. No. 22-875	Wayne (21SPC1195)	Dismissed
IN RE S.A.B.S. No. 22-830	Wilkes (20JA145)	Vacated and Remanded
MARECIC v. BAKER No. 23-38	Iredell (18CVD3017)	Affirmed
MESSICK v. WALMART STORES, INC. No. 22-1069	N.C. Industrial Commission (X45404) (X82412)	Affirmed
ODINDO v. KANYI No. 23-437	Wake (22CVD1497)	Dismissed
SLOAN v. TOWN OF MOCKSVILLE No. 23-121	Davie (21CVS381)	Affirmed
STATE v. BEST No. 22-1050	Pitt (20CRS50522) (20CRS85)	No Error

STATE v. BLACK No. 23-102	Haywood (21CRS488)	Dismissed
STATE v. COX No. 23-31	Forsyth (17CRS190) (18CRS111)	No Error
STATE v. COX No. 23-405	Cleveland (19CRS55692-93) (20CRS53868)	Affirmed
STATE v. DALEY No. 23-7	New Hanover (19CRS2698) (19CRS51951-54)	No Error
STATE v. FENNER No. 23-6	Wake (21CRS200683-86)	No Error
STATE v. FORE No. 23-231	Henderson (20CRS53541-45) (20CRS53549) (21CRS247-48)	Dismissed
STATE v. GIBBS No. 20-591-2	New Hanover (18CRS56870)	No Error
STATE v. HOPKINS No. 22-1010	Transylvania (19CRS214) (19CRS216) (19CRS217) (19CRS51397)	No Error
STATE v. IVEY No. 22-1033	Iredell (19CRS51309-15)	No Error.
STATE v. JOHNSON No. 22-1051	Guilford (20CRS66568) (20CRS78879) (21CRS79567-68)	Dismissed
STATE v. LINK No. 23-468	Randolph (17CRS51759)	No Error
STATE v. McSPADDEN No. 23-247	Forsyth (21CRS53428)	Vacated
STATE v. MOORE No. 23-259	Craven (19CRS53491-493) (20CRS794-797) (21CRS519)	No Error

STATE v. O'HANLAN No. 23-279	Swain (00CRS194-97) (99CRS2025-28)	Affirmed.
STATE v. PITTS No. 23-70	New Hanover (17CRS50730)	Dismissed
STATE v. REGISTER No. 22-437	Duplin (20CRS50271-72) (20CRS50908-09)	No Error
STATE v. STEPHENS No. 23-280	Wake (18CRS218993-94)	No Error
STATE v. STREATER No. 23-302	Davidson (20CRS51464) (20CRS51466) (20CRS948)	No Error
STATE v. THOMAS No. 23-158	Wayne (18CRS1396) (18CRS52883-84)	No Error
VENABLE v. GREP SE. LLC No. 23-218	Mecklenburg (21CVS9629)	Affirmed

CUSICK v. EST. OF LONGIN

[290 N.C. App. 555 (2023)]

KATHLEEN M. CUSICK, PLAINTIFF
v.
THE ESTATE OF KEVIN C. LONGIN, BY AND THROUGH ITS ADMINISTRATRIX, ANNE MARIE LONGIN, DEFENDANT

No. COA22-879

Filed 3 October 2023

1. Jurisdiction—estate claim—monies owed under separation agreement—registration of foreign support order

The trial court had subject matter jurisdiction over plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement, which provided that plaintiff was to receive eighty-four monthly alimony payments, only thirty-two of which plaintiff had received as of her ex-husband's passing. Plaintiff was not required to register the foreign support order in North Carolina as a prerequisite to invoking the trial court's jurisdiction, and her claim—alleging breach of contract for which she sought a sum certain as a remedy—constituted a justiciable civil matter involving an amount of money statutorily decreed to be appropriate for resolution in the superior court division.

2. Estates—claim for monies owed—out-of-state separation agreement—foreign law applied—payment obligation ended at death

Plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement—pursuant to which plaintiff was entitled to receive eighty-four monthly alimony payments, only thirty-two of which she had received at the time of her ex-husband's passing—was properly dismissed for failure to state a claim for relief. Based on a plain reading of the agreement in its entirety, the parties intended for the payments to constitute future maintenance and not property division, and there was no provision in the agreement that the payments would continue posthumously. Based on Colorado law, which governed the validity of the agreement, obligations to pay future maintenance are presumed to cease at the death of either party unless expressly contracted for and, therefore, plaintiff was not entitled to recover the remaining balance from her ex-husband's estate.

Appeal by plaintiff from order entered 21 July 2022 by Judge Reggie McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2023.

Donna P. Savage and Matthew A. Freeze for the plaintiff-appellant.

Alexander W. Warner for the defendant-appellee.

STADING, Judge.

Plaintiff Kathleen Cusick ("plaintiff") appeals from the trial court's order granting defendant-estate's motion to dismiss. For the reasons below, we affirm.

I. Background

In 1991, plaintiff and decedent Kevin Longin ("decedent") married in the state of Washington. In 2018, they divorced in the state of Colorado. As part of their divorce, the District Court of Chafee County, Colorado, entered a Decree of Dissolution of Marriage on 7 September 2018. The decree incorporated two Memorandums of Understanding ("MOU"), documenting the terms of the Separation Agreement reached by the parties through mediation. The first MOU, signed by the parties on 5 July 2018, included a specific list of marital assets and did not refer to the income of either spouse. Under that MOU, decedent assumed an obligation to make monthly payments of $2,000 to plaintiff over a period of sixty months.

On 31 August 2018, the parties amended the MOU and the Separation Agreement. The parties noted that "[s]ubsequent to the Separation Agreement being filed, along with other necessary documents, [plaintiff] reported to the court that her attorney had not reviewed any of [decedent's] disclosure of assets or financial documents prior to mediation[.]" Plaintiff's review of decedent's disclosure of assets and financial documents led to "further negotiations" that prompted a change in paragraph 13 of the MOU and an extension of the payment obligation by twenty-four months, for a total of eighty-four months. The Separation Agreement specifically stated: "The payment of maintenance shall be deemed to be contractual in nature and shall not be modified for any reason. The Court shall be divested of all jurisdiction to modify maintenance after the entry of the permanent orders."

On 9 March 2021, decedent died intestate in Mecklenburg County, North Carolina. Decedent's sister, Anne Marie Longin, qualified as administratrix of his estate ("defendant-estate") on 9 June 2021. Before his passing, decedent made thirty-two monthly payments to plaintiff, totaling $64,000, in compliance with the Separation Agreement. At the time of decedent's passing, fifty-two monthly payments remained, with a balance of $104,000.

On 16 September 2021, plaintiff made a claim in the amount of $104,000 against decedent's estate by hand-delivering the Written Statement of Claim to defendant-estate's attorney. In response, defendant-estate rejected plaintiff's claim. Also, plaintiff filed the Written Statement of Claim with the Mecklenburg County Clerk of Superior Court. Since the claim was rejected, plaintiff timely sued in Mecklenburg County Superior Court for $104,000 on 16 March 2022, within three months as required by N.C. Gen. Stat. § 28A-19-16.

Thereafter, defendant-estate moved for a dismissal of plaintiff's suit for several reasons under North Carolina's Rules of Civil Procedure —including the two arguments preserved for consideration on appeal— lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim upon which relief can be granted under Rule 12(b)(6). Defendant-estate maintained that plaintiff's failure to register the Colorado support order under N.C. Gen. Stat. § 52C-6-602, resulted in the trial court lacking subject matter jurisdiction. Additionally, defendant-estate contended that, under Colorado law, the estate no longer had an obligation to pay plaintiff's claim for $104,000 after decedent's death. Plaintiff countered that defendant-estate was not entitled to judgment as a matter of law because plaintiff stated a breach-of-contract claim under Colorado law. The trial court agreed with defendant-estate and granted its 12(b)(6) motion, dismissing plaintiff's complaint without prejudice. Plaintiff filed her notice of appeal with this Court on 19 August 2022.

On appeal, plaintiff contends that since the Separation Agreement contains a non-modification clause, she is still entitled to $104,000 in maintenance payments, even after the decedent's death. Defendant-estate disagreed, asserting that, under Colorado law, plaintiff is not entitled to posthumous maintenance. Moreover, defendant-estate argues that plaintiff's claim should be dismissed for lack of subject matter jurisdiction.

II. Jurisdiction

The trial court's grant of defendant-estate's 12(b)(6) motion to dismiss is a final order, and no other claims remain pending. Therefore, this Court has jurisdiction to hear plaintiff's appeal under N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

A. Subject Matter Jurisdiction

[1] As a preliminary consideration, we address defendant-estate's contention that the trial court did not have subject matter jurisdiction

and this claim should be dismissed pursuant to N.C. Gen. Stat. § 1A-1, R. 12(b)(1) (2021). "Our review of a trial court's decision denying or allowing a Rule 12(b)(1) motion is *de novo* except to the extent that the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003) (internal quotation marks and citation omitted). However, "when considering a Rule 12(b)(1) motion—in contrast to a motion under Rule 12(b)(6)—a trial court is not confined to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Id.* (internal quotation marks and citation omitted). In this case, the trial court's order does not address defendant-estate's challenge to subject matter jurisdiction.

Defendant-estate published a notice to creditors under N.C. Gen. Stat. § 28A-14-1 (2021) on 22 June 2021, noting that "all persons . . . having claims against [the] estate to present them . . . on or before the 30th day of September, 2021, or this notice will be pleaded in bar of their recovery." On 29 September 2021, plaintiff filed the Written Statement of Claim based on the remaining alimony payments. In reply, on 23 December 2021, defendant-estate sent a denial of the claim to plaintiff. On 16 March 2022, plaintiff filed a complaint for monies owed in Mecklenburg County Superior Court, claiming that jurisdiction was proper under N.C. Gen. Stat. §§ 1-75.4, 7A-240, and 28A-19-16 (2021). Defendant-estate countered, arguing that plaintiff's failure to register the foreign support order, as permitted by N.C. Gen. Stat. § 52C-6-602(a) (2021), deprived the trial court of subject matter jurisdiction.

Defendant-estate maintains that our decision in *Halterman v. Halterman* stands for the proposition that registration of the Colorado order is a prerequisite for the trial court to have subject matter jurisdiction. 276 N.C. App. 66, 855 S.E.2d 812 (2021). In *Halterman*, the order was issued in Florida, the defendant-appellee was a resident of Virginia, and the plaintiff-appellant and children were residents of North Carolina. *Id.* at 68, 855 S.E.2d at 813. Upon consideration of the defendant-appellee motion to dismiss the plaintiff-appellant's petition to register a child support order for lack of subject matter jurisdiction, the trial court granted the defendant-appellee's motion to dismiss. *Id.* at 69, 855 S.E.2d at 814. On appeal, our Court noted the concerns implicated by registration under Chapter 52 of the North Carolina General Statutes, referred to as the Uniform Interstate Family Support Act ("UIFSA"), and the "essential differences in registration of foreign orders under" Chapter 50A of the North Carolina General Statutes, referred to as the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

Id. at 76–77, 855 S.E.2d at 818–19. Ultimately, our Court affirmed the absence of subject matter jurisdiction "for purposes of child support modification or enforcement." *Id.* at 77, 855 S.E.2d at 819.

While *Halterman* is not squarely on point in addressing the present concern, our Court's opinion provides a level of guidance in attending to the significance of registering a foreign order that is subject to modification, which would also permit enforcement by the mechanism of contempt. *Id.* Furthermore, the considerations underlying the purpose of UIFSA are relevant to our determination:

> UIFSA introduced for the first time the principle of continuing, exclusive jurisdiction and the one-order system. The goal of this provision, like its corollary under the UCCJEA, makes only one support order effective at any one time. UIFSA also provides direct enforcement procedures that do not require assistance from a tribunal and limits modification more than it was under URESA.

3 Reynolds on North Carolina Family Law § 10.24 (2022) (internal quotation marks and citation omitted). The circumstances here provide that plaintiff is suing defendant-estate for a breach of contract, seeking a remedy of a sum certain in response to the denial of a claim as anticipated under N.C. Gen. Stat. § 28A-19-16. Thus, the complaint alleges claims for "justiciable matters of a civil nature" and original general jurisdiction is vested in the trial division. N.C. Gen. Stat. § 7A-240. Moreover, given the amount in controversy, the superior court is the proper division within the trial division to adjudicate these claims. N.C. Gen. Stat. § 7A-243 (2021). Additionally, the concerns of multiple orders, confusion regarding modification, and necessity of enforcement by contempt anticipated by UIFSA are not present. Considering the foregoing, the trial court did not want of subject matter jurisdiction.

B. Failure to State a Claim

[2] Plaintiff argues that the trial court erred in granting defendant-estate's motion to dismiss under N.C. Gen. Stat. § 1A-1, R. 12(b)(6) (2021).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Kohn v. Firsthealth of the Carolinas, Inc., 229 N.C. App. 19, 21, 747 S.E.2d 395, 397 (2013) (citation omitted).

It is well-settled that a claim may be dismissed under Rule 12(b)(6) when one of the following is satisfied: (1) the complaint, on its face, reveals that no law supports the claim; (2) the complaint, on its face, reveals a lack of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). Like the standard applied to our analysis pursuant to Rule 12(b)(1), we review a trial court's Rule 12(b)(6) order of dismissal *de novo*. *Id.*

Beginning with our *de novo* determination, "[t]he general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere[.]" *Muchmore v. Trask*, 192 N.C. App. 635, 639, 666 S.E.2d 667, 670–71 (2008), *review allowed, writ allowed*, 363 N.C. 374, 678 S.E.2d 666 (2009) (internal quotation marks and citation omitted). "North Carolina has long adhered to the general rule that . . . the law of the place where the contract is executed governs the validity of the contract." *Id.* at 639, 666 S.E.2d at 670 (citation omitted); *see also Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) ("[T]he interpretation of a contract is governed by the law of the place where the contract was made." (citation omitted)). Accordingly, we will apply relevant governing Colorado law. *See Muchmore*, 192 N.C. App. at 639–40, 666 S.E.2d at 670.

Plaintiff urges us to accept the position that paragraph 13 of the MOU, entitled "Agreements Regarding Maintenance," genuinely addresses "property division." In making this argument, plaintiff asserts that a reading of the entire Separation Agreement leads to such a conclusion. However, viewing the agreement in its entirely shows that the parties intended for numerous other provisions to address property apportionment, and for paragraph 13 to directly concern future maintenance. Additionally, plaintiff posits that Colorado law supports this position in requiring that a *court* "shall award maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. . . ." Colo. Rev. Stat. § 14-10-114(3)(d) (2023). To the contrary, here, the parties were free to set terms as they pleased.

Thus, it is appropriate to apply the more relevant authority—Colorado's statute for modification and termination of maintenance, support, and property disposition. Colo. Rev. Stat. § 14-10-122(2)(a)) provides:

> Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the earlier of:

I. The death of either party;

II. The end of the maintenance term, unless a motion for modification is filed prior to the expiration of the term;

III. The remarriage of or the establishment of a civil union by the party receiving maintenance; or

IV. A court order terminating maintenance.

Colo. Rev. Stat. § 14-10-122(2)(a) (2023). Here, plaintiff contends that she and decedent agreed to extend the payments posthumously. Analogous to a federal circuit court sitting in diversity, "we are obliged to interpret and apply the substantive law of [the] state." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 512 (4th Cir. 1999). In conducting our *de novo* analysis, "we may of course consider all of the authority that the state high court[ ] would, and we should give appropriate weight to the opinions of [its] intermediate appellate courts." *Id.* (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967)). We next look to available precedent in the appellate courts of Colorado.

In 2017, a division of the Colorado Court of Appeals considered facts similar to the present matter when deciding *In re Marriage of Williams*, in which a husband and wife divorced in Colorado, with the husband making "monthly [post-divorce] payments to [the] wife under the [separation] agreement until his death. . . ." 2017 COA 120M, ¶ 5, 410 P.3d 1271, 1273. After her former husband died, the wife petitioned his estate to continue the payments posthumously. *Id.* Upon declining to continue payments, the wife sued her former husband's estate. *Id.* at ¶¶ 5–6. The trial court "ruled that the premarital and separation agreements obligated the estate to continue making the monthly payments to the wife until her death or remarriage." *Id.* at ¶ 7, 410 P.3d at 1273. The estate then appealed, asserting that the trial court "erred in determining that husband's payment obligations continue after his death, as an obligation of his estate." *Id.* at ¶¶ 7–8, 410 P.3d at 1273. The appellate court sided with the estate and found that there was no longer an obligation to continue the monthly payments posthumously. *Id.* at ¶ 8, 410 P.3d at 1273. Specifically, the appellate court found that the trial court erred because

> [The] premarital agreement entitled [the] wife to receive the monthly payments specifically "from [the husband]," not also from his estate after he had died. Likewise, the separation agreement expressly provide[d] that "Husband shall pay to the Wife" the monthly payments. Neither

> agreement said anything about the estate making the payments after [the] husband's death.

Id. at ¶ 18, 410 P.3d at 1275–76 (citation omitted). Hence, the "husband's personal obligation to pay ended when he died, absent a clear indication to the contrary, which . . . neither the premarital nor separation agreement provided." *Id.* at ¶ 21, 410 P.3d at 1276 (citations omitted).

Plaintiff maintains that we should disregard the ruling in *Williams*, in favor of the reasoning employed in *In re Marriage of Parsons*, an earlier opinion from a division of the Colorado Court of Appeals. 2001 COA 116, ¶ 1, 30 P.3d 868. In that case, the separation agreement provided that the husband was to pay monthly maintenance to the wife for ninety-six months. *Id.* at ¶¶ 1–2, 30 P.3d at 868. The wife remarried in the interim and the "husband filed a motion to terminate maintenance, alleging that termination was required . . . because the separate agreement did not specifically provide that maintenance would continue if wife remarried." *Id.* at ¶ 2, 30 P.3d at 868–69. The court disagreed with the former husband, finding that "the presence of a nonmodification clause is sufficient to overcome the statutory presumption that maintenance terminates upon the recipient's remarriage." *Id.* at ¶ 4, 30 P.3d at 869.

More recently, in 2021, when deciding *In re Marriage of Cerrone*, the Colorado Court of Appeals wrestled with a similar issue of whether a maintenance obligation "ended automatically on [one party's] remarriage." 2021 COA 116, ¶ 1, 499 P.3d 1064. In that opinion, a division of the appellate court held that "the *Parsons* division diverged from the plain language of section 14-10-122(2)(a)(III) when it concluded that 'the presence of a non-modification clause'—standing alone—is sufficient to overcome the statutory presumption that the obligation to pay maintenance ends on the recipient spouse's remarriage." *Id.* at ¶ 18, 499 P.3d at 1067 (quoting *Parsons*, 2001 COA 116 at ¶ 4, 30 P.3d at 869). Further, the opinion offered that "we do not view as talismanic the terms 'contractual' and 'nonmodifiable.' " *Id.* at ¶ 19, 499 P.3d at 1067. Therefore, the court held "to avoid termination of maintenance by operation of law under section 14-10-122(2)(a)(III), a separation agreement or decree must include an 'express provision' that maintenance will continue even if the recipient spouse remarries." *Id.* at ¶ 20, 499 P.3d at 1067.

In view of the foregoing, under Colorado precedent, a split of authority exists. While panels of the North Carolina Court of Appeals are bound by decisions of predecessor panels, Colorado's Court of Appeals does not adhere to the same paradigm. *Compare In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different

case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."); *with* Colo. R. App. P. 49 ("Review in the supreme court . . . will be granted only when there are special and important reasons . . . [such as] a division of the court of appeals has rendered a decision in conflict with the decision of another division of said court. . . ."). Although rarely encountered in our setting, this quandary is hardly novel in the context of federal court. *See, e.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Food Lion*, 194 F.3d at 512; *Hatfield v. Palles*, 537 F.2d 1245 (4th Cir. 1976).

Akin to the matters addressed by the United States Court of Appeals for the Fourth Circuit in both *Food Lion* and *Hatfield*, the "process is more complicated here because [the] state's highest court has [not] applied its law to circumstances exactly like those presented in this case." *Food Lion*, 194 F.3d at 512. "Thus, we must offer our best judgment about what we believe those courts would do if faced with [plaintiff's] claim[ ] today." *Id.* (citation omitted). The Supreme Court of Colorado has held, "[w]hen construing a statute, courts must ascertain and give effect to the intent of the General Assembly . . . and must refrain from rendering judgments that are inconsistent with that intent. To determine legislative intent, we therefore look first to the plain language of the statute." *State v. Nieto*, 2000 CO 689, ¶ 17, 993 P.2d 493, 500. Therefore, we find it prudential to employ "the most fundamental semantic rule of interpretation"—the ordinary-meaning rule that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012). In the case *sub judice*, the plain language of Colorado's statute prescribes the general rule that the death of a party terminates an obligation to pay future maintenance unless "otherwise agreed in writing or expressly provided in the decree. . . ." Colo. Rev. Stat. § 14-10-122(2)(a).

Applying the plain-meaning rule of statutory construction, we find sounder logic underlies the more temporally proximal cases of *Williams* and *Cerrone*. Therefore, we are compelled to the same result: defendant-estate no longer had an obligation to continue the monthly payments to plaintiff in light of the decedent's passing. Here, the Separation Agreement stated that decedent "shall pay 60[, later amended to 84,] consecutive monthly payments of $2,000 (two thousand dollars) to [plaintiff] as and for maintenance." Like the agreement in *Williams*, the provision only stated that decedent "shall pay," and did not provide that payments would continue posthumously. *See Williams* at ¶ 18, 410 P.3d at 1275–76. Also, by analogy, the agreement at issue here fails for reasons comparable to the one in *Cerrone*—the parties did not include

an "express provision" that maintenance would continue upon the occurrence of an event listed in Colo. Rev. Stat. § 14-10-122(2)(a). *See Cerrone* at ¶ 20, 499 P.3d at 1067. Simply put, in absence of an express provision to the contrary, the Colorado Dissolution of Marriage Decree cannot be interpreted to conclude that maintenance obligations continue after death. Since plaintiff and decedent did not agree in writing to posthumous payments, that obligation terminated upon decedent's death under Colo. Rev. Stat. § 14-10-122(2)(a). Consequently, plaintiff's claim fails as matter of law under Rule 12(b)(6). *See Grich*, 228 N.C. App. at 589, 746 S.E.2d at 318 (noting that a complaint may be dismissed per Rule 12(b)(6) when the complaint, on its face, reveals that no law supports the claim).

Plaintiff's attempt to distinguish *Williams* and *Cerrone* is unavailing. Plaintiff argues that the facts in the present case are distinguishable from *Williams* "[b]ecause those contracts included different terms and clauses than does the Separation Agreement and the Amendment here[.]" While that may be so, plaintiff misconstrues the crux of the *Williams* holding—if the parties want posthumous maintenance payments, then they must contract for them. *Williams*, at ¶ 23, 410 P.3d at 1276 ("Accordingly, without a clear expression of intent to continue the payment obligation beyond husband's lifetime, the period that husband was obligated to pay, during which the amount of the payments was nonmodifiable, ended with his death."). Plaintiff's effort to discredit *Cerrone* also falls short. As discussed above, the text of Colo. Rev. Stat. § 14-10-122(2)(a) anticipates that "the death of either party" will terminate the obligation to pay future maintenance unless "agreed in writing or expressly provided in the decree." Colo. Rev. Stat. § 14-10-122(2)(a) (emphasis added); *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). The instrument at issue is a decree and there is no express provision to negate the statutorily presumed termination event. On account of Colo. Rev. Stat. § 14-10-122(2)(a)'s mandate and an application of the *Williams* and *Cerrone* decisions, plaintiff cannot interpret in North Carolina what she could have bargained for in Colorado years ago. Here, defendant-estate's duty to pay ended when the decedent passed away. *See* Colo. Rev. Stat. § 14-10-122(2)(a).

Since we affirm the trial court's order on the ground discussed *supra*, we are not compelled to consider additional alternative grounds for dismissal. *See, e.g.*, *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 357, 323 S.E.2d 294, 314 (1984) ("In view of our conclusion that the trial court correctly dismissed the complaint on [one ground] . . . as to all

defendants, we need not address the trial court's alternative ground for dismissal of the complaint[.]"); *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 10, 732 S.E.2d 373, 380–81 (2012) ("[W]here a lower court's ruling is based on alternative grounds, a court on appeal need not address the second alternative ground where the appellate court determines the first alternative ground was correct[.]").

IV. Conclusion

Our *de novo* determination of the trial court's dismissal begins and ends with Colorado precedent. Defendant-estate's obligation to pay plaintiff the outstanding $104,000 balance ended when decedent passed away. The trial court's dismissal of plaintiff's complaint for failure to state a claim under Rule 12(b)(6) stands.

AFFIRMED.

Judges DILLON and CARPENTER concur.

IN THE MATTER OF J.M.

No. COA23-215

Filed 3 October 2023

Appeal and Error—mootness—child custody appeal—issue already resolved—public interest exception—capable of repetition yet evading review exception

In a matter involving numerous juvenile delinquency petitions, the county department of social services' (DSS) appeal of the trial court's disposition order—as to the portion of the order placing the juvenile in the temporary custody of DSS—was rendered moot by a later permanency planning order—made during the pendency of the appeal of the disposition order—which removed DSS as custodian for the juvenile and placed her in her grandmother's custody. Because the appealed issue was resolved by the permanency planning order, the appellate court dismissed the appeal as moot. The public interest exception to the general rule of dismissal for moot appeals did not apply because the interests in the case were confined to the parties and the legal standards concerning dispositional orders did not need clarification. Furthermore, the exception for cases capable of repetition yet evading review did not apply

because the challenged conduct was not too fleeting to be litigated before the conduct ended, as juvenile custody cases allow ample time for litigation.

Appeal by Cumberland County Department of Social Services from order entered 9 August 2022 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 22 August 2023.

Cumberland County Department of Social Services, by Mariamarta Tye Conrad & Patrick Andrew Kuchyt, for Appellant.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State-Appellee.

CARPENTER, Judge.

The Cumberland County Department of Social Services ("CCDSS") appeals from the trial court's order granting CCDSS custody of Janet,[1] the affected juvenile in this case. After careful review, we dismiss this case as moot.

I. Factual & Procedural Background

On 12 October 2021, Cumberland County filed twenty-one delinquency petitions[2] against Janet, who lived with her grandmother at the time. On 18 October 2021, Hoke County filed nineteen additional delinquency petitions against Janet. On 18 January 2022, Hoke County filed another delinquency petition against Janet. And on 16 June 2022, Cumberland County filed two more delinquency petitions against Janet. All of Janet's petitions involved theft allegations.

On 18 July 2022, Janet admitted to two of the petitions, and on 9 August 2022, she admitted to two other petitions. The State dismissed the remaining petitions. On 9 August 2022, the trial court found Janet delinquent and imposed a "Level 2" disposition. As part of its order (the "Disposition Order"), the trial court placed Janet in the temporary

1. We shall use this pseudonym to preserve the juvenile's confidentiality.

2. Delinquency petitions serve as charging documents for juveniles.

custody of CCDSS. CCDSS timely appealed the Disposition Order to this Court, but only concerning Janet's custody.

On 4 October 2022, the trial court entered a permanency-planning order (the "Planning Order"). In the Planning Order, the trial court ruled that "[CCDSS] is removed as custodian for the juvenile, and there should be no further involvement in these matters by [CCDSS]." The trial court then found "[i]t [wa]s in the best interest of the juvenile that legal and physical custody of the juvenile should be with [her grandmother]." The trial court noted the grandmother's custody "remain[ed] temporary until the disposition of the appeal pursuant to N.C. [Gen. Stat.] § 7B-2605." Thus, the grandmother's custody of Janet will become permanent after the disposition of this appeal. After entry of the Planning Order, CCDSS's appeal from the Disposition Order remained pending at this Court. On 22 May 2023, the State moved to dismiss this case.

II. Jurisdiction

We first address whether this Court has jurisdiction to hear this case. Specifically, we consider the State's motion to dismiss the appeal as moot. The State argues the appealed issue is resolved, and thus moot. And CCDSS argues the issue warrants review, despite its resolution. After careful review, we agree with the State.

A case is moot when the appealed controversy is resolved. *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). If a case is moot, it should generally be dismissed. *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978).

Here, CCDSS's appeal only concerns a portion of the Disposition Order: the trial court's grant of custody to CCDSS. Indeed, "CCDSS is not asking this Court to disturb any other provisions in the Disposition Order." But in the Planning Order, the trial court removed CCDSS as Janet's custodian, and the trial court granted the grandmother custody of Janet. Therefore, this case is moot because CCDSS already received the relief it sought: removal from its role as Janet's custodian. *See Simeon*, 339 N.C. at 370, 451 S.E.2d at 866. So under the general rule, this case must be dismissed as moot. *See In re Peoples*, 296 N.C. at 148, 250 S.E.2d at 912.

Nevertheless, there are five exceptions to this general rule of dismissal: (1) when a defendant voluntarily stops the challenged conduct; (2) when the challenged conduct involves an important public interest; (3) when the challenged conduct evades review but is capable of repetition; (4) when there are adverse collateral consequences of denying

review; and (5) when other claims of class members remain. *In re Brook*s, 143 N.C. App. 601, 604–05, 548 S.E.2d 748, 751 (2001).

CCDSS argues two exceptions apply here: the public-interest exception and the capable-of-repetition-yet-evading-review exception. We shall address each argument in turn.

A. Public-Interest Exception

Under the public-interest exception, this Court may "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). But "this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." *Anderson v. N.C. State Bd. of Elections*, 248 N.C. App. 1, 13, 788 S.E.2d 179, 188 (2016). After all, "self-serving contentions . . . cannot defeat the principle of judicial restraint that sustains our State's mootness doctrine." *Id.* at 14, 788 S.E.2d at 189.

Here, the interests involved are confined to CCDSS, Janet, and Janet's grandmother—not the public. *See Randolph*, 325 N.C. at 701, 386 S.E.2d at 186. Further, the legal standards concerning dispositional orders are clear; this Court has clarified the standards, and this Court enforces them. *See, e.g.*, *In re I.W.P.*, 259 N.C. App. 254, 263–64, 815 S.E.2d 696, 704 (2018) (discussing the N.C. Gen. Stat. § 7B-2501(c) factors and the controlling caselaw). This case would not clarify the law, nor does it involve any other "clear and significant issues of public interest." *See Anderson*, 248 N.C. App. at 13, 788 S.E.2d at 188.

Thus, because the public-interest exception is "very limited," and resolving this case would only resolve "self-serving contentions," this case falls outside of the exception. *See id.* at 13–14, 788 S.E.2d at 188–89.

B. Capable of Repetition Yet Evading Review

A case is capable of repetition, yet evades review, " 'only in exceptional situations.' " *Id.* at 8, 788 S.E.2d at 185 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 1669, 75 L. Ed. 2d 675, 689 (1983)). More specifically, a case is capable of repetition, yet evades review, when: (1) the challenged conduct is too fleeting to be litigated before the conduct ends; and (2) there is a reasonable expectation that the complaining party will be affected by the same conduct again. *Id.* at 8, 788 S.E.2d at 185. Under this exception, "the underlying conduct upon which the relevant claim rests [must be] necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its

cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future." *Chavez v. McFadden*, 374 N.C. 458, 468, 843 S.E.2d 139, 147 (2020).

The first prong requires a brief controversy with a "firmly established" endpoint. *See Anderson*, 248 N.C. App. at 8, 788 S.E.2d at 185. An example of such a controversy includes election misconduct. An election is short, and its conclusion is established by statute and "beyond the control of litigants." *See id.* at 8, 788 S.E.2d at 185. Because an election winner is declared soon after any alleged election misconduct, the scenario is too fleeting to be litigated before the election ends. *See id.* at 8, 788 S.E.2d at 185. Juvenile-custody controversies, however, are not too fleeting to be litigated before the controversy ends. Indeed, we regularly review juvenile-custody cases. *See, e.g.*, *In re K.T.L.*, 177 N.C. App. 365, 373, 629 S.E.2d 152, 158 (2006) (reviewing a dispositional order placing a delinquent juvenile in DSS's custody).

Here, the challenged conduct is this: The trial court granted temporary custody of Janet to CCDSS. Yet CCDSS no longer has custody of Janet; the trial court granted Janet's custody to her grandmother. As mentioned, this Court regularly reviews similar cases; a dispositional order granting juvenile custody is not the type of controversy that evades review because of its short duration. *See In re K.T.L.*, 177 N.C. App. at 373, 629 S.E.2d at 158. Indeed, juvenile custody can last for several years, allowing ample time to litigate. Disputed juvenile custody is not "necessarily of such limited duration that [it] cannot be fully litigated prior to its cessation." *See Chavez*, 374 N.C. at 468, 843 S.E.2d at 147. Therefore, this is not an "exceptional" case that is capable of repetition and evading review. *See Anderson*, 248 N.C. App. at 8, 788 S.E.2d at 185. Because the challenged conduct is not too fleeting to be litigated, we need not reach the second prong of this exception. *See id.* at 8, 788 S.E.2d at 185.

Accordingly, this case is moot, and neither of the tendered exceptions apply. Therefore, we must dismiss this appeal. *See In re Peoples*, 296 N.C. at 148, 250 S.E.2d at 912.

III. Conclusion

We hold that this appeal is moot. Therefore, we lack jurisdiction and grant the State's motion to dismiss.

DISMISSED.

Judge ARROWOOD and Judge COLLINS concur.

KLEIN v. KLEIN

[290 N.C. App. 570 (2023)]

KIMBERLY KLEIN, PLAINTIFF
v.
GARY KLEIN, DEFENDANT

No. COA22-378

Filed 3 October 2023

1. Divorce—equitable distribution—classification and distribution of property—numerous arguments—support of competent evidence

In an equitable distribution, alimony, and child custody and support matter, where the husband lodged numerous challenges on appeal, the Court of Appeals affirmed the trial court's first order regarding equitable distribution. The trial court did not err in its classification and distribution of the parties' property as to: a familial loan (the classification as a marital debt was supported by the findings and competent evidence; the husband ultimately admitted it was a loan to purchase the marital home; there did not have to be a written agreement memorializing the debt), loans to the husband's colleague (the characterization of the payments to the husband's colleague as loans was supported by competent evidence; there did not have to be a written agreement memorializing the debt), one of the wife's retirement accounts (the finding that the account had marital and separate components was supported by competent evidence), the proceeds of a lawsuit (the classification of the proceeds as marital instead of separate was supported by competent evidence regarding the purpose of the lawsuit—to protect the husband's income-earning ability during the marriage), and payments toward a marital debt (the husband made a payment on the parties' joint tax liability using marital funds, not his separate funds).

2. Divorce—appeals—order final as to some claims—trial court's jurisdiction over unresolved claims

Where the trial court's first order in a divorce-related matter fully resolved claims related to child custody, child support, and alimony but did not fully resolve claims related to equitable distribution, N.C.G.S. § 50-19.1 allowed immediate appeal of the order as to those fully resolved claims. However, because the order was not final as to the equitable distribution claims, the husband's first notice of appeal (timely filed within thirty days of entry of the first order) did not deprive the trial court of jurisdiction to enter additional orders distributing two of the husband's retirement

accounts. Furthermore, the husband waived his alternative arguments regarding the retirement account orders because he failed to provide any support for his conclusory statements.

3. Child Custody and Support—child support—gross income—work-related childcare costs—school tuition

In a divorce-related matter, the trial court did not abuse its discretion in the child support provisions of its order, to which the husband made numerous challenges on appeal. As for the calculation of the wife's gross income, the trial court's findings were supported by competent evidence of the wife's current income (additionally, the court was not required to make findings on the wife's reasonable expenses arising from her self-employment), and the court was not required to treat the wife's non-recurring, one-time early withdrawal from a retirement account as income. As for the allocation of summer camp expenses as work-related childcare costs, the trial court's finding that the wife had $386.56 in monthly work-related childcare costs was supported by competent evidence in the form of the wife's financial affidavit and her testimony. Finally, as for the child's school tuition expenses, which the trial court ordered the husband to pay, the trial court properly utilized the Child Support Guideline Worksheet and allocated all of the expenses based on the parties' respective percentage responsibility for the total support obligation (in other words, contrary to the husband's argument, he was not "solely responsible" for the tuition costs).

4. Divorce—alimony—sufficiency of findings—standard of living, reasonable needs, capacity to earn future income—marital misconduct

In a divorce-related matter, the trial court's award of alimony was proper where the court made sufficient findings regarding the parties' accustomed standard of living, the wife's reasonable needs, and the wife's capacity to earn future income. The trial court also made sufficient findings regarding the husband's marital misconduct—illicit sexual behavior and indignities—where the wife presented circumstantial evidence showing that the husband had the opportunity and inclination to commit marital misconduct. Specifically, the husband spent nearly $100,000 on: hotel stays that corresponded with dates of large cash withdrawals, lingerie and sex store purchases for individuals other than the wife, pornography, a payment to at least one woman for sex, spyware on the wife's phone, a secret email account, numerous background checks for potential sexual partners, and online services intended for customers to

contact women for the purpose of arranging sexual encounters. In addition, the trial court found that the husband lacked credibility. The alimony order was affirmed on appeal.

Appeal by defendant from order and judgment entered 8 October 2021 and orders entered 10 January 2022 by Judge Tracy H. Hewett in District Court, Mecklenburg County. Heard in the Court of Appeals 10 January 2023.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and Haley E. White, for plaintiff-appellee.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for defendant-appellant.

STROUD, Chief Judge.

Defendant-husband appeals from three orders. The first order and judgment grants equitable distribution, awards child support to plaintiff-wife, and awards alimony to plaintiff-wife. The other two orders distribute specific retirement plans and were entered after defendant-husband's notice of appeal from the first order. For the reasons below, we affirm the judgment and order and two orders regarding retirement plans.

I. Background

Defendant-husband ("Husband") and plaintiff-wife ("Wife") were married on 29 October 2005. During the parties' marriage, the parties had one child, David,[1] who was born in 2012. During the marriage, Husband practiced as a physician, having obtained his license in 1992. Up until 2011, Husband alternated employment with private healthcare companies and federal agencies, and from 2011 onward Husband was employed primarily as a physician with the Department of Defense. Wife is self-employed and a business owner, and since 2014 has worked on a part time basis while caring for David. "Throughout the marriage[,]" Husband provided the primary financial support for the family.

In April 2020, Wife's uncle, whom she considered and referred to as her father, passed away. Wife wanted to provide support to her aunt, "whom she considers her mother and [David's] grandmother[,]" who

1. A pseudonym is used.

was living in Virginia. Wife wanted to travel to visit her aunt, but Wife and Husband disagreed about whether Wife should be able to travel to Virginia with David. Wife wanted to take David with her to Virginia to maintain his home-schooling, and Husband was scheduled to fly out of state in early May for an undetermined length of time. However, Husband generally refused to discuss the possibility of Wife travelling to see her aunt. Wife, upset by Husband's unwillingness to discuss the matter, the death of her uncle, and some other circumstances of the parties' marriage, decided to travel to Virginia regardless.

On 22 April 2020, while Husband was at work, Wife left for Virginia with David. Wife also left a letter on Husband's desk, letting him know that she and David were on their way to Virginia, "expressing her unhappiness with their marriage, and outlining the issues that both parties needed to work on in order to attempt to save their marriage." Wife's letter "was not an intention to separate but clearly spelled out the possibility of continuing to work on the marriage." Wife said in her letter that she was "not abandoning [Husband] and [she was] not going [to Virginia] for a long time." Wife's letter "gave no indication that [Wife] was abandoning [Husband] and taking the minor child." Husband and Wife spoke on the phone twice on 22 April 2020, and during these conversations, Husband confirmed he received Wife's letter.

While Wife and David were in Virginia, supporting Wife's aunt and planning her uncle's funeral, Wife received a letter from an attorney representing Husband which "accus[ed] [Wife] of absconding with [David] and threaten[ed] to seek emergency custody." Husband had not indicated to Wife during the 22 April 2020 phone calls that he believed Wife had absconded with David. Aside from alleging Wife absconded with David, the letter from Husband's attorney also stated "[u]pon [Wife's] return, it is [Husband's] desire to begin the separation process." Wife retained an attorney in Virginia and through counsel informed Husband she would be returning to Charlotte with David after her uncle's funeral. At some point in early May, Husband vacated the marital home, and Wife returned to the home with David.

On 26 May 2020, Wife filed a complaint in District Court, Mecklenburg County, alleging claims for temporary and permanent child custody, temporary and permanent child support, postseparation support, alimony, equitable distribution including an unequal share of the marital property and an interim distribution, and attorney's fees. Wife alleged the parties separated on 23 April 2020 "when [Husband] expressed his desire to separate while" Wife and David were in Virginia, as discussed above. Wife also alleged a pattern of marital misconduct, including

sexual misconduct, by Husband. On 15 June 2020, Husband filed a motion to change venue from Mecklenburg County to Union County and an answer to the complaint. Among other things, Husband denied that he initiated the parties' separation but admitted that a dispute had arisen between the parties. Husband also denied any allegations of marital misconduct and denied Wife was entitled to alimony, an unequal distribution of the marital property, an interim distribution, or postseparation support. Husband asserted counterclaims for child custody, equitable distribution, and attorney's fees. Husband later voluntarily dismissed his motion for change of venue.

On 1 October 2020, the trial court entered a consent order resolving the parties' claims for postseparation support, temporary child support, temporary child custody, and an interim distribution ("Consent Order"). The Consent Order awarded joint legal custody of David, with Wife having primary physical custody and Husband secondary physical custody of David. The Consent Order directed Husband to pay Wife $1,373.46 per month in child support and $3,900 per month in postseparation support, to continue providing medical insurance for David and Wife, and to pay child support and postseparation support arrears of $23,806.24. The Consent Order also directed Husband to pay Wife an interim distribution of $65,000, pay the parties' joint 2019 income tax liabilities, and reserved the issue of attorney's fees.

The claims for child custody, child support, equitable distribution, and alimony were heard 14 June 2021 through 16 June 2021. The trial court entered a written order on 8 October 2021 ("First Order"). The First Order (1) granted primary legal and physical custody of David to Wife and secondary physical custody to Husband, (2) ordered Husband to pay Wife $1,166.62 per month in child support pursuant to the North Carolina Child Support Guidelines, (3) ordered Husband to pay Wife $3,685.25 per month in alimony from 14 June 2021 until 14 June 2028, and (4) equitably distributed the parties' marital property. The First Order included an attached Child Support Guideline Worksheet showing the calculation of child support and an exhibit summarizing the equitable distribution of the parties' marital property. As to Husband's two federal retirement accounts, the trial court specifically reserved distribution of these accounts for entry of two additional court orders, a "Court Order Acceptable for Processing" and a "Qualifying Retirement Benefits Court Order." [2]

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2. The trial court reserved distribution of Husband's Thrift Savings Plan through a "Qualified Retirement Benefits Court Order," but later titled the order distributing Husband's retirement plan as a "Retirement Benefits Court Order."

Husband filed notice of appeal from the First Order on 22 October 2021. The trial court entered the two orders distributing Husband's federal retirement accounts on 10 January 2022 and Husband filed separate notices of appeal from each of the orders regarding retirement accounts on 7 February 2022.

II. Jurisdiction

Since the First Order did not entirely dispose of the parties' claims, we must first consider whether it is an interlocutory order and whether this Court has jurisdiction to consider the appeal. The First Order fully resolved the claims of child custody, child support, and alimony, but it did not fully resolve the equitable distribution claims. As to Husband's two retirement plans, in the other two orders, the trial court identified the plans, classified the plans, and directed the division of the plans but did not complete the distribution of the plans. Instead, the First Order noted that the trial court would enter two additional orders to bring about the division of the retirement plans, specifically a "Court Order Acceptable for Processing" for Husband's Federal Employees Retirement System Pension and a "Qualifying Retirement Benefits Court Order" for Husband's Thrift Savings Plan. Thus, the First Order is an interlocutory order, as it did not fully 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).

> Generally, there is no right to appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citations omitted). However, in 2013, our General Assembly enacted section 50-19.1, which provides:
>
> > Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of [Section] 1A-1, Rule 54(b), but for the other pending claims in the same action.
>
> N.C. Gen. Stat. § 50-19.1 (2015).

Kanellos v. Kanellos, 251 N.C. App. 149, 151-52, 795 S.E.2d 225, 228 (2016) (emphasis removed).

All the claims in this case fall under the scope of North Carolina General Statute § 50-19.1, which allows immediate appeal of an order which is final as to some claims but not as to other claims in the same action. *See* N.C. Gen. Stat. § 50-19.1 (2021). The First Order was a final and immediately appealable order as to the claims of child custody, child support, and alimony, and Husband timely appealed within thirty days of entry of the First Order. *See* N.C. R. App. P. 3 (noting appeals must be made within 30 days). Husband's appeal from the First Order as to the claims of child support and alimony is properly before this Court under North Carolina General Statute § 50-19.1. *See* N.C. Gen. Stat. § 50-19.1.

But the First Order was not a final, appealable order as to the claim of equitable distribution and Husband's first notice of appeal did not deprive the trial court of jurisdiction to enter the additional orders distributing the retirement plans. The First Order specifically directed that the trial court would enter two additional orders distributing Husband's federal retirement plans:

> 164. . . . [Husband's] interest in the FERS Pension is a marital asset. [Wife] shall be distributed and assigned a share of [Husband's] benefits under the FERS . . . *by means of a Court Order Acceptable for Processing ("COAP")*. . . . .
>
> 165. [Husband] is a participant in the Thrift Savings Plan . . . . From this account, [Wife] shall be distributed fifty percent (50%) of the account balance . . . . *[Wife's] share of the account shall be distributed to her via a Qualifying Retirement Benefits Court Order ("QRBCO") prepared by [Wife's] attorney.*

(Emphasis added.) Despite Husband's appeal filed on 22 October 2021, the trial court retained jurisdiction to complete its adjudication of the equitable distribution claims under North Carolina General Statute § 50-19.1: "An appeal from an order or judgment under this section *shall not deprive the trial court of jurisdiction over any other claims pending in the same action*." N.C. Gen. Stat. § 50-19.1 (emphasis added).

The equitable distribution claim remained "pending in the same action" and the trial court was not deprived of jurisdiction over the equitable distribution claim by Husband's appeal of the First Order. *See* N.C. Gen. Stat. § 50-19.1 The trial court still had jurisdiction to enter the two orders distributing Husband's retirement plans. Husband also filed notice of appeal from these two orders within thirty days of entry of the orders, so Husband's appeal from the two retirement plan orders is properly before this Court. *See* N.C. R. App. P. 3.

III. Equitable Distribution

We first note Husband's brief raises an unusual number of issues. Although he summarizes his arguments in five "Issues Presented" in the brief, these broad statements of the issues actually contain at least fifteen sub-issues, touching on nearly every aspect of the equitable distribution, alimony, and child support portions of the First Order. We have attempted to address each argument for which Husband has presented a cognizable argument based upon the record and legal authority. *See* N.C. R. App. P. 28. We will begin with Husband's challenges to the portion of the First Order regarding equitable distribution.

A. Standard of Review

This Court reviews the trial court's First Order and two orders regarding retirement to determine if "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. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Stovall v. Stovall*, 205 N.C. App. 405, 407, 698 S.E.2d 680, 683 (2010) (citation omitted). "The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360 (2012) (citation omitted).

"A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination." *Hill v. Hill*, 244 N.C. App. 219, 224, 781 S.E.2d 29, 34 (2015) (quotation marks omitted).[3] "The classification of property in an equitable distribution proceeding requires the application of legal principles, and we therefore review *de novo* the classification of property as marital, divisible, or separate." *Green v. Green*, 255 N.C. App. 719, 724, 806 S.E.2d 45, 50 (2017) (quotation marks omitted).

The equitable distribution award is reviewed for an abuse of discretion:

> A trial court is vested with wide discretion in family law cases, including equitable distribution cases. Accordingly,

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3. This case is named "*Hill v. Sanderson*, 244 N.C. App. 219, 781 S.E.2d 29 (2015)" in Westlaw and the South Eastern Reporter, but "*Hill v. Hill*, 244 N.C. App. 219, 781 S.E.2d 29 (2015)" in the North Carolina Court of Appeals Reports. Therefore, we will refer to this case as "*Hill v. Hill*, 244 N.C. App. 219, 781 S.E.2d 29 (2015)."

> a trial court's ruling in an equitable distribution award . . . will be disturbed only if it is so arbitrary that [it] could not have been the result of a reasoned decision.

Wright v. Wright, 222 N.C. App. 309, 311, 730 S.E.2d 218, 220 (2012) (brackets in original) (citations and quotation marks omitted). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

B. Analysis

[1] Husband argues the trial court made numerous errors in classification and distribution of the parties' marital property. North Carolina General Statute § 50-20 governs the equitable distribution of marital and divisible property. *See* N.C. Gen. Stat. § 50-20 (2021). "Under N.C.G.S. § 50-20(c), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Watson v. Watson*, 261 N.C. App. 94, 97, 819 S.E.2d 595, 598 (2018). "Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Id.*

Husband specifically challenges several findings of fact and alleges six errors the trial court committed when classifying and distributing the parties' property. Husband argues the trial court (1) erred by misclassifying a familial gift of money as a loan and distributing the marital debt to Husband; (2) erred by misclassifying a gift of money by Husband to his colleague as a loan and distributing the "loan[;]" (3) erred by distributing one of Wife's retirement accounts to Wife as separate property because Wife failed to sufficiently trace the funds, and "[t]he entire contents of the account were marital[;]" (4) erred by classifying the proceeds of a lawsuit as marital property instead of distributing those proceeds to Husband in full as his separate property; (5) erred by failing to credit Husband for postseparation payments Husband made on the parties' mortgage and joint tax liability and for Wife's $65,000 interim distribution; and (6) erred by distributing Husband's federal retirement benefits because the trial court lacked subject matter jurisdiction to enter subsequent orders after Husband filed his first notice of appeal.

1. Familial Loan

Husband first challenges finding of fact 170 as "not supported by competent evidence." (Capitalization altered.) Finding of fact 170 states:

> 170. **Loan for Purchase of [the Marital Home]:**
>
> a. In 2011, [Wife] and [Husband] desired to purchase a home located at . . . . They were unable to obtain a mortgage on their own, so [Wife's] aunt and uncle ("the Kellys") agreed to purchase the house for the parties. The Kellys, [Husband], and [Wife] agreed that [Husband] and [Wife] would lease the house from the Kellys and pay the monthly mortgage payments until they were able to purchase the house from them. The Kellys paid a down payment of $110,000.00 for the purchase of the . . . home. [Wife's aunt] and [Husband] agreed that [Husband] would repay the $110,000.00 down payment shortly after the purchase of the . . . home.
>
> b. After leasing the house for three (3) years, the parties desired to purchase the house from the Kellys, but **[Husband] said they could not purchase the house for fair market value, so the Kellys and [the parties] agreed that the parties could purchase the . . . residence for the original purchase price and the Kellys gifted the equity of $84,000.00 to [Wife], [Husband], and the minor child**.
>
> c. Unbeknownst to [Wife], the $110,000.00 loan for the down payment was never repaid to the Kellys.
>
> d. [Wife] contends the $110,000.00 loan is a debt subject to equitable distribution.
>
> e. **[Husband] initially contended that the $110,000.00 was a gift from the Kellys and not subject to equitable distribution. [Husband] testified that he never told anyone that he would pay back the $110,000.00.** However, [Wife] introduced an email from the mortgage lender to Mrs. Kelly which stated: "*I talked to* [*Husband*] *after talking with you. He would be prepared to repay you the monies you will have to expend for the down payment and closing costs (as evidenced on the attached Itemized Fee Worksheet). He could give these monies to you immediately after closing.*"

> f. **The Court finds [Husband's] contention that the $110,000.00 was a gift is not credible.**
>
> g. **[Husband] testified that he has a moral obligation to repay the $110,000.00 loan, but not a legal obligation because the loan was not memorialized in writing.**
>
> h. **[Husband] ultimately changed his testimony and testified that the $110,000.00 from the Kellys was a loan.**
>
> i. The Court finds that the $110,000.00 loan from the Kellys is a marital debt that should be distributed to [Wife].

(Bolding added, italics in original).

We first note that subsections (a) through (h) of finding 170 are findings of fact. "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683. The classification of the loan as marital in subsection (i) is a conclusion of law, which we review *de novo*. *See Green*, 255 N.C. App. at 724, 806 S.E.2d at 50. This conclusion of law must be supported by written findings of fact. *See Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993).

In his challenge to the findings of fact in subsections (a) through (h), Husband's argument mostly addresses conflicting evidence as to the intentions of the parties, the intentions of the Kellys, and the circumstances of the payment of the $110,000 by the Kellys, but the trial court has the duty to consider the credibility of the evidence and to resolve those conflicts in the evidence. *See Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011) ("Because the trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony, we refuse to re-weigh the evidence on appeal." (quotation marks and brackets omitted)). The trial court found Husband's claims about the loan not to be credible. We cannot second-guess the trial court's finding as to Husband's credibility in finding of fact 170(f). *See id.*

Husband's only specific substantive argument as to a lack of competent evidence supporting finding 170 addresses the reference to the email from the mortgage lender referenced in subsection (e). But even if we were to assume the trial court should have sustained Husband's

objection to admission of the email as evidence, and thus the portion of finding 170(e) referring to the contents of the email was not supported by the evidence, the rest of finding 170 is supported by the evidence.

Subsection (h) finds that Husband "ultimately changed his testimony and testified that the $110,000.00 from the Kellys was a loan." This finding is supported by the evidence. Husband initially testified the $110,000 from the Kellys was a gift, and the parties "[n]ever borrowed" the money. However, during cross-examination, the trial court had to repeatedly remind Husband to answer the questions he was asked. Eventually, after being reminded he was under oath, Husband changed his testimony and testified that he and Wife did, in fact, borrow $110,000 from the Kellys for the purchase of the marital home. Husband then testified that, although he acknowledged the parties borrowed the money, it was his "position that because there was no legal instrument memorializing [the obligation to repay the loan], that [he didn't] have a legal obligation to repay" the $110,000 loan, only a moral obligation to do so.

The remainder of Husband's argument regarding finding of fact 170 addresses the trial court's classification of the payment as a loan, which we review *de novo*. *See Green*, 255 N.C. App. at 724, 806 S.E.2d at 50. Husband, quoting *Geer v. Geer*, argues "[l]oans from close family members must be closely scrutinized for legitimacy." *See Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 430 (1987). Husband also argues the "loan" was not "an obligation recognized by law" because there was no written agreement signed by the parties. Husband cites no apposite legal authority to support his argument there must be a written agreement to support a marital debt.[4] The case Husband cites for this proposition, *Lewis v. Lester*, is inapposite; it deals with an agreement to transfer land and states: "It is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. § 22-2)." *Lewis v. Lester*, 235 N.C. App. 84, 87, 760 S.E.2d 91, 93 (2014).

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4. While, as cited by Husband, *Geer* indicates that who is legally liable for a debt is a concern that the trial court must remain cognizant of, *see Geer*, 84 N.C. App. at 475, 353 S.E.2d at 429, we note this Court has declined to extend the rationale in *Geer* and concluded the enforceability of a loan is but a distributional factor to be considered in the trial court's discretion. *See Mrozek v. Mrozek*, 129 N.C. App. 43, 47, 496 S.E.2d 836, 839 (1998) ("Plaintiff additionally argues that 'loans from close family members must be closely scrutinized for legitimacy.' However, any concerns the trial court may have with respect to the fact that this marital debt is owed to defendant's parents or that defendant is the sole signatory and may have an affirmative defense to repayment are more properly treated as distributional factors.") (citations omitted).

Further, in *Geer*, the wife argued that "unsecured debts do not qualify as marital property as defined in G.S. 50-20(b)(1) and therefore are not subject to distribution by the court." *Geer*, 84 N.C. App. at 475, 353 S.E.2d at 429. This Court rejected this argument and affirmed the trial court's classification of a debt to the husband's parents as a marital debt. *Id.* at 476, 353 S.E.2d at 430. Indeed, in *Geer*, the evidence supported the trial court's finding that

> the parties borrowed $5,000.00 from defendant's parents in 1970 for the purchase of a mobile home with the promise that it would be repaid with interest. There is also evidence to show that subsequently the parties bought defendant's parents' Peugeot automobile by paying them $800 at the time of the purchase and promising to pay the balance of $3,700.00 plus 6% interest at a later time. *Plaintiff did not deny the existence or amount of the loan from defendant's parents in her testimony.* This evidence is sufficient to support the court's finding that the loans from defendant's parents were legitimate debts and that the value of the two debts totaled at least $9,000.00, inclusive of interest; therefore, this finding of fact is conclusive on appeal.

Id. (emphasis added).

"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." *Comstock v. Comstock*, 240 N.C. App. 304, 317, 771 S.E.2d 602, 612 (2015) (quotation marks omitted). The trial court's findings of fact support its classification of the $110,000 as a marital debt. It was incurred during the marriage and before the date of separation. It was used to purchase the marital home of the parties; this purchase was clearly for the joint benefit of the parties. Husband ultimately admitted that the $110,000 was a loan from the Kellys to purchase the parties' marital home. The trial court did not err by classifying the $110,000 from the Kellys as a loan, not a gift, and a marital debt subject to distribution.

2. Loans to Husband's Colleague

Husband next purports to challenge findings of fact 181, 184, and 185 as unsupported by competent evidence, but Husband's argument solely focuses on finding of fact 181.[5] *See* N.C. R. App. P. 28(b)(6) ("Issues not

5. We also note finding of fact 184 is a conclusion of law that simply states an equal distribution is equitable, *see In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76

presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Finding of fact 181 states:

> 181. During the marriage, [Husband] loaned money to [Husband's colleague] on two (2) occasions. The total amount loaned to [Husband's colleague] was $15,000.00. [Husband] discussed the first loan with [Wife] and the parties agreed to loan [Husband's colleague] $5,000.00. [Husband] told [Wife] that [Husband's colleague] would repay the money once he was able to. [Husband] did not discuss the second loan of $10,000.00 with [Wife] prior to making the loan to [Husband's colleague]. Both loans were made from [Husband's] SECU Money Market Account # . . . . The Court finds that [Husband's] right to repayment of the $15,000.00 loan to [Husband's colleague] is a marital asset, is valued at $15,000.00, and should be distributed to [Husband].

Husband argues finding of fact 181 is not supported by competent evidence. Similar to the familial loan in finding of fact 170, Husband argues there was insufficient evidence to classify the payment as a loan since there was no written agreement memorializing the debt between the parties and Husband's colleague, and Wife could not testify as to any terms associated with the loan. Husband does not argue that the payments were not made from a marital account or during the parties' marriage.

There is competent evidence in the record to support the trial court's findings regarding the circumstances of the loan to Husband's colleague. Wife testified the parties made two payments to Husband's colleague. Wife testified Husband told her about the first $5,000 payment to Husband's colleague and that she "thought it was a loan . . . . [*She*] *thought* [*Husband's colleague*] *was going to pay it back*." (Emphasis added.) When asked whether Husband told her it was a loan, Wife testified she believed he told her that. Wife also testified Husband did not discuss the second $10,000 payment to Husband's colleague with her, and she was unaware of any "arrangements [Husband] and [his colleague] had with one another about the second $10,000 payment[.]" Husband did not deny that he paid $15,000 to his colleague, but he testified it was a gift to help fund the colleague's needs and educational expenses, and he never expected his colleague to pay the money back.

(1997), and finding 185 states the trial court attached and incorporated a chart summarizing the distribution of the parties' property.

Again, the trial court had to make a credibility determination between the parties. *See Williamson*, 217 N.C. App. at 392, 719 S.E.2d at 628. The testimony presented as to these payments is more ambiguous than the testimony regarding the loan from the Kellys, but there is nevertheless competent evidence to support the trial court's finding characterizing the payments to Husband's colleague as a loan and not a gift. There was competent evidence as to the purpose of the payments. *See generally Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683 (noting competent evidence is needed to support the trial court's findings of fact). The parties received no property or benefit from the colleague in return for the funds, but based upon Wife's testimony, the payment was a loan and the parties expected the colleague to repay the loan. Husband's arguments as to the enforceability of the loan, again, do not change the classification of the loan; the enforceability of the loan was but a distributional factor to be considered by the trial court. *See Mrozek v. Mrozek*, 129 N.C. App. 43, 47, 496 S.E.2d 836, 839 (1998).

3. Charles Schwab IRA

Husband next argues finding of fact 168 is not supported by competent evidence. Finding of fact 168 states:

> 168. [Wife] is the owner of a Charles Schwab IRA (formerly USAA Traditional IRA . . .), which has marital and separate components. The total balance on the date of separation was $120,253.00. The total current balance is $153,086.00. [Wife] presented compelling, credible evidence tracing the source of funds held in the Charles Schwab IRA, which showed that only twenty nine percent (29%) of the balance of the Charles Schwab IRA is marital and the remaining seventy one percent (71%) is [Wife's] separate property resulting from her employment at the University of Pennsylvania, which ended in 1998. Twenty nine percent (29%) of the current balance of the Charles Schwab IRA equals $44,395, which should be distributed to [Wife]. The remaining balance of $108,691.00 shall be and remain [Wife's] separate property.

First, Husband does not challenge the finding as to the total values of the account. Husband contends there was "insufficient competent evidence" to classify any portion of the IRA as Wife's separate property. We accordingly narrow our review of finding 168 to whether there is competent evidence to support the finding that the account "has marital and separate components." *Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683.

Once again, Husband's primary argument is based mainly upon an objection to introduction of evidence presented at trial which he characterizes as a "letter prepared by her attorney." Wife referred to this letter during her testimony regarding the IRA. When the letter was first mentioned, Husband objected to certain statements in the letter as hearsay. However, later in the trial, Wife presented additional testimony regarding the letter, as well as the 335 pages of account statements that accompanied the letter, without any objection from Husband. Husband did not renew his objection to any statements in the letter during Wife's extensive testimony regarding her contributions to the IRA prior to and during the marriage at this point in the trial, and he never objected to the account statements with the letter.[6] Husband has therefore waived any argument on appeal as to Exhibit 44. *See generally State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) ("Any benefit of the prior objection was lost by the failure to renew the objection, and defendant is deemed to have waived his right to assign error to the prior admission of the evidence.").

The trial court's findings are supported by the evidence. Wife testified the funds in the Charles Schwab account began "as a TIAA-CREF account" when she worked at the University of Pennsylvania, prior to the parties' marriage. Wife testified that she made no other contributions after she left the University. Then, in 2010, Wife transferred the balance of the TIAA-CREF account to Fidelity; the entire balance was her separate property. Then, also in 2010, Wife opened up her USAA retirement account and moved the funds in the Fidelity account to the USAA account. From 2011 through 2018, relatively small, recurring annual transfers were made from the TIAA-CREF account to the USAA account; Wife testified that "the way the contract worked," the TIAA-CREF balance "could only come over in small payments at a time[.]"

Further, Wife then testified while the account was at USAA, and during the parties' marriage, she made contributions to the account. In 2014, Wife transferred her balance from a retirement account she contributed to while working at Novant Health to the USAA account; Wife testified that the Novant Health funds created a marital component in the USAA account. Wife also testified "69 percent of the total deposits were separate, and 29 percent of the total deposits were marital[,]" and that there was an additional 2% separate component from the small, recurring

6. When the trial court was reviewing the exhibits which had been admitted later in the trial, Husband again "noted for the record" without elaboration his original objection to the letter in Exhibit 44.

TIAA-CREF transfers. The portions of finding of fact 168 regarding the marital and separate components of the account are supported by competent evidence. *See Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683.

4. Lawsuit Proceeds

Husband next challenges findings of fact 125 to 141 regarding classification of proceeds of a lawsuit by Husband during the marriage and contends these findings were not supported by competent evidence, but his argument does not actually challenge the findings of fact. Instead, Husband argues the trial court erred by classifying the lawsuit proceeds as marital instead of separate. Since Husband does not challenge the findings of fact, they are binding on this Court. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360 (noting unchallenged findings of fact are binding on this Court).

Findings of fact 125 through 141 state:

> 125. Regarding the legal settlement and [Husband's] contention that the settlement proceeds are his separate property, the Court finds that [Husband] failed to meet his burden to prove that the settlement proceeds are his separate property.
>
> 126. [Husband] failed to prove that the settlement proceeds were to compensate for an injury or damages that were personal to him. Instead, the preponderance of the evidence shows that the efforts in the lawsuit were to protect the plaintiffs' income earning abilities while he was married to [Wife].
>
> 127. Moreover, the settlement agreement failed to allocate specific amounts for specific types of damage and waived all claims–whether marital or separate.
>
> 128. In 2010, [Husband] and three other physicians were dismissed from the American Association of Physician Specialists ("AAPS"). As a result, they retained . . . a law firm in Glen Allen, VA.
>
> 129. [Wife] was involved in the discussions with attorneys at [the Virginia law firm], and the other Plaintiffs/physicians in the case. The money [Wife] earned through mEDhealth went to pay legal fees related to [Husband's] dismissal from the AAPS.
>
> 130. [The Virginia law firm] referred the case to G. Donovan "Don" Conwell, an attorney in Florida.

131. The Court heard testimony from Attorney Conwell. The Court also heard testimony from Dr. Castillo, who was the lead plaintiff in the lawsuit against the AAPS.

132. Attorney Conwell testified, and the Court so finds, that one objective of the lawsuit was to reinstate the physicians in the AAPS. To that end, he filed a motion for summary judgment to reinstate the physicians in the AAPS, and the motion for summary judgment was granted. The AAPS appealed, forcing Attorney Conwell and the physicians to defend against the appeal. Attorney Conwell and the physicians prevailed on appeal and were reinstated to the AAPS.

133. Attorney Conwell testified, and the Court so finds, that the lawsuit generally stated a demand for damages for lost income, among other things. The case settled upon a total amount to be paid and split between the four physicians. There was no delineation of the award for different injuries.

134. There was no evidence presented showing that a portion of the settlement was intended to compensate for a particular category or categories of damages.

135. Dr. Castillo testified, and the Court so finds, that as a result of being dismissed from the AAPS, the physicians could not hold themselves out as being board certified by the AAPS, and the lawsuit enabled them to keep their certifications and licenses so that they were able to continue to work and earn an income.

136. The physicians sought an injunction to prevent the loss of their board certification and licensure.

137. The loss of the physicians' board certification would greatly impact their ability to work and earn an income; it would result in the loss of the physicians' ability to practice their respective specialties.

138. Dr. Castillo testified, and the Court so finds, that without the injunction, he would have lost not only his licensure and his ability to serve and practice at his hospital, but the ability to participate with most insurance plans is dependent on licensure.

> 139. [Husband] received $587,063.63 from the settlement and deposited into his SECU Account # . . . . Of that, $325,463.48 went to reimbursing Dr. Castillo for fronting legal fees for [Husband].
>
> 140. Based on the above, [Husband] failed to meet his burden to show that the settlement proceeds are his separate property.
>
> 141. However, even if [Husband] had met his burden to show that the settlement proceeds are his separate property, [Husband] failed to trace the funds held in SECU Account # . . . on the date of separation back to the funds received from the legal settlement.

Based upon the findings of fact, Husband and other physicians brought the lawsuit to prevent the loss of their board certification and licensure because the loss of board certification would "greatly impact [their] ability to work and earn an income[.]" Yet Husband's argument on appeal relies upon cases dealing with classification of proceeds from personal injury claims. Husband notes that North Carolina applies the "analytic approach" by focusing on what the proceeds are intended to replace.

> The analytic approach asks what the award was intended to replace, and has been adopted by statute or case law in eight of the nine community property states. Generally, under the analytic approach the personal injury award may be seen as composed of three potential elements of damages: (1) those compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs; (2) those compensating for lost wages, lost earning capacity, and medical and hospital expenses; and (3) those compensating the non-injured spouse for loss of services or loss of consortium.

Johnson v. Johnson, 317 N.C. 437, 446-47, 346 S.E.2d 430, 435-36 (1986) (brackets in original) (citations and footnotes omitted).

Ignoring the trial court's unchallenged findings regarding the purpose of the lawsuit – to protect Husband's certification to practice and his ability to earn income as a physician – Husband argues "[t]he overwhelming evidence established the primary claim in [the] lawsuit was for defamation – personal injury to [Husband's] reputation and character." Husband points to evidence he presented regarding injury to his reputation and his "emotional distress and mental anguish." But even

if the trial court's unchallenged findings were not binding, and even if there was evidence that Husband made claims for "emotional distress and mental anguish," the trial court's findings of fact are supported by competent evidence. *See Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683. The trial court found Husband failed to carry his burden of proving the settlement proceeds were his separate property because he "failed to prove that the settlement proceeds were to compensate for an injury or damages that were personal to him." *See O'Brien v. O'Brien*, 131 N.C. App. 411, 418, 508 S.E.2d 300, 305 (1998) (discussing the parties' "dual burdens of proof" as to classification of marital property).

Contrary to Husband's characterization of his lawsuit, the evidence presented at trial overwhelmingly indicates that the purpose of this suit was to seek an injunction reinstating Husband's status with the professional organization, because without membership and certification by the organization, he would risk loss of his license and be unable to continue practicing medicine. While the plaintiffs, including Husband, had asserted a claim that included damages for non-economic loss, the claim also asserted damages for economic loss, and the settlement simply grants a sum of money but does not specify for which claims and what type of damages the award is intended to address. Wife testified that this money was acquired during the marriage, and both Wife and Dr. Castillo, a co-plaintiff, testified this lawsuit was to recover compensation for economic loss; these findings are therefore supported by competent evidence. *See generally Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683. Husband's argument is overruled.

5. Credit for Payments Toward Marital Debt

Husband next argues he was not given proper credit for payments he made to the parties' joint tax liability of $27,000.[7] Husband agreed to pay the parties' 2019 joint income tax liability in the Consent Order, and he asserts he was entitled to a credit for paying Wife's share of the parties' joint 2019 tax liability from his separate property, as the taxes were paid from Husband's SECU account.

Husband's argument is based upon his claim that the funds in the SECU account were his separate property. We have already addressed the classification of the funds in the SECU account as marital; this

7. We note Husband asserts the Consent Order "required [Husband] to pay the parties' joint tax liability in the amount of $27,087.23." However, the interim distribution order does not state the amount that Husband was required to pay; the order simply states that whatever tax liability resulted from the parties' joint 2019 taxes were to be paid from Husband's SECU account.

account held the proceeds of the lawsuit discussed above. Husband contended the proceeds were his separate property, but as addressed above, the trial court properly held the proceeds in the SECU account were marital property. Thus, Husband paid the 2019 tax liability – a marital obligation – from the SECU account and he paid it from marital funds, not from his separate funds. Husband's argument that he did not receive a credit or offset for post-separation payments is without merit. *See generally Bodie v. Bodie*, 221 N.C. App. 29, 34, 727 S.E.2d 11, 15 (2012) ("A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (*from non-marital or separate funds*) for the benefit of the marital estate." (emphasis added) (quotation marks omitted)).

6. Federal Retirement Benefits

[2] Husband's final argument as to the equitable distribution is that the trial court was without jurisdiction to enter the two orders distributing his federal retirement benefits after his notice of appeal from the First Order, or in the alternative, that these orders violate North Carolina and federal law. We have already addressed Husband's argument regarding jurisdiction of the trial court above; the trial court had jurisdiction to enter the orders under North Carolina General Statute § 50-19.1. *See* N.C. Gen. Stat. § 50-19.1. We have also previously addressed Husband's arguments regarding the substance of the equitable distribution contained in the First Order, and we have affirmed the equitable distribution provisions in the First Order. The First Order directed the entry of the two retirement plan orders. Husband has not raised any argument that the two retirement plan orders failed to comply with the provisions of the First Order.

Husband's alternative arguments – perhaps they may be better characterized as general statements of objections – regarding the two retirement plan orders are presented in one-half of a page in his brief. These arguments are generally that the two orders "are not supported by competent evidence" and that they do not correctly address any "post separation salary adjustments."

Husband has not identified any specific findings of fact in the two orders he challenges as unsupported by the evidence, nor has he presented any specific argument regarding the conclusions or decrees of the two orders. Husband has consequently waived any challenges to the findings and conclusions in these orders, and we therefore affirm the two orders, Court Order Acceptable for Processing and Retirement Benefits Court Order. *See generally Eaton v. Campbell*, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) ("Because defendants' limited and

unsupported arguments give us no reason to disturb the trial court's judgment in which its conclusions of law are supported by its findings of fact which are, in turn, supported by the record evidence, . . . we affirm." (citation omitted)).

IV. Child Support

[3] Husband next challenges the portion of the First Order establishing child support and argues the child support provisions of the First Order should be reversed because these provisions were "not entered in accordance with the Child Support Guidelines." (Capitalization altered.) For the reasons below, the trial court correctly applied the Child Support Guidelines and did not abuse its discretion.

A. Standard of Review

Generally, "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Ferguson v. Ferguson*, 238 N.C. App. 257, 260, 768 S.E.2d 30, 33 (2014) (quotation marks omitted). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.*

In a child support proceeding, "our review of the trial court's findings is limited to whether those findings are supported by competent evidence in the record." *Kaiser v. Kaiser*, 259 N.C. App. 499, 510, 816 S.E.2d 223, 231 (2018) (citations omitted). "Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Johnson v. Johnson*, 259 N.C. App. 823, 827, 817 S.E.2d 466, 471 (2018) (quotation marks omitted). Conclusions of law are reviewed *de novo*, and "[i]f the trial court labels a conclusion of law as a finding of fact, the appellate court still employs *de novo* review." *Thomas v. Burgett*, 265 N.C. App. 364, 367, 852 S.E.2d 353, 356 (2019) (citations omitted).

B. Analysis

Child support is governed by North Carolina General Statute § 50-13.4. *See* N.C. Gen. Stat. § 50-13.4 (2021). As noted by Husband:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the

> child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c). Here, child support was determined by "applying the presumptive [child support] guidelines[,]" N.C. Gen. Stat. § 50-13.4(c), and the trial court incorporated Worksheet B, calculating child support under the Guidelines, and attached it to the First Order.[8] *See* N.C. Gen. Stat. § 50-13.4(c1) (requiring the prescription of "uniform statewide presumptive guidelines for the computation of child support obligations").

Husband argues the trial court failed to follow the Guidelines and (1) erred in calculating Wife's gross income, (2) erred by assigning some expenses as childcare costs, and (3) erred by requiring Husband to pay education expenses. Husband argues these findings, as well as those findings that rely upon the unsupported or erroneous findings, should be vacated and the trial court abused its discretion in entering the child support portion of the Order. For the reasons below, the trial court did not abuse its discretion when entering the child support provisions of the First Order.

1. Wife's Gross Income

Husband first argues the trial court failed to calculate Wife's gross income, as defined by the Child Support Guidelines. "[D]eterminations of gross income are conclusions of law reviewed *de novo*." *Thomas*, 265 N.C. App. at 367, 852 S.E.2d at 356. The North Carolina Child Support Guidelines define "gross income" as "actual gross income from any source," including "self-employment . . . ownership or operation of a business . . . and annuities." N.C. Child Support Guidelines, AOC-A-162, at 3 (2020). "When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time[.]" *Id.* Additionally, "[t]he court must determine the parent's gross income as of the time the child support order was originally entered, not as of the time of remand nor on the basis of the parent's average monthly gross income over the years

8. The North Carolina Child Support Guidelines use standardized worksheets to calculate a child support obligation. *See* N.C. Child Support Guidelines, AOC-A-162, at 5 (2020). Worksheet B is published by the North Carolina Administrative Office of the Courts, Form AOC-CV-628. *See* Worksheet B Child Support Obligation Joint or Shared Physical Custody, AOC-CV-628 (2020).

preceding the original trial." *State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 207, 680 S.E.2d 876, 879 (2009) (citations, quotation marks, and brackets omitted).

The trial court only made one finding regarding Wife's gross income in the First Order: "[Wife] is self-employed as a consultant . . . . She earns a total gross monthly income of $6,861.25, which is comprised of $6,630.00 wages/salary; $165.00 business income; and $66.25 from cosmetic sales for LimeLife." This finding is consistent with Wife's 4 June 2021 financial affidavit and her testimony at trial. Husband argues the trial court (1) failed to account for pension and annuity payments Wife received in 2020 and (2) failed to make findings regarding ordinary and necessary business expenses from Wife's self-employment income. We first address Wife's pension and annuity payments.

Husband argues the trial court erred because Wife listed $46,512 received as distributions from pensions and annuities on her 2020 individual tax return, which was absent from Wife's 2021 financial affidavit, and the trial court's First Order does not account for any of Wife's pensions and annuities income. Wife's financial affidavit, in and of itself, is competent evidence. *See Rea v. Rea*, 262 N.C. App. 421, 427, 822 S.E.2d 426, 431 (2018) (noting the wife's financial affidavit is competent evidence). As to the $46,512 in annuities Wife claimed on her 2020 taxes, but the trial court did not find as income, Wife testified she "cashed in an annuity in order to pay off some of [her] bills and credit card debt that [she] had as mostly legal fees and some other purchases[.]" Wife testified the $46,512 was withdrawn from a pension retirement account she cashed in to pay her legal bills, and also testified that the $46,512 was "cashed out of [her] IRA[.]" Regardless of the exact account the $46,512 was withdrawn from, there was evidence in the record to show that the $46,512 was a non-recurring, one-time early withdrawal from one of Wife's retirement accounts.

The trial court is not required to treat the conversion of an asset into cash as income for purposes of a child support calculation. Depending upon the evidence in the particular case, the trial court has the discretion to treat a non-recurring, early withdrawal from a retirement account as income for purposes of child support, but here, Husband has failed to demonstrate any abuse of discretion in the trial court's findings as to Wife's income. *See McKyer v. McKyer*, 179 N.C. App. 132, 144, 632 S.E.2d 828, 835 (2006) (applying the 2006 Child Support Guidelines). "[T]he mere fact that a non-recurring payment has occurred, in the absence of evidence that the payment was 'income' at all, is alone insufficient to establish that the payment was necessarily non-recurring

income." *Id*. Here, similar to *McKyer*, Husband simply asserts "[t]he trial court did not make findings to reflect how often [Wife] receives such irregular or non-recurring income as required by the guidelines[,]" but Husband "makes no argument as to why receipt of the [payment] constitutes 'income.' " *Id*.

Additionally, although the Guidelines require "current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period[,]" N.C. Child Support Guidelines, AOC-A-162, at 3 (2020), "this Court has established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 234 (2005) (quotation marks and emphasis omitted). Wife's tax return was filed in April 2021, based on her income from the year prior to entry of the First Order. Wife then filed an updated financial affidavit on 4 June 2021. The hearing on the parties' claims took place 14 June 2021 through 16 June 2021, and the trial court entered its First Order on 8 October 2021.

Here, the trial court had competent evidence of Wife's income in 2021 available, and the trial court did not err by utilizing the most recent figures from the current year to calculate Wife's income. *See Rea*, 262 N.C. App. at 427, 822 S.E.2d at 431; *Holland*, 169 N.C. App. at 568, 610 S.E.2d at 234. The trial court did not err by entering a finding without accounting for Wife's retirement withdrawal when the trial court applied the Guidelines, using Wife's current income, because "[u]nder the Child Support Guidelines, [c]hild support calculations . . . are based on the parents' current incomes at the time the order is entered." *Midgett*, 199 N.C. App. at 207, 680 S.E.2d at 879 (quotation marks and emphasis omitted). Husband's arguments as to the trial court's treatment of Wife's early retirement withdrawal are overruled.

Husband also argued the trial court erred in determining Wife's gross income by "failing to make findings regarding the 'ordinary and necessary' expenses incurred for self-employment or operation of a business." The Guidelines define "[g]ross income from self-employment . . . as gross receipts minus ordinary and necessary expenses required for self-employment or business operation." N.C. Child Support Guidelines, AOC-A-162, at 3 (2020). "Expense reimbursements or in-kind payments . . . received by a parent in the course of employment, self-employment, or operation of a business are counted as income if they are significant and reduce personal living expenses." *Id*.

Husband asserts the trial court failed by making findings as to Wife's "ordinary and necessary" business expenses because Wife paid

for "regular business expenses like internet, phone, [her] computer, support, and some legal fees" through her business but the trial court made "no findings regarding the reasonableness of these expenses in the determination of [Wife's] income." Husband notes "the trial court received substantial evidence regarding mEDhealth's profits and losses" upon which such findings could be made. However, Husband does not clearly articulate an argument. Husband does not identify any specific unreasonable expense the trial court might have disregarded nor does he state how the trial court should have treated any specific expense.

Additionally, Husband's argument is somewhat baffling, since Wife's gross income would be reduced by deduction of these alleged business expenses from her business income, leaving Wife with a lower income for purposes of the child support obligation. A lower income would simply *reduce* Wife's share of the child support obligation and *increase* Husband's child support obligation based upon the percentage of the total child support obligation assigned to Husband. Here, Husband notes the trial court "received substantial evidence" of Wife's self-employment income and simply points to the absence of findings to assert the trial court erred. But "the trial court need not make a finding as to every fact which arises from the evidence." *Matter of M.S.E*, 378 N.C. 40, 54, 859 S.E.2d 196, 209 (2021). The trial court made sufficient ultimate findings of fact as to the parties' incomes as needed to calculate Guideline child support. In this case, there is no indication that either party requested to deviate from the Guidelines, and the trial court did not do so *sua sponte*. As a result, the trial court was not required to make findings on Wife's reasonable expenses arising from her self-employment as they relate to her income and relative ability to pay child support. *See generally Ferguson*, 238 N.C. App. at 260-61, 768 S.E.2d at 33-34. The trial court made the required finding as to Wife's gross income based upon the evidence. *See* N.C. Child Support Guidelines, AOC-A-162, at 3 (2020). Husband's argument that the trial court erred by failing to make findings regarding Wife's business expenses and the impact of these expenses on her income is overruled.

2. Work-Related Child Care Costs

Husband next argues the trial court "erred in allocating summer camp expenses as work-related child care costs[,]" (capitalization altered), because there was evidence in the record indicating not all of Wife's claimed child care expenses "had any relationship to her employment responsibilities." Husband asserts, therefore, "[t]he trial court's inclusion of summer camp expenses was not in accordance with the child support guidelines and constitutes an abuse of discretion." We disagree.

"Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes." N.C. Child Support Guidelines, AOC-A-162, at 4 (2020). The trial court found Wife "ha[d] a monthly work-related childcare cost of $386.58" and entered an adjustment to Worksheet B for these expenses when determining the parties' child support obligation under the Guidelines.

This finding is supported by competent evidence. Wife's June 2021 financial affidavit is included in the record. In this affidavit, Wife attested that her monthly work-related childcare costs averaged over a full year were $386.58 per month. Wife also testified that these figures were calculated based on David's usual after-school care and "the average of all of" the summer camps David participates in "because they're all different prices." Wife then testified that she uses after-school childcare and summer camps to facilitate meeting her professional obligations. Wife testified that David "goes to summer camp so that [she] can work, [and] so that he can have a camp experience." When questioned whether "[t]he summer camp has nothing to do with childcare so you can perform your work responsibilities, correct[,]" Wife answered "[n]o. It has something to do with it, but it also has to do with [David] wanting/needing those same activities, just like lots of kids, activities for growth and opportunity, being with friends, learning new skills, whatever it is." Wife continued "[a]nd *I also would not be able to work and bring in the income, which would then just decrease my income and increase* [*Husband's*] *need to support us*." (Emphasis added.)

Wife's financial affidavit and her testimony are competent evidence to support the trial court's finding that Wife has $386.56 in "monthly work-related childcare cost[s,]" *see Rea*, 262 N.C. App. at 427, 822 S.E.2d at 431, and "[f]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Johnson*, 259 N.C. App. at 827, 817 S.E.2d at 471. Husband's argument is overruled.

3. Private School Tuition and Expenses

Husband next argues the trial court made insufficient findings regarding tuition expenses, including that the trial court failed to make a finding accounting for increases in tuition and failed to make a finding regarding registration and institution fee expenses. Husband also argues the trial court did not explain why he "should be solely responsible for these costs or provide analysis of this shared expense between the parties." For the reasons below, Husband's argument does not have merit.

The trial court found "the minor child attends school . . . at a cost of $1,211.25 per month. This is a reasonable extraordinary expense for the minor child. [Husband] should continue to pay the minor child's private school tuition expense at" the child's school. The trial court included this expense in the Child Support Guidelines Worksheet attached to the First Order. The trial court then ordered Husband to pay "monthly school tuition (including the registration and institution fee expenses) directly to the minor child's school."

The Child Support Guidelines provide for extraordinary expenses:

> Other extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools *to meet a child's particular education needs* . . .) may be added to the basic child support obligation and ordered paid by the parents *in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.*

N.C. Child Support Guidelines, AOC-A-162, at 5 (2020) (emphasis added). "According to the child support guidelines, the trial court may make adjustments for extraordinary expenses and order payments for such term and in such manner as the court deems necessary." *Ferguson*, 238 N.C. App. at 265, 768 S.E.2d at 36 (quotation marks and brackets omitted). The trial court has the authority to add extraordinary expenses to the basic child support obligation set under the Guidelines and prorate these expenses based on the parties' incomes, so long as the trial court determines the expenses "are reasonable, necessary, and in the child's best interest." *Id.* (quotation marks and citation omitted). Adjustments for extraordinary expenses are not deviations from the Guidelines, and therefore, "absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." *Id.* (quotation marks omitted).

The trial court found "[i]t is in [David's] best interests that he continues to attend [his current school][,]" and Husband does not challenge the trial court's findings regarding his current school. The trial court found David had attended his private school since kindergarten, the parties agreed he should continue to attend the school, and the school's religious values motivated their decision to send David to that school. David was "thriving" at this school and "has established strong, close relationships with his teachers and peers." Consistent with the Guidelines, the trial court added David's education expenses to the basic child

support obligation on Worksheet B and prorated those expenses based on the parties' respective incomes. *See* N.C. Child Support Guidelines, AOC-A-162, at 5 (2020).

The trial court did not abuse its discretion by not making a finding regarding any increase in tuition. Any increase in tuition, should it occur, may be addressed in a future proceeding upon a motion to modify Husband's support obligation. *See* N.C. Gen. Stat. § 50-13.7 (2021). Additionally, we cannot determine the basis of Husband's argument the trial court failed to make specific findings regarding "registration and institution fee expenses." As best we can tell from the record, the bill for tuition from the school includes various fees, and some of those fees are characterized as registration and institution fees, but it is not clear what amount of fees Husband is responsible for, or how often those fees are due. Finding 60 states that "the minor child attends school at [name of school redacted] at a cost of $1,211.25 per month." Husband did not challenge this finding of fact, and it is binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360. This argument is without merit.

As to Husband's argument that the trial court did not explain why he "should be solely responsible for these costs or provide analysis of this shared expense between the parties[,]" Husband's argument shows a misunderstanding of the effect of the calculations on Child Support Guidelines Worksheet B. Husband is not "solely responsible" for the tuition costs, and the Worksheet itself is an "analysis of this shared expense between the parties." Additionally, Husband does not challenge the use of Worksheet B to calculate his support obligation.

On Worksheet B, the parties' total support obligation was "adjust[ed]" by $1,211.25 for private school "expenses paid directly by" Husband. Worksheet B accounts for the total child support obligation and the percentages owed by each party, based upon their individual incomes and the custodial time with the child, and prorates the parties' obligations based upon their share of their total income, including adjustments for expenses paid for both parties. Here, the trial court included adjustments for $386.58 per month in "[w]ork-related child care costs" to be paid by Wife, $244.21 per month in "[h]ealth [i]nsurance premium costs – child's portion" to be paid by Husband, and, as an extraordinary expense, $1,211.25 per month in tuition costs to be paid by Husband.

The calculation of child support accounted for the allocation of all these expenses paid by both parties, based upon their respective percentage responsibility for the total support obligation. Consequently, the

Worksheet accounts for the full $1,211.25 per month paid by Husband for David's education costs, prorates it between the parties based on their income, and Husband's ultimate child support obligation takes into account the expenses he pays. The trial court did not abuse its discretion in utilizing Worksheet B or its calculation for child support, and Husband's argument is without merit.

V. Alimony

[4] We next address Husband's challenge to the portion of the First Order establishing alimony. Continuing his blunderbuss approach, Husband purports to challenge nearly every potential aspect of the alimony award: the findings of fact the trial court made; the findings of fact the trial court did not make; Wife's status as a dependent spouse; the parties' accustomed standard of living; Wife's current income and expenses; the possibility that Wife may earn a greater income in the future; the trial court's consideration of factors under North Carolina General Statute § 50-16.3A; and of course the amount of alimony awarded. To the extent we can separate the wheat from the chaff, we will address the arguments properly presented.

A. Standard of Review

Husband's arguments address both entitlement and the amount of alimony the trial court awarded. "[A]limony is comprised of two separate inquiries[,]" whether a spouse is entitled to alimony and if so, the amount. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000).

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Collins v. Collins*, 243 N.C. App. 696, 699, 778 S.E.2d 854, 856 (2015) (ellipses and brackets in original) (citations and quotation marks omitted). "If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence." *Id.* "The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360.

"Whether a spouse is entitled to an award of alimony or post-separation support is a question of law. This Court reviews questions of law *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Collins*, 243 N.C. App. at 699, 778 S.E.2d at 856 (citations and quotation marks omitted).

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal 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. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272-73 (2013) (citations and quotation marks omitted).

B. Status of Wife as Dependent Spouse

We have grouped Husband's arguments based on the findings his arguments address.

1. Findings Regarding the Parties' Accustomed Standard of Living and Wife's Reasonable Needs

Husband first contends Wife "is not a dependent spouse because she is not actually and substantially dependent upon [Husband] for her maintenance and support." (Capitalization altered.) But there are two types of dependent spouses; a dependent spouse is one "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is *substantially in need of maintenance and support* from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2021) (emphasis added). "A party is 'actually substantially dependent' upon her spouse if she is currently unable to meet her own maintenance and support." *Carpenter v. Carpenter*, 245 N.C. App. 1, 4, 781 S.E.2d 828, 832 (2016) (quoting *Barrett*, 140 N.C. App. at 370, 536 S.E.2d at 644). "A spouse is 'substantially in need of maintenance' if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs." *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644-45.

Husband first contends the "trial court did not make factual findings regarding the parties' accustomed standard of living during the marriage." (Capitalization altered.) Husband also contends that the "trial court's findings related to [Wife's] dependency and the parties' expenses are not supported by competent evidence. Findings of fact 68 through 88 should be vacated." Thus, Husband claims the trial court did not make sufficient findings of fact regarding the parties' standard of living

during the marriage while *also* claiming that the trial court's findings of fact addressing exactly that should be vacated. Essentially, Husband seems to contend the trial court should have been more specific as to the details of the parties' accustomed standard of living during the marriage as opposed to their current needs and expenses.

Findings of fact 68 through 79 address the parties' income and expenses. We will not quote these findings, which are highly detailed findings, including several tables summarizing the reasonable expenses for each party and the child, contained in two single-spaced pages of the order. Husband does not articulate any specific argument challenging any of these findings as unsupported by the evidence, and therefore they are binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360. The trial court also made extensive, detailed findings regarding the parties' property and financial circumstances during the marriage in the portion of the First Order addressing equitable distribution. Those findings address the parties' marital home, vehicles, bank accounts, retirement plans, jewelry, art collection, household goods, debts, life insurance policies, business interests, credit cards, and frequent flyer miles. Clearly, the trial court considered all these findings in coming to its evaluation of the accustomed standard of living and its conclusion regarding Wife's status as a dependent spouse.

2. Findings Regarding Wife's Capacity to Earn Future Income

Husband also contends the trial court "failed to make any findings regarding [Wife's] capacity to earn future income." First, the trial court need not make specific findings regarding capacity to earn income unless a spouse is suppressing her income in bad faith and the court imputes income. *See Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) ("Alimony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." (emphasis in original) (citation omitted)). The trial court's findings show Wife was appropriately and gainfully employed and there was no basis for imputation of income. In addition, the trial court made the following findings addressing Wife's work history and future earning potential, and these findings are supported by the evidence:

> d. For the majority of the parties' marriage, [Wife] made substantial sacrifices that advanced [Husband's] career and increased his earning capacity. [Wife] agreed to relocate many times for [Husband's] career even though she was required to find a new employment as a result of

> the relocations. In addition to agreeing to relocate, [Wife] assisted [Husband] in editing his journal articles and reviewing documents for his articles and research. [Wife] took care of the household and the minor child while [Husband] attended numerous conferences and meetings. All of these contributions increased [Husband's] income and earning capacity.
>
> e. [Wife] sacrificed her career to a large extent to care for the household and the minor child. The parties agreed that [Wife] would work part-time in order to be the primary caretaker for the minor child.
>
> f. [Husband] has a higher income than [Wife]. His earning capacity will remain the same or increase.
>
> g. [Wife] cares for the parties' child the majority of the time. [Wife's] earning capacity is limited due to her role as the primary caregiver for the minor child. [Wife] could not increase her income without traveling and increasing her work hours, which she cannot do as long as she . . . is the minor child's primary caregiver.
>
> h. [Wife] is 47 years old. Her earning capacity will likely stay the same with a *potential* to increase once the minor child is sixteen (16) years old and takes on more responsibility for his care and transportation.

(Emphasis in original.) The trial court addressed the proper factors, based upon the evidence. *See* N.C. Gen. Stat. § 50-16.3A (2021).

The trial court made sufficient findings of fact regarding the parties' accustomed standard of living during the marriage as well as Wife's current reasonable needs for support, and Wife's capacity to earn future income. These findings are supported by the evidence. This argument is without merit.

3. Marital Misconduct

The trial court made detailed findings regarding the alimony factors stated in North Carolina General Statute § 50-16.3A. *See* N.C. Gen. Stat. § 50-16.3A(b). As noted above, Husband has generally challenged all the findings regarding the alimony factors as unsupported by the evidence, but he does not make a specific argument on most of them, so we will not address those factors. Husband *does* address the trial court's findings as to marital misconduct in detail.

Husband purports to challenge "[f]indings of fact 40 through 43, 46, 79, 84, and 152" and argues "[t]he evidence regarding marital misconduct was pure conjecture and all attendant findings should be vacated." We preliminarily note findings 40 through 43 were in the section of the First Order addressing child custody, and although Husband nests additional arguments here, including challenging various statements of the minor child as hearsay, we need not address his evidentiary arguments because as relevant to alimony, these findings all address Husband's credibility, or lack thereof, and even if we disregard findings 41 through 43, the trial court's other findings make its assessment of Husband's lack of credibility abundantly clear. For purposes of Husband's argument as to entitlement to alimony, we do not address these findings.

The challenged findings state in relevant part:

> 79. In determining the amount, duration, and manner of payment of alimony, the Court finds, in addition to the above findings, as follows:[9]
>
> . . . .
>
> i. [Wife] was a faithful and dutiful wife, who supported and loved [Husband] through a difficult revelation in their marriage.
>
> j. [Wife] did not commit marital misconduct.
>
> k. [Husband] has committed acts of "marital misconduct" as that term is defined in N.C.G.S. § 50-16.1A(3)(a) and (f). Specifically: [Husband] committed acts of illicit sexual behavior with at least one woman other than [Wife] during the parties' marriage. [Husband] wasted marital assets for non-marital purposes in furtherance of his illicit sexual activities as detailed further in Finding of Fact 152, below.

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9. The majority of finding of fact 79 has nothing to do with marital misconduct, and instead simply recounts evidence regarding the length of the marriage, how much the parties worked, and the disparity in the parties' income. These are factors the trial court was required to consider in determining whether Wife was entitled to alimony and the amount of alimony she was entitled to receive. *See* N.C. Gen. Stat. § 50-16.3A(a)-(b). Husband's argument focuses on the challenges quoted here; Husband does not articulate an argument against the omitted findings and they are binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360; *see also* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

> l. [Wife] did not condone [Husband's] illicit sexual behavior or other marital misconduct as described herein.
>
> m. [Husband's] marital misconduct set forth above rendered the condition of [Wife] intolerable and her life burdensome.
>
> . . . .
>
> 152. [Wife] analyzed the expenditures from [Husband's] USAA Checking Account # . . . and presented evidence of [Husband's] marital waste. [Husband] spent substantial sums of money for non-marital purposes, including but not limited to, lingerie and sex store purchases for individuals other than [Wife]; pornography; numerous hotel charges; PayPal charges to at least one female, for sex; spyware that he installed on [Wife's] phone; charges for a secret email account; numerous background checks for potential sexual partners; Match.com; among other similar expenditures for non-marital purposes.

In addition to the challenged findings, the trial court made two findings relevant to Husband's marital misconduct that Husband does not challenge:

> 153. Of the $123,869.00 that [Husband] claimed was used for home improvements, only $29,603.00 was used for home improvements.
>
> 154. Accordingly, $29,603.00 was used for marital purposes and should be distributed equally to the parties. The remainder was used by [Husband], for non-marital purposes in furtherance of his illicit extramarital activities and should be distributed to [Husband].

Husband's argument focuses mostly on the finding of illicit sexual behavior, finding 79(k).

Marital misconduct may be a factor considered by the trial court in determining alimony, *see* N.C. Gen. Stat. § 50-16.3A(b)(1), but "[i]f the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court *shall* order that alimony be paid to [the] dependent spouse." N.C. Gen. Stat. § 50-16.3A(a) (emphasis added). "Illicit sexual behavior" is distinguished from other

forms of marital misconduct as it mandates an award of alimony to a dependent spouse, whereas other forms of marital misconduct may simply be considered as a factor, in the trial court's discretion, in determining alimony. *See Romulus v. Romulus*, 215 N.C. App. 495, 521-22, 715 S.E.2d 308, 325 (2011); *see also* N.C. Gen. Stat. § 50-16.3A(b)(1).

Here, the trial court found Husband had committed both illicit sexual behavior and indignities. As noted above, Husband's marital misconduct under Subsection 50-16.1A(3)a. mandates an award of alimony, but indignities under Subsection 50-16.1A(3)f. is a factor the trial court may consider when determining entitlement to alimony. *See* N.C. Gen. Stat. § 50-16.3A(a).

Husband's main argument here centers on finding 79(k). Husband argues Wife "had no personal knowledge of any fact found by the trial court regarding illicit sexual activity by [Husband]" and that she "could not identify any individual with whom [Husband] had the relationship." Wife counters by noting the evidence of Husband's tremendous expenditures for lingerie, sex toys, hotels, pornography, "SmartSextalk," secret emails, a subscription to Match.com, and online payment to someone named "Jenna." Wife relies upon *Rea v. Rea*, which states that "[i]t is well-established that direct evidence of illicit sexual behavior or indignities as a result of that behavior is not required but can be shown by circumstantial evidence." *Rea*, 262 N.C. App. at 424, 822 S.E.2d at 429. This case has different facts from prior cases, such as *Rea*, addressing the sufficiency of circumstantial evidence under the "opportunity and inclination" doctrine to support a finding of "illicit sexual behavior," so we must consider if the evidence in this case will also suffice to support the trial court's findings.

In *Rea*, this Court explained,

> Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.
>
> Thus, if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than mere conjecture exists to prove sexual intercourse by the parties.

> *Coachman v. Gould*, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996) (citation and quotation marks omitted).
>
> The evidence at trial included a private investigator ("PI") who testified that on 6 August, before separation, she witnessed and photographed Husband kissing Ms. Smith. The investigative report, admitted as an exhibit, shows that the investigator parked near Husband's truck in the parking lot of a shopping mall at 1:09 p.m. and waited until 3:45 p.m., when Husband and Ms. Smith arrived, and Ms. Smith parked her car next to Husband's truck. Husband and Ms. Smith kissed. Husband then got into his own truck, and both vehicles left at the same time. Thereafter, on 18 and 19 August, two nights in a row only ten days after the parties' separation, the PI saw Husband's and Ms. Smith's vehicles parked overnight at a hotel. Although the overnight stays at the hotel were shortly after the parties separated, "[n]othing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]" N.C. Gen. Stat. § 50-16.3A(b)(1) (2015).
>
> Furthermore, Wife testified that prior to their separation Husband began to repeat specific suspicious behaviors he exhibited in 2011 when he had a prior affair; these actions prompted her to hire the PI. For example, Husband failed to come home one night. Wife also saw Husband and Ms. Smith together, including at Husband's temporary residence, shortly after the date of separation, and when Wife confronted the Husband about the other woman, he said, "she was a better woman than" Wife. We conclude there was competent evidence to support finding of fact 11(a) and (b). This argument is overruled.

Id. at 424-25, 822 S.E.2d at 429-30 (formatting altered).

In *Rea*, there was evidence the husband was having a relationship with a specific woman, Ms. Smith. *See id.* The two of them were observed together overnight at a hotel twice. *See id.* Other cases using the "opportunity and inclination" doctrine present similar facts. *See*, *e.g.*, *Wallace v. Wallace*, 70 N.C. App. 458, 319 S.E.2d 680 (1984); *Horney v. Horney*, 56 N.C. App. 725, 289 S.E.2d 868 (1982); *Owens v. Owens*, 28 N.C. App. 713, 222 S.E.2d 704 (1976).

The statutory definition of "illicit sexual behavior" is quite specific:

> Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse[.]

N.C. Gen. Stat. § 50-16.1A(3)a. The term "sexual act" as used in this context is also specifically defined, by reference to North Carolina General Statute § 14-27.20(4):

> (4) Sexual act. — Cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. It is an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.20 (2021).

Some of the terms of North Carolina General Statute § 50-16.1A are not so well-defined. For example, "deviate sexual acts" apparently means something other than the "sexual acts" as defined by North Carolina General Statute § 14-27.20(4), but no case has explained exactly what it is.[10] In this case, the facts of the "opportunity" and "inclination" do not present the traditional situation with evidence of someone observing an overnight stay at a hotel or residence, *see Rea*, 262 N.C. App. at 424, 822 S.E.2d at 429, but the circumstantial evidence of Husband's illicit sexual behavior is still compelling. Finding 152 summarizes this extensive evidence:

> 152. [Wife] analyzed the expenditures from [Husband's] USAA Checking Account . . . and presented evidence of [Husband's] marital waste. [Husband] spent substantial

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10. In *Haddon v. Haddon*, it seems the alleged "deviate sexual acts" were between the husband and the wife, not with a third party, but we do not know what they did as the Court was apparently too appalled by the evidence to describe it:

> Evidence of abnormal and unnatural sexual conduct was offered by both plaintiff and defendant. There was conflicting evidence on the question of whether such conduct was abhorrent and intolerable to the plaintiff. However, the plaintiff did offer abundant evidence that defendant's persistent sexual conduct was intolerable to her and that she was forced against her will to engage in them with defendant.

Haddon v. Haddon, 42 N.C. App. 632, 635, 257 S.E.2d 483, 485 (1979).

> sums of money for non-marital purposes, including but not limited to, lingerie and sex store purchases for individuals other than [Wife]; pornography; numerous hotel charges; ATM withdrawals of large sums of cash that lined up with the hotel charges; PayPal charges to at least one female, for sex; spyware that he installed on [Wife's] phone; charges for a secret email account; numerous background checks for potential sexual partners; Match.com; among other similar expenditures for non-marital purposes.

Taking all these purchases in context, along with the testimony of both Husband and Wife about their relationship and the circumstances of Husband's many nights away in hotels, a permissible inference for the trial court to make from Husband's "opportunity and inclination" to commit illicit sexual behavior was to find Husband had committed illicit sexual behavior with at least one woman during the marriage. The evidence of Husband's activities was circumstantial, but the trial court properly considered the weight of the evidence and made findings of fact which are supported by this evidence. The evidence showed "inclination" to engage in sexual activity with other women, as demonstrated by the online services and purchases of lingerie and sex toys not used with Wife, as well as "opportunity" for sexual activities with the many hotel nights which corresponded with the dates of cash withdrawals and other purchases. *See Rea*, 262 N.C. App. at 424-25, 822 S.E.2d at 429-30. There was evidence of a PayPal payment "for sex" to "at least one female." Further, the evidence showed that some of the online services used by Husband are specifically intended to allow customers to contact women for the purpose of arranging sexual encounters. Husband did background checks on "potential sexual partners." Husband spent nearly $100,000 on these purchases, including hotels, lingerie, and sex toys. The large ATM withdrawals of cash matched up to the nights of the hotel charges. Although caselaw discussing inclination and opportunity warns against application of the doctrine where the evidence might only support a conjecture "that an adulterous affair had taken place[,]" in this case the evidence supports a reasonable inference of both Husband's opportunity and inclination to engage in illicit sexual behavior during the parties' marriage. *See Wallace*, 70 N.C. App. at 461-62, 319 S.E.2d at 682-83 (citation omitted); *see also Coachman v. Gould*, 122 N.C. App. 443, 446-47, 470 S.E.2d 560, 563 (1996).

There was competent evidence to support the trial court's finding that Husband engaged in illicit sexual behavior during the marriage. Additionally, Husband did not articulate an argument against the trial

court's finding Husband committed indignities and his "marital misconduct set forth above rendered the condition of [Wife] intolerable and life burdensome[,]" so this finding of fact is binding on appeal. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). While indignities do not mandate an award of alimony as illicit sexual behavior does under North Carolina General Statute § 50-16.3A(a), the trial court's findings also support the trial court's conclusions that "[a]n award of alimony from [Husband] to [Wife] is equitable" and "[Wife] is entitled to an award of alimony from [Husband]." *See* N.C. Gen. Stat. § 50-16.3A(a) ("The court shall award alimony to the dependent spouse upon a finding . . . that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section."), *see also* N.C. Gen. Stat. § 50-16.3A(b)(1) (requiring the trial court to consider marital misconduct as an equitable factor in establishing entitlement and amount of alimony). We therefore affirm the First Order regarding alimony.

VI. Conclusion

We affirm the First Order as to the equitable distribution of the parties' property as well as the trial court's two orders regarding retirement, Court Order Acceptable for Processing and Retirement Benefits Court Order distributing Husband's federal retirement plans. We also conclude the trial court did not abuse its discretion when applying the Child Support Guidelines and affirm the First Order as to the trial court's child support determination. As to the portion of the trial court's First Order awarding alimony, we conclude the evidence supports the trial court's finding that Husband committed "acts of illicit sexual behavior with at least one woman" other than Wife during the marriage and the trial court's findings also support the trial court's conclusion that an award of alimony was equitable. The trial court did not err in finding Husband committed marital misconduct, did not err in determining Wife was entitled to alimony, and did not abuse its discretion in awarding alimony to Wife. The alimony provisions of the First Order are also affirmed.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JAMES KELLY MOORE, III

No. COA22-714

Filed 3 October 2023

1. Constitutional Law—right to counsel—criminal trial—waiver—forfeiture

Defendant's constitutional right to counsel was not violated in his trial for first-degree murder where defendant executed a written waiver of counsel after the trial court conducted a colloquy in accordance with N.C.G.S. § 15A-1242 informing defendant of his rights. Although the written waiver was not included in the record on appeal, its absence did not invalidate defendant's waiver. Further, presuming without deciding that defendant did not give a knowing and voluntary waiver, he engaged in misconduct sufficiently serious to forfeit the right to counsel, including having seven different attorneys during various stages of hearings and the trial (one of whom was his sister, whose *pro hac vice* admission was revoked on the trial court's own motion), warning his attorney during trial that she should withdraw for her own safety, and showing purported State Bar complaints about that same attorney to her and to the prosecutors during trial. The trial court's findings and conclusion that defendant's conduct was an attempt to delay or obstruct the proceedings and constituted egregious conduct were supported by competent evidence.

2. Criminal Law—motion for continuance—time to seek other counsel—during first-degree murder trial

The trial court did not err by denying defendant's motion to continue his first-degree murder trial, which defendant made during the State's case-in-chief in order to seek other counsel, where defendant had already waived and forfeited his right to counsel three days earlier after the court allowed defendant's trial counsel to withdraw at defendant's request.

3. Evidence—testimony of witness—first-degree murder trial—other crimes, wrongs, or acts—plain error review

The trial court did not commit plain error in defendant's trial for first-degree murder of a prostitute by admitting the testimony of a second prostitute regarding her interactions with defendant—including an allegation that defendant raped and robbed her—during

an encounter that took place a day after defendant interacted with the victim and after the victim's last known contact with her family. The testimony was admissible as relevant and probative of defendant's identity as the perpetrator of the murder. Further, the acts related by the witness were close enough in proximity and place to those involving the victim to be properly included under Evidence Rule 404(b), and their probative value was not outweighed by the danger of unfair prejudice, where defendant used the same phone number to locate, message, and solicit both prostitutes; the location the witness identified as the site of her encounter with defendant was the same location where the victim's body was later discovered; and the victim's text messages also alleged she had been raped.

Appeal by defendant from judgment entered 17 February 2022 by Judge Henry L. Stevens in Onslow County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Mark L. Hayes, for the defendant-appellant.

TYSON, Judge.

James Kelly Moore, III ("Defendant") appeals from judgment entered on a jury's verdict finding him guilty of first-degree murder. We find no error.

I. Background

Defendant and his girlfriend, Erica Gaines ("Gaines") moved to and resided on East Fort King Street in Ocala, Florida in March 2017. After Thanksgiving 2017, Defendant borrowed Gaines' Kia Sorento SUV to purportedly visit his family in North Carolina for the weekend. Defendant failed to return the vehicle until approximately two to three weeks later.

After arrival in North Carolina, Defendant and Amanda Bell ("Bell") visited Laura Saldana's home in the Northwoods area of Jacksonville in the early morning hours of 3 December 2017. Defendant and Bell left Saldana's house in Gaines' Kia Sorento. Defendant drove to a field located off Thomas Humphrey Road, parked, and the two "made out" in the vehicle. Defendant later drove Bell to a hotel, arrived around 6:00 a.m., and engaged in sexual intercourse.

Defendant and Bell left the hotel after a few hours to eat and later returned to the hotel. Defendant left, while Bell stayed at the hotel. Throughout the morning of 4 December 2017 Defendant left and returned to the hotel a few times. Defendant returned to the hotel for the last time at approximately 12:30 p.m.

Defendant had access to two cell phone numbers. Both of those phone numbers exchanged hundreds of text messages with a cell phone number associated with a prostitute, Shelby Brown ("Brown"), on 3 and 4 December 2017. Brown advertised on Backpage.com, a website used for sexual solicitations, and was "pimped" by Tamara Jackson ("Jackson"). Jackson had provided Brown with a cell phone to use for her prostitution contacts.

Brown lived with Jackson in a mobile home Jackson had rented, located on 183 Orvin Drive in Sneads Ferry. A camera recording on Orvin Drive showed a Kia Sorento SUV going to 183 Orvin Drive and leaving multiple times on 3 December 2017 and 4 December 2017. The camera showed the Kia Sorento: arrive at 4:14 p.m. and leave at 4:42 p.m. on 3 December 2017; arrive at 11:37 p.m. on 3 December 2017 and leave at 1:15 a.m. on 4 December 2017; and, arrive at 2:41 a.m. and leave at 3:11 a.m. on 4 December 2017.

Wendy Moore, Brown's mother, awoke to a text message from Brown saying "This ni--a I'm wit might kill me he jus beat me up n raped me in the back seat so I love you if I don't see u again." Moore called and spoke with Brown. While talking on the telephone Moore and her daughter also exchanged text messages. Moore asked Brown over the telephone where she was located or where she was going. Brown replied via text message "Belgrade." Moore replied *via* text message: "U want me to call popo" and "Call 911 or I will."

Brown responded by text message asking "Are u high?" Moore replied "Stop playing f--king games." Moore called Brown. Brown sounded upset to her, was crying, and asked Moore why she had done that. Moore did not speak with Brown again after 4 December 2017.

Moore contacted Mariann Milan ("Milan"), Brown's best friend, and asked her to contact Brown and learn what was happening to her. Milan contacted Brown via Facebook Messenger, but she was suspicious of Brown's purported replies, because the messages incorrectly used the homophones: "too" and "to." Brown regularly used the words correctly when she had written prior messages. Milan never heard from Brown again after 4 December 2017.

Jackson, the pimp, exchanged text messages with Brown's cell telephone number at 1:30 p.m. on 4 December 2017. Jackson texted Brown stating she needed her cell phone back. Brown replied she would return the cellphone and further stated: "Mama. Chill. I'm coming ok. And I might have some thing good for u. I just seen a bag full of mone[money bag emoji.] 25 thousand[.] Looking at it right now[.]" Brown texted she needed to be picked up in the Northwoods area. A text message sent at 6:39 p.m. gave an address of 308 Doris Avenue and the description "Black. Older guy."

Jackson went to the address given on the corner of Vernon Drive and Doris Avenue around 9:00 p.m. that evening, but Brown was not there. The text message exchange purportedly from Brown also incorrectly used the homophones: "too" and "to." Later analysis of the phone records showed the numbers for both Brown and Defendant were located in Sneads Ferry, about 20 minutes from the Northwoods area.

Defendant's cell phone number (336)-830-XXXX was carried on Gaines' Verizon account. Defendant called Gaines and asked her to change his cell phone number while he was in North Carolina. A few hours later, Defendant called Gaines screaming and yelling because she had not yet changed his phone number. Gaines changed Defendant's phone number to (336)-978-XXXX.

Denell Sharek ("Sharek") also worked as a prostitute and advertised on Backpage.com. Sharek requires new prospective "tricks" to send a picture of themselves to her. Defendant, who Sharek later identified as "June" sent her a picture of himself from phone number (352)-600-XXXX on 3 December 2017 at 4:12 a.m.

Defendant texted Sharek and requested to see her for an hour on 5 December 2017. Defendant's visit was quoted to cost $200. In the text messages between Defendant and Sharek, Defendant incorrectly used the homophones: "too" and "to." Sharek took a cab to Defendant's location for their encounter. Defendant had Sharek get into his dark colored SUV. Sharek panicked because she did not do "car dates." They drove off of the paved road, through gravel, and into a field. Sharek later identified this location as at the end of Thomas Humphrey Road off the paved portion.

Defendant parked the SUV, exited the SUV, and got into the backseat. Defendant pulled Sharek out of the front passenger's seat and into the backseat. Sharek testified Defendant raped her. When Defendant completed his crimes, he told her to get out of the SUV and walk. Defendant kept Sharek's cell phone and purse, which contained around

$600 to $700 in currency. As Sharek walked towards the hotel where she was staying, Defendant drove up in the SUV beside her and told her to get inside. Defendant returned her purse and cellphone, but the money from inside the purse was gone. Sharek did not report this incident to law enforcement until they began investigating Brown's homicide.

At 7:39 a.m. Sharek received a missed call and four text messages from (910)-548-XXXX, a cell number Brown had used. No prior communications had occurred between Brown and Sharek. The text messages stated: "Hey there beautiful sexy lady;" "Are you doing out calls;" "Hello;" and, "Hey babe." Sharek did not respond to the missed call or the text messages. Sharek also received text messages from (910)-335-XXXX and (336)-978-XXXX, both numbers associated with Defendant.

Defendant returned Gaines' Kia Sorento SUV to her in Florida before Christmas. Gaines testified her Kia Sorento contained a "really bad odor" inside, unlike any odor Gaines had smelled before. When Gaines asked Defendant about the smell, he responded a friend had left a bag of chicken in the back. The floorboard and third-row seats were wet. Gaines used carpet freshener to try to alleviate the odor. The stench was so strong Gaines would leave the windows down.

Gaines noticed Defendant had an open wound on his chest. When Gaines questioned him, Defendant said he had been bitten. Defendant had scratches on his arms, which Defendant asserted had resulted from mosquito bites. Gaines' Kia Sorento SUV was repossessed by the lender on 7 January 2018. Gaines' child had left a Batman mask inside the vehicle.

Children from Onslow County found a partially burned and decomposed body in a grassy area near a dirt road off Thomas Humphrey Road on 31 December 2017. The grass around the corpse did not appear to be burned. Law enforcement officers had walked in that area investigating gunfire previously and had not seen a body. An individual who had walked his dog there a week prior to discovery did not see anything at that time.

The corpse was decomposing with extensive maggot infestation. The body had multiple areas of burning with significant burning around her pelvic area. The State Medical Examiner identified the body as Brown's through fingerprints.

Dr. Zachary O'Neill performed the autopsy on 8 January 2018. Dr. O'Neill observed ten stab wounds to the left and right of Brown's neck. Nine of the wounds were located close together, and at least one of the stabs caused a lethal injury of the right jugular vein. Dr. O'Neill testified

the stabbing had occurred first and was the cause of Brown's death. The burning occurred after Brown was deceased, and then the decomposition occurred.

The *Jacksonville Daily News* published an article on 11 January 2018 stating a body was found off of Thomas Humphrey Road on 31 December 2017. Google search records associated with the account Junehova@gmail.com showed a search was performed on 11 January 2018 asking: "can autopsies show sperm in a decomposed body[?]" The GPS cellular records for the inquiry originated from an address on East Fort King Street in Ocala, Florida, where Defendant and Gaines lived.

Gaines' former Kia Sorento was sold by the lender to an overseas buyer located in Costa Rica. Law enforcement officers located the Kia vehicle in a Florida port the day before it was scheduled to be shipped abroad. Law enforcement officers found white powder, which appeared to be carpet deodorizer, and the vehicle's interior was damp. Positive indications for the presence of blood were located on: the front carpet on the drivers' side, an access panel in the back of the vehicle, and the vehicle's third row. A Batman mask was inside the vehicle. Several swabs taken from the vehicle were submitted for DNA testing.

The vehicle's access panel swab had a DNA profile, which was a mixture of two contributors: the major profile being consistent with Brown's DNA profile and a minor profile that was inconclusive. The third-row seat sample had a DNA profile which was consistent with Brown's DNA profile. The sample from the driver's side front carpet was insufficient for DNA analysis.

Defendant was indicted for first-degree murder on 12 June 2018. Krystal Moore, Defendant's sister, a licensed attorney in Georgia, was permitted *pro hac vice* to appear in Onslow County Superior Court. Moore had listed George Battle of Mecklenburg County as her North Carolina sponsoring counsel. *See* N.C. Gen. Stat. § 84-4.1(5) (2021) ("A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State, has agreed to be responsible for filing a registration statement with the North Carolina State Bar, and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State."). The record contains no evidence of Battle appearing in Onslow County Superior Court at any time during Moore's representation of Defendant.

Defendant retained Thomasine Moore, who was not related to Krystal Moore or Defendant, as co-counsel. Thomasine Moore filed a motion to withdraw due to a conflict of interest on 23 August 2018, which the court allowed on 19 December 2018. Krystal Moore submitted a motion dated 23 July 2018 and filed 13 December 2018 requesting for the trial court to appoint additional counsel. The trial court appointed Walter Hoyt Paramore, III on 19 December 2018.

Paramore filed a motion to withdraw as counsel, which was allowed. Paul Castle ("Castle") was next appointed as Defendant's attorney on 30 January 2019. A trial date was set for 30 September 2019. Castle filed a motion to withdraw due to his inability to work with Krystal Moore. The trial court held a hearing on 23 August 2019 to hear Castle's motion. At the hearing, Castle asserted: "an irreparable conflict arose between him and [Krystal] Moore." Castle further asserted he was asked to withdraw by Krystal Moore. Castle acknowledged one counsel cannot force another to withdraw from representation, but the situation was conflicted because Defendant and Krystal Moore are siblings. Castle was also unable to contact Defendant.

The 23 August 2019 hearing began at 2:03 p.m. Krystal Moore was not present when the hearing commenced. The trial court heard from Castle, the State, and Defendant. The trial court then addressed Defendant:

> THE COURT: Okay. [Defendant], do you understand the motion that we're here for today?
>
> . . .
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And do you understand that Mr. Castle is asking to withdraw?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that's because he can't effectively assist you, apparently because of your sister's representation. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Do you want to be heard as to his motion to withdraw?
>
> DEFENDANT: He can withdraw, yes, sir.
>
> THE COURT: Okay. And you told me last time that you were going to hire an attorney, is that correct?

DEFENDANT: I am.

THE COURT: Have you hired anybody?

DEFENDANT: I would have to get in contact with my sister and talk to her about it, and my family members.

THE COURT: Okay. And I understand that your sister is representing you, and this matter has been set at least twice in front of me with an order that she be here, and she hasn't appeared yet. Do you understand that?

DEFENDANT: Yes, sir.

. . .

THE COURT: Okay. Anything you want to say, [Defendant], before I make the decision?

DEFENDANT: I mean, he can withdraw.

The trial court then addressed the State. The State spoke on Krystal Moore's non-attendance in court, the requirements for admission *pro hac vice*, and Defendant's current representation:

[DISTRICT ATTORNEY]: Judge, you know, of course, Krystal Moore is not here. We've not seen Krystal Moore in this courtroom since January the 23rd of 2019. She was ordered to be here today. She was ordered to be here today. And, Judge, as the Court is also well aware, sir, that she's in this case pro hac vice with another attorney and, Judge, I know the Court is aware of the statute. We've reviewed the same. Let's see. It's G.S. 84-4.1, and one of the requirements, it does appear, to be some personal appearance from that attorney. That attorney she's listed is an individual in Mecklenburg County by the name of George Battle. He has also never appeared in this court. We've never had any contact with him. I think [my co-counsel] attempted to reach him early in the proceedings, and he never spoke to him. Is that correct?

[ASSISTANT DISTRICT ATTORNEY]: That's right.

[DISTRICT ATTORNEY]: So, Judge, we've got a lot of issues here, in terms of representation. But if the record would reflect that Ms. Moore is not present today.

The trial court then revoked Krystal Moore's *pro hac vice* admission *ex mero motu*:

> THE COURT: Okay. Sir, on my review of the statute that [the State] is referencing, which is North Carolina General Statute 84-4.1, it indicates in that that when she was let in - - I understand from previous discussion that Ms. Thomasine Moore was representing you, who is a local counsel here who is experienced. And to be admitted to - - it says you're going to associate with local counsel who is going to be appearing in the proceedings with you. And that local counsel is no longer included.
>
> So, in my discretion, under 84.4 - - 84-4.2, on my own motion, I'm going to revoke your sister's pro hac vice status here. That's going to leave you without a counsel, because I'm going to allow Mr. Castle to withdraw. What I'm going to do is, I'm going to appoint IDS immediately to represent you so that you've got somebody there to appear for you that can answer your questions. Do you understand what I'm saying so far?
>
> DEFENDANT: So are we trying to say she's not going to be my lawyer no more?
>
> THE COURT: Yes. She's not - - doesn't have the authority to practice law in the State of North Carolina. So I'm going to appoint a capital defender to represent you. They will participate, if they can - - if they're the lead counsel.

Krystal Moore arrived at 2:11 p.m. after the above colloquy. The following exchange took place:

> THE COURT: Is this Ms. Moore? Ms. Moore, we started at 2:00.
>
> MOORE: I understand, Your Honor. I'm traveling from out of town.
>
> THE COURT: Okay. Did you communicate with anybody that you were going to be late?
>
> MOORE: Yes, I communicated - - it was earlier this week - - that I was going to be late. Ms. Caitlin Emmons.
>
> THE COURT: Okay. You're talking about the judicial assistant - -
>
> MOORE: Yes.
>
> . . .

THE COURT: I understand from my judicial assistant that she notified you that the hearing was going to be today and there was no response after you asked to appear by telephone.

MOORE: When she said that it was going to go forward and I had already told her that I had a conflict in my schedule, I'm here as soon as possible.

THE COURT: Okay. I understand that Mr. Castle has asked to withdraw. You can put your stuff down. At this point, I have allowed Mr. Castle to withdraw, which gets us back to the issue of do you have counsel in the State of North Carolina that is appearing with you?

MOORE: We would have to move to appoint new counsel.

THE COURT: Say again.

MOORE: We would have to move to appoint new counsel. I do have someone, as far as my sponsor, for my pro hac, yes. And so --

THE COURT: Okay. Well, there's nobody that's appearing in this case. Nobody has appeared in this case, with the exception of Thomasine Moore, who was removed or withdrew. I don't know when the date was, but I can look through the file and figure it out, but it's been at least one attorney back.

THE STATE: It was December 13th of '18, sir.

THE COURT: Of 2018?

THE STATE: Mm-hmm.

THE COURT: So what's the plan? I understand that He's [sic] on trial in a first-degree murder case in September, next month.

MOORE: That is correct, Your Honor.

THE COURT: And this is the first time you've been here since January?

MOORE: I'm not sure when the last time I've been here.

THE COURT: Okay. Is there anything you want to say?

MOORE: We would like to move to appoint new counsel, and would like an order entered doing so.

THE COURT: I understand from Mr. Castle that he's had problems communicating with your brother because of your involvement; that he didn't get discovery from you and had to go to the D.A.'s office to get it. Is that the case?

MOORE: Absolutely not, Your Honor.

THE COURT: If I have IDS coming in, they're the ones that have the experience in representing people in capital cases in the State of North Carolina. I would appoint them as lead counsel, unless you're planning on hiring somebody that you're going to associate that is going to be appearing in this courtroom with you at every proceeding that we have.

. . .

THE COURT: Okay. I'm going to do that, under one condition, but let me ask you this. How much criminal experience do you have doing criminal cases? Because he's on trial for first-degree murder.

MOORE: I'm aware of that, Your Honor.

THE COURT: So how much time, criminal?

MOORE: Are you asking how many cases?

THE COURT: Yes.

MOORE: I already went over my qualifications with the other judge.

THE COURT: Right. And I have the authority to remove you right this second from it. So I'm asking a question, and I would appreciate an answer.

MOORE: It's part of my practice.

THE COURT: Okay. I'm going to assume that to be none, since you can't answer it.

MOORE: No. I mean, you asked me a question. I said it's part of my practice. I do it often.

THE COURT: Okay. Anything else from the state?

. . .

THE COURT: And so you're asking me to appoint somebody else. He had a great lawyer in there with Mr. Castle,

and now he's out. And I understand, again, this matter, at least, was set for September 30th, if I'm not mistaken.

[THE STATE]: September 30th, that's right, Judge.

THE COURT: Okay. Is there anything else you want to say, ma'am?

MOORE: I would like to say that Mr. Castle also has a conflict that he did not disclose to the client or to myself, and that is one of the reasons that I asked him to withdraw.

THE COURT: Okay. Do you want to be heard?

MR. CASTLE: I'm not aware of any such conflict.

THE COURT: Okay. All right. In this case – this is a very serious case, ma'am, and these guys do this for a living and have for decades, doing these type of cases. I have, in the interest as a judge on the North Carolina Superior Court, to ensure that he has a fair trial, that he's represented competently. And so, again, I've allowed Mr. Castle to withdraw. I don't have anyone here that is appearing with you in this case that you have associated. You're asking me to associate them by making them the -- by me appointing somebody.

MOORE: No, Your Honor. I actually do have association in the case for my pro hac. That's not an issue.

THE COURT: That's a guy in Charlotte, from what I understand in the hearing when you weren't here. And I don't know what he does, either, but he's not appearing in this case and hasn't appeared.

MOORE: That's all that we needed, as far as my pro hac. Your Honor, we're actually asking for an appointment of counsel to assist with the case.

THE COURT: Okay. Well, I'm going to do it the other way around. I'm going to – I'm going to, under my own motion, ma'am, and in my discretion, I'm going to revoke your pro hac vice status. I am going to appoint IDS, Indigent Defense Services, to represent him. If y'all hire somebody here, then they can take it over, that's fine, but we'll get a name of the counsel and we'll provide it to [Defendant], okay?

> MOORE: And, Your Honor, why are you revoking my --
>
> THE COURT: It's totally in my discretion. I don't feel like it's moving forward. I think we're going to have an ineffective assistance of counsel. You haven't appeared here in a murder case since January. I mean, I could keep going. I don't feel like you have -- I don't feel like that it's going to be in [Defendant]'s best interests to be represented by his sister.
>
> MOORE: Your Honor, you're saying that I haven't appeared here since January. We actually set the matter for trial, and there was only one other admin date that the D.A.'s office said that they actually needed. And so that's one of the reasons why I haven't appeared here, because there is no more admin dates.
>
> THE COURT: Okay. We had one two weeks ago, on Friday. Weren't we here on Friday, two weeks ago?
>
> [THE STATE]: Yes, sir.
>
> MOORE: That -- from my understanding, that was not an admin hearing, with regards to --
>
> THE COURT: That was a hearing in which [Defendant] was in here and I was addressing Mr. Castle's motion to withdraw. So at this point, with the matter as serious as it is and with it drawing near for time to have the trial, that's the Court's order, and I will appoint IDS. If we can contact them and let them know. Okay. Anything else?

Attorney Scott Jack ("Jack") was appointed to represent Defendant on 23 August 2019. The parties agreed on 12 August 2020 to a proposed trial date of 1 February 2021 subject to the jury not being required to wear face masks due to COVID-19. Jack was allowed to withdraw as Defendant's attorney at Defendant's request on 8 September 2020. Defendant told the trial court he and Jack had developed "different views on certain issues." At the hearing Defendant stated he was going to retain his own counsel or otherwise to represent himself. The trial court engaged in a colloquy regarding counsel and waiver with Defendant, who signed a waiver of counsel.

On 3 December 2020, with trial still scheduled to begin on 1 February 2021, Defendant told the trial court he was still in the process of finding an attorney because "those attorneys that was for Onslow County was

not for me" but "if it doesn't come in, [he's] still good enough to handle [his] own situation." Attorney Bellonora McCallum ("McCallum") was appointed as standby counsel.

Defendant informed the trial court he wanted McCallum to represent him on 7 January 2021. McCallum was appointed as trial counsel that day. Defendant's trial date was continued and re-scheduled for 28 June 2021. Defendant's 28 June 2021 trial was later continued until November 2021, and was then continued again until 7 February 2022. No speedy trial motion was filed or objection was raised by Defendant prior to trial.

Jury selection ended on 8 February 2022. The next day the parties made opening statements. On 10 February 2022 McCallum informed the trial court she had received an email from Defendant's sister, Krystal Moore, on the previous day with an attachment which contained a complaint to the North Carolina State Bar containing Defendant's typewritten signature. The trial court questioned Defendant about his satisfaction with McCallum's representation and services. Defendant responded and informed the trial court he had "no problem" with McCallum's services.

Krystal Moore also emailed the district attorney and assistant district attorney assigned to the case on 9 February 2022. Attached to her email was a drafted complaint about both attorneys to the North Carolina State Bar. The complaint was signed by Krystal Moore.

The State proceeded with its case-in-chief. McCallum informed the trial court Defendant requested for her to withdraw from representation on 14 February 2022. McCallum informed the trial court she had also received an email from Krystal Moore demanding McCallum not to harass her anymore. McCallum did not respond to the email and continued to prepare and communicate with Defendant and his parents. In chambers, McCallum reported to the court that Defendant had advised her to withdraw from representing him for her safety.

McCallum further reported she was unable to provide effective legal assistance after conversations with Defendant concerning his request for her to withdraw from representation. McCallum also asserted she could not effectively represent Defendant under constant threat of having frivolous bar complaints filed against her.

When the trial court addressed and questioned Defendant on his request for McCallum to withdraw, he stated "I was going to handle this first, but from my understanding I can get some more attorneys in here." McCallum requested a continuance to allow Defendant to find new counsel. The trial court informed Defendant that he had time to

prepare for this trial for years and months and a new attorney would not be able to "come in and start handling a case" in the middle of a trial already underway.

Defendant stated he wanted the trial court to "stop the trial because there is too much going on." The trial court told Defendant the trial had already begun and would continue. The trial court further warned Defendant he would be forfeiting his right to appointed counsel if he persisted in having McCallum removed.

The trial court engaged in the following colloquy with Defendant and his counsel out of the presence of the jury:

> THE COURT: Okay? That is not being ugly. We have gone through all of this time and this is a 2017 case. So it's time to get it done. She is a very good attorney. She can stay in the case or I'm going to find out what you want to do about attorney.
>
> DEFENDANT: No. I want to excuse [McCallum].
>
> THE COURT: Let me go through these questions with you because that probably means you're going to be representing yourself. Do you understand that? You've, basically, forfeited your right to have an attorney if you fire her because you have gotten rid of every other one since then. Do you understand that?
>
> DEFENDANT: Yes, sir, I do.
>
> THE COURT: Let me go through these questions with you real quick.
>
> MCCALLUM: Can you give them some time to see if there's an attorney that they found who can show up this week? I will just say that. Can you give him an opportunity to call up the attorney they found to see if they can show up this week?
>
> THE COURT: My only issue with that is before you got in the case. When I was talking to [Defendant], they were going to have Black Lives Matter bring an attorney in and that attorney has yet to show up. At this point, we have jurors that are missing their work to be here. That poor lady at the end said that she can't afford two-weeks, and this is just dragging it out further. Let me go over these questions with you real quick, [Defendant]. I know that

you can hear me and understand me. Are you now under the influence of any alcohol, drugs, narcotics, medicines, pills, or any other substance?

DEFENDANT: No, sir, I'm not.

THE COURT: Any other pills?

DEFENDANT: No, sir.

THE COURT: For the record how old are you, sir?

DEFENDANT: Fourty-four,[sic] forty-five. One of them.

THE COURT: Fourty-five? [sic] How far did you go in school?

DEFENDANT: Graduated high school.

THE COURT: You understand how to read and write; is that correct?

DEFENDANT: Yes, sir.

THE COURT: Do you have any mental handicaps?

DEFENDANT: No, sir, I don't.

THE COURT: You understand you do have the right to be represented by an attorney, and the Court has appointed a multitude of them, and now this one is still sitting beside you and I'm about to let her out. You understand you do have the right to be represented?

DEFENDANT: Yes, sir, I do.

THE COURT: Do you understand that if you decide to represent yourself by getting rid of her that you have to follow the rules of evidence and procedures that lawyers do?

DEFENDANT: Yes, sir, but I am not representing myself.

THE COURT: If you let her go I'm telling you that you're going to be forfeiting your right to have an attorney.

DEFENDANT: That's fine.

THE COURT: You understand if you do represent yourself that you are held to the same legal standards. I can't give you legal advice?

DEFENDANT: Yes, sir, I understand.

> THE COURT: Do you understand that you are charged with murder, and the maximum sentence is life without parole, and you're willing to handle that without an attorney?
>
> DEFENDANT: Yes, sir, I understand. I will have an attorney come in.
>
> THE COURT: Okay. Anything else from the State?
>
> [THE STATE]: I just want to make sure that it is clear that he does not want this attorney that is sitting next to him right now, Ms. Bellonora McCallum. That is his intent.
>
> THE COURT: I think he's been clear. Is that your intent for her to withdraw?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: You're positive?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. I'm going to allow her to withdraw.

The trial court permitted McCallum to withdraw from representing Defendant and concluded Defendant had forfeited his right to further appointed counsel by his conduct. Defendant's trial proceeded. Defendant was advised of his right to be present and participate to represent himself. Defendant elected to leave the courtroom to make "phone calls." Defendant represented he did not wish to be present in court, cross-examine witnesses, present evidence, or to provide a closing argument.

Defendant made three oral motions at the beginning of court on 17 February 2022 asking for new counsel to be appointed, a mental health evaluation to be performed on him, and for a mistrial. The trial court denied all three motions. The same day, Defendant was convicted of first-degree murder. The trial court found Defendant to be a prior record level V offender with 16 prior level points. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant gave oral notice of appeal in open court.

Defendant filed a *pro se* motion for appropriate relief ("MAR") in the trial court on 28 February 2022. The trial court denied the MAR by order filed 11 April 2022. Defendant filed a written notice of appeal of the order denying his MAR on 14 April 2022. On 17 May 2022 Defendant filed a motion to consolidate the appeals of the original judgment and the denial of the MAR, which was granted by order on 20 May 2022.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1414, and 15A-1444(a) (2021).

III. Issues

Defendant argues the trial court erred by: (1) denying his right to counsel when he sought to change attorneys during trial; (2) denying his motion for a continuance when he sought to change attorneys during trial; and, (3) allowing Sharek to testify about unrelated allegations.

IV. Defendant's Right to Counsel

[1] Our Court previously articulated two means by which a defendant may lose his right to be represented by counsel: (1) a knowing and voluntary waiver after being fully advised under N.C. Gen. Stat. § 15A-1242; and, (2) forfeiture of the right by serious misconduct in *State v. Blakeney*, 245 N.C. App. 452, 459-61, 782 S.E.2d 88, 93-94 (2016), holding:

> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and

> intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant who is abusive toward his attorney may forfeit his right to counsel.

Id. (internal citations, ellipses, alterations, and quotation marks omitted).

This Court in *Blakeney* also describes a third manner, a mixture of waiver and forfeiture, in which a defendant may lose the right to counsel:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Id. at 464-65, 782 S.E.2d at 96 (citation, ellipses, and quotation marks omitted).

A. Standard of Review

This Court reviews a trial court's findings of fact to determine whether they are "supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). This Court "reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted); *see State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver

of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We . . . review this ruling *de novo*.") (citations omitted)).

Whether a defendant was entitled to or forfeited counsel is also reviewed *de novo*. *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982) (citations omitted); *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93.

B. Challenged Findings of Fact

Defendant challenges the following findings of fact:

> 28. The trial of the State v. James Moore case began on Monday, 7 February 2022. Jury selection continued until the end of the day on Tuesday, 8 February 2022. Wednesday morning, 9 February 2022, the parties made opening statements. On Thursday, 10 February 2022 Ms. McCallum told the Court that on Wednesday before opening statements she received an e-mail from Ms. Krystal Moore and attached to the email was a bar complaint. At first, Ms. McCallum thought it was something from Ms. Moore, but after going through it in court, she noticed that it appeared to have been signed by her client. The bar complaint was typed. Ms. McCallum thought the matter should be addressed by the Court, so she notified the Court of the issue. The Court questioned the defendant in open court outside the presence of the jury and concluded that the defendant was satisfied with his counsel.
>
> . . .
>
> 30. On Monday, 14 February 2022, Ms. McCallum represented to the Court that the defendant told her that the defendant wanted Ms. McCallum to withdraw from this matter. Ms. McCallum made this representation in chambers to the Court and then on the record. In chambers, Ms. McCallum added that the defendant told Ms. McCallum that for her safety, she should withdraw from the case. Ms. McCallum advised that she has spoken to the defendant regularly and that she believed she is unable to provide effective legal assistance after her conversation with the defendant concerning his request that she withdraw from representation of the defendant. Further, Ms. McCallum received an e-mail at midnight, 11 February 2022, from Ms.

Krystal Moore directing Ms. McCallum to stop threatening Ms. Moore and stop sending messages. Ms. McCallum stated that she has not communicated or responded back or emailed Ms. Moore. The Court finds Ms. McCallum to be credible. The defendant's parents, Mr. James Moore, II and Ms. Rose Moore were present during the trial. Ms. McCallum stated that she has communicated with them and believed that the defendant's parents wanted her to continue to represent the defendant.

31. During the afternoon of Friday, 11 February 2022 Denell Sharek testified in the trial of the above captioned case. Ms. Sharek testified that the defendant sexually assaulted Ms. Sharek on 5 December 2017 in the same secluded location where Shelby Brown's Body [sic] was found. Ms. Sharek was able to identify the defendant based on a picture the defendant sent of himself to Ms. Sharek. Ms. Sharek's testimony was very unfavorable for the defendant and highly inculpatory. The Court finds that the defendant asked Ms. McCallum to withdraw as counsel in an effort to secure a mistrial because of Ms. Sharek's testimony.

. . .

35. The defendant acknowledged that he understood that he had the right to be represented by an attorney, and that he was forfeiting his right to have an attorney by asking Ms. McCallum to withdraw. Further the defendant acknowledged that he understood that if the defendant proceeded to represent himself by terminating Ms. McCallum's representation of the defendant, he would have to follow the rules of evidence and procedures that lawyers do and that he would be held to the same legal standards as attorneys. The Court instructed the defendant that he could not provide legal advice during the trial to the defendant. The defendant acknowledged that he understood that he was charged with murder and the maximum sentence for that crime is life without parole. The defendant on multiple occasions made [it] clear his desire for Ms. McCallum to withdraw as counsel. The defendant clearly indicated that he was not satisfied with any attorneys who have been appointed to represent the defendant including Walter H. Paramore, III, Paul Castle, Scott Jack and Bellonora McCallum. All of these attorneys are well qualified and

> the only conflicts these attorneys had, with the exception of Mr. Paramore's conflict, were engineered by the defendant either individually or acting together with his sister, Krystal Moore.

The challenged findings of fact are supported by competent evidence in the record. *State v. Thomsen*, 242 N.C. App. 475, 485 776 S.E.2d 41, 48 (2015) (citation omitted), *aff'd*, 369 N.C. 22, 789 S.E.2d 639 (2016). Defendant's challenges are without merit.

C. Waiver of Counsel

Defendant argues the trial court erred in concluding he had waived and/or forfeited his right to counsel.

Both the Constitution of the United States and the North Carolina Constitution recognize criminal defendants have a 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, and handle their case without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

Before a defendant is allowed to waive the right to counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory safeguards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.* (citation omitted).

The procedure to waive counsel is codified in N.C. Gen. Stat. § 15A-1242 (2021). Courts may only enter an order to allow defendants to waive their right to counsel after being satisfied the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.* (citation omitted). A "trial court must obtain a written waiver of the right to counsel." *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992) (citation omitted).

The record indicates Defendant executed a written waiver of court-appointed attorney on 8 September 2020 after the trial court had conducted a colloquy into Defendant's present mental state, not being under the influence of any drugs or intoxicants, understanding of the charge and its possible punishment, level of education attained, right to appointed or retained counsel, right to represent himself, and Defendant's obligations and responsibilities if he decided to represent himself. The transcript also reflects the trial court conducted a similar colloquy when Defendant sought to remove McCallum as his counsel during trial.

Written waivers of counsel, certified by the trial court, create a rebuttable presumption that the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C. Gen. Stat. § 15A-1242. *State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002) (citation omitted), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003).

"Once a written waiver of counsel is executed and certified by the trial court, subsequent waivers or inquiries are not necessary before further proceedings." *State v. Harper*, 285 N.C. App. 507, 517, 877 S.E.2d 771, 780 (2022) (citation omitted).

The signed waiver and certification by the superior court judge that a proper inquiry and disclosure was made in compliance with N.C. Gen. Stat. § 15A-1242 was not included in the record on appeal. The only mention of the signed waiver was in the transcript of the hearing where it was signed and in the order denying Defendant's MAR. ("The defendant signed a waiver of court-appointed counsel and was sworn on the same.").

This absence in the record does not invalidate Defendant's waiver. *See State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (holding *inter alia* the lack of a written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the defendant's waiver of counsel); *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (affirming *Heatwole* holding "that a waiver was not invalid simply because there was no written record of the waiver" (citation and internal quotation marks omitted)).

Defendant further asserts he did not intend to represent himself, asserting his answer below during the 14 February 2022 colloquy stated his intention:

> THE COURT: Do you understand that if you decide to represent yourself by getting rid of her that you have to follow the rules of evidence and procedures that lawyers do?

DEFENDANT: Yes, sir, but I am not representing myself.

Defendant's argument is misplaced. The transcript quoted above shows the trial court had unequivocally warned Defendant before the now-asserted reply of the practical effect and consequence of his decision dismissing McCallum would be to represent himself. However, the trial court continued the inquiry with Defendant:

> THE COURT: If you let her go I'm telling you that you're going to be forfeiting your right to have an attorney.
>
> DEFENDANT: That's fine.
>
> THE COURT: You understand if you do represent yourself that you are held to the same legal standards. I can't give you legal advice?
>
> DEFENDANT: Yes, sir, I understand

The trial court also stated Defendant would not have the right to another appointed attorney, and Defendant would have to hire his own attorney or represent himself. Defendant stated he understood.

At each colloquy, the trial court advised and counseled Defendant about his right to an attorney, including his right to appointed counsel. The trial court counseled Defendant on the complexity of handling his own jury trial and the fact the judge would neither be able to offer legal advice nor excuse non-compliance with any rules of evidence or procedure.

The trial court addressed the seriousness of the first-degree murder charge. The trial court advised a conviction by the jury of first-degree murder carried a life sentence without the possibility of parole. The trial court further told Defendant that no other appointed counsel would be able or willing to immediately step into the middle of an ongoing trial. After being fully advised, Defendant proceeded to fire McCallum and was left to acquire his own counsel or proceed *pro se*.

Defendant clearly waived and/or forfeited his right to further court-appointed counsel. Defendant's argument is overruled.

D. Forfeiture of Counsel

Presuming, without deciding, Defendant did not give a knowing and voluntary waiver of his right to counsel, we will also examine the trial court's and MAR court's holdings Defendant had forfeited his right to counsel.

Defendant asserts the trial court and MAR court judge erred in concluding he had forfeited his right to appointed counsel by his conduct.

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)).

"Forfeiture of counsel is separate from waiver because waiver requires a knowing and intentional relinquishment of a known right[,] whereas forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Schumann*, 257 N.C. App. 866, 879, 810 S.E.2d 379, 388 (2018) (citation and quotation marks omitted).

Our Court has held when a defendant has forfeited their right to counsel, then a "trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that [the] defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (citation omitted).

In *Montgomery*, this Court examined the issue of a criminal defendant forfeiting their right to counsel as an issue of first impression. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 ("Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture."). This Court held, *inter alia*, "a defendant who is abusive toward his attorney may forfeit his right to counsel." *Id.* at 525, 530 S.E.2d at 69 (citing *U.S. v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995)).

This Court further held "[a] forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel[.]" *Id.* at 524, 530 S.E.2d at 69 (citing LaFave, Israel, & King *Criminal Procedure*, § 11.3(c) at 548 (1999) (quotation marks omitted)). The defendant had been afforded "ample opportunity" to obtain counsel over a period of over a year; had twice fired appointed counsel and had retained a private attorney; had been disruptive in the courtroom, causing the trial to be delayed; had refused to cooperate with his counsel when his counsel was not allowed to withdraw; and, had physically assaulted his counsel. *Id.* at 525, 530 S.E.2d at 69. This Court ultimately held the defendant had forfeited his right to counsel and the trial court did not have to follow the waiver procedures outlined in N.C. Gen. Stat. § 15A-1242. *Id.*

Since the decision in *Montgomery*, this Court has upheld a forfeiture only in "situations involving egregious conduct by a defendant." *See Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. The Supreme Court of North Carolina first examined and recognized a defendant's forfeiture of counsel in *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 445-46 (2020) ("We have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel."). Our Supreme Court recognized a defendant's forfeiture, holding: "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Id.* at 535, 838 S.E.2d at 446.

While the Supreme Court, in *Simpkins*, recognized the ability of a criminal defendant to forfeit by "egregious misconduct" the right to counsel, the Court held the defendant's conduct in that case had not arisen to a forfeiture. *Id.* at 539, 838 S.E.2d at 448. The defendant did not employ counsel before appearing at trial and put forth "frivolous legal arguments about jurisdiction throughout the proceedings." *Id.* at 540, 838 S.E.2d at 448. The defendant had different counsels representing him previously during the pre-trial proceedings. *Id.*

The trial court did not conduct a colloquy to determine if the defendant was waiving his right to counsel under N.C. Gen. Stat. § 15A-1242. Our Supreme Court held this was error to fail to determine if the defendant desired to waive his right to counsel using the proper procedure and further held, under the facts in *Simpkins*, this defendant did not forfeit his right to counsel at trial. *Id.* at 540, 838 S.E.2d at 449. The record did not lead our Supreme Court to "conclude that h[is] failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel." *Id.*

In 2022, the Supreme Court of North Carolina further examined the forfeiture of counsel in both *State v. Harvin*, 382 N.C. 566, 879 S.E.2d 147 (2022) and *State v. Atwell*, 383 N.C. 437, 881 S.E.2d 124 (2022).

In *Harvin*, our Supreme Court analyzed over two decades of persuasive Court of Appeals precedent and found two circumstances where forfeiture of counsel could occur:

> The first category includes a criminal defendant's display of aggressive, profane, or threatening behavior. *See, e.g.*, *id.* at 536-39 (first citing *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000) (finding forfeiture where a defendant, *inter alia*, disrupted court proceedings with profanity and assaulted his attorney in court); then citing *State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896

> (2015) (finding forfeiture where a defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings [and] repeatedly and vigorously objected to the trial court's authority to proceed"); then citing *State v. Joiner*, 237 N.C. App. 513, 767 S.E.2d 557 (2014) (finding forfeiture where a defendant, *inter alia*, yelled obscenities in court, threatened the trial judge and a law enforcement officer, and otherwise behaved in a belligerent fashion); then citing *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998) (finding forfeiture where a defendant physically attacked and tried to seriously injure his counsel); and then citing *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001) (same)). . . .
>
> The second broad type of behavior which can result in a criminal defendant's forfeiture of the constitutional right to counsel is an accused's display of conduct which constitutes a "[s]erious obstruction of the proceedings." *Simpkins*, 373 N.C. at 538. Examples of obstreperous actions which may justify a trial court's determination that a criminal defendant has forfeited the constitutional right to counsel include the alleged offender's refusal to permit a trial court to comply with the mandatory waiver colloquy set forth in N.C.G.S. § 15A-1242, "refus[al] to obtain counsel after multiple opportunities to do so, refus[al] to say whether he or she wishes to proceed with counsel, refus[al] to participate in the proceedings, or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings." *Id.* at 538. In *Simpkins*, we further cited the decisions of the Court of Appeals in *Montgomery* and *Brown*, *inter alia*, as additional illustrations of this second mode of misconduct which can result in the forfeiture of counsel.

Id. at 587, 879 S.E.2d at 161.

In *Harvin*, the defendant had five court-appointed attorneys prior to trial. *Id.* at 590, 879 S.E.2d at 163. Two of the defendant's attorneys withdrew due to no fault of the defendant, and two others withdrew as a result of "respective incompatible attorney-client relationships with [the] defendant [and] did so *not* because of [the] defendant's willful tactics of obstruction and delay" but "due to differences related to the *preparation* of [the] [d]efendants defense" not a "refus[al] to *participate* in preparing a defense." *Id.* (citation omitted).

The defendant in *Harvin* indicated his intent to not represent himself at trial at a hearing approximately a month before trial. *Id.* at 574, 879 S.E.2d at 154. At a pre-trial hearing three weeks prior to trial, the defendant's stand-by-counsel stated he was prepared to serve as standby counsel, but was not prepared to assume full representation of the defendant. *Id.* On the morning of trial, the defendant also indicated his intent to not represent himself during a colloquy with the court to comply with N.C. Gen. Stat. § 15A-1242. *Id.* at 575, 879 S.E.2d at 154. The trial court took a recess and attempted to locate any of the prior counsel who could come in, but none could. *Id.* at 579, 879 S.E.2d at 156.

The Supreme Court of North Carolina held the trial court erred by finding the defendant had forfeited his right to counsel and requiring the defendant to proceed *pro se*. *Id.* at 592, 879 S.E.2d at 164. The Supreme Court further held the defendant's behavior in requesting two of his counsel to be removed, seeking to proceed *pro se*, and then deciding he needed the help of counsel before proceeding at trial while remaining polite, cooperative, and constructively engaged in the proceedings was not "the type or level of obstructive and dilatory behavior which [would] allow[ ] the trial court . . . to permissibly conclude that [the] defendant had forfeited the right to counsel." *Id.*

The Supreme Court further examined forfeiture of counsel and applied reasonings from both *Simpkins* and *Harwin* in *Atwell*. During a pretrial hearing, the State had requested for the case to move forward after previously agreeing to a continuance to give more time for the defendant to hire a private attorney. *Atwell*, 383 N.C. at 448-54, 881 S.E.2d at 132-35. The defendant, appearing *pro se*, told the trial court "she had made payments to a private attorney," but could not afford to continue to make payments and wanted another court-appointed attorney. *Id.* at 440, 881 S.E.2d at 127. The trial court then responded with a history of her firing two prior attorneys, signing four waivers of appointed counsel, and asking why she now wanted another continuance to hire yet another attorney. *Id.*

Once the State indicated it was prepared to calendar the case for trial, the trial court addressed the defendant:

> THE COURT: Well, *what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney.* If you would like to hire your own attorney, that will be fine, but based on these — *the history of this file, it appears to me that your process in moving this case along has been nothing more than to*

see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, that doesn't preclude you from hiring your own attorney. *You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?*

THE DEFENDANT: Representing myself.

THE COURT: Yes.

THE DEFENDANT: It means representing myself.

THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the [d]iscovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

. . .

THE COURT: I don't know what's ultimately going to have [to] happen to this case but you are entitled to a jury trial most definitely. *What I want you to understand is that if you represent yourself, you're going to be held to the same standards of an attorney. Do you understand that?*

THE DEFENDANT: *You're giving me no choice. I mean, I asked for another court appointed attorney and you said no*, so—

THE COURT: You've had choice after choice after choice. *You've been given a court appointed attorney on three occasions, which is two more than you usually get.*

> THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.
>
> THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the other took—you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: *You've denied me a court appointed attorney. Yes, I understand that.*
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

Id. at 440-43, 881 S.E.2d at 128 (footnote omitted).

The trial court, in *Atwell*, did not conduct an N.C. Gen. Stat. § 15A-1242 colloquy and entered an order stating the defendant had forfeited her right to counsel through her delay tactics prior to trial. *Id.* at 454, 881 S.E.2d at 135. The Supreme Court held this was error.

Relying on the analysis of *Harvin*, the Supreme Court of North Carolina held "the record likewise does not permit an inference, much less a legal conclusion, by the trial court or a reviewing court that defendant engage[d] in the type of egregious misconduct that would permit the trial court to deprive defendant of [her] constitutional right to counsel." *Id.* at 453, 881 S.E.2d at 135 (internal quotation marks omitted). The defendant had not forfeited her right because she had "ongoing, nonfrivolous concerns about her case." *Id.* at 454, 881 S.E.2d at 135. The defendant could not waive her right to counsel without expressing "*the express*[ ] *desire to proceed without counsel*" through the statutory colloquy of N.C. Gen. Stat. § 15A-1242. *Id.*

A defendant may also forfeit their right to counsel by engaging in "serious misconduct." *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. This Court has recognized forfeiture by misconduct when a defendant (1) engages in "flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys;" (2) employs "offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court;" or (3) "refus[es] to acknowledge the trial court's jurisdiction or participate in the judicial process, or insist[s] on nonsensical and nonexistant legal 'rights.' " *Id.* at 461-62, 782 S.E.2d at 94.

The State asserts these facts present a "hybrid" situation from *Blakeney*. While this may be true, Defendant both gave knowing and

voluntary waivers of counsel, and he forfeited his right to counsel under our precedents. Defendant met all of the instances of "serious misconduct" to forfeit counsel. *See id.*

Including Krystal Moore, his sister, and her North Carolina sponsor, Defendant had seven attorneys representing him during the various stages of hearings and trial. Thomasine Moore and Paramore withdrew due to conflicts of interests. Moore's *pro hac vice* admission was revoked due to her conduct, noncompliance with our State's rules of *pro hac vice* admission, lack of participation or appearance by or responses from her North Carolina sponsor, and her lack of experience handling first-degree murder cases that could potentially result in an ineffective assistance of counsel claim. The trial court also found and concluded Moore was not "credible and [she] did not demonstrate candor with the Court."

While acknowledging that one counsel cannot command a co-counsel to withdraw, Castle petitioned to withdraw due to conflict between himself and Krystal Moore. Moore had requested for him to withdraw and had prevented contact between himself and Defendant. Defendant terminated appointed counsel Jack because of "different views."

At Defendant's express request, McCallum was appointed as trial counsel after she was initially appointed as his standby counsel. Defendant also later confirmed during trial he was satisfied with McCallum's representation. In the middle of trial following the testimony of Sharek, whose testimony the court found was highly inculpatory, Defendant sought to terminate McCallum's representation and warned of her safety if she did not withdraw.

Unlike *Simpkins*, *Harvin*, and *Atwell*, wherein our Supreme Court held there was no egregious misconduct, none of those cases involve a defendant's decision to fire a counsel during the middle of trial after the jury was empaneled and the State had presented its case in chief. This incident was not Defendant's only misconduct.

McCallum informed the trial court she should be allowed to withdraw because she had been informed by Defendant she should withdraw for her safety. This threat was documented in the trial court's denial of Defendant's MAR as constituting "offensive or abusive behavior." *Id.*

The trial court also documented misconduct by Krystal Moore and Defendant of preparing and sharing purported complaints to the North Carolina State Bar against both district attorneys and McCallum during trial. Defendant purportedly "signed" the complaint against McCallum electronically, despite not having access to a computer and testifying in open court on 9 February 2022 that he was satisfied with McCallum's

services. The trial court attributed the change from 9 February 2022 to 14 February 2022 to the testimony of Sharek. The purported "conflicts" with the attorneys, which were attributable to Defendant and/or Krystal Moore, were found and concluded to be "attempts to disrupt the orderly administration of justice."

The trial court specifically found and concluded Defendant's decision to fire McCallum "was an attempted effort to delay, disrupt and obstruct the proceedings and prevent them from coming to completion which undermines the purposes of the right to counsel and constitutes 'egregious misconduct.' "

After Defendant was allowed to terminate McCallum's representation, but learned the trial underway was going to proceed, Defendant informed the Court he did not want to be physically present in the courtroom. Defendant's egregious conduct forfeited his right to further appointed counsel. The trial court did not err in concluding Defendant had forfeited his right to appointed counsel and by later denying his MAR on this ground.

Defendant's MAR asserted he was denied the counsel of his choice in violation of his rights under the Sixth Amendment to the United States Constitution when the trial court revoked Krystal Moore's *pro hac vice* admission *ex mero motu*. *See* N.C. Gen. Stat. § 84-4.2 (2021) ("Permission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice . . . on its own motion and in its discretion."). The order denying the MAR properly denied relief based upon the lack of sponsoring counsel's appearance in Onslow County; Krystal Moore's conduct, lack of attendance in court, lack of candor with the court, errors in North Carolina law and procedure, and lack of criminal trial experience; the role of appointed counsel; and Defendant's right to competent counsel. Defendant did not advance this argument on appeal and has abandoned this argument. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Defendant's argument is without merit and is dismissed.

E. Motion for Appointment of Counsel

Defendant argues the trial court erred by denying his 17 February 2022 motion for a court-appointed attorney. This argument is deemed abandoned for his failure to cite any authority in support thereof. N.C. R. App. P. 28(b)(5). As held above, Defendant had already waived and forfeited his right to an attorney three days earlier during trial outside of the presence of the jury.

V. Motion for Continuance

[2] Defendant argues the trial court erred in denying his motion to continue the trial during trial to enable him to secure other counsel, after allowing his trial counsel to withdraw at his request, after the jury was empaneled, and while the State was presenting its case in chief.

A. Standard of Review

A motion to continue generally rests within the trial court's discretion and is reviewable on appeal only for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 111, 240 S.E.2d 426, 431 (1978) (citations omitted). When the motion to continue is based on a constitutional right, "the question presented is one of law and not of discretion, and the order of the court below is reviewable" on appeal. *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976) (citations omitted).

B. Analysis

"To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (citation omitted).

Defendant sought to continue his trial in progress to enable him to fire his appointed attorney, who had entered appearance, filed motions, represented him for jury selection, opening statement, and during the State's case-in-chief. Defendant was informed no other appointed counsel would be able to effectively represent him by immediately appearing in the middle of a first-degree murder trial. As held above, Defendant had already waived and forfeited his right to an attorney three days earlier during trial. The trial court did not err in denying Defendant's motion to continue.

VI. Sharek's Testimony

[3] Defendant contends the trial court erred in admitting testimony from Sharek under Rules 401, 402, 403, and 404(b).

A. Preservation

Our appellate rules provide: "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Our Supreme Court has held:

> To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [The defendant's] failure to object at trial waived his right to have this issue reviewed on appeal.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted).

"To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citation and quotation marks omitted).

It is insufficient to rely upon the objections lodged pre-trial or after similar evidence has previously been admitted without protest as "the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Hudson*, 331 N.C. 122, 151, 415 S.E.2d 732, 747-48 (1992) (citation and quotation marks omitted).

Defendant's counsel, McCallum, filed a motion *in limine* to exclude the testimony of Sharek "pursuant to North Carolina General Statute § 8C-1 Rules 401, 402, 403, & 404(b); and Rules 701-02; and North Carolina General Statute § 15A-951-952[.]"

The trial court held a hearing on Defendant's motion on 1 October 2021. McCallum argued:

> Again, this is limited. We're just asking that the term "rapist" or "barber" -- "rapist barber," those two terms not be allowed into testimony or the State be able to present anything, type of compilation that showed that's what was stated in her phone. We understand her testimony is going to be her testimony, but to allow a term such as "rapist" or "rapist barber" or to show that's how she stated it is highly prejudicial, improper character evidence on top of that. It will just inflame the jury. So at this point, you know, if her testimony is sufficient (phonetic), we just ask that those terms not be used by her any other -- anyone else, that he's been labeled as a rapist or that she had saved in her phone that he was a rapist or a rapist barber is the term that was used.

McCallum continued:

> Right. We understand she's going to testify. We're just asking that "rapist" or "rapist barber" should not be a part of any testimony, whether officer or her or anything shown in any exhibits where her phone had it saved as that, or her alluding to saying that. That's what we're asking for. We definitely feel the probative value substantially outweighs the danger of unfair prejudicial.

The trial court redacted the term "rapist" from Sharek's cellular phone information. McCallum never argued the entirety of Sharek's testimony of her encounter with Defendant should be excluded during the motion *in limine*.

When Officer Michael Gibbs, the officer who had downloaded cellular data, including a photo purportedly of Defendant from Sharek's cell phone, was on the stand and the line of questioning was leading toward this information from Sharek and Defendant's image on her cell phone, McCallum renewed her objection for the same grounds as her motion *in limine*. The trial court heard arguments from McCallum outside of the presence of the jury:

> Yes, Your Honor, just to reiterate what was argued concerning excluding testimony from Denell Sharek. Because I know that is where this is going since Officer Gibbs is the one that downloaded the cell phone to the Cellebrite and obtained the photo of [Defendant] based on her allegations of rape. So I know we are starting to get out into it. I'm renewing the objection on the record. I'm confident. I'm sure once the jury comes back in and once she is called as a witness I'm going to have to renew it again. The objection is concerning the testimony and the photo that is trying to be published to the jury and entered into evidence pursuant to 8C-1 Rules 401, 402, 404B and Rule 701 and 702, and that is pursuant to the North Carolina General Statute 15[A]-1951 and 1952. If I need to file another copy of what was filed. We, again, argue that is going to be very prejudicial to allow her to get up and there are no charges that have been filed against him. This is something that was brought to attention when she was under investigation -- I don't want to say she was under investigation, but she was being questioned about being one of the last persons to speak to Ms. Brown. Then it turns into a situation where a photo was provided to her and, Your Honor, it definitely there would

> be some information provided where she will say, as she has said in her statements, that it happens. Where someone will take a photo -- someone took her photo and used it and pretend like there [sic] someone else; and this goes to identification. There was no identification done prior to today, and so that is a part of what is going to happen today. *I will also have to renew the objection when that happens also if the Court allows her to testify and this photo to be brought into evidence.* There was no out-of-court identification of [Defendant] except for the photo that was presented from her phone.

(emphasis supplied). The trial court subsequently overruled Defendant's objection and allowed Officer Gibbs to testify about the photograph, which had been sent from one of Defendant's phones to Sharek.

When Sharek was called to the stand, McCallum objected on the grounds of: "8C-1 Rules 401, 402, 403, and 404B in the due process of my client." Defendant did not object during Sharek's testimony. Defendant asserts this objection preserves his arguments asserting Sharek's testimony violated Rules 401, 402, 403, and 404(b) on appeal, citing N.C. Gen. Stat. § 15A-1446(d)(10) (2021) and *State v. Corbett*, 376 N.C. 799, 826, 855 S.E.2d 228, 248 (2021).

"In N.C. [Gen. Stat.] § 15A-1446(d) (2017), the General Assembly enumerated a list of issues . . . appealable without preservation in the trial court." *State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018). Our Supreme Court reviewed N.C. Gen. Stat. § 15A-1446(d)(10) and held "notwithstanding a party's failure to object to the admission of evidence at some point at trial, a party may challenge subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." *Corbett*, 376 N.C. at 826, 855 S.E.2d at 248 (citation, quotation marks, and alteration omitted).

In *Corbett*, the defendants objected to testimony based upon purported blood splatters found on their clothing on numerous occasions. The defendants objected to a portion of the blood splatter expert's report, but failed to object again when he testified at trial. Our Supreme Court held *inter alia*, N.C. Gen. Stat. § 15A-1446(d)(10) preserved their objections by operation of law.

McCallum's only objection to Sharek's testimony at trial was the general objection on the grounds of: "8C-1 Rules 401, 402, 403, and 404B in the due process of my client" prior to her testimony. The trial court had

previously redacted text references to Defendant as "rapist" and other prejudicial text references after her pre-trial motion.

This objection, presuming it was directed toward Sharek's entire involvement with Defendant and no charges currently pending related to that incident, was untimely and did not specifically preserve the admission for appellate review. *See State v. Williams*, 355 N.C. 501, 576, 565 S.E.2d 609, 652 (2002) (citations omitted). This assertion was not an "improperly overruled objection" to trigger N.C. Gen. Stat. § 15A-1446(d)(10).

Defendant argues in the event he did not preserve his evidentiary arguments, he seeks plain error review of these issues. We review these arguments under that standard. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

B. Standard of Review

Our Supreme Court has held plain error:

> is always to be applied cautiously and only in the exceptional case where, after the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right to the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted).

C. Analysis

1. Rules 401 & 402

Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021). Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, (1992). Evidence is admissible so long as it is relevant, unless excluded under

another Rule. N.C. Gen. Stat. § 8C-1, Rule 402 (2021). Defendant argues the rape and other allegations of the encounter between Defendant and Sharek is not relevant to whether he killed Brown. Defendant only argued it was inadmissible on appeal under Rule 401.

Defendant's argument is misplaced. The challenged testimony was relevant under Rule 401 and admissible under Rule 402. The evidence was admissible, relevant, and probative to show the identity of the person who is alleged to have committed the crimes. Defendant has failed to show Sharek's testimony was irrelevant and inadmissible under Rules 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402.

2. Rule 404(b)

Rule 404(b) provides:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

The Supreme Court of North Carolina has repeatedly interpreted Rule 404(b) to be a rule of inclusion, and not exclusion. *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012). This rule of inclusion of Rule 404(b) testimony or evidence is constrained by the requirements of similarity and temporal proximity of the evidence of the acts. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation omitted).

Defendant argues the alleged rape and robbery of Sharek is too dissimilar from the murder of Brown to be admitted under Rule 404(b). The trial court allowed Sharek to testify about the circumstances leading up to an alleged rape of her and the subsequent events, which occurred 5 December 2017, the day after Brown was last seen or heard from alive. The trial court admitted this testimony for the purpose of showing the "identity of the person who committed the crime charged in this case."

"When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence

lacks probative value." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 114 (1999). "[T]he passage of time between the commission of the two acts slowly erodes the commonality between them[.]" *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988).

"Further, where the perpetrator's identity is in question, there must be significant similarities and little passage of time between incidents." *State v. Enoch*, 261 N.C. App. 474, 490, 820 S.E.2d 543, 555 (2018) (citing *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 420 (1986) (alterations and quotation marks omitted)).

Substantial evidence of similarity between the Defendant's prior bad acts with Sharek and of Brown's murder exists. Sharek alleged she was raped and robbed by Defendant the day after Brown's last known contact. Defendant used the same phone number to locate, message, and solicit both prostitutes: Brown and Sharek. The location Sharek identified where her assault and robbery had occurred was the location where Brown's stabbed and burned body was later discovered. Sharek was allegedly raped inside the Kia Sorento SUV, which was later found to contain Brown's DNA. Brown texted her mother she had been raped and assaulted in the back seat of a vehicle by a man fitting Defendant's description. Sharek testified she was raped in the back seat of the Kia Sorento. Defendant stole both Sharek's and Brown's phones. The temporal proximity and place of both events and Sharek's testimony identifying Defendant far exceed any assertion that "its *only* probative value [was] to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Lyons*, 340 N.C. at 668, 459 S.E.2d at 782. Defendant's argument is overruled. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

3. Rule 403

Even relevant, probative, and admissible evidence under Rules 401, 402, and 404(b) "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2021). Defendant argues the probative value of admitting this evidence is outweighed by the danger of unfair prejudice, and asserts the alleged prior actions with Sharek was admitted solely to establish his general propensity to commit the crime charged.

When prior incidents are offered for a proper purpose, "the ultimate test of admissibility is whether they are sufficiently similar and not so

remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (citation omitted).

The alleged incident where Sharek was raped and robbed by Defendant occurred the day after Brown's last contact with her family and the day the State alleged she was murdered. The alleged attack and robbery occurred in the same location where Brown's body was later found. Brown's text messages alleged she had been raped. The trial court did not err, and certainly did not commit plain error, in admitting Sharek's testimony under Rules 403 and 404(b). N.C. Gen. Stat. § 8C-1, Rules 403, 404(b). Defendant's argument is overruled.

VII. Conclusion

Defendant knowingly and voluntarily waived his right to counsel by terminating his latest among many appointed counsels following highly detrimental testimony during trial and after being repeatedly advised and informed of the consequences of this decision. Defendant's conduct during pre-trial and through trial in superior court supports a finding and conclusion that he repeatedly dismissed appointed counsel during pre-trial and while trial was underway and waived and forfeited his right to counsel.

The trial court did not err in denying his motion for appointment of new counsel. Defendant 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.

Sharek's testimony was properly admitted under North Carolina Rules of Evidence 401, 402, 403, and 404(b) under plain error review. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403 and 404(b).

Defendant received a fair trial, free of prejudicial errors he preserved and argued and failed to show any plain error. There is no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GORE concur.

STATE v. PARKER

[290 N.C. App. 650 (2023)]

STATE OF NORTH CAROLINA
v.
TERRELL JERMAINE PARKER, DEFENDANT

No. COA23-90

Filed 3 October 2023

1. Constitutional Law—effective assistance of counsel—murder trial—statements during closing argument—no concession of guilt—contradiction of defendant's testimony

In a prosecution for first-degree murder, defendant did not receive ineffective assistance of counsel where his trial counsel never conceded defendant's guilt to the charged crime, and therefore the issue of whether counsel committed a *Harbison* error (by failing to obtain defendant's consent to concede guilt) was rendered moot. Instead, counsel's statements during his closing argument—including a statement that if the jury found defendant had used excessive force against the victim, defendant would be guilty of voluntary manslaughter—signaled an attempt to convince the jury that defendant lacked the requisite intent to be found guilty of first-degree murder, and that the most defendant could be convicted of was the lesser offense of voluntary manslaughter. Although counsel did contradict defendant's testimony regarding how defendant arrived at the scene of the crime, none of counsel's statements to that effect were so serious as to deprive defendant of a fair trial.

2. Homicide—first-degree murder—jury instructions—aggressor doctrine—"stand your ground" laws—sufficiency of record

After defendant went to the driveway of another man's home, got into a fight with the man, and then fatally shot him, there was no plain error in defendant's prosecution for first-degree murder where the trial court instructed the jury on the aggressor doctrine but not on "stand your ground" laws. The record contained enough evidence warranting an instruction on the aggressor doctrine, including testimony indicating that defendant may have initiated the fight during a phone call with the victim just before arriving at the victim's home. On the other hand, "stand your ground" laws apply only to spaces where a person has a lawful right to be, and there was insufficient evidence supporting defendant's argument that he had a lawful right to be at the victim's residence during the fight.

3. Criminal Law—prosecutor's closing argument—murder trial —statements regarding severity of sentences—not grossly improper

The trial court was not required to intervene ex mero motu during the prosecutor's closing argument in a first-degree murder trial, where the prosecutor made certain statements implying that defendant's minimum sentence would not be severe enough if the jury convicted him of voluntary manslaughter instead of murder. Although these statements might not have been good trial practice, they were neither "grossly improper" nor against the law, since trial attorneys have the right to inform the jury of the punishments prescribed in a case, and here, counsel for both defendant and the State commented on what defendant's minimum and maximum sentences could be.

Appeal by defendant from judgment entered 21 July 2022 by Judge Wayland J. Sermons Jr. in Gates County Superior Court. Heard in the Court of Appeals 22 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery for the State.

Sarah Holladay, for defendant-appellant.

FLOOD, Judge.

Terrell Jermaine Parker ("Defendant") appeals his conviction for first-degree murder arguing (1) he received ineffective assistance of counsel, (2) the trial court erred in its jury instructions, and (3) the trial court erred by failing to intervene *ex mero motu* in the State's closing argument. For the reasons discussed below, we disagree.

I. Facts and Procedural Background

At first, the night of 21 December 2018 was as most nights were for Defendant—uneventful. After getting off work, he met his friend Marcus Walton ("Walton") at Defendant's cousin's house where together they drank bourbon, played Spades, and talked about the possibility of going to see a street race later that evening. Around 9:00 p.m., Walton received a call from Dominique Hathaway ("Hathaway") who informed Defendant and Walton that their barber was going on break until after Christmas, so if they wanted to get their hair cut, they would have to go that evening. Upon hearing this news, Walton and Defendant finished

their drinks and headed over to get their hair cut by their barber at his in-home barbershop. Upon arrival, Defendant crossed paths with Isaac Jermaine Hawk ("Hawk"), who was on his way out of the barbershop. Defendant and Hawk had a contentious relationship, dating back to when they were teenagers; so, when Hawk appeared friendly towards Defendant, it took Defendant by surprise. Defendant asked Hawk if the two could speak outside, and Hawk agreed. The two spoke about comments Hawk had allegedly made about the baby Defendant and his girlfriend recently had together—implying Hawk, not Defendant, was the father. Hawk denied making the comments, and the conversation ended in a handshake.

After leaving, Hawk went to the home of Rashawn Goodman ("Goodman"), where a few other people including Aaron Eason ("Eason") had gathered. While there, Hawk told Eason about the conversation he had just had with Defendant, calling it "an argument." After about an hour or two, Eason and Hawk left Goodman's home in separate cars, both driving to Hawk's residence. While on the way to Hawk's residence, Eason began receiving several phone calls from blocked numbers. After five or so calls, Eason answered the phone and recognized the voice of the caller to be Hathaway, who asked to speak with Hawk. Eason explained he was not with Hawk, and the conversation ended.

Upon arrival at Hawk's residence, Eason received another call, this time from Defendant. Eason passed the phone to Hawk, who spoke with Defendant for approximately two minutes. After the conversation ended, Hawk changed out of flip flops and into tennis shoes then reported that Defendant was on his way over.

A few minutes later, a car driven by Hathaway pulled into Hawk's driveway, and Defendant emerged from the back-passenger seat. Defendant walked up the driveway towards Hawk, and the two began arguing face-to-face with each other. As the two argued, they began walking back down the driveway, towards Hathaway's car, with Defendant walking backwards. After about three to five minutes of arguing, a fist-fight broke out between Defendant and Hawk in which both men landed a few blows. Due to it being dark outside, witnesses could not tell who swung the first punch.

After a few minutes of fighting, Defendant continued walking backwards away from Hawk, while Hawk, with his hands up, continued to walk towards Defendant. At that point, Defendant pulled out a gun and began shooting Hawk. Hawk was shot five times and died in his driveway. Before first responders arrived, Defendant, Hathaway, and Walton fled the scene.

A short distance from Hawk's residence, Hathaway wrecked his car. At this point, Defendant got out, threw his gun in the woods, and started walking through the night towards Virginia.

Meanwhile, responding to the emergency call, Deputy David Adkins ("Deputy Adkins") began traveling towards Hawk's residence. On his way, he noticed Hathaway and Walton standing on the side of the road after having wrecked their vehicle. After checking in at the scene of the shooting at Hawk's residence, Deputy Adkins doubled back to check on Hathaway and Walton, each of whom was observed to be uninjured and unharmed.

Approximately four hours after the shooting, a law enforcement officer found Defendant walking on the side of the road and detained him. A search of Defendant revealed no weapon, and while he did smell of alcohol, Defendant showed no signs of impairment and only some minor scratches on his palms.

II. Jurisdiction

Appeal to this Court lies of right from the final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

Defendant raises several issues on appeal, all of which arise from the proceedings of his trial, which took place between 18 and 21 July 2022. Defendant contends that, during his trial, he received ineffective assistance of counsel, and the trial court erred in both its jury instructions and by failing to intervene *ex mero motu* during the State's closing arguments.

A. Ineffective Assistance of Counsel

[1] To begin, Defendant asserts he received ineffective assistance of counsel ("IAC") when his attorney (1) conceded Defendant's guilt prior to obtaining Defendant's consent, and (2) undermined Defendant's testimony during closing arguments. Upon review, we hold these arguments lack merit and accordingly, conclude there was no IAC.

Whether a defendant received IAC at trial is a question of law reviewable *de novo*. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

To prevail on his IAC claim, Defendant must first "show that counsel's performance was deficient[,]" which requires a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 688 (1984). Next, Defendant must show "that the deficient performance prejudiced the defense[,]" which requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable." *Id.* at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 688.

1. Conceding Guilt Without Prior Informed Consent

In his first IAC claim, Defendant contends he is entitled to a new trial because his counsel "conceded his guilt without first obtaining his express, informed consent."

It is per se prejudicial error for counsel to concede a defendant's guilt without obtaining prior consent. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). In addition to an explicit admission of guilt, an "implied admission of guilt can, in fact, constitute a *Harbison* error." *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020). Counsel may, however, without consent, remind the jury it could find the defendant guilty of a lesser-included offense, if any, if it does not find defendant guilty of the charged offense. *State v. Campbell*, 359 N.C. 644, 696, 617 S.E.2d 1, 33 (2005).

Here, Defendant claims his counsel violated *Harbison* when he conceded or implied Defendant's guilt during closing arguments without Defendant's consent. In *Harbison*, the defendant was convicted of second-degree murder and assault with a deadly weapon following a closing argument from his counsel in which counsel stated, "I have my opinion as to what happened on that April night, and I don't feel that [defendant] should be found innocent." *Harbison*, 315 N.C. at 177-78, 337 S.E.2d at 506. The *Harbison* court held defense counsel's closing argument was per se prejudicial error because, "[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." *Id.* at 180, 337 S.E.2d at 507.

Here, Defendant draws this Court's attention to certain statements made by defense counsel to bolster his argument that defense counsel conceded guilt without Defendant's prior consent. Defendant's counsel's statements read, in relevant part:

> Now was his use of force excessive? That is a jury question. I will come back to that in a minute. If you find that to

> be excessive, that is manslaughter. That's voluntary manslaughter. If you find the use of force to be excessive, that is voluntary manslaughter.
>
> . . . .
>
> Was the use of force excessive under the circumstances? Consider all things that were happening, consider he is going 116 feet backwards. You decide whether the use of force is excessive. But if it was excessive, that is voluntary manslaughter. That is not first degree murder. That is not second degree murder. That is voluntary manslaughter.

A *de novo* review of the Record, however, reveals Defendant's counsel neither stated nor implied Defendant's guilt. These statements made by Defendant's counsel are more akin to the statements made by defense counsel in *Campbell*, where counsel for the defendant pointed out to the jury that the element of specific intent was the only difference between first and second-degree murder; thus, without specific intent, the most serious crime the defendant could be convicted of was second-degree murder. *See Campbell*, 359 N.C. at 696, 617 S.E.2d at 33. Our Supreme Court held counsel's statements to the jury regarding specific intent did not constitute IAC.

Here, Defendant was charged with first-degree murder, and the transcript reveals his counsel advocating for the jury to find Defendant either not guilty, or guilty of voluntary manslaughter. Under *Campbell*, those statements did not render his assistance ineffective. Further, because our review of the Record reveals that Defendant's counsel neither stated nor implied Defendant's guilt, the inquiry under *Harbison* of whether or not Defendant's consent was obtained is rendered moot. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. Finally, nothing in our review of the Record indicates Defendant's counsel was deficient such that he was deprived a fair trial. *See Strickland*, 466 U.S. at 687, 104 S. Ct. 2064, 80 L. Ed. 2d at 688. For those reasons, we hold there was no IAC pertaining to Defendant's first claim.

2. Undermining Defendant's Testimony in Closing Arguments

In his second IAC claim, Defendant argues his counsel rendered "ineffective assistance by directly undermining [Defendant's] testimony in closing argument."

To prevail on an IAC claim for statements made during closing arguments, a defendant has the burden of showing their counsel's statements were incoherent and failed to negate the elements of the crime

for which they were charged. *State v. Moore*, 286 N.C. App. 341, 351, 880 S.E.2d 710, 717 (2022). When closing arguments fail to provide any positive advocacy, however, then counsel can be considered ineffective. *State v. Davidson*, 77 N.C. App. 540, 545-46, 335 S.E.2d 518, 521–22 (1985).

Here, Defendant specifically contends he received IAC when, during closing arguments, his counsel directly contradicted Defendant's own testimony. The statements made by defense counsel, however, do not rise to the level of being "incoherent" or lacking of any "positive advocacy." *See Moore*, 286 N.C. App. at 351, 880 S.E.2d at 717; *see also Davidson*, 77 N.C. App. at 545-46, 335 S.E.2d at 521–22. For example, Defendant points to the fact that, in his own testimony, he claims to have fallen asleep in Hathaway's car, then woke up to realize he was at Hawk's house; whereas, in closing arguments, defense counsel stated Defendant *intentionally* went to Hawk's house that evening.

> He went over to the house. He shouldn't have gone to the house. That was stupid. He went over to the house but he didn't go to kill nobody, he went over there to talk to him. Boys done pumped him up talking junk. He went there to finish the conversation. He ain't go over there to fight. That man ain't no fighter. Somebody done choked you out. He ain't over there to fight that man. He went over to talk, to finish the conversation.
>
> Things turned sour and this is where we are. There is no premeditation, there is no deliberations. There is no cool state of mind. You have two grown men fighting over a female and they are intoxicated. I can't say it enough.

Here, defense counsel's statement is far from incoherent or lacking positive advocacy. While it is true the statements seem to contradict Defendant's testimony that he had "dozed off" in the car and then woke up to find himself at Hawk's house, nothing else in the Record corroborates Defendant's statement. Additionally, in closing arguments, defense counsel actively worked to negate the elements of first-degree murder by stating:

> Now if it was premeditation and deliberation [Defendant] would have pulled the gun out and shot [Hawk] right then when he got out of the car.
>
> Let me ask you this, why would a man that wants to kill somebody talk to him?
>
> . . .

> So they talk, they have a conversation. And it gets heated. Five to eight minutes. Now why didn't [Defendant] shoot [Hawk]? Then Hawk, who doesn't take no junk, don't take no mess, putting his shoes on, ready to fight, he starts punching on [Defendant] right here. He starts punching on him. [Defendant] is over there to talk. [Defendant] told you. Ladies and gentlemen, if [Defendant] was over there to shoot that man, he would have shot him. There is no way in the world we could get around the fact this man retreated all the way to the end of that driveway and didn't even pull that trigger. You know he was asking for help. You know he was asking for help. There is no way in the world.

The statements made by defense counsel hardly rise to the level of being incoherent or ineffective. *See Moore*, 286 N.C. App. at 351, 880 S.E.2d at 717. Throughout his closing argument, defense counsel made several attempts to impress upon the jury that Defendant lacked the requisite intent to be found guilty of first-degree murder. Moreover, while it is true that counsel's account of how Defendant wound up at Hawk's house on the evening of 21 December differs from Defendant's own testimony, counsel's statements were not so serious as to deprive Defendant of a fair trial. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 688. For those reasons, we hold there was no IAC pertaining to Defendant's second claim.

B. Jury Instructions

[2] Next, Defendant argues the trial court erred in failing to instruct the jury on stand your ground laws and by instructing the jury on the aggressor doctrine.

Decisions regarding the trial court's jury instructions are reviewed by this Court *de novo*. *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105 (2010). When objections are made to the trial court's jury instruction, this Court reviews to determine whether an error was committed and whether a different result would have been reached but-for that error. N.C. Gen. Stat. § 15A-1443(a) (2021). Where counsel fails to object, however, this Court reviews for plain error. N.C. R. App. P. 10(a)(4). A plain error is one that is so grave, it results in a "miscarriage of justice or in the denial to appellant of a fair trial[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant contends the trial court made two errors—the first in failing to instruct the jury on stand your ground rights under N.C. Gen.

Stat. § 14-51.3 (2021), and the second when it instructed the jury on the aggressor doctrine. Counsel for Defendant did not object to either of the jury instructions, so we review for plain error. *See* N.C. R. App. P. 10(a)(4).

As stated above, a plain error constitutes a "miscarriage of justice" or denial of a fair trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Our *de novo* review of the Record reveals enough facts that jury instructions regarding the aggressor doctrine were warranted, and instructions on stand your ground laws were not. For example, the testimony indicating Defendant may have initiated the fight during a phone call with Hawk, prior to arriving at Hawk's residence, supports the trial court's decision to instruct the jury on the aggressor doctrine. Further, instruction on stand your ground laws is only applicable in spaces where a person has lawful right to be; here, the only evidence supporting Defendant's contention that he had a lawful right to be at Hawk's residence was nebulous testimony about a street race potentially happening nearby. *See* N.C. Gen. Stat. § 14-51.3 ("A person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm[.]").

Given those facts, this Court does not conclude that the instructions given to, or omitted from the jury, constitute a miscarriage of justice. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. For that reason, we conclude there was no plain error in the trial court's jury instructions.

C. *Ex Mero Motu* Intervention

[3] Finally, Defendant asserts the trial court erred when it failed to intervene *ex mero motu* in the State's closing argument.

"When [a] defendant fails to object to an argument, this Court must determine if the argument 'was so grossly improper that the trial court erred in failing to intervene *ex mero motu*.' " *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (quoting *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002)). During closing arguments, counsel has "the right to inform the jury of the punishment prescribed by law[.]" *State v. Walters*, 294 N.C. 311, 314, 240 S.E.2d 628, 630 (1978).

Defendant takes specific issue with the following statements made by the State during its closing argument:

> Did [Defendant] tell you the minimum punishment for second degree murder is 144 months? Did [Defendant] tell you the minimum punishment for voluntary manslaughter is 38 months? Less time than it took this case to come to

> trial is the minimum. Who doesn't think this case is serious? Who doesn't think this case is serious? Its just trying to invoke some sympathy or some pity for [Defendant], that's all it is about. That's why they just tell you the max. They don't tell you the minimum.

Defendant argues "[i]t was plainly and grossly improper for the [State] to argue that the jury should not convict [him] of voluntary manslaughter because the sentence he might receive would not be sufficiently severe." While suggesting that the minimum sentence would not be severe enough punishment might run afoul of the unspoken rules of courtroom etiquette, it is not, in fact, against the law. *Walters* tells us that counselors have the right to inform the jury of the punishments prescribed, and here, counsel for both Defendant and the State made clear what the minimum and maximum sentences could be. *See Walters*, 294 N.C. at 314, 240 S.E.2d at 630. For that reason, we conclude the trial court did not err when it failed to intervene during the State's closing argument.

IV. Conclusion

After careful review, we conclude Defendant did not receive ineffective assistance of counsel and accordingly, we dismiss both of Defendant's ineffective assistance of counsel claims. Further, we conclude the trial court neither erred nor plainly erred by deciding to instruct the jury on the aggressor doctrine but not stand your ground laws. Finally, we hold the trial court did not err when it neglected to intervene in the State's closing argument.

NO ERROR.

Chief Judge STROUD and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
ANGELA BENITA PHILLIPS, DEFENDANT

No. COA22-866

Filed 3 October 2023

Assault—with a deadly weapon inflicting serious injury—jury instructions—castle doctrine—prohibition of excessive force improper

Defendant was entitled to a new trial on a charge of assault with a deadly weapon inflicting serious injury—arising from defendant having shot the victim after the victim entered defendant's front porch—where the trial court erroneously included over defendant's objection the statement that "[a] defendant does not have the right to use excessive force" in the court's jury instruction on self-defense within a home. Pursuant to the castle doctrine defense, excessive force is presumed necessary unless the State rebuts the presumption; here, the trial court's statement was prejudicial because it was erroneous, confusing, and possibly resulted in a different verdict than if it had not been included.

Judge HAMPSON dissenting.

Appeal by Defendant from judgment entered 11 May 2022 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals on 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorneys General John P. Barkley & Hyrum J. Hemingway, for the State.

Reece & Reece, by Mary McCullers Reece, for Defendant-Appellant.

CARPENTER, Judge.

Angela Benita Phillips ("Defendant") appeals from judgment after a jury convicted her of assault with a deadly weapon inflicting serious injury. On appeal, Defendant argues the trial court erroneously instructed the jury by including an instruction on the prohibition of excessive force. After careful review, we agree with Defendant. We vacate the trial court's judgment and remand for a new trial.

I. Factual & Procedural Background

On 4 April 2021, after a verbal altercation between Defendant and Latonya Dunlap ("Victim"), Defendant shot Victim. On 22 June 2021, a Cumberland County grand jury indicted Defendant for assault with a deadly weapon inflicting serious injury. On 9 May 2022, the State tried this case before a jury and the Honorable James Ammons, Jr. in Cumberland County Superior Court.

At trial, witnesses testified that the altercation began with Victim entering Defendant's front porch and ended with Defendant shooting Victim while she was on Defendant's front porch. During the charge conference, Defendant requested the trial court provide North Carolina Pattern Jury Instruction-Criminal ("NCPJI") 308.80 to the jury. NCPJI 308.80 is an instruction on self-defense, specifically, self-defense within a defendant's home. The trial court granted the request but modified NCPJI 308.80 to include language prohibiting the use of "excessive force." Over Defendant's objection, the trial court instructed the jury with the modified charge. On 11 May 2022, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant orally appealed in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issue

The issue on appeal is whether the trial court erroneously instructed the jury by including an instruction on the prohibition of excessive force.

IV. Analysis

This Court reviews the legality of jury instructions de novo. *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). " 'Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

An erroneous jury instruction "is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

North Carolina General Statute section 14-51.2 is colloquially known as the Castle Doctrine. Under the Castle Doctrine:

> the lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm. . . when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home . . . . (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2021). In other words, it is presumed that an occupant of a home may use deadly force to prevent an intruder from entering the home if the occupant reasonably believed the intruder was trying to unlawfully enter the home. *See id.* This presumption, however, is rebuttable. *Id.* § 14-51.2(c). For example, an occupant cannot use deadly force if the intruder has "discontinued all efforts to unlawfully and forcefully enter the home." *Id.* § 14-51.2(c)(5).

In Castle Doctrine scenarios, excessive force[1] is not prohibited. *See id.* § 14-51.2(b). Indeed, the Castle Doctrine allows an occupant to use the ultimate force when defending his or her home: "force that is intended or likely to cause death." *Id.* And under the Castle Doctrine, the ultimate force is presumed necessary unless the presumption is rebutted. *See id.*

North Carolina has a "Stand Your Ground" Doctrine, as well: N.C. Gen. Stat. § 14-51.3 (2021). *See State v. Walker*, 286 N.C. App. 438, 448, 880 S.E.2d 731, 739 (2022) (labeling N.C. Gen. Stat. § 14-51.3 the "stand your ground" statute). Section 14-51.3 states:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to

1. Excessive force is force that exceeds what reasonably appears necessary for self-defense. *See State v. Shoemaker*, 80 N.C. App. 95, 102, 341 S.E.2d 603, 608 (1986).

> be if either of the following applies: (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another. (2) Under the circumstances permitted pursuant to [the Castle Doctrine].

N.C. Gen. Stat. § 14-51.3(a). In other words, if a person is in a legally occupied place, that person need not retreat and may use deadly force if he or she "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." *See id.* The Stand Your Ground Doctrine overlaps with the Castle Doctrine because the Stand Your Ground Doctrine also applies in Castle Doctrine scenarios, i.e., self-defense situations within the home. *See id.* So if the Castle Doctrine presumption applies, deadly force is presumed necessary, and you need not retreat. *See id.* Said differently: If you reasonably believe an intruder is unlawfully entering your home, you have a presumed right to use deadly force under the Castle Doctrine, *id.* § 14-51.2(b), and you need not retreat under the Stand Your Ground Doctrine, *id.* § 14-51.3(a).

In *State v. Benner*, the North Carolina Supreme Court discussed both doctrines and contemplated the possibility of excessive force. 380 N.C. 621, 638, 869 S.E.2d 199, 210 (2022). In *Benner*, the defendant shot and killed the victim while the victim was in the defendant's home. *Id.* at 625, 869 S.E.2d at 202. A jury convicted the defendant of first-degree murder, and the defendant appealed, arguing the trial court erred by failing to give him a "complete self-defense instruction." *Id.* at 629, 869 S.E.2d at 205. The Court analyzed both section 14-51.2 and section 14-51.3 and stated that it is a:

> well-established legal principle that, even though a defendant attacked in his own home is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault, such an entitlement would not excuse the defendant if he used excessive force in repelling the assault.

Id. at 636, 869 S.E.2d at 209 (*purgandum*). The Court continued: "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground." *Id.* at 636, 869 S.E.2d at 209.

Although the *Benner* Court addressed an in-home self-defense scenario, its excessive-force language pertained only to the Stand Your

Ground Doctrine. *See id.* at 636, 869 S.E.2d at 209. As mentioned, the Stand Your Ground Doctrine applies to in-home scenarios, N.C. Gen. Stat. § 14-51.3(a), and the *Benner* Court spoke in Stand Your Ground terms: "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to *stand his or her ground*," *Benner*, 380 N.C. at 636, 869 S.E.2d at 209 (emphasis added).

In *Walker*, this Court discussed *Benner* and stated: "That decision makes clear that the use of deadly force cannot be excessive and must still be proportional even when the defendant has no duty to retreat and is entitled to *stand his ground* . . . ." *Walker*, 286 N.C. App. at 447, 880 S.E.2d at 738 (emphasis added). In other words, the *Benner* prohibition of excessive force concerns the Stand Your Ground Doctrine, not the Castle Doctrine. *See id.* at 447, 880 S.E.2d at 738. We agree.

This Court went on to compare the Castle Doctrine and the Stand Your Ground Doctrine. We said, "the castle doctrine statute does not obviate the proportionality requirement inherent to lethal self-defense; instead, it simply presumes that the proportionality requirement is satisfied under specific circumstances." *Id.* at 448, 880 S.E.2d at 739. Then concerning the Stand Your Ground Doctrine, we said the defendant "could use deadly force against the victim under Subsection 14-51.3(a) *only* if it was necessary to prevent imminent death or great bodily harm, i.e., if it was proportional." *Id.* at 449, 880 S.E.2d at 739.

Put together: Under the Castle Doctrine, excessive force is impossible unless the State rebuts the Castle Doctrine presumption, but under the Stand Your Ground Doctrine, excessive force is possible if the defendant acts disproportionately. *See id.* at 448–49, 880 S.E.2d at 739. So in Castle Doctrine scenarios, unless the State rebuts the Castle Doctrine presumption, a jury cannot find that a defendant used excessive force. *See id.* at 448–49, 880 S.E.2d at 739.

Here, the trial court instructed the jury based on NCPJI 308.80, but added the following language:

> A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances as you find them to exist from the evidence including the size, age, and strength of the defendant as compared to the victim; the

> fierceness of any assault upon the defendant; and whether the victim possessed a weapon.

Defendant argues the trial court's jury instruction incorrectly stated the law by including language explaining the excessive-force prohibition. Defendant argues the Castle Doctrine provides her with a rebuttable presumption that deadly force is authorized, and since no force exceeds deadly force, excessive force is impossible where the State fails to rebut the presumption. We agree with Defendant.

Here, when the trial court conclusively stated that "[D]efendant does not have the right to use excessive force," the trial court concluded that the State rebutted the Castle Doctrine presumption. But whether the State successfully rebutted the Castle Doctrine presumption was for the jury to decide, as a matter of fact, and the remainder of the equation was a matter of law. *See* N.C. Gen. Stat. § 14-51.2(b). If the jury determined the question of fact—whether deadly force was authorized because the State failed to rebut the presumption—in the affirmative, Defendant, as a matter of law, did not use excessive force when she shot Victim. *See id.*

The trial court could have instructed the jury this way: If the State rebutted the Castle Doctrine presumption, Defendant could not use excessive force to protect herself; but if the State failed to rebut the presumption, the proportionality of Defendant's force was irrelevant. *See id.* Therefore, the trial court erred by categorically stating that Defendant "d[id] not have the right to use excessive force." *See id.* If this case only concerned the Stand Your Ground Doctrine, the excessive-force instruction may have sufficed. *See Benner*, 380 N.C. at 636, 869 S.E.2d at 209. But because this case concerns the Castle Doctrine, the excessive-force instruction was erroneous. *See* N.C. Gen. Stat. § 14-51.2(b).

Further, by stating that Defendant "d[id] not have the right to use excessive force," it is probable that the trial court confused the jury. Indeed, shortly after the trial court instructed the jury, a juror asked the court if it could "repeat the last," to which the court replied, "[i]t is confusing." A special verdict form may have helped the jury discern the nuanced issues arising from the different self-defense doctrines.

Because the trial court's instruction was both erroneous and confusing, there is a reasonable possibility that the jury would have reached a different result if it received a proper instruction. *See Castaneda*, 196 N.C. App. at 116, 674 S.E.2d at 712. Thus, Defendant was prejudiced by the instruction and is therefore entitled to a new trial. *See id.* at 116, 674 S.E.2d at 712.

V. Conclusion

We hold the trial court erred when it instructed the jury, and there was a reasonable possibility of a different result had the trial court correctly instructed the jury. Therefore, we vacate the trial court's judgment and remand for a new trial.

VACATED AND REMANDED.

Judge STADING concurs.

Judge HAMPSON dissents in a separate opinion.

HAMPSON, Judge, dissenting.

The Castle Doctrine, applied as a *statutory* defense, must be viewed in the context of the statutory scheme in which it is found and read together with its accompanying statutes. *See* N.C. Gen. Stat. § 14-51.2 (Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm.); N.C. Gen. Stat. § 14-51.3 (Use of force in defense of person; relief from criminal or civil liability); N.C. Gen. Stat. § 14-51.4 (Justification for defensive force not available). It is not a stand-alone defense but is rather integrated into a defense of justification—or the right to stand one's ground—in defense of person or property. Specifically, N.C. Gen. Stat. § 14-51.3 first provides: "A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force." N.C. Gen. Stat. § 14-51.3(a). That statute further provides two instances where deadly force may be justified:

> a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

Id. These subsections, together, create the basis for the so-called "Stand-Your-Ground" defense. Both rely on a central unifying principle

for justifying the use of deadly force in defense of person or property: the person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm[.]" N.C. Gen. Stat. § 14-51.3(a)(1). Unlike subsection 1, however, under subsection 2—by reference to section 14-51.2—when a lawful occupant of a home, motor vehicle, or workplace knowingly applies deadly force in defense against an unlawful breaking or entering or removal of a person, the lawful occupant is entitled to a presumption that they reasonably feared imminent death or serious bodily harm. N.C. Gen. Stat. § 14-51.2(b). As such, both subsections apply the same "reasonable belief" standard, but under subsection 2, the lawful occupant's belief is presumptively reasonable unless and until the State overcomes that presumption.

Indeed, we have previously observed the Castle Doctrine Statute—N.C. Gen. Stat. § 14-51.2—"functions by creating a presumption of reasonable fear of imminent death or serious bodily harm in favor of a lawful occupant of a home, which in turn justifies the occupant's use of deadly force." *State v. Austin*, 279 N.C. App. 377, 382, 865 S.E.2d 350, 355, *rev. denied*, 871 S.E.2d 519 (N.C. 2022). While N.C. Gen. Stat. § 14-51.2 provides the same self-defense protections to one acting in defense of person or property, it broadens the traditional notion of self-defense by removing the burden from a defendant to prove key elements of traditional self-defense. *Id.* at 380, 865 S.E.2d at 353.

> In effect, this provision eliminates the needs for lawful occupants of a home to show that they reasonably believed the use of deadly force was necessary to prevent imminent death or serious bodily injury to themselves or others—a requirement of traditional self-defense. Instead, that belief is presumed when the statutory criteria are satisfied.

Id. at 382-83, 865 S.E.2d at 355.

Hence, the Castle Doctrine Statute "simply provides that a lawful occupant of a home, workplace, or motor vehicle is entitled to a rebuttable presumption that deadly force is reasonable when used against someone who had or was unlawfully breaking into that location or kidnapping someone from that location." *State v. Walker*, 286 N.C. App. 438, 448, 880 S.E.2d 731, 739, *rev. denied*, 887 S.E.2d 879 (N.C. 2023). "In other words, the castle doctrine statute does not obviate the proportionality requirement inherent to lethal self-defense; instead, it simply presumes that the proportionality requirement is satisfied under specific circumstances." *Id.* Moreover, "the castle doctrine's rebuttable presumption is not limited to the five scenarios listed in the statute."

Austin, 279 N.C. App. at 384, 865 S.E.2d at 356. Viewed correctly, "the castle doctrine . . . is effectively a burden-shifting provision, creating a presumption in favor of the defendant that can then be rebutted by the State." *Id.* "[I]f the State presents substantial evidence from which a reasonable juror could conclude that a defendant did not have a reasonable fear of imminent death or serious bodily harm, the State can overcome the presumption and create a fact question for the jury." *Id.*

This is consistent with how our State Supreme Court has applied the stand-your-ground principles. Indeed, our Supreme Court continues to acknowledge that the statutory Castle Doctrine Defense and Stand-Your-Ground laws track consistently with the respective common law defenses including: "the well-established legal principle that, even though a defendant attacked in his own home is ' "entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault," ' such an entitlement ' "would not excuse the defendant if he used excessive force in repelling the assault," ' " *State v. Benner*, 380 N.C. 621, 636, 869 S.E.2d 199, 209 (2022) (quoting *State v. Francis*, 252 N.C. 57, 60, 112 S.E.2d 756, 758 (1960)).[1]

Furthermore, here, while Defendant contends the trial court erred by giving the "excessive force" instruction, Defendant's argument ignores the trial court's repeated instructions squarely placing the burden of proof to overcome the defense of habitation on the State. "We examine the instructions 'as a whole' to determine if they present the law 'fairly and clearly' to the jury." *Austin*, 279 N.C. App. at 385, 865 S.E.2d at 356 (quoting *State v. Chandler*, 342 N.C. 742, 751–52, 467 S.E.2d 636, 641 (1996)). "The purpose of a jury instruction 'is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' " *Id.* (quoting *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006)). "An error in jury instructions 'is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.' " *Id.* (quoting *State v. Dilworth*, 274 N.C. App. 57, 61, 851 S.E.2d 406, 409 (2020)).

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1. The majority is, of course, correct that both *Benner* and *Walker* discuss these principles in terms of "stand-your-ground" and not expressly in terms of defense of habitation. However, I see that as an outgrowth of the fact that the justification defenses of the statutory Castle Doctrine and defense of person both fall under the umbrella of a Stand-Your-Ground law. The statutory Castle Doctrine simply provides an additional protection to the lawful occupant of a dwelling, vehicle or workplace and places the burden on the State to overcome the presumption.

In this case, the trial court instructed the jury, "If the defendant assaulted the victim to prevent a forcible entry into the defendant's home or to terminate the intruder's unlawful entry the defendant's actions are excused and the defendant is not guilty." "The State has the burden of proving to you from the evidence beyond a reasonable doubt that the defendant did not act in lawful defense of the defendant's home." After listing the circumstances in which Defendant would be justified in using deadly force, the trial court further explained: "A lawful occupant within a home does not have a duty to retreat from an intruder in these circumstances. Furthermore, a person who unlawfully and by force enters or attempts to enter a person's home is presumed to be doing so with the intent to commit an unlawful act involving force or violence." The trial court then instructed specifically on the elements of the Castle Doctrine statute:

> In addition, absent evidence to the contrary, the lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious harm to herself or others when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home or if that person had removed or was attempting to remove another person against that person's will from the home, and two, that the person who uses the defensive force knew or had reason to believe that an unlawful and forceful entry or forcible act was occurring or had occurred.

In charging the jury on returning its verdict on the offenses submitted, the trial court instructed: "If you find from a reasonable doubt that the Defendant assaulted the victim, you may return a verdict of guilty only if the State has also satisfied you beyond a reasonable doubt that the defendant did not act in lawful defense of the defendant's home." "If you do not so find or have a reasonable doubt about whether the State has proved any one or more of these things that the defendant would be justified in defending the home, it would be your duty to return a verdict of not guilty." Critically, Defendant does not contend the trial court erred in any of these instructions. Taken as a whole, the trial court's instructions adequately applied the law to the evidence, emphasized the Castle Doctrine presumption, and mandated the jury place the burden of proof on the State to prove Defendant was not justified in the use of deadly force in the face of an intruder—such that there is not a reasonable

possibility, on the facts of this case, that the jury would have returned a different verdict.

Here, Defendant was entitled to the statutory Castle Doctrine presumption. Likewise, the State was entitled to attempt to rebut that presumption; including through evidence Defendant did not actually have a reasonable fear of imminent death or serious bodily harm and the force exercised by Defendant was, in fact, excessive under the factual circumstances of this case. *See Austin*, 279 N.C. App. at 384, 865 S.E.2d at 356. Thus, the trial court's instruction on excessive force was not erroneous. Therefore, there was no error at trial. Consequently, Defendant is not entitled to a new trial. Accordingly, I respectfully dissent.

SCOTT THOMAS, AMY ELIZABETH DUNN, JAMES BRIAN DUNN, DAVE EMONSON, PENNY EMONSON, AND JOHN FARABOW, PLAINTIFFS

v.

VILLAGE OF BALD HEAD ISLAND; PETER QUINN, MAYOR OF VILLAGE OF BALD HEAD ISLAND; VILLAGE COUNCIL MEMBERS OF THE VILLAGE OF BALD HEAD ISLAND, EACH IN THEIR REPRESENTATIVE CAPACITY AS COUNCIL MEMBERS OF THE VILLAGE OF BALD HEAD ISLAND; TO WIT: SCOTT GARDNER, MAYOR PRO TEM; GINNIE WHITE, COUNCILOR; EMILY HILL, COUNCILOR; AND JERRY MAGGIO, COUNCILOR, DEFENDANTS

No. COA23-242

Filed 3 October 2023

Cities and Towns—road closure—challenged by residents—standing—"persons aggrieved"—factual basis

In an action brought against a village (defendant) by a group of residents (plaintiffs) challenging the village council's decision to close a road, the trial court properly granted defendant's Rule 12(b)(6) motion to dismiss where plaintiffs failed to provide a factual basis demonstrating that they had standing to sue under N.C.G.S. § 160A-299(b) as "persons aggrieved" by the road closure. Firstly, plaintiffs could not establish standing by relying on facts from their individual affidavits (which the trial court declined to consider after denying plaintiffs' oral motion to amend their initial petition) where they abandoned any argument in their appellate brief addressing why the affidavits should be considered for the first time on appeal. Secondly, plaintiffs did not meet the statutory definition of "persons aggrieved" where they alleged that they were "nearby property owners" concerned with how the road closure would affect "clear public interests" rather than "adjacent property owners" who suffered

some unique personal injury "distinct from the rest of the community" as a result of the closure. Finally, because plaintiffs were not "persons aggrieved," they could not assert standing as "any person" under section 160A-299(a) to challenge defendant's allegedly deficient notice of the public hearing on the road closure.

Appeal by plaintiffs from order entered 16 September 2022 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2023.

John M. Kirby for plaintiffs-appellants.

Brooks Pierce McLendon Humphrey & Leonard, L.L.P., by S. Wilson Quick and Jimmy C. Chang, for defendants-appellees.

FLOOD, Judge.

Scott Thomas, Amy Elizabeth Dunn, James Brian Dunn, Dave Emonson, Penny Emonson, and John Farabow (collectively "Plaintiffs") appeal from the trial court's order granting Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs allege the trial court erred in: (1) finding Plaintiffs lacked standing to challenge the decision to close a portion of Lighthouse Wynd; (2) concluding Plaintiffs did not have standing to bring this action where the relevant statute allows "any person" to be heard prior to the closure of a road; and (3) rejecting the doctrine of relation back as to John Farabow ("Farabow") and Dave and Penny Emonson (the "Emonsons"). As we explain in further detail below, the trial court did not err.

I. Factual and Procedural Background

On 3 May 2021, Defendant Village of Bald Head Island (the "Village") received a petition and request from Mark and Robin Prak; Old Ballast Stone, LLC; the Old Baldy Foundation, Inc.; the Village Chapel; Bald Head Limited, LLC; and the Bald Head Island Association, seeking closure of a portion of Lighthouse Wynd (the "Road") that is near Old Baldy lighthouse—specifically, the west end of the Road between where it intersects with Ballast Stone Alley and where it intersects with Timber Bridge. On 18 February 2022, these petitioners renewed their request for closure of the Road. On 18 March 2022, the Village adopted resolution number 2022-0304 (the "Resolution"), whereby the Village declared its intent to consider closing the Road. In the Resolution, the Village also

set the public hearing on the considered Road closing to be held "at 10:00 [a.m.], or shortly thereafter, on Thursday," 14 April 2022.

On or about 30 March 2022, the Village filed a Certification of Mailing and Sign Posting, which read, in relevant part:

> I, Darcy Sperry, Village Clerk, with the Village of Bald Head Island, DO HEREBY CERTIFY that in accordance with [N.C. Gen. Stat. §] 160A-299(a), I mailed, or caused to be mailed, via USPS certified mail a Notice of Public Hearing being held by the Village Council on [14 April] 2022.
>
> This notice informed the abutting property owners of the subject property that the applicant is seeking to close a portion of the subject property. The mailed notice included the date, time, place, and subject of the meeting. The notice also included the process by which interested parties can participate in the public hearing (in person or via email). The notice was mailed on [29 March] 2022.
>
> Staff has also posted the subject parcel with two [] signs indicating that the property is subject to a Public Hearing with instructions to contact the Development Services Department via phone or email.

The Village also filed a copy of the notice that was published in the local newspaper, The State Port Pilot. This notice was published in the 23 March 2022, 30 March 2022, 6 April 2022, and 13 April 2022 editions of the newspaper. On 5 April 2022, the Village issued by email a notice where they changed the start time of the 14 April 2022 Village Council "regular scheduled meeting" from 10:00 [a.m.] to 9:00 [a.m.]. Plaintiff Scott Thomas ("Thomas") was a recipient of this email. The same day, the Village posted notice of this time change.

On 13 April 2022, Thomas sent an email to Village Clerk—Darcy Sperry—and several other people, requesting the Village not close the Road. In the email, Thomas asserted closure of the Road would be detrimental to the "island community because of [Old Baldy's] historical significance, aesthetic appeal and environmental sensitivity[;]" not closing the Road would be in "the public's best interest[;]" and the Village did not provide proper notice prior the 14 April 2022 hearing.

On 14 April 2022, during the Village Council's regularly scheduled meeting, the Village Council held a hearing on the closure of the Road. The Record shows Thomas phoned in to the hearing to speak remotely, and he expressed several concerns regarding closure of the Road "including

but not limited to fire and emergency services, on[-]street parking, tree scape, pedestrian safety, lack of site plan, and Island infrastructure[.]" Thereafter, the Village Council unanimously voted to adopt order number 2022-0402 (the "Order") to permanently close the Road.

On 12 May 2022, Thomas, Amy Elizabeth Dunn, and James Brian Dunn (the "Dunns") filed a Petition to Vacate and Notice of Appeal from the Order (the "Initial Petition"). On 29 June 2022, Thomas and the Dunns filed an Amended Petition (the "Amended Petition"), which added Farabow and the Emonsons as petitioners. The Amended Petition did not add any allegations or circumstances unique to any Plaintiffs. On 2 August 2022, Defendants filed a Motion to Dismiss the Amended Petition pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 12 September 2022, the trial court held a hearing on Defendants' motion to dismiss. At the hearing, Plaintiffs made an oral motion to amend the Amended Petition via affidavits by each of the Plaintiffs, to "give further specifics about the individual positions of each" Plaintiff. The trial court denied Plaintiffs' motion and declined to consider the affidavits.

On 16 September 2022, the trial court entered an order granting Defendants' motion to dismiss, for Plaintiffs' "failure to establish standing pursuant to the requirements of [N.C. Gen. Stat. §] 160A-299" and, as to Farabow and the Emonsons, for "failure to file an appeal [to the trial court] within [thirty] days from the adoption of the Order . . . as required by [N.C. Gen. Stat. §] 160A-299." On 17 October 2022, Plaintiffs filed written notice of appeal.

II. Jurisdiction

Plaintiffs' appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(a)(1), and 1-277, and Rule 3(a) of the North Carolina Rules of Appellate Procedure. *See* N.C. Gen. Stat. §§ 7A-27(a)(1), and 1-277 (2021); *see* N.C. R. App. P. 3(a).

III. Standard of Review

"A ruling on a motion to dismiss for want of standing is reviewed *de novo*." *Ring v. Moore Cnty.*, 257 N.C. App. 168, 170, 809 S.E.2d 11, 12 (2017). This Court's review of an order granting a Rule 12(b)(6) motion to dismiss does not entail review of the trial court's reasoning; rather, this 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 America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cnty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

"Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004). "For the purpose of the motion [to dismiss under Rule 12(b)(6)], the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979).[1]

IV. Analysis

Plaintiffs argue on appeal: (A) the trial court erred in concluding Plaintiffs did not have standing to bring this action where Plaintiffs were "persons aggrieved" under N.C. Gen. Stat. § 160A-299; (B) even if Plaintiffs were not persons aggrieved under N.C. Gen. Stat. § 160A-299, they were still persons entitled to be heard prior to a road closure; and (C) the trial court erroneously found Farabow and the Emonsons failed to timely file their claims.

A. Standing as "Persons Aggrieved"

We first address whether Plaintiffs had standing as "person[s] aggrieved" pursuant to N.C. Gen. Stat. § 160A-299. As we explain below, Plaintiffs did not have standing.

Plaintiffs argue, pursuant to N.C. Gen. Stat. § 160A-299(b), they are "persons aggrieved" by the closure of the Road, and therefore, the trial court erred in dismissing their amended complaint for lack of standing. We disagree.

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1. Although standing presents an issue of subject matter jurisdiction under Rule 12(b)(1), standing is sometimes addressed under Rule 12(b)(6). Defendant's motion to dismiss was based only upon Rule 12(b)(6). Plaintiffs' brief on appeal also addresses the argument regarding standing under Rule 12(b)(6), so we have limited our analysis to address the arguments under Rule 12(b)(6) as well. The standard of review of *de novo* is the same either way, although the information the Court may consider is different. *See United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43–44 (2022).

N.C. Gen. Stat. § 160A-299(b) provides, in pertinent part:

> Any person aggrieved by the closing of any street or alley . . . may appeal the council's order to the General Court of Justice within [thirty] days after its adoption. . . . In addition to determining whether procedural requirements were complied with, the court shall determine whether, on the record as presented to the city council, the council's decision to close the street was in accordance with the statutory standards of subsection (a) of this section and any other applicable requirements of local law or ordinance.
>
> No cause of action or defense founded upon the invalidity of any proceedings taken in closing any street or alley may be asserted, nor shall the validity of the order be open to question[,] . . . except in an action or proceeding begun within [thirty] days after the order is adopted.

N.C. Gen. Stat. § 160A-299(b) (2021). To show standing to challenge a road closing under N.C. Gen. Stat. § 160A-299, a plaintiff must provide a "factual basis to support the argument that he is an aggrieved person in this case." *Cox v. Town of Oriental*, 234 N.C. App. 675, 680, 759 S.E.2d 388, 391 (2014). This Court has defined an "aggrieved party" under N.C. Gen. Stat. § 160A-299 as "one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property." *In re Granting of Variance by Town of Franklin*, 131 N.C. App. 846, 849, 508 S.E.2d 841, 843 (1998) (citation omitted).

In *Cox*, the plaintiff, who appealed to the trial court the Town of Oriental's decision to close a street under N.C. Gen. Stat. § 160A-299, argued he is a person aggrieved as "a member of the public and a taxpaying resident of the Town" and as a "successor in interest to these public rights of way, which were designed and dedicated to provide access to the citizens of the Town." 234 N.C. App. at 679, 759 S.E.2d at 391 (cleaned up). We held, "as [the plaintiff's] property is not adjacent to" the street closure and the plaintiff "has not alleged any personal injury . . . [nor alleged] some special connection to [the street] *distinct from the rest of the community*[,]" the plaintiff was not an "aggrieved person" under N.C. Gen. Stat. § 160A-299, and he lacked standing to bring his claim. *Id.* at 680, 759 S.E.2d at 391 (emphasis in original).

1. Affidavits

Here, Plaintiffs provide as a factual basis, in support of the argument they are aggrieved persons, the contents of the Amended Petition and affidavits from each individual Plaintiff. As to the affidavits, Plaintiffs first presented them at the 16 September 2022 hearing as a means to amend the Amended Petition. The trial court denied Plaintiffs' oral motion to amend and, as such, never considered the contents of the affidavits. Plaintiffs again present the affidavits in the Record on appeal, but in their brief allege no error on part of the trial court in denying their oral motion and posit no reason as to why this Court should consider these affidavits for the first time on appeal. "[A] party's failure to brief a question on appeal ordinarily constitutes a waiver of the issue." *In re N.R.M.*, 165 N.C. App. 294, 296, 598 S.E.2d 147, 148 (2004) (citation omitted); *see* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Plaintiffs, therefore, have abandoned any argument concerning the trial court's denial of their motion to amend the Amended Complaint, and we will not consider the contents of the affidavits for the first time on appeal.

We note that, in their reply brief, Plaintiffs contend we may consider the affidavits in our review of the trial court's decision to grant Defendants' motion to dismiss for lack of standing, as our Supreme Court has provided, "[a]n appellate court considering a challenge to a trial court's decision to grant or deny a motion to dismiss for lack of *subject matter jurisdiction* may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint[,]" and may make findings of fact to that effect. *United Daughters*, 383 N.C. at 624, 881 S.E.2d at 43 (emphasis added); *see Hammond v. Hammond*, 209 N.C. App. 616, 631, 708 S.E.2d 74, 84 (2011).

Our Supreme Court's articulated scope of consideration concerns review of a trial court's decision to grant or deny a 12(b)(1) motion and, here, the trial court made no findings of fact that we may review, nor did Plaintiffs request the court make findings. *See United Daughters*, 383 N.C. at 624, 881 S.E.2d at 43. Moreover, the current appeal concerns the trial court's granting of Defendants' 12(b)(6) motion, not a 12(b)(1) motion, and, as articulated above, Plaintiffs have not argued on appeal that the trial court erred in refusing to consider the affidavits. Additionally, a "reply brief is not an avenue to correct the deficiencies contained in the original brief." *State v. Dinan*, 233 N.C. App. 694, 698–99, 757 S.E.2d 481, 485 (2014). Plaintiffs' argument in their reply brief on this Court's consideration of the affidavits is not sufficient for us to consider the affidavits' contents on appeal.

2. "Persons Aggrieved"

As we do not consider the contents of Plaintiffs' affidavits, per our standard of review we look to only the allegations set forth in the Amended Petition. *See Taylor*, 382 N.C. at 679, 878 S.E.2d at 800. Plaintiffs allege in the Amended Petition that they are statutory "aggrieved persons" as "nearby property owners" and allege that closure of the Road would "contravene the proof of clear public interests in public safety, traffic calming, pedestrian access, historical preservation and conservation." Per *Cox*, where we provided a plaintiff must demonstrate he is an adjacent property owner who has suffered some unique personal injury distinct from the rest of the community, none of these contentions are sufficient to establish standing as an "aggrieved person." 234 N.C. App. at 680, 759 S.E.2d at 391. A "nearby" property owner is not necessarily the same as an "adjacent" property owner, and Plaintiffs' assertions regarding public interests do not demonstrate "some special damage, distinct from the rest of the community, amounting to a reduction in the value of [their properties]." *See id.* at 679, 759 S.E.2d at 390–91; *see Franklin*, 131 N.C. App. at 849, 508 S.E.2d at 843. As such, Plaintiffs have not provided a factual basis demonstrating they are "persons aggrieved" pursuant to N.C. Gen. Stat. § 160A-299, and the Amended Petition "on its face reveals the absence of facts sufficient to make a good claim." *See Cox*, 234 N.C. App. at 680, 759 S.E.2d at 391; *see Wood*, 355 N.C. at 166, 558 S.E.2d at 494. The trial court, therefore, did not err.

As we have determined Plaintiffs had no standing to file the Amended Petition, we need not address Plaintiffs' argument concerning whether Farabow's and the Emonsons' claims "relate back" to the initial Petition under *Baldwin v. Wilkie*, 179 N.C. App. 567, 635 S.E.2d 431 (2006), and N.C. R. Civ. P. 15(c). *See Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 786 (2012) ("[The p]laintiffs contend that, under this Court's holding in *Baldwin*[,] . . . Rule 15(c) allows a plaintiff to add an additional party plaintiff to an already filed action and have the new plaintiff's claims relate back to the original filing. However, since we have determined that [the plaintiffs] had no standing to file the original complaint, we need not address [the] plaintiffs' Rule 15(c) argument.").

B. Standing as "Any Persons"

Plaintiffs argue that, even if this Court were to determine that Plaintiffs did not have standing as "persons aggrieved" ' under N.C. Gen. Stat. § 160A-299(b), Plaintiffs nevertheless had a "right to be heard" before the Village and have standing under N.C. Gen. Stat. § 160A-299(a) to challenge Defendants' allegedly deficient notice for the hearing on closure of the Road. We disagree.

Under N.C. Gen. Stat. § 160A-299(a),

> When a city proposes to permanently close any street or public alley, the council shall first adopt a resolution declaring its intent to close the street or alley and calling a public hearing on the question. . . . At the hearing, any person may be heard on the question of whether or not the closing would be detrimental to public interest, or the property rights of any individual.

N.C. Gen. Stat. § 160A-299(a) (2021). As provided in N.C. Gen. Stat. § 160A-299(b), however, "[a]ny *person aggrieved* by the closing of any street . . . may appeal the council's order . . . . [On appeal] the court shall determine whether . . . the council's decision to close the street was in accordance with the statutory standards of subsection (a)[.]" N.C. Gen. Stat. § 160A-299(b) (emphasis added).

Per the plain language of N.C. Gen. Stat. § 160A-299(b), and as articulated above, to have standing to appeal a council's decision to close a street or alley under N.C. Gen. Stat. § 160A-299 a plaintiff must provide a factual basis demonstrating he is a "person aggrieved[.]" N.C. Gen. Stat. § 160A-299(b); *see Cox*, 234 N.C. App. at 680, 759 S.E.2d at 391; *see Wood*, 355 N.C. at 166, 558 S.E.2d at 494. Plaintiffs, here, have failed to do so, and we will not consider the alleged deficiencies in Defendants' notice for a public hearing under N.C. Gen. Stat. § 160A-299(a).

V. Conclusion

Plaintiffs have failed to establish a factual basis demonstrating they are "person[s] aggrieved" under N.C. Gen. Stat. § 160A-299, and therefore have failed to establish standing to contest Defendants' decision to close the Road. We affirm the trial court's decision to grant Defendants' motion to dismiss.

AFFIRMED.

Chief Judge STROUD and Judge STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 October 2023)

CITY OF GASTONIA v. McDANIEL No. 23-104	Gaston (19CVS2966)	Dismissed
HEISLER v. SUTTON No. 22-933	Davidson (18SP245)	Affirmed
IN RE A.L-R.T. No. 23-166	Burke (19JT58) (19JT59)	Affirmed
IN RE J.S. No. 23-165	Guilford (16JT353) (16JT354)	Affirmed
IN RE K.C.S. No. 23-93	Gaston (21JT199)	Affirmed
IN RE M.L.B. No. 23-25	Robeson (14JT356)	Vacated and Remanded
IN RE R.A.F. No. 21-754-2	Henderson (15JT26) (15JT27)	Affirmed
IN RE S.A.R. No. 23-124	Surry (21JT2) (21JT3) (21JT4) (21JT5)	Affirmed
LEVINE v. CARTER No. 23-113	Mecklenburg (20CVD6864)	Affirmed
LOWRIE v. EST. OF CSANYI No. 23-116	Rowan (21CVS2204)	Affirmed
STATE v. ADAMS No. 23-132	Wilson (19CRS51373)	No Error
STATE v. BLACK No. 23-356	Davidson (18CRS57302) (20CRS54530) (20CRS55347)	Vacated
STATE v. FILMORE No. 22-917	Mitchell (20CRS50278) (21CRS92)	No Error

STATE v. MABLE No. 23-117	Lenoir (20CRS51725)	Vacated
STATE v. RADFORD No. 22-1003	Onslow (19CRS54163) (19CRS54292)	No Error
STATE v. RAMIREZ No. 23-171	Pitt (16CRS54112) (16CRS54199)	AFFIRMED IN PART, AND REMANDED
STATE v. RUTH No. 20-657-2	Forsyth (17CRS55391)	New Trial
STATE v. SIDBERRY No. 23-130	Forsyth (21CRS56217-18)	No Error
STONER v. STONER No. 21-467	Mecklenburg (17CVD1839)	Affirmed
ZHANG v. REALI No. 23-436	Wake (21CVS12685)	Affirmed

HEADNOTE INDEX

APPEAL AND ERROR—Continued

continue to request similar types of records from defendant and that defendant could evade review of the "public records" issue by producing the records during discovery. **Gray Media Grp., Inc. v. City of Charlotte, 384.**

Denial of motion for appropriate relief—guilty plea—recanted testimony—pure question of law—certiorari denied—In a case in which defendant had entered an *Alford* plea to second-degree murder and robbery with a dangerous weapon, defendant's appeal from the denial of his motion for appropriate relief (MAR) was dismissed, and his petition for a writ of certiorari denied, where the trial court properly determined that there was no recanted testimony for purposes of N.C.G.S. § 15A-1415(c) because a witness's statement to police identifying defendant as the person who shot and killed the victim, which she later recanted, was not made under oath or affirmation at a trial or in an affidavit or deposition and therefore did not constitute testimony. The trial court was not required to hold an evidentiary hearing where the basis for the MAR involved a pure question of law and not one of fact. **State v. Brown, 196.**

Interlocutory order—denying motion to dismiss constitutional challenges—sovereign immunity defense—substantial right—In a case brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders issued in response to COVID-19 violated their rights under the state constitution, an interlocutory order denying legislative defendants' motion to dismiss under Civil Procedure Rule 12(b)(6) was immediately appealable, since the motion was at least partially based on a sovereign immunity defense and therefore affected a substantial right. Additionally, the trial court's denial of legislative defendants' Rule 12(b)(2) motion was also immediately appealable to the extent that it relied upon a sovereign immunity defense. Conversely, the denial of legislative defendants' Rule 12(b)(1) motion to dismiss based on sovereign immunity did not affect a substantial right and therefore was not immediately appealable. **Howell v. Cooper, 287.**

Mootness—child custody appeal—issue already resolved—public interest exception—capable of repetition yet evading review exception—In a matter involving numerous juvenile delinquency petitions, the county department of social services' (DSS) appeal of the trial court's disposition order—as to the portion of the order placing the juvenile in the temporary custody of DSS—was rendered moot by a later permanency planning order—made during the pendency of the appeal of the disposition order—which removed DSS as custodian for the juvenile and placed her in her grandmother's custody. Because the appealed issue was resolved by the permanency planning order, the appellate court dismissed the appeal as moot. The public interest exception to the general rule of dismissal for moot appeals did not apply because the interests in the case were confined to the parties and the legal standards concerning dispositional orders did not need clarification. Furthermore, the exception for cases capable of repetition yet evading review did not apply because the challenged conduct was not too fleeting to be litigated before the conduct ended, as juvenile custody cases allow ample time for litigation. **In re J.M., 565.**

Mootness—public meeting notice requirements—emergency decision ratified at regular meeting—regular meeting not challenged—In an action for declaratory relief arising from a town's decision to remove from public property a monument commemorating Confederate soldiers, although plaintiffs alleged that the town's initial emergency meeting did not comply with notice requirements under the open meetings law, plaintiffs' notice argument was moot where plaintiffs did not independently challenge the town's subsequent regular meeting, at which the town

CHILD CUSTODY AND SUPPORT

Child support—gross income—work-related childcare costs—school tuition—In a divorce-related matter, the trial court did not abuse its discretion in the child support provisions of its order, to which the husband made numerous challenges on appeal. As for the calculation of the wife's gross income, the trial court's findings were supported by competent evidence of the wife's current income (additionally, the court was not required to make findings on the wife's reasonable expenses arising from her self-employment), and the court was not required to treat the wife's non-recurring, one-time early withdrawal from a retirement account as income. As for the allocation of summer camp expenses as work-related childcare costs, the trial court's finding that the wife had $386.56 in monthly work-related childcare costs was supported by competent evidence in the form of the wife's financial affidavit and her testimony. Finally, as for the child's school tuition expenses, which the trial court ordered the husband to pay, the trial court properly utilized the Child Support Guideline Worksheet and allocated all of the expenses based on the parties' respective percentage responsibility for the total support obligation (in other words, contrary to the husband's argument, he was not "solely responsible" for the tuition costs). **Klein v. Klein, 570.**

Custody action—between mother and grandparents—best interests of child—The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that it was in their granddaughter's best interests to allow plaintiffs visitation. An analysis of a child's best interests is inappropriate and offends the Due Process Clause when the parent's conduct has not been inconsistent with his or her constitutionally protected status. **Rose v. Powell, 339.**

Custody action—between mother and grandparents—constitutionally protected status of parent—The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that defendant acted in a manner inconsistent with her constitutionally protected parental status when she made plaintiffs an integral part of the granddaughter's life. Although plaintiffs provided some financial support to defendant, had weekly phone calls with her, and sometimes went to her house to let her dog out, defendant never represented that either plaintiff would be considered a parent to the granddaughter or that they would have guaranteed visitation. Furthermore, plaintiffs made no allegations that defendant was unfit or otherwise incapable of caring for the granddaughter. **Rose v. Powell, 339.**

Custody action—between mother and grandparents—N.C.G.S. § 50-13.1—required showing—The trial court did not err when it granted defendant mother's motion to dismiss plaintiff grandparents' custody action seeking secondary custody of their granddaughter (defendant's daughter) several years after plaintiffs' son, the father of defendant's daughter, died, where plaintiffs argued that they were entitled to bring a visitation claim under N.C.G.S. § 50-13.1. It is defendant's constitutionally protected right to decide with whom her daughter associates, and plaintiffs had no authority to seek visitation or custody under N.C.G.S. § 50-13.1 in the absence of a showing that defendant was unfit or had abandoned or neglected her daughter. **Rose v. Powell, 339.**

CONSTITUTIONAL LAW—Continued

Systems Division of the Department of the State Treasurer (respondent) issued a final agency decision requiring petitioner to pay an additional contribution to one of its cap-exempt employees, the trial court erred in concluding that the statute violated the Contract Clause of the federal constitution. Petitioner failed to establish that the statute substantially impaired its employment contract with the employee where there was no record evidence showing that the additional contribution was significant in relation to all of the contributions petitioner made to the employee's pension throughout that employee's career, and where there was no evidence showing that the employee's salary increase toward the end of her career affected how the statute's benefit cap analysis applied to her. Further, petitioner failed to establish that it had an implied contract with respondent that gave petitioner a vested right in keeping constant the amounts it contributed to the state pension fund. **Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div., 226.**

Effective assistance of counsel—appellate—failure to raise sufficiency of evidence—The trial court properly denied defendant's motion for appropriate relief, in which defendant alleged that his appellate counsel provided ineffective assistance because he failed to raise a sufficiency of the evidence argument on direct appeal from defendant's conviction for robbery with a dangerous weapon, where defendant failed to demonstrate that his appellate counsel provided deficient performance. Although defendant contended that fingerprint evidence from the victim's backpack was the only evidence of defendant being the perpetrator of the crime and therefore should have been challenged on the basis that there was no evidence that the fingerprint could only have been impressed at the time of the robbery, any argument to that effect would have failed because the State presented other pieces of evidence linking defendant to the crime. **State v. Todd, 448.**

Effective assistance of counsel—failure to request jury poll—group affirmation of unanimous verdict—In defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property, defendant's counsel was not ineffective for failing to ask the trial court to conduct a jury poll. There was not a reasonable probability of a different result if the jurors had been polled individually because the jury foreman and the other jurors, as a group, affirmed in open court that their verdicts were unanimous and there was no evidence that a juror was coerced into a verdict. **State v. Lynn, 532.**

Effective assistance of counsel—murder trial—statements during closing argument—no concession of guilt—contradiction of defendant's testimony—In a prosecution for first-degree murder, defendant did not receive ineffective assistance of counsel where his trial counsel never conceded defendant's guilt to the charged crime, and therefore the issue of whether counsel committed a *Harbison* error (by failing to obtain defendant's consent to concede guilt) was rendered moot. Instead, counsel's statements during his closing argument—including a statement that if the jury found defendant had used excessive force against the victim, defendant would be guilty of voluntary manslaughter—signaled an attempt to convince the jury that defendant lacked the requisite intent to be found guilty of first-degree murder, and that the most defendant could be convicted of was the lesser offense of voluntary manslaughter. Although counsel did contradict defendant's testimony regarding how defendant arrived at the scene of the crime, none of counsel's statements to that effect were so serious as to deprive defendant of a fair trial. **State v. Parker, 650.**

Effective assistance of counsel—right to conflict-free counsel—claim prematurely asserted on direct appeal—dismissal without prejudice—In defendant's

CONSTITUTIONAL LAW—Continued

prosecution for charges arising from an attempted robbery and assault with a deadly weapon, where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State, the Court of Appeals dismissed—without prejudice to his right to bring a motion for appropriate relief in the trial court—defendant's claim for ineffective assistance of counsel based on the allegation that defense counsel renewed his motion to withdraw yet asked the trial court not to grant the motion. **State v. Bridges, 81.**

Effective assistance of counsel—right to conflict-free counsel—Sullivan review—notice, inquiry, and waiver—In defendant's prosecution for charges arising from an attempted robbery and an assault with a deadly weapon, there was no violation of defendant's Sixth Amendment right to conflict-free counsel where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State. Upon defense counsel's motion to withdraw due to the alleged conflict of interest, the trial court did not err by denying the motion because the court had notice of the potential conflicts, the court conducted an adequate inquiry into the conflicts, and defendant gave a knowing, intelligent, and voluntary waiver of the conflicts. **State v. Bridges, 81.**

Effective assistance of counsel—self-defense instruction—additional language unnecessary—In defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property—charges which arose from defendant having fired several gunshots during an altercation at a fast food restaurant—defendant's counsel was not ineffective for failing to ask the trial court to include in the self-defense jury instruction a requirement to consider whether other restaurant patrons had weapons. The jury was unlikely to have reached a different result where the given instruction followed the statutory language on self-defense, including the reasonable belief standard, and where there was no evidence that anyone else had brandished a gun. **State v. Lynn, 532.**

North Carolina—county school fund provision—challenge to anti-pension-spiking statute—In an action brought by a county board of education (petitioner) challenging an anti-pension-spiking statute, which established a contribution-based benefit cap on certain state employees' pensions while requiring employers to make additional contributions to employees who were exempt from the benefit cap (to restore those employees' retirement allowances to the pre-cap amount), the trial court erred in concluding that the statute violated Article IX, Section 7(a) of the state constitution, which requires county school funds to be used exclusively for maintaining free public schools. In its as-applied challenge to the statute, petitioner failed to present any facts showing that the additional contributions required under the statute would undermine its ability to provide a sound basic education to children in the county or that such payments did not constitute a use that maintained free public schools. **Wilson Cnty. Bd. of Educ. v. Ret. Sys. Div., 226.**

North Carolina—Law of the Land clause—statute of limitations defense—retrospective claim revival—The divided decision of a three judge panel dismissing plaintiffs' claims against a county board of education—for allegedly failing to protect them from sexual abuse committed by a school employee when they were in high school—was reversed where the dismissal was based on the majority's

CONSTITUTIONAL LAW—Continued

erroneous determination that the SAFE Child Act, under which plaintiffs' claims were filed and which allowed them to revive previously time-barred claims, was facially unconstitutional. Although the majority concluded that the revival provision of the Act violated due process rights protected by the Law of the Land clause by retroactively taking away defendant's statute of limitations defense, and thus interfered with a vested right, nothing in the North Carolina Constitution prohibits the revival of statutes of limitation and, therefore, the Act was constitutional and plaintiffs' claims were dismissed in error. **McKinney v. Goins, 403.**

North Carolina—right to earn a living—executive orders—closing bars during global pandemic—sovereign immunity—In an action brought by bar owners and operators (plaintiffs) alleging that a series of emergency executive orders—which, in response to COVID-19, initially closed bars and then repeatedly extended those closures—violated their rights under the state constitution to "the enjoyment of the fruits of their own labor" and to substantive due process under "the law of the land," the trial court properly denied legislative defendants' Rule 12(b)(6) motion to dismiss, which asserted a sovereign immunity defense. According to a landmark case, sovereign immunity cannot be used as a defense against alleged violations of constitutional rights guaranteed under the Declaration of Rights. Contrary to legislative defendants' argument, plaintiffs were not required to seek injunctive relief before stating a claim for monetary damages on grounds that the former remedy constituted the "least intrusive remedy available"; rather, the obligation to seek the "least intrusive remedy available" refers to the judiciary's duty to formulate remedies for constitutional violations in a way that minimizes its encroachment upon other branches of government. Further, legislative defendants could not rely on a sovereign immunity defense because plaintiffs stated colorable constitutional claims where they alleged that a blanket prohibition against conducting their bar businesses violated their right to earn a living—a right protected under both the "fruits of labor" clause and the "law of the land" clause. **Howell v. Cooper, 287.**

Right to counsel—criminal trial—waiver—forfeiture—Defendant's constitutional right to counsel was not violated in his trial for first-degree murder where defendant executed a written waiver of counsel after the trial court conducted a colloquy in accordance with N.C.G.S. § 15A-1242 informing defendant of his rights. Although the written waiver was not included in the record on appeal, its absence did not invalidate defendant's waiver. Further, presuming without deciding that defendant did not give a knowing and voluntary waiver, he engaged in misconduct sufficiently serious to forfeit the right to counsel, including having seven different attorneys during various stages of hearings and the trial (one of whom was his sister, whose pro hac vice admission was revoked on the trial court's own motion), warning his attorney during trial that she should withdraw for her own safety, and showing purported State Bar complaints about that same attorney to her and to the prosecutors during trial. The trial court's findings and conclusion that defendant's conduct was an attempt to delay or obstruct the proceedings and constituted egregious conduct were supported by competent evidence. **State v. Moore, 610.**

CONSUMER PROTECTION

North Carolina Debt Collections Act—threshold elements—proximate injury—summary ejectment action—wrong amount of rent listed in complaint—An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection

CONSUMER PROTECTION—Continued

Act (specifically, the provision found in N.C.G.S. § 75-54(4) prohibiting debt collectors from falsely representing "in any legal proceeding" the amount of debt a consumer owes them) by incorrectly listing in its complaint the amount of rent defendant paid under the parties' lease agreement. In listing the rate of rent, plaintiff mistakenly included a washer-dryer fee that plaintiff had waived after the parties amended the lease agreement; however, defendant was not proximately injured by plaintiff's error—a threshold element for a section 75-54(4) claim—since plaintiff did in fact waive the washer-dryer fee and defendant never argued that he paid or was misled about the fee. **Onnipauper LLC v. Dunston, 486.**

North Carolina Debt Collections Act—threshold elements—unfair act—landlord-tenant context—monthly fee for use of well on leased premises— An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection Act (specifically, the prohibition found in N.C.G.S. § 75-55(2) against collecting debts through "unconscionable means") by collecting a monthly fee from defendant to use a well that provided water for the leased premises. Defendant failed to establish a valid section 75-55 claim where—although he did satisfy three threshold elements, showing that he was a "consumer" who owed a "debt" to a "debt collector"—he failed to show that plaintiff committed an "unfair act" by charging him the monthly well-use fee, which was neither contrary to public policy nor prohibited by statute since it neither violated N.C.G.S. § 42-42 (which requires landlords to provide fit and habitable premises for tenants but does not require landlords to do so for free) nor violated N.C.G.S. § 42-42.1 (which provides that a lessor "may" charge lessees for water consumption based on a metered measurement, but which would not have required plaintiff to do so because of an exemption applicable to landlord-tenant relationships). **Onnipauper LLC v. Dunston, 486.**

CONTRACTS

Breach—separation agreement—payments from ex-husband's military pension—specific performance—In an action regarding a separation agreement between a retired Marine (defendant) and his ex-wife (plaintiff), where the agreement provided that plaintiff would receive fifteen percent of defendant's monthly military pension for the remainder of defendant's life, the trial court did not err in ruling that defendant breached the agreement by refusing to pay plaintiff her portion of his pension after learning that plaintiff was statutorily barred from receiving the payments through the Defense Finance and Accounting Service (DFAS). Although the agreement stated that plaintiff was responsible for coordinating with DFAS to have the payments come to her, the parties' clear intention was that plaintiff receive the agreed-upon portion of defendant's pension regardless of how the payments were delivered. Furthermore, the trial court did not abuse its discretion in ordering specific performance as plaintiff's remedy, since damages would be inadequate (because plaintiff would have to repeatedly sue to secure her monthly payments), defendant testified that he was capable of directly paying plaintiff, and plaintiff had already performed her obligations under the agreement. **Diener v. Brown, 273.**

Separation agreement—breach of contract—anticipatory breach—pleading—In a legal dispute between separated spouses, the trial court erred in dismissing plaintiff wife's complaint for failure to state a claim where she adequately pleaded the elements of a breach of contract claim (thereby entitling her to the remedy of specific performance), alleging that defendant husband breached the terms of the

CRIMINAL LAW—Continued

motion to withdraw his guilty plea. To the extent that the terms of the plea arrangement may have been unclear, the trial court should have sought clarification from the parties. **State v. Robertson, 360.**

Jury selection—prosecutor's voir dire statements—probation as possible sentence—During jury selection for defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property, the trial court did not abuse its discretion by allowing the prosecutor to forecast to potential jury members that probation was within the range of sentencing possibilities that defendant could receive. Even though probation would be allowed pursuant to statute only under narrow circumstances, the prosecutor's statements were technically accurate and therefore not manifestly unsupported by reason. **State v. Lynn, 532.**

Motion for continuance—time to seek other counsel—during first-degree murder trial—The trial court did not err by denying defendant's motion to continue his first-degree murder trial, which defendant made during the State's case-in-chief in order to seek other counsel, where defendant had already waived and forfeited his right to counsel three days earlier after the court allowed defendant's trial counsel to withdraw at defendant's request. **State v. Moore, 610.**

Order denying motion to suppress—findings of fact—unsupported by the evidence—In a criminal defendant's appeal from an order denying his motion to suppress evidence seized from his backpack following a *Terry* stop and frisk, four of the trial court's findings of fact were stricken from the order because they were unsupported by the evidence. Three of these unsupported findings stated that one of the officers observed defendant entering a pathway marked on both sides by "No Trespass" signs and that all of the officers at the scene believed defendant was trespassing at the time of the *Terry* stop. The fourth unsupported finding stated that, after asking defendant for his identification card, the officers returned the identification card to defendant prior to searching his backpack. **State v. Wright, 465.**

Prosecutor's closing argument—murder trial—statements regarding severity of sentences—not grossly improper—The trial court was not required to intervene ex mero motu during the prosecutor's closing argument in a first-degree murder trial, where the prosecutor made certain statements implying that defendant's minimum sentence would not be severe enough if the jury convicted him of voluntary manslaughter instead of murder. Although these statements might not have been good trial practice, they were neither "grossly improper" nor against the law, since trial attorneys have the right to inform the jury of the punishments prescribed in a case, and here, counsel for both defendant and the State commented on what defendant's minimum and maximum sentences could be. **State v. Parker, 650.**

DECLARATORY JUDGMENTS

Standing—removal of Confederate monument—ownership stake not alleged—The trial court properly granted summary judgment to a town on plaintiffs' claims seeking a temporary restraining order, preliminary injunction, and declaratory judgment—which plaintiffs filed to challenge the town's decision to remove from public property a monument commemorating Confederate soldiers—where plaintiffs not only failed to allege they had any proprietary or contractual interest in the monument but also either denied having or admitted to not having an ownership interest in various discovery responses and therefore lacked standing to pursue a claim for declaratory relief. **Edwards v. Town of Louisburg, 136.**

DIVORCE

Alimony—sufficiency of findings—standard of living, reasonable needs, capacity to earn future income—marital misconduct—In a divorce-related matter, the trial court's award of alimony was proper where the court made sufficient findings regarding the parties' accustomed standard of living, the wife's reasonable needs, and the wife's capacity to earn future income. The trial court also made sufficient findings regarding the husband's marital misconduct—illicit sexual behavior and indignities—where the wife presented circumstantial evidence showing that the husband had the opportunity and inclination to commit marital misconduct. Specifically, the husband spent nearly $100,000 on: hotel stays that corresponded with dates of large cash withdrawals, lingerie and sex store purchases for individuals other than the wife, pornography, a payment to at least one woman for sex, spyware on the wife's phone, a secret email account, numerous background checks for potential sexual partners, and online services intended for customers to contact women for the purpose of arranging sexual encounters. In addition, the trial court found that the husband lacked credibility. The alimony order was affirmed on appeal. **Klein v. Klein, 570.**

Appeals—order final as to some claims—trial court's jurisdiction over unresolved claims—Where the trial court's first order in a divorce-related matter fully resolved claims related to child custody, child support, and alimony but did not fully resolve claims related to equitable distribution, N.C.G.S. § 50-19.1 allowed immediate appeal of the order as to those fully resolved claims. However, because the order was not final as to the equitable distribution claims, the husband's first notice of appeal (timely filed within thirty days of entry of the first order) did not deprive the trial court of jurisdiction to enter additional orders distributing two of the husband's retirement accounts. Furthermore, the husband waived his alternative arguments regarding the retirement account orders because he failed to provide any support for his conclusory statements. **Klein v. Klein, 570.**

Equitable distribution—claim requirements—filing of equitable distribution affidavits in custody case insufficient—In the course of a marital dissolution, in which the husband filed a complaint for custody of the parties' two children, and the wife later initiated a separate action in which she obtained an absolute divorce, where neither party included a claim of equitable distribution (ED) in their initial pleadings, the filing by each party of ED affidavits during discovery in the custody matter did not constitute an "application of a party" for ED as required by statute (N.C.G.S. § 50-20(a)), and, therefore, the trial court properly concluded that there were no pending ED claims in the matter. **Brown v. Brown, 254.**

Equitable distribution—classification and distribution of property—numerous arguments—support of competent evidence—In an equitable distribution, alimony, and child custody and support matter, where the husband lodged numerous challenges on appeal, the Court of Appeals affirmed the trial court's first order regarding equitable distribution. The trial court did not err in its classification and distribution of the parties' property as to: a familial loan (the classification as a marital debt was supported by the findings and competent evidence; the husband ultimately admitted it was a loan to purchase the marital home; there did not have to be a written agreement memorializing the debt), loans to the husband's colleague (the characterization of the payments to the husband's colleague as loans was supported by competent evidence; there did not have to be a written agreement memorializing the debt), one of the wife's retirement accounts (the finding that the account had marital and separate components was supported by competent evidence), the proceeds of a lawsuit (the classification of the proceeds as marital instead of separate

JURISDICTION

Estate claim—monies owed under separation agreement—registration of foreign support order—The trial court had subject matter jurisdiction over plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement, which provided that plaintiff was to receive eighty-four monthly alimony payments, only thirty-two of which plaintiff had received as of her ex-husband's passing. Plaintiff was not required to register the foreign support order in North Carolina as a prerequisite to invoking the trial court's jurisdiction, and her claim—alleging breach of contract for which she sought a sum certain as a remedy—constituted a justiciable civil matter involving an amount of money statutorily decreed to be appropriate for resolution in the superior court division. **Cusick v. Est. of Longin, 555.**

Office of Administrative Hearings—contested case—termination of Medicaid contract—adverse determination—The Office of Administrative Hearings (OAH) had subject matter jurisdiction to hear a contested case regarding the partial termination of a contract for the provision of mental health services to Medicaid beneficiaries because respondent—which, as a legally authorized agent of the state agency charged with administering the Medicaid program in North Carolina, was a "Department" as defined by statute—had initiated an "adverse determination," as defined by statute, against petitioner—a healthcare provider contracted by respondent to provide certain mental health services to respondent's plan members—by terminating three services provided by petitioner and seeking to recover a Medicaid overpayment. **B & D Integrated Health Servs. v. N.C. Dep't of Health & Hum. Servs., 244.**

Prayer for judgment continued (PJC)—no conditions attached—PJC not final—The trial court did not err by granting the State's motion to enter judgment on defendant's plea of guilty to misdemeanor death by vehicle where, although seven years had passed since the court had continued judgment on the guilty plea, the prayer for judgment continued (PJC) was not a final judgment because it did not contain conditions that amounted to punishment. Although defendant had been required, as part of his plea agreement, to acknowledge responsibility by giving an apology in open court, he was not ordered to complete any further requirements after the PJC was granted, other than to follow the law. **State v. McDonald, 92.**

Subject matter—equitable distribution—order entered during pendency of appeal—issues in new order embraced in order appealed from—In an equitable distribution action, an order granting a preliminary injunction—preventing plaintiff from disposing of certain real property categorized as separate property—was vacated because the trial court lacked subject matter jurisdiction to enter the order during the pendency of plaintiff's appeal from a prior order—which required plaintiff to pay a distributive award to defendant—since the order granting the injunction addressed issues that were embraced by the prior order being appealed from. Specifically, a key issue in the pending appeal was whether the court erred in requiring plaintiff to pay the sum it awarded defendant given the collateral effect it would have on plaintiff's separate property—the same property that the court's preliminary injunction prevented plaintiff from disposing of. **Crowell v. Crowell, 1.**

Superior court—petition for judicial review—contested case—constitutional challenges to anti-pension-spiking statute—After an administrative law judge granted summary judgment for a county board of education (petitioner) in a contested case challenging anti-pension-spiking legislation, the superior court had jurisdiction to hear petitioner's as-applied constitutional challenges against the

LANDLORD AND TENANT—Continued

later; therefore, the memorandum was insufficient to bind future purchasers to the amendment's terms beyond the end of the original lease term. Further, defendant was not estopped from refusing to honor the option to renew because the deed conveying the property did not contain any language stating that defendant was taking subject to the unregistered lease amendment, and there was no basis for reformation of the deed where plaintiff did not assert that a term had been left out by mutual mistake. Finally, neither the estoppel certificate provided to defendant during due diligence nor defendant's later acceptance of plaintiff's rent check (for a period of time beyond the end of the original lease) were sufficient bases for binding defendant to the renewal option. **Greaseoutlet.com, LLC v. MK S. II, LLC, 17.**

LARCENY

Misdemeanor larceny of a vehicle—sufficiency of evidence—felonious intent—permanent deprivation of property—The trial court erred in denying defendant's motion to dismiss a charge of misdemeanor larceny of a vehicle where the State failed to present sufficient evidence supporting the element of felonious intent. According to the evidence, the victim and his friend, a drug dealer, went to a mobile home for a social visit when defendant, accompanied by another man, burst into the home, approached the victim while holding a hammer and demanding "powder" (implying an intent to steal drugs, which he ultimately did not find), seized the keys to the victim's truck from the victim's person, and took the truck for a joyride, after which defendant voluntarily returned the truck, handed the keys back to the victim, and released the victim unharmed. Apart from the taking itself, there were no additional facts present to support an inference that defendant intended to permanently deprive the victim of his truck. Further, evidence of defendant's threatened force against the victim and use of force to seize the victim's keys did not overcome the uncontradicted evidence that defendant intended only a temporary deprivation of the truck. **State v. Spera, 207.**

NEGLIGENCE

Insurance agent—inaccurate information on insurance application—contributory negligence—In a real property insurance dispute, where plaintiff filed a claim for hurricane damage and his homeowner's insurance company responded by cancelling his policy due to material misrepresentations in his application for insurance (because it did not disclose plaintiff's pond or that his property spanned five acres), plaintiff's allegations were sufficient to state a claim for negligence against his insurance agent (defendant), who had filled out the insurance application on plaintiff's behalf, where plaintiff alleged, among other things, that defendant acted as plaintiff's agent, that plaintiff provided accurate information to defendant for the application process, that defendant assured plaintiff that the new policy would provide the same coverage as his existing policy, that defendant told plaintiff he need only sign the signature page of the multi-page application, that defendant provided inaccurate information regarding plaintiff's property on the application (including its acreage and the presence of a pond), and that defendant breached his duty of care and proximately caused injury to plaintiff. Plaintiff's alleged failure to read the other pages of the insurance application before signing did not establish, as a matter of law, that plaintiff was contributorily negligent; rather, that was a question for a jury to determine. As for the issue of punitive damages, plaintiff's complaint failed to allege facts showing he was entitled to punitive damages based on the allegations concerning defendant's conduct in filling out the insurance application. **Jones v. J. Kim Hatcher Ins. Agencies Inc., 316.**

TERMINATION OF PARENTAL RIGHTS—Continued

of jurisprudence under the mootness doctrine, noting that: in applying the "single ground" rule, it had essentially determined that issues concerning the remaining grounds for termination were moot on appeal; and a refusal to review those remaining grounds could have collateral consequences (such as affecting a parent's ability to regain his or her parental rights in the future pursuant to N.C.G.S. § 7B-1114). Nevertheless, because the father did not challenge the "single ground" jurisprudence on appeal, the appellate court was bound to follow it. **In re E.Q.B., 51.**

Dispositional order—no-contact provision—not authorized by statute— After finding grounds to terminate a father's parental rights in his three children, the trial court exceeded its authority when it included a provision in its dispositional order prohibiting any future contact between the father and the children, as there are no statutory provisions authorizing a trial court to issue a no-contact order in a Chapter 7B case. **In re E.Q.B., 51.**

Grounds for termination—abandonment—failure to contact or provide for children—six-month period—The trial court properly terminated a father's parental rights in his three children on the ground of abandonment where the court found—based on clear, cogent, and convincing evidence—that the father failed to provide care, affection, financial support, and a safe and loving home for the children in the six months before the termination petition was filed. The father could not communicate with the children through their mother, with whom the children lived, after the mother started blocking his phone calls and then obtained a domestic violence protective order (DVPO) barring him from contacting her. However, the DVPO did not appear to prohibit the father from contacting his children directly. Further, the record and the court's unchallenged findings showed that the father could have communicated indirectly with the children through his aunt and that he had the ability to file a custody complaint or sign a voluntary support agreement at any time, but that the father made no effort to exercise any of those options. **In re E.Q.B., 51.**

Grounds for termination—willful abandonment—lack of contact with child—restrictive parole conditions—The trial court erred by terminating respondent-father's parental rights to his daughter based on willful abandonment where the court's findings were insufficient to establish willfulness. During the determinative six-month period immediately preceding the filing of the petition by the child's mother, respondent was subject to restrictive parole conditions in another state that prohibited him from engaging in any form of communication with his daughter, but his actions during that time period—including submitting several applications to modify the conditions of his parole, fulfilling certain precursor conditions in furtherance of those requests, and remaining current on his child support obligations—were not consistent with a willful determination to forego all parental duties or to relinquish all parental claims to his child. **In re C.J.B., 303.**

Grounds for termination—willful abandonment—sufficiency of findings—no attempts to contact child—The trial court did not err in concluding that grounds existed to terminate respondent-father's parental rights in his daughter based on willful abandonment where the court's findings of fact were sufficient to support its conclusions of law. The father's specific challenges to the findings regarding his lack of gifts for his daughter and lack of effort to contact her lacked merit, especially in light of other, unchallenged findings establishing that he never sent gifts or attempted to contact her. Furthermore, the trial court was not required to make findings on every piece of evidence presented, and on the issue of whether the mother intentionally obstructed access to the daughter, the trial court made detailed