NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 293

19 MARCH 2024

7 MAY 2024

RALEIGH
2025

CITE THIS VOLUME

293 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

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

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES JR.
JOHN C. MARTIN[1]
LINDA M. McGEE

Former Judges

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

[1] Died 9 April 2024.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes[2]

[2] Appointed Assistant Appellate Division Reporter 23 September 2024.

CASES REPORTED

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

BUILDERS MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
DANIEL R. NEIBEL, INDIVIDUALLY AND D/B/A
DAN THE MAN CONSTRUCTION, DEFENDANT

No. COA23-240

Filed 19 March 2024

1. Process and Service—service by publication—due diligence—attempts to serve personally—subsequent money judgment not void

In plaintiff insurance company's action seeking to renew a prior money judgment entered against defendant, the trial court properly granted summary judgment in plaintiff's favor where, because plaintiff complied with Civil Procedure Rule 4(j1) in serving defendant its original complaint by publication, the money judgment entered in the original lawsuit was not void for lack of personal jurisdiction and therefore could be renewed. Before serving defendant by publication in Watauga County, North Carolina—the last known county where defendant resided—plaintiff exercised reasonable due diligence in attempting to personally serve defendant at each of his known addresses, making two attempts at each of defendant's two addresses in Watauga County, and one attempt at defendant's Indiana address on file with the Licensing Board for General Contractors. Although defendant argued that plaintiff should have taken additional steps to locate him, he failed to forecast evidence at summary judgment that these other steps would have been fruitful.

2. Process and Service—service by publication—defendant's last known county of residence—reasonable belief defendant was there

In plaintiff insurance company's action seeking to renew a prior money judgment entered against defendant, the trial court properly granted summary judgment in plaintiff's favor where, because plaintiff complied with Civil Procedure Rule 4(j1) in serving defendant its original complaint by publication in Watauga County, North Carolina, the money judgment entered in the original lawsuit was not void for lack of personal jurisdiction and therefore could be renewed. Although the original lawsuit was filed in Wake County and defendant had addresses listed in Watauga County and in Indiana, plaintiff's service by publication solely in Watauga County was still proper because it was reasonable for plaintiff to believe defendant was located there since: all of plaintiff's dealings with defendant occurred there, defendant's last known residence was there, plaintiff's insurance records for defendant indicated that defendant only conducted business in North Carolina, and defendant worked with plaintiff through a Watauga County insurance agent.

Judge GORE dissenting.

Appeal by Defendant from Judgment entered 22 July 2022 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 31 October 2023.

Stuart Law Firm, PLLC, by William A. Piner, II, for Plaintiff-Appellee.

Buckmiller, Boyette & Frost, PLLC, by Joseph Z. Frost, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Daniel R. Neibel, individually and d/b/a Dan the Man Construction (Defendant) appeals from Summary Judgment granting a money judgment in favor of Builders Mutual Insurance Company (Plaintiff) renewing a prior judgment entered against Defendant. The Record before us tends to reflect the following:

On 10 March 2021, Plaintiff filed a Complaint in Wake County District Court alleging Plaintiff had previously obtained a judgment in Wake County on 11 March 2011 (2011 Judgment). The Complaint

alleged the 2011 Judgment remained unsatisfied and sought entry of a renewed judgment for: (1) the principal sum of $4,343.81 with judgment interest accruing from 14 August 2009; (2) the principal sum of $200.00 with judgment interest accruing from 12 August 2009; and (3) court costs. On 10 June 2021, Defendant filed an Answer asserting affirmative defenses, including that the underlying 2011 Judgment was void for lack of personal jurisdiction, insufficient process, and insufficient service of process.

On or about 27 May 2022, Plaintiff filed a Motion for Summary Judgment. Defendant served a Memorandum of Law in Opposition to Motion for Summary Judgment on Plaintiff on 19 July 2022. The trial court heard Plaintiff's Motion for Summary Judgment on 21 July 2022.

At the summary judgment proceedings, Plaintiff asserted it filed a verified complaint in the underlying lawsuit on or about 25 January 2010 seeking to collect unpaid insurance premiums in the total amount of $4,543.81 related to Defendant's business (the 2010 Complaint). Defendant submitted his own Affidavit opposing summary judgment and other documents, including the 2010 Complaint, as exhibits attached to his Memorandum of Law opposing summary judgment. Attached as exhibits to the 2010 Complaint were billing records and insurance applications for policies purchased through an insurance agency in Boone, North Carolina, reflecting Defendant's address in Sugar Grove, North Carolina. Defendant also submitted a Certificate of Assumed Name for his construction business to do business in Watauga County. The Certificate reflected addresses in Valle Crucis and Vilas, North Carolina. Defendant also submitted documentation reflecting his address on file with the North Carolina Licensing Board for General Contractors was in Paragon, Indiana.

Following unsuccessful attempts to personally serve Defendant with the 2010 Complaint, Plaintiff served Defendant by publication on 21 December 2010 in Watauga County, North Carolina. The Affidavit of Service by Publication filed in that underlying suit reflected in January 2010, Plaintiff attempted to serve the 2010 Complaint and summons on Defendant via certified mail at Defendant's Sugar Grove address. The summons was returned unclaimed. In April 2010, Plaintiff then attempted to serve the 2010 Complaint and alias and pluries summons at Defendant's Paragon, Indiana address. The summons was again returned unclaimed. In June 2010, Plaintiff again attempted service via alias and pluries summons by certified mail at an address in Vilas, North Carolina which was also unsuccessful. Finally, in August 2010, Plaintiff yet again attempted

service of process on Defendant by Watauga County Sheriff again at the addresses in Vilas and Sugar Grove. This alias and pluries summons was not served because Defendant could not be located at those addresses by the Sheriff's office. Ultimately, on or about 13 October 2010, Plaintiff caused Notice of Service of Process by Publication to be published in The Watauga Democrat newspaper as Watauga County was Defendant's last known residence. Following publication of the Notice Service of Process by Publication, Plaintiff moved for summary judgment and obtained the 2011 Judgment on 11 March 2011.

At the hearing on summary judgment in the case *sub judice*, Defendant contended the 2011 Judgment was void for lack of personal jurisdiction—and should not be renewed—arguing Plaintiff failed to comply with the requirements for service by publication of the 2010 Complaint. Defendant asserted Plaintiff failed to exercise reasonable diligence in attempting to personally serve Defendant prior to resorting to service by publication and by publishing the Notice of Service by Publication only in Watauga County and not in Paragon, Indiana and/or Wake County, North Carolina where the action was pending. Defendant's own Affidavit averred that while he was currently a resident of Watauga County, he did not reside and was not present in Watauga County between March 2009 and September 2012. Instead, Defendant claimed during that time he lived in Gosport, Indiana. As such, he further asserted he was not served and did not have actual notice of the 2010 Complaint or 2011 Judgment.

On 22 July 2022, the trial court entered Summary Judgment in favor of Plaintiff and against Defendant for the full amounts in the 2011 Judgment. Defendant, however, was not served nor provided a copy of the trial court's Summary Judgment until 5 December 2022. Defendant timely filed Notice of Appeal on 21 December 2022. *See* N.C. R. App. P. 3(c)(2) ("In civil actions . . . a party must file and serve a notice of appeal . . . within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period" prescribed by Rule 58 of the North Carolina Rules of Civil Procedure).

Issues

The issues on appeal are whether the trial court properly entered Summary Judgment for Plaintiff renewing the 2011 Judgment where: (I) service by publication of the 2010 Complaint was utilized following multiple attempts by Plaintiff to personally serve Defendant at multiple addresses in Watauga County and Indiana; and (II) Notice of Service of Process by Publication was published in Watauga County.

Analysis

Summary judgment is proper when "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) (2023). A grant of summary judgment "is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Erthal v. May*, 223 N.C. App. 373, 378, 736 S.E.2d 514, 517 (2012) (citations and quotation marks omitted).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). When ruling on a motion for summary judgment, all inferences of fact "must be drawn against the movant and in favor of the party opposing the motion." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation and quotation marks omitted).

On appeal in this case, Defendant argues Summary Judgment was improperly entered for Plaintiff, and, instead, should have been entered in favor of Defendant. Specifically, Defendant contends the 2011 Judgment was, itself, void because of defects in Plaintiff's service of process by publication. As such, Defendant asserts the trial court had no jurisdiction to enter the underlying 2011 Judgment against him in the first place, and the 2011 Judgment could not, therefore, be renewed in the present action.

" 'A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void.' " *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003) (quoting *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980)). "Service of process by publication is in derogation of the common law. Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Id.* (citation and quotation marks omitted).

Service by publication is governed by Rule 4(j1) of the North Carolina Rules of Civil Procedure. "Rule 4(j1) permits service by publication on

a party that cannot, through due diligence, otherwise be served." *Id.* Rule 4(j1) of the North Carolina Rules of Civil Procedure provides in relevant part:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2023).

I. Due Diligence

[1] Defendant first contends Plaintiff failed to exercise due diligence in attempting to locate Defendant before resorting to service by publication of the 2010 Complaint. Defendant asserts Plaintiff should have utilized other avenues to locate Defendant beyond the attempts Plaintiff made to serve Defendant either in Watauga County or Indiana. We disagree.

"Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516 (citations omitted). However, "there is no 'restrictive mandatory checklist for what constitutes due diligence' for purposes of service of process by publication; '[r]ather, a case by case analysis is more appropriate.' " *Jones v. Wallis*, 211 N.C. App. 353, 358, 712 S.E.2d 180, 184 (2011) (quoting *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980)). "Further, a plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of 'due diligence.' This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful." *Id.* at 359, 712 S.E.2d at 185.

Here, Defendant offers two suggestions for additional steps. First, Defendant suggests Plaintiff should have attempted service at a Post Office Box in Watauga County. Second, Defendant suggests Plaintiff should have made repeated attempts at service to the Paragon, Indiana address on file with the North Carolina Licensing Board for General Contractors. Defendant also suggests Plaintiff should have tried simply contacting him by telephone to ascertain an address for service of the lawsuit against him.

Defendant, however, fails to identify any indication in the Record that these steps would have been fruitful. To the contrary, Defendant's entire factual basis for his argument is that he did not live and was not present in Watauga County at the time—necessarily defeating his suggestion that service at a Watauga County Post Office Box would have borne fruit. Likewise, Defendant casually ignores the fact that the attempt at service at the Paragon, Indiana address was returned unclaimed and offers no indication further attempts would have been successful. Defendant also makes no effort to argue telephone calls would have resulted in successful service of the 2010 Complaint.

Defendant cites *Barclays American/Mortgage Corporation v. BECA Enterprises*, 116 N.C. App. 100, 446 S.E.2d 883 (1994), as supportive of his argument. In *Barclays*, the "sole attempt at personal service of Notice . . . consisted of a certified letter mailed to the business address . . ., a postal box number." *Id.* at 103, 446 S.E.2d at 886. We concluded, on the facts of that case, this was insufficient to constitute due diligence where the record reflected other addresses including a personal address that had been used previously to contact the defendant. *Id.* at 104, 446 S.E.2d at 886-87.

This case is a far cry from *Barclays*. Here, Plaintiff utilized their own records and the public record to attempt service on Defendant at business and residential addresses in Watauga County. Moreover, Plaintiff attempted service at the Indiana address on file with the Licensing Board for General Contractors. On the facts of this case, we conclude Plaintiff exercised due diligence in making multiple attempts to personally serve Defendant with the 2010 Complaint. This is particularly so where Defendant has not forecast that any other attempts would have been fruitful. *See Jones*, 211 N.C. App. at 358, 712 S.E.2d at 184.

II. Publication in Watauga County

[2] Defendant further contends Notice of Service by Publication of the 2010 Complaint in Watauga County was insufficient to meet the requirements of N.C. R. Civ. P. 4(j1). In relevant part, Rule 4(j1) requires:

> a notice of service of process by publication . . . in a newspaper . . . circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2023). Instead, Defendant contends Plaintiff was required to serve him by publication in Indiana and/or Wake County, North Carolina, or, possibly, in Indiana, Wake County, *and* Watauga County. Defendant contends Plaintiff either reasonably believed Defendant was located in Watauga County or Indiana and should have served him by publication in both locations. Alternatively, Defendant contends Plaintiff had no reliable information about his whereabouts and, as such, should have served Defendant in Wake County (where the action was pending) and Watauga County and/or Indiana. Defendant, however, offers no case law supporting his alternative and conflicting positions.[1]

In *Winter v. Williams*, this Court concluded service by publication was proper in Wake County—where the action was pending—where (a) plaintiff had made diligent attempts to serve defendant at addresses in Wake County and Granville County, North Carolina; (b) the only other information plaintiff received about defendant's location was "defendant may be out west, possibly California,"; (c) inquiries to the California Department of Motor Vehicles revealed no information; and, importantly, (d) the defendant's last known address was also in Wake County. 108 N.C. App. 739, 743-45, 425 S.E.2d 458, 460-61 (1993). We concluded there the plaintiff had no reliable information concerning the defendant's location. *Id.* at 745, 425 S.E.2d at 461.

Subsequently, in *Chen v. Zou* this Court observed where a trial court's findings "demonstrate that [p]laintiff had reliable information (from [d]efendant herself) that [d]efendant was living in New York City . . . service by publication in Mecklenburg County—where the action was pending—was ineffective." 244 N.C. App. 14, 19, 780 S.E.2d 571, 575 (2015). We noted "*Winter* is distinguishable from the present case because [p]laintiff had reliable information from [d]efendant and several other individuals that [d]efendant was in New York City, an area significantly smaller and more precise than 'out West,' or 'possibly California.' " *Id.*

---

1. Indeed, to be fair, our dissenting colleague provides a far more thoughtful analysis in making Defendant's case for him.

Here, Defendant appears to effectively concede service by publication in Watauga County itself was not improper. Indeed, it was entirely reasonable for Plaintiff to believe Defendant would be located in Watauga County. Plaintiff's dealings with Defendant all occurred in Watauga County. Defendant's last known residence was in Watauga County. Plaintiff's records of insuring Defendant all reflected Defendant's business was conducted only in North Carolina. Defendant's purchase of insurance products from Plaintiff was through a Watauga County insurance agent. Indeed, Defendant's own affidavit submitted in the present action admits he was a resident and conducting business in Watauga County until 2009 and then returned to Watauga County in 2012—indicating he had not permanently severed all ties with Watauga County and underscoring the reasonableness of Plaintiff's belief as to Defendant's likely location.

Rather, Defendant—again without citing authority—contends Plaintiff was required to do more. Defendant contends Plaintiff was required to serve Defendant by publication in Indiana, arguing Plaintiff had reason to believe Defendant was located there because of the address on file with the Licensing Board for General Contractors. However, Plaintiff attempted service at this address and was unsuccessful, and the Record provides no further indication Plaintiff had any other reason to believe Defendant was located in Indiana. *See Winter*, 108 N.C. App. at 745, 425 S.E.2d at 461. This is particularly so given Plaintiff's dealings with Defendant, which all occurred exclusively in Watauga County. Therefore, we conclude on the facts of this case that Plaintiff had no reason to believe Defendant was located in Indiana. Thus, Plaintiff was not required to serve Defendant with notice of the 2010 Complaint by publication in Indiana.

Defendant further contends that, alternatively, Plaintiff had no reliable information whatsoever about Defendant's location. Thus, Defendant asserts, Plaintiff was required, as a matter of law, to serve Defendant in Wake County where the action was pending. We disagree.[2]

Ultimately, the test for the constitutional validity of service "is not whether defendants received [a]ctual notice but whether the notice was of a nature [r]easonably calculated to give them actual notice and the opportunity to defend." *Royal Bus. Funds Corp. v. S.E. Dev. Corp.*, 32 N.C. App. 362, 369, 232 S.E.2d 215, 219 (1977). Here, it is apparent that

2. This single point is where our dissenting colleague and we, respectfully, part ways.

service by publication in Wake County—of the three options available—was the option least reasonably calculated to give Defendant notice of the 2010 Complaint and an opportunity to defend.

Defendant's argument boils down to a contention that because Plaintiff could not obtain service of him at his Watauga County addresses, then Plaintiff necessarily did not believe Defendant was in Watauga County. Indeed, this is the analysis employed by the dissenting opinion here. This contention, however, misses the point. If Plaintiff had been able to effectuate personal service on Defendant at those addresses, service by publication would not be necessary. But it cannot logically follow that just because personal service was not effectuated in a county where Defendant was last known to reside and conduct business related to the lawsuit, Defendant was no longer located in that county—or more to the point, that Plaintiff could not reasonably believe Defendant would be located in that county for purposes of publication.

Indeed, the dissent's analysis here functionally eviscerates the protections for defendants afforded by Rule 4(j1). Under the dissent's analysis, if a plaintiff is unable to serve a defendant personally at their last known location, publication of the notice cannot—as a matter of law—occur in that county. This cannot be so. The purpose of the notice of publication is to provide as meaningful an opportunity for a defendant to receive notice of the lawsuit as possible under the circumstances. Publication in the county where the suit is pending is the last resort. *See*, *e.g.*, *Zou*, 244 N.C. App. at 19, 780 S.E.2d at 575 (publication of notice inadequate in Mecklenburg County where plaintiff had information defendant had moved to New York).

Here, there is no dispute publication in Wake County would have provided practically zero chance of notice to Defendant. Meanwhile, it is not unreasonable for Plaintiff to believe Defendant would be located in Watauga County where he had resided, where his business was located, and where Defendant conducted business with Plaintiff through a local insurance agency. This is much different than the generalized assertion a defendant was "out west, possibly California." *See Winter*, 108 N.C. App. at 745, 425 S.E.2d at 461. The test is not whether Defendant was, in fact, located in Watauga County—but whether in 2010 Plaintiff reasonably believed Defendant was located in Watauga County based on what reliable information it had at the time.

Defendant's own affidavit underscores the reasonableness of Plaintiff's belief Defendant would be located in Watauga County. Defendant admits he resided and operated his business in Watauga

County, except for a temporary absence when he left to go to Indiana to care for his ailing father, returning to Watauga County after his father's death. As such, we conclude Defendant has failed to establish Plaintiff was required to publish notice of service of process by publication of the 2010 Complaint in Wake County where the action was pending.

Thus, in the case *sub judice*, Defendant has failed to forecast evidence Plaintiff failed to exercise due diligence in attempting personal service or that service by publication in Watauga County was invalid. Therefore, the trial court had personal jurisdiction over Defendant to enter the 2011 Judgment. Consequently, in this action, the trial court did not err in granting Summary Judgment to Plaintiff renewing the 2011 Judgment.

Conclusion

Accordingly, for the foregoing reasons, the trial court's 22 July 2022 Summary Judgment is affirmed.

AFFIRMED.

Judge STROUD concurs.

Judge GORE dissents with separate opinion.

GORE, Judge, dissenting.

The majority opinion seeks to mitigate the tough consequences of an inadequate application of the stringent service by publication requirements, however, I believe a correct application of Rule 4(j1) requires remand and consequently to vacate the prior judgment, therefore I respectfully dissent.

Rule 4(j) of the North Carolina Rules of Civil Procedure states:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in

> accordance with G.S. 1-597 and G.S. 1-598 and *circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.*

N.C. R. Civ. P. 4(j1) (2023) (emphasis added).

The majority is satisfied with plaintiff's reliance upon evidence of its prior dealings with defendant to establish it reasonably believed defendant was located in Watauga County. The evidence is dated a year or more prior to the filing of the prior judgment action, and evidence obtained through attempts to serve defendant during the lawsuit contradicted this reasonable belief. I agree with the majority that plaintiff demonstrated service by publication was proper in this case. But I disagree with the majority's generous reading of what qualifies as a reasonable belief that defendant was located in Watauga County. Case law demonstrates the Courts must strictly apply service by publication requirements. *See Henry v. Morgan*, 264 N.C. App. 363, 365 (2019) (discussing how our Courts must strictly construe whether the party properly served the defendant under Rule 4(j1) because this type of service is a "derogation of the common law."); *Dowd v. Johnson*, 235 N.C. App. 6, 10 (2014) (cleaned up) ("Because service by publication is a derogation of the common law, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute.").

The majority argues that my application of Rule 4(j1) "functionally eviscerates the protections for defendants." I am not suggesting that a failure to personally serve defendant at their last known address equates as a matter of law in ruling that service by publication is not proper in that county. I am merely pointing to the facts of this case and comparing it with prior decisions by this Court that utilize the available facts to determine whether the serving party properly published in the area where the serving party believed the defendant was located. Given the strict requirements of service by publication, the purpose is not to determine whether defendant would actually get notice by publication in a certain county, although this is certainly a desired outcome as this equates to personal jurisdiction, but instead it is the proper application of Rule 4(j1). I agree with the majority, that it is likely in this case defendant would not receive notice through publication in the county where the case was pending, after all he was in Indiana at the time of the lawsuit. But we are not given the luxury of applying the law based on how

we think it should turn out, but rather by interpreting the law as articulated by the General Assembly and previously applied by the Courts.

In *Winter v. Williams*, the defendant argued the service by publication in the county in which the action was pending was improper because the serving party had some information defendant could be out west in California. 108 N.C. App. 739, 744–45 (1993). The *Winter* Court held that service by publication "in the county in which the action was pending" was proper. *Id.* at 745. The Court reasoned that the "defendant's last known address was in Wake County and despite reasonable efforts, [the] plaintiff had no 'reliable information' as to the defendant's whereabouts." *Id.*

Conversely, in *Chen v. Zou*, a later decision by this Court addressing the same application of Rule 4(j1), we discussed why service by publication in the location in which the action was pending was "inadequate." 244 N.C. App. 14, 19 (2015). The *Chen* Court determined the serving party did not "exercise due diligence" in attempting to serve the defendant, because the plaintiff had "reliable information" defendant was in New York City. *Id.* The effect of this inadequate service by publication was to recognize the prior divorce judgement was void and order it set aside. *Id.* at 20.

In both cases, the *Winter* Court and the *Chen* Court diverged in the application of Rule 4(j1) based upon evidence obtained during the legal proceedings. In *Winter*, the information obtained while attempting service demonstrated the plaintiff lacked reliable information of the defendant's whereabouts, because he received notice from a failed service attempt that the defendant could be located out in California. 108 N.C. App. at 743. The *Winter* Court determined the plaintiff only knew of the defendant's prior address and lacked reliable information as to where the defendant was located, therefore, publication was proper in the location where the action was pending. *Id.* at 745. Whereas, in *Chen*, the information the plaintiff had about the defendant during the legal proceedings (by talking to and texting the defendant) demonstrated the plaintiff had reliable information of where the defendant was located. 244 N.C. App. at 18–19. Therefore, the *Chen* Court stated it was improper to publish in the location where the action was pending, because he had reliable information from the defendant of her location. *Id.* at 19.

Plaintiff made the following attempts to serve defendant: (1) by certified mail to Sugar Grove, North Carolina, but it was returned unclaimed; (2) by certified mail to Paragon, Indiana, but it was returned unclaimed; (3) by certified mail to Vilas, North Carolina, but it was returned unclaimed;

and (4) by personal service through the Watauga County Sheriff to both Vilas, North Carolina, and Sugar Grove, North Carolina, but the sheriff told plaintiff that defendant could not be located at either address, and there was no forwarding information. It appears plaintiff used due diligence to obtain the Indiana address and attempt service there. While I would not impute a requirement for further attempts at the Indiana address beyond the service attempted, it does raise suspicion as to plaintiff's reliable information and reasonable belief of defendant's location.

Plaintiff made multiple attempts of service and each time received information that defendant could not be located at those addresses. Plaintiff also received notice prior to the hearing that stated defendant moved from the address in Watauga County. This evidence altogether, casts doubt upon plaintiff's reliance of prior dealings with defendant for where it believed defendant was located. When I consider the key differences between proper service by publication and improper service by publication in *Winter* and *Chen*, it becomes evident that the prior dealings of plaintiff with defendant were not enough to strictly comply with the requirements of Rule 4(j1). The requirement of service by publication in the location in which the action is pending, is a last resort, but it is necessary when the serving party reveals it lacks reliable information of defendant's location. Further, while it is not required, plaintiff could have published in more than one county when the evidence raised a question of whether plaintiff properly believed defendant was located in Watauga County, and whether that belief was based upon reliable information of defendant's location.

I am not suggesting defendant's lack of knowledge is determinative of the proper application of service by publication requirements, instead, I merely suggest the evidence admitted, without dispute, casts great doubt upon the majority's determination service by publication was proper in Watauga County. In applying both *Winter* and *Chen* to the present case, I would consider the evidence obtained during the legal proceedings and let that guide the determination as to whether plaintiff had reliable information of defendant's location. In this case, because the evidence casts doubt on plaintiff's reliable information of defendant's location, I would determine the service by publication should have been issued in the county in which the case was pending, and therefore, service was improper and the judgment should be vacated for lack of personal jurisdiction. Therefore, I respectfully dissent.

GERALD COSTANZO, ET AL., PLAINTIFFS
v.
CURRITUCK COUNTY, NORTH CAROLINA, ET AL., DEFENDANTS

No. COA22-699

Filed 19 March 2024

Counties—expenditures—scope of authority—net proceeds of occupancy tax—amendment to authorizing session law

In a declaratory judgment action to determine the scope of a county's authority to use the net proceeds of an occupancy tax for various purposes, where the legislature amended the law that granted counties authority to collect an occupancy tax by eliminating portions of the law and by providing greater specificity in certain definitions regarding how funds could be used, there was a clear legislative intent to narrow the scope of counties' discretion in making certain expenditures from those funds. The trial court's order granting summary judgment for the county on all claims was reversed as to plaintiffs' claim challenging past expenditures on general public safety services since those services did not meet the newly adopted definition of "tourism-related expenditures," and plaintiffs were entitled to summary judgment on that claim. The trial court's order was vacated as to the remaining claims, and the matter was remanded for further proceedings.

Judge HAMPSON concurring in a separate opinion.

Appeal by plaintiffs from order entered 28 December 2021 by Judge Wayland J. Sermons, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 8 February 2023.

Fox Rothschild L.L.P., by Troy D. Shelton and Robert H. Edmunds, Jr., for the plaintiffs-appellants.

Womble Bond Dickinson (US) L.L.P., by Christopher J. Geis, for the defendants-appellees.

STADING, Judge.

Gerald Costanzo, et al., ("plaintiffs") appeal an order granting summary judgment for Currituck County, et al., ("the County"). For the

reasons set forth below, we reverse the order in part, vacate in part, and remand for further proceedings.

I. Background

Currituck County is North Carolina's northernmost coastal county containing a strip of land that is part of the Outer Banks. The town of Corolla, situated on this strip of land, is a tourist destination. This area generates most of the County's occupancy tax revenue from lodging facilities. Although comprising approximately one-tenth of the County's land, this area also contributes to more than half of the County's property tax base. The property tax, sales tax, and other tax revenue generated in this area feeds into the County's General Fund allocated for public purposes throughout the County under N.C. Gen. Stat. §§ 153A-149, 153A-151, and 105-113.82 (2023).

In 1987, the General Assembly gave the County authority to collect an occupancy tax on rentals of rooms and other lodgings ("the Session Law"). *See* 1987 N.C. Sess. Laws 209, § 1(a). The Session Law required that "at least seventy-five percent (75%) of the net proceeds" of the occupancy tax levied be used "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). The County then had to deposit the remaining net proceeds of the occupancy tax into its General Fund, which could "be used for any lawful purpose." *Id*. In 1999, the Session Law was modified, and the County was permitted to levy an "[a]dditional occupancy tax" under its subsection 1(a1). N.C. Sess. Law 1999-155, H.B. 665 § 1(a1). The County could use the net proceeds of taxes levied under this subsection for the Currituck Wildlife Museum. N.C. Sess. Law 1999-155, H.B. 665 § 1(a1); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

In 2004, the General Assembly amended the Session Law ("the Amendment"), narrowing the scope of how the County may use occupancy tax proceeds. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). In contrast to the Session Law, the Amendment deleted the phrase "tourist related purposes," opting instead for "tourism-related expenditures, including beach nourishment." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 §§ 1(a2), 2(e). Moreover, the Amendment removed the language that authorized the County to make certain expenditures, "including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C.

Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

Even so, after the Amendment's enactment, the County continued to allocate occupancy tax revenue to expenditures previously authorized under the Session Law. The County's continued allocation of these funds, in a manner not specifically authorized by the Amendment, prompted plaintiffs to file their complaint on 7 May 2019, suing for declaratory judgment and injunctive relief. Plaintiffs alleged that defendants "improperly and unlawfully diverted [tax levies] to purposes other than those purposes permitted by the [Amendment]." Specifically, plaintiffs sought relief as follows: (1) declaratory judgment that transfers of occupancy tax proceeds from the designated tourism development fund to the County's General Fund are unlawful, (2) declaratory judgment that the County's expenditures of occupancy tax proceeds for public safety services are unlawful, (3) declaratory judgment that the County's expenditures of occupancy tax proceeds for non-promotional operations and activities of the County's Economic Development Department are unlawful, (4) declaratory judgment that the County's expenditures of occupancy tax proceeds for two ongoing projects—park facility construction and historic building restoration—are unlawful, (5) declaratory judgment that the County's loan of occupancy tax proceeds to finance the construction of a water treatment facility is unlawful, (6) declaratory judgment that the County's expenditures of occupancy tax proceeds to fund special service districts are unlawful, (7) declaratory judgment that the aforementioned claims violate the Amendment and N.C. Gen. Stat. § 159-13(b)(4) (2023), which prohibits expenditures of revenue for purposes not permitted by law, (8) declaratory judgment that the County's use of occupancy tax proceeds violates the North Carolina Constitution, (9) preliminary injunction against the use of occupancy tax proceeds for public safety services and equipment, (10) permanent injunction against the transfer of occupancy tax proceeds to the County's General Fund, and the use occupancy tax proceeds for public safety services or any other unlawful purpose, (11) court construction of the term "tourism-related expense" under N.C. Gen. Stat. § 1-254 (2023), (12) permanent injunction requiring the County to restore and replace unlawfully used occupancy tax proceeds, and (13) inclusion of the County Manager in his individual capacity.

The County filed its answer and partial motion to dismiss plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6) (2023). The motion to dismiss alleged that: (1) the Board of

Commissioners did not have the legal capacity to be sued,[1] (2) the County Manager was not a proper party,[2] and (3) plaintiffs' claim under the North Carolina Constitution was unavailable.[3] Plaintiffs then moved to preliminarily enjoin use of the funds for contested purposes, which the trial court later denied. Thereafter, plaintiffs moved for partial summary judgment as to their second cause of action concerning expenditures of occupancy tax proceeds "for public safety services, including police, emergency medical and fire services and equipment." The County moved for summary judgment as to all of plaintiffs' claims and requested the trial court to strike an affidavit submitted in plaintiffs' motion. The trial court held a hearing on the cross-motions in which it assessed "such weight and relevancy as it deem[ed] appropriate" to the contested affidavit, ordered summary judgment for the County on all claims, and denied plaintiffs' request for partial summary judgment. Plaintiffs timely entered their notice of appeal.

II. Jurisdiction

Jurisdiction is proper under N.C. Gen. Stat. § 7A-27(b)(1) (2023) since the trial court's order granting summary judgment is a final judgment.

III. Analysis

A. Tourism-Related Expenditures

The Session Law, enacted in 1987, allowed for three-quarters of the net proceeds of the tax levied under its subsection 1(a), to be spent "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). But, in 2004, the Amendment deleted this text and directed that the net proceeds of such tax levied under this subsection *shall* be used "only for tourism-related expenditures, including beach nourishment." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). The Amendment also removed the text directing the County to deposit the remainder of the net proceeds into its General Fund to "be used for any lawful purpose." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Additionally, the Amendment authorized a "Second Additional Occupancy Tax" under its

---

1. The trial court dismissed the Board of Commissioners from the suit.

2. Plaintiffs filed a notice of voluntary dismissal of the County Manager in his individual capacity and the trial court granted a dismissal in his official capacity from the suit.

3. The trial court dismissed this cause of action from the suit.

subsection 1(a2) only if the County "also levies the tax under subsections (a) and (a1)."[4] N.C. Sess. Law 2004-95, H.B. 1721 § 1(a2). However, the Amendment modified how the County "may" use the net proceeds of tax levied under subsections (a1) and (a2) to "shall use at least two-thirds" of these funds "to promote travel and tourism and shall use the remainder . . . for tourism-related expenditures." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Moreover, the Amendment required the County to create a Tourism and Development Authority to "expend the net proceeds of the tax levied under this act." N.C. Sess. Law 2004-95, H.B. 1721 § 3.

Not only did the Amendment eliminate portions of the Session Law, but it also provided greater specificity with definitions to direct the use of funds. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Notably, the Amendment defined "tourism-related expenditures" as those that "in the judgment of the . . . Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes tourism-related capital expenditures and beach nourishment." *Id.* And it defined expenditures that "promote travel and tourism" as those that "advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in these activities." *Id.* Language was also added to clarify the definition of net proceeds as "[g]ross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent [ ] of the first five hundred thousand dollars [ ] of gross receipts collected each year." *Id.*

The parties do not dispute that the Amendment eliminated the term "tourism related purposes," which the 1987 Session Law defined to include "construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection and emergency services." Also, the parties do not dispute that the Amendment replaced the term "tourism related purposes" with "tourism-related expenditures." The dispute concerns whether the Amendment prohibits certain expenditures that the County has classified as tourism-related expenditures. Plaintiffs contend that the County acted *ultra vires* by using these funds to pay for general public services

4. Referencing 1987 N.C. Sess. Laws 209, § 1(a) and N.C. Sess. Law 1999-155, H.B. 665 § 1(a1).

because the General Assembly deauthorized such spending in the Amendment. However, the County points to language in the Amendment that allows for the "the judgment of the . . . Board of Commissioners," to determine which expenditures are categorized as tourism-related.

Questions of statutory interpretation are reviewed *de novo*. *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted). "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). "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." *Id.* "Where . . . the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974). "If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction, including those above stated." *Id.* at 220, 210 S.E.2d at 203. With these principles in mind, we must consider whether the disputed expenditures are "designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

To the extent any ambiguity exists in the Amendment's use of the language "the judgment of the . . . Board of Commissioners" or "tourism-related expenditure," our analysis is guided by precedent which weighs against constructing the text as giving the Board of Commissioners unlimited discretion. "It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities. . . ." *Efird v. Bd. of Comm'rs for Forsyth Cnty.*, 219 N.C. 96, 106, 12 S.E.2d 889, 896 (1941) (citations omitted). "Counties . . . exist solely as political subdivisions of the State and are creatures of statute. They are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given." *Davidson Cnty. v. High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (citations omitted). And, "[p]owers which are necessarily implied from those expressly granted are only those which are indispensable in attaining

the objective sought by the grant of express power." *Id.* (citation omitted). Furthermore, such statutorily granted powers are to be "strictly construed." *Id.* (citations omitted). Thus, total deference to the judgment of the Board of Commissioners defies strict construction of their statutorily granted powers under the Amendment. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. 587, 589, 610 S.E.2d 255, 258 (2005).

We are also guided by the actions of the Legislature in their enactment of the Amendment. "[A] change in the language of a prior statute presumably connotes a change in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012). "Legislative history is a factor to consider in determining legislative intent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990) (citation omitted). The Amendment serves as "an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history." *Id.* (citations omitted). Here, we cannot ignore the Legislature's deliberate actions that eliminated some explicitly permitted uses of occupancy tax proceeds and crafted a definition of "tourism-related expenditures." N.C. Sess. Law 2004-95, H.B. 1721, § 2(e)(4). Likewise, it is difficult to overlook the Amendment's creation of a Tourism Development Authority "to expend the net proceeds of the tax levied under this act. . . ." N.C. Sess. Law 2004-95, H.B. 1721, § 3. *See Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 642, 870 S.E.2d 269, 277 (2022) ("[A] statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation.").

Our interpretation is correspondingly informed by the Amendment's title: "An Act to Allow an Increase in the Currituck County Tax and to Change the Purpose for Which the Tax may be Used." N.C. Sess. Law 2004-95, H.B. 1721; *see State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763-64 (1992) ("We therefore cannot, as defendant would have us do, ignore the title of the bill."). When "the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981); *see also Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (holding the title of a bill is "a legislative declaration of the tenor and object of the act"). Though not dispositive, the Amendment's title—which includes notating a change to the purpose for which the occupancy tax may be used—displays an intent by the Legislature to limit the scope of how occupancy tax expenditures may be used. *See, e.g.*, *In re FLS Owner II, LLC*, 244 N.C. App. 611, 616,

781 S.E.2d 300, 303 (2016); *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012); *State v. Flowers*, 318 N.C. 208, 215, 347 S.E.2d 773, 778 (1986).

Considering the Legislature's actions—the significant changes in the text and title of the Amendment—we can only conclude that their intent was to narrow the scope of how the County is permitted to use occupancy tax funds. While the County has discretion in deciding how to dispel occupancy taxes, it must do so within the directives set by the Legislature. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. at 590, 610 S.E.2d at 258. Our *de novo* review leads us to conclude that although the County was permitted some discretion in determining the use of net proceeds from occupancy tax levies, the Legislature intentionally removed some previously permitted uses and provided a narrower definition with definitive parameters to prohibit some of the County's customary expenditures permitted by the Session Law.

B. The Trial Court's Order for Summary Judgment

Following the dismissal of plaintiffs' claim under the North Carolina Constitution and denial of a preliminary injunction, plaintiffs moved for partial summary judgment and the County moved for summary judgment as to the remaining claims. Among those remaining claims, plaintiffs requested that the trial court enter declaratory judgment that the County's expenditures of occupancy tax proceeds for the following purposes are unlawful: (1) public safety services and equipment, (2) non-promotional operations and activities of the County's Economic Development Department, (3) construction of a park and restoration of a building historically used as a jail, (4) loan of occupancy tax proceeds to finance the construction of a water treatment facility, and (5) funding of special service districts. Further, plaintiffs maintained that these disputed uses of occupancy tax proceeds violate the Amendment and N.C. Gen. Stat. § 159-13(b)(4) (2023), which prohibit expenditures of revenue for purposes not permitted by law and sought judgment declaring the transfer of these funds from the Tourism Development Authority Fund to the County's General Fund unlawful. Additionally, plaintiffs requested court construction of the term "tourism-related expense" under N.C. Gen. Stat. § 1-254 (2023). In view of the foregoing claims, plaintiffs requested a permanent injunction against the transfer of occupancy tax proceeds to the County's General Fund, used for any unlawful purpose, as well as a permanent injunction requiring the County to restore and replace unlawfully used occupancy tax proceeds. The parties presented the trial court with their cross-motions for summary judgment based on conflicting interpretations of the Amendment and its impact

on expenditures originally authorized under the Session Law. N.C. Sess. Law 2004-95, H.B. 1721; N.C. Sess. Law 1987, Chapter 209, H.B. 555. The trial court denied partial summary judgment for plaintiffs and granted summary judgment for the County as to all claims.

A trial court should grant summary judgment only 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). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action. . . . The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "When considering a motion for summary judgment, the 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). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

Plaintiffs moved for summary judgment only as to their second cause of action, asserting an "impropriety of occupancy tax expenditures by the County on what [it] termed general public safety services." Plaintiffs characterized "general public safety services" to include police, fire, and emergency medical services and equipment. Further, plaintiffs maintained that other taxes, such as lodging and sales tax from tourists, are available to cover costs incidental to the impact of tourism with respect to these items. In support of their position, plaintiffs presented an affidavit citing documents and records of the County. The data displayed unrefuted instances of occupancy tax proceeds appropriated for the Currituck Outer Banks area's seasonal law enforcement and emergency medical services correlating to full annual costs. Moreover, the numbers showed that these funds covered the costs of equipment for law enforcement and a fire hydrant. The County does not dispute the expenditures alleged by plaintiffs. Rather, it moved the trial court for summary judgment as to the balance of the claims, arguing that "finances are just not relevant in this motion," and that the law "allow[ed] the County Board of Commissioners to determine what is a tourism-related expenditure." The record reveals no controversy as to the facts but as to the legal significance of those facts.

While plaintiffs' claim sought declaratory relief, this case is proper for summary judgment determining the applicability of the Amendment.

See Blades v. Raleigh, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972) ("Here, there is no substantial controversy as to the facts disclosed by the evidence. The controversy is as to the legal significance of those facts. Such controversy as there may be in respect of the facts presents questions of fact for determination by the court."). The County does not dispute the actions of the Legislature and contents of the Amendment but contends that since tourists create an increased need for services, it is permitted to use occupancy tax dollars to offset such costs. However, our analysis of the text of the Amendment and the Legislature's intent leads us to a different conclusion. The expenditures of the occupancy tax proceeds in the "judgment" of the Board of Commissioners are reviewable and subject to the constraints contained in the law. *See Efird v. Bd. of Comm'rs for Forsyth Cnty.*, 219 N.C. at 106, 12 S.E.2d at 896. The constraints here are readily apparent from the plain language contained in the Amendment as the authority to expend these resources in this manner was neither expressly conferred upon the County nor necessarily implied from those expressly given. *See Davidson Cnty. v. High Point*, 321 N.C. at 257, 362 S.E.2d at 557. Moreover, any alleged ambiguity within the law is resolved by the title of the Amendment and the Legislature's removal of specific language. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. at 216, 388 S.E.2d at 141; *see State ex rel. Cobey v. Simpson*, 333 N.C. at 90, 423 S.E.2d at 763-64.

We conclude that the disputed expenditures in plaintiffs' second cause of action are not "designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities . . . by attracting tourists or business travelers to the county." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Here, "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" as to plaintiffs' second claim for relief. N.C. Gen. Stat. § 1A-1, Rule 56(c). Accordingly, we reverse the trial court's denial of partial summary judgment for plaintiff and vacate the trial court's grant of summary judgment for the County as to the remaining claims. We remand this matter for proceedings not inconsistent with this opinion.

IV. Conclusion

An application of guiding legal principles and precedent leads us to conclude that significant alterations to the original language contained in the Session Law and additions included in the Amendment convey an intent by the Legislature to narrow the scope of expenditures funded by the net proceeds of levied occupancy tax. The Amendment limits

the discretion of the Board of Commissioners and requires that such funds shall be spent only as permitted by strict construction of the term "tourism-related expenditures." Considering the evidence contained in the record, in a light most favorable to the County, we hold that the County did not act in accordance with the Amendment when spending occupancy tax proceeds for public safety services and equipment. This is not to say that the County has acted in bad faith, rather our determination is based on expenditures contained in the record which were no longer authorized after the Amendment was enacted. Therefore, we reverse the trial court's denial of summary judgment for plaintiffs and remand to the Superior Court for entry of summary judgment for plaintiffs as to the past expenditures in their second cause of action. We also vacate the trial court's grant of summary judgment for the County on the remaining claims. Furthermore, we remand this matter to the trial court for proceedings not inconsistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judge MURPHY concurs.

Judge HAMPSON concurs in a separate opinion.

HAMPSON, Judge, concurring.

I agree with the Opinion of the Court that (a) summary judgment was improperly entered for the County on the second claim for relief; (b) summary judgment as to the remaining claims should also be vacated; and (c) this matter should be remanded to the trial court for further proceedings. I write separately to emphasize that—in my view—the County's use of occupancy tax funds to fund law enforcement, emergency medical services, and fire protection might well be expenditures that, "in the judgment of the . . . Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county." 2004 N.C. Sess. Law 95, § 2(e)(4). Here, however, the Record does not disclose that in appropriating the proceeds of the occupancy tax, the County—through its Board of Commissioners—exercised its judgment, or discretion, in so doing.

The local legislation at issue provides a statutory mechanism whereby the County may enact occupancy taxes. *See* 1987 N.C. Sess. Laws 209, § 1(a); 2004 N.C. Sess. Law 95, § 1(a2). The Board of Commissioners

then exercises its judgment to determine what are tourism-related expenditures. 2004 N.C. Sess. Law 95, § 2(e). As Defendants note in their briefing, the 2004 amended act also required creation of the Currituck County Tourism Development Authority (TDA). The act further imposes the duty on the TDA to expend the occupancy tax revenue to "promote travel, tourism, and conventions in the county, sponsor tourist-related events and activities in the county, and finance tourist-related capital projects in the county." 2004 N.C. Sess. Law 95, § 3(1.1).

The Record here—including Defendants' own forecast of evidence—reflects, however, all occupancy tax revenue goes to the TDA, which keeps 1/3 of the funds for its tourism-related activities and submits the remaining 2/3 of the funds back to the County's general fund for spending by the County in the Commissioners' discretionary budgetary authority. Nowhere in this process is there any indication that the Board of Commissioners is exercising any judgment in determining what constitutes a tourism-related expenditure before funds are assigned to the general fund (or other special funds). In my view, while it facially appears the County is proceeding in good faith and there is no allegation the County's budgetary process does not conform to law, the County's appropriations of the occupancy tax is being performed under a misapprehension of the applicable law. *See Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion." (citations omitted)). Thus, I would conclude the County has abused its discretion in its appropriation of the occupancy tax revenues without exercising its judgment to determine it was expending those funds for tourism-related activities. Therefore, the trial court's order is properly reversed in part, vacated in part, and this matter remanded for further proceedings.

eDEALER SERVICES, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT
AND
VANGUARD DIRECT, INC., RESPONDENT-INTERVENOR

No. COA23-680

Filed 19 March 2024

1. Administrative Law—final agency decision—award of information technology contract—scope of review by superior court—standards of review

The superior court, acting as appellate court, used the correct standards of review to determine whether a final agency decision by the State Chief Information Officer correctly affirmed the award of an information technology contract to one of two competing bidders. The superior court correctly reviewed claims regarding procedural errors under a de novo standard of review, and substantive claims challenging the agency decision as arbitrary, capricious, and an abuse of discretion under whole-record review. Further, the superior court did not impermissibly engage in independent fact-finding when it considered the factual history of the case based on the official record, which included the proposed decision of an administrative law judge and the final agency decision.

2. Administrative Law—final agency decision—award of information technology contract—superior court review—procurement process not followed

Upon review of the final decision of the State Chief Information Officer that had confirmed the award of an information technology contract to one of two competing bidders, the superior court, acting as appellate court, correctly applied de novo and whole-record standards of review to alleged procedural and substantive errors, respectively, when it determined that the agency's evaluating committee failed to follow applicable law and the evaluation criteria of the procurement process when assessing the relative merits of the two bidders and, therefore, that the final agency decision should be vacated for being arbitrary and capricious and an error of law.

3. Administrative Law—final agency decision—award of information technology contract—arbitrary and capricious—scope of relief—trial court's authority

After determining that the final decision of the State Chief Information Officer confirming the award of an information technology contract to one of two competing bidders was arbitrary and capricious and an error of law, the superior court acted within the authority granted by section 150B-51(c) of the Administrative Procedure Act (APA)—the controlling statutory scheme—when it modified the final agency decision by vacating the contract to the bidder chosen by the agency and awarding the contract to the other bidder, and the court was under no obligation pursuant to the APA to remand for further findings of fact.

Appeal by respondent-appellant and intervenor-appellant from order entered 5 March 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans and Special Deputy Attorney General Kathryne E. Hathcock, for respondent-appellant.

Stevens, Martin, Vaughn & Tadych, PLLC, by Michael J. Tadych and K. Matthew Vaughn, for respondent-intervenor-appellant.

Parker Poe Adams & Bernstein, LLP, by R. Bruce Thompson, II, Michael A. Goldsticker, and Catherine G. Clodfelter, for petitioner-appellee.

FLOOD, Judge.

The North Carolina Department of Transportation (the "NCDOT") and Vanguard Direct, Inc. appeal from the superior court's order and opinion vacating a contract the NCDOT had awarded to Vanguard. On appeal, the NCDOT and Vanguard argue the superior court erred by: (A) incorrectly applying the relevant standards of review by making independent findings of fact; and (B) reversing the Final Agency Decision and ordering the contract be awarded to eDealer Services, LLC instead of remanding to State Chief Information Officer Thomas Parish, IV (the "State CIO") for further findings. After careful review, we affirm.

I. Factual and Procedural Background

In 2019, the NCDOT and the North Carolina Department of Information Technology (the "NCDIT") issued a Request for Proposal (the "RFP"), seeking proposals from bidders to be the vendor for North

Carolina's ELT Solution. The ELT Solution is an electronic platform that tracks lien and title information between the NCDOT and the lienholder of a vehicle. The RFP used a "Best Value" procurement method that considered five criteria when evaluating bids:

> **Criterion A:** Substantial conformity to solicitation specifications and requirements
>
> **Criterion B:** Proposed project approach and schedule
>
> **Criterion C:** Corporate existence of similar size and scope and strength of references relevant to technology areas of specifications
>
> **Criterion D:** Explanations of the Statewide Technical Architecture Objectives
>
> **Criterion E:** Price

eDealer and Vanguard were the only vendors to submit proposals in response to the RFP. These two proposals were evaluated by the appointed Evaluation Committee (the "Committee") and subject matter experts for the NCDIT and the NCDOT. In the review process, the Committee evaluated the strengths and weaknesses of eDealer's and Vanguard's proposals and then compared and contrasted the proposals. Thereafter, the Committee determined Vanguard's proposal was the most advantageous and offered the "best value" to the State.

In June 2020, the NCDOT awarded Vanguard the contract. On 26 June 2020, eDealer filed a bid protest with the NCDOT and the NCDIT, arguing the Committee improperly applied the procurement rules and policies and improperly evaluated the competing proposals. On 8 September 2020, the NCDOT sent a written response to eDealer, affirming its decision to award the contract to Vanguard.

On 22 October 2020, eDealer sent a letter to the State CIO and requested a hearing on the bid protest. The State CIO applied to the Office of Administrative Hearings (the "OAH") requesting it preside over the bid protest. On 6 November 2020, the OAH issued a Notice of Contested Case and Assignment. After ten months of pre-hearing filings, the matter came before an Administrative Law Judge (the "ALJ") on 8 through 10 and 17 September 2021.

At the conclusion of the hearing, the ALJ issued a Proposed Decision recommending that the State CIO cancel the contract award to Vanguard and award the contract to eDealer. In its proposed decision,

the ALJ concluded that the Committee failed to use proper procedures, and Vanguard failed to meet "multiple" RFP requirements, rendering its proposal incomplete.

On 8 June 2022, the State CIO reviewed the ALJ's Proposed Decision and issued a Final Agency Decision (the "Final Decision"), concluding eDealer failed to meet its burden of showing the award to Vanguard was an error, rejecting the ALJ's Proposed Decision, and affirming the award to Vanguard.

On 8 July 2022, eDealer filed a Petition for Judicial Review with Wake County Superior Court, requesting the award to Vanguard be canceled and the contract be awarded to eDealer. On 5 March 2023, the superior court issued its Order and Opinion on Petition for Judicial Review (the "Order"), concluding the Final Decision contained procedural errors, and the award to Vanguard was "arbitrary and capricious." In lieu of remanding to the State CIO for further findings, the superior court vacated the award to Vanguard and awarded the contract to eDealer. The superior court concluded remand would be "futile" as the "only reasonable decision, justified by the entire record, was that eDealer's proposal provided the 'Best Value' to the State."

The NCDOT and Vanguard filed separate notices of appeal.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final judgment from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

The NCDOT and Vanguard present two issues on appeal: whether the superior court, sitting as an appellate court, erred by (A) failing to apply the proper standards of review and improperly making findings of fact and conclusions of law, leading to the vacatur of the award to Vanguard; and (B) exceeding its authority in ruling to reverse the Final Decision and order the contract be issued to eDealer, instead of remanding to the State CIO for further findings.

A. Standards of Review

[1] We first address the NCDOT and Vanguard's contention that the superior court misapplied the applicable standards of review. Specifically, the NCDOT and Vanguard argue the superior court did not apply the proper standards of review because it made new, independent factual findings when conducting its *de novo* and whole-record reviews. We disagree.

Under our review of a superior court's order entered upon review of an agency decision, we must first "determine whether the trial court exercised the appropriate scope of review and, if appropriate[,] . . . decide whether the trial court did so properly." *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 40, 684 S.E.2d 914, 918 (2009) (alterations in original) (citation omitted and internal quotation marks omitted).

1. Appropriate Scope of Review

"The proper standard for the superior court's judicial review 'depends upon the particular issues presented on appeal.' " *Powell v. N.C. Crim. Just. Educ. and Training Standards Comm'n*, 165 N.C. App. 848, 851, 600 S.E.2d 56, 58 (2004) (citation omitted). "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *N.C. Dep't of Env't and Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (second alteration in original) (citation and internal quotation marks omitted). Thus, claims that a decision is "[m]ade upon unlawful procedure" receive *de novo* review whereas claims that a decision is "[u]nsupported by substantial evidence . . . or [is a]rbitrary or capricious" receive whole-record review. *Id.* at 658–59, 599 S.E.2d at 894.

In its request for judicial review, eDealer argued the Final Decision was made upon unlawful procedure. In its petition, eDealer alleged, *inter alia*, the Final Decision relied on the following procedural errors: (1) the Committee failed to employ a "Best Value" methodology as required by law; (2) Vanguard's proposal failed to satisfy all the RFP requirements, resulting in multiple material deficiencies; (3) the Committee impermissibly used clarifications to cure Vanguard's material deficiencies; and (4) the Committee failed to follow their own procedures when evaluating eDealer and Vanguard's strengths and weaknesses because they relied on two out of the five criteria.

Based on eDealer's assignment of the above procedural errors, the superior court correctly noted that it reviews claims of procedural errors under a *de novo* standard of review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

eDealer further argued that the Final Decision was unsupported by substantial evidence, and was arbitrary, capricious, and an abuse of discretion because the Committee failed to apply the "Best Value" methodology, which led to several errors in their analyses of Criterion A, Criterion B, and Criterion C. Again, the superior court correctly noted

that its review of these claims was whole-record review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

The NCDOT and Vanguard concede that the superior court correctly summarized the standards of review in its Order, but argue that the Order demonstrates that the superior court impermissibly made new independent factual findings. The NCDOT specifically challenges paragraphs 11–15, 17–20, 22–29, 54(b), 57–62, and 66–67.

"According to well-established law, it is the responsibility of the administrative body, not the 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.' " *Bill Davis Racing*, 201 N.C. App. at 41, 684 S.E.2d at 919 (citation omitted). The superior court, therefore, acts as an appellate court when exercising judicial review over an agency decision. *See In re Denial of N.C. IDEA's Refund of Sales*, 196 N.C. App. 426, 432, 675 S.E.2d 88, 94 (2009). "It is the traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure, while generally deferring to the latter's 'unchallenged superiority' to act as finders of fact[.]" *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citations omitted).

Here, the NCDOT's argument that the Order includes independent findings of fact lacks merit. The "findings" challenged by the NCDOT are not independent findings of fact the superior court reached based on logical reasoning through the evidentiary facts. *See Weaver v. Dedmon*, 253 N.C. App. 622, 631, 801 S.E.2d 131, 138 (2017) ("Any determination reached through logical reasoning is properly classified as a finding of fact."). Instead, the superior court, through paragraphs 11–15, 17–20, and 22–29, detailed the factual history of the case based on the findings contained in the Final Decision and the Proposed Decision. *See Bill Davis Racing*, 201 N.C. App. at 43, 684 S.E.2d at 920 (reasoning the inclusion of findings of fact in the trial court's order may not "necessitate a conclusion that it applied an incorrect standard of review" if the trial court merely summarized the findings of fact made by the administrative agency).

The NCDOT argues that consideration of the Proposed Decision was in error because the superior court was bound to the *agency's record* and the findings made in the Final Decision. This, however, is an incorrect statement of law, and as eDealer points out, would lead to the "rubber stamping" of an agency's decision and "render judicial review hollow." Contrary to the NCDOT's arguments, "[i]n reviewing a final decision in a contested case, the [trial] court shall determine whether

the petitioner is entitled to the relief sought in the petition based upon its review of the final decision *and the official record*." N.C. Gen. Stat. § 150B-51(c) (2023) (emphasis added).

Thus, the superior court was within its authority to consider both the Proposed Decision and the Final Decision when reviewing the evidence and did not engage in independent fact finding. *See id.*

As for paragraphs 54(b), 57–62, and 66–67, these paragraphs were included in the superior court's *de novo* and whole-record reviews and can be more clearly analyzed under the second prong of our analysis—whether the superior court applied the standards of review correctly. *See Bill Davis Racing*, 201 N.C. App. at 40, 684 S.E.2d at 918.

2. Applications of Standards of Review

[2] We next consider whether, in light of our standard of review, the superior court properly applied the *de novo* standard of review to the alleged procedural errors in the Final Decision, and whole-record review to the alleged substantive errors.

a. *De Novo Review*

The NCDOT and Vanguard argue the superior court failed to properly apply the *de novo* standard of review because it failed to give due deference to the State CIO's expertise and did not adequately explain how or why the contemplated errors were made upon unlawful procedure or affected by an error of law. We disagree.

Under a *de novo* review, "the reviewing court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." *Meza v. Div. Soc. Servs.*, 364 N.C. 61, 69, 692 S.E.2d 96, 102 (2010) (citation and internal quotation marks omitted). Even when considering the matter anew, a reviewing court "traditionally give[s] some deference to an agency's right to interpret the statute which it administers." *Armstrong v. N.C. State Bd. of Dental Exam'rs*, 129 N.C. App. 153, 159, 499 S.E.2d 462, 467 (1998). "[A]n agency's interpretation is not binding, [however,] [a]nd under no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation and internal quotation marks omitted).

Here, the superior court included four specific instances that show the Committee failed to follow proper procedure for the procurement process. We review each instance in order.

(i) Best Value Methodology

First, the superior court concluded the Committee improperly applied the "Best Value" methodology because the members of the Committee were instructed that they would need to come to consensus as to each proposal's ratings before performing a direct comparison of the competing proposals.

Our General Statutes establish that "[t]he acquisition of information technology by the State of North Carolina shall be conducted using the Best Value procurement method." N.C. Gen. Stat. § 143-135.9(c) (2023). Under the North Carolina Administrative Code, this "Best Value" methodology requires the Committee to evaluate the "relative strengths, deficiencies, weaknesses, and risk supporting its award recommendation." 09 NCAC 06B .0302(1)(f) (2023).

The NCDOT argues that, although the superior court stated the language of the statute, it did not explain how the Committee failed to apply the Best Value method. This argument is unsupported by the face of the Order.

In paragraph 54(a) of the Order, the superior court stated:

> (a) The Evaluation Committee[e] did not properly apply the "Best Value" methodology. . . . The "Best Value" method requires an evaluation of each proposal's "relative strengths, deficiencies, weaknesses, and risks," and consists of "a comparative evaluation of technical merit and costs." 09 NCAC 06B .0302(1)(f) and (2). The Evaluation Committee's prohibition on comparing the two proposals while grading each Evaluation Criterion, Specification, and Requirement did not follow proper procedure for a "Best Value" procurement. The Final Decision notes that the proposals were eventually compared at the **end** of the evaluation process. By that time, however, the Evaluation Committee had already reached consensus final grades for each proposal. Those grades – made without the benefit of any direct comparison – formed the primary basis of the contract award.

The superior court likewise included a detailed explanation of what the "Best Value" method required and how the Committee failed to properly apply the method.

The superior court, therefore, properly applied the relevant law to the facts of this case and conducted a proper *de novo* review. *See Meza*, 364 N.C. at 69, 692 S.E.2d at 102.

(ii) Mandatory Requirements

Next, the superior court concluded the Committee should not have considered Vanguard's proposal as it failed to meet certain, mandatory RFP requirements, rendering the proposal incomplete and therefore invalid.

The superior court's conclusion reflects a proper application of the procurement requirements to the relevant facts. According to paragraph 54(b) of the Order:

> (b) Vanguard's proposal failed to meet certain threshold "Requirements," which, under NCDIT procurement rules, are mandatory and must be satisfied in order for a proposal to be considered. With respect to the missing PMP certification and missing deliverables, the Final Decision contends that these were not mandatory "Requirements." Final Decision at 16, ¶ 65. Yet these items were expressly labeled in the RFP under the category "Project Management **Requirements**." Pet'r Ex. 1 at 5 & 19. With respect to references, the RFP stated that "[o]ffers **must** provide three (3) current References for work of similar scope and size." Pet'r Ex. 1 at 37. Here, the Final Decision agrees that use of the word "must" denotes a non-waivable Requirement, but the Final Decision found that Vanguard's submission of any three references —regardless of scope or size — was sufficient. Final Decision at 8, ¶¶ 19, 80, 179. This is incorrect in that the plain terms of the RFP require the references to concern work of "similar scope and size."

Despite the specificity of the superior court's consideration of Vanguard's proposal in light of the RFP requisites, the NCDOT argues that the superior court failed to consider the definition of "requirements" as provided "within the DIT Procurement Policies and Procedures Manual in the record."

The Policies and Procedures Manual defines "requirements" as:

> Features mandated by State legislation; regulatory attributes that must adhere to a type of governance, such as HIPAA or FERPA; statewide policies and procedures, such as Architecture and Security; and certain technical specifications defined by the procuring Agency. *Considered nonnegotiable.*

(emphasis added).

It is clear from the plain language of the definition that any and all requirements were nonnegotiable, and omission of any requirement would render a proposal incomplete. Further, the definition lends no support to the NCDOT's conclusory statement as to the superior court's failure to properly interpret the information in the record.

The NCDOT further argues that the superior court reached this conclusion despite the "Final Decision's direct citation to the information at issue." We interpret this to be an argument that Vanguard's clarifications cured these defects. This argument is more fully discussed in our consideration of the superior court's third illustration of the Final Decision's procedural errors, to which we next turn.

(iii) Clarifications

Third, the superior court concluded the "Committee improperly used clarifications to cure material deficiencies in Vanguard's Proposal."

Pursuant to the RFP, vendors were required to submit written offers that conformed with enumerated specifications. The Committee was required to evaluate these written proposals pursuant to the above described "Best Value" method. The Committee was permitted to request clarifications; however, pursuant to law, "[c]larifications *shall not* be utilized to cure material deficiencies or to negotiate." 09 NCAC 06B .0307 (emphasis added).

In its third illustration, the superior court concluded the Committee's use of clarifications to cure material deficiencies in Vanguard's proposal was in violation of the applicable law and the procurement procedures. While the superior court failed to state in its analysis of the third illustration the legal support for why the Committee's reliance on clarifications to cure Vanguard's material deficiencies was unlawful, it did state in its factual background that the Committee was prohibited, pursuant to 09 NCAC 06B .0307, from using requests for clarification to cure material defects in the written proposal. The inclusion of this correctly stated rule demonstrates to this Court that the superior court conducted an appropriate *de novo* review when determining the Committee could not rely on clarifications to cure material defects. *See* 09 NCAC 06B .0307.

(iv) Evaluation Criteria

Finally, the superior court concluded the Committee erred by focusing solely on Criterion A and Criterion E and "should have engaged in a more substantive, multi-factored analysis" which would have included consideration of the remaining three criteria.

The superior court correctly stated that the Final Decision, to justify the award to Vanguard, relied on Vanguard's eleven strengths and zero weaknesses, as compared to eDealer's four strengths and two weaknesses. These strengths and weaknesses, however, were solely based on Criteria A and E, which for reasons discussed below, was in error.

The superior court's conclusion that the Committee should have engaged in a more "substantive multi-factored analysis rather than focus on these few specifications" reflects a proper *de novo* review. Accordingly, a thorough review of the Order demonstrates that the superior court properly applied a *de novo* review and did so without engaging in independent fact finding. *See Bill Davis Racing*, 201 N.C. App. at 40, 684 S.E.2d at 918.

b. *Whole-Record Review*

The NCDOT and Vanguard argue the superior court incorrectly applied the whole-record review because it compared its review of the record against the Final Decision instead of determining whether the Final Decision was supported by substantial evidence. We disagree.

When applying the whole-record test, "the reviewing court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Meza*, 364 N.C. at 69–70, 692 S.E.2d at 102 (citation and internal quotation marks omitted). "Rather, a court must examine *all the record evidence*—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (emphasis added) (citation omitted). "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* at 660, 599 S.E.2d at 895 (citation and internal quotation marks omitted).

The NCDOT once again seems to argue, more specifically, that the superior court was bound by the evidence contained in the Final Decision and could not consider the Proposed Decision. As explained above, this is an incorrect interpretation of the law. A review of the Order shows the superior court correctly engaged in a whole-record review. The superior court concluded "the contract award to Vanguard was unsupported by substantial evidence in view of the entire record and [] it was arbitrary, capricious, and an abuse of discretion." We interpret this conclusion to be based on a review of whether the evidence in the record, including the Proposed Decision, supported the Final Decision, rather than based on a "new evaluation of the evidence[,]" as the NCDOT argues.

First, the superior court reasoned the lack of evidence supporting the Final Decision's award of the contract to Vanguard was "most apparent with respect to Criterion C[,] which concerned 'Corporate Experience of Similar Size and Scope and Strength of references Relevant or Material to Technology area(s) or Specifications.' " The superior court concluded the whole record did not support a conclusion that Vanguard and eDealer were equal with respect to this criterion because "no reasonable mind would find the parties to have the same degree of experience based on all the evidence presented." The superior court then proceeded to detail the evidence contained in the official record that shows eDealer had far more ELT experience than Vanguard. Contrary to the NCDOT and Vanguard's arguments, we conclude this was not the superior court conducting a "new evaluation of the evidence" but was instead the superior court determining that the Final Decision's conclusion that Vanguard was the stronger applicant with respect to Criterion C was not supported by substantial evidence—a correct application of whole-record review. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Second, the superior court reviewed whether the Final Decision's conclusion that Vanguard was the stronger applicant with respect to Criterion B—proposed project schedule—was supported by substantial evidence. In its proposal, Vanguard listed a proposed schedule of 381 days whereas eDealer's proposed schedule was forty-five days. Despite this great disparity in the proposed schedules, the Final Decision concluded it was reasonable to evaluate both proposals as the same with respect to Criterion B. The superior court concluded, and we agree, that this conclusion was wholly unsupported by the evidence as eDealer's schedule was more than eight times shorter than Vanguard's.

Lastly, the superior court concluded the Final Decision's award of the contract to Vanguard based on Vanguard's "strengths" with respect to Criterion A was unsupported for reasons discussed above. Based on the superior court's analysis, it concluded that the Final Decision could not "be reconciled, under any reasonable interpretation of all the relevant evidence, with the fact that eDealer's proposal was superior with respect to Evaluation Criteria A, B, and C—the three most important Evaluation Criteria." Perhaps most importantly, the superior court stated:

> In conducting its review, the [c]ourt has not independently weighed each of these Evaluation Criteria, requirements, and specifications just discussed. Instead, after reviewing the entire record, the [c]ourt finds no discernible basis to justify the favorable grades that Vanguard received

> over eDealer for these specifications, such that the Final Decision was arbitrary and capricious.

This was not a hollow statement included by the superior court to justify its conclusion, as it is clear to this Court that this statement is supported by the evidence in the Record on Appeal.

Based on our review of the Order and the entire Record on Appeal, we conclude the superior court correctly applied the whole-record review and was justified in its ultimate conclusion that the Final Decision was unsupported by substantial evidence. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

The superior court, therefore, appropriately applied *de novo* review to the procedural errors and whole-record review to the substantive errors, and did so correctly. Thus, the superior court was justified in determining the award to Vanguard was arbitrary and capricious and an error of law. *See Bill Davis Racing*, 201 N.C. App. at 40, 684 S.E.2d at 918.

B. Disposition of the Order

[3] The NCDOT and Vanguard's second assignment of error is that the superior court should have remanded the case for further findings instead of vacating the award to Vanguard and awarding the contract to eDealer. We disagree.

Issues of statutory interpretation are questions of law reviewed *de novo*. *Armstrong*, 129 N.C. App. at 156, 499 S.E.2d at 466. The Administrative Procedure Act (the "APA") grants a reviewing court broad discretion to determine the scope of relief that should be afforded in response to an erroneous agency decision. When a reviewing court determines a decision is made on unlawful procedure or is arbitrary or capricious, "[t]he court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision . . . ." N.C. Gen. Stat. § 150B-51(b) (2023).

Here, the superior court identified four illustrations of how the procurement process failed to follow proper procedure. The superior court then determined the Final Decision was unsupported by substantial evidence because it was arbitrary, capricious, and an abuse of discretion. Based on these identified errors, and the lack of evidence in the record to support the award to Vanguard, the superior court determined remand would be "futile," reversed the Final Decision, and awarded the contract to eDealer. The superior court was within its statutory authority to modify the order instead of remanding for further findings. *See* N.C. Gen. Stat. § 150B-51(b).

The NCDOT and Vanguard, however, argue the NCDIT has sole discretion to review an award of information technology contracts, and the superior court could not modify the award pursuant to N.C. Gen. Stat. § 150B-51(b). An acceptance of this argument would lead to the conclusion that the NCDIT is exempt from the APA, which would be an erroneous interpretation of the relevant statutes. The NCDOT and Vanguard also argue the controlling statute is clear and unambiguous. The NCDOT and Vanguard are correct the controlling statute is unambiguous, but they are incorrect as to which statute is controlling.

Under N.C. Gen. Stat. § 143B-1350(a), "[t]he State CIO is responsible for establishing policies and procedures for information technology procurement for State agencies. *Notwithstanding any other provisions of law*, the Department shall . . . approve information technology procurements . . . ." N.C. Gen. Stat. § 143B-1350(a) (2023) (emphasis added). The APA applies to *every agency*, except those the APA explicitly enumerates as being excepted from the APA, of which neither the NCDIT nor the NCDOT is included. *See* N.C. Gen. Stat. § 150B-1(c)(1)–(8). "Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning." *Armstrong*, 129 N.C. App. at 156, 499 S.E.2d at 466.

The language of the APA makes clear that it applies to *all agencies*, except those that fall under very specific exemptions. The statutory provisions pertaining to Information Technology contracts apply "*notwithstanding any other provisions of law*." *See* N.C. Gen. Stat. §143B-1350(a) (emphasis added). Based on this language, coupled with the General Assembly's omission of the NCDIT from its list of agencies exempted from the APA, we are left with the conclusion that the APA is the controlling statutory scheme.

The superior court, therefore, had the authority under N.C. Gen. Stat. §150B-51(c) to modify the Final Decision, vacate the contract to Vanguard, and award the contract to eDealer. The superior court had no obligation to remand for further findings of fact. *See* N.C. Gen. Stat. §150B-51(c).

Having concluded the APA is the controlling statute, and the superior court had the authority to modify the Final Decision in lieu of remanding, we reach neither the NCDOT's nor Vanguard's remaining arguments.

IV. Conclusion

We conclude the superior court applied the correct standards of review and did not make independent findings of fact, but rather utilized

information contained in the official record to conclude the State CIO contract award to Vanguard was erroneous. We further conclude the superior court had the authority to modify the contract award instead of remanding for further fact finding.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

FLETCHER HOSPITAL INC. D/B/A ADVENTHEALTH HENDERSONVILLE, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING AND CERTIFICATE OF NEED SECTION, RESPONDENT
AND
MH MISSION HOSPITAL, LLLP, RESPONDENT-INTERVENOR

No. COA23-672

Filed 19 March 2024

1. Hospitals and Other Medical Facilities—certificate of need—failure to conduct a public hearing—agency error

The N.C. Department of Health and Human Services Certificate of Need Section erred by conditionally approving a certificate of need (CON) application for a freestanding emergency department without holding an in-person public hearing pursuant to N.C.G.S. § 131E-185(a1)(2); even though the agency provided an alternative to a hearing due to public health concerns in the midst of the COVID-19 pandemic, the agency had no authority to suspend the statutory hearing requirements.

2. Hospitals and Other Medical Facilities—certificate of need—contested case—agency error—substantial prejudice not presumed

In a contested case hearing challenging the conditional approval of a certificate of need application to develop a freestanding emergency department, although the Administrative Law Judge (ALJ) correctly determined that the agency committed error by failing to hold a public hearing pursuant to statute, the appellate court vacated the ALJ's order granting summary judgment in favor of petitioner (another healthcare provider that filed comments in opposition to the CON application) and remanded the matter for further

proceedings because petitioner had not established that the error substantially prejudiced its rights, which could not be presumed under the facts of this case and needed to be proven.

Appeal by respondent and respondent-intervenor from a Final Decision entered 17 March 2023 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 20 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellant N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Matthew A. Fisher, Kenneth L. Burgess, Iain M. Stauffer, and William F. Maddrey, for respondent-intervenor-appellant MH Mission Hospital, LLLP.

Wyrick Robbins Yates & Ponton LLP, by Charles George, Frank S. Kirschbaum, Trevor P. Presler, for petitioner-appellee Fletcher Hospital. Inc., d/b/a AdventHealth Hendersonville.

Nelson Mullins Riley & Scarborough LLP, by Andrew T. Heath, Noah H. Huffstetler, III, D. Martin Warf, Nathaniel J. Pencook, Candace S. Friel, and Lorin J. Lapidus, for Amici Curiae University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System.

GORE, Judge.

Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the "Agency" or the "Department") and respondent-intervenor MH Mission Hospital, LLLP ("Mission"), appeal from a Final Decision entered 17 March 2023 by Administrative Law Judge David F. Sutton (the "ALJ"), which granted summary judgment for petitioner Fletcher Hospital. Inc., d/b/a AdventHealth Hendersonville ("AdventHealth"). The ALJ's Final Decision granting summary judgment in favor of AdventHealth, denying the Agency and Mission's respective motions for summary judgment, and reversing the Agency's decision to

conditionally approve Mission's Certificate of Need ("CON") application, is a final decision subject to the provisions of N.C.G.S. § 131E-188(b). Therefore, this Court has jurisdiction pursuant to N.C.G.S. § 7A-29(a).

Respondents present two issues for review: (i) whether the ALJ erroneously concluded that the Agency erred by not holding a public hearing on Mission's CON application pursuant to N.C.G.S. § 131E-185(a1)(2), and (ii) whether the ALJ erred in concluding that AdventHealth had shown substantial prejudice as a matter of law as the result of the Agency's alleged error. Upon review, we vacate and remand for additional proceedings.

I.

In this case, Mission submitted a non-competitive application to develop a freestanding emergency department ("FSED") in Chandler, North Carolina. The total projected capital expenditure for the FSED was $14,749,500. The Agency did not hold an in-person public hearing on Mission's CON application, citing public health concerns related to the COVID-19 pandemic. Instead, the Agency devised an alternative process whereby members of the public could submit written comments regarding applications under review in lieu of appearing at in-person public hearings.

AdventHealth filed written comments in opposition to Mission's application to develop the FSED. Pursuant to the alternative process, members of the public also filed written comments in lieu of appearing at an in-person public hearing. At the conclusion of the review, the Agency conditionally approved Mission's CON application to develop the FSED.

AdventHealth commenced this action by filing a Petition for Contested Case Hearing on 23 June 2022 contesting the Agency's decision to conditionally approve Mission's CON application. AdventHealth alleged, among other things, that the Agency's failure to hold an in-person public hearing constituted Agency error and substantially prejudiced AdventHealth's rights as a matter of law. AdventHealth, the Agency, and Mission all filed motions for summary judgment on 15 February 2023. The ALJ held a hearing on the motions on 27 February 2023. The ALJ entered its Final Decision granting summary judgment in favor of AdventHealth on 17 March 2023.

On 14 April 2023, the Agency and Mission each filed written notice of appeal from the ALJ's 17 March 2023 Final Decision.

II.

"The nature of the error asserted determines the appropriate manner of review[.]" *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596 (2005) (citation omitted). "Where a party asserts an error of law occurred, we apply a *de novo* standard of review." *Presbyterian Hosp. v. N.C. DHHS*, 177 N.C. App. 780, 782 (2006) (quotation marks and citation omitted). Here, respondents assert the ALJ erred in concluding that petitioner AdventHealth was entitled to judgment as a matter of law. "As summary judgment is a matter of law, review by the Court in this matter is *de novo*." *Id.* (internal citation omitted).

"[J]ust as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision." *Cumberland Cnty. Hosp. Sys. v. N.C. DHHS*, 237 N.C. App. 113, 119 (2014). 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.G.S. § 1A-1, Rule 56(c) (2023).

> The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. To meet its burden, the movant is required to present a forecast of the evidence available at trial that shows there is no material issue of fact concerning an essential element of the non-movant's claim and that the element could not be proved by the non-movant through the presentation of further evidence.

Bio-Medical Applications of N.C. Inc. v. N.C. DHHS, 282 N.C. App. 413, 415 (2022).

III.

[1] The first question presented is whether the ALJ correctly determined that the Agency erred by failing to hold a public hearing on Mission's CON application under N.C.G.S. § 131E-185(a1)(2). We conclude that AdventHealth has shown Agency error.

The North Carolina General Assembly has designated the Agency as the health planning agency for the State of North Carolina and empowered it to establish standards, plans, criteria, and rules to carry out the provisions and purposes of the CON Law (§§ 131E-175–192) and to

grant or deny CONs. N.C.G.S. §§ 131E-177(1), (6) (2023). The CON Law requires health care providers to obtain a CON from the Agency before developing or offering a "new institutional health service" within the State. § 131E-178(a) (2023).

In this case, Mission's proposed capital expenditure to develop a FSED is $14,749,500. This amount exceeds the statutory threshold of $4,000,000 "to develop or expand a health service or a health service facility" as defined by § 131E-176(16)(b). Therefore, Mission's proposed FSED project would constitute a "new institutional health service" within the meaning of § 131E-178(a) and require a CON.

North Carolina General Statutes § 131E-185 "sets forth procedures and requirements for the CON review process, allowing any interested party to submit written comments or make oral comments at the scheduled public hearing." *Good Hope Health Sys., L.L.C. v. N.C. DHHS*, 189 N.C. App. 534, 563 (2008). Section 131E-185(a1)(2) expressly provides, the Agency "*shall ensure* that a public hearing is conducted at a place within the appropriate service area if one or more of the following circumstances apply[:] . . . the proponent proposes to spend five million dollars ($5,000,000) or more . . . ." § 131E-185(a1)(2) (2023) (emphasis added). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 276 (1988) (citation omitted). Respondents concede that Mission's Application met the criteria for a public hearing, given that Mission's proposed capital expenditure to develop its FSED project exceeded $5,000,000. *See* § 131E-185(a1)(2). Further, there is no dispute among the parties that the Agency did not conduct a public hearing during its review of Mission's application.

Still, respondents contend the Agency's decision to not hold in-person public hearings during the relevant time of review was not error considering the "unique challenges" posed by the COVID-19 pandemic. A decision to this effect, they assert, would have been "irresponsible," have "undermine[d]" the Agency's "statutory duties," and have been "contrary to public policy." Moreover, respondents argue the Agency's unilateral "decision to implement an alternative process for public hearings in CON reviews" effectively "balance[ed] the protection of public health with the rights of the public to participate in the CON process[,]" while also "eliminating the risk associated with a public gathering." We note that the record shows, and respondents do not dispute the fact, that the Agency *did* conduct public hearings while the State of Emergency for COVID-19 was still in effect.

Regardless, we recognize the COVID-19 pandemic presented a wide range of unique and complex challenges, but neither the Agency nor Mission directs this Court to any statute, rule, regulation, or case law that would authorize the Agency to implement its own procedures as a substitute to the public hearing provision, or any other provision mandated by statute. Respondents may argue that strict compliance with § 131E-185(a1)(2) would have been irresponsible under the circumstances, have undermined the Agency's statutory duties, or that the public hearing provision in § 131E-185(a1)(2) should yield to broader public policy concerns. Yet, "we must decline" respondents' "invitation to engage in public policy considerations here in light of the unambiguous and specific language chosen by the General Assembly in drafting and enacting . . ." the CON law. *In re N.P.*, 376 N.C. 729, 737 (2021). It is well-established that this Court has "no power to add to or subtract from the language of the statute." *Ferguson v. Riddle*, 233 N.C. 54, 57 (1950). "Given the clarity of the statutes which pertain to" the public hearing requirement in § 131E-185(a1)(2), "any such public policy concerns raised here should be directed to the state's legislative branch for contemplation." *In re N.P.*, 376 N.C. at 737.

Alternatively, the University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System (together, "UNC Health") filed an Amici Curiae brief with this Court in support of no party, seeking "only to offer its perspective on the statutory question raised by the Agency not holding an in-person public hearing under the unique circumstances presented by the COVID-19 pandemic and what significant impact that would have on UNC Health and other similarly situated health care entities across the State." Amici UNC Health asserts, among other things, that "applying settled canons of statutory construction to the public hearing provision [in § 131E-185(a1)(2)] confirms that the time period for holding a public hearing specified in the statutes is directory, not mandatory." While UNC Health presents an argument that is both persuasive and well-supported by citation to authority, that argument is difficult to reconcile with our Supreme Court's decision in *HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573 (1990), wherein the Court held that statutory provisions in § 131E-185(a1) and (c) "clearly prescribe a mandatory maximum time limit of 150 days within which the Department must act on applications for certificates of need. To the extent it is applicable, this time limit is *jurisdictional* in nature." 327 N.C. at 577 (emphasis added). The Court further explained:

> When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals

> the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay. The comprehensive legislative provisions controlling the times within which the Department must act on applications for certificates of need, set forth in Article 9, will be nullified if the Department is permitted to ignore those time limits with impunity.

Id. at 579. Accordingly, we determine that the Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error. Even so, Agency error alone does not resolve this matter and our inquiry does not end here.

[2] AdventHealth filed its petition for a contested case hearing pursuant to N.C.G.S. §§ 131E-188 and 150B-23 and 26 N.C.A.C. 3.0103, challenging the Agency Decision to conditionally approve the Mission Application.

North Carolina General Statutes § 150B-23(a) states, in relevant part:

> A party that files a petition . . . shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise 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.
>
> The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case under this section.

§ 150B-23(a) (2023) (emphasis added). "This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute." *Parkway Urology, P.A. v. N.C. DHHS*, 205 N.C. App. 529, 536 (2010).

> [T]he ALJ in a CON case must, in evaluating the evidence, determine *whether the petitioner has met its burden in*

> *showing that* (1) *the agency substantially prejudiced the petitioner's rights*, *and* (2) acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

Surgical Care Affiliates, LLC v. N.C. DHHS, 235 N.C. App. 620, 630 (2014) (cleaned up). Generally, "[t]hese are discrete requirements and proof of one does not automatically establish the other." *Id.* (citations omitted).

AdventHealth contended, and the ALJ agreed, that it was entitled to summary judgment on its claim for relief on grounds that the Agency erred by failing to hold an in-person public hearing on Mission's CON application as required by § 131-185(a1)(2), and as a result, that the Agency substantially prejudiced its rights *as a matter of law*. The ALJ expressly relied on this Court's decision in *Hospice at Greensboro, Inc. v. N.C. DHHS Div. of Facility Servs.*, 185 N.C. App. 1 (2007) to support its conclusion that failure to hold a public hearing is inherently prejudicial, and thus, eliminates a requirement that AdventHealth separately show actual, particularized harm resulting from the impairment of its rights.

In contrast, respondents assert the ALJ not only misapplied our holding in *Hospice at Greensboro*, but also ignored decades of appellate precedent that conclusively establish agency error and substantial prejudice are separate and distinct elements under § 150B-23. While we have already determined that AdventHealth met its burden in showing that the Agency erred by failing to hold a public hearing under the facts of this case, we agree with respondents' position that substantial prejudice must be proven; it is not presumed to exist *per se* on this record. A mere showing that the Agency's action was erroneous "does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice[ ]" to satisfy each element of its claim for relief. *Surgical Care*, 235 N.C. App. at 630.

In *Hospice at Greensboro*, the Agency issued a "No Review" letter that authorized the respondent-intervenor to open a hospice without first undergoing the statutorily required CON review process, and the petitioner sought a contested case hearing. 185 N.C. App. at 3–5. On appeal, the respondent-intervenor argued for reversal because the petitioner "failed to allege in its petition for a contested case hearing that the CON Section 'substantially prejudiced' its rights and failed to forecast evidence of 'substantial prejudice' as required by [N.C.G.S.] § 150B-23(a) (2005)." *Id.* at 16. We disagreed and held "that the issuance of a 'No Review' letter, which results in the establishment of 'a new

institutional health service' without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law." *Id.* In reaching our holding, we reasoned that the petitioner:

> was denied any opportunity to comment on the CON application, because there was no CON process. In fact, the CON Section's issuance of a "No Review" letter to [the respondent-intervenor] effectively prevented any existing health service provider or other prospective applicant from challenging [the respondent-intervenor's] proposal at the agency level, except by filing a petition for a contested case.

Id. at 17.

Our determination in *Hospice at Greensboro* represents a narrow holding in a fact-specific case, and its guidelines apply to such instances where a petitioner is deprived of *any* opportunity to contest the applicant's proposal at the Agency level. It applies to instances where a CON determination is required, but the Agency foregoes the CON review process entirely and issues an exemption instead. In such cases, an affected person is deprived of any opportunity to contest the Agency's determination at the Agency level, and thus, prejudice is presumed as a result. *See id.* at 16–17. We have declined to extend the reach of *Hospice at Greensboro* and its automatic prejudice rule to cases where the Agency does subject a qualifying application to a CON review, but that review process is alleged to be deficient in some enumerated way. *See Surgical Care*, 235 N.C. App. at 629.

In our case, the Agency did conduct a CON review on Mission's application. AdventHealth challenged Mission's application at the Agency level by filing written comments in opposition to Mission's proposal. The Agency determined that the CON should issue upon findings that Mission's proposal "is either consistent with or not in conflict with" each of the criteria listed in § 131E-183(a). Thereafter, AdventHealth filed its petition for a contested case hearing alleging the Agency's CON determination was deficient or erroneous in several specified ways.

Section 150B-23(a) imposes dual requirements on the petitioner in a contested case hearing; "[a]s discussed above, . . . the petitioner must establish ([1]) 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*, . . . ([2]) that the [A]gency's decision was erroneous in a certain, enumerated way, such as failure

to follow proper procedure or act as required by rule or law." *Surgical Care*, 235 N.C. App. at 629. As the petitioner, AdventHealth has the burden of proof in this matter pursuant to § 150B-25.1. As "[t]he party moving for summary judgment[,]" AdventHealth "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citation omitted). As already discussed, AdventHealth satisfied its burden of proof by showing Agency error. However, it must also separately establish that it was substantially prejudiced by the Agency's error; it may not rest its case upon a bare allegation that it was prejudiced by Agency error alone. "[P]roof of one does not automatically establish the other." *Surgical Care*, 235 N.C. App. at 630; *see also Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 309 (1999) ("It is well-established that conclusory statements standing alone cannot withstand a motion for summary judgment." (citation omitted)). "[T]he Agency's action under part two of this test might ultimately result in substantial prejudice to a petitioner, [but] the taking of the action does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice." *Surgical Care*, 235 N.C. App. at 630.

> In order to establish substantial prejudice, the petitioner must provide specific evidence of harm resulting from the award of the CON that went beyond any harm that necessarily resulted from additional competition. The harm required to establish substantial prejudice cannot be conjectural or hypothetical and instead must be concrete, particularized, and actual or imminent.

Bio-Medical, 282 N.C. App. at 417 (cleaned up).

Here, AdventHealth satisfied its burden of proof in showing Agency error, but it failed to forecast particularized evidence of substantial prejudice. Yet, our determination in this case should not be misconstrued. AdventHealth may ultimately satisfy its burden; it may not. The ALJ ruled on two specific issues that have been raised and briefed in this appeal: failure to conduct a public hearing under § 131E-185(a1)(2) and reversible error *per se*. We have resolved those specific issues. While this Court may address summary judgment on alternative grounds de novo, we deem this case an appropriate circumstance to remand for further proceedings not inconsistent with this opinion.

IV.

For the foregoing reasons, we determine that petitioner met its burden in showing that the Agency erred by failing to hold a public hearing

on respondent-intervenor's application under § 131E-185(a1)(2), but substantial prejudice cannot be presumed *per se* under § 150B-23(a). Our narrow, fact-specific holding in *Hospice at Greensboro* does not apply to the facts in this case. Thus, we vacate the ALJ's Order on Summary Judgment and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges GRIFFIN and STADING concur.

TRICOSA GREEN, PLAINTIFF
v.
E'TONYA CARTER, DEFENDANT

No. COA22-494

Filed 19 March 2024

1. Collateral Estoppel and Res Judicata—child support—prior reference describing parental status—collateral estoppel inapplicable—no adjudication of fact

In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, where the child's non-biological parent argued that the trial court was collaterally estopped from finding that she was a "lawful parent" based on a prior court order that referred to her as a "non-parent" in place of her name, collateral estoppel principles did not apply because the reference was not an adjudication of any fact or issue in that case but was merely a descriptive term used for convenience and clarity.

2. Child Custody and Support—child support—primary liability—same-sex unmarried couple—non-biological parent's obligation—gender neutral interpretation of statute inappropriate

In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, the trial court erred by adopting a gender neutral interpretation of N.C.G.S. § 50-13.4—regarding primary liability for child support to be shared by a child's "mother" and "father"—to deem the child's non-biological parent a "lawful parent" required by statute to pay child support. The clear and unambiguous statutory language did not allow for the extension of primary liability for child support to a non-biological or

non-adoptive parent, even one acting in loco parentis and sharing custodial rights.

3. Child Custody and Support—child support—secondary liability—unmarried partner—acting in loco parentis—voluntary assumption of obligation in writing required

In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, although the child's non-biological parent stood in loco parentis to the child and enjoyed custodial rights, she could not be secondarily liable for child support pursuant to N.C.G.S. § 50-13.4 because she had not voluntarily assumed a child support obligation in writing.

Judge HAMPSON dissenting.

Appeal by plaintiff from order entered 3 November 2021 by Judge J. Rex Marvel in District Court, Mecklenburg County. Heard in the Court of Appeals 11 April 2023.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for plaintiff-appellant.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellee.

STROUD, Judge.

This case raises the issue of whether Plaintiff, who is not the child's parent but who is a person acting as a parent, can be required to pay child support under North Carolina General Statute Section 50-13.4(b). Based on long-established North Carolina law, the short answer is no: Plaintiff cannot be required to pay child support unless she is the child's mother or father *or* she agreed formally, in writing, to pay child support.

The long answer requires us to interpret North Carolina General Statute Section 50-13.4(b), which governs both primary liability and secondary liability for child support. *See* N.C. Gen. Stat. § 50-13.4(b) (2019). The difference between primary and secondary liability for child support is that a person may be held secondarily liable for child support only if the people who are primarily liable – the child's parents – cannot adequately provide for the child's needs. *See id.* Indeed, North Carolina General Statute Section 50-13.4(b) first establishes that a child's "mother" and "father" have primary liability for child support. *Id.*

A "mother" is the female parent of a child, either as a biological parent or as an adoptive parent. Merriam-Webster's Collegiate Dictionary 810 (11th ed. 2005). Similarly, a "father" is the male parent of a child, whether as a biological parent, by adoption, by legitimation, or by adjudication of paternity. *Id.* at 456.

North Carolina General Statute Section 50-13.4(b) also sets out who can have secondary liability for child support: "any other person, agency, organization or institution standing in *loco parentis*." N.C. Gen. Stat § 50-13.4(b). "Standing in *loco parentis*" means "in the place of a parent" and "may be defined as one who has assumed the status and obligations of a parent without a formal adoption." *In re A.P.*, 165 N.C. App. 841, 845, 600 S.E.2d 9, 12 (2004) (citations and quotation marks omitted). Further, North Carolina General Statute Section 50-13.4(b) limits secondary liability for child support to a person standing in *loco parentis* only if that person has "voluntarily assumed the obligation of support in writing." N.C. Gen. Stat. § 50-13.4(b).

Because the parties are women who were previously in a romantic relationship, never married, and share custody of the child equally, the trial court determined that Plaintiff is primarily liable to pay child support, as a "parent," based on a novel "gender neutral" interpretation of North Carolina General Statute Section 50-13.4. But based on the well-established law discussed below, the trial court did not have a legal basis to order Plaintiff to pay child support. Instead of being "gender neutral" in application, the trial court's interpretation of North Carolina General Statute Section 50-13.4(b) created a different result than would have been required under the law if the parties to this case had been a heterosexual couple. North Carolina General Statute Section 50-13.4(b) has the same application to both same-sex unmarried couples who have a child by in vitro fertilization as to unmarried heterosexual couples who have a child by in vitro fertilization if the male partner is not the donor of the sperm; neither can be required to pay child support.

Further, the General Assembly has given instructions in North Carolina General Statute Section 12-3(16) on when a statute may have a gender neutral interpretation, and Section 50-13.4 is not covered by this statute. *See* N.C. Gen. Stat. § 12-3(16) (2019). In addition, Plaintiff also could not be secondarily liable to pay child support because this would violate established precedent addressing child support liability for a person standing in *loco parentis* to a child, regardless of gender. *See generally* N.C. Gen. Stat. § 50-13.4. For these reasons, as explained in detail below, we reverse the trial court's order and remand for further proceedings.

I. Background

This summary is based on the findings of fact in the trial court's orders as the findings were not challenged on appeal. *See In re K.W.*, 282 N.C. App. 283, 286, 871 S.E.2d 146, 149 (2022) ("Unchallenged findings of fact are deemed supported by the evidence and are binding on appeal."). The parties are two women, never married to one another, who were in an "on again off-again" romantic relationship. During the parties' relationship, they planned to have a child together. The parties participated in an in vitro fertilization ("IVF") program in the State of New York. Both parties signed the IVF Agreement in November 2015, jointly selected a sperm donor, and Partner[1] paid for the IVF process.

In November 2016, in the State of Michigan, Mother gave birth to Alisa.[2] On Alisa's birth certificate, Mother is listed as the child's mother. Under Michigan law, Partner "could not be listed on the minor child's birth certificate." The parties jointly selected a name for the child which reflected both of their names. Partner presented a proposed parenting agreement to Mother, but the parties never signed the agreement.

The parties later ended their romantic relationship, and both moved to North Carolina. In September 2018, Partner filed a child custody proceeding in Mecklenburg County against Mother, seeking custody of Alisa. In March 2019, the trial court entered a Temporary Parenting Arrangement Order granting Partner some visitation with Alisa. On 16 September 2019, at the close of the hearing on permanent custody, the trial court announced its ruling in the child custody proceeding granting the parties joint legal and physical custody. The parties immediately began operating under the joint custodial schedule.

On 11 October 2019, after the trial court's mid-September rendition of its ruling in the custody proceeding, Mother filed a "verified complaint for child support; motion to consolidate and attorney's fees[.]" Mother alleged Partner "has acted as and been treated as a parent to [Alisa] since before her birth" and has exercised custodial time with Alisa based on the permanent custody arrangement rendered on 16 September 2019. Mother alleged Partner "(i) is a parent to [Alisa] in the same sense as the heterosexual terms 'Mother' and 'Father' are used, (ii) is standing in loco

1. In the trial court, Ms. Carter was the plaintiff in the first complaint for child custody, and Ms. Green was the defendant; in the second complaint for child support, the parties' positions were reversed. The two cases were later consolidated. We will therefore refer to Plaintiff-appellant as "Partner" and Defendant-appellee as "Mother" in this opinion to avoid confusion.

2. A pseudonym is used for the minor child.

parentis to [Alisa], and (iii) has voluntarily assumed the obligation of support of [Alisa], in writing." Mother asserted claims for child support under North Carolina General Statute Section 50-13.4 and for attorney's fees. Mother also moved to consolidate the child custody and child support cases, which was allowed.

On or about 24 October 2019, the trial court entered the permanent custody order granting Partner joint legal and physical custody of Alisa. The permanent custody order includes findings of fact about both parties, their relationship, Alisa's birth, and their current circumstances. The trial court found Partner had been a substantial part of Alisa's life since her birth. The court concluded that Partner and Alisa had a parent-child relationship, and that Mother had "acted in a manner inconsistent with her protected status as a parent and[,]" as such, "ha[d] waived her constitutional right to exclusive care, custody, and control of the minor child based on clear, cogent, and convincing evidence." The trial court then concluded both Partner and Mother were "fit and proper to exercise joint legal custody and share physical custody of [Alisa]." The court set a permanent child custody arrangement granting an equal number of days with each party. The custody order is a final order which was not appealed.

On 2 December 2019, the trial court entered a temporary child support order. The trial court found Partner, as "De Facto Mother[,]" was a parent to Alisa "in the same sense as the heterosexual terms 'Mother' and 'Father' are used" and both parties were "equally liable" for Alisa's support. The trial court ordered Partner to pay Mother $604.21 in monthly child support and to continue paying the health insurance premiums for Alisa; the trial court ordered Mother to continue paying work-related child-care expenses for Alisa. On 16 December 2019, Partner filed an answer to Mother's complaint for child support. Partner identified herself as "Non-Parent" in her answer and denied any liability for child support or attorney's fees.

On 26 March 2021, Partner filed a "Motion to Dismiss, Answer and Motion to Return Child Support." Partner claimed that she was not the "biological or adoptive parent" of Alisa but she was a *de facto* parent, or standing in *loco parentis*, and as such was not liable for child support to Mother under North Carolina law. Partner also moved to vacate the temporary child support order and for Mother to reimburse her for $8,458.94 in child support that she had paid under the temporary support order. Further, Partner moved for dismissal under North Carolina General Statute Section 1A-1, Rule 12(b)(6) for failure to state a claim. The trial

court heard Partner's motion to dismiss on 1 June 2021 and entered an order denying Partner's motion to dismiss on 1 September 2021.

On 7 September 2021, the trial court held a hearing on permanent child support. At the close of Mother's evidence, Partner moved again to dismiss the complaint for child support because she, as a non-parent, could not be liable for child support under North Carolina law. The trial court denied Partner's motion without clarification or explanation.

During closing arguments, Partner again argued North Carolina law, "as currently written, does not allow th[e] [trial] [c]ourt to order [Partner] to pay child support." Partner continued, "[e]ven if the law, even if everybody in this courtroom agrees that things aren't as they should be or that the laws haven't caught on yet, this [c]ourt has to apply the laws as written." The trial court ultimately rendered a ruling finding Partner was a "parent" within the meaning of the child support statute and should be liable for support. The trial court asked the parties to submit more evidence and arguments after the hearing for purposes of calculating Partner's support obligation.

On 3 November 2021, the trial court entered a Permanent Child Support Order ("Support Order"). The Support Order identified Partner as "De Facto Mother" and Mother as "Biological Mother[.]" The trial court found:

> 14. [Partner] is a parent to [Alisa] in the same sense as the heterosexual terms "Mother" and "Father" are used. The court finds it is appropriate to apply those terms in a gender-neutral way.
>
> 15. There exists pleading, proof and circumstances that warrant this court to hold [Mother] and [Partner] equally liable for the support of the minor child. Specifically, by way of example and not limitation, [Partner] has:
>
> a. allowed her employer-sponsored health insurance to pay for [Mother's] IVF process with the express intention of birthing and raising a child together,
>
> b. signed IVF paperwork which equally bound her to the risks and rewards of the IVF process,
>
> c. continued to communicate with and to visit [Mother] even as their romantic relationship deteriorated, but before [Alisa] was born,

d. held herself out to family, friends, and social media and this Court as [Alisa's] mother,

e. took maternity photos with [Mother],

f. attended [Alisa's] baby shower as an honored parent (in matching T Shirts with [Mother]),

g. moved to Charlotte to be closer to [Alisa] after [Alisa's] birth and the end of [Partner's] relationship with [Mother],

h. kept [Alisa] for a two-week period while [Mother] traveled for work,

i. continuously helped to pay for [Alisa's] day care expenses,

j. continuously provided health insurance for [Alisa]. To do so, [Partner] signed documents claiming the minor child as her dependent and sought reimbursement for certain medical expenses;

k. continuously provided financial support to [Mother] for the benefit of [Alisa], including cash, diapers, clothes and the like;

l. filed a lawsuit and signed a complaint for child custody to be granted court ordered custody of [Alisa]. In this complaint, [Partner] refers to herself as a mother and a parent to [Alisa],

m. has maintained a consistent 50/50 parenting schedule with [Alisa],

n. has been regularly involved in [Alisa's] medical and educational development by attending doctors' appointments and being involved with her teachers,

o. [r]eferred to [Alisa] consistently as her child and to herself continuously as [Alisa's] mother.

1.(sic) [Partner] has enthusiastically and voluntarily held herself out as a parent to [Alisa] and has a support obligation that accompanies her, now court ordered, right to 50/50 custody. The duty of support should

accompany the right to custody in cases such as this one.

16. [Partner] owes a duty of support to [Alisa], and [Mother] is entitled to support from [Partner] for the use and benefit of [Alisa], pursuant to N.C.G.S. § 50-13[.4] and Worksheet B of the North Carolina Child Support Guidelines.

The trial court calculated child support using the North Carolina Child Support Guidelines. Based on the findings of fact, the trial court concluded:

4. Both [Mother] and [Partner] are the lawful parents of [Alisa] and owe a duty of support to [Alisa], pursuant to the provisions of N.C.G.S. § 50-13.4.

5. The terms Mother and Father in N.C.G.S. § 50-13.4 should be read to allow for gender neutral application to parent and parent.

The trial court then ordered Partner to pay $246.11 per month in child support and to continue paying Alisa's health insurance premiums. On 2 December 2021, Partner filed a notice of appeal.

II. Collateral Estoppel

[1] Although Partner's arguments primarily address the trial court's conclusions of law and the interpretation of North Carolina General Statute Section 50-13.4, she first argues the trial court was prevented by collateral estoppel from finding she is a "lawful parent" of Alisa because the permanent custody order referred to her as "Non-parent." Under the collateral estoppel doctrine, "parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted). "Collateral estoppel is intended to prevent repetitious lawsuits." *Campbell v. Campbell*, 237 N.C. App. 1, 5, 764 S.E.2d 630, 633 (2014) (citations and quotation marks omitted). To successfully assert collateral estoppel, a party must show "that the earlier suit resulted in a final judgment on the merits, that the issue in question was *identical to an issue actually litigated and necessary to the judgment*, and that both [defendant] and [plaintiff] were either parties to the earlier suit or were in privity with parties." *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) (emphasis added) (citation omitted).

In this case, the doctrine of collateral estoppel does not apply because the trial court's use of the term "Non-parent" in place of Ms. Green's name or the word "plaintiff" in the custody order was not an adjudication of any fact or issue in that case. Court orders in child custody and child support cases often use descriptive terms to refer to the parties instead of technical legal terms such as "plaintiff" or "defendant." Here, the custody order used the word "Non-parent" to refer to Partner merely for convenience and clarity, just as we have used the terms "Mother" and "Partner" in this opinion. *See, e.g.*, *State v. Gettleman*, 275 N.C. App. 260, 262, n.1, 853 S.E.2d 447, 449, n.1 (2020) (explaining that "[f]or ease of reading and clarity —and consistent with the parties' briefs, the record, and the transcripts of the proceedings below – we refer to Defendant Marc Christian Gettleman, Sr., as 'Big Marc,' Defendant Marc Christian Gettleman, II, as 'Little Marc,' and Defendant Darlene Rowena Gettleman as 'Darlene.' ").

Here, using the terms "Mother" and "Non-parent" made the custody order easier to read and understand, especially as each party was *both* a plaintiff and a defendant in two lawsuits. While the trial court could have used the parties' names or their titles as "plaintiff" and "defendant," or even nicknames or pseudonyms, the use of those terms in the context of the custody order would not have served as an adjudication of any fact or legal issue for purposes of North Carolina General Statute Section 50-13.4. *See generally id.* Accordingly, the trial court's use of the term "Non-parent" in place of Ms. Green's name or the word "Plaintiff" in the custody order does not create a basis for collateral estoppel regarding Partner's potential liability for child support under North Carolina General Statute Section 50-13.4, particularly considering the trial court's "gender neutral" interpretation of these words in the Support Order.

III. Primary Liability for Child Support under North Carolina General Statute Section 50-13.4(b)

[2] Partner's second issue on appeal is whether the trial court erred by "entering a child support order requiring a nonparent to be primarily liable for child support to the child's biological parent." Partner contends North Carolina General Statute Section 50-13.4 does not allow the trial court to interpret or apply the statute in a gender neutral manner to treat Partner as a lawful parent of the minor child who owes a duty of financial support.

As none of the findings of fact are challenged on appeal, and Partner challenges only the trial court's conclusions of law that "[b]oth [Mother] and [Partner] are the lawful parents of the minor child and owe a duty

of support to the minor child, pursuant to the provisions of N.C.G.S. § 50-13.4" and "[t]he terms Mother and Father in N.C.G.S. § 50-13.4 should be read to allow for gender neutral application to parent and parent[,]" *de novo* review is appropriate. *See Schroeder v. City of Wilmington*, 282 N.C. App. 558, 565, 872 S.E.2d 58, 63 (2022) (A "*de novo* standard applies to questions of statutory interpretation."). Meanwhile, Mother acknowledges that "the technical language of the child support statute uses the terms 'mother' and 'father' to refer to the two parents" but contends

> that is simply the language of the statute. The spirit of the statute is that the two people whose actions resulted in the birth of the child are liable for the support of that child and ensuring that the child receives support from her parents is what the statute seeks to accomplish.

Thus, in summary, Mother contends that instead of relying upon the plain language of the statute, we should consider the legislative intent to interpret the statute in a way to ensure there are two parents responsible for child support.

We therefore must first consider the meaning of the words "mother" and "father" in North Carolina General Statute Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.4. These words are not defined by this statute or by any other provision of Chapter 50.[3] N.C. Gen. Stat. § 50 *et seq.* (2019). In addition, Section 50-13.4 also uses the word "parent" and "parents," referring collectively to the "mother" and "father." *See* N.C. Gen. Stat. § 50-13.4. Since the trial court concluded the parties should be considered as "parent and parent" we must consider the meaning of "parent" as well.

In this statute, the words "mother," "father," and "parent" are used as nouns. These words can also be used as verbs or adjectives and can have different meanings depending on context. North Carolina's child support statute uses "mother" and "father" as nouns to describe the people with primary liability for child support for a minor child. *Id.*

Where a statute defines a word, courts must apply that definition. *See Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219-20, 210 S.E.2d 199, 203 (1974) ("Where, however, the statute, itself, contains a

3. As far as we can tell, the definition of "parent" is provided in only two North Carolina General Statutes. *See* N.C. Gen. Stat. § 14-321.2 (2019) (prohibiting unlawful transfer of custody of a minor child and defining "parent" as "a biological parent, adoptive parent, legal guardian, or legal custodian"); *see also* N.C. Gen. Stat. § 51-2.2 (2019) ("As used in this article, the terms 'parent,' 'father,' or 'mother' includes one who has become a parent, father or mother, respectively by adoption.").

definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. The courts must construe the statute as if that definition had been used in lieu of the word in question." (citation omitted)). But if a word is not defined by the statute, we must "begin with the plain language of the statute[.]" *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019) ("When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." (citation and quotation marks omitted)).

The trial court's order concluded Mother and Partner should be considered as "parent and parent" by giving a "gender neutral" interpretation to the words "mother and father" under North Carolina General Statute Section 50-13.4. In North Carolina General Statute Section 50-13.4, the words "mother," "father," and "parent" are used as nouns to describe the people with primary liability for child support for a minor child. N.C. Gen. Stat. § 50-13.4. We turn to the ordinary definitions of "mother," "father," and "parent" when used as nouns. *See Surgical Care Affiliates, LLC, v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 621, 807 S.E.2d 679, 684 (2017) ("When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term–but to simply consult a dictionary.").

Webster's New Collegiate Dictionary, 8th Edition defines "mother," when used as a noun, and as applicable to this case, as "a female parent." Webster's New Collegiate Dictionary 751 (8th ed. 1977). The same definition for "mother" is given in the Ninth and Eleventh editions of the dictionary. Webster's New Collegiate Dictionary 774 (9th ed. 1985); Merriam-Webster's Collegiate Dictionary 810 (11th ed. 2005). These dictionaries all define "father" as "a man who has begotten a child[.]" Webster's New Collegiate Dictionary 418 (8th ed. 1977); Webster's New Collegiate Dictionary 451-452 (9th ed. 1985); Merriam-Webster's Collegiate Dictionary 456 (11th ed. 2005). While North Carolina statutes do address legitimation and adjudication of paternity in North Carolina General Statutes Chapter 49, Articles 2 and 3, these statutes address male parents – fathers – and they do not address maternity. N.C. Gen. Stat. § 49-10 *et seq.* (2019) (addressing legitimation); N.C. Gen. Stat. § 49-14 *et seq.* (2019) (addressing adjudication of paternity). Thus, in North Carolina General Statute Section 50-13.4 "mother" is the female parent of a child and "father" is the male parent of a child, either biologically or by adoption or other legal process to establish paternity. N.C. Gen. Stat. § 50-13.4.

In addition, these dictionaries all distinguish "mother," as a female parent, from "father," as a male parent, in the biological sense by their reproductive roles. A "female" is defined as an "individual that bears young or produces eggs as distinguished from one that begets young." Webster's New Collegiate Dictionary 422 (8th ed. 1977); *see also* Oxford English Dictionary 823 (2nd ed. 1989) (defining female as "belonging to the sex which bears offspring"). A "male" is defined as "of, relating to, or being the sex that begets young by performing the fertilizing function in generation and produces relatively small usu[ally] motile gametes (as sperms, spermatozoids, or spermatozoa) by which the eggs of a female are made fertile." Webster's New Collegiate Dictionary 695 (8th ed. 1977); *see also* Oxford English Dictionary 259 (2nd ed. 1989) ("Of or belonging to the sex which begets offspring, or performs the fecundating [or fertilizing] function of generation.").

Further, "mother" and "father" are collectively referred to as "parents" in North Carolina General Statute Section 50-13.4 and "parent" is defined as "one that begets or brings forth offspring[,]" Webster's New Collegiate Dictionary 833 (8th ed. 1977), or "[a] person who has begotten or borne a child; a father or mother." Oxford English Dictionary 222 (2nd ed. 1989). Thus, a "female parent" is the person who provides the egg (as opposed to the sperm) and/or gestates the child and gives birth to the child. *See id.*; Webster's New Collegiate Dictionary 422 (8th ed. 1977); *see also* Oxford English Dictionary 823 (2nd ed. 1989). Our Court has made clear that conferring parental status outside our statutory framework

> [is] without legal authority or precedent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions). . . . The trial court's ruling in this case rests solely upon a flawed and non-existent legal theory.

Heatzig v. MacLean, 191 N.C. App. 451, 458, 664 S.E.2d 347, 353 (2008) (citations omitted).

Because the language of North Carolina General Statute Section 50-13.4 is "clear and unambiguous[,]" we cannot rely upon the "spirit of the statute" as Mother contends but we "must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Boseman v. Jarrell*, 364 N.C. 537, 545, 704 S.E.2d 494, 500 (2010) (citation and

quotation marks omitted). Here, Partner is not a biological or adoptive parent of Alisa. *See generally* N.C. Gen. Stat. §§ 49-10, 49-14, 48-1-106. Further, North Carolina General Statute Section 50-13.4(b) establishes that a "mother" and "father" share the primary liability for child support. *See* N.C. Gen. Stat. § 50-13.4(b).

A. Legal Basis for a Gender Neutral Application of the Terms "Mother" and "Father" used in North Carolina General Statute Section 50-13.4.

Despite the plain meanings of the terms "mother," "father," and "parent," the trial court's order relied on a "gender neutral" application of these words to conclude Partner should be held primarily liable for child support. The trial court concluded North Carolina General Statute Section 50-13.4 "should be read to allow for gender neutral application to parent and parent." The court based this conclusion primarily on four findings:

> 14. [Partner] is a parent to [Alisa] in the same sense as the heterosexual terms "Mother" and "Father" are used. The court finds it is appropriate to apply those terms in a gender-neutral way.
>
> 15. There exists pleading, proof and circumstances that warrant this court to hold [Mother] and [Partner] equally liable for the support of [Alisa].
>
> . . . .
>
> 1. (sic) [Partner] has enthusiastically and voluntarily held herself out as a parent to [Alisa] and has a support obligation that accompanies her, now court ordered, right to 50/50 custody. The duty of support should accompany the right to custody in cases such as this one.
>
> 16. [Partner] owes a duty of support to [Alisa], and [Mother] is entitled to support from [Partner] for the use and benefit of [Alisa], pursuant to N.C.G.S. § 50-13[.]

Thus, the trial court recognized that Section 50-13.4 uses the terms "mother" and "father" but concluded a gender neutral application was "appropriate" based on (1) Partner's actions in holding herself out as a parent and (2) Partner's custodial rights. But there is no legal basis for holding a person *primarily* responsible for child support based only on custodial rights or standing in *loco parentis* to a child. If Partner had been a male in a romantic relationship with Mother, and they had a child

by IVF with donor sperm, the male partner may stand in *loco parentis* to the child, but he would not be the "father" of the child as this word is used in North Carolina General Statute Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.4. At best, standing in *loco parentis* may support secondary liability for child support, as we will discuss below. *See id.*

Mother contends Partner, as a "de facto" mother, should be considered as a "mother" as this term is used in North Carolina General Statute Section 50-13.4. Mother notes that Partner

> argues that [Mother] is [Alisa's] mother, that there is no father, and that the statute can only be read as involving one mother and one father – i.e., that it cannot be read as gender-neutral and applying to situations involving two parents who happen to be of the same gender. (See Appellant's brief, p 18) [Mother] disagrees. You do not need to read this statute as specifically applying to same-sex couples to determine that [Partner] is responsible for the support of the minor child. This statute expressly provides that the mother of a minor child is responsible for that child's support. [Mother] is the biological mother, so, yes, she is liable for support. [Partner] is also the mother – she has been found by the trial court to be a de facto parent – a second mother. As such, [Partner] fits within the definition of persons responsible for providing support for . . . [Alisa].

But Mother cites no legal authority for this argument, and we can find no such authority. As discussed above, Partner is not a "mother" of the child based on the plain meaning of the word. N.C. Gen. Stat. § 50-13.4. Mother also argues "[t]he intent of the statute requires a gender-neutral reading of the terms 'mother' and 'father.' A gender-based reading of this statute would be unconstitutional." In support of this argument, Mother cites only *M.E. v. T.J.*, 275 N.C. App. 528, 538, 854 S.E.2d 74, 89 (2020), *aff'd as modified*, 380 N.C. 539, 869 S.E.2d 624 (2022).

In *M.E.*, this Court addressed an entirely different statute, North Carolina General Statute Section 50B-1(b)(6), regarding domestic violence protective orders ("DVPO"). *See id.* at 531, 854 S.E.2d at 84-85. This Court stated that "our analysis is limited to a *de novo* review of whether Plaintiff was unconstitutionally denied a DVPO under N.C.G.S. § 50B-1(b)(6) *solely based on the fact that Plaintiff is a woman* and *Defendant is also a woman*." *Id.* at 538, 854 S.E.2d at 89 (emphasis in original). Mother's brief does not cite any provisions of the North

Carolina or United States Constitutions and makes no substantive constitutional argument based on *M.E.*

Mother argues only that the "underlying principles behind the gender-neutral reading" of the statute regarding domestic violence should also be applied to North Carolina General Statute Section 50-13.4. But even if a "gender neutral" interpretation would allow for Partner to be treated differently than a male in the same situation – and it does not – a "gender neutral" interpretation is not available for North Carolina General Statute Section 50-13.4. The General Assembly has amended the North Carolina General Statutes to mandate the terms "husband" and "wife," unlike the terms "mother" and "father," be construed in gender-neutral terms. N.C. Gen. Stat. § 12-3(16) (2019).

Shortly after the Supreme Court's opinion in *Obergefell v. Hodges*, 576 U.S. 644 (2015) held the right to marriage is a fundamental constitutional right for same-sex couples, the General Assembly added subsection 16 in North Carolina General Statute Section 12-3(16), titled "Rules for construction of statutes." It states:

> In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:
>
> . . . .
>
> (16) "Husband and Wife" and similar terms.–The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.

N.C. Gen. Stat. § 12-3(16) (effective July 12, 2017).

North Carolina General Statute Section 12-3(16) does not apply to this case because the parties were never married to one another. *See id.* The words "mother" and "father," as well as the related legal rights and obligations, differ from "husband" and "wife." *See id.*; *see generally* N.C. Gen. Stat. Chapter 50 (using "husband" and "wife" and "mother" and "father" in separate Sections of the Chapter). Since the General Assembly has specifically addressed the instances where a gender neutral interpretation may be used, this Court is not free to give the words

"mother" and "father" in North Carolina General Statute Section 50-13.4 a gender neutral meaning or application. *See Boseman*, 364 N.C. at 545, 704 S.E.2d at 500. Mother's interpretation would re-write North Carolina General Statute Section 50-13.4, and only the General Assembly has the authority to re-write the statute. *See State v. J.C.*, 372 N.C. 203, 208, 827 S.E.2d 280, 283 (2019) ("It is not the province of the courts to rewrite statutes absent some constitutional defect or conflict with federal law." (citation omitted)).

Further, another section of North Carolina General Statute Section 12-3 addresses gender in construction of statutes:

> (1) Singular and Plural Number, Masculine Gender, etc.–Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and *every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.*

N.C. Gen. Stat. § 12-3(1) (emphasis added). North Carolina General Statute Section 12-3(1) would allow construction of a statute using the pronoun "his" to include "hers" unless "the context [of the statute] clearly shows to the contrary." *Id.*

The North Carolina General Statutes are replete with uses of the pronoun "his" or "he," but most statutes using these terms are clearly not referring only to males; they are referring to persons, either natural or corporate. *See, e.g.*, N.C. Gen. Stat. § 1A-1, 15(a) (2019). For example, North Carolina Rules of Civil Procedure 15(a) provides,

> A party may amend *his* pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, *he* may so amend it at any time within 30 days after it is served.

Id. (emphasis added). In North Carolina Rule of Civil Procedure 15(a), the words "his" and "he" refer back to a "party" who has filed a pleading, and these may clearly be read as "her" and "she" or even "its" and "it." *Id.* The gender of the party is entirely irrelevant for purposes of a procedural rule about amending pleadings. *See generally id.* Indeed, a "party"

to a case may even be a city or town, or a corporation or other corporate entity with no sex or gender. *See*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 4 (2019) (setting out manner of service of process for all types of "parties," including "natural persons" as well as the State, Agencies of the State, and various corporate entities). But in North Carolina General Statute Section 50-13.4, "the context clearly shows to the contrary" of a gender neutral interpretation. *See* N.C. Gen. Stat. §§ 12-3(1), 50-13.4. As used in North Carolina General Statute Section 50-13.4, the word "mother" is, by definition, female and the word "father" is, by definition, male. *See* N.C. Gen. Stat. § 50-13.4. The trial court, therefore, erred in giving North Carolina General Statute Section 50-13.4 a "gender neutral" interpretation to impose primary liability for child support upon Partner.

IV. Secondary Liability for Child Support Based on the Status of Standing in *Loco Parentis*

[3] Both parties make arguments in the alternative regarding secondary liability for child support based on Partner's standing in *loco parentis* to Alisa. "This Court has defined a person *in loco parentis* as one who has assumed the status and obligations of a parent without formal adoption." *See Moyer v. Moyer*, 122 N.C. App. 723, 724, 471 S.E.2d 676, 678 (1996) (citation and quotation marks omitted). Partner asserts she is not Alisa's mother but stands in *loco parentis* to Alisa so she could, at most, only be secondarily liable for child support. But Partner also asserts the requirements for secondary liability under Section 50-13.4(b) are not met. Mother asserts Partner may be secondarily liable for child support because she assumed a voluntary obligation to support Alisa but admits "[c]ounsel has not been able to locate case law that addresses what is required for this voluntary assumption to be in writing in a case involving two people who were not married to each other." Mother also identifies no writing in which Partner assumed a child support obligation for Alisa.

It is undisputed that Partner stands in *loco parentis* to Alisa. The trial court addressed Partner's status as in *loco parentis* to Alisa in the custody order as well as the Support Order on appeal. North Carolina General Statute Section 50-13.4(b) addresses when "any other person" standing in *loco parentis* may have secondary liability for child support:

> In the absence of pleading and proof that the circumstances otherwise warrant, *any other person*, agency, organization or institution *standing in loco parentis shall be secondarily liable for such support*. Such other circumstances may include, but shall not be limited to,

> the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. *However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing.*

N.C. Gen. Stat. § 50-13.4(b) (emphasis added).

North Carolina General Statute Section 50-13.4(b) does not mention the marital status or sex of a person standing in *loco parentis*; it applies simply to "a person who is not the child's parent . . . standing in *loco parentis*[.]" *Id.* Thus, North Carolina General Statute Section 50-13.4(b) applies to Partner because she is "a person who is not the child's parent . . . standing in *loco parentis*." *Id.*

North Carolina General Statute Section 50-13.4(b) was first adopted in 1967 and has not been significantly amended since it changed the liability framework between parents in 1981, but the history of the statute aids in understanding the differences between primary and secondary responsibility for child support as well as the allocation of primary liability to the "mother" and "father" of a child. *See* N.C. Gen. Stat. § 50-13.4 (1967); N.C. Gen. Stat. § 50-13.4 (1976 & Supp. 1979); N.C. Gen. Stat. § 50-13.4 (1981). Section 50-13.4(b) states, "In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child." N.C. Gen. Stat. § 50-13.4(b). Even before the adoption of Chapter 50 of the North Carolina General Statutes, common law recognized that both parents of a child, mother and father, owe a duty of support to the child. *See Lee v. Coffield*, 245 N.C. 570, 572, 96 S.E.2d 726, 728 (1957) ("The fact that the father, during life, is primarily responsible for the support, maintenance, and education of his minor children does not relieve the mother of her responsibility. Upon the death of the father, a duty rests on the mother to the best of her ability to provide for the support of her children. This we conceive to be the common law as adopted by North Carolina." (citation omitted)).

Before amendments to North Carolina General Statute Section 50-13.4 in 1981, the law set different child support standards for mothers and fathers. *See* N.C. Gen. Stat. § 50-13.4(b) (1967). The father of a child was primarily liable for financial support of the child; the mother had secondary liability and would be ordered to pay child support only if the father could not provide full support for the child. *See id.* The statute held the father primarily liable for child support and the mother secondarily liable from the time of adoption of Section 50-13.4 in 1967 through 1981:

> (b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, *in that order*, for the support of a minor child. *Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child.* Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

N.C. Gen. Stat. § 50-13.4 (1976 & Supp. 1979) (emphasis added).

The Supreme Court of North Carolina noted the primary responsibility of the father for child support based on the plain language of Section 50-13.4:

> Taken together, [§ 50-13.4(b) and (c)] clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Thus, where the father cannot reasonably be expected to bear all the expenses necessary to meet the reasonable needs of the children, the court has both the authority and the duty to order that the mother contribute supplementary support to the degree she is able.
>
> . . . .
>
> *The statute places primary liability for the support of the minor child on the father. Therefore, . . . the father of*

> *the minor child, is primarily liable for support of the child. It is his responsibility to pay the entire support of the child in the absence of pleading and proof that circumstances of the case otherwise warrant. The mother's duty is secondary.*

In re Register, 303 N.C. 149, 153-54, 277 S.E.2d 356, 359 (1981) (emphasis added) (citations, quotation marks, and alterations omitted).

In 1981, Section 50-13.4(b) was amended to make the mother and father of a child *both* primarily liable for child support. *See* N.C. Gen. Stat. § 50-13.4(b) (1981) ("In the absence of pleading and proof that the circumstances otherwise warrant, *the father and mother shall be primarily liable for the support of a minor child*. . . . Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case[.]" (emphasis added)). The Supreme Court of North Carolina clarified the effect of the 1981 amendment in *Plott v. Plott* by footnote:

> Prior to the statutory amendments to G.S. 50-13.4 in 1981, the father had the primary duty of support, while the mother's duty was only secondary. In cases decided under the prior version of 50-13.4(b), the courts softened the financial burden placed on fathers by reading subsections (b) and (c) to G.S. 50-13.4 together. These companion subsections were interpreted as contemplating a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Prior case law interpreted this statute as requiring the trial court to first find that the father alone could not make the entire payment before the mother could be required to contribute. Practically all states have imposed on mothers an equal duty to support.

313 N.C. 63, 67 n.1, 326 S.E.2d 863, 866 n.1 (1985) (citations and quotation marks omitted). "Today, the equal duty of both parents to support their children is the rule rather than the exception in virtually all states. The parental obligation for child support is not primarily an obligation of the father but is one shared by both parents." *Id.* at 68, 326 S.E.2d at 867 (citation, quotation marks, and alterations omitted).

Another important addition in the 1981 amendment to Section 50-13.4 was the addition of the words "secondary liability" for those standing in *loco parentis* and the clarification as to when that secondary liability would attach. *See* N.C. Gen. Stat. § 50-13.4 (1981) (stating there would be no secondary liability "absent evidence and a finding that such person, agency, organization or institution [standing in *loco parentis*] has voluntarily assumed the obligation of support in writing.").[4]

Here, although Partner does stand in *loco parentis* to Alisa, she did not "voluntarily assume[ ] the obligations in writing." *See* N.C. Gen. Stat. § 50-13.4 (2019). There was no written agreement for Partner to assume a child support obligation for Alisa. There are no findings of fact in the Support Order and no evidence to show Partner assumed this obligation in writing.[5]

The trial court found Partner "signed IVF paperwork which equally bound her to the risks and rewards of the IVF process." But the IVF paperwork addressed mostly the medical "risks and rewards" of the procedure, not the legal responsibilities. Furthermore, the IVF paperwork includes a section entitled "Legal Considerations and Legal Counsel." This section informs the parties:

> The law regarding embryo cryopreservation, subsequent thaw and use, and parent-child status of any resulting child(ren) is, or may be, unsettled in the state in which either the patient, spouse, partner, or any donor currently or in the future lives, or the state in which the ART ["Assisted Reproductive Technology"] program is located.

The parties acknowledged they had not received legal advice from the IVF procedure and that they should consult an attorney with any questions regarding "individual or joint parental status as to a resulting child."

The trial court also found Partner "continuously provided health insurance for [Alisa]. To do so, [Partner] signed documents claiming [Alisa] as her dependent and sought reimbursement for certain medical expenses." Again, this finding notes Partner "signed documents" for insurance purposes, but there is no indication in the evidence that these documents addressed child support in any way. Partner's provision of

---

4. Based upon the findings of fact, "[t]he parties jointly selected a [sperm] donor for the IVF process[.]" Thus, there is no "father" of the child available to contribute to the support of the child.

5. There is a finding in the Support Order that "[Partner] presented [Mother] with a parenting agreement, but that agreement was never signed."

medical insurance for Alisa supports the trial court's finding Partner stood in *loco parentis* to Alisa, but it is not a voluntary assumption of a child support obligation. *See* N.C. Gen. Stat. § 50-13.4. Because Partner never assumed a child support obligation in writing, Partner could not be held secondarily liable for child support. *See id.* ("[T]he judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing.").

Indeed, imposing even secondary liability for child support based solely upon Partner's *de facto* parental relationship with Alisa and her custodial rights would be contrary to the long-established law applicable to heterosexual couples in the same situation. *See generally Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994); *Moyer*, 122 N.C. App. 723, 471 S.E.2d 676. A parent's romantic partner or a stepparent may have a close and loving relationship with the biological child of her partner and may even have custodial rights under North Carolina General Statute Section 50-13.2, but the romantic partner or stepparent has no secondary child support obligation unless it was voluntarily assumed in writing. *See* N.C. Gen. Stat. § 50-13.4. Ironically, any attempt to treat a same-sex couple differently than a heterosexual couple as to the law to secondary liability for child support would lead to disparate outcomes and end up treating the child of a same-sex relationship *differently* than the child of a heterosexual relationship under the same circumstances.

In two cases, *Duffey v. Duffey* and *Moyer v. Moyer*, this Court clarified the requirement for a written agreement to establish secondary child support liability in the context of a de facto parent. *See Duffey*, 113 N.C. App. 382, 438 S.E.2d 445; *Moyer*, 122 N.C. App. 723, 471 S.E.2d 676. In *Duffey*, the plaintiff-mother had a daughter before her marriage to the stepfather. *See Duffey*, 113 N.C. App. at 383, 438 S.E.2d at 446. The stepfather treated the stepdaughter as his own and intended to adopt her, but the adoption proceedings were never completed. *Id.* Three more children were born during the parties' marriage, although the stepfather was not the natural father of the last child, who was conceived after the parties' separation, but born before they were divorced. *Id.* After the parties separated, they executed a separation agreement addressing custody of the children. *Id.* The stepfather agreed to pay child support for each of the four children, including the two who were not his biological or adoptive children. *Id.* The separation agreement was later incorporated into the judgment of absolute divorce. *Id.* at 384, 438 S.E.2d at 446. The stepfather appealed from the trial court's order requiring him to pay child support, claiming the trial court had erred in interpreting the

separation agreement and "the trial court's order requiring him to pay support for his stepchildren [was] void as against public policy." *Id.* at 384, 438 S.E.2d at 447.

On appeal in *Duffey*, this Court rejected the stepfather's argument and affirmed the trial court's order requiring him to pay child support for the two stepchildren because he stood in *loco parentis* to the children and had voluntarily assumed the child support obligation in the executed separation agreement:

> By signing the Separation Agreement in which he agreed to pay child support to plaintiff, defendant voluntarily and in writing extended his status of in loco parentis and gave the court the authority to order that support be paid. This is all that is required by the express terms of N.C.G.S. § 50-13.4(b).

Id. at 385, 438 S.E.2d at 447-48.

This Court reasoned:

> Applying the applicable law to the facts of this case, the trial court found that defendant had voluntarily assumed an obligation of support for Derissa and Dominique and that he stood in loco parentis to these two stepchildren at the time of the execution of the Separation Agreement. We agree.
>
> All the evidence shows that defendant voluntarily accepted Derissa and Dominique into his home and that he acted as a father to his stepchildren. Defendant cared and provided for his stepchildren by supplying them with military identification and listing them as his dependents. Thus, there is no doubt that defendant stood in loco parentis to Derissa and Dominique during the term of his marriage to plaintiff.

Id. at 385, 438 S.E.2d at 447.

Similarly, in *Moyer v. Moyer*, this Court applied the same law but came to a different result because the stepfather had *not* formally entered into a written agreement to pay child support. *Moyer*, 122 N.C. App. at 725-26, 471 S.E.2d at 678. In *Moyer*, the parties were the child's biological mother and stepfather. *Id.* at 723, 471 S.E.2d at 677. The plaintiff-mother had a daughter from a past relationship when she married the stepfather in 1987. *Id.* at 723-24, 471 S.E.2d at 677. Together they had a son in 1990. *Id.* at 724, 471 S.E.2d at 677. During the marriage, the stepfather supported both children. *Id.* The parties separated in 1994 and signed an

informal hand-written agreement in which the stepfather agreed to pay $400 per month as child support for both children. *Id.* This agreement was not acknowledged. *Id.* The mother brought a claim against the stepfather for child support for both children, and the trial court concluded the stepfather was in *loco parentis* to the stepdaughter and ordered him to pay child support for her. *Id.* The stepfather appealed only "those portions of the order relating to support" of the stepdaughter. *Id.*

After this Court reviewed the development of the law regarding the obligation of a person standing in *loco parentis* to pay child support in detail, it went on to explain what evidence would be required for secondary liability for child support to attach to a non-parent standing in *loco parentis*:

> [T]he court may not order that support be paid by a person standing *in loco parentis* absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. . . . If the rule were otherwise, a stepparent *in loco parentis* could find himself with a legal duty of support without the formalities required to bind a biological or adoptive parent to an identical obligation. Such a result is illogical, not in the interest of public policy, [because] it places a stricter duty on a stepparent *in loco parentis*, than on a biological or adoptive parent.

Id. at 725-26, 471 S.E.2d at 678-79 (citations omitted).

Our dissenting colleague relies upon *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)), for the proposition that the duty of primary liability for child support should accompany the right to custody in this type of case. But in *Price*, the analysis and holding addressed custody, not child support. *See generally id.* There is no mention of a child support claim or order in *Price v. Howard*. *See generally id.* The opinion did mention that the trial court's order on custody had also required the nonparent party to share therapy costs for the child, but the holding of the case addressed custodial rights. *See id.* at 84, 484 S.E.2d at 537. To the extent *Price* could be considered as a *sub silentio* ruling on some sort of child support obligation based upon the reference to therapy costs, *Price* refers only to potential secondary liability under North Carolina General Statute Section 50-13.4(b), not primary liability. The Court stated:

> Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also

> acquire a duty to support the child. *See* N.C.G.S. § 50-13.4(b) (1995). It is clear that the duty of support should accompany the right to custody in cases such as this one. Therefore, upon remand, the trial court should reconsider the issue of who should bear the costs of the child's therapy in light of its ultimate custody award.

Id. Therefore, we do not consider *Price* as controlling authority on the issue of a nonparent's liability for child support.

Here, under *Duffey* and *Moyer*, the result as to secondary liability for child support would be the same as if Mother had been in a romantic relationship with, for example, an infertile man as her partner, and the unmarried couple had a child by IVF using a sperm donor.[6] *See Duffey*, 113 N.C. App. 382, 438 S.E.2d 445; *Moyer*, 122 N.C. App. 723, 471 S.E.2d 676. Although the child may consider the man as her father, and he may act as a father to the child, and he may even be granted custodial rights, he still would have no child support obligation under North Carolina General Statute Section 50-13.4 *unless* he assumed the obligation in a writing.[7] *See* N.C. Gen. Stat. § 50-13.4. The law is the same for any partner or spouse standing in *loco parentis* to the child of his or her partner, no matter the sex of the parties, so in this case Partner cannot be held secondarily liable for child support.

---

6. If the mother is married, North Carolina General Statute Section 49A-1, entitled "Status of child born as a result of artificial insemination" may apply. N.C. Gen. Stat. § 49A-1 (2019). Section 49A-1 states, "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique." *Id.*

7. Mother's brief noted that she could not find any law addressing an agreement to pay child support in a same-sex relationship. We recognize that *Duffey* and *Moyer* involved heterosexual couples and *Moyer* relied upon North Carolina General Statute Section 52-10.1 regarding agreements of a "married couple" to hold that the written agreement did not satisfy the formalities to order the stepfather to be obligated to pay child support to the stepchild. *Moyer*, 122 N.C. App. at 726, 471 S.E.2d at 679. Under North Carolina General Statute Section 12-3(16), a "married couple" could now include a same-sex married couple as a term "suggesting two individuals who are then lawfully married to each other[.]" N.C. Gen. Stat. § 12-3(16). Since the parties here were not married, Section 52-10.1 would not apply to them, but the requirement of Section 50-13.4 for the person standing in *loco parentis* to "voluntarily assume[ ] the obligation of support in writing" still applies to this case. N.C. Gen. Stat. § 50-13.4. Here, because there was no written agreement of any sort regarding child support, we need not address whether any particular level of formality is required for a written agreement regarding child support by a same-sex unmarried couple.

V. Conclusion

The trial court's attempt to impose one obligation of a mother or father – child support – upon Partner, to go along with the benefit of joint custody already conferred upon her is understandable. It may seem only fair for Mother and Partner to share the responsibility of financial support for Alisa along with the benefits of joint physical and legal custody. It may seem just as fair to require a stepfather or male partner who stands in *loco parentis* to his partner's child to pay child support, especially if he also shares custody with the child's natural or legal parent. But here, North Carolina's statutes and established case law allow Partner to act as a parent to Alisa under Section 50-13.2 without paying child support under Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.2 (stating custody may be awarded to "such person, agency, organization or institution as will best promote the interest and welfare of the child"); *see also* N.C. Gen. Stat. § 50-13.4 ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child.").

We fully appreciate the difficult issues created by IVF and other forms of assisted reproductive technology, but only the General Assembly has the authority to amend our statutes to address these issues.[8] Protection of the children born into these situations, whether to a same-sex couple or a heterosexual couple, is a complex policy issue, but this Court does not have the role of creating new law or adopting new policies for our state. *See Allen v. Allen*, 76 N.C. App. 504, 507, 333 S.E.2d 530, 533 (1985) ("Issues of public policy should be addressed to the legislature.").

After our *de novo* review, we conclude the trial court erred by giving a "gender neutral" interpretation to North Carolina General Statute Section 50-13.4, ordering Partner to pay child support. Partner cannot be held primarily liable for child support because she is not Alisa's "parent" within the meaning of North Carolina General Statute Section 50-13.4(b). Partner cannot be secondarily liable for child support under North Carolina General Statute Section 50-13.4(b) because she did not assume an obligation to support Alisa in writing. We therefore reverse the Support Order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

---

8. For a full discussion of these issues, *see* The Honorable Beth S. Dixon, For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology, 43 CAMPBELL L. REV. 21 (2021).

Judge FLOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.[1]

In 1997, in *Price v. Howard*, our Supreme Court grappled with a child custody case involving an unwed heterosexual couple where the man—despite having believed he was the father and acted in all ways as the father to the parties' child—was determined to not actually be the biological father of the child. *Price v. Howard*, 346 N.C. 68, 70-71, 484 S.E.2d 528, 529 (1997). The man's name was not listed on the birth certificate, but his last name was given to the child. The man had exercised custody with the child. The man acted in all ways as a natural parent to the child. *Id.* There, our Supreme Court recognized that a biological mother may act inconsistently with her constitutionally protected status as a natural parent by ceding custodial and other parenting duties to a third-party where "[k]nowing that the child was her natural child, but not plaintiff's, she represented to the child and to others that plaintiff was the child's natural father. She chose to rear the child in a family unit with plaintiff being the child's *de facto* father." *Id.* at 83, 484 S.E.2d at 537.

Crucially, as it relates to this case, the Court concluded by reversing the mandate of the Court of Appeals which had, in turn, reversed the trial court's order requiring the parties to share therapy costs for the child. The Court stated: "Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also acquire a duty to support the child. *See* N.C.G.S. § 50–13.4(b) (1995). It is clear that the duty of support should accompany the right to custody in cases such as this one." *Id.* at 84, 484 S.E.2d at 537.

Today, almost 28 years later, the majority effectively holds that—as it relates to an unwed same-sex couple—the duty of support, as a matter of law, does not accompany the right to custody in cases such as *this* one. To the contrary, the majority decision here concludes holding

1. I agree with the majority's statement of facts and analysis in Parts I and II of the Opinion of the Court. I respectfully dissent from Part III for the reasons stated. Although not necessary to my reasoning, and an issue I would not reach in this case, I concur in the result in Part IV, again, for reasons stated. I further dissent from the conclusion reached in Part V because—for all the reasons stated—the proper result here is to affirm the trial court.

a woman in an unwed same-sex couple to the principle espoused by our Supreme Court in *Price* applicable to a man in an unwed heterosexual couple is, somehow, not gender-neutral. I disagree and respectfully dissent. The trial court's Order should be affirmed.

I. Primary Liability of Child Support

In this case, as the trial court found, the pleadings and evidence establish circumstances warranting both parties in this case held primarily liable for the support of their minor child. Moreover, the trial court's Findings support its Conclusions of Law, including that Plaintiff and Defendant are parents of the minor child and owe a duty of support to their minor child under N.C. Gen. Stat. § 50-13.4. *See State o/b/o Midgett v. Midgett*, 199 N.C. App. 202, 205-06, 680 S.E.2d 876, 878 (2009) (recognizing the standard of review for child support orders is broadly an abuse of discretion but requires—as any bench trial—analyzing whether trial court's findings are supported by evidence and, in turn, the findings support the conclusions of law). Three independent—but also interrelated—legal bases undergird this conclusion: (A) our case law derived from *Price* establishing partners—including but not limited to same-sex partners—of a biological parent may become *de facto* parents by assuming parental rights and responsibilities ceded by the biological parent; (B) collateral and judicial estoppel; and (C) the language of the child support statute itself.

A. De Facto Parent

As it relates to this case, our Courts have subsequently followed the reasoning in *Price* and applied it—in gender neutral fashion—including to same-sex unwed couples. *See Ellison v. Ramos*, 130 N.C. App. 389, 396, 502 S.E.2d 891, 895 (1998) (female in unwed heterosexual relationship had standing to pursue custody action against biological father). In particular, in *Mason v. Dwinnell*, this Court applied *Price* to a custody determination involving a same-sex unwed couple who had a child through IVF. There, the trial court found:

> [The parties] jointly decided to create a family and intentionally took steps to identify [non-biological parent] as a parent of the child, including attempting to obtain sperm with physical characteristics similar to [non-biological parent], using both parties' surnames to derive the child's name, allowing [non-biological parent] to participate in the pregnancy and birth, holding a baptismal ceremony at which [non-biological parent] was announced as a parent and her parents as grandparents, and designating

> [non-biological parent] as a parent of the child on forms and to teachers.

Mason v. Dwinnell, 190 N.C. App. 209, 222-23, 660 S.E.2d 58, 67 (2008). Moreover, after the child's birth:

> The findings of fact also reveal that [the parties] functioned as if both were parents, with [biological parent] agreeing to allow [non-biological parent] to declare the child as a dependent on her tax returns and the parties sharing caretaking and financial responsibilities for the child. The court found, without challenge by [biological parent], that [biological parent] "encouraged, fostered, and facilitated the emotional and psychological bond between the minor child and [non-biological parent]" and that "[t]hroughout the child's life, [non-biological parent] has provided care for him, financially supported him, and been an integral part of his life such that the child has benefited from her love and affection, caretaking, emotional and financial support, guidance, and decision-making." As a result, [non-biological parent] became "the only other adult whom the child considers a parent . . ."

Id. at 223, 660 S.E.2d at 67. This Court held: "In sum, we conclude that the district court's findings of fact establish that [biological parent], after choosing to forego as to [non-biological parent] her constitutionally-protected parental rights, cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Id.* at 227, 660 S.E.2d at 70. We determined these findings supported the conclusion the biological parent had acted inconsistently with her constitutionally protected status as a parent. *Id.* at 230, 660 S.E.2d at 71. While we acknowledged our decision did not mean that "[non-biological parent] is entitled to the rights of a legal parent," *id.* at 227, 660 S.E.2d at 70, we noted the biological mother

> nonetheless voluntarily chose to invite [non-biological parent] into that relationship and function as a parent from birth on, thereby materially altering her child's life. [Biological mother] gave up her right to unilaterally exclude [non-biological parent] (or unilaterally limit contact with [non-biological parent]) by choosing to cede to [non-biological parent] a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child.

Id. at 226, 660 S.E.2d at 69. We went on to affirm the trial court's best interests determination awarding joint legal and physical custody to the parties. *Id.* at 233, 660 S.E.2d at 73.

What *Price*, *Mason*, and other cases recognize at law is that a person who is in a domestic or intimate relationship with the biological parent—but is not a biological parent to a child may, in fact, be "transformed into a parent": a de facto parent. *See Boseman v. Jarrell*, 364 N.C. 537, 552, 704 S.E.2d 494, 504 (2010); *Moriggia v. Castelo*, 256 N.C. App. 34, 53, 805 S.E.2d 378, 388-89 (2017); *Davis v. Swan*, 206 N.C. App. 521, 529, 697 S.E.2d 473, 478 (2010). This relationship exceeds that of a typical *in loco parentis* relationship—such as a step-parent relationship—where a person has become part of a child's life *in place of a parent* and taken on obligations and responsibilities associated with parenting. *See Liner v. Brown*, 117 N.C. App. 44, 48, 449 S.E.2d 905, 907 (1994) (quoting *Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974) ("This Court has defined the term in loco parentis to mean "in the place of a parent" and has defined "person in loco parentis" as "one who has assumed the status and obligations of a parent without a formal adoption.").[2]

The de facto parent relationship arises under "the circumstances of [a parent] intentionally creating a family unit composed of [themselves], [the] child and, to use the Supreme Court's words, a 'de facto parent.' " *Mason*, 190 N.C. App. at 225-26, 660 S.E.2d at 68 (quoting *Price*, 346 N.C. at 83, 484 S.E.2d at 537). This is so where a trial court in a custody case make findings that "establish that [the legal parent] intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that [they] 'induced [non-parent and minor] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.' " *Id.* at 226, 660 S.E.2d at 69. The use of this de facto parenting relationship is one that was judicially created and recognized as a basis for a judicial determination a parent had acted inconsistently with their parental status to permit the de facto parent standing to seek legal and physical custody of their child.

In this case, Plaintiff utilized this de facto parent concept to obtain legal custody. In her Amended Complaint for Custody, Plaintiff alleged

---

2. Notably, however, for purposes of asserting *in loco parentis* as a defense to a criminal offense, we have held the *in loco parentis* "relationship is established only when the person with whom the child is placed intends to assume the status of a parent by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance." *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811 (1980).

"Plaintiff has a parent-child relationship with the minor child and the minor child refers to Plaintiff as 'Mom' or 'Mama.' " Plaintiff further alleged: the parties jointly entered into an assisted reproductive technology agreement; Plaintiff's heavy involvement in the IVF process—including jointly selecting a sperm donor and the storage and freezing of embryos and Plaintiff's payment of costs associated with storage and "significant sums towards the costs of IVF treatment"; Plaintiff's participation in appointments during the pregnancy; Plaintiff's provision of health insurance for Defendant including for IVF treatments, doctor's visits, and delivery; Plaintiff's adding the child as a dependent on her health insurance; Plaintiff's provision of "substantial funds" and "financial assistance" to Defendant to assist in providing for the child's needs and expenses—including daycare expenses; and joint sharing of parental responsibilities.

The trial court relied on many of these facts to conclude Plaintiff has a "parent/child relationship with the minor child and has standing to seek custody of the minor child against" Defendant—including specifically Plaintiff's provision of health insurance for the child and coverage of IVF treatments, payment of uninsured medical expenses for the child, and payment of daycare expenses. The trial court—in the custody order—expressly found Plaintiff "bonded with the minor child and formed a parent-child like relationship with the minor child." Based on its Findings, the trial court ultimately concluded: "The parties are fit and proper *parents* to have joint legal custody of the minor child and to share physical custody of the minor child . . ." (emphasis added). In granting joint legal custody, the trial court awarded Plaintiff final decision-making authority regarding the child's education. The trial court further ordered the parties to alternate physical custody on holidays and special occasions including Thanksgiving, Christmas, and Mothers' Day.

No party has challenged this custody order. Specifically, the parties do not challenge the trial court's Findings and Conclusions that a parent-child relationship existed between Plaintiff and the minor child or, indeed, that Plaintiff is a fit and proper parent to have custody of the minor child. Indeed, the custody order appears consistent with the holdings of *Price* and *Mason* in its analysis of the relationship between Plaintiff and the minor child and whether Defendant "intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that [they] 'induced [Plaintiff and the minor child] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.' " *Mason*, 190 N.C. App. at 225-26, 660 S.E.2d at 69 (quoting *Price*, 346 N.C. at 83, 484 S.E.2d at 537).

As such, Plaintiff was transformed into a parent—certainly a *de facto* parent—through the parties' actions. Because of that particular status and relationship with the minor child—based on the principles espoused in *Price* and applied in *Mason*— Plaintiff sought and obtained legal custody of the child.[3] Consistent with *Price*, then, "[i]t is clear that the duty of support should accompany the right to custody in cases such as this one." *Price*, 346 N.C. at 84, 484 S.E.2d at 537. Indeed, the trial court—expressly echoing our Supreme Court in *Price*—found "De Facto Mother has enthusiastically and voluntarily held herself out as a parent to the minor child and has a support obligation that accompanies her, now court ordered, right to 50/50 custody. The duty of support should accompany the right to custody in cases such as this one."

B. Collateral and Judicial Estoppel

Although not expressly applied in the trial court's order in this case, undergirding its reasoning are the two related concepts of collateral and judicial estoppel. The trial court recognized Plaintiff had litigated the issue of her de facto parentage of the minor child to obtain custody in the very same case file in which the child support order was ultimately entered. The trial court determined that having prevailed on that issue in the custody proceeding under based on allegations of a parental relationship and her assumption of the rights and duties of a parent—including providing health insurance and other financial support for the child—and having been adjudged in the custody order to be a parent to the minor child, Plaintiff should not then be permitted to disavow the parental relationship to avoid paying child support.

"Under the doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Strates Shows, Inc. v. Amusements of America, Inc.*, 184 N.C. App. 455, 461, 646 S.E.2d 418, 423 (2007) (citation and quotation marks omitted). "Collateral estoppel bars the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.* (citation and quotation marks omitted). "The elements of collateral estoppel are as follows:

---

3. "Although not defined in the North Carolina General Statutes, our case law employs the term 'legal custody' to refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27-28 (2006) (citations omitted).

(1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 37, 738 S.E.2d 819, 825 (2013) (citation and quotation marks omitted). Notably "the fact that a prior judgment was based on an erroneous determination of law or fact does not as a general rule prevent its use for purposes of collateral estoppel." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986).

Although a related concept, judicial estoppel differs from collateral estoppel in three ways:

> First, judicial estoppel seeks to protect the integrity of the judicial process itself, whereas collateral estoppel and res judicata seek to protect the rights and interests of the parties to an action. Second, unlike collateral estoppel, judicial estoppel has no requirement that an issue have been actually litigated in a prior proceeding. Third, unlike collateral estoppel, judicial estoppel has no requirement of "mutuality" of the parties in either its offensive or defensive applications.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 16, 591 S.E.2d 870, 880–81 (2004) (citations omitted). "[B]ecause of its inherent flexibility as a discretionary equitable doctrine, judicial estoppel plays an important role as a gap-filler, providing courts with a means to protect the integrity of judicial proceedings where doctrines designed to protect litigants might not adequately serve that role." *Id.* at 26, 591 S.E.2d at 887.

In *Whitacre*, the North Carolina Supreme Court identified three factors used to determine the applicability of judicial estoppel:

> The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, is that a "party's subsequent position 'must be clearly inconsistent with its earlier position.' " Second, the court should "inquire whether the party has succeeded in persuading a court to accept that party's earlier position." Third, the court should inquire "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Judicial estoppel is an "equitable doctrine invoked by a court at its discretion."

Price v. Price, 169 N.C. App. 187, 190-91, 609 S.E.2d 450, 452 (2005) (quoting *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) (citations omitted)).

Applying collateral estoppel, there was a prior suit between these parties which resulted in a permanent custody order constituting a final judgment on the merits. *See* N.C. Gen. Stat. § 50-19.1 (2023). The custody suit as with the child support action involved the issue of whether Plaintiff was, de facto, a parent of the child. The issue was actually litigated in the custody suit and necessary to the judgment because absent a determination Plaintiff was a de facto parent, Plaintiff would not have had standing to seek custody of the minor child. Finally, the trial court determined Plaintiff had formed a parent-child relationship—and, thus, Plaintiff was a de facto parent of the child. Indeed, the trial court in the custody proceeding went further: finding both Plaintiff and Defendant were "fit and proper parents." Critically on the facts of this case, without these determinations, the trial court could not have awarded Plaintiff the legal custody of the minor child Plaintiff sought. The trial court's adjudication in the custody action precludes Plaintiff from contending she is not, in fact, a parent of the minor child in a later child support proceeding.

Judicial estoppel is equally, if not more, applicable. First, in her initial Complaint for custody, Plaintiff alleged the minor child was "her child." In the Amended Complaint, Plaintiff referred to herself as "Mom." Plaintiff further alleged she has "a parent-child relationship with the minor child." Plaintiff alleged that part of this relationship was the fact she provided financial support for the child, including health insurance. For Plaintiff to claim herself as a parent providing support for the child in the custody action while claiming not to be a parent to disavow any obligation to support her child is clearly inconsistent. For example, Plaintiff alleged she acted as a parent to the child by providing health insurance—but now seeks to claim she should not be obligated to provide health insurance for the child under a support order because she is not a parent.

Second, Plaintiff absolutely succeeded in persuading the trial court she had a parent-child relationship with the child and convincing the court she was a fit and proper *parent* to exercise custody. Indeed, the trial court awarded her joint legal custody including decision-making responsibilities and final decision-making authority over educational decisions.

Third, permitting Plaintiff's inconsistent position creates an unfair advantage by putting her in the position of having all the benefits of

legal and physical custody with none of the legal support obligations. Defendant would suffer an unfair detriment in that Plaintiff may now make long-term decisions with financial ramifications for the child, including specifically educational decisions, which Defendant would be solely responsible for paying. Indeed, Plaintiff's position may even have detrimental impacts on the child if Plaintiff is no longer obligated to provide financial support or health insurance for the child.

As such, Plaintiff, having claimed a parent-child relationship as a de facto parent to the child to wrest custody, at least in part, away from Defendant should be estopped in the subsequent child support proceeding from denying that she is a parent to the child for purposes of her support obligation.

C. Child Support Statute

Ultimately, however, it is the plain language of the child support statute itself that provides for Plaintiff to share in the primary liability for child support. Section 50-13.4(b) expressly provides: "*In the absence of pleading and proof that the circumstances otherwise warrant*, the father and mother shall be primarily liable for the support of a minor child." N.C. Gen. Stat. § 50-13.4(b) (2023) (emphasis added).

In this case, the trial court expressly found "pleading, proof and circumstances" warranting holding both parties equally liable for child support of their child, including many facts that were also used to establish Plaintiff's custodial rights. Plaintiff has not challenged any of these Findings on appeal. Those Findings are, thus, binding on this Court on appeal. *Cash v. Cash*, 286 N.C. App. 196, 202, 880 S.E.2d 718, 725 (2022). In turn, they support the trial court's conclusion Plaintiff should be held liable for child support as a lawful parent. *See id.*

Again, crucially, Plaintiff has been found by a court in a custody action to be a parent to the minor child. This parental status was not thrust unwittingly upon Plaintiff. Plaintiff voluntarily assumed this status even before the birth of the child. Plaintiff actively advocated for this status in the custody proceeding. Plaintiff has not challenged any Finding of Fact in the support order reaffirming the parental status she obtained through her custody action. As a parent, Plaintiff may be held liable for child support. *See* N.C. Gen. Stat. § 50-13.4(b) ("However, the judge may not order support to be paid by a person who is not the child's parent . . . absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing."). Indeed, the facts and circumstances of this case compel the conclusion Plaintiff should be held primarily liable for the support of her child along with Defendant. *See id.*

Thus, the trial court's Findings support its determination under Section 50-13.4(b) that Plaintiff and Defendant should be held primarily liable for child support. Therefore, the trial court did not err in ordering Plaintiff to pay child support in this case. Consequently, the trial court's Order should be affirmed.

II. Secondary Liability for Child Support

As I would conclude on the facts and circumstances of this case Plaintiff is primarily liable for child support and would affirm the trial court on that basis, I would not otherwise reach the issue of secondary liability for child support. However, I do agree with the majority to the extent that if Plaintiff is determined to not be a parent to the child, then, in the absence of a written assumption of the support obligation, Plaintiff may not be held secondarily liable for support. If, as Plaintiff claims, she is nothing more than a temporary *in loco parentis* figure to Defendant's child with no real duties or obligations, then it follows Plaintiff cannot be held legally liable for the support of the child. However, it also follows that having disavowed any support obligation or parental status with respect to support, Plaintiff's custodial rights—obtained by her allegations of parental status and obligations—may be revisited. The trial court, on motion of a party, should consider whether Plaintiff's disavowal of her parental status and support obligation constitutes a substantial change of circumstances affecting the child warranting a modification of Plaintiff's legal and physical custodial rights in the child's best interests. *See* N.C. Gen. Stat. § 50-13.7 (2023). As in *Price*, the right to custody should accompany the duty of support in cases such as this one. *Price*, 346 N.C. at 84, 484 S.E.2d at 537.

HUDSON v. HUDSON

[293 N.C. App. 87 (2024)]

AL HUDSON, PLAINTIFF
v.
ANSLE HUDSON, DEFENDANT

No. COA22-1000

Filed 19 March 2024

Judges—recusal—scope of authority to enter subsequent order—order vacated—new hearing required

In a years-long domestic case, a trial judge lacked authority to enter an order on permanent child support and alimony after she recused herself from all future hearings in the case. Although the support and alimony issues were heard prior to the recusal, the judge's stated reason for recusing—in order to promote justice after plaintiff father commented that the judge favored one party over another—was not limited to any particular issue or claim. Therefore, the support and alimony order was vacated and the matter was remanded for a new hearing and entry of a new order.

Appeal by defendant from order entered 7 July 2022 by Judge Tracy H. Hewett in District Court, Mecklenburg County. Heard in the Court of Appeals 8 August 2023.

Sodoma Law, by Amy E. Simpson, for plaintiff-appellee.

Marcellino & Tyson, PLLC, by Danielle J. Walle and Matthew T. Marcellino, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a child support and alimony order. Because the trial judge had previously recused before entering the order, we reverse and remand.

I. Procedural Background

Because the determinative issue on appeal is based upon the trial judge's lack of authority to enter the order after her recusal from the case, we need not thoroughly address the factual background of this case. In brief summary, plaintiff-father and defendant-mother were married and had three children. They later separated and divorced. In August 2019, Judge Tracy H. Hewett entered an order for post-separation support and temporary child support.

In September 2021, Judge Hewett heard Mother's claims for alimony and permanent child support. In November 2021, Judge Hewett emailed counsel a general summary of her ruling and directed Father's counsel to draft the order. Before the ruling from the September 2021 hearing was written and signed by Judge Hewett, Judge Hewett entered an Order of Recusal on or about 7 March 2022. The Order of Recusal stated that Judge Hewett recused herself from all future hearings "not based on any parts of the Judicial Code of Conduct" but because Father commented "the court was biased toward defendant/mother and/or prejudiced against plaintiff/father" and as such recusal was appropriate "[b]ased on the perception articulated and the years long history of these parties appearing before this judge, and believing that in order to promote justice all parties must feel heard." Thereafter, on 7 July 2022, Judge Hewett entered a Permanent Child Support and Alimony Order. Mother appeals.

II. Recusal

Mother contends "[t]he trial judge erred by continuing to preside over this matter following her recusal" and "[t]he trial judge lacked authority to enter orders following her recusal without following the requisite procedures to continue presiding over this matter."

> Black's Law Dictionary defines *recusal* as "removal of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest." *Disqualification* is defined as "something that incapacitates, disables, or makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party."

State v. Smith, 258 N.C. App. 682, 686 n. 2, 813 S.E.2d 867, 869 n. 2 (2018) (emphasis in original) (citations and brackets omitted). Both parties heavily rely on the Code of Judicial Conduct, but their arguments speak more to when a judge should recuse, not the authority of a judge after an order for recusal has been entered. The recusal order was not appealed, and we express no opinion on whether Judge Hewett was in fact required to recuse. The order of recusal is the law of the case.

Father, citing unpublished caselaw, contends a partial recusal is appropriate and left Judge Hewett with authority to enter the Permanent Child Support and Alimony Order since she had previously heard the evidence and, by email, rendered a general ruling. *See State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) ("Citation to unpublished authority is expressly

disfavored by our appellate rules but permitted if a party, in pertinent part, believes there is no published opinion that would serve as well as the unpublished opinion. N.C. R. App. [P.] 30(e)(3) (2004). . . . [W]e reiterate that citation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion." (quotation marks and ellipses omitted)). In *Zurosky v. Shaffer*, No. COA14-954, 242 N.C. App. 523, 776 S.E.2d 897 (2015) (unpublished), Father's cited case, this Court noted that at times a partial recusal may be appropriate, but not in circumstances

> where the trial judge recused herself on the issue of attorney's fees due to her spouse's interest as a partner of the firm seeking recovery of the fees, the underlying motions for which attorney's fees are sought are amply intertwined with the claims for attorney's fees so that recusal from both issues is proper.

Id., slip op. at 10. Father argues because there are no "intertwined" issues, partial recusal is appropriate. We disagree.

Indeed, even if we found Father's argument persuasive, *Zurosky* is still inapposite to this case. In *Zurosky*, attorney's fees were the very issue upon which the trial judge could have been perceived as biased, but here we are bound by Judge Hewett's own order of recusal. *See id.* The recusal order was not limited to particular issues but to "future hearings that involve either or both above-named parties" because Father commented "the court was biased toward defendant/mother and/or prejudiced against plaintiff/father" and as such recusal was appropriate "[b]ased on the perception articulated and the years long history of these parties appearing before this judge, and believing that in order to promote justice all parties must feel heard."

Although the recusal order referred to "future hearings," the order from the 8 and 9 September 2021 hearing had not yet been entered. An order is not effective until it is written, signed, and filed. *See McKinney v. Duncan*, 256 N.C. App. 717, 719-20, 808 S.E.2d 509, 511-12 (2017) ("A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. This Court has previously held that Rule 58 applies to orders, as well as judgments, such that an order is likewise entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." (citations and quotation marks omitted)). The recusal order did not limit its application only to any newly filed motions or issues arising after entry of the recusal order, and given the stated reason for the recusal order, the purpose of the recusal order would not be served by a limited or partial recusal. Father claimed Judge

Hewett was biased against him and that based on the "years long history of these parties appearing before this judge" the order was necessary to "promote justice" and allow "all parties [to] feel heard." This reason for recusal is not limited to any particular issue or claim. In addition, as Father is the party who requested the recusal, we find it disingenuous that he now contends he believes Judge Hewett should not be recused from entering the order on appeal, since he argues the order should be affirmed.

While we are not aware of any binding authority regarding a trial court's authority after recusal, nor does Mother cite to any, we do find persuasive the reasoning in the unpublished case of *Phillips v. Phillips*, No. COA09-1059, 206 N.C. App. 330, 698 S.E.2d 557 (2010) (unpublished):

> Once a trial judge has been disqualified or has recused herself, that judge may not enter an order or judgment in the case in which she was presiding. *See Motors Corp. v. Hagwood*, 233 N.C. 57, 58-61, 62 S.E.2d 518, 518-20 (1950) (explaining that a hearing conducted by a trial court who already had retired, but was attempting to serve as an emergency judge, was *coram non judice*, and the judgment entered was vacated). *Accord Bolt v. Smith*, 594 So.2d 864, 864 (Fla. Dist. Ct. App. 1992) ("[O]nce a trial judge has recused himself, further orders of the recused judge are void and have no effect."); *Byrd v. Brown*, 613 S.W.2d, 695, 699-700 (Mo. Ct. App. 1981) (holding that the trial judge lacked "authority" over the case once the judge was disqualified and, therefore, the judge's subsequent orders were "void"). Therefore, in addition to the stay pending appeal, the trial judge's recusal also operated to divest her of authority to enter the subsequent order awarding attorneys' fees.

Id., slip op. at 7-8 (alterations in original).

Recusal simply means "[r]emoval of oneself[.]" Black's Law Dictionary 1529 (11th ed. 2019). While we, as in *Zurosky*, "make no determination as to whether a partial recusal is appropriate in other cases or under different circumstances[,]" *Zurosky*, slip op. at 10, here, where the recusal order itself provides the recusal was based upon perceived bias against one party, Judge Hewett had no authority to enter the order on appeal after her recusal. As we conclude Judge Hewett did not have authority to enter the Permanent Child Support and Alimony Order, we vacate the order and remand to the trial court for further proceedings.

Our Supreme Court has previously stated that upon recusal of a district court judge, Rule 63 does not allow a "substituted judge" to "enter . . . [the recused judge's] order as written" but instead must hold a new hearing. *See Lange v. Lange*, 357 N.C. 645, 648, 588 S.E.2d 877, 879-80 (2003). While the appeal in *Lange* was from the recusal order itself, the Supreme Court stated,

> If the Court of Appeals determines that Judge Christian erred in entering his order recusing Judge Jones from the parties' case, the matter will be remanded to the trial court for further proceedings in accordance with Rule 63. In such circumstance, the newly assigned judge will have the discretion either to enter Judge Jones' order or to hold a new custody modification hearing.
>
> However, if Judge Christian's recusal order is affirmed on appeal, Rule 63 has no application in that Judge Jones was properly recused before he retired. In such case, the newly assigned judge will have no discretion in how to proceed in that a new hearing will be held and a new order entered. Therefore, affirming Judge Christian's recusal order will have the effect of eliminating any discretion a judge may have to enter Judge Jones' custody modification order.

Our Supreme Court determined in *Lange* that Rule 63 would give a newly assigned judge discretion to enter the same order on behalf of the judge who heard the matter if this was based only on that judge's retirement, but if the recused judge was properly recused, Rule 63 would not allow the newly assigned judge the discretion to enter the same order on behalf of the recused judge. *See id.* Therefore, not only did Judge Hewett lack the authority to enter the order after her recusal, on remand the trial court must hold a new hearing.

We appreciate Judge Hewett's decision to recuse to "promote justice" and to allow "all parties [to] feel heard" even if recusal was not necessarily required under the Code of Judicial Conduct. The Code of Judicial Conduct is intended to be a minimum standard of behavior for judges so it is prudent for a judge to err on the side of caution. Certainly her intent was not to prolong the resolution of this case, and it is unfortunate that a new hearing is required. But considering the recusal order and the requirements of Rule 63, we are constrained to vacate the order on appeal and to order a new hearing.

III. Conclusion

We vacate the Permanent Child Support and Alimony Order and remand this matter to the trial court for a new hearing and entry of a new order.

VACATED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

IN THE MATTER OF THE APPEAL OF
OAK MEADOWS COMMUNITY ASSOCIATION, APPELLANT

FROM THE DECISION OF THE RANDOLPH COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE EXEMPTION OF CERTAIN REAL PROPERTY.

No. COA23-728

Filed 19 March 2024

Taxation—property tax—exemption—manufactured home community—definition of "providing housing"

The North Carolina Property Tax Commission properly denied a non-profit organization's request for a property tax exemption because the organization's operation of a leased-land housing cooperative—in which the organization owned the land and rented home sites to members who secured their own individually-owned manufactured homes—did not meet the definition of "providing housing" for low-income residents pursuant to N.C.G.S. § 105-278.6(a)(8). The statutory term was unambiguous and, given its plain meaning, clearly required more than merely making real property available for others to purchase their own dwelling structures.

Appeal by taxpayer-appellant from final decision entered 28 February 2023 by the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 23 January 2024.

Robinson, Bradshaw & Hinson, P.A., by Emily J. Schultz, H. Hunter Bruton, Emma W. Perry, Curtis C. Strubinger, and Timothy P. Misner, for taxpayer-appellant.

Poyner Spruill LLP, by Emily M. Meeker and N. Cosmo Zinkow, for appellee Randolph County.

ZACHARY, Judge.

This appeal raises a single issue of law: the definition of the phrase "providing housing" as used in the property tax exemption provided for "[r]eal and personal property owned by . . . [a] nonprofit organization *providing housing* for individuals or families with low or moderate incomes[.]" N.C. Gen. Stat. § 105-278.6(a)(8) (2023) (emphasis added). Oak Meadows Community Association ("Oak Meadows") applied for this exemption, which the Randolph County Board of Equalization and Review ("Randolph County") denied. Oak Meadows now appeals from the final decision of the North Carolina Property Tax Commission ("the Commission"), which affirmed Randolph County's denial of Oak Meadows's request. After careful review, we affirm.

I. Background

Oak Meadows is a North Carolina nonprofit organization, and its purpose is "to own and maintain land as a manufactured home community with the goal of a permanently affordable, safe, and stable environment in which its current and future members shall live as residents[.]" Oak Meadows owns approximately 3.74 acres of land ("the Property") in Asheboro, North Carolina. The Property has the infrastructure to operate as a manufactured home community ("MHC") accommodating 60 manufactured homes.

Oak Meadows is structured as a leased-land housing cooperative, in which its members are residents on the Property. Oak Meadows's members own their manufactured homes individually, and Oak Meadows has no ownership interest in any of the homes. No individual obtains a financial return on investment through membership in Oak Meadows.

On 9 February 2022, Oak Meadows requested a property tax exemption pursuant to § 105-278.6(a)(8) for the Property. On 16 February 2022, Randolph County denied Oak Meadows's request, concluding that "housing is not being provided for individuals or families with low or moderate incomes." Oak Meadows timely appealed to the Commission, before which the matter came on for hearing on 9 November 2022.

On 28 February 2023, the Commission issued its final decision, affirming the denial of Oak Meadows's request. The Commission found as fact:

2. There appears to be no dispute that the manufactured homes situated in the MHC on the [Property] are individually owned, and that [Oak Meadows] has no ownership interest in the manufactured homes. Accordingly, we find that [Oak Meadows] owns only the underlying land within the MHC and does not own any of the homes themselves.

3. Although [Oak Meadows] owns the MHC land, we note that land alone is insufficient to house an individual or family. [Oak Meadows] facilitates manufactured home lot rentals for its members, but since individual homeowners must secure their own manufactured housing separately from leasing lots within the MHC, we find that [Oak Meadows] does not "provid[e] housing for individuals or families."

Based on these findings of fact, the Commission concluded:

2. The plain language of N.C. Gen. Stat. §105-278.6 provides that a property owner must be engaged in "providing housing for individuals or families with low or moderate incomes" in order to receive the benefit offered by the statute. [Oak Meadows] does not provide housing by solely owning the rental lots in a MHC, and the individual homeowners are responsible for securing their own homes to place upon the rental lots. Accordingly, [Oak Meadows] does not qualify for the benefit offered by N.C. Gen. Stat. §105-278.6.

3. Although [Oak Meadows] contends that granting the requested exemption is consistent with the policy of the State in promoting the creation of housing for low and moderate income households, we find there to be no ambiguity in the language of the statute that would allow for the requested exemption under the facts of this case, and note further that the Commission has no authority to override the stated intent of the General Assembly.

Consequently, the Commission affirmed Randolph County's denial of Oak Meadows's request. Oak Meadows timely filed notice of appeal.

II. Discussion

Oak Meadows argues that the Commission erred as a matter of law by denying its request for a property tax exemption because the

Commission's "atextual interpretation cannot be squared with [N.C. Gen. Stat. § 105-278.6(a)(8)]'s plain meaning, or [its] statutory structure and purpose." We disagree.

A. Standard of Review

On appeal from a decision of the Commission, this Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b). This Court

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

Id. "In making these determinations, the court shall review the whole record or the portions of it that are cited by any party, and due account shall be taken of the rule of prejudicial error." *Id.* § 105-345.2(c).

"The taxpayer bears the burden of proving that its property meets the requirements of an *ad valorem* taxation exemption." *In re Blue Ridge Hous. of Bakersville LLC*, 226 N.C. App. 42, 49, 738 S.E.2d 802, 807 (2013) (cleaned up), *disc. review improvidently allowed*, 367 N.C. 199, 753 S.E.2d 152 (2014). "Issues of statutory construction are questions of law, reviewed de novo on appeal." *Id.* (cleaned up). When conducting de novo review, the appellate court "considers the matter anew and freely substitutes its own judgment for that of the Commission." *Id.* (citation omitted).

B. Analysis

"In appeals to the Commission, the taxpayer bears the burden of proving that its property is entitled to an exemption under the law." *In re Eagle's Nest Found.*, 194 N.C. App. 770, 773, 671 S.E.2d 366, 368 (2009). "This burden is substantial and often difficult to meet because all property is subject to taxation unless exempted by a statute of statewide origin." *Id.* (citation omitted). "[W]here a statute provides for an exemption from taxation, the statute is construed strictly against the taxpayer and in favor of the State. The underlying premise when interpreting taxing statutes is: Taxation is the rule; exemption the exception." *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 611, 231 S.E.2d 656, 658 (1977) (cleaned up).

When interpreting tax statutes, as with any other statute, it is a "well-recognized rule that the words used in a statute must be given their natural or ordinary meaning." *In re N.C. Forestry Found., Inc.*, 296 N.C. 330, 337, 250 S.E.2d 236, 241 (1979). "Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *In re POP Capitol Towers, LP*, 282 N.C. App. 491, 497, 872 S.E.2d 338, 342 (2022) (citation omitted).

Here, the parties agree that this case may be resolved upon review of the plain language of N.C. Gen. Stat. § 105-278.6(a)(8), although they disagree as to the effect of that language. The term "provide housing" as used in § 105-278.6(a)(8) "has not been defined by statute or judicial decision; therefore, we look to its natural, approved and recognized meaning." *In re R.W. Moore Equip. Co.*, 115 N.C. App. 129, 132, 443 S.E.2d 734, 736, *disc. review denied*, 337 N.C. 693, 448 S.E.2d 533 (1994). When interpreting undefined words or phrases, "courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Parkdale Am., LLC v. Hinton*, 200 N.C. App. 275, 279, 684 S.E.2d 458, 461 (2009).

In its appellate brief, Oak Meadows provides a dictionary definition of the word "provide" as meaning to "supply" or "make available." Oak Meadows thus contends that it "is 'providing housing' by supplying real property and making it available to use for housing." Oak Meadows further explains that it "provides individuals and families with a place to live—namely legal home sites in a safe and affordable community" and that "a home site, like the manufactured home itself, is an essential element of manufactured housing."

Be that as it may, providing "an essential element of manufactured housing" is not the same as "providing housing." It strains credulity to suggest that the natural or ordinary meaning of the phrase "providing housing" would be "providing [the real property for] housing[.]" N.C. Gen. Stat. § 105-278.6(a)(8).

Notably, Oak Meadows offers a dictionary definition of "provide" in its appellate brief, but fails to include a dictionary definition of "housing." "Housing" is defined as: "Structures built as dwellings for people, such as houses, apartments, and condominiums." *Housing*, Black's Law Dictionary (11th ed. 2019). This definition is consistent with the natural or ordinary meaning of "housing" and also contradicts Oak Meadows's argument that it "is 'providing housing' by supplying real property and making it available to use for housing." As the Commission aptly noted, "land alone is insufficient to house an individual or family." Thus, the Commission did not err in rejecting Oak Meadows's argument.

Because the "statutory language is clear and unambiguous," we are without authority to "engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *POP Capitol Towers*, 282 N.C. App. at 497, 872 S.E.2d at 342 (citation omitted). We therefore affirm the Commission's final decision, which affirmed Randolph County's denial of Oak Meadows's request for a property tax exemption pursuant to N.C. Gen. Stat. § 105-278.6(a)(8).

III. Conclusion

For the foregoing reasons, the Commission's final decision is affirmed.

AFFIRMED.

Judges COLLINS and WOOD concur.

IN RE X.M.

[293 N.C. App. 98 (2024)]

IN RE X.M., M.M., M.M., P.C.

No. COA23-655

Filed 19 March 2024

1. Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—noncompliance with case plan—unresolved substance abuse

The trial court properly terminated a mother's parental rights in her four children on the ground of willful failure to make reasonable progress in correcting the conditions that lead to the children's removal from the home (N.C.G.S. § 7B-1111(a)(2)), where the mother did not adequately comply with the portions of her case plan requiring her to create a safe living environment for her children and to address her substance abuse issues. Further, the court correctly reasoned that, because of the mother's failure to engage in any meaningful treatment for her substance abuse, her incapability to parent was both willful and likely to continue into the future.

2. Appeal and Error—record on appeal—termination of parental rights proceeding—incomplete transcript—no prejudice shown

In an appeal from an order terminating a mother's parental rights in her four children, there was no merit to the mother's argument that the transcript of the underlying proceedings—which was inaudible for certain portions due to technological errors—was inadequate to allow for meaningful appellate review. The mother failed to demonstrate prejudice stemming from the incomplete transcript where the parties worked together to create a purported narrative of the inaudible portions and where the trial court additionally relied upon prior orders and reports in the case when making its findings and conclusions. Although the mother also argued that the narrative was insufficient to allow for review of the court's best interests determination, she failed to show any inaccuracies in the narrative or to otherwise explain how the information it provided precluded appellate review.

Appeal by respondent from order entered 19 January 2023 by Judge Corey J. MacKinnon in McDowell County District Court. Heard in the Court of Appeals 6 March 2024.

IN RE X.M.

[293 N.C. App. 98 (2024)]

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for the respondent-appellant-mother.

McDowell County DSS, by Aaron G. Walker, for the petitioner-appellee.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for the guardian ad litem.

TYSON, Judge.

Respondent-Mother ("Mother") appeals from an order entered on 19 January 2023, which terminated her parental rights to her four minor children. We affirm.

I. Background

Mother and Father are the biological parents of their four minor children, Alexander, Maria, Matthew, and Patricia. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Father did not appeal the trial court's 19 January 2023 order terminating his parental rights.

Father had primary custody of all four children since May 2014. The Yancy County district court found Mother had failed to provide proper care and supervision to her children or to follow a safety plan. The court also found she had kept the children in a home where domestic violence had occurred, and she had abused controlled substances. The order adjudicated the four children as neglected pursuant to N.C. Gen. Stat. § 7B-101(15) (2023) and granted Father primary custody.

The McDowell County Department of Social Services ("DSS") began investigating Father in October 2019. A report to DSS alleged Father had left the four children under the care of a 21-year-old cousin, while Father lived and traveled out of state doing carnival work. Father discussed the matter with DSS and agreed to only leave the children with the young cousin for short periods of time.

McDowell County DSS received another report on 24 February 2020. This report alleged Father had left the four children with a cousin for six months and asserted the cousin was unable to properly address the minor children's behaviors or to provide proper care and support. An exhibit attached to the subsequent Juvenile Petition summarized the report as follows:

> The allegations were that the minor children were fighting and physically assaulting one another. The minor children disclosed to [the] social worker that a male teen in the home encouraged [Alexander] to physically assault the other three children. [Alexander] has been diagnosed with PTSD, ODD, ADHD, [and] Autism Spectrum Disorder. [Alexander] was taunted by the adults in the home and his behavior escalated into a physical altercation between [Alexander] and the other minor children. [Alexander] is eligible to be placed in a Level II Therapeutic Foster Care based on his mental health issues, however, the parents have not made themselves available to sign the necessary forms to facilitate that move.

Later reports also identified Maria and Patricia as possible victims of sexual assault by a non-relative.

DSS investigated and assessed whether the cousin was an acceptable placement for the children and whether any other relatives were available for placement. The cousin caring for the children admitted to the social worker that she suffered from multiple sclerosis, anxiety, and depression, and could not work or adequately care for the children. McDowell County DSS attempted to reach Mother, who was living in Summerton, South Carolina, at the time. Mother failed to respond. Social workers also reached out to Father to identify another potential guardian for the children. Father explained he "had no one" else and stated: "I guess do what you need to do."

The court adjudicated the four children as neglected and dependent and placed them into DSS custody on 24 March 2020. An Adjudication Order was entered on 11 June 2020, and it required Mother and Father to "aggressively comply" with the following case plan requirements: (1) complete a Comprehensive Clinical Assessment, follow all service recommendations, and demonstrate benefit from the service recommendations; (2) submit to random drug screenings as requested by DSS and produce negative results; (3) maintain appropriate housing, employment or income, and transportation; and, (4) consistently visit with the children.

Several permanency planning review hearings were held between March 2020 and August 2022, including hearings on 27 August 2020, 22 October 2020, and 27 May 2021. Permanency planning review hearings were scheduled for 14 October 2021 and 18 November 2021, but those hearings were rescheduled because the evaluation of Father's new

residence in California had not been completed. Another permanency planning hearing scheduled for 9 December 2021 was rescheduled because the social worker was sick. A permanency planning hearing was held on 20 January 2022, which changed the primary permanent plan for each of the minor children to adoption with a secondary plan of reunification.

Mother and Father put minimal efforts into completing their case plans, did not cooperate with DSS, and did not regularly visit with their children between the time the children were taken into DSS custody in March 2020 and the hearing to terminate Mother's and Father's parental rights in August 2022. Father tested positive for several drugs, including cocaine, methamphetamine, amphetamines, and THC. Mother tested positive for amphetamines, methamphetamine, cocaine, cannabinoids, benzoylecgonine, and norcocaine, and she also admitted to using heroin.

Father avoided contact with DSS, and at one point hung up the phone on a social worker. Mother would reply to text messages, but she refused to reveal her whereabouts, where she was living, and evaded being served with motions. Lastly, both Mother and Father rarely and sporadically visited with their children throughout the more than two-year period while in DSS' custody.

A motion to terminate parental rights was filed on 11 August 2022, and an amended motion was later filed on 11 October 2022. DSS sought to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(6) (2023) and to terminate Father's parental rights pursuant to N.C. Gen. Stat § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(7). The court terminated Mother's and Father's parental rights pursuant to each of the respective grounds as alleged in DSS' petitions on 19 January 2023. Father did not appeal.

Mother filed notice of appeal on 22 February 2023.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2023).

III. Issues

Mother argues the trial court erred by concluding grounds existed to terminate her parental rights according to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(6). She also argues the available transcript, which was inaudible for certain portions due to technological errors, is inadequate to provide meaningful appellate review.

IV. Termination of Parental Rights

[1] "[A]n 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. . . . [I]f 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 J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

A. Standard of Review

"We review a trial court's adjudication [to terminate parental rights] under N.C.G.S. § 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 E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation and internal quotation marks omitted). "The trial court's supported findings are deemed conclusive even if the record contains evidence that would support a contrary finding." *In re L.D.*, 380 N.C. 766, 770, 869 S.E.2d 667, 671 (2022) (citation and internal quotation marks omitted).

Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *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." (citations omitted)).

In a termination of parental rights hearing, "[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2023). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

B. Analysis

Courts may terminate a parent's rights to the care, custody, and control of their child when certain limited, statutorily-defined grounds exist. A court may terminate parental rights if the evidence and findings clearly and convincingly demonstrate:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made

> in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2).

Our Supreme Court has outlined the analysis trial courts must perform before terminating a parent's parental rights pursuant to this ground:

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, *and* (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (emphasis supplied) (citation omitted).

"[A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465-66, 619 S.E.2d 534, 545 (2005) (citation and internal quotation marks omitted). "Leaving a child in foster care or placement outside the home is willful when a parent has the ability to show reasonable progress, but is unwilling to make the effort." *In re A.J.P.*, 375 N.C. 516, 525, 849 S.E.2d 839, 848 (2020) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court stated:

> Parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2). However, in order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home.

In re J.S., 374 N.C. at 815-16, 845 S.E.2d at 71 (citation, internal quotation marks, and alterations omitted).

The Supreme Court further explained a parent's non-compliance with case plan conditions are relevant, "provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (citation and quotation marks omitted).

Here, the children were removed from Mother's and Father's care for their failure to: create a safe living environment for their children; to refrain from illegally using controlled substances; and, to find a suitable guardian while they traveled to carnivals in various states. Mother failed to address and remedy each of these concerns.

Mother has consistently struggled to adequately address her substance abuse issues. While Mother attended a detoxification program for one week in August 2020, she continued to test positive for the presence of controlled substances afterwards. In December 2020, Mother tested positive for the presence in her body of amphetamines, methamphetamines, cocaine, cannabinoids, benzoylecgonine, and norcocaine. Mother later attended some group substance abuse sessions in March of 2021. Despite those group sessions, Mother continued to refuse drug tests and screens throughout the life of this case; and on the occasions when she did comply with the random drug screens, she always tested positive.

Mother also failed to comply with the portions of her case plan requiring her to create a safe living environment for her children. As of the date of the termination of parental rights hearing, Mother was homeless and had been so for several months. When social workers attempted to serve Mother with motions to terminate her parental rights, she revealed she was temporarily working in Coney Island, but refused to reveal her exact whereabouts. If her children were not in her care while traveling for work, Mother failed to provide DSS with any information about the identity of where they would reside or who the children would stay with.

The trial court also explained Mother's incapability to parent was willful and would likely continue into the future, given her "failure to refrain from substance abuse", and given she "has not engaged in any meaningful treatment." In other words, "the objectives sought to be achieved by the case plan provision in question address issues that

contributed to causing the problematic circumstances that led to the juvenile[s'] removal from the parental home." *Id*. The trial court did not err by terminating Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

V. Transcript

[2] Mother cites the section of the Juvenile Code regarding the recordation of juvenile proceedings, which provides: "All adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely notice of appeal has been given." N.C. Gen. Stat. § 7B-806 (2023).

An appellant bears the burden to "commence settlement of the record on appeal, including providing a verbatim transcript if available." *Sen Li v. Zhou*, 252 N.C. App. 22, 27, 797 S.E.2d 520, 524 (2017). "Where the appellant has done all that she can to do so, but those efforts fail because of some error on the part of our trial courts, it would be inequitable to simply conclude that the mere absence of the recordings indicates the failure of appellant to fulfill that responsibility." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998).

This Court has previously explained: the "unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). In addition, "violation of the statute [requiring recording] does not relieve defendant of her burden of complying with App. R. 9(a)(1)(v) and showing prejudicial error." *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988) (first citing an earlier version of N.C. R. App. P. 9(a)(1)(e); and then citing *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981)).

In child custody cases, this Court has explained:

> [O]nly where a trial transcript is entirely inaccurate and inadequate, precluding formulation of an adequate record and thus preventing appropriate appellate review[,] would a new trial be required. Where the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by this Court, the assertion that the recordation of juvenile court proceedings are inadequate to protect juvenile's rights is properly overruled.

In re Hartsock, 158 N.C. App. 287, 293, 580 S.E.2d 395, 399 (2003) (citations, internal quotation marks, and alterations omitted).

Respondent, working together with DSS' counsel and the Guardian Ad Litem's counsel, developed a purported narrative of proceedings. The introduction to the narrative explained the portions of the hearing the transcriptionist was able to decipher from the recordings were "inadequate for the parties to designate that the transcript would be used to present testimonial evidence and statements occurring at the hearing." Further, the narrative introduction explained the history of how both parties addressed the missing segments and settled upon the narration provided on appeal:

> On 8 June 2023, respondent's counsel served petitioner's counsel and GAL counsel with a redlined version of the transcript, reflecting what respondent's counsel could hear when listening to the audio file. On 23 June 2023, GAL counsel suggested changes to the annotations. Respondent's counsel accepted those changes on 7 July 2023. On that same date and 13 July 2023, Respondent's counsel circulated a proposed narrative of proceedings. The parties agree that the following shall serve as a narrative of the proceedings that occurred on 19 January 2023 pursuant to N.C. R. App. P. 9(c)(1). It is not a verbatim or complete transcript. The parties further agree that the narrative best presents the true sense of the testimonial evidence, statements made, and events occurring at the TPR hearing concisely and at a minimum of expense to the litigants.

Mother argues the available narrative of proceedings is inadequate to resolve whether sufficient findings support the likelihood of adoption of Maria, Matthew, and Patricia, which is a required factor in the best interest determination. However, the trial court also took judicial notice of all prior orders and reports from the underlying juvenile orders.

Mother has failed to demonstrate the narrative prepared for appeal, coupled with the prior orders and reports from previous permanency planning hearings, were "entirely inaccurate and inadequate" or otherwise "preclud[ed] formulation of an adequate record and thus prevent[ed] appropriate appellate review." *In re Hartsock*, 158 N.C. App. at 293, 580 S.E.2d at 399 (citation and internal quotation marks omitted). Mother's argument is without merit and overruled.

VI. Conclusion

Respondent's parental rights were properly terminated under N.C. Gen. Stat. § 7B-1111(a)(2). *See In re T.M.L.*, 377 N.C. at 379, 856 S.E.2d at 793. We need not address Respondent's remaining arguments on appeal regarding grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (3), and (6). *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71.

Mother has failed to demonstrate prejudice stemming from the inadequacy or the unavailability of portions of the trial court transcript. Mother has not demonstrated any inaccuracies in the provided and agreed-upon narration or explained how the provided information precluded appellate review. *See In re Hartsock*, 158 N.C. App. at 293, 580 S.E.2d at 399. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); NAACP ALAMANCE COUNTY BRANCH #5368; DOWN HOME NC; ENGAGE ALAMANCE; DREAMA CALDWELL; TAMARA KERSEY; REVEREND DOCTOR DANIEL KUHN; REVEREND RANDY ORWIG; AND MARYANNE SHANAHAN, PLAINTIFFS

v.

ALAMANCE COUNTY; ALAMANCE COUNTY BOARD OF COMMISSIONERS; AND COMMISSIONERS STEVE CARTER, WILLIAM LASHLEY, PAMELA T. THOMPSON, JOHN PAISLEY, AND CRAIG TURNER, JR., IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA23-262

Filed 19 March 2024

1. Counties—authority—removal of Confederate monument—monument protection law

In a civil action seeking the removal of a Confederate monument located outside of a county courthouse, the trial court properly granted summary judgment for the county, its board of commissioners, and multiple commissioners in their official capacities (collectively, defendants) because they lacked authority to remove the monument under N.C.G.S. § 100-2.1, which limits the circumstances under which an "object of remembrance" may be removed. The monument at issue met the definition of an "object of remembrance," and neither of the two enumerated scenarios where the

statute allowed for relocation of the monument were applicable in this case. Further, although section 100-2.1 does not apply to monuments that a "building inspector or similar official" has determined poses a threat to public safety, the building inspector exception did not apply here because the county manager who contacted defendants about removing the monument was not a "similar official" to a building inspector.

2. Constitutional Law—North Carolina—monument protection law—as-applied challenge—county's refusal to remove Confederate monument

In a civil action seeking the removal of a Confederate monument located outside of a county courthouse, the trial court properly granted summary judgment for the county, its board of commissioners, and multiple commissioners in their official capacities (collectively, defendants) where defendants did not violate the state constitution by maintaining the monument pursuant to a monument protection statute (N.C.G.S. § 100-2.1), and therefore the statute was constitutional as applied in the case. First, defendants did not violate the Equal Protection Clause because, regardless of any potential discriminatory intent on their part, defendants could not have relocated the monument anyway because they lacked authority under section 100-2.1 to do so. Second, defendants did not violate N.C. Const. art. V, § 2(7) (permitting counties to appropriate taxpayer money to accomplish "public purposes only") by spending taxpayer funds on law enforcement's response to protests at the monument and on the erection of a fence around the monument, since expenditures for public safety and the protection of county-owned property served public purposes. Finally, defendants did not violate the Open Courts Clause where plaintiffs failed to show that they were deprived of public access to legal proceedings by virtue of the monument's presence, even if offensive to some, in front of the courthouse.

Appeal by plaintiffs from order entered 5 October 2022 by Judge Forrest Donald Bridges in Alamance County Superior Court. Heard in the Court of Appeals 14 November 2023.

Wilmer Cutler Pickering Hale & Dorr LLP, by Ronald C. Machen, Jr., Karin Dryhurst, Mark C. Fleming, and Marissa M. Wenzel; The Paynter Law Firm, PLLC, by Stuart M. Paynter, Gagan Gupta,

and Sara Willingham; and Tin, Fulton, Walker & Owen, PLLC, by Abraham Rubert-Schewel, for Plaintiffs-Appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by Natalia K. Isenberg; and Womble, Bond, Dickinson (US) LLP, by Christopher J. Geis, for Defendants-Appellees.

DILLON, Chief Judge.

This appeal arises from a dispute concerning the presence of a Confederate monument outside a county courthouse.

I. Background

The monument at issue is located in front of the Alamance County courthouse in Graham and depicts an archetypal Alamance County infantry soldier serving the Confederacy during the Civil War (the "Monument").

In the summer of 2020, there was an increase in protests nationwide against the presence of Confederate monuments in public squares. On 30 March 2021, the North Carolina State Conference of the NAACP, the Alamance County branch of the NAACP, Down Home NC, Engage Alamance, and several individuals (collectively, "Plaintiffs") commenced this suit against Alamance County, the Alamance County Board of Commissioners, and multiple commissioners in their official capacities (collectively, "Defendants"). Plaintiffs assert Defendants' maintenance and protection of the Monument is unconstitutional. Consequently, they demand the Monument be moved from its current location in front of the courthouse to a "historically appropriate location."

The parties filed cross-motions for summary judgment. After a hearing on the matter, the trial court entered an order granting Defendants' motion for summary judgment. Plaintiffs appeal.

II. Analysis

On appeal, Plaintiffs argue that Defendants acted and are acting unconstitutionally by maintaining and protecting the Monument in its current location in front of the courthouse and refusing to remove the Monument to another location. For the reasoning below, we conclude that Defendants lack authority from our General Assembly to remove the Monument based on N.C. Gen. Stat. § 100-2.1 (the "Monument Protection Law" or the "Law") and that the Monument Protection Law as applied in this dispute is constitutional. We, therefore, affirm the order of the trial court granting Defendants summary judgment.

A. Defendants Lack Authority Under the Monument Protection Law

[1] Our Court reviews questions of statutory interpretation *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). Additionally,

> [w]hen a court engages in statutory interpretation, the principal goal is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, "the spirit of the act and what the act seeks to accomplish." If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

McAuley v. N.C. A&T State Univ., 383 N.C. 343, 347, 881 S.E.2d 141, 144 (2022) (cleaned up).

Subsection (b) of the Monument Protection Law provides that "[a]n object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection." N.C. Gen. Stat. § 100-2.1(b) (2023). An "object of remembrance" is defined as "a monument . . . that commemorates an event, a person, or military service that is part of North Carolina's history." *Id.*

The record conclusively shows that the Monument is a monument located on public property which commemorates military service that is part of North Carolina's history. In so concluding, we note our federal government recognizes that service in the Confederate Army qualifies as "military service." *See* 38 U.S.C. § 1501 ("The term 'Civil War veteran' includes a person who served in the military or naval forces of the Confederate States of America during the Civil War"); *Id.* § 1532 (allowing surviving spouses of Confederate soldiers to qualify as surviving spouses of Civil War veterans for receiving pensions). We further note that North Carolina recognizes "Confederate Memorial Day" as a legal public holiday. N.C. Gen. Stat. § 103-4(a)(5) (2023). Thus, we conclude as a matter of law that the Monument was of the type intended to be covered by the General Assembly when it enacted the Monument Protection Law.

And for the reasoning below, we conclude that, under the Monument Protection Law, Defendants lack authority to remove the Monument.

None of the statutory exceptions to the Monument Protection Law, set forth in subsection (c) of the Law, apply in the present case. Indeed, the Monument Protection Law provides four exceptions to the Law's application. *Id.* § 100-2.1(c)(1)–(4). The only exception potentially applicable here is the building inspector exception, which exempts an object of remembrance from the limitations of the statute if "a building inspector or similar official has determined [the object of remembrance] poses a threat to public safety because of an unsafe or dangerous condition." *Id.* § 100-2.1(c)(3). The building inspector exception only gives discretion to a "building inspector or similar official" to determine whether a monument poses a safety threat. Building inspectors' duties include the enforcement of laws regarding the following: building construction; installation of plumbing, electric, heating, refrigeration, and air-conditioning systems; and "maintenance of buildings and other structures in a safe, sanitary, and healthful condition." N.C. Gen. Stat. § 160D-1104(a)(1)–(3) (2023). On its face, the building inspector exception is intended to allow for removal only when there are *structural concerns* about a monument that could endanger the public, such as when a monument is at risk of toppling over due to faulty design.

Here, Plaintiffs argue that Alamance County's county manager should have qualified as a "similar official" under the building inspector exception. On 20 June 2020, during the wave of protests in summer 2020, the county manager emailed the commissioners, asking them to consider removing the Monument. He was concerned about the safety of people protesting at the Monument, both protesters attending in favor of and in opposition to the Monument.[1]

In contrast to a building inspector's role, a county manager's role is a managerial role. *See* N.C. Gen. Stat. § 153A-82 (2023). Specifically, the county manager is "the chief administrator of county government" whose duties include, among others, the following: supervision of county offices, departments, boards, commissions, and agencies; attendance at meetings of the board of commissioners; ensurance that the board of commissioners' orders, ordinances, resolutions, and regulations are faithfully executed; and preparation of the annual budget. *Id.*

Because the county manager is not a "similar official" to a building inspector, we conclude the building inspector exception does not apply to the county manager in this case. Accordingly, the trial court

1. The county manager did not consult with the county attorney before sending this email and was unaware that the Law would prohibit removal of the Monument.

correctly determined that no exceptions applied to allow for removal of the Monument.

Having determined that the Monument Protection Law applies to the Monument, we consider whether the Law authorizes Defendants to remove the Monument. Subsection (b) of the Law provides two circumstances under which an object of remembrance may be relocated, namely (1) "[w]hen appropriate measures are required by the State or a political subdivision of the State to preserve the object" or (2) "[w]hen necessary for construction, renovation, or configuration of buildings, open spaces, parking, or transportation projects." N.C. Gen. Stat. § 100-2.1(b)(1)–(2). However, there is nothing in the record showing that either circumstance applies to the Monument. Accordingly, we conclude the General Assembly has not clothed Defendants with authority to remove the Monument under the facts of this case.

B. North Carolina Constitution

[2] Plaintiffs contend the trial court erred "by holding that a statute could excuse violations of the North Carolina Constitution" because Defendants violate multiple provisions of the North Carolina Constitution by "maintaining and protecting a symbol of white supremacy in front of an active courthouse at the center of town."

Plaintiffs bring an as-applied—rather than a facial—constitutional challenge of the statute. "[A]n 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." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citation omitted).

Plaintiffs argue there are material disputes of fact regarding these constitutional claims that could not be decided at summary judgment and warranted a trial. We disagree with Plaintiffs and conclude that Plaintiffs' constitutional claims were appropriately decided as matters of law at the summary judgment stage.

As a preliminary matter, Plaintiffs correctly note that a statute cannot excuse constitutional violations because our state constitution governs as "the supreme law of the land." *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944). However, as discussed below, there are no constitutional violations here that the statute would be excusing.

1. Equal Protection Clause

First, Plaintiffs argue there was discriminatory intent behind Defendants' decision not to move the Monument, in violation of the Equal Protection Clause.

Our state constitution's Equal Protection Clause states that "[n]o 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. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

In their brief, Plaintiffs invoke the *Arlington Heights* analysis for determining whether discriminatory intent was a motivating factor in Defendants' decision. *See id.* at 265–68. However, Defendants' intent in not relocating the Monument is irrelevant in this case. Even if some of the Defendants had a discriminatory intent, as alleged by Plaintiffs, that intent was not the reason that the Monument has remained in front of the courthouse—the Monument has remained in place *because the Monument Protection Law forbids Defendants from moving the Monument.*

As a county, Alamance County (and, thus, its Board of Commissioners) can only act within the boundaries set forth by the General Assembly. *See High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965) (noting that counties "possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them."). Under the Monument Protection Law, the County has no authority to move the Monument. Regardless of some commission members' comments or misunderstandings of their legal ability to move the Monument, the rule of law does not change. At all times, the Monument Protection Law has required the County to leave the Monument in its current place. Defendants' hands are tied—even if they wanted to move the Monument, they could not.

The General Assembly (under N.C. Const. art. VII, § 1) has authority to grant and rescind counties' powers. However, Plaintiffs did not sue the legislature, which is the entity with the authority to alter the power given to counties to relocate monuments under the Monument Protection Law.

Thus, we conclude Defendants did not violate the Equal Protection Clause by failing to move the Monument.

B. Alleged Misuse of Taxpayer Money

Next, Plaintiffs argue that Defendants' expenditures violate the constitutional provision that counties may appropriate money "for the accomplishment of public purposes only." N.C. Const. art. V, § 2(7).

"The term 'public purpose' is not to be narrowly construed. It is not necessary that a particular use benefit every citizen in the community to be labeled a public purpose." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citation omitted). "Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Haugh v. Cnty. of Durham*, 208 N.C. App. 304, 315, 702 S.E.2d 814, 822 (2010). "A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government." *Green v. Kitchin*, 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948). "[C]ourts will not interfere with the exercise of discretionary powers conferred on [a local government] for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Id.* at 459, 50 S.E.2d at 551.

Here, Defendants spent funds on the law enforcement response to protests at the Monument and on the erection of a fence to protect the Monument. There is no doubt that expenditures for public safety and protection of county-owned property serve a public purpose. Public safety is a primary objective of local government, as carried out by law enforcement, and supports the county's general welfare by maintaining a safe environment for the community. And preventing damage to county-owned property saves the county from paying for repairs later on when the property is damaged. Further, the General Assembly explicitly allows a board of county commissioners "to expend from the public funds of the county an amount sufficient to erect a substantial iron fence" to protect monuments "erected to the memory of our Confederate dead[,]" N.C. Gen. Stat. § 100-9 (2023), indicating that the General Assembly sees this property protection as a public purpose.

Accordingly, it was not an abuse of discretion for Defendants to make such expenditures and no constitutional rights were violated.

C. Open Courts Clause

Finally, Plaintiffs argue that Defendants violate North Carolina's Open Courts Clause by their "maintenance of the Monument outside the courthouse [which] conveys the appearance of judicial prejudice because it broadcasts officially sanctioned racial degradation[.]"

The Open Courts Clause of the North Carolina Constitution instructs that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18.

This Clause was added to the North Carolina Declaration of Rights in 1868. Our Supreme Court has interpreted this provision to require members of the public access to legal proceedings so they can "see and hear what goes on in the courts." *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999). We conclude that the Open Courts Clause does not prohibit the placement of an object of historical remembrance in or around a courthouse, though some may find offense. Indeed, in many courthouses and other government buildings across our State and nation, there are depictions of historical individuals who held certain views in their time many today would find offensive.

In this case, Plaintiffs fail to show they are denied the Clause's guarantees. They do not contend that the Alamance County courthouse is not regularly in session or that legal remedies are being withheld, nor do they contend that trials are closed to the public or that criminal defendants are denied speedy trials. Therefore, we conclude Defendants did not violate the Open Courts Clause.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment to Defendants.

AFFIRMED.

Judges STROUD and ZACHARY concur.

PERRYMAN v. TOWN OF SUMMERFIELD

[293 N.C. App. 116 (2024)]

TERESA W. PERRYMAN AND DANNY B. NELSON, BOTH INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE TOWN OF SUMMERFIELD THROUGH THEIR STANDING AS TAXPAYERS OF THE TOWN OF SUMMERFIELD, PLAINTIFFS

v.

TOWN OF SUMMERFIELD; C. DIANNE LAUGHLIN, INDIVIDUALLY AND IN HER FORMER OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; DENA H. BARNES, INDIVIDUALLY AND IN HER FORMER OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; JOHN W. O'DAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; E. REECE WALKER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TOWN OF SUMMERFIELD COUNCIL MEMBER; NELSON MULLINS RILEY & SCARBOROUGH LLP; AND FRAZIER, HILL AND FURY, RLLP, DEFENDANTS

No. COA23-40

Filed 19 March 2024

1. Civil Procedure—motion to dismiss—lack of standing—dependent on merits of motion to dismiss for failure to state a claim

In an action for declaratory and injunctive relief filed against a town and its council members (defendants) by two residents (plaintiffs), who alleged that the town had illegally appropriated taxpayer money to fund a council member's legal defense in a quo warranto action, the appellate court declined to address whether plaintiffs sufficiently alleged their standing as taxpayers to bring their claim and to survive defendants' Rule 12(b)(1) motion to dismiss where, in order to determine whether plaintiffs adequately alleged an infringement of a legal right necessary to establish standing, the appellate court needed to address the merits of defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. Thus, the court decided the appeal based on its Rule 12(b)(6) analysis of plaintiffs' substantive claims.

2. Cities and Towns—failure to state a claim—challenge to town's use of taxpayer money—not illegal—claim barred by collateral estoppel and res judicata

In an action for declaratory and injunctive relief filed against a town and its council members (defendants), where two residents (plaintiffs) alleged that the town violated N.C.G.S. § 1-521 by using taxpayer money to fund a council member's legal defense in a quo warranto action, the trial court properly granted defendants' motion to dismiss the action for failure to state a claim. First, the town did not violate section 1-521's prohibition against appropriating tax funds to defend against a quo warranto action because, here, the purported quo warranto action was not a true quo warranto action but rather an impermissible collateral attack on judicial determinations made

in prior lawsuits. Second, because one of the plaintiffs had already filed a lawsuit against the town that raised the same cause of action and the exact same issue, and because the dismissal of that suit with prejudice under Rule 12(b)(6) operated as a final judgment on the merits, plaintiffs' claims were barred under both collateral estoppel and res judicata principles.

Appeal by Plaintiffs from Order entered 26 May 2022 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 26 October 2023.

Rossabi Law Partners, by Gavin J. Reardon, for Plaintiffs-Appellants.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus and G. Gray Wilson, for Defendants-Appellees Town of Summerfield, C. Dianne Laughlin, Dena H. Barnes, John W. O'Day, and E. Reece Walker.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell Jr., for Defendant-Appellee Nelson Mullins Riley & Scarborough LLP.

HAMPSON, Judge.

Factual and Procedural Background

Teresa W. Perryman and Danny B. Nelson (Plaintiffs) appeal from an Order dismissing their Complaint against the Town of Summerfield (the Town), C. Dianne Laughlin, Dena H. Barnes, John W. O'Day, E. Reece Walker (collectively, the Town Defendants), and Nelson Mullins Riley & Scarborough LLP (Law Firm Defendant). The Record before us reflects the following:

On 7 January 2022, Plaintiffs filed a Complaint against the Town Defendants, Law Firm Defendant, and Frazier, Hill and Fury, RLLP (Frazier Hill) (collectively, Defendants).[1] Plaintiffs' Complaint sought declaratory and injunctive relief along with disgorgement of attorney fees paid by the Town to the Law Firm Defendant and Frazier Hill arising from allegations the Town Defendants had appropriated Town

1. As noted below, Plaintiffs voluntarily dismissed their claims against Frazier, Hill and Fury, RLLP and, thus, it is not a party to this appeal.

funds for the defense of a *quo warranto* action in contravention of N.C. Gen. Stat. § 1-521.

The Complaint alleged Todd Rotruck—a non-party to this action—was elected to the Town's Council in November 2017. However, in April 2018, following a voter challenge, the Guilford County Board of Elections determined Rotruck was not an eligible voter in the Town. The Complaint further alleged that following his subsequent removal from the Town Council, Rotruck filed two lawsuits. The first was filed against the Town challenging his removal from the Council and seeking reinstatement by writ of mandamus. This case was dismissed with prejudice and Rotruck did not appeal. The second was against the Guilford County Board of Elections challenging its determination Rotruck was an ineligible voter in Summerfield. The trial court in that action affirmed the Board of Elections' decision. Rotruck did appeal this ruling and this Court affirmed the trial court's decision. *Rotruck v. Guilford Cnty. Bd. of Elections*, 267 N.C. App. 260, 833 S.E.2d 345 (2019). In October 2018, the Town Council voted to appoint Dianne Laughlin (Laughlin) to the seat previously held by Rotruck.

The Complaint further alleged Rotruck commenced a third action—this time captioned as a *quo warranto* action—in which Rotruck, as a relator nominally on behalf of the State, sought to challenge Laughlin's appointment to the Council (the Quo Warranto Action). On 15 February 2019, the trial court in the Quo Warranto Action entered an order staying the proceeding pending the outcome of Rotruck's appeal to this Court in his action against the Guilford County Board of Elections. Rotruck would eventually dismiss the Quo Warranto Action in January 2020.[2]

The Complaint also alleged a fourth related lawsuit—this time by a group of individuals including J. Dwayne Crawford and Plaintiff Nelson[3]—filed in May 2019 (the Crawford Lawsuit). This fourth suit challenged the Town's use of funds to pay attorney fees for Laughlin's defense of the Quo Warranto Action filed by Rotruck. In January 2020, the trial court in the Crawford Lawsuit dismissed the action. This Court subsequently affirmed the dismissal of the Crawford Lawsuit. *Crawford v. Town of Summerfield*, 276 N.C. App. 275, 855 S.E.2d 301 (2021) (unpublished).

---

2. The dismissal followed this Court's affirmance of the trial court's decision in Rotruck's action against the Board of Elections.

3. Nelson took a voluntary dismissal in the Crawford Lawsuit.

The Complaint in the case *sub judice* again challenged the Town's alleged expenditure of funds to pay attorney fees in the Quo Warranto Action under N.C. Gen. Stat. § 1-521. The Complaint alleged Plaintiffs had standing to challenge the expenditures as taxpayers to the Town. The Complaint further alleged the Town Council members themselves should be held liable in both their official and individual capacities. With respect to the Law Firm Defendant and Frazier Hill, the Complaint alleged each should be ordered liable for the fees paid to them in defense of the Quo Warranto Action.

On 14 March 2022, the Town Defendants and the Law Firm Defendant each filed Motions to Dismiss the Complaint. Both Motions alleged the Complaint should be dismissed under Rules 12(b)(1), (6), and (7) of the North Carolina Rules of Civil Procedure. In summary, the Motions alleged Plaintiffs lacked standing to challenge the use of Town funds; the present action was barred by issue preclusion and collateral estoppel arising from the Crawford Lawsuit; the Quo Warranto Action was not, in fact, a *quo warranto* action but merely an effort to improperly relitigate issues already decided in the two earlier suits by Rotruck against the Town and the Board of Elections; the Complaint was barred by the statute of limitations; and Plaintiffs failed to join Rotruck as a real party in interest. In addition, the Law Firm Defendant alleged the claim for disgorgement should be dismissed as there was no separate claim recognized for disgorgement outside of the contractual relationship and Plaintiffs were not parties to any contract with the Law Firm Defendant.

The Motions to Dismiss were heard on 25 April 2022 in Guilford County Superior Court. The same day, Plaintiffs voluntarily dismissed Frazier Hill from this action. At the hearing, the remaining Defendants asked the trial court to take judicial notice of the contents of the court files in the two lawsuits filed by Rotruck, the Quo Warranto Action, and the Crawford Lawsuit.

On 26 May 2022, the trial court entered its Order granting the Motions to Dismiss. In its Order, the trial court took judicial notice of the trial and appellate filings in the two actions filed by Rotruck, the Quo Warranto Action, and the Crawford Lawsuit. The trial court made Findings of Fact for purposes of its consideration of Defendants' Motions under Rule 12(b)(1), relying in part on the order dismissing the prior Crawford Lawsuit, noting that even if not binding, the order was persuasive. The trial court noted: "The Guilford County Superior Court has previously considered the Town Defendants' position that the Town's payments pursuant to the fee agreement were authorized by N.C. Gen. Stat. §160A-167(a) and not in contravention of N.C. Gen.

Stat. § 1-521. In the Crawford Lawsuit, Judge Hall ruled in the Town Defendants' favor on that issue." The trial court further noted that this Court affirmed the order in the Crawford Lawsuit. The trial court ruled Plaintiffs had failed to establish standing to bring the lawsuit. Separately, the trial court considered Defendants' Motions under Rule 12(b)(6) and determined that, even assuming Plaintiffs had standing, the Complaint should be dismissed for failure to state a claim upon which relief could be granted. In so doing, the trial court rejected Plaintiffs' request for findings of fact and conclusions of law as inconsistent with Rule 12(b)(6). The trial court dismissed Plaintiffs' Complaint with prejudice under both Rules 12(b)(1) and (6).

On 24 June 2022, Plaintiffs timely filed Notice of Appeal from the trial court's Order. On 24 October 2023, prior to oral argument in this matter, Plaintiffs filed a Motion to Dismiss Appeal against Law Firm Defendant. We allow the Motion to Dismiss the Appeal against Law Firm Defendant. The trial court's Order as to the dismissal of the Law Firm Defendant is now unchallenged and remains undisturbed. We therefore limit our discussion of the trial court's Order to the dismissal of the Town Defendants.

Issues

The dispositive issues on appeal are whether: (I) Plaintiffs had standing as taxpayers to challenge the Town's allegedly improper expenditures of tax funds to pay attorney fees for Laughlin in the Quo Warranto Action; and (II) the trial court properly dismissed the Complaint against the Town Defendants for failure to state a claim under Rule 12(b)(6).

Analysis

In this case, the trial court dismissed Plaintiffs' Complaint under Rules 12(b)(1)—for lack of standing—and 12(b)(6)—for failure to state a claim upon which relief may be granted. "The standard of review on a motion to dismiss under Rule 12(b)(1) is de novo." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011). "On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts '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.' " *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 31, 847 S.E.2d 903, 906 (2020) (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003)).

I. Taxpayer Standing

[1] Here, Plaintiffs first contend they sufficiently alleged standing as taxpayers to bring their Complaint and to survive the Town Defendants' Motion to Dismiss under 12(b)(1). Plaintiffs alternatively contend they have derivative standing to bring the action on behalf of the Town's interests. Plaintiffs further argue the trial court erred in considering the merits of their action in its 12(b)(1) analysis.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation and quotation marks omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Est. of Apple v. Com. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). "As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). Standing may properly be challenged by a 12(b)(1) motion to dismiss. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss.").

"Standing to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (citation and quotation marks omitted). More recently, the North Carolina Supreme Court clarified, under North Carolina law, standing exists when a party alleges the infringement of a legal right under a valid cause of action. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021). There, in relevant part, the Supreme Court explained:

> 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.

"Generally, an individual taxpayer has no standing to bring a suit in the public interest." *Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46 (citing *Green v. Eure*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975)). However, the taxpayer may have standing if he can demonstrate:

> [A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury[;] or that he is a member of the class prejudiced by the operation of [a] statute.

Id. (quoting *Texfi Indus. v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted)). "We recognized as early as the nineteenth century that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Goldston v. State*, 361 N.C. 26, 30-31, 637 S.E.2d 876, 879-80 (2006).

Here, the trial court expressly found for purposes of Rule 12(b)(1) Plaintiffs were taxpayers. The trial court also found Plaintiffs sought to challenge tax funds allegedly appropriated and expended to pay attorney fees in the Quo Warranto Action. Thus, Plaintiffs generally "have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Goldston*, 361 N.C. at 30-31, 637 S.E.2d at 879-80. The trial court, however, determined Plaintiffs did not have taxpayer standing where the Crawford Lawsuit had previously decided the issue of the alleged payment of attorney fees in the Quo Warranto Action in the Town's favor. In effect, the trial court determined Plaintiffs failed to allege any infringement of a legal right to challenge the payments allegedly made by the Town. *See Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 733. Recognizing "there is a fine line between the issue of standing and the issue of failure to state a claim[,]" we address the substantive allegations of Plaintiffs' Complaint under a 12(b)(6) analysis. *Texfi Indus., Inc.*, 44 N.C. App. at 269, 261 S.E.2d at 23. Considering our analysis here, we also do not reach the issue of whether Plaintiffs established derivative standing to bring a suit on behalf of the Town.

II. Failure to State a Claim

[2] A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted). "[A] motion to dismiss is properly granted when it appears that the law does not recognize the plaintiff's cause of action or provide a remedy for the alleged [cause of action]." *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 755, 460 S.E.2d 356, 358 (1995). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). A Rule 12(b)(6) dismissal is proper where "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).

Moreover, documents attached to and incorporated into a complaint are properly considered as part of a Rule 12(b)(6) motion to dismiss. *Holton v. Holton*, 258 N.C. App. 408, 418-19, 813 S.E.2d 649, 657 (2018) (citing *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004)). "Additionally, a document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment." *Id.* at 419, 813 S.E.2d at 657.

Plaintiffs argue the trial court erred by dismissing their Complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiffs contend they stated a valid claim for declaratory and injunctive relief declaring the Town's payments of attorney fees in the Quo Warranto Action unlawful under N.C. Gen. Stat. § 1-521. Plaintiffs assert they alleged Rotruck brought a quo warranto action directly against Laughlin and the Town, therefore, was barred from appropriating attorney fees for Laughlin's defense under N.C. Gen. Stat. § 1-521.

Quo warranto actions in North Carolina are governed by Article 41 of Chapter 1 of the North Carolina General Statutes. Under N.C. Gen. Stat. § 1-515, quo warranto actions are generally brought by the Attorney General on behalf of the State, including in instances "[w]hen a person usurps, intrudes into, or unlawfully holds or exercises any public office[.]" N.C. Gen. Stat. § 1-515 (2021). However, a private party may bring a quo warranto action under Article 41 when "application is made to the Attorney General by a private relator to bring such an action[.]" N.C. Gen. Stat. § 1-516 (2021). N.C. Gen. Stat. § 1-521 provides for an

expedited trial procedure for quo warranto actions and further provides: "It is unlawful to appropriate any public funds to the payment of counsel fees in any such action." N.C. Gen. Stat. § 1-521 (2021).

Here, Plaintiffs allege Rotruck properly applied to the Attorney General and was granted leave to bring the Quo Warranto Action as a relator. Plaintiffs further allege the Town appropriated public funds to pay counsel fees on behalf of Laughlin in violation of Section 1-521. Indeed, this Court has recognized a separate declaratory judgment action claiming a violation of Section 1-521 is a viable method of bringing this claim. *State ex rel. Pollino v. Shkut*, 271 N.C. App. 272, 275, 843 S.E.2d 716, 719 (2020).

The Town Defendants counter, however, that the Complaint and documents properly considered at 12(b)(6) establish the Quo Warranto Action was itself nothing more than an impermissible collateral attack on prior court decisions, and, thus, in fact, not a valid quo warranto action. As such, the Town Defendants contend they were authorized to appropriate funds for the Quo Warranto Action and Plaintiffs' Complaint should fail as a matter of law.[4] The Town Defendants point to both Rotruck's prior actions against the Town and the Guilford County Board of Elections as well as the Quo Warranto Action and subsequent Crawford Lawsuit as barring Plaintiffs' Complaint. The Complaint contains allegations concerning the filing and outcomes in each of those actions and the trial court permissibly considered the documents filed in those actions—including Complaints in Rotruck's action against the Town, the Quo Warranto Action, and the Crawford Lawsuit; the orders dismissing each of those actions; and the stay order issued in the Quo Warranto Action—for purposes of Rule 12(b)(6). *See Holton*, 258 N.C. App. at 418-19, 813 S.E.2d at 657; *see also Stocum v. Oakley*, 185 N.C. App. 56, 61, 648 S.E.2d 227, 232 (2007) (trial court may take judicial notice of its own records in prior cases where it has relevance). Plaintiffs make no argument on appeal that the trial court erred in considering the materials from these prior lawsuits.

"A collateral attack is one in which a party is not entitled to the relief requested 'unless the judgment in another action is adjudicated invalid.' " *In re Webber*, 201 N.C. App. 212, 219, 689 S.E.2d 468, 474 (2009) (quoting *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (citation omitted)). " 'A collateral attack on a judicial proceeding is "an attempt to avoid, defeat, or evade it, or deny its force and effect, in

4. The Town Defendants assert payment of attorney fees was generally authorized by N.C. Gen. Stat. § 160A-167(a).

some incidental proceeding not provided by law for the express purpose of attacking it." ' " *Id.* (quoting *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation omitted)). "Collateral attacks generally are not permitted under North Carolina law." *Id.*

Examination of the four prior actions alleged in the Complaint reveals several crucial points factoring into our analysis. First, Rotruck's action against the Town sought mandamus relief reversing his removal from the Town Council and a declaration his removal was invalid. This lawsuit was dismissed with prejudice pursuant to Rules 12(b)(1) and 12(b)(6). *See Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2d 269, 274 (1992) ("A dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice."). Second, in Rotruck's action seeking judicial review of the Guilford County Board of Elections, a Superior Court affirmed the determination of the Board of Elections that Rotruck was not an eligible voter residing in the Town—the basis of his removal from the Town Council. On appeal, this Court found "no merit to Plaintiff's arguments," and affirmed. *Rotruck*, 267 N.C. App. at 262, 833 S.E.2d at 347.

The Complaint in the Quo Warranto Action, in turn, alleged Rotruck was the rightful holder of the seat on the Town Council, that he was improperly removed, and the seat declared vacant. Thus, the Quo Warranto Action Complaint alleged Laughlin could not validly hold the seat. The Quo Warranto Action sought Rotruck's reinstatement to the Council. On 21 March 2019, the trial court in the Quo Warranto Action entered an order staying that action pending Rotruck's appeal against the Board of Elections. In relevant part, the court concluded Rotruck's first two suits against the Town and the Board of Elections "are binding on this [c]ourt, and thus operate as COLLATERAL ESTOPPEL and issue preclusion with respect to the claims brought and made in those actions." The trial court there further concluded: "That most, if not all, remedies that this [c]ourt could in equity entertain pursuant to Relator's claim for Quo Warranto would be inconsistent with the Orders of this [c]ourt . . . or be in express violation of the Orders of this [c]ourt[.]" The court in the Quo Warranto Action observed "proceeding with the present matter before decision of the North Carolina Court of Appeals . . . would subject the parties to the risk of inconsistent Judgments[.]" Rotruck subsequently voluntarily dismissed the Quo Warranto Action after this Court decided in favor of the Board of Elections.

Unquestionably, the Crawford Lawsuit raised the same claims against the Town Defendants as in the present case: a declaration

payment of Laughlin's attorney fees was unlawful under Section 1-521 and holding the Town Defendants liable for those fees. The trial court in the Crawford Lawsuit also dismissed that action under Rules 12(b)(1) and 12(b)(6) with prejudice. In so doing, the trial court determined allowing further amendment of the complaint in that case would be futile. The court concluded "that under the facts of this case, . . . the binding ruling of the North Carolina Courts relative to the underlying quo warranto action, as well as our [c]ourts' rulings in those actions entitled *Rotruck v. Guilford County Board of Elections* . . . and *Rotruck v. Summerfield Town Council* . . . demonstrate that [Laughlin] was indeed a duly appointed member of the Summerfield Town Council." The court further ruled Laughlin "is entitled to reimbursement for [counsel] fees, including expenses incurred for the defense of the quo warranto action pursuant to G.S. § 160A-167(a)." Additionally, the court expressly concluded "as a matter of law that the Town Council did not appropriate funds for the defense of an expedited trial pursuant to a quo warranto action as proscribed by G.S. § 1-521."

Here, for Rotruck to have been entitled to relief in the Quo Warranto Action, it would have required judgments in both his prior lawsuits against the Town and the Board of Elections to be invalidated. *See In re Webber*, 201 N.C. App. at 219, 689 S.E.2d at 474. The Quo Warranto Action would require a determination Rotruck was eligible to sit on the Council and that he should be reinstated—determinations that were conclusively made in those two prior actions. The Quo Warranto Action was plainly "an attempt to avoid, defeat, or evade . . . , or deny [the] force and effect" of the two prior failed actions in an incidental purported quo warranto proceeding. *Id.* Moreover, nothing in the quo warranto statutes provides a mechanism for attacking prior judicial determinations involving a party's claim to public office. *See id.* While Plaintiffs claim the Quo Warranto Action was narrowly focused only on Laughlin's right to hold office, this ignores the fact the entire basis of the action was Rotruck's already rejected claim he was improperly removed from office and had a right to that office instead of Lauglin. There was no contention in the Quo Warranto Action that Laughlin should be removed from the office for any other reason other than Rotruck's claim to the office. Rotruck's voluntary dismissal of the Quo Warranto Action following this Court's decision in *Rotruck v. Guilford County Board of Elections* is at least a tacit concession on his part that the Quo Warranto Action fell with the successful voter challenge.

Thus, in this case, Plaintiffs' Complaint and the documents referenced and properly considered at 12(b)(6) reveal the Quo Warranto

Action was not a valid quo warranto action under Article 41 of Chapter 1 of the General Statutes, but instead an impermissible collateral attack on prior conclusive judicial determinations. Therefore, on the facts of this case, Plaintiffs' Complaint failed to state a cause of action based on the allegedly unauthorized appropriation of counsel fees under Section 1-521. Consequently, the trial court did not err in dismissing Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Moreover, the Crawford Lawsuit bars the present Complaint under principles of either *res judicata* or collateral estoppel.

> [U]nder *res judicata* as traditionally applied, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have "merged" with the judgment; where defendant prevails, the judgment "bars" the plaintiff from further litigation. In either situation, all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded. Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. Traditionally, courts limited the application of both doctrines to parties or those in privity with them by requiring so-called "mutuality of estoppel:" both parties had to be bound by the prior judgment.

Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 428-29, 349 S.E.2d 552, 556-57 (1986) (citations omitted).

Here, Plaintiffs in this case—asserting standing as Town residents and taxpayers to challenge the appropriation of funds by the Town—are in privity with the Crawford Lawsuit plaintiffs—who also asserted claims as Town residents and taxpayers. *See State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (" 'In general, "privity involves a person so identified in interest with another that he represents the same legal right" ' previously represented at trial.") (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996) (citation omitted)). Indeed, Plaintiff Nelson was originally a party to the Crawford Lawsuit.

The Crawford Lawsuit was dismissed under both Rule 12(b)(1) for lack of standing *and* Rule 12(b)(6) for failure to state a claim. The case was dismissed with prejudice because allowing a second amendment to the complaint in that case would have been futile precisely because the trial court there concluded plaintiffs' claim that the Town improperly appropriated funds for the defense of the Quo Warranto Action failed as a matter of law. This Court affirmed that dismissal. *Crawford*, 276 N.C. App. 275, 855 S.E.2d 301 (unpublished).

The dismissal in *Crawford* with prejudice under Rule 12(b)(6) operated as a final judgment on the merits. *See Hoots*, 106 N.C. App. at 404, 417 S.E.2d at 274. The Complaint in this case alleged the same cause of action against the Town Defendants. *Res Judicata* bars this second action against the Town Defendants. Likewise, even for purposes of collateral estoppel, the issue of whether the Crawford Lawsuit plaintiffs could bring a claim against the Town for appropriation of attorney fees in the Quo Warranto Action was actually litigated, decided, and necessary to the court's determination there to dismiss the case with prejudice resulting in a final judgment on the merits. Indeed, in affirming the trial court, this Court made no modification to the trial court's dismissal with prejudice. *Compare United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 650, 881 S.E.2d 32, 60 (2022) (vacating in part and remanding case for dismissal without prejudice and not with prejudice where dismissal was based solely on lack of subject matter jurisdiction).

Even if Plaintiffs have facially alleged a violation of § 1-521 by the Town Defendants, the Complaint on its face reveals a bar to Plaintiffs' claim arising by operation of the Crawford Lawsuit and the dismissal of Rotruck's prior actions, including the Quo Warranto Action. Thus, additionally, Plaintiffs' Complaint in this action is barred by *res judicata* and collateral estoppel by operation of the dismissal of the Crawford Lawsuit with prejudice and this Court's affirmance of that dismissal. Therefore, the Complaint and the documents properly considered on a Motion to Dismiss reveal Plaintiffs' claims in this case are barred. Consequently, the trial court did not err by dismissing Plaintiffs' Complaint with prejudice under Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, the trial court's 26 May 2022 Order dismissing Plaintiffs' Complaint with prejudice is affirmed.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

STATE OF NORTH CAROLINA
v.
DAVID ASHLEY BIVINS

No. COA23-550

Filed 19 March 2024

Sentencing—prior record level—calculation—State-conceded error —additional points improperly assessed

A judgment convicting defendant of multiple drug-related crimes and sentencing him as a habitual felon was vacated because, as the State conceded on appeal, the trial court erred in sentencing defendant as a prior record level V offender by counting three additional points based on prior convictions that, under the sentencing statute, should not have counted toward the assessment of defendant's prior record level. The instructions on remand directed the court to determine whether an additional point should be added based on one of defendant's new convictions; that said, regardless of the court's determination, the total number of points would only support sentencing defendant as a prior record level IV offender.

Appeal by defendant from judgment entered 23 March 2021 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 21 February 2024.

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

Michelle Abbott, for the defendant-appellant.

TYSON, Judge.

David Ashley Bivins ("Defendant") appeals from judgment entered upon a jury's verdicts for Selling or Delivering a Schedule II Controlled Substance and Felonious Possession with Intent to Sell or Deliver Methamphetamine. The judgment he appeals from was also entered pursuant to a plea agreement for Felonious Possession with Intent to Sell or Deliver Methamphetamine, Selling or Delivering a Schedule II Controlled Substance, and to attaining Habitual Felon Status. We discern no error at trial or in the plea agreement, but vacate the judgment and remand for the trial court to correct a State-conceded sentencing error.

I. Background

Cleveland County Sheriff's Office Narcotics Division and a confidential informant participated in a controlled buy of methamphetamine on 20 July 2019 and again on 8 August 2019. The confidential informant had previously worked with Narcotic Division deputies and participated in multiple controlled buys of drugs. Narcotic Division deputies met with the informant prior to the buy, searched his person for contraband, provided him with $200 in marked currency, and equipped him with a cell phone capable of recording the interaction.

The confidential informant traveled to a local motel, while being surveilled from the neighboring Bojangles restaurant parking lot, and purchased 1.95 grams of methamphetamine from Defendant. Following the buy, the confidential informant "turned over the meth" to the Narcotic Division lead deputy. The lead deputy debriefed with the confidential informant to confirm the details of the buy, searched his person and his vehicle to ensure the integrity of the controlled buy, and then released the informant. The lead deputy entered the sealed bag of suspected methamphetamine into the Sheriff's Office secured evidence locker and submitted it for laboratory analysis.

On 23 March 2021, a jury convicted Defendant of one count of Possession with Intent to Sell or Deliver Methamphetamine and one count of Selling or Delivering a Schedule II Controlled Substance. After the jury's verdict, but prior to sentencing, Defendant also entered into a plea arrangement with the State. Defendant pleaded guilty to having attained Habitual Felon Status, along with one additional count of Possession with Intent to Sell or Deliver Methamphetamine and one additional count of Selling or Delivering a Schedule II Controlled Substance pursuant to a plea agreement, which stemmed from a second controlled buy by the same confidential informant from Defendant on 8 August 2019.

At the sentencing hearing held on 23 March 2021, the State submitted a Prior Record Level Worksheet ("PRL Worksheet") and copies of records of the Defendant's prior convictions to support the worksheet. The PRL Worksheet submitted by the State assigned a total of sixteen points to Defendant, based upon seven prior misdemeanor convictions, three prior felony convictions, and for Defendant being on probation at the time of the offense.

Defendant stipulated to his prior record level and signed the PRL Worksheet. His four substantive convictions were consolidated for

sentencing. Defendant was sentenced as a level V offender to 127 to 165 months of active imprisonment.

Defendant filed a petition for writ of *certiorari* on 6 September 2022, seeking a belated appeal after failure to enter timely notice of appeal. This Court granted Defendant's petition for writ of *certiorari* on 26 October 2022.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(5) (2023) and N.C. R. App. P. 21(a)(1).

III. Issues

Defendant challenges his sentence of 127 to 165 months imprisonment for two counts of Selling or Delivering a Schedule II Controlled Substance, two counts of Felonious Possession with Intent to Sell or Deliver Methamphetamine, and attaining Habitual Felon Status. Defendant argues the trial court erred by sentencing him at an inflated prior record level. The State concedes this error.

IV. Sentencing Error

A. Standard of Review

Sentencing errors are preserved for appellate review "even though no objection, exception, or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(18) (2023). Although a defendant may stipulate to "the existence of [his or her] prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law." *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830-31 (2013) (citation omitted). "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)).

B. Analysis

Our General Statutes provide: "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.14(a) (2023). A prior record level is determined by counting eligible points for prior convictions the State has proven. N.C. Gen. Stat. § 15A-1340.14(b), (f). Generally, only non-traffic Class A1 and

Class 1 misdemeanor offenses count. N.C. Gen. Stat. § 15A-1340.14(b). Convictions of Class 2 and Class 3 misdemeanors do not count. *See id.*

One point is assigned for misdemeanor convictions, and a misdemeanor is "defined as any Class A1 and Class 1 nontraffic misdemeanor offense." N.C. Gen. Stat. § 15A-1340.14(b)(5). The following misdemeanor offenses also receive one prior record point: (1) Impaired Driving, pursuant to N.C. Gen. Stat. § 20-138.1 (2023); (2) Impaired Driving in a Commercial Vehicle, pursuant to N.C. Gen. Stat. § 20-138.2; and, (3) Death by Vehicle, pursuant to N.C. Gen. Stat. § 20-141.4(a2). N.C. Gen. Stat. § 15A-1340.14(b)(5).

The points assigned for prior felony convictions include two points for Class H or I Felony convictions, and four points for Class G Felony convictions. N.C. Gen. Stat. § 15A-1340.14(b)(3)-(4). Prior felony convictions used to establish whether a person has attained habitual felon status do not also count in determining a prior record level. N.C. Gen. Stat. § 14-7.6 (2023).

When multiple convictions are entered in the same superior court session in the same calendar week, only the conviction carrying the most points is assessed. N.C. Gen. Stat. § 15A-1340.14(d). If a prior offender is convicted of more than one offense in a single session of district court, only one of the convictions is used. *Id.*

The relevant statutes "do not prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained in the same week to determine prior record level." *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996).

An offender with ten to thirteen points shall be sentenced as a prior record level IV, and an offender with fourteen to seventeen points shall be sentenced as a prior record level V. N.C. Gen. Stat. § 15A-1340.14(c).

On appeal, Defendant points out several purported errors in the trial court's sentencing. First, a clerical discrepancy exists between the PRL Worksheet and the structured sentencing document. The PRL Worksheet states Defendant had sixteen prior record level points, while the structured sentencing document listed fifteen prior record level points. Regardless of the variance in points between the two documents, the trial court sentenced Defendant as a level V offender.

Second, Defendant asserts, and the State concedes, he was erroneously assessed with four additional points to increase his prior record level from IV to V. The PRL Worksheet shows seven points for prior

misdemeanors, eight points for prior felonies, and one point for committing the current offense while on probation, which totals sixteen points.

Defendant has accumulated seventeen prior misdemeanor convictions over a ten-year period. Four of Defendant's misdemeanor convictions are for traffic-related offenses, which are not included in the prior record level calculation per N.C. Gen. Stat. § 15A-1340.14(b)(5). Four of Defendant's misdemeanor convictions are for Class 2 or 3 offenses, and those convictions are also excluded in the prior record level calculation. *Id.* Four of Defendant's misdemeanor convictions were entered on the same date as an offense with a higher point total. The higher-point total conviction is the only conviction properly included in Defendant's point total calculation pursuant to N.C. Gen. Stat. § 15A-1340.14(d). In accordance with the statutes' disregard and exclusion of certain convictions, Defendant's PRL Worksheet should include a total of five points for five countable misdemeanors under N.C. Gen. Stat. § 15A-1340.14(b)(5).

Defendant also has six prior felony convictions, in addition to the four felony convictions before us on appeal. Here, three of those six prior convictions were used to establish the indictment that Defendant had attained habitual felon status, and two felonies occurred on the same day, leaving only two felonies to be assessed in the PRL Worksheet calculation. *See Truesdale*, 123 N.C. App. at 642, 473 S.E.2d at 672; N.C. Gen. Stat. § 15A-1340.14(d).

One of these is a Class I felony, properly assessed at two points. N.C. Gen. Stat. § 15A-1340.14(b)(4). The other was a Class G felony to be assigned four points. N.C. Gen. Stat. § 15A-1340.14(b)(3). Under the current statutes, Defendant's PRL Worksheet should include a total of six points based upon the two qualifying felony convictions, and not those otherwise used to support the habitual felon indictment or occurring on the same court session.

N.C. Gen. Stat. § 15A-1340.14(b)(7) provides that one additional point should be assigned "if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision . . . ." In this case, the Defendant stipulated to the fact that he was on probation for prior offenses at the time of the current offenses, which supports the addition of one point to be included in his PRL Worksheet calculation. N.C. Gen. Stat. § 15A-1340.14(b)(7).

Additionally, N.C. Gen. Stat. § 15A-1340.14(b)(6) provides one additional prior record level point may be assigned "[i]f all the elements of the present offense are included in any prior offense for which the offender

was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point." On appeal, the State argues Defendant should have been assessed one additional point because all elements of the present offense for Selling or Delivering a Schedule II Controlled Substance are included in Defendant's prior offense on 6 April 2016 for Selling or Delivering a Schedule II Controlled substance conviction. On remand for resentencing, the trial court should assess whether one additional point should be added pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6).

Under the current statutes, Defendant's prior record level should have been assessed as at least twelve points: five for misdemeanors, six for felonies, and one additional point for being on probation at the time of the offense. Depending on the trial court's assessment of N.C. Gen. Stat. § 15A-1340.14(b)(6), Defendant's prior record level potentially could be assessed as thirteen total points. N.C. Gen. Stat. § 15A-1340.14. Regardless of whether the trial court assesses Defendant's prior record level as twelve or thirteen total points to support a prior record level IV, the trial court erred when sentencing Defendant by assigning three additional prior record level points to achieve a prior record level V. The State concedes this error.

V. Conclusion

Defendant received a fair trial, free from prejudicial errors he preserved or argued on appeal. His waivers of trial and guilty pleas to other crimes under the plea agreement are not challenged as not knowingly and intelligently entered.

After using three prior felony convictions to support his habitual felon indictment and excluding non-qualifying prior convictions, Defendant should have been sentenced within the presumptive range, per the plea agreement, as a prior record level IV offender with twelve or thirteen prior record level points. The trial court's judgments are vacated, and we remand for re-sentencing based on the conceded proper prior record level. *It is so ordered.*

NO ERROR AT TRIAL; JUDGMENT VACATED AND REMANDED FOR RESENTENCING.

Judges MURPHY and WOOD concur.

STATE OF NORTH CAROLINA
v.
SAEQUAN MARQUETTE JACKSON

No. COA23-636

Filed 19 March 2024

1. Homicide—felony murder—armed robbery—continuous transaction—sufficiency of evidence

In a prosecution for first-degree murder under a felony murder theory and for the predicate felony of robbery with a dangerous weapon, the trial court properly denied defendant's motion to dismiss both charges where the State presented sufficient evidence showing that defendant's acts of shooting the victim and then taking the victim's car constituted a single, continuous transaction. Importantly, the time between the shooting and the taking was short where, according to eyewitness testimony, defendant briefly sat down and then drove off in the victim's car a few minutes after shooting the victim, who was still alive when defendant left the scene.

2. Homicide—felony murder—armed robbery—jury instruction—self-defense—applicability

In a prosecution for first-degree murder under a felony murder theory and for the predicate felony of robbery with a dangerous weapon, the trial court did not commit plain error by declining to instruct the jury on self-defense. Under binding legal precedent, self-defense is not a defense to felony murder but can be a defense to the underlying felony, which would defeat the felony murder charge. However, self-defense is not a defense to armed robbery, and therefore defendant was not entitled to a self-defense instruction.

Appeal by Defendant from Judgments entered 19 December 2022 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Deputy General Counsel Daniel P. Mosteller, for the State.

Marilyn G. Ozer for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Saequan Marquette Jackson (Defendant) appeals from Judgments entered pursuant to jury verdicts finding Defendant guilty of First-Degree Murder based on Felony Murder, Robbery with a Firearm, and Possession of a Stolen Vehicle. The Record before us tends to show the following:

On 31 August 2018, Defendant was staying with a female friend in her Greensboro, North Carolina apartment. Defendant was awoken by a series of phone calls to the friend's cell phone by Ronald McCray. Defendant testified he answered the friend's phone to tell McCray to stop calling. McCray stated he was outside the apartment and, according to Defendant, threatened him.

McCray arrived at the apartment complex around 6:40 a.m. Defendant went out to the parking lot with a nine-millimeter handgun in his waistband. Defendant testified McCray exited the car and walked toward Defendant, threatening to kill him. Defendant shot McCray four times. Tachayla Loggins, a sixteen-year-old who lived in the same apartment complex witnessed the shooting and went inside her apartment to tell her mother. Loggins' mother looked outside and saw Defendant sitting outside "for a few minutes" before eventually leaving in McCray's vehicle. Defendant acknowledged at trial he had stolen the car after briefly returning to his friend's apartment.

Loggins and her mother went outside around the same time Defendant left the scene in McCray's car. McCray was still alive and awake on the ground of the parking lot when Loggins and her mother arrived. McCray later died from the gunshot wounds. The day after this incident, police received a report McCray's car was abandoned in a field. Defendant was subsequently arrested on 31 August 2018 for First-Degree Murder. On 8 October 2018, Defendant was indicted on one count of First-Degree Murder, one count of Robbery with a Dangerous Weapon, and one count of Possession of a Stolen Motor Vehicle.

Defendant's trial began 5 December 2022. On 9 December 2022, the jury returned verdicts finding Defendant guilty of First-Degree Murder based on Felony Murder, Robbery with a Dangerous Weapon, and Possession of a Stolen Vehicle. The trial court sentenced Defendant to six to seventeen months of imprisonment for the conviction of Possession of a Stolen Vehicle. The trial court sentenced Defendant to life in prison without parole for the First-Degree Murder conviction, to run at the expiration of the sentence for Possession of a Stolen Vehicle. The trial court arrested judgment on the Robbery with a Dangerous Weapon conviction because it was the underlying felony supporting

the Felony Murder conviction. Defendant gave oral Notice of Appeal in open court.

Issues

The issues are whether the trial court (I) erred by denying Defendant's Motion to Dismiss the armed robbery charge and instructing the jury on felony murder; and (II) plainly erred by instructing the jury self-defense could not justify felony murder based on armed robbery.

Analysis

I. Motion to Dismiss

[1] Defendant first contends the trial court erred by denying his Motion to Dismiss the Felony Murder and Armed Robbery charges due to insufficient evidence Defendant shooting McCray and taking his car were a continuous transaction. Specifically, Defendant contends the taking of the vehicle was an "afterthought," and the State failed to present evidence Defendant intended to rob the victim at the time of the murder by force.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Wilson*, 269 N.C. App. 648, 651-52, 839 S.E.2d 438, 441 (2020) (quoting *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007)). "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) (citation omitted); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

"If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). "Only defendant's evidence which does not contradict and is not inconsistent with the state's evidence may be considered favorable to defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state."

State v. Sumpter, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986) (citations omitted). However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

In the present case, Defendant moved to dismiss the First-Degree Murder and Armed Robbery charges for insufficient evidence. The First-Degree Murder conviction was based on Felony Murder. "Felony murder elevates a homicide to first-degree murder if the killing is committed in the perpetration or attempted perpetration of certain felonies or any 'other felony committed or attempted with the use of a deadly weapon[.]' " *State v. Frazier*, 248 N.C. App. 252, 262, 790 S.E.2d 312, 320 (2016) (quoting N.C. Gen. Stat. § 14-17(a)). "The temporal order of the killing and the felony is immaterial where there is a continuous transaction[.]" *State v. Roseborough*, 344 N.C. 121, 127, 472 S.E.2d 763, 767 (1996). Furthermore, "it is immaterial whether the intent to commit the felony was formed before or after the killing, provided that the felony and the killing are aspects of a single transaction." *Id.*

Our statute defining armed robbery provides: "Any person . . . who, having in possession or with the use or threatened use of any firearms, . . . whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another[.]" N.C. Gen. Stat. § 14-87(a) (2021).

Here, there was substantial evidence to support finding the shooting and armed robbery constituted a continuous transaction. The State presented evidence showing the time between the shooting and taking was short. Loggins and her mother went to the victim just as Defendant left the scene, at which point McCray was still alive and awake. Loggins' mother testified Defendant drove off within "a few minutes" after briefly sitting in McCray's car. Looking to our precedents in similar cases and drawing "every reasonable inference" in the State's favor, this evidence supports the conclusion this was a continuous transaction.

A similar set of facts arose in *State v. Reaves*, 9 N.C. App. 315, 176 S.E.2d 13 (1970). There, a defendant shot a State Highway Patrol officer then fled in the officer's patrol car, which contained the officer's service revolver. *Id.* at 316-17, 176 S.E.2d at 15. On appeal, the defendant argued the evidence was insufficient to support a conviction for armed robbery because the intent to take the car and revolver "arose in defendant's mind only after defendant found his own automobile locked[.]" *Id.* at 317, 176 S.E.2d at 15. Therefore, the defendant argued, "there was not the necessary coincidence in time between the use . . . of a deadly weapon and the

felonious taking[.]" *Id*. This Court rejected that argument, concluding there was "one continuing transaction[.]" *Id*. Our Supreme Court has similarly rejected an argument that "if the jury found defendant took [a vehicle] 'while scared and confused' in order to escape the scene, he would not be guilty of armed robbery[.]" *State v. Webb*, 309 N.C. 549, 555, 308 S.E.2d 252, 256 (1983). The Court observed that even if the evidence was favorable to the defendant, it was not exculpatory justifying a separate jury instruction. *Id*.

Defendant points to *State v. Powell* in support of his contention his taking of the car was an "afterthought." 299 N.C. 95, 261 S.E.2d 114 (1980). In *Powell*, our Supreme Court held the underlying larceny did not support the defendant's guilt for felony murder because the evidence, viewed in the light most favorable to the State, indicated the defendant "took the objects as an afterthought once the victim had died." *Id*. at 102, 261 S.E.2d at 119. As Defendant correctly notes, however, *Powell* has been distinguished frequently. Indeed, our Supreme Court has repeatedly rejected arguments a defendant must have intended to commit armed robbery at the time he killed the victim in order for the exchange to be a continuous transaction. *See State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992) ("Neither the commission of armed robbery . . . nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing." (citation omitted)); *State v. Faison*, 330 N.C. 347, 359, 411 S.E.2d 143, 150 (1991) ("[I]t is immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction." (citation omitted)).

Additionally, this issue was squarely and accurately presented to the jury. The trial court issued jury instructions, in pertinent part, as follows:

> If you find beyond a reasonable doubt that there is a continuous transaction, the temporal order of the threat or use of a firearm and the taking is immaterial. Provided that the theft and the force are aspects of a single transaction, it's immaterial whether the intention to commit the theft was formed before or after force was used upon the victim.

Further:

> Therefore, if you, the jury, find from the evidence beyond a reasonable doubt that . . . there was an immediate causal connection between the defendant's use of force and his

> felonious conduct, it would be your duty to find the defendant guilty[.]
>
> . . .
>
> And, finally, . . . if the State has failed to satisfy you beyond a reasonable doubt that . . . the defendant did act in self-defense but that there was an immediate causal connection between the defendant's use of force and his felonious conduct, then the defendant's actions would be justified by self-defense[.]

These instructions are consistent with our case law on continuous transactions in the context of felony murder, and they present the issue of continuity squarely to the jury. In returning a verdict of guilty, the jury clearly determined the shooting and vehicle theft were a continuous transaction. Thus, whether the shooting and theft were a single transaction was a jury issue, which was presented to the jury. Therefore, the jury's verdict of guilty determined the shooting and theft were a continuous event. Consequently, we conclude the trial court did not err by denying Defendant's Motion to Dismiss.

II. Jury Instruction

[2] Defendant contends the trial court plainly erred by not instructing the jury it could consider self-defense as a justification for felony murder or armed robbery.

"[T]he trial court has a duty 'to instruct the jury on all substantial features of a case raised by the evidence.' " *State v. Fletcher*, 370 N.C. 313, 325, 807 S.E.2d 528, 537 (2017) (quoting *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted)). Defendant did not object to the jury instructions at trial. Consequently, our review on appeal is limited to plain error. N.C. R. App. P. 10(a)(4) (2021) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . 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.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)

(citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant argues he was entitled to an instruction that self-defense was available as a defense to felony murder. Our Supreme Court has held "self-defense is not a defense to felony murder." *State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016). However, "[p]erfect self-defense . . . may be a defense to the underlying felony, which would thereby defeat the felony murder charge[.]" *Id.* (citation omitted). Thus, "self-defense is available in felony murder cases only to the extent that self-defense relates to applicable underlying felonies as in the case sub judice." *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995).

Here, the underlying felony was armed robbery. Our Supreme Court has held "self-defense is not a defense to [armed robbery]." *State v. McLymore*, 380 N.C. 185, 199 n. 3, 868 S.E.2d 67, 78 n. 3 (2022); *see also State v. Evans*, 228 N.C. App. 454, 459, 747 S.E.2d 151, 155 (2013) (holding trial court did not err in omitting a self-defense instruction where defendant was charged with first-degree murder based on felony murder rule with the underlying felonies attempted robberies with a dangerous weapon); *State v. Jacobs*, 363 N.C. 815, 822, 689 S.E.2d 859, 864 (2010) ("We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself[.]"). Based on our precedents, self-defense is inapplicable to armed robbery. Therefore, self-defense does not excuse felony murder where the underlying felony is armed robbery. Consequently, Defendant was not entitled to a self-defense instruction on the charge of felony murder.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
WARREN DOUGLAS JACKSON

No. COA23-727

Filed 19 March 2024

1. Search and Seizure—traffic stop—protective frisk—probable cause—plain feel doctrine—pill bottle

After pulling defendant over for driving without a license, an officer who conducted a protective frisk of defendant's person did not have probable cause to seize a pill bottle that he felt when patting down defendant's pocket. The "plain feel" doctrine did not apply where there was insufficient information from either the context of the stop or the shape of the bottle to put the officer on alert that the bottle contained contraband.

2. Search and Seizure—traffic stop—inevitable discovery doctrine—additional basis for vehicle search—inferred finding

In a trial for possession of methamphetamine, which was found in defendant's car after he was pulled over for driving without a license (DWLR), the methamphetamine was admissible under the inevitable discovery doctrine. Although the officer did not have probable cause to search defendant's car based on finding a pill bottle on defendant's person during a protective frisk—because the "plain feel" doctrine was inapplicable under the circumstances—the officer testified that even if no contraband had been found on defendant's person he would have arrested defendant for DWLR and would have searched defendant's car incident to that arrest. Although the trial court did not make an express finding that the officer would have made an arrest for DWLR, defendant presented no evidence conflicting with the officer's testimony; therefore, such a finding could be inferred.

Judge STADING concurring in result only.

Appeal by defendant from judgment entered 14 February 2023 by Judge R. Gregory Horne in Superior Court, Avery County. Heard in the Court of Appeals 28 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth G. Arnette, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

ARROWOOD, Judge.

Warren Douglas Jackson ("defendant") appeals from judgment entered upon his conviction for possession of methamphetamine. For the following reasons, we find that defendant received a fair trial free from prejudicial error.

I. Background

Detective Ridge Phillips ("Phillips") of the Avery County Sheriff's Office was patrolling in a rural section of Avery County, North Carolina when he saw defendant driving a truck on Squirrel Creek Road. Knowing that defendant had a revoked driver's license at the time, Phillips pulled him over. According to Phillips, at the time of the stop, he had interacted with defendant two to three times in the past. Specifically, Phillips testified that he had previously arrested defendant for possession of a firearm by a felon and that he had been aware of defendant's previous involvement with narcotics.[1]

Upon approaching defendant's truck, Phillips testified that he asked defendant if he could search the truck to "make sure there were no guns, knives, drugs or anything in the vehicle" and that defendant consented to the search. Phillips's body camera did not record any sound while defendant was sitting in the truck, so the request to search the truck and defendant's response cannot be substantiated. According to Phillips, he then asked defendant to step out of the truck.[2]

As defendant stepped out of the truck, the audio from Phillips's body camera activated, and defendant could be heard stating, "Yeah, I got a pocketknife." As Phillips directed defendant in position for a pat-down search, the following exchange occurred:

Phillips: You just got a pocketknife?

Defendant: Yeah.

---

1. However, when asked about specific information that Phillips had on defendant relating to drug possession, Phillips stated, "I couldn't tell you."

2. Phillips testified that while interacting with defendant, defendant did not act nervous or evasive and complied with his requests. Specifically, when asked whether there was anything "suspicious about [defendant's] behavior aside from having a knife on him," Phillips testified, "No, not on his behavior."

> **Phillips**: Alright, keep your hands out of your pockets. I am going [to] pat you down for my safety.

After patting down defendant's front right pant pocket, Phillips asked defendant, "What all is in your pocket right here?" While asking the question, Phillips simultaneously slid a travel-size pill bottle out of the pocket.[3] In response, defendant stated, "cigarette lighter and my medicine." Phillips testified, "On the pat-down I felt what was a pill bottle in the front right pocket, what I know through my training and experience to be a pill bottle. People keep their controlled substances, whether it be pills or other things, inside of it." Phillips further testified that when feeling the bottle, it was not "consistent with a prescription bottle." With the pill bottle in Phillips's hand, Phillips asked defendant what kind of medicine was in the bottle, and defendant stated, "Percocets." Phillips opened the bottle and observed two pills inside. Phillips testified that when he saw the bottle, he noticed it was not a prescription bottle.

After defendant stated he had a prescription for the pills, Phillips told defendant he was going to detain him and placed defendant in handcuffs. Phillips told defendant he "was just detaining him for now because [he] found them Percocets" and started pulling other items out of defendant's pockets, including a wallet, lighters, and a pocketknife. While searching defendant's pockets, Phillips stated, "You can't carry around Percocets in your pocket without the prescription bottle, okay. That is a controlled substance."[4] Defendant replied that he kept them in a non-prescription bottle to prevent people from stealing them, given that the prescription bottle would let people know he had them.

Because of the pills, Phillips told defendant, "I am going to start the search, okay on you. It is against the law to carry Percocets like that without a prescription bottle. Like I said right now, you're just being detained. You ain't under arrest." While searching defendant's pant leg, Phillips noticed that one of defendant's pant legs was slightly stuck in his boot. Phillips searched defendant's boot and sock area and found a bag of methamphetamine. Phillips then arrested defendant for possession

---

3. When asked if he immediately pulled the pill bottle out of defendant's pocket after feeling it, Phillips testified, "Yes."

4. Although it is illegal to possess a controlled substance without a valid prescription, N.C.G.S. § 90-95(a)(3), no statutory provision exists in North Carolina that prohibits a person from possessing their prescription medicine outside of its original prescription container.

of methamphetamine.[5] Phillips issued defendant a citation for driving while license revoked ("DWLR").

Defendant was indicted for felony possession of methamphetamine and misdemeanor possession of a Schedule II controlled substance on 29 November 2021. Defendant moved to suppress the evidence obtained during the traffic stop on 20 May 2022, arguing that Phillips did not have probable cause to search him or the truck, nor did Phillips have any other basis to conduct the searches.

A suppression hearing was held before trial on 13 and 14 February 2023. Phillips was the sole witness called during the hearing. When asked on the first day of the hearing whether defendant would have been detained based on his revoked license status—even if no contraband had been found—the following exchange occurred between Phillips and the State:

Phillips: Yes, he can be arrested for that.

The State: So would he have been able to drive away from the scene had you found nothing on his person?

Phillips: No.

On the second day of hearing, the exchange with respect to Phillips's intentions continued:

The State: Yesterday you indicated that even if taking all, if nothing was found during your search of defendant or nothing was found in the vehicle, that the defendant would not have been allowed to leave the scene?

Phillips: Correct.

The State: What would you have done with defendant, assuming nothing else was found, what would you have done with him?

Phillips: Arrested him for driving while licensed revoked.

Phillips further testified that, after arresting someone for DWLR, he would search their person before placing them in his patrol car. On cross-examination of Phillips, defendant's questioning centered on

5. Phillips specifically told defendant he was "under arrest for possession of methamphetamine."

Phillips's interactions with defendant leading up to and during the protective frisk and the pocket search. Defendant presented no other evidence for the suppression motion. At the hearing's conclusion, the trial court denied defendant's motion and concluded that the search was lawful and that there was no constitutional violation of defendant's rights.

The possession of methamphetamine charge proceeded to jury trial, and defendant was found guilty of possession of methamphetamine. The trial court sentenced defendant to six to seventeen months' imprisonment, suspended for twenty-four months' supervised probation, on 14 February 2023. Defendant gave notice of appeal in open court. The misdemeanor possession charge was dismissed on 14 June 2023.

II. Discussion

Defendant raises numerous arguments on appeal. Defendant contends the seizure of the pill bottle exceeded the scope of a protective frisk and that because defendant was never arrested for DWLR, the search incident to arrest exception to the warrant requirement was inapplicable. Defendant also argues that defendant lacked probable cause to open the container. Lastly, in the alternative, defendant argues that the arrest for possession of the pills was not supported by probable cause. The State contends that the search and seizure were lawful, and, even if unlawful, the motion was still properly denied because the methamphetamine found in defendant's boot was admissible under the inevitable discovery doctrine.

A. Standard of Review

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether the trial court's findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146–47 (2003) (cleaned up). "The trial court's conclusions of law, however, are reviewed de novo." *State v. Duncan*, 272 N.C. App. 341, 345 (2020) (citing *State v. Fernandez*, 346 N.C. 1, 11 (1997)). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in light most favorable to the State." *Id.* (cleaned up).

B. The "Plain Feel" Doctrine and Probable Cause

[1] Evidence of contraband during a protective frisk may be admissible under the "plain feel" doctrine, provided that the officer "feels an object whose contour or mass" make its incriminating nature immediately apparent. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). In other words,

evidence of contraband—plainly felt during a frisk—may be admissible if "the officer had probable cause to believe that the item was in fact contraband." *State v. Shearin*, 170 N.C. App. 222, 226 (2005) (citing *Dickerson*, 508 U.S. at 375–77). In determining whether an object's incriminating nature was immediately apparent and whether probable cause existed to seize it, the totality of the circumstances is considered. *State v. Robinson*, 189 N.C. App. 454, 459 (2008) (citation omitted). When such "*facts and circumstances within the officer's knowledge* are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband, probable cause exists." *State v. Briggs*, 140 N.C. App. 484, 493 (2000) (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983)) (emphasis in original).

In *Robinson*, this Court held that there was probable cause to seize a film canister during a protective frisk because sufficient information existed to believe it contained contraband. 189 N.C. App. at 459–60. In concluding that probable cause existed, this Court considered that (1) the defendant was stopped in an area known for being a "drug location," (2) the officer had reports that the defendant sold drugs nearby; (3) the defendant "stopped talking, straightened up very abruptly, and looked surprise or frightened" when the officer made eye contact; (4) the officer thought defendant would flee and that the defendant then "started backing away, turned his right side away from the officer, and reached into his right pocket"; (5) the officer had "arrested at least three others who had exactly the same type of canister" with narcotics stored in them; and (6) the officer testified that it was immediately apparent that crack-cocaine was packaged in the film canister. *Id.* at 459 (cleaned up).

Here, the State, relying heavily on *Robinson*, contends that Phillips had probable cause to seize the pill bottle under the "plain feel" doctrine. We do not accept this contention because the facts and circumstances present at the time Phillips seized the pill bottle are substantially different from those in *Robinson*. Unlike *Robinson*, defendant was not in a "drug location," and there were no reports that defendant sold drugs in the area. Defendant also provided no reason for Phillips to believe that he was nervous during the stop and complied with Phillips's requests. Further, Phillips felt what he knew to be a pill bottle, which is distinct from a film canister in that people commonly carry such containers with their medication inside.[6]

6. We do not imply that possessing a film canister alone constitutes probable cause either. *See State v. Sapatch*, 108 N.C. App. 321, 325 (1992) (holding that "[p]ossession of film canisters, without more, is insufficient to give rise to probable cause of a crime" even if the officer "had personal knowledge of their illegal use in other incidents."). However, carrying around a film canister in the digital age is less common than having a pill bottle with medication.

Thus, the State's application of the "plain feel" doctrine and reliance on *Robinson* is incorrect.[7]

We also reject the State's contention that the unlabeled pill bottle, for which defendant was unable to provide a prescription during the stop, gave Phillips probable cause that it contained contraband and to seize it. The State was unable to cite to a single case in North Carolina to support this contention, and many jurisdictions expressly reject the idea. *See People v. Alemayehu*, 494 P.3d 98, 108–09 (Colo. App. 2021) (citing several "authorities [that] reject the idea that an unlabeled pill pottle, in and of itself, constitutes probable cause" and concluding the same). However, even assuming *arguendo* that Phillips's search and seizure violated defendant's constitutional rights, the methamphetamine found in defendant's boot was still admissible because the contraband's discovery was shown to be inevitable.

C. Inevitable Discovery

[2] In response to the State's argument relating to the inevitable discovery doctrine, defendant contends that Phillip's discovery of the methamphetamine was not inevitable because defendant was not placed under arrest for DWLR and the trial court's finding was insufficient to support a conclusion that Phillips would have arrested defendant for driving while license revoked had the drugs not been located. Because that finding was inferred under our case law, we disagree.

Under the exclusionary rule, evidence obtained via unconstitutional search and seizure is generally inadmissible in a criminal case. *State v. Garner*, 331 N.C. 491, 505–06 (1992). However, under the inevitable discovery doctrine, "if the State can establish by a preponderance of the evidence that the contraband ultimately or inevitably would have been discovered by lawful, independent means, then it is admissible." *State v. Larkin*, 237 N.C. App. 335, 343 (2014) (cleaned up). This Court "use[s] a flexible case-by-case approach in determining inevitability." *Id.* (citing *Garner*, 331 N.C. at 503).

In the case *sub judice*, Phillips testified that—assuming no contraband had been discovered on defendant's person or in the truck—he would have arrested defendant for DWLR and subsequently searched defendant before transporting him in his patrol car. Upon review of the suppression hearing transcript, we agree with defendant that the trial court

7. This case is further distinct from *Robinson* in that Phillips never testified to previously arresting individuals for carrying controlled substances in the same type of pill bottle, nor did Phillips testify that it was immediately apparent to him that the pill bottle contained contraband.

made no express finding as to whether Phillips would have made such an arrest. However, our Supreme Court has held that "only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312 (2015) (citations omitted). "When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *Id.* (citation omitted); *State v. Munsey*, 342 N.C. 882, 885 (1996) ("If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court."). Consequently, "our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." *Bartlett*, 368 N.C. at 312.

Here, defendant presented no evidence that conflicted with Phillips's testimony that he would have arrested defendant for DWLR had no contraband been found. Instead, defendant's evidence—consisting only of a brief cross-examination of Phillips—focused on Phillips's interactions with defendant regarding the protective frisk and the pocket search. Because defendant's evidence failed to controvert Phillips's testimony, the finding that Phillips would have arrested defendant for DWLR is thus inferred under *Bartlett*. *See State v. Baker*, 208 N.C. App. 376, 384 (2010) ("[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.").

Based on that inferred finding, the State provided sufficient evidence to support a finding that, had defendant not been arrested for possession of the seized substances, he would have been arrested for DWLR. In conjunction with such an arrest, the officer would have conducted a search incident to that arrest which would have led to the discovery of methamphetamine. Thus, the seizure was inevitable even if we reject the State's contentions regarding the initial pat down and search. Accordingly, the trial court did not err in denying the defendant's motion to suppress.

III. Conclusion

For the foregoing reasons, we find defendant had a fair trial free from prejudicial error.

NO ERROR.

Judge COLLINS concurs.

Judge STADING concurs in result only.

STATE OF NORTH CAROLINA
v.
AARON MICHAEL McLAWHON

No. COA23-814

Filed 19 March 2024

Constitutional Law—North Carolina—right to remain silent—evidence of pre-arrest silence—plain error analysis

In a prosecution for statutory sexual offense with a child by an adult and other related crimes, the trial court did not commit plain error in allowing the lead detective in the case to testify that she was unable to get defendant to come in for an interview during her investigation. Even if the court had violated defendant's right to remain silent under the North Carolina Constitution by admitting this evidence of his pre-arrest silence, defendant elicited substantially similar testimony from the detective on cross-examination and therefore could not show that the court's error had a probable impact on the jury's verdict.

Appeal by Defendant from judgment entered 28 September 2022 by Judge Josephine K. Davis in Pitt County Superior Court. Heard in the Court of Appeals 6 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State-Appellee.

Reid Cater for Defendant-Appellant.

COLLINS, Judge.

Defendant Aaron McLawhon appeals from judgment entered upon guilty verdicts of three counts of statutory sexual offense with a child by an adult, sexual act by a substitute parent or custodian, and indecent liberties with a child. Defendant argues that the trial court plainly erred by admitting a detective's testimony that she was unable to interview Defendant during her investigation. We find no plain error.

I. Background

Defendant and his wife were foster parents to J.P., born in 2012, and her younger sister, M.P., beginning in March 2018.[1] In August 2019, J.P.

1. We use initials to protect the identities of the minor children. *See* N.C. R. App. P. 42.

and M.P. moved in with their paternal grandmother ("Mimi"), who was in the process of adopting them. Mimi observed J.P. "laying on the loveseat and . . . fondling [herself]" in April 2020. Mimi took J.P. into the bedroom and asked whether anyone had ever touched her inappropriately; J.P. said that Defendant had touched her. Mimi reported the allegation to the Pitt County Department of Social Services ("DSS"); DSS reported the allegation to Detective Nikki Dolenti with the Pitt County Sheriff's Department on 17 April 2020.

A DSS social worker took J.P. in for a forensic evaluation on 6 May 2020 at the TEDI Bear Child Advocacy Center, which is "a place that helps the community to address issues of children . . . involved in allegations of maltreatment." During the forensic evaluation, J.P. "described in pretty good detail that [Defendant] put his hands in her private parts and that she was trying to stop it."

J.P. and M.P.'s maternal grandmother ("Mamu") came to visit in May 2020. Mamu is active "in an organization called . . . Bikers Against Child Abuse" and "happened to bring [her] uniform and on the back is a big black patch that says Bikers Against Child Abuse." J.P. asked Mamu about the organization; Mamu explained that child abuse "can be when a child gets hit or verbally or emotionally get[s] abused by words and things[,]" but she also explained that "there is another type of abuse which is called sexual abuse." Mamu explained that sexual abuse occurs "when somebody touches you wrong like in your privates and you really don't like it." J.P. responded, "like me?" J.P. "did not tell [Mamu] right then and there," but Mamu told J.P. to let her know if she ever wanted to talk about what happened to her.

J.P. asked to speak privately with Mimi and Mamu on 24 May 2020. J.P. told them that Defendant "touch[ed] her private area with his fingers." J.P. stated that she and Defendant "were sitting there watching movies and . . . were under blankets[,]" and he touched her vagina "under [her] panties." J.P. also told them that Defendant "would take a shower and he would ask her to come in and take a shower with her and she was scared because she was afraid that he was going to get mad at her[.]" Furthermore, J.P. stated that "when [Defendant] was touching her and everything[,] she did it also because she didn't want [M.P.] to be touched." Later that afternoon, J.P. asked to speak with Mimi and Mamu again because she "ha[d] more to tell [them]." J.P. told them that Defendant "touched her with his tongue and with his hand and that it hurt really bad."

Detective Dolenti interviewed J.P. on 27 May 2020, and J.P. told her that Defendant had "licked her private" and drew a picture to "show [her] how they were laying on the bed."

Defendant was indicted for three counts of statutory sexual offense with a child by an adult, sexual act by a substitute parent or custodian, and indecent liberties with a child. The matter came on for trial on 26 September 2022. J.P. testified that Defendant touched the inside of her vagina with his hand in the living room on multiple occasions; that Defendant touched her vagina with his mouth while she was in his bedroom; and that she would shower with Defendant when he asked because she "was scared he would do something to [her]." The jury returned guilty verdicts on all charges. The trial court consolidated Defendant's convictions and sentenced him to 300 to 420 months of imprisonment. Defendant appealed.

II. Discussion

Defendant argues that the trial court plainly erred by "allowing the State to present substantive evidence of defendant's pre-arrest silence." (capitalization altered). Specifically, Defendant argues that his "right to remain silent under the North Carolina Constitution was violated when Detective Dolenti testified that his refusal to speak with her prompted her to present the case to the District Attorney." Defendant failed to object to Dolenti's testimony at trial, and we thus review only for plain error. *See State v. Stroud*, 252 N.C. App. 200, 211, 797 S.E.2d 34, 43 (2017) ("[W]here an alleged constitutional error occurs during either instructions to the jury or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended[.]").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks, brackets, and citations omitted). A defendant cannot show prejudice "when cross-examination elicits testimony substantially similar to the evidence challenged." *State v. Barnett*, 223 N.C. App. 450, 457, 734 S.E.2d 130, 135 (2012) (citation omitted).

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 173-74 (2010) (quoting *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 (2008)). "[A] defendant's

pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." *Id.* at 395, 698 S.E.2d at 174 (citing *Boston*, 191 N.C. App. at 649 n.2, 663 S.E.2d at 894 n.2).

Here, when the State asked Dolenti on direct examination whether she did "anything else as far as [her] investigation after interviewing [J.P.] on May the 27th," Dolenti testified as follows:

> At that point I had already spoken with the attorney that was representing [Defendant] and was unable to get [Defendant] to come in for an interview. So my next step was to consult with the District Attorney's office in reference to the case.

Even assuming arguendo that the trial court erred by admitting this testimony, Defendant elicited substantially similar testimony on cross-examination. The following exchange took place between defense counsel and Dolenti:

> [DEFENSE COUNSEL:] And once you sat down with [J.P.] in that interview on the 27th you took out warrants the next day?
>
> [DOLENTI:] I believe that's the timeline.
>
> [DEFENSE COUNSEL:] So you were still making a decision about what was going to happen with the case until the allegation that he was performing oral sex on [J.P.]?
>
> [DOLENTI:] There was multiple things that kind of came to a head at that point. It was the end of my investigation. [Defendant] wouldn't come into interview and at that point I had no one else to talk to about the case.

By questioning Dolenti on the timeline of her investigation, defense counsel "elicit[ed] testimony substantially similar to the evidence challenged." *Barnett*, 223 N.C. App. at 457, 734 S.E.2d at 135. Defendant thus cannot establish that the admission of Dolenti's direct examination testimony "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citations omitted).

Accordingly, the trial court did not plainly err by admitting Dolenti's testimony that she "was unable to get [Defendant] to come in for an interview."

III. Conclusion

For the foregoing reasons, we find no plain error.

NO PLAIN ERROR.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JACOB GREY SHELTON, DEFENDANT

No. COA23-729

Filed 19 March 2024

Sexual Offenses—sexual exploitation of a minor—nude photographs—depiction of sexual activity—circumstantial evidence

The trial court properly denied defendant's motion to dismiss a charge of sexual exploitation of a minor where the State presented sufficient evidence that defendant took nude photographs of a minor that depicted "sexual activity" as that term is defined by statute (N.C.G.S. § 14-190.16). Although defendant had deleted the photographs long before trial, a reasonable juror could still determine from the available circumstantial evidence that the photographs exhibited the minor in a lascivious way and that her pubic area was at least partially visible. Any contradictions in the witnesses' testimonies went to the weight and credibility of the evidence—an issue properly submitted to the jury.

Appeal by Defendant from judgment entered 10 January 2023 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 5 March 2024.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Lucas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

GRIFFIN, Judge.

Defendant Jacob Grey Shelton appeals from the trial court's judgment entered after a jury found him guilty of first-degree sexual exploitation of a minor. Defendant contends the trial court erred by denying his motion to dismiss the charge because there was insufficient evidence to show he took photographs of a minor which depicted "sexual activity." We find no error.

I. Factual and Procedural Background

This case concerns an incident where Defendant took nude photographs of a minor female. The evidence tended to show as follows:

Late one night in Fall 2021, Defendant entered the bedroom of his girlfriend's daughter, Rachel,[1] and asked her to do "just this one thing for [him]." Rachel agreed because Defendant promised he would buy her whatever she wanted for Christmas in exchange. Defendant then forcibly and fully undressed Rachel, posed her on her bed, and took photographs of her with his cell phone. Defendant went to the bathroom for about fifteen minutes, and thereafter left Rachel alone for the remainder of the night. Rachel did not tell anyone what Defendant did that night. Rachel had witnessed Defendant be physically abusive to her mother before and feared he would hurt them if she told anyone.

Rachel eventually told a friend at school and the school guidance counselor what happened. The guidance counselor reported Rachel's statements to the Department of Social Services, who began investigating the next day and engaged the Sheriff's Office. Law enforcement interviewed Defendant twice regarding the incident. Detective Doiel of the Surry County Sheriff's Office first interviewed Defendant on 13 December 2021. Defendant denied taking any pictures of Rachel and said that, though he had gone into her room that night, it was to help her clean. Detective Doiel requested Defendant return the next day and Defendant agreed. Agent Stovall with the State Bureau of Investigation interviewed Defendant again the next day. Defendant once again denied taking any photos at first, but eventually admitted that he had taken two photographs of Rachel while she sat naked on her bed. Defendant said he realized his actions were wrong and deleted the pictures the next day. Detective Doiel then joined Agent Stovall in the room and Defendant repeated his confession, including confirmation that Rachel's legs were spread slightly apart when he took the photographs.

---

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

On 21 February 2022, a grand jury indicted Defendant on one charge of first-degree sexual exploitation of a minor. Defendant's case came on for jury trial on 24 October 2022 in Surry County Superior Court. During trial, the State presented the testimony of Rachel's guidance counselor, Detective Doiel, Agent Stovall, and Rachel. The State showed the jury a video recording of Defendant's confession to Detective Doiel and Agent Stovall. Defendant elected not to present any evidence. Defendant made a motion to dismiss the State's charge at the close of the State's evidence and again after stating his decision not to present any evidence. The trial court denied each motion.

The jury found Defendant guilty of first-degree sexual exploitation of a minor. On 10 January 2023, the trial court entered judgment on the jury's verdict and sentenced Defendant to a term of 73 to 148 months' imprisonment. Defendant entered oral notice of appeal in open court.

II. Analysis

Defendant contends the trial court erred by "denying [Defendant's] motion to dismiss where (1) the actual photos at issue were deleted long before trial, and (2) the other evidence failed to prove that those photos depicted 'sexual activity' as defined by statute." Essentially, Defendant asserts the State failed to present direct evidence that the photographs showed sexual activity, and the remaining circumstantial evidence was insufficient as well. We disagree.

" 'In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.' " *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed . . . even if the suspicion so aroused by the evidence is strong." *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (internal marks omitted) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). The evidence must be considered in the light most favorable to the State, and "[c]ontradictions and discrepancies in the evidence are strictly for the jury to decide." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983) (citation omitted); *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020) (citations omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State*

v. Chekanow, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (internal marks and citation omitted).

"[S]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Campbell*, 373 N.C. at 221, 835 S.E.2d at 848 (citation omitted). Evidence may be direct or circumstantial:

> Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. In other words, as has been said, circumstantial evidence is merely direct evidence *indirectly applied.*

State v. Wright, 275 N.C. 242, 249–50, 166 S.E.2d 681, 686 (1969) (citation omitted). " 'It is immaterial whether the substantial evidence is circumstantial or direct, or both.' " *State v. Ambriz*, 286 N.C. App. 273, 277, 880 S.E.2d 449, 457 (2023) (citation omitted). "Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence[.]" *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (citations omitted). " 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury[.]' " *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citations omitted). Cases involving sexual exploitation are not exceptions to these principles. *See Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 570, 351 S.E.2d 305, 321 (1986) (confirming in sexual exploitation of minor case that "the jury *may* be convinced beyond a reasonable doubt by the State's presentation of circumstantial evidence").

Section 14-190.16 of the North Carolina General Statutes sets out the offense of first-degree sexual exploitation of a minor to be conduct which causes a minor to engage in sexual activity with the intent to make a visual representation of that activity:

> A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:
>
> (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage

> in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity[.]

N.C. Gen. Stat. § 14-190.16 (2021). Defendant does not challenge whether the evidence showed that he knowingly made a visual representation—photographs—of Rachel while she was completely naked. Defendant challenges only the sufficiency of the State's evidence showing whether the photographs taken depicted "sexual activity."

"Sexual activity" is defined, among other things, to include "[t]he lascivious exhibition of the genitals or pubic area of any person." N.C. Gen. Stat. § 14-190.13(5)(g) (2021). "Our appellate courts have defined the term 'lascivious' as 'tending to arouse sexual desire.' " *State v. Corbett*, 264 N.C. App. 93, 100, 824 S.E.2d 875, 880 (2019) (citation omitted). "[T]he General Assembly intended that the relevant statutory language be construed broadly in order to provide minors with the maximum reasonably available protection from sexual exploitation." *State v. Fletcher*, 370 N.C. 313, 329, 807 S.E.2d 528, 540 (2017).

The parties each compare the present case to this Court's decisions in *State v. Ligon*, 206 N.C. App. 458, 697 S.E.2d 481 (2010), and *State v. Corbett*, 264 N.C. App. 93, 824 S.E.2d 875. In *State v. Ligon*, this Court was asked to determine whether photographs taken by the Defendant of a minor female met the statutory definition of "sexual activity." *Ligon*, 206 N.C. App. at 459, 697 S.E.2d at 483. The State presented photographs showing a minor female "sitting on a bench with her legs spread apart." *Id.* at 460, 697 S.E.2d at 483. Though some of the photographs showed either the defendant or the female pulling her shorts back and exposing her crotch, "[d]ue to the lighting in the photographs, it could not be determined whether the pictures showed [the female's] private parts or underpants." *Id.* The defendant claimed he took the photographs as evidence of marks left when his dog scratched the minor female, but also admitted to a detective that he intended to masturbate to the photographs when he returned home. *Id.* at 461, 697 S.E.2d at 484.

The State alleged the photographs showed "sexual activity" because they depicted the touching of the female's genitals as masturbation. *Id.* at 469, 697 S.E.2d at 489; *see* N.C. Gen. Stat. §§ 14-190.13(5)(a), (c). The Court noted that "the State failed to procure the testimony of the alleged victim" and "presented no evidence that [the defendant] had done anything to satisfy the statutory definition of prohibited sexual conduct." *Id.* It then held that "the pictures [did] not depict any sexual activity" because the statutory definition of masturbation was "not satisfied by a

photograph of [the female] merely having her hand in proximity to her crotch area" or a photograph of the defendant "touching [her] shorts, not her body." *Id.*

In *State v. Corbett*, this Court was again asked to "address the question of when charges of . . . sexual exploitation are properly submitted to a jury." *Corbett*, 264 N.C. App. at 94, 824 S.E.2d at 876. The State admitted into evidence a photograph "showing [his minor daughter] standing naked in [the defendant's] room[.]" *Id.* at 95, 824 S.E.2d at 877. The minor female was shown "fully nude except for her socks" and "[t]he focal point of the picture [was her] naked body." *Id.* at 100, 824 S.E.2d at 880. The defendant argued that the photograph did not show "sexual activity" because " '[w]hile [the female was] unclothed, her arms [were] crossed in front of her body and her hands block any view of her genital area.' " *Id.*

The Court disagreed with the defendant's argument, holding a reasonable juror could determine the photograph was "lascivious" because it was "clearly intended to elicit a sexual response based on the context in which it was taken[.]" *Id.* The facts that the photograph centered on the minor female's naked body and was taken in a bedroom supported the Court's holding. The Court further held that "reasonable jurors could have determined that the photograph at issue depicted [the minor female's] pubic area." *Id.* Though her "hands [were] positioned over her genitalia in the photograph, the fingers of her left hand [were] spread far enough apart that clearly visible gaps exist[ed] between them such that her pubic area [was] at least partially visible." *Id.* The partial visibility of the minor female's pubic area was enough to constitute "sexual activity" under sections 14-190.16 and 14-190.13(5)(g).

We hold the present case to be similar to *Corbett* and distinguishable from *Ligon*. The State presented the video recording of Defendant's confession to Detective Doiel and Agent Stovall into evidence, and played it for the jury to view. In the video, Defendant admitted that he went into Rachel's bedroom late at night and took photographs of Rachel while she sat on her bed fully nude, with her legs "slightly apart." Like the photographs in *Corbett*, the photographs here focused on Rachel's naked body while she sat on her bed, in her bedroom. Defendant prefaced the photographs by bargaining with Rachel for a favor, saying "I'll buy you anything for Christmas if you just do this one thing for me." After acquiring the photographs, Defendant left Rachel's room and went to the bathroom for ten to fifteen minutes. In context, a reasonable juror could have determined that the photographs exhibited Rachel in a lascivious way and that her pubic area was at least partially visible between her legs.

The present case differs from *Ligon* in two meaningful ways. First, the State claimed that the photographs showed Rachel's unclothed pubic area, not that they showed Rachel being touched or masturbating. The State had to present evidence only that the photographs depicted Rachel's unclothed pubic area, not that anyone was touching that area. Second, the State here procured the testimony of Rachel, the alleged victim. Rachel testified she was fully nude and "sitting up" on her bed when Defendant took the photographs. Rachel "heard the sound and the camera and the light flashed" twice on Defendant's phone. Rachel further explained that she was "looking directly at the phone," "[Defendant] was directly in front of [her]," and her hands were placed beside her on the bed. Rachel's testimony indicated that the photographs were taken in good lighting, directly in front of her, and her hands were not obstructing her pubic area from view. Even if her legs were only "slightly apart," a reasonable juror could have determined that the photographs depicted Rachel's pubic area.

Defendant contends this evidence did not prove the State's case because Detective Doiel's testimony contradicted Rachel's testimony. Detective Doiel testified that Rachel stated she never saw the photographs. On re-cross examination, Rachel testified Defendant showed her the photographs after taking them and she could at least see her breasts in them. Notably, though, there was no contradiction as to Rachel and Defendant's positioning when the photographs were taken. In total, Rachel's testimony still tended to show Defendant's guilt and contradictions in the evidence do not warrant dismissal; they instead present a question of weight and credibility for the jury to decide. *See Lowery*, 309 N.C. at 766, 309 S.E.2d at 236.

We recognize that the State's evidence in *Ligon* and *Corbett* included direct evidence that is not present in this case: the State submitted the photographs alleged to depict sexual activity into evidence and showed them to the jury. Though his arguments include assertions that the evidence was, at least in part, insufficient because the photographs were not present in this case, Defendant has failed to show precedent which states the photographs must be available at trial to prove the charge of sexual exploitation. The evidence needs only to show the defendant, *inter alia*, "induce[d], coerce[d], [or] encourage[d]" the minor to engage in "sexual activity" so the photographs could be taken. In the absence of direct evidence, the State satisfied its burden to prove these elements through sufficient circumstantial evidence. *See Cinema I Video*, 83 N.C. App. at 570, 351 S.E.2d at 321.

III. Conclusion

We hold that the State's case, including the testimony of the victim and Defendant's own admission, presented sufficient evidence of Defendant's guilt beyond mere conjecture or suspicion from which a reasonable jury could conclude that the photographs contained sexual activity beyond a reasonable doubt. The trial court did not err in denying Defendant's motion to dismiss the charge of first-degree sexual exploitation of a minor.

NO ERROR.

Judges HAMPSON and STADING concur.

STATE OF NORTH CAROLINA
v.
NATHAN JOSEPH TEMPLETON

No. COA23-443

Filed 19 March 2024

Motor Vehicles—fleeing to elude arrest—jury instructions—defense of necessity—reasonableness of belief

Defendant was not entitled to a jury instruction on the defense of necessity in his trial for felony fleeing to elude arrest with a motor vehicle and speeding in excess of eighty miles per hour, where defendant did not establish that his actions in driving his motorcycle at a high rate of speed while leading law enforcement vehicles on a thirty-minute chase were reasonable and that he had no other acceptable choices. Where one of the chasing vehicles was clearly marked "Sheriff" and had lights and sirens activated, a reasonable person would have had ample time and opportunity to realize that the pursuers were law enforcement and not members of a motorcycle gang who defendant claimed had threatened him earlier in the evening.

Appeal by Defendant from Judgment entered 15 September 2022 by Judge G. Frank Jones in Onslow County Superior Court. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi L. Regina, for the State.

Castle, Peterson & Naylor, P.C., by Paul Y.K. Castle, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Nathan Joseph Templeton (Defendant) appeals from a Judgment entered pursuant to jury verdicts finding him guilty of felony Fleeing to Elude Arrest with a Motor Vehicle and Speeding in Excess of Eighty Miles Per Hour. The Record before us, including evidence presented at trial, tends to show the following:

On 5 September 2021 at approximately 3:43 a.m., Sergeant Keith Whaley with the Onslow County Sheriff's Office saw a motorcycle travelling at a "high rate of speed" while parked in an unmarked patrol car off Highway 258. Using a radar, Sergeant Whaley clocked Defendant's speed at 114 miles per hour. Sergeant Whaley activated his blue lights and siren and began to pursue Defendant.

Defendant made several turns before making a U-turn in a yard and passing in front of Sergeant Whaley's car. Soon thereafter, Defendant nearly hit a marked patrol vehicle driven by Deputy Kyle O'Connor parked at the entrance to the subdivision Defendant was exiting. This marked patrol car had its lights and sirens activated. At trial, Defendant testified he immediately saw the "Sheriff" marking on the patrol vehicle. Defendant then led both Sergeant Whaley and Deputy O'Connor on a high-speed chase that lasted approximately thirty minutes. While attempting to make a turn, Defendant laid down his motorcycle, allowing Sergeant Whaley to catch him. Defendant continued his efforts to stand the motorcycle back up until he was finally held at gunpoint and forced to lay the bike back down. Defendant was subsequently arrested.

On 1 March 2022, Defendant was indicted for one count of felony Fleeing to Elude Arrest with a Motor Vehicle, one count of Speeding in Excess of Eighty Miles Per Hour, one count of Reckless Driving to Endanger, and one count of Carrying a Concealed Weapon Without a Valid Permit. The trial court determined it did not have jurisdiction with respect to the Concealed Weapon charge, and the charge was consequently dismissed.

Defendant's case came for trial on 13 September 2022. At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence. The trial court denied the motion.

Defendant then testified as to his account of the incident. Defendant claimed earlier in the evening on the night of the incident at issue, members of a motorcycle gang threatened Defendant while he was out riding. During the charge conference, Defendant requested the jury be instructed on the defense of necessity. The trial court stated, having viewed the evidence "[i]n the light most favorable to the defendant . . . in the exercise of discretion, the Court finds that the defendant failed . . . to demonstrate no other acceptable choices were available." Accordingly, the trial court declined to instruct the jury on the defense of necessity.

On 15 September 2022, the jury returned verdicts finding Defendant guilty of felony Fleeing to Elude Arrest with a Motor Vehicle and Speeding in Excess of Eighty Miles Per Hour, and found Defendant not guilty of Reckless Driving to Endanger. The trial court consolidated the charges and sentenced Defendant to four to fourteen months of imprisonment, then suspended execution of the sentence and placed Defendant on supervised probation for twelve months. Defendant timely filed Notice of Appeal on 23 September 2022.

Issue

The sole issue on appeal is whether the trial court erred by denying Defendant's request to instruct the jury on the defense of necessity.

Analysis

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). We review challenges to the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

The burden of "raising and proving affirmative defenses" is on the defendant in a criminal trial. *State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982). Where there is insufficient evidence to support

each element of a defense, "the trial judge need not give a requested instruction on that point." *State v. Partin*, 48 N.C. App. 274, 285, 269 S.E.2d 250, 257 (1980).

To establish a defense of necessity, a defendant must prove: (1) defendant's action was reasonable; (2) defendant's action was taken to protect life, limb, or health of a person; and (3) no other acceptable choices were available to the defendant. *State v. Hudgins*, 167 N.C. App. 705, 710-11, 606 S.E.2d 443, 447 (2005). Defendant did not establish his actions were reasonable nor that there were no other acceptable choices available to him.

First, Defendant had ample time and opportunity to realize the vehicles pursuing him were law enforcement. The pursuit began only after Defendant-Appellant sped past Sergeant Whaley's parked patrol car at over 100 miles per hour, which then activated both lights and sirens. The chase took approximately thirty minutes. Although Defendant claimed at trial his fear stemmed from threats made to him by a motorcycle gang, a reasonable person would have realized he was being pursued by cars, not motorcycles.

Defendant analogizes this case to *State v. Whitmore*, an unpublished opinion of this Court. 264 N.C. App. 136, 823 S.E.2d 167 (2019). Although unpublished opinions are not controlling legal authority, N.C. R. App. P. Rule 30(e)(3) (2023), this case is instructive. In *Whitmore*, we held the trial court did not err by failing to instruct the jury on the defense of necessity because there was not substantial evidence of each element of the defense. *Id.* at *5. There, the defendant fled in a vehicle after being shot in an altercation at a barber shop, although no one was pursuing him. *Id.* at *1. One to two miles from the barber shop, the defendant ran two red lights while travelling at twice the speed limit and struck another vehicle, killing the driver. *Id.* This Court concluded the defense of necessity did not apply because the defendant had "ample opportunity to realize he was not being pursued in the one or two miles he traveled" before the collision, therefore there was not evidence presented there were no acceptable alternatives available to the defendant. *Id.* at *5.

Here, although Defendant was, in fact, being followed, he had ample opportunity to realize the vehicles pursuing him were law enforcement. Unlike the defendant in *Whitmore*, whose flight was at most two miles, Defendant's chase took thirty minutes—more than enough time for a reasonable person to realize the vehicles in pursuit were law enforcement. Moreover, the pursuit began only after Defendant sped past a

parked car which then activated lights and sirens. Additionally, while the defendant in *Whitmore* had been shot, Defendant in this case had at most received vague threats from a motorcycle gang, making his reasons for fleeing from patrol cars less compelling.

This case is also distinguishable from *State v. Miller*, in which this Court concluded the trial court erred by not instructing the jury on the defense of necessity. 258 N.C. App. 325, 344, 812 S.E.2d 692, 704-05 (2018). In *Miller*, the defendant was convicted of driving while impaired after fleeing from a bar where a patron threatened him and his wife with a gun, driving a golf cart on a highway. *Id.* at 326, 812 S.E.2d at 694. In *Miller*, witnesses testified specifically as to why alternative routes were not an option and the defense presented evidence that an alternative driver was likely also intoxicated at the time. *Id.* at 342-43, 812 S.E.2d at 703-04. The defendant also presented evidence that his actions were reasonable based on real, present threats made with a deadly weapon. *Id.* at 339-40, 812 S.E.2d at 702-03.

Here, Defendant has presented no such evidence on the lack of acceptable alternatives or the reasonableness of his actions. Again, Defendant passed a marked police car with lights and sirens activated during the chase, and the chase continued for a significant amount of time thereafter. Unlike the threat described in *Miller*, Defendant in this case did not present evidence to support the reasonableness of his belief he was being chased by a motorcycle gang. Defendant did not explain why he believed the patrol cars' lights and sirens belonged to motorcycles, nor why he failed to notice the pursuing vehicles had two headlights each rather than one, as is typical of motorcycles. Knowing the second car was a law enforcement vehicle marked "Sheriff," Defendant clearly had an alternative to fleeing. Thus, Defendant did not establish his actions were reasonable nor that he had no acceptable alternative available. Therefore, the defense of necessity did not apply. Consequently, the trial court did not err by not instructing the jury on the defense of necessity.

Conclusion

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

NO ERROR.

Judges MURPHY and ARROWOOD concur.

LORI NICOLE STERNOLA, PLAINTIFF
v.
MARK DONOVAN ALJIAN, DEFENDANT

No. COA23-266

Filed 19 March 2024

Child Custody and Support—child support and arrears—imputation of father's income—improper judicial notice of job market—unsupported finding of bad faith suppression of income—delay in entering child support order

An order determining the permanent child support obligation and amount of arrears owed by a father, who had lost his job at a foreign bank, was reversed and remanded. Firstly, the court abused its discretion in taking judicial notice of the "substantial employment opportunities in banking and finance" in Charlotte, where the father lived, as this fact was not the sort of undisputed adjudicative fact contemplated under Evidence Rule 201(b). Secondly, the court erred by imputing income to the father where none of the evidence supported the court's finding that the father failed to seek new employment in good faith. Finally, by waiting twenty-one months after the child support hearing to enter the order—at which point the children had either reached or were close to reaching the age of majority—the judge failed to diligently discharge their administrative duties pursuant to Canon 3B(1) of the Code of Judicial Conduct and was instructed on remand to enter factual findings explaining the delay.

Appeal by defendant from judgment entered 4 August 2022 by Judge William F. Helms III in Union County District Court. Heard in the Court of Appeals 21 February 2024.

Emblem Legal, PLLC, by Stephen M. Corby, for the plaintiff-appellee.

Connell & Gelb PLLC, by Michelle D. Connell, and The Honnold Law Firm, P.A., by Bradley B. Honnold, for the defendant-appellant.

TYSON, Judge.

Mark Donovan Aljian ("Defendant") appeals from an order on permanent child support and adjudication of arrears. We reverse and remand.

I. Background

Defendant and Lori Nicole Sternola ("Plaintiff") met in Los Angeles in 1998, moved to London, England in 2001, and were married on 1 June 2002. They separated in February 2011 and later divorced. Plaintiff is a citizen of the United States. Defendant is a dual citizen of the United States by birth and a naturalized citizen of the United Kingdom.

Plaintiff and Defendant are parents of three children: KMA, born September 2001; M-MA, born March 2003; and, RTA, born May 2006. All three children were born while the parties resided in the United Kingdom and hold dual United States and United Kingdom citizenships.

Since separation in 2011, Plaintiff and Defendant have shared custody of their then minor children with Plaintiff having nine overnights and Defendant having five overnights every two weeks. The Central Family Court in London ("London Court") entered an order 13 December 2011 addressing property division, alimony, and child support.

The London Court entered an order allowing their teenager, KMA, to move with Plaintiff to the United States on 29 April 2015. Defendant retained custody of the other two children in London. Plaintiff and KMA moved to Waxhaw, in July 2015. Defendant, M-MA, and RTA remained in London.

The London Court entered an order addressing the cost apportionment of orthodontic treatment for the children and for reimbursement of air travel for the children. The London Court also entered an order on 9 August 2017 which allowed Defendant to move with M-MA and RTA to Los Angeles, California.

Plaintiff took custody of M-MA and RTA in August 2017 and kept them in Waxhaw in violation of the custody order. The London Court entered an order requiring her to return to the United Kingdom on 14 September 2017. Plaintiff appealed this order in the United Kingdom. Plaintiff also filed a complaint in Union County for temporary and permanent child custody and motions for emergency child custody, assumption of jurisdiction, and for attorneys' fees. Defendant filed a petition to register and enforce a foreign custody order on 4 October 2017. The district court entered a temporary child custody order on 14 November 2017, which ordered a status report of proceedings in the London Court.

The London Court entered an order on 22 December 2017 after both parties had moved to the United States. Plaintiff was living in North Carolina, and Defendant was living in California. The order also set out Plaintiff's and Defendant's visitation schedule with their children.

Mother amended her complaint adding claims for prospective and retroactive child support on 18 May 2018.

Defendant was involuntarily terminated from his employment with the Hong Kong and Shanghai Banking Corporation on 25 July 2019 due to his position being eliminated. Defendant received a one-year severance equal to his salary following termination. Defendant moved to Charlotte to be nearer to the children in October 2019.

The district court held a hearing on child support on 12 October 2020. The oldest child had reached eighteen years old at the time of the hearing, and the other children were seventeen and fourteen years old. Almost two years later, the district court entered an order on permanent child support and adjudication of arrears on 4 August 2022 finding, *inter alia*, Defendant's child support obligation was $2,000 per month, and he owed $32,296 in unpaid support arrears to Plaintiff. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Defendant argues the district court erred by: (1) using speculative, unsubstantiated, and incompetent evidence to impute and determine his income; (2) imputing income in the absence of evidence of bad faith suppression of income to avoid paying child support; (3) ordering him to pay arrearage of $32,296; and, (4) denying his due process rights by delaying entry of the order for over 21 months after hearing.

IV. Findings of Fact

Defendant argues the district court erred by using speculative, unsubstantiated, and incompetent evidence to impute and determine his income.

A. Standard of Review

Generally, the trial court's decision regarding child support is:

> 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 [substantial] , , , evidence support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation marks omitted).

A trial court abuses its discretion when it renders a decision that is "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) (citations omitted). We review conclusions of law *de novo*. *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013).

B. Analysis

Defendant challenges the following findings of fact:

> 17. Father has had a successful banking career and has attained a superior education, with an undergraduate and masters degrees (sic) from Ivy League schools;
>
> 18. Since 2011, Father has borrowed money from his mother for litigation expenses and living expenses. The terms of these loans were extremely favorable to Father. The Promissory Notes from 2011-2020 obligate Father to pay interest only, with interest rates from 1.51% to 2.5%. These interests (sic) rates were at all times below the Bank Prime lending rate, which ranged from 3.25% to 5.5% during this time period, per the Federal Reserve Bank and the Wall Street Journal.
>
> . . .
>
> 23. The Charlotte area is well-known as a banking center, and public data from the Bureau of Labor Statistics indicates substantial employment opportunities in banking and finance.

The record indicates Defendant received degrees from the University of California, Los Angeles ("UCLA"). At the time of the hearing and the time of this opinion, UCLA is a member of the Pac-12 Conference, and scheduled to join the Big Ten Conference on 2 August 2024. The Ivy League is a conference of eight schools located in the Northeastern United States. UCLA has been referred to as a "public ivy" by Richard Moll in *Public Ivies: A Guide to America's Best Public Undergraduate Colleges and Universities* and Howard and Matthew Greene in *The Public Ivies: America's Flagship Public Universities*. Although UCLA has been referred to by some as a "public ivy," it is not in the Ivy League conference.

Defendant testified the debt he incurred to his mother was spent on litigation expenses. ("It's entirely gone to litigation."). Unchallenged findings of fact show Defendant received a purchase money loan in the amount of $663,000.00 with an interest rate of 1.51%.

Defendant further argues the district court erred in taking purported judicial notice of "substantial opportunities in banking and finance" to exist after Defendant testified a bank in Charlotte was undergoing layoffs and restructuring. The evidence presented by Defendant was contradictory to the finding of which the district court had received no other evidence, but which determined by taking judicial notice.

North Carolina General Statutes allow courts to take judicial notice of adjudicative facts, which are "not subject to reasonable dispute in that [they] are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2023). The Official Commentary to N.C. Gen. Stat. § 8C-1, Rule 201(b) provides: "With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy." N.C. Gen. Stat. § 8C-1, Rule 201(b) N.C. Commentary (2023).

In *Thompson v. Shoemaker*, 7 N.C. App. 687, 690, 173 S.E.2d 627, 630 (1970), this Court denied a request to take judicial notice "of the scarcity of low income housing in the City of Charlotte[,]" because "the unavailability of low income housing in Charlotte is undoubtedly subject to debate and in our opinion it is not a factor that can be judicially noticed by this court." *Id.*

This Court in *Hinkle v. Hartsell*, 131 N.C. App. 833, 837, 509 S.E.2d 455, 458 (1998), applied the holding in *Thompson* in a custody case where the trial court took purported judicial notice that an area of Charlotte was a "high crime area." This Court held this finding was also error because "the prevalence of crime in and about the premises of the [Charlotte neighborhood], and how this crime affects the safety of its residents, is no doubt a matter of debate within the community." *Id.*

In the absence of substantial competent evidence, the trial court erred in finding by purportedly "judicially noticing" there were "substantial employment opportunities in banking and finance." Because the findings challenged by Defendant where the district court took judicial notice are crucial to the ultimate determination of the district court, the order of the district court is vacated. In light of our vacating the trial court's order, we need not address Defendant's remaining arguments,

other than the imputation of Defendant's capacity to earn income, which may recur on remand. We address this argument.

V. Imputing Income

Defendant argues the trial court erred in imputing income to him.

A. Standard of Review

"Child 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." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). When this Court reviews for an abuse of discretion:

> 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. 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.

Spicer v. Spicer, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted).

B. Analysis

Defendant argues the district court erred by imputing income after finding his capacity or ability to earn "$20,000.00 per month or more and his failure to seek employment in good faith." Defendant argues no evidence exists of his bad faith suppression of income to avoid paying child support.

N.C. Gen. Stat. § 50-13.4(c) determines child support payments and provides:

> 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, . . . and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2023).

Our Supreme Court has stated:

> In determining the amount of . . . child support to be awarded the trial judge must follow the requirements of applicable statutes. . . . Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Capacity to earn, however, may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children.

Beall v. Beall, 290 N.C. 669, 673-74, 228 S.E.2d 407, 410 (1976) (internal quotations and citations omitted).

"Only when there are findings based on competent evidence to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income or indulging in excessive spending to avoid family responsibilities, can a party's capacity to earn by considered." *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985) (citations omitted).

A trial court may only impute capacity to earn income to base an award of child support after the trial court has found the parent has disregarded his parental obligations by:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully (sic) refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or[,] (8) intentionally leaving his employment to go into another business.

Wolf v. Wolf, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002).

This Court has held "evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith." *Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003) (citations omitted).

Defendant's employment was involuntarily terminated in June 2019, as his position with the company was eliminated. Defendant was given

a severance package of one year's salary on 25 July 2019. Defendant presented evidence he had moved from Los Angeles to Charlotte to be closer to his children and to begin learning new skills to expand the potential pool of employers. The evidence presented to the trial court was Defendant had submitted many applications seeking employment in Charlotte and was not refuted. Defendant did not act in a willful disregard for his support obligations. *Id*. None of the other *Wolf* factors apply. *Wolf*, 151 N.C. App. at 526-27, 566 S.E.2d at 518-19. The district court erred in imputing capacity to earn income to Defendant.

VI. Conclusion

At least two of the parties' children have reached the age of majority and the other will reach the age of majority later this year. The district court abused its discretion in taking judicial notice of purported undisputed adjudicative facts pertaining to the job market in banking and finance in the Charlotte metropolitan area. The district court also erred in imputing capacity to earn income to Defendant by improperly finding without a basis that he had acted in bad faith to depress his income.

Canon 3B(1) of the North Carolina Code of Judicial Conduct requires a judge to "diligently discharge the judge's administrative responsibilities[.]" The prejudice to the parties by the delay in filing the order is obvious. Upon remand, the district court is to make findings of fact to explain the twenty-one month delay after hearing in the entry of the prior order.

The permanent order is vacated and remanded for further proceedings. *It is so ordered.*

VACATED AND REMANDED.

Judges MURPHY and WOOD concur.

THOMAS A. WARREN, Individually and as Personal Representative of the ESTATE OF THOMAS E. WARREN, JR., EVELYN WARREN, and ROSALIND REGINA PLATT, Plaintiffs

v.

SNOWSHOE LTC GROUP, LLC, MMDS OF NORTH CAROLINA, INC., DR. KARRAR HUSSAIN, M.D., EAGLE INTERNAL MEDICINE AT TANNENBAUM, and DR. RICHARD LYNCH, D.O., Defendants

No. COA22-595

Filed 19 March 2024

1. Appeal and Error—appellate rules violations—prior dismissal as sanctions—reconsideration on remand—Rule 2 invoked—petition for writ of certiorari addressed

On remand from the Supreme Court to determine whether sanctions other than dismissal were appropriate to address plaintiff's numerous appellate rules violations in a wrongful death case, the Court of Appeals remained convinced that dismissal was justified due to the scale and scope of the violations but, in the interest of finally resolving the drawn-out appeal, Rule 2 should be invoked by that court to suspend the appellate rules and consider plaintiff's petition for writ of certiorari.

2. Appeal and Error—petition for writ of certiorari denied—lack of merit on appeal—untimely complaint renewal—dismissal appropriate

After invoking Rule 2 to suspend multiple appellate rules violations in order to consider plaintiff's petition for writ of certiorari, the appellate court determined that, because plaintiff failed to show merit or that error probably occurred in the lower court, further review was not warranted and the appeal should be dismissed. The trial court did not err by dismissing with prejudice plaintiff's wrongful death lawsuit where the trial court properly denied plaintiff's belated motion for extension of time to re-file the lawsuit (more than a year after plaintiff took a voluntary dismissal) as not being allowed by Civil Procedure Rule 6(b), which does not permit a trial court to extend an expired statute of limitations.

On remand from the Supreme Court of North Carolina by Order dated 13 December 2023. Appeal by Plaintiffs from order entered 22 February 2022 by Judge John O. Craig, III, in Guilford County Superior Court. Originally heard in the Court of Appeals 11 January 2023 with order dismissing the appeal issued 11 January 2023.

Hatcher Legal, PLLC, by Nichole M. Hatcher, for Plaintiff-Appellants.

Bovis Kyle Burch & Medlin, by Brian H. Alligood, for Defendant-Appellee Snowshoe LTC Group, LLC.

Cranfill Sumner LLP, by Steven A. Bader and Samuel H. Poole, Jr., for Defendant-Appellee Lynch.

HAMPSON, Judge.

Factual and Procedural Background

Thomas A. Warren, individually and as personal representative of the Estate of Thomas E. Warren, Jr., Evelyn Warren, and Rosalind Regina Platt (Plaintiffs) appeal from an Order dismissing their Complaint against Snowshoe LTC Group, LLC (Snowshoe), MMDS of North Carolina, Inc., Dr. Karrar Hussain, M.D., Eagle Internal Medicine at Tannenbaum, and Dr. Richard Lynch, D.O. (Lynch) (collectively Defendants) under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim for which relief may be granted.

[1] As an initial matter, on 6 October 2022, Defendant Lynch filed a Motion to Dismiss Plaintiffs' Appeal citing numerous violations of the North Carolina Rules of Appellate Procedure contending the rules violations in totality constituted gross and substantial violations of the Rules of Appellate Procedure. We agreed with Plaintiffs' position and determined, consistent with *Dogwood Development and Management Company v. White Oak Transportation Company*, 362 N.C. 191, 200-01, 657 S.E.2d 361, 367 (2008), that dismissal was the appropriate sanction given the nature and number of the rules violations, the resulting frustration of adversarial process, and the impairment of our ability to substantively review this case. We allowed Defendant's Motion to Dismiss Plaintiff's Appeal by Order dated 11 January 2023.

Plaintiff sought *en banc* review by this Court of our Order dismissing the appeal. This Court—with no judges voting to allow—denied *en banc* review on 13 February 2023. Plaintiffs filed a Petition for Discretionary Review of our Order dismissing the appeal. On 13 December 2023, the Supreme Court issued an Order allowing discretionary review for the limited purpose of vacating our prior Order and remanding for consideration of whether another sanction other than dismissal is appropriate.

Plaintiffs' appellate rules violations in this case begin with the failure to properly designate the Order being appealed in their notice of

appeal compounded by their failure to include a statement of grounds for appellate review in their brief. The adversarial process and our appellate review are further hampered by, among other things: Plaintiffs' substantial failure to include record citations in briefing; failure to include a non-argumentative statement of facts; and various failings in properly compiling or timely settling the Record on Appeal. Indeed, it is not even clear Plaintiffs' notice of appeal of the Order that Plaintiffs actually seek to challenge was ever timely or timely prosecuted. We remain convinced the scale and scope of the violations of our Appellate Rules more than justify dismissal of the appeal. Considering the circumstances of this case, no other sanction is warranted or appropriate.

However, given the length of time this case has now been pending in our appellate courts and in the interest of finally resolving this appeal for the benefit of all parties involved, in the exercise of our discretion we invoke Rule 2 of the Appellate Rules to suspend operation of our rules and treat Plaintiffs' appeal as a Petition for Writ of Certiorari. It is fundamental that "a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Cryan v. Nat'l Council of Young Men's Christian Associations of United States*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). We, therefore, examine the dispositive issue argued by Plaintiffs on appeal to determine whether review by *certiorari* is merited. The Record before us tends to reflect the following:

On 21 October 2020, Plaintiffs filed a Complaint against Defendants alleging the wrongful death of their decedent on 18 November 2015—and ancillary claims—arising from Defendants' alleged medical malpractice. The same day, Plaintiffs filed a Motion for Extension of Time Under N.C. Gen. Stat. § 1A-1, Rule 6(b) alleging the Complaint in this case constituted a re-filing of a previously filed suit which had been voluntarily dismissed without prejudice on 16 September 2019. The Motion for Extension requested the one-year time period to re-file the previous suit under Rule 41(a)(1) be retroactively extended to permit the filing of the Complaint in this case. The Motion for Extension alleged Plaintiffs' delayed filing of the Complaint was the result of excusable neglect. Defendants Snowshoe and Lynch filed Motions to Dismiss Plaintiff's Complaint.[1]

1. It appears the remaining Defendants did not appear in this action because they were never served with the Summons and Complaint.

On 10 March 2021, the trial court entered an Order which included the following unchallenged Findings of Fact:

> 1. The instant action is a renewal of a lawsuit previously filed by the same Plaintiffs on November 21, 2017 . . . . Plaintiffs filed a voluntary dismissal of that lawsuit, without prejudice, on September 16, 2019.
>
> 2. Plaintiffs' decedent . . . whose death is the subject of Plaintiffs' initial and current wrongful death actions, died on November 18, 2015.
>
> 3. The instant lawsuit was commenced by Plaintiffs' filing of their complaint on October 21, 2020.

Based on these Findings of Fact, the trial court concluded:

> 1. Rule 41(a)(1) of the North Carolina Rules of Civil Procedure allows a Plaintiff to dismiss an action without prejudice. Provided the initial action was timely filed, the same Rule permits a Plaintiff to file a new action based on the same claims within one year after the dismissal.
>
> 2. Plaintiffs' complaint in this action was filed outside of the one year renewal period, as was Plaintiffs' motion for extension of time to refile complaint.
>
> 3. Because the complaint was untimely filed, Plaintiffs' wrongful death action is barred by the applicable two-year statute of limitations.
>
> 4. Where, as here, a complaint shows on its face that it is barred by the statute of limitations, dismissal under Rule 12(b)(6) is appropriate.
>
> 5. Because the complaint was untimely refiled, it must be dismissed as a matter of law.

As a result of its Findings of Fact and Conclusions of Law, the trial court denied Plaintiffs' motion to extend the time to file its complaint, allowed Defendants' Motion to Dismiss, and dismissed the action with prejudice. On 22 February 2022, the trial court entered an order amending clerical errors in its 10 March 2021 Order dismissing Plaintiffs' Complaint with prejudice. On 2 March 2022, Plaintiffs filed Notice of Appeal, which designated only the order entered 22 February 2022 amending the 10 March 2021 Order.

Issue

[2] The dispositive issue on appeal is whether the trial court erred in denying Plaintiffs' Motion for Extension of Time to file the Complaint under Rule 6(b) and dismissing the Complaint where the Complaint was filed after the expiration of the one-year re-filing period provided by Rule 41(a)(1) of the North Carolina Rules of Civil Procedure and after the expiration of the statute of limitations.

Analysis

Plaintiffs argue the trial court abused its discretion in denying their Motion for Extension of Time under Rule 6(b) of the North Carolina Rules of Civil Procedure to file their Complaint after the expiration of the one-year period provided by Rule 41(a)(1) for re-filing of a lawsuit voluntarily dismissed without prejudice. Plaintiffs contend the trial court should have allowed the motion for extension of time upon a showing of excusable neglect and deemed their belated Complaint timely filed.

Rule 6(b) provides in relevant part:

> (b) Enlargement.--When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. *Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.*

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2023) (emphasis added).

"Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of 'excusable neglect.' " *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). "As an initial matter, the only time periods that may be extended based upon the authority available pursuant to N.C. Gen. Stat. § 1A–1, Rule 6(b), are those established by the North Carolina Rules of Civil Procedure." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 52, 762 S.E.2d 645, 651-52 (2014) (citing *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 108, 493 S.E.2d 797, 801 (1997)).

However, our Courts recognize Rule 6(b) does not permit a trial court to extend a statute of limitations. *See id.* This is so, at least in part, because " 'the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense', and '[i]t is clear that a judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned.' " *Osborne v. Walton*, 110 N.C. App. 850, 854–55, 431 S.E.2d 496, 499 (1993) (quoting *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970)). "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all." *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957) (superseded by statute, N.C. Gen. Stat. § 1-15(b) (1971), on other grounds as recognized in *Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985)).

For example, in *Glynne*, we observed a trial court had no authority to extend the time for filing a state court complaint under Rule 6(b) after the tolling provisions of a federal statute expired and the statute of limitations had run. *Glynne*, 236 N.C. App. at 52, 762 S.E.2d at 651. Similarly, in *Osborne*, this Court concluded Rule 6(b) could not be applied to extend a statute of limitations where an action abated following the expiration of time to file a complaint after issuance of a summons under N.C. R. Civ. P. 3(a)(1)-(2). *Osborne*, 110 N.C. App. at 855, 431 S.E.2d at 499.

We have also held "that trial courts do not have discretion pursuant to Rule 6(b) to prevent a discontinuance of an action under Rule 4(e) when there is neither endorsement of the original summons nor issuance of alias or pluries summons within ninety days after issuance of the last preceding summons." *Locklear v. Scotland Mem'l Hosp., Inc.*, 119 N.C. App. 245, 247–48, 457 S.E.2d 764, 766 (1995) (citing *Dozier v. Crandall*, 105 N.C. App. 74, 78, 411 S.E.2d 635, 638 (1992)). In *Locklear*, this Court recognized, following discontinuance of the action: "Any subsequent issuance of a summons in the case would have resulted in the commencement of an entirely new action from the date the summons was issued, more than one year after the date on which plaintiffs took a voluntary dismissal and otherwise outside of the statutory limitations period." *Id.* at 248, 457 S.E.2d at 766.

In this case, like our Court in *Osborne*, even if we construed Rule 6(b) as providing authority to extend the one-year savings provision provided by N.C. R. Civ. P. 41(a), Rule 6(b) cannot apply to extend an otherwise expired statute of limitations. *See Osborne*, 110 N.C. App. at

855, 431 S.E.2d at 499. Here, Plaintiffs make no argument that—absent the savings provision of Rule 41(a)—the statute of limitations on their claims arising from Plaintiffs' decedent's 2015 death had not expired by the time they filed their 2020 Complaint. As in *Locklear*: "Any subsequent issuance of a summons in the case would have resulted in the commencement of an entirely new action from the date the summons was issued, more than one year after the date on which plaintiffs took a voluntary dismissal and otherwise outside of the statutory limitations period." 119 N.C. App at 248, 457 S.E.2d at 766. Upon expiration of the one-year savings provision, Defendants' right to rely on the statute of limitations defense vested. *See Osborne* 110 N.C. App. at 854–55, 431 S.E.2d at 499.

Plaintiff's Complaint was filed more than one year after the date on which Plaintiffs took a voluntary dismissal and after the expiration of the applicable statute of limitations. Plaintiff's action is barred by the statute of limitations. *Id.* Therefore, even if the trial court had authority under Rule 6(b) to extend the one-year timeframe for re-filing a complaint following a voluntary dismissal, any extension would have been futile following expiration of the statute of limitations. *Id.* Consequently, Plaintiffs have failed to show any merit in their appeal of the trial court's dismissal of this action pursuant to Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, we conclude Plaintiffs arguments on appeal are without sufficient merit to justify further review by *certiorari* and dismiss the appeal.

APPEAL DISMISSED.

Chief Judge DILLON and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MARCH 2024)

BURLESON v. BURLESON No. 23-187	Wake (19CVS16342)	Affirmed
EST. OF BARRY v. BLUE No. 23-599	Cumberland (20CVS733)	Affirmed
IN RE A.G.C. No. 23-355	Rutherford (21JT123) (21JT124) (21JT125)	Affirmed
IN RE A.Z.M.M. No. 23-539	Cabarrus (21JT189)	Affirmed
IN RE C.W.M. No. 23-702	Buncombe (20JT16)	Affirmed
IN RE D.G.E. No. 23-622	Yancey (20JT10) (20JT11) (20JT12)	Affirmed
IN RE E.D-A. No. 22-1002	Durham (17JT104)	Affirmed
IN RE E.G.C. No. 23-683	Franklin (20JT55) (20JT56)	Affirmed
IN RE K.M.S. No. 23-787	Forsyth (21JT89)	Affirmed
IN RE L.L. No. 23-273	Wake (21JA34)	Affirmed
IN RE M.G.W. No. 23-271	Wayne (21JB13)	Vacated and Remanded
IN RE S.C. No. 23-615	Wake (22JB550)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
IN RE S.D.Z. No. 23-828	Rowan (23JT3)	Affirmed.

IN RE S.M.B. No. 23-862	Rowan (22JA209) (22JA210)	Affirmed
IN RE Z.C. No. 23-835	Robeson (20JT111)	Affirmed
KEAN v. KEAN No. 23-46	Iredell (18CVD2233)	Affirmed
STATE v. ALLISON No. 23-635	Burke (20CRS52824)	No Error
STATE v. BENNETT No. 23-461	Avery (21CRS244) (21CRS50281) (21CRS50283)	No Error.
STATE v. BOYCE No. 23-779	Iredell (21CRS51625-26)	No Error
STATE v. BURNETTE No. 23-162	Stokes (20CRS50720)	No Error in Part; Remanded for Resentencing
STATE v. CALDERON No. 23-400	Harnett (15CRS52730-32)	No Error
STATE v. CONNER No. 23-470	Columbus (16CRS1248-49)	Affirmed
STATE v. COVINGTON No. 23-480	Mecklenburg (03CRS241344) (03CRS241674-75) (03CRS241680)	Affirmed
STATE v. CRUMP No. 23-53	Union (21CRS52096)	Affirmed
STATE v. HANCOCK No. 23-758	Union (21CRS50781) (22CRS789)	No Error
STATE v. JONES No. 23-687	Union (18CRS50322)	AFFIRMED AS MODIFIED
STATE v. LEGGETTE No. 23-849	Forsyth (18CRS60008)	Vacated and Remanded.

STATE v. LEWIS No. 23-644	Granville (19CRS51061)	No Error; Remanded For Correction of Clerical Errors.
STATE v. MELVIN No. 22-859	New Hanover (21CRS50140)	No Error
STATE v. PATE No. 23-738	Scotland (21CRS50001-02)	NO ERROR IN PART; REMAND IN PART
STATE v. PRICE No. 23-367	Mecklenburg (20CRS221045) (20CRS221048) (20CRS221052-56)	NO ERROR AT TRIAL, RESTITUTION JUDGMENT VACATED AND REMANDED.
STATE v. RICK No. 23-10	Gaston (19CRS55442)	No Error
STATE v. SWAIN No. 23-807	Bertie (18CRS50604) (18CRS50612)	Dismissed
STATE v. WALKER No. 23-681	Anson (21CRS50581-82)	No Error.
STROUPE v. WOOD No. 23-127	Rowan (21CVS180)	Affirmed
VENTERS v. LANIER No. 23-870	Wake (21CVS1307)	Dismissed

JUDITH M. AYERS, PETITIONER
v.
CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA23-420

Filed 2 April 2024

Public Officers and Employees—dismissal of social worker—use of racial epithet—unacceptable personal conduct—just cause analysis

An administrative law judge (ALJ) correctly determined that a county department of social services (DSS) lacked just cause to dismiss a career state employee (petitioner, a social worker supervisor) for one instance of using a racial epithet during a private conversation with her supervisor about what the abbreviation "NR" might mean in the "race" category of a client intake form. Although there was no dispute that petitioner's conduct constituted unacceptable personal conduct, the ALJ's conclusion regarding just cause was supported by its findings of fact, which were in turn supported by substantial evidence. Therefore, the ALJ's decision to retroactively reinstate petitioner with back pay and attorneys' fees, subject to certain conditions, was affirmed.

Judge TYSON concurring in result only.

Judge COLLINS dissenting.

Appeal by Respondent from final decision entered 31 January 2023 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 1 November 2023.

Hornthal, Riley, Ellis, & Maland, L.L.P., by John D. Leidy, for petitioner-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Luke A. West and Jennifer B. Milak, and The Twiford Law Firm, P.C., by Courtney Hull, for respondent-appellant.

MURPHY, Judge.

For the third time, Respondent-Appellant Currituck County Department of Social Services ("DSS") appeals from an Office of

Administrative Hearings ("OAH") final decision reversing the dismissal of Petitioner-Appellee Judith Ayers from her position as Social Worker Supervisor III for unacceptable personal conduct ("UPC"). Having twice remanded, we now affirm.

A State agency may only discipline a career state employee for just cause. N.C.G.S. § 126-34.02 (2023). "Just cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Wetherington v. N.C. Dep't of Pub. Safety* ("*Wetherington I*"), 368 N.C. 583, 591 (2015) (marks omitted). This requires the agency to consider various factors and balance the equities to arrive at the appropriate level of discipline. *See Wetherington v. N.C. Dep't of Pub. Safety* ("*Wetherington II*"), 270 N.C. App. 161, 194, *disc. rev. denied*, 374 N.C. 746 (2020). It does not permit the agency to manipulate its inquiry to contrive just cause for a preordained level of discipline. *See id.* at 185-201 (reversing the ALJ's determination of just cause where the agency shoehorned a per se rule into the case's eponymous multifactor just cause analysis).

An agency's determination of just cause is subject to both administrative and judicial review. *See Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, *aff'd per curiam*, 370 N.C. 386 (2017). At both levels, the tribunal reviews whether the facts support the existence of just cause de novo. *Id.* at 100, 102. However, "the [administrative law judge ('ALJ')] is the sole fact-finder, and the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility." *Id.* at 108.

Where the ALJ concluded the agency lacked just cause based on its findings of fact and where those findings were supported by substantial evidence, the agency must show the ALJ's determination was an error of law. In such cases, if the agency merely argues how its own version of the facts might have supported a contrary conclusion without demonstrating that the ALJ committed errors of law, the agency does not carry its burden of proving it acted with just cause because "we defer to the ALJ's findings of fact [when supported by substantial evidence], even if evidence was presented to support contrary findings." *Id.*

Here, we hold the ALJ's findings of fact, to the extent necessary for the ultimate just cause determination, were supported by substantial evidence in the record. We further hold, upon de novo review, that there was no error in the ALJ's determination that DSS lacked just cause to dismiss Ayers for her single instance of UPC in light of the facts and circumstances of this case. Accordingly, we affirm the ALJ's final decision

to retroactively reinstate Ayers with back pay and attorneys' fees, subject to a two-week suspension without pay and subject to her taking additional cultural diversity and racial sensitivity training.

BACKGROUND

The facts of Ayers's UPC and DSS's initial response are fully set out in the initial appeal. *Ayers v. Currituck Cnty. Dep't of Soc. Servs.* ("*Ayers I*"), 267 N.C. App. 513, 514-19 (2019). The facts of the ALJ's Final Decision on Remand from *Ayers I* are fully set out in the second appeal. *Ayers v. Currituck Cnty. Dep't of Soc. Servs.* ("*Ayers II*"), 279 N.C. App. 514, 515-19 (2021). Partially borrowing from *Ayers II*, "we include a recitation of the facts and procedural history relevant to the issues currently before us":

A. Prior to Incident

> . . . Ayers had been employed with DSS from 2007 until the incident in 2017. Ayers was the supervisor for the Child Protective Services Unit at DSS who reported directly to the DSS Director. Neither party contests that Ayers was a career State employee.
>
> Ayers consistently received positive work performance reviews and had never been disciplined as a DSS employee before the incident occurred. Until 30 June 2017, her boss was the DSS Director, Kathy Romm, who had hired Ayers; Romm had asked Ayers whether she wanted to take her position upon Romm's retirement. Ayers declined to pursue the position, and Romm hired another DSS employee, Samantha Hurd. Both Ayers and Hurd are Caucasian women.
>
> Prior to Hurd's promotion, she supervised DSS's Foster Care Unit, and she and Ayers had a history of disagreements and conflict in their roles. The disagreements and conflict continued after Hurd's promotion.

B. Incident

> On 3 November 2017, Hurd asked Ayers about a racial demarcation–"NR"–that a social worker had included on a client intake form; Hurd did not recognize the demarcation, asked Ayers what it stood for multiple times, and Ayers responded with a racial epithet. Ayers claimed she said "nigra rican," while Hurd claimed Ayers said "[n-----]

rican" ("the N word"). According to testimony from Hurd and Ayers, Ayers initially laughed about the comment, but became apologetic and embarrassed soon afterward. After investigation, Hurd and Ayers discovered the client referred to on the form was Caucasian.

C. Disciplinary Action

The incident occurred on Friday, 3 November 2017, and Hurd conferred with DSS's counsel over the following weekend. After receiving guidance, Hurd applied a twelve-factor test, derived from a guide for North Carolina public employers published by the University of North Carolina at Chapel Hill Institute of Government, to Ayers's comment and instituted disciplinary proceedings against her on Monday, 6 November 2017. . . .

. . . .

After meeting with Ayers, Hurd placed her on investigatory status with pay, and subsequently terminated her employment with DSS; Ayers appealed, and Hurd affirmed her decision. Ayers filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings.

D. 13 June 2018 ALJ Decision

An ALJ held a contested case hearing on 19 April 2018 and reversed Hurd's termination decision in a *Final Decision* filed 13 June 2018 ("First ALJ Order"). Findings of Fact 23 and 47 in the First ALJ Order described Ayers's and Hurd's different recollections of the word Ayers used, but the First ALJ Order also included the word "negra-rican," which was a third variation of the word. A fourth variation, "negro-rican," appeared in Conclusion of Law 13. The ALJ applied the three-prong test from *Warren*, determined the first prong of "whether the employee engaged in the conduct the employer alleges[,]" was not met in light of the disagreements on verbiage, and reversed Hurd's termination of Ayers. DSS appealed the First ALJ Order.

E. *Ayers I*

In an opinion filed 1 October 2019, we vacated and remanded the First ALJ Order. We noted Finding of Fact 23 from the First ALJ Order, which included a third and

incorrect variation of the word used when describing the disagreement on epithet verbiage between Ayers and Hurd, was the "critical finding driving the ALJ's analysis" in its reversal of Hurd's termination decision. We found,

> the ALJ's [f]inding is not supported by the evidence in the [r]ecord[, particularly Ayers's own testimony]. It is then apparent the ALJ carried out the remainder of its analysis under the misapprehension of the exact phrase used and that the ALJ's understanding of the exact phrase used was central to both the rest of the ALJ's [f]indings and its [c]onclusions of [l]aw. Therefore, we vacate the [First ALJ Order] in its entirety and remand this matter for the ALJ to reconsider its factual findings in light of the evidence of record and to make new conclusions based upon those factual findings.

In addition to noting "the ALJ's conclusions and considerations of the 'totality of the circumstances' were also grounded in its misapprehension of the evidentiary record[,]" we held either " 'n----- rican' or the variant 'nigra rican' " "constitute[d] a racial epithet[,]" and DSS "met its initial burden of proving [Ayers] engaged in the conduct alleged under *Warren*." In vacating the First ALJ Order, we instructed the ALJ to "make new findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline."

F. ALJ Decision on Remand

On remand, the ALJ entered its *Final Decision on Remand* ("Second ALJ Order") on 5 May 2020, made additional findings of fact and conclusions of law, applied the three-prong *Warren* test, and reversed DSS's termination of Ayers. The ALJ decided the first two prongs of the *Warren* test–Ayers engaging in the conduct alleged and the conduct constituting unacceptable personal conduct–were met. . . . [Specifically, the ALJ concluded Ayers's conduct was that for which no reasonable person should expect to receive prior warning, a willful violation of DSS's written personnel policy, and conduct unbecoming

> of an employee.] However, the ALJ concluded the third prong of the *Warren* test–whether DSS had just cause for the disciplinary action taken under N.C.G.S. § 126-35(a)–was not met. In concluding a lesser disciplinary measure was warranted, the Second ALJ Order focused on: Ayers's "ten-year employment history with no prior disciplinary actions" and high performance reviews; that Hurd "did not think it was significant whether anyone heard [Ayers's] comment"; the lack of evidence that this one-time comment was harassment of a specific individual or caused actual harm to DSS, until DSS revealed the incident to others; and that DSS's decision "was influenced by . . . past philosophical differences [between Hurd and Ayers] and their past history." However, the Second ALJ Order also found that "[DSS] did not consider if [Ayers's] . . . comment caused any actual harm to the agency's reputation. [DSS] only considered potential harm to the agency." The Second ALJ Order also acknowledged the lack of resolution regarding whether anyone other than Hurd heard Ayers's epithet, which the ALJ deemed a "necessary consideration." Despite the lack of resolution of the resulting harm factor from *Wetherington I*, the Second ALJ Order retroactively reinstated Ayers with a two-week suspension without pay, ordered back pay, and ordered reimbursement of Ayers's attorney fees.

Id. (alterations in original) (citations omitted); (citing *Warren v. N.C. Dep't of Crime Control & Pub. Safety* ("*Warren I*"), 221 N.C. App. 376, *disc. rev. denied*, 366 N.C. 408 (2012)).

G. *Ayers II*

DSS appealed the Second ALJ Order, arguing "(A) 'the ALJ made findings of fact not supported by substantial evidence' in its Second ALJ Order; (B) specific conclusions of law from the Second ALJ Order are erroneous; and (C) DSS 'had just cause to dismiss [Ayers].' " *Id.* at 520 (alterations in original). In an opinion filed 5 October 2021, we determined we could not meaningfully conduct our appellate review because, "[f]or us to conduct meaningful appellate review regarding just cause for disciplinary action, the ALJ must [have made] complete findings of fact regarding the harm to DSS resulting from Ayers's UPC, including whether any occurred"; but

> the ALJ found that Hurd, as DSS's representative in the disciplinary decision regarding Ayers, did not consider

> the necessary resulting harm factor, and thus did not consider all of the required factors.
>
> . . . .
>
> Substantial evidence support[ed] the ALJ's determination that Hurd, and DSS, did not consider a required factor under *Wetherington I*.

Id. at 520, 524-26. Accordingly, we "remand[ed] to the ALJ with instructions to remand to DSS to conduct a complete, discretionary review regarding Ayers's UPC and corresponding disciplinary action." *Id*. at 526.

H. DSS's Investigation on Remand and Final Agency Decision Addendum

Per our instructions, the ALJ further remanded to DSS "to conduct a complete disciplinary review[.]" In the course of this investigation, Hurd reviewed the prior documentation of the case: the First and Second ALJ Orders; our *Ayers I* and *Ayers II* opinions; conference and hearing transcripts; termination, reply, and appeal letters between Ayers and Hurd; various DSS policies and job descriptions; the North Carolina State Administrative Code; and the case file whose incomplete reporting was the genesis this now-half-decade-long series of appeals and remands. Hurd additionally reviewed DSS's daily reception logs of visitors and determined a client was in the building at the time of Ayers's UPC but did not further investigate whether the client was aware of the incident. Hurd also, for the first time, interviewed Tiffany Sutton, a black employee under Ayers's supervision whom Hurd previously identified as speculatively having overheard Ayers's UPC. Sutton had not overheard Ayers's UPC but learned of it at some indeterminable time from gossip surrounding Ayers's absence. Hurd did not interview any other employee as part of this investigation.

Upon concluding her investigation, Hurd issued DSS's Final Agency Decision Addendum ("Addendum") setting forth Hurd's and DSS's bases for resulting and potential harm, including:

> **<u>Harm to the agency's provision of services</u>**
>
> The ability to perform the essential functions of the Social Work Supervisor III position has been irreparably harmed as a result of your conduct. Your unacceptable conduct caused a complete abrogation of your ability to fulfil operational and personnel responsibilities. These duties require supervisors to function autonomously with little

to no supervision. Engaging in this conduct altered your ability to perform independently in the work environment. Further, your ability to testify objectively before any tribunal has been called into question. That is a risk I cannot accept. Your ability to supervise any program or exercise sound judgement [sic] in any dynamic has been completely compromised.

You are unable to complete any job task in the agency without total supervision. This is a burden the agency cannot bear. Your conduct interrupted the normal duties of the Director and other supervisory personnel causing them to assume your workload, a disruption to the workflow of the agency with no other back-up position available. A bias was demonstrated by stereotyping a family[.] . . . Bias negatively affects every aspect on the continuum of social services programming, including child welfare reporting. During the time between the pre-disciplinary conference and the local appeals hearing you submitted contradictory information regarding your conduct. . . . This insubordination[1] caused harm to the agency, as such undermines the ability to trust your judgement [sic], or allow you to complete essential job duties autonomously as is required. Thus, I have no confidence in your ability to be forthcoming and honest in all aspects of your work. You cannot be permitted to perform work in any capacity within the agency with certitude you will not alter, suppress, or omit material facts. Moreover, your conduct has damaged my confidence in your ability to serve with integrity as Director's Designee and there was no back up to fulfil that role in your absence.

---

1. The ALJ found,

   Hurd never charged Petitioner with being insubordinate in any disciplinary letter or advised Petitioner that she was being terminated from employment for being insubordinate. The first time [] Hurd determined that Petitioner was engaged in insubordination in November 2017, was in Hurd's [21 March 2022] Final Agency Decision Addendum. . . . [T]he evidence presented in these proceedings failed to show that Petitioner was insubordinate during the DSS local appeals hearing.

DSS challenges this finding but does not argue we should consider Ayers's alleged insubordination in our analysis of just cause.

Harm to morale

Your conduct offended a Currituck County employee, the Social Services Director. I consider your conduct to be highly offensive, vulgar, crude, and discriminatory. It further harmed the morale of the agency by creating an uncomfortable and untrusting team atmosphere among subordinates, colleagues, and your immediate supervisor. The authority given to you as a supervisor was undermined by your actions and the conduct destroyed the trust of your employer to rely upon you to make fair, objective decisions without concern for prejudice.

Harm to agency mission and work of the agency

The conduct violated the following policies: 1.) [DSS's] Civil Rights Action [*sic*] of 1964 Requirements policy, 2.) The Currituck County Personnel Policy, . . . and 3.) The . . . [DSS] Family Services manual . . . .

Violating policy constitutes harm to the agency because it frustrates the purpose of having a policy to follow at all. Between the investigatory leave period and the local appeals hearing, you failed to demonstrate introspection regarding your conduct. This negates any prospect of rehabilitation without unacceptable risk. The agency suffered yet more harm by having to post the position, recruit, and train a replacement. In the interim, the Director and another supervisor assumed your job duties which interfered with the daily business operations of the agency.

Harm to agency budget

. . . . As a result of the lack of cooperation and subsequent dismissal, the department was required to retain an attorney, incur legal expenses, hire and train a replacement for the position, and interrupt other personnel from their duties to be involved in the litigation process.

Detrimental to state service- social harm

[The Addendum cursorily characterizes Ayers's UPC as hate speech and offensive conduct detrimental to state services. DSS does not argue we should consider this 'social harm' in our just cause analysis.]

Potential harm

. . . . [T]he Director is accountable to the social services board, and is responsible and accountable for the actions, conduct and performance of departmental employees. . . . The [DSS] Board agrees with my decision to terminate your employment. Retaining your employment in any capacity within the department after using a racial epithet during the course of your governmental duties, would cause the board to doubt my ability to effectively administer our programming, personnel and distrust my decision making and judgement. This would adversely affect the relationship between the Director and the board and would damage the integrity they expect regarding the performance of my duties. . . .

As referenced, your conduct severely violated crucial polices [sic] and rules. An employee who cannot be trusted to follow rules when in the presence of the Social Services Director, cannot be trusted to follow rules when working independently. Your continued employment in any capacity would make the agency vulnerable to negligent retention and supervision which would subject the county to liability.[2] Additionally, your good faith and credibility could be of great concern, thereby damaging your testimony in the multiple cases in which you are required to testify. Continuing to entrust you with the oversight of child welfare cases, or any other matters within the agency knowing that you have demonstrated overt racism, bias and stereotyping in the course of your work, subjects the county to additional liability.

Your conduct violated the agency's compliance with the Civil Rights Act of 1964. The violation could potentially affect the agency's receipt of federal funding. Your actions would affect public trust, client confidence, and destroy the agency's credibility in the community if I simply ignored your remarks and returned you to any employment.

After conducting a thorough investigation and careful review of the totality of facts and circumstances, I affirm

2. We do not opine on Hurd's legal conclusions, except to the extent discussed in our analysis as necessary for our ultimate just cause conclusion.

> my decision to terminate your employment . . . for unacceptable personal conduct. I conclude you are unable to complete any of the above duties fairly or independently without total and continuous supervision. The need and frequency of total supervision required to continue your employment in a supervisory position or any other position within the department is an accommodation the department is unable to implement. There are no positions available within the department of social services that do not include interacting with and providing services to the public in a fair, non-biased manner. . . .

I. 31 January 2023 ALJ Decision

On 31 January 2023, the ALJ entered its *Amended Final Decision on Remand*, containing additional findings of fact and conclusions of law. The ALJ found the Addendum "unreasonable and [] most likely the result of [Hurd's] bias in favor of supporting and justifying her original action in dismissing Petitioner." She further found the Addendum's bases for actual harm "[were] all either descriptions of potential harm or resulted from [] Hurd's decision to dismiss Petitioner and were not caused by or the result of the incident itself" and that "Hurd's subjective opinion" "that Petitioner was not fit to be entrusted with her supervisory or other duties" was "unsubstantiated, speculative, [] unreasonable[,] not supported by a preponderance of the evidence[,] and [] contrary to other evidence in the record."

Determining "Petitioner's unacceptable conduct did not cause Respondent to experience any actual harm[,]" the ALJ concluded DSS lacked just cause to dismiss Ayers and retroactively reinstated Ayers with back pay and attorney fees, subject to a two-week suspension without pay and additional cultural diversity and racial sensitivity training.

DSS appeals, again arguing it had just cause to dismiss Ayers and challenging specific findings of fact and conclusions of law. On this appeal, DSS additionally requests we reverse the ALJ's award of attorneys' fees based on its view of the merits.

ANALYSIS

A. Standard of Review

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N.C. Dep't of Env't &*

Nat. Res. v. Carroll, 358 N.C. 649, 659 (2004); *see* N.C.G.S. § 150B-51(c) (2023). "Under the *de novo* standard of review, the [reviewing] court considers the matter anew and freely substitutes its own judgment for the agency's." *Wetherington II*, 270 N.C. App. at 172. In contrast, under 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. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.
>
> We undertake this review with a high degree of deference because it is well established that
>
> [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 part the testimony of any witness.

Harris, 252 N.C. App. at 100 (fifth, sixth, seventh, and eighth alterations in original) (marks and citation omitted); *see Carroll*, 358 N.C. at 674 ("[T]he 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.").

Thus, "we recognize the ALJ is the sole fact-finder, and the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility. As such, we defer to the ALJ's findings of fact, even if evidence was presented to support contrary findings." *Harris*, 252 N.C. App. at 108. We review the ALJ's findings of fact and conclusions of law based on their substance rather than their label. *See Watlington v. Dep't of Soc. Servs. of Rockingham Cnty.*, 261 N.C. App. 760, 768 (2018) (quoting *In re Simpson*, 211 N.C. App. 483, 487-88 (2011)) ("When this Court determines that findings of fact and conclusions of law have been

mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review."). "Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination made by logical reasoning from the evidentiary facts, however, is more properly classified a finding of fact." *Simpson*, 211 N.C. App. at 487 (marks and citation omitted).

The ALJ "need not recite all of the evidentiary facts but must find those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *See Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 350-51, *disc. rev. denied*, 370 N.C. 67 (2017); *see*, *e.g.*, *Ayers II*, 279 N.C. App. at 523-27 (remanding based on the lack of findings and evidence of the necessary resulting harm factor). An ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning. *In re G.C.*, 384 N.C. 62, 67 (2023). "A . . . finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the [tribunal's] ultimate finding." *State v. Fuller*, 376 N.C. 862, 864 (2021). Likewise, evidentiary facts are conclusive on appeal if supported by substantial evidence in the record or unchallenged by the parties. *In re Berman*, 245 N.C. 612, 616-17 (1957) ("The administrative findings of fact . . . if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope of its reviewing powers."); *Brewington*, 254 N.C. App. 1, 17 (2017), *disc. rev. denied*, 371 N.C. 343 (2018) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)) ("Where no exception is taken to a finding of fact . . ., the finding is presumed to be supported by competent evidence and is binding on appeal.").

We need not review every challenged finding of fact, only those necessary "to determine whether the ALJ properly ruled that [DSS] [failed to] establish[] by a preponderance of the evidence that [it] had just cause to terminate [Ayers's] employment[.]" *See Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 210, *disc. rev. denied*, 368 N.C. 919 (2016).

B. ALJ and Appellate Court Just Cause Review

State employees in North Carolina enjoy legislatively-enacted career protections. Among these is that no career State employee "shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35 (2023). "This Section establishes a condition precedent that must be fulfilled by the employer *before* disciplinary

actions are taken." *Brown v. Fayetteville State Univ.*, 269 N.C. App. 122, 130 (2020) (emphasis added) (marks omitted). This is true for every career State employee, and one's "position as a supervis[or] . . . does not lower the standard that must be met in order to justify his dismissal." *Whitehurst v. E. Carolina Univ.*, 257 N.C. App. 938, 948 (2018).

An employee who believes she was disciplined without just cause may pursue a grievance. Under the grievance procedure, she is entitled to an informal final agency decision that specifically sets forth the basis for her dismissal. N.C.G.S. § 126-34.01 (2023). She may appeal that decision to the OAH "as a contested case pursuant to the method provided in [N.C.G.S.] § 126-34.02" and N.C.G.S. § 150B-22 *et seq. Harris*, 252 N.C. App. at 98. On appeal to the OAH, the agency must show just cause by a preponderance of the evidence, N.C.G.S. § 150B-25.1(c) (2023),[3] and the "ALJ is free to substitute their judgment for that of the agency regarding the legal conclusion of whether just cause existed for the agency's action." *Harris*, 252 N.C. App. at 102. The ALJ enters a final decision, specifying findings of fact and conclusions of law, N.C.G.S. § 150B-34(a) (2023), and may reinstate the employee and award back pay and attorneys' fees as appropriate "without regard to the initial agency's determination." *Harris*, 252 N.C. App. at 102; *see* N.C.G.S. § 126-34.02(a), (e) (2023). A party may appeal the ALJ's final decision directly to this Court, N.C.G.S. §§ 7A-29(a), 126-34.02(a) (2023),[4] and we review the existence of just cause de novo. *Wetherington II*, 270 N.C. App. at 190.

Just cause may be based on either unsatisfactory job performance or UPC. 25 N.C.A.C. 1J.0604(b) (2023). DSS alleges Ayers's conduct met three grounds of UPC, as enumerated in the North Carolina Administrative Code:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .

---

3. Specifically, the statute reads, "[t]he burden of showing by a preponderance of the evidence that a career State employee subject to Chapter 126 of the General Statutes was discharged, suspended, or demoted for just cause rests with the agency employer." N.C.G.S. § 150B-25.1(c) (2023). Despite the clarity of this language, DSS, at times, misapprehends the burden of proof, stating, "Respondent contends Petitioner failed to meet her burden of proving Respondent acted without 'just cause' in terminating her employment.

4. Previously appeal was to the Superior Court, as governed by N.C.G.S. § 150B-43. *See* N.C.G.S. § 126-37(b2) (2012). Hence, some cases refer to the reviewing court as the "trial court." *E.g.*, *Carroll*, 358 N.C. at 660 ("[T]he trial court applies the whole record test . . . .").

> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a [S]tate employee that is detrimental to [S]tate service . . . .

See 25 N.C.A.C. 1J.0614(8)(a), (d)-(e) (2023).

Whether an agency has just cause to discipline an employee based on UPC requires three inquiries:

> [t]he proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of [UPC] provided by the Administrative Code. [UPC] does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Warren I, 221 N.C. App. at 383. The ALJ concluded—and Ayers does not contest in this appeal—that Ayers's use of a racial epithet was UPC under all three of DSS's alleged examples under the North Carolina Administrative Code. *Ayers II*, 279 N.C. App. at 519. Accordingly, we consider the third inquiry: whether DSS has proven by the preponderance of the evidence that Ayers's UPC amounts to just cause to dismiss her. We conclude DSS did not meet its burden.

C. The Just Cause Framework

"Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*." *Warren I*, 221 N.C. App. at 378. "Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness[.]" *Carroll*, 358 N.C. at 669 (marks and citations omitted). "Inevitably, [the just cause] inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.* Rather, "public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct[.]" *Brewington*, 254 N.C. App. at 25 (characterizing this as the "primary holding" of *Wetherington I*, 368 N.C. at 593); *see also Warren I*, 221 N.C. App. at 382 ("[N]ot every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline.").

Accordingly, "[a] formulaic approach" "comparing the misconduct in this case to the misconduct in . . . cases in which our appellate courts have held just cause for dismissal existed . . . is unpersuasive, as just cause '. . . can only be determined upon an examination of the facts and circumstances of each individual case.' " *Watlington*, 261 N.C. App. at 770 (quoting *Carroll*, 358 N.C. at 669). However, we look to precedent to guide our application of the facts and circumstances of each individual case: consideration of "factors such as the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, [and] discipline imposed in other cases involving similar violations . . . is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct[,]" *Wetherington I*, 368 N.C. at 592, to "the extent there was any evidence to support them. [The disciplining agency] [can]not rely on one factor while ignoring the others." *Wetherington II*, 270 N.C. App. at 190. Where the agency ignores a required factor—or purports to consider it but actually applies a per se rule—we will not give the agency an additional "bite[] at the apple" to consider the factor, so long as the record permits our meaningful de novo review of the factor.[5] *Compare Wetherington II*, 270 N.C. App. at 191-201 (disallowing further discretionary factfinding despite the agency's failure to consider "severity of the violation," "resulting harm," and "discipline imposed in other cases involving similar violations" factors), *with Ayers II*, 279 N.C. App. at 523-27 (remanding based on our inability to meaningfully review the "resulting harm" factor).

In *Wetherington II*, we separately analyzed each of the five *Wetherington* factors. *Wetherington II*, 270 N.C. App. at 191-200. There, the petitioner,

> then a trooper with the North Carolina State Highway Patrol, misplaced his hat during a traffic stop; he then lied about how he lost his hat, which was later recovered, mostly intact. [The highway patrol] terminated [his] employment as a trooper based upon its "per se" rule that any untruthfulness by a state trooper is unacceptable personal conduct and just cause for dismissal.

Id. at 162. On the trooper's initial appeal, our Supreme Court held the patrol's "use of a rule requiring dismissal for all violations of the

5. In contrast, where an incomplete investigation frustrates our meaningful de novo review of a required factor, we remand for further investigation, as we did in DSS's prior appeal. *Ayers II*, 279 N.C. App. at 523-27.

[p]atrol's truthfulness policy was an error of law"[6] and remanded for the patrol to make a proper just cause analysis. *Wetherington I*, 368 N.C. at 593. On remand, the patrol affirmed its termination of the trooper. On appeal from that determination, we held the patrol's second consideration "was substantively no different" than its prior application of a per se rule and "conclude[d] as a matter of law, on *de novo* review, that [the trooper's] unacceptable personal conduct was not just cause for dismissal." *Wetherington II*, 270 N.C. App. at 163, 199.

Here, DSS likewise failed to undertake a proper just cause analysis initially. *Ayers II*, 279 N.C. App. at 523-25. On remand, DSS again considered the UNC School of Government twelve-factor test, *see id.* at 516-17, 524, but did so "along with the five *Wetherington* factors." Although *Wetherington I*'s recognition of the "flexible definition of just cause" and description of "factors *such as*" the five it explicitly addressed contemplates that additional factors may sometimes be relevant to just cause, *Wetherington I*, 368 N.C. at 591-92 (emphasis added) (marks omitted), DSS makes no argument that the twelve factors of the UNC School of Government were either appropriate or necessary to its analysis of just cause here. We believe the *Wetherington* factors are sufficient for us to analyze de novo whether Ayers's conduct constituted just cause for her termination, so we do not consider the twelve-factor test.

D. Analyzing the Just Cause Factors

Having discussed the just cause framework, we turn to whether DSS had just cause to dismiss Ayers. Before analyzing the appropriate and necessary factors, however, we address generally DSS's challenges to findings of fact. DSS purports[7] to challenge 39 of 139 findings of fact and 28 of 52 conclusions of law—several of which, in actuality, are findings of fact, *see Watlington*, 261 N.C. App. at 768—as unsupported by substantial evidence. These challenges, as well as DSS's discussion of resulting harm, frequently highlight how Hurd's version of the facts in DSS's Final Agency Decision Addendum differ from the ALJ's findings. This approach is unpersuasive because the ALJ "was not obligated to find facts based on" a party's "*own* view of the record," *Brewington*, 254

---

6. Thus, the law is no longer—as DSS seeks to rely—that "[o]ne act of UPC presents 'just cause' for any discipline, up to and including dismissal." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597 (2005).

7. DSS does not specifically argue nine of these findings. *See Brewington*, 254 N.C. App. at 17 ("[B]ecause finding of fact 11 is the only finding that [the petitioner] challenges with a specific argument, issues concerning the remaining challenged findings have been abandoned.").

N.C. App. at 23, and because "we defer to the ALJ's findings of fact, *even if evidence was presented to support contrary findings*." *Harris*, 252 N.C. App. at 108 (emphasis added).

We turn to our just cause analysis and consider each of the "appropriate and necessary" factors in turn. *Wetherington I*, 368 N.C. at 592. In doing so, we address specific challenged findings of fact as necessary. *See Wetherington II*, 270 N.C. App. at 178 n. 8.

1. Severity of the Violation

We first address the severity of Ayers's UPC. Since our Administrative Code defines UPC flexibly such that "there is no bright line test to determine whether an employee's conduct establishes [UPC,]" *Carroll*, 358 N.C. at 675; *see* 25 N.C.A.C. 1J.0614(8) (2023), we cannot pragmatically assess Ayers's UPC against some baseline violation. *See Watlington*, 261 N.C. App. at 770 (marks omitted) ("[C]omparing the misconduct in this case to the misconduct in . . . cases in which our appellate courts have held just cause for dismissal existed . . . is unpersuasive, as just cause . . . can only be determined upon an examination of the facts and circumstances of each individual case."). Rather, for this factor, we examine the potential harmfulness and frequency of Ayers's UPC. *See id*. at 770-71 (considering potential harm and the frequency of the petitioner's misconduct, albeit without explicitly discussing the *Wetherington* factors); *accord Davis v. N.C. Dep't Health & Hum. Servs.*, 269 N.C. App. 109 (2019) (unpublished) ("[T]he potential for harm does speak to the severity of the violation.").

In *Wetherington II*, our severity analysis discussed the context and effects of the trooper's UPC in a manner that, at first, appears duplicative of the "subject matter involved" and "resulting harm" factors, but actually suggests a potential harm inquiry. We said that the trooper's "untruthful statement regarding losing his hat was not a severe violation of the truthfulness policy" because "[i]t did not occur in court and it did not affect any investigation, prosecution, or the function of the Highway Patrol"; rather, it "was about a matter . . . all parties concede was not very important." *Wetherington II*, 270 N.C. App. at 191. Thus, our discussion connected the lie's out-of-court context to its lack of effects on patrol's investigatory and prosecutorial functions. In this light, any apparent redundancy between this factor and "resulting harm" merely reflected that the particular circumstances created minimal, if any, potential harm.

In *Wetherington II*'s severity analysis, we further considered the isolated nature of the trooper's UPC. Specifically, the trooper's conduct was

not "an elaborate lie full of fabricated details" but rather contained only a singular fabricated detail: "the lie or 'untruth' lay only in the hat's location when [the trooper] misplaced it." *Wetherington II*, 270 N.C. App. at 191-92. Conversely, in *Watlington v. Department of Social Services of Rockingham County*, we considered that the frequency of the dismissed employee's UPC displayed a "repeated inclination" to engage in it. *Watlington*, 261 N.C. App. at 770-71 (considering the employee's five instances of exchanging gifts with social services clients).

Here, the ALJ concluded "[t]he preponderance of evidence proved there was only a minimal degree of potential risk that Petitioner's racial comment could or would have affected [] Respondent's integrity, employee morale, or provision of services." DSS points to several unavailing bases for potential harm. Primarily, it argues it has shown "widespread potential harm" in that its continued employment of Ayers would reflect poorly on Hurd's "credibility and trust" in the eyes of the county board of social services. *See* N.C.G.S. §§ 108A-1 to -11 (2023). DSS grounds this argument in the Addendum, but the ALJ made no findings of fact that reflect how Ayers's UPC could have affected Hurd's individual reputation in the eyes of the board. *See Harris*, 252 N.C. App. at 100. Regardless—as consistent with the ALJ's final decision—we do not see how an adverse reflection on Hurd's individual reputation, if any, based solely on Hurd's own assertions, created any potential to undermine the mission of DSS or is otherwise relevant to whether DSS had just cause to dismiss Ayers.

DSS further posits that "Petitioner's UPC exposed DSS to vulnerability for negligent retention and supervision liability" and "violated DSS's compliance with the Civil Rights Act of 1964[,]" *see* 42 U.S.C. § 2000d, *et seq.*, which "could jeopardize the receipt of federal funding." The ALJ found,

> 123. While [] Hurd and Respondent claim that Petitioner violated various policies that Respondent is required to follow, [] Hurd and Respondent failed to demonstrate how Petitioner violated any of these policies when she spontaneously uttered a racial slur in a vacant office to her supervisor. . . .

DSS argues this finding is contrary to several portions of the record: the policies themselves, Hurd's testimony, the Addendum, and Sutton's testimony. But none of this evidence demonstrates how DSS's usage of non-dismissal forms of discipline to address Ayers's UPC would have subjected the agency to tort liability or violated federal law.

Despite this lack of identifiable liability, Ayers's conduct carried a risk of significant potential harm, albeit a relatively low risk of that harm coming to pass. Ayers's use of a racial slur in an office, with the door open, created the possibility that her subordinate employees or a client in the building might have overheard the language. And the impact of such a slur having been heard was potentially great; Sutton testified that merely learning of Ayers's "inappropriate, disrespectful, and belittling" words *after-the-fact* adversely affected her professional relationship with Ayers, undermined Ayers's supervisory authority, and was inconsistent with DSS's core values. This conduct, if exposed to a subordinate or client, "would have affected [] Respondent's integrity, employee morale, [and the] provision of services," not only by virtue of the morale impact on any listeners who have been personally affected by the slur, but also by severely undermining confidence that DSS's employees were discharging their duties in a manner that upheld the dignitary equality of all persons, regardless of race.

However, our "severity of the violation" inquiry does not end there. While gravity of the harm, had it come to pass, speaks to the severity of the conduct, "that Petitioner's conduct . . . was an aberrant and unintended event" mitigates this severity. The ALJ found,

> 139. The preponderance of the evidence established that Petitioner's conduct on [3 November 2017] was an aberrant and unintended event. There was no evidence that Petitioner acted maliciously, with any racially-motivated reason or with any racially motivated intent to offend, harass, or belittle any given ethnicity, race, or anyone with whom she worked. Instead, the evidence proved that Petitioner's statement was a careless mistake and a "momentary lapse in judgment" by a highly effective and professional employee.

This finding is best characterized as an ultimate fact, and it is reasoned from ample evidentiary facts; in particular, those reflecting that Ayers has not otherwise made inappropriate remarks and expressed immediate and consistent embarrassment, regret, and remorse:

> 35. Petitioner immediately regretted her statement, told [] Hurd that she could not believe she had said that, and apologized to [] Hurd.
>
> . . . .
>
> 37. Shortly after Petitioner made the above-described statement, Petitioner and [] Hurd left the vacant office to

locate the file for the "F" family. On the way, Petitioner apologized to [] Hurd again and said something like, Please don't tell anyone about what I said, especially the first part. It's Friday." Petitioner made this request because she was embarrassed and surprised by what she had said.

. . . .

45. [After the 6 November 2017 pre-disciplinary conference], Petitioner apologized and told [] Hurd:

> It was [an] inappropriate comment . . . It was a guess. It was words [that] just came out of her mouth. I shocked myself. I apologize. I don't use these words in my personal life, my work life. I don't allow this in staffing. We were solving a 'word problem.' I apologize for me and to you. These comments were not to the family - I think not it means 'non-reported.' It was in a vacant office. It is inappropriate.

. . . .

60. At the 2018 Hearing, Petitioner admitted she "absolutely said something that's improper." "I'm still embarrassed by that." "I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional."

61. She "had never made an off-color remark like that before in her [[] Hurd's] presence or anyone else's presence, at work or even my personal life."

. . . .

114. . . . . The evidence at both the initial hearing and at the reconvened hearing showed without question that Petitioner was remorseful about making a racial comment during the [i]ncident, ... Respondent failed to present any credible evidence to rebut those facts.

. . . .

124. . . . A preponderance of the evidence showed that Petitioner demonstrated introspection regarding her conduct in the [i]ncident, both immediately following the [i]ncident, throughout the local administrative processes, during the 2018 Hearing, and during the 2022 Hearing.

. . . .

> 128. Despite the passage of over four and one-half years between the [i]ncident and the 2022 Hearing, Respondent presented no evidence of any form of unprofessional conduct by Petitioner in any setting other than during the [3 November 2017] [i]ncident.
>
> 129. Petitioner consistently expressed regret and embarrassment about the incident in her conversations with and written submissions to [] Hurd following the [i]ncident.
>
> 130. While testifying before the Undersigned on two separate occasions, several years apart, Petitioner has consistently demonstrated that she regrets and is embarrassed by her conduct from the [i]ncident.

In other words, although the harm itself *may* have been great under different circumstances, we cannot ignore the ALJ's findings that the circumstances themselves, including the time of day and volume of potential listeners in the building, created a low risk of such a harm actually coming to pass and were uncharacteristic of Ayers's past and future behavior relative to the incident.

DSS seeks to resist finding of fact 139 by challenging each of the above findings save for number 35. Specifically, DSS argues that Ayers has not been consistently remorseful. It acknowledges that several "findings imply Petitioner has in all ways been remorseful and taken responsibility for her egregious utterance" but adds that, "[n]otwithstanding the ALJ's discretion to [determine] matters of credibility, the record does not bear this out." However, several of the findings quoted above directly quote the evidence that "bears out" Ayers's remorse and acceptance of responsibility.

DSS also argues we cannot "ignore . . . DSS's repeated findings and conclusions made throughout DSS's investigation that Ayers showed no remorse and did not take responsibility." But it was the ALJ's prerogative to assess the credibility and weight of DSS's investigatory findings. *See Harris*, 252 N.C. App. at 100. Moreover, the ALJ found Ayers's statements during DSS's investigation were "reasonably attributable to Petitioner's concern that [] Hurd had already made her decision about the [i]ncident" and that, "if she provided any more testimony about the [i]ncident, [] Hurd would just 'pick it apart and . . . make a deal out of that too.' " We hold the ALJ's ultimate fact 139 is properly reasoned from evidentiary facts, which in turn are supported by substantial evidence in the record.

Accordingly, the ALJ's finding and conclusion that Ayers's UPC was "an aberrant and unintended event" rather than a pattern of misconduct mitigates the severity of Ayers's UPC. Nevertheless, we reiterate that Ayers's UPC carried a risk of significant potential harm.

2. Subject Matter Involved

Turning to the subject matter involved, DSS does not identify the subject matter, arguing only "[t]here is no dispute . . . that the subject matter is most serious." Ayers, meanwhile, identifies the subject matter as "improper language[.]" However, the subject matter is best identified as the meaning of "NR" in the race field on DSS's intake form.

In *Wetherington II*, we considered the subject matter to be, trivially, "the loss of the hat"; that is, the object of the trooper's lie and not dishonesty generally. *Wetherington II*, 270 N.C. App. at 192. Likewise, here, we consider the object of Ayers's racial slur. The ALJ found this was the meaning of "NR":

> 115. . . . Petitioner was only answering Hurd's question regarding what did the letters "NR" mean. Given those facts, there was no proof that Petitioner was referring to the specific family listed on the form when she blurted out her racial comment.

Again, pointing to the Addendum, DSS contends that Ayers intended her slur to describe the family listed on the DSS form. However, the ALJ credited Ayers's contrary testimony that she was not referencing the family but "trying to decipher the race code." Undeterred by this evidence, DSS makes a conclusory argument that, "Ayers'[s] own testimony on these issues does not and cannot amount to 'substantial evidence.' " But it is well established that "the probative value of particular testimony [is] for the [ALJ] to determine, and [the ALJ] may accept [or reject] . . . the testimony of any witness." *Harris*, 252 N.C. App. at 100 (second and third alterations in original).

Accepting finding of fact 115, this subject matter is not any person or family, mitigating its seriousness. However, we are also cognizant that, in light of the form's coding being used as a racial demarcation, the subject matter and decision to use the epithet carries an irretractable gravity, even when not referring to a particular person or family. Thus, the mitigation on this factor is, ultimately, only partial.

3. Resulting Harm

We proceed to "resulting harm." In *Ayers II*, we considered the factor as "harm to DSS" and held DSS had only considered "the *potential*

for harm to the reputation of, and workers at, DSS[.]" *Ayers II*, 279 N.C. App. at 525. Thus, we "remand[ed] to the ALJ with instructions to remand to DSS" to investigate resulting harm to DSS. *Id.* at 527. Unsurprisingly, on this appeal, the parties devote the bulk of their arguments to this factor and related factual issues.

DSS identifies several bases for resulting harm. Specifically, DSS points to the disruption caused by Ayers's mandated absence, legal fees incurred by DSS in defending Ayers's dismissal, harmful rumors of Ayers's UPC upon her absence, Ayers's frustration of policies, Hurd's diminished trust in Ayers, and Hurd's personal offense upon hearing Ayers's UPC. Although DSS contends that "[Hurd], within her discretion, determined that there was irreparable harm to DSS. . . . . [Her] determination that harm resulted was a sufficient exercise of that discretion[,]" an agency's discretion does not permit it to classify any and all harm as "resulting harm."[8] *See Wetherington II*, 270 N.C. App. at 194 (rejecting the highway patrol supervisor's discussion of potential harm as a basis for resulting harm). Thus, we do not defer to Hurd's determinations of harm but, rather, consider the ALJ's findings related to each of DSS's proposed bases of resulting harm.

The ALJ ultimately found each basis for resulting harm either resulted from the discipline itself or was not factually supported:

> 113. In the Final Agency Decision Addendum, [] Hurd characterized several matters as actual harm purportedly resulting from the [i]ncident. However, these matters are all either descriptions of potential harm or resulted from [] Hurd's decision to dismiss Petitioner and were not caused by or the result of the [i]ncident itself.
>
> . . . .
>
> 133. After conducting an investigation specifically to determine whether the agency suffered any actual harm resulting from the [i]ncident, [] Hurd was unable to show that the agency suffered any actual harm. However, [] Hurd tried to portray the potential for harm as actual harm even though much of the potential harm was speculative, based only on her subjective belief, or is contrary to or otherwise refuted by the passage of nearly five (5) years since [] Hurd dismissed Petitioner.

---

8. In *Ayers II*, we rejected DSS's similar argument that its discretion permitted it to ignore the "resulting harm" factor entirely. *Ayers II*, 279 N.C. App. at 524-25.

We agree with the ALJ's legal conclusion that "potential harm [and matters] result[ing] from [] Hurd's decision to dismiss Petitioner" are not resulting harm. *See Wetherington I*, 368 N.C. at 592; *Wetherington II*, 270 N.C. App. at 194-95. Further, we consider the ALJ's findings and conclusions to the effect that DSS has not otherwise shown resulting harm are best classified as ultimate findings of fact. Thus, for each of DSS's bases, we inquire whether DSS may fairly characterize it as resulting harm; and, if so, we further consider whether the ALJ's ultimate finding that the basis lacks factual support was appropriately reasoned from evidentiary findings supported by substantial evidence.

a. Ayers's Absence and DSS's Legal Expenses

We have previously distinguished between resulting harm and mere potential harm. *E.g.*, *Wetherington II*, 270 N.C. App. at 194-95. This case requires us to further distinguish between the harm proximately resulting from the UPC and that resulting ipso facto from an agency's imposition of discipline. When an agency disciplines an employee for UPC, we inquire "whether *that misconduct* amounted to just cause for the disciplinary action taken." *Warren I*, 221 N.C. App. at 383 (emphasis added). Any harm resulting *from* the discipline had not yet resulted when the agency was required to determine whether just cause existed *for* the discipline.[9] *See Brown*, 269 N.C. App. at 128-32 (adopting the U.S. Supreme Court's reasoning that "after-acquired evidence . . . could not serve as a valid justification for upholding the employee's termination because the employer did not know [this evidence] until after she was discharged" and applying it to contested cases brought by career State employees).[10]

DSS's proposed bases for resulting harm illustrate this point. DSS argues Ayers's UPC "interrupted [Hurd's] normal duties and require[ed] others to pick up her workflow" and notes "[t]he [Final Agency Decision] Addendum also addressed the actual harm to DSS's budget[.]" However, it does not challenge that "any interruption of [] Hurd's duties, other staff's duties, or workflow at DSS was not due to the [i]ncident itself . . . [but rather] resulted from [] Hurd's decision to place Petitioner on leave and Petitioner's resulting absence from the agency after [] Hurd dismissed Petitioner."

---

9. DSS argues that some harm—specifically employee resignations—might have resulted had it not terminated petitioner. We decline to speculate what harm would and would not have resulted had DSS opted for a non-dismissal form of discipline.

10. *Brown* further held "this type of evidence could be used to limit the employee's relief[,]" at least where the evidence creates an independent and lawful basis for the termination. *Brown*, 269 N.C. App. at 128. DSS does not ask us to limit Ayers's relief should we conclude it lacked just cause.

These bases seek to use of the fact of Ayers's dismissal to justify the dismissal, but "[f]airness and equity do not allow just cause for dismissal to be predicated upon" the dismissal itself. *Cf. Whitehurst*, 257 N.C. App. at 947 ("Fairness and equity do not allow just cause for dismissal to be predicated upon [the petitioner's] failure to respond appropriately to facts of which he had no knowledge."). Rather, this circularity "is functionally indistinguishable from [a rule of] 'per se' dismissal[.]" *Wetherington II*, 270 N.C. App. at 191. A contrary holding would place disciplined State employees in a Catch-22, as an exercise of their right to appeal, *see* N.C.G.S. §§ 126-34.01 to -.02 (2023), would subject the agency to legal expenses and potentially tip the scales in favor of just cause, even where none had existed prior.[11]

b. Rumors of Ayers's UPC

DSS also points to harm to Sutton upon learning of rumors of Ayers's UPC as a basis for resulting harm. Learning of Ayers's words "disappointed and shocked" Sutton, and she understandably considered them "inappropriate, disrespectful, and belittling." However, Sutton did not witness Ayers's UPC and only learned of it because of Ayers's absence from work after her dismissal. The dismissal itself required DSS have just cause. N.C.G.S. § 126-35 (2023). DSS could not have relied upon after-the-fact office gossip as potential harm—realized only *after* the dismissal—as "resulting harm" to show just cause *for* the dismissal. *Brown*, 269 N.C. App. at 128-32.[12]

c. Frustration of Policies

Another of DSS's bases for resulting harm is an even more naked application of a *per se* rule. DSS argues "[t]he Addendum addressed harm to the DSS's mission and work by frustrating the purpose of numerous policies[.]" Although Ayers's policy violation was certainly relevant

---

11. Such a result could raise due process implications as well. *Brewington*, 254 N.C. App. at 27-28 ("It is well established that career State employees enjoy a property interest in continued employment. This property interest is created by state law, N.C.[G.S.] § 126-35(a), and is guaranteed by the Due Process Clauses of the Fifth and the Fourteenth Amendments to the United States Constitution.").

12. DSS fairly notes, "[r]egardless of when or how she learned of the conduct, Sutton was harmed." Consistent with the "flexible concept" of just cause, *Carroll*, 358 N.C. at 669, we do not ignore this but have more appropriately considered it as potential harm—not-yet realized when DSS imposed discipline.

DSS also notes, "[i]t is likely that in many situations, properly investigating the use of racial slurs to a supervisor, will necessarily result in harm to colleagues who learn of the slurs. As such, Ayers'[s] use of the slurs, even though it was a single incident and even though she had little prior discipline, [or, more accurately, no prior discipline,] constitutes

to whether Ayers's conduct constituted UPC, Ayers does not contest that prong of *Warren*. Rather, at this prong, we consider whether *this particular* "frustrati[on] of the purpose" of a policy "amounted to just cause for the disciplinary action taken." *Warren I*, 221 N.C. App. at 383. Restating the fact of the UPC does not advance this inquiry. Further, although Hurd testified that "a supervisor who disregards policy is harmful because supervisors are intended to be leaders" at DSS and it is "important that they demonstrate compliance with those policies personally[,]" Ayers's position as supervisor or leader "does not lower the standard that must be met in order to justify [her] dismissal." *See Whitehurst*, 257 N.C. App. at 948.

d. Hurd's Diminished Trust in Ayers

DSS's remaining bases for resulting harm lack factual support. DSS argues it showed harm to Hurd in that "Petitioner's UPC justifiably obliterated [Hurd's] trust in Petitioner's judgment, . . . [and] there was simply no way Petitioner could function autonomously without total supervision or eliminate the risk of another abhorrent racial outburst." Although this reads more like potential harm, it is relevant to just cause regardless (to the extent it is supported in fact) and we address it here.

In *Wetherington II*, we held a supervisor's unreasonable belief that an employee would repeat his UPC if permitted to remain in his position is not a proper basis for resulting harm. There, the trooper's supervisor claimed in his dismissal letter to the trooper that

---

good cause for dismissal." DSS, elsewhere, argues, "[it] cannot possibly be the law of North Carolina" that "[Hurd] was required to ask other social workers whether they also heard the racial slurs" because such an investigation "would necessarily be causing additional harm to the agency by spreading the vile racist slurs throughout the agency[.]"

Whether DSS considers such a holding possible or not, we held DSS was required to conduct a complete investigation, sufficient for the ALJ to make findings of fact regarding resulting harm, including discerning "whether anyone else heard such statement[.]" *Ayers II*, 279 N.C. App. at 526 (emphasis omitted). To consider harm caused by or "spread" by an investigation as "resulting harm" would tie the level of resulting harm to the thoroughness of an agency's investigation therein. This would create tension between just cause's "notions of equity and fairness" and an agency's discretion over how to conduct its investigation. *See Brewington*, 254 N.C. App. at 14, 25.

We are mindful that, if mere knowledge of an employee's UPC would create harm, and if the very act of investigating UPC spreads knowledge of the UPC, it could be unavoidable for an agency to investigate just cause without spreading harm. If and when such cases arise, we trust agencies will exercise their discretion over their investigations in a manner to minimize that harm. We note, for example, that Hurd's transcribed interview of Sutton in this case utilized open-ended questioning that did not require Hurd to repeat Ayers's words, not even in redacted fashion.

> I have no confidence that you can be trusted to be truthful to your supervisors or even to testify truthfully in court or at administrative hearings. . . . [Y]our ability to perform the essential job functions of a Trooper is reparably limited due to the Highway Patrol's duty to disclose details of the internal investigation to prosecutors[.] . . . If you were to return to duty with the Highway Patrol I could not, in good conscience, assign you to any position . . . within the Highway Patrol . . ., any assignment would compromise the integrity of the Highway Patrol and the ability of the State to put on credible evidence to prosecute its cases.

Wetherington II, 270 N.C. App. at 165. But while "[i]t [was] easy to understand the resulting harm to the agency from a trooper's intentional lie about substantive facts in sworn testimony or in the course of his official duties[,]" the trooper had made no lie of that sort, and the highway patrol "ha[d] never been able to articulate how *this particular lie* was so harmful." *Id.* at 195 (emphasis added). Rather, the highway patrol's analysis was "substantively no different" than a per se rule because any "sort of untruthfulness, in any context" would have permitted dismissal under the highway patrol's reasoning. *Id.* at 195, 199.

Under *Wetherington II*, Hurd and DSS could not reasonably presume Ayers's one instance of UPC meant she would have a future "racial outburst" in the manner that the highway patrol assumed the trooper's single lie meant he would have perjured himself given the opportunity; they needed some reasonable ground for the belief. As DSS notes, Hurd was simultaneously the sole witness, "principal investigator," and administer of discipline, making this basis for harm wholly dependent on the reasonableness of her individual belief. However, the ALJ found this belief to be unreasonable:

> 114. [] Hurd subjectively believed that Petitioner was not fit to be entrusted with her supervisory or other duties for Currituck DSS and claimed this belief constituted "harm" resulting from the [i]ncident. However, Hurd's subjective belief was unsubstantiated, speculative, and unreasonable. [] Hurd's subjective opinion on these matters was not supported by a preponderance of the evidence and was contrary to other evidence in the record. The evidence at both the initial hearing and at the reconvened hearing showed without question that Petitioner was remorseful about making a racial comment during the [i]ncident, that Petitioner's comment was uncharacteristic of her, and

> that there was no reasonable expectation or likelihood that Petitioner would repeat such comment. Respondent failed to present any credible evidence to rebut those facts.

On the other hand, the ALJ expressly found, based on supporting evidence on the record, "Hurd's decision to dismiss Petitioner from employment was influenced by [] Hurd's past philosophical differences with Petitioner and their past history."

These findings were amply reasoned from unchallenged findings of fact that reflect the "friction[,]" and "difficult but professional relationship[,]" and "significant philosophical differences" between Hurd and Ayers. Indeed, DSS admits that Hurd relied, in part, on these "prior difficulties" to determine "there was irreparable harm to DSS[.]" Further, Romm—the former DSS director over both employees—"did not think [Ayers's] conduct on [3 November 2017] was typical or characteristic of [her] behavior" and had no "doubts or concerns about [her] fitness to be a supervisor at [] DSS[,]" despite her UPC.

DSS further challenges finding of fact 114 based on its opinions that Ayers was not remorseful and had a "racist upbringing[.]" But the ALJ's findings reflect neither of these, and any evidence in support of its opinions does not preclude the ALJ's findings to the contrary. *See Harris*, 252 N.C. App. at 108.

e. Hurd's Personal Offense

DSS's last basis of resulting harm is that "[h]earing the statement harmed [Hurd's] morale, who considered it highly offensive, vulgar, crude, and discriminatory." The ALJ found "Respondent presented no evidence . . . that Petitioner's comment during the [3 November 2017] [i]ncident affected . . . the morale of any DSS employees . . . . [T]he [i]ncident did not affect . . . the morale of any employee[.]" Citing a portion of Hurd's 2018 testimony, DSS argues "[i]t is not true there was no evidence of it negatively impacting the morale of any DSS employee . . . Hurd is an employee[] . . . [and] testified to the unsettling effect this had on her." However, "the probative value of particular testimony [is] for the [ALJ] to determine," *id.* at 100 (second alteration in original), and we have, in *Ayers II*, already considered the effect of this testimony and held Hurd's consideration that she "thought [Ayers's UPC] was extremely offensive and inflammatory" was not consideration of resulting harm. *Ayers II*, 279 N.C. App. at 525. We may not revisit our conclusion that Hurd's personal offense was not resulting harm to DSS. *Wetherington II*, 270 N.C. App. at 172-73 ("According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law

of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal.").

Having considered each of DSS's proposed bases for resulting harm, we hold the ALJ's ultimate findings that DSS has not shown resulting harm are properly reasoned from evidentiary facts supported by substantial evidence in the record. The facts, as the ALJ found based on substantial evidence, do not show that Ayers's UPC had caused any resulting harm to DSS, its reputation, its employees, or its ability to provide services to the public at the time DSS dismissed Ayers. This factor weighs against the existence of just cause to dismiss Ayers.

4. Ayers's Work History

Having discussed at length the "resulting harm" factor, we turn to Ayers's work history. Analyzing this factor in *Whitehurst v. East Carolina University*, we considered both the dismissed employee's performance reviews and her disciplinary history. *Whitehurst*, 257 N.C. App. at 938.

DSS does not challenge the ALJ's findings related to Ayers's work history:

> 10. From 2011 through 2017, [] Romm conducted the annual evaluations of Petitioner.[] Romm consistently rated Petitioner as "substantially exceeded" expectations in all areas and rated Petitioner's performance as "Excellent" in all areas. An "Excellent" rating was the highest possible evaluation rating an employee can receive in a performance evaluation.
>
> 11. [] Romm never had any concerns about Petitioner's professionalism, adherence to policy, attitude, or her work performance.
>
> 12. Until her dismissal, Petitioner had not received any prior disciplinary action during her employment with Respondent.
>
> . . . .
>
> 132. In the [8 November 2017] termination letter and the [21 November 2017] Final Agency Decision, [] Hurd referenced a [21 July 2017] conversation with Petitioner to show she had placed Petitioner on prior notice that Petitioner's conduct towards [] Hurd was inappropriate and unprofessional. However, the preponderance of the evidence showed that [] Hurd actually relied upon

> the [21 July 2017] conversation to show support for, and further justify, her decision to dismiss Petitioner even though she never documented her [21 July 2017] conversation with Petitioner as a disciplinary action. . . . Hurd never issued any disciplinary action to Petitioner for prior job performance or conduct deficiencies. [] Hurd never documented the [21 July 2017] matter in writing or as a disciplinary action. There was no evidence [] Hurd documented "many discussions" with Petitioner about any prior unacceptable conduct.

DSS does not argue we should consider the 21 July 2017 conversation and concedes Ayers's work history is "mitigation[.]" As Ayers received consistently excellent performance reviews and had no prior disciplinary actions, "[t]his factor could only favor some disciplinary action short of termination." *Wetherington II*, 270 N.C. App. at 196.

5. Discipline Imposed in Other Cases Involving Similar Violations

We now turn to the final *Wetherington* factor. DSS argues "[t]he ALJ's reliance on the lack of prior DSS discipline for similar conduct is misleading as no employee had ever used a racial epithet at work before." To the extent the ALJ considered that DSS permitted employees to use non-racial profanity in the workplace, we agree with DSS that this was error. However, this does not end our inquiry into this factor.

Consistent with just cause's "notions of equity and fairness[,]" *Carroll*, 358 N.C. at 669, we have characterized this factor as whether "this dismissal was based upon disparate treatment[.]" *Wetherington II*, 270 N.C. App. at 198-99. "Similar violations" are not limited to factually similar UPC; rather, the similar violations only need "some relevant denominator . . . for comparison." *Id.* at 199. "Although there is no particular time period set for this factor, [there is] no legal basis for relying only upon disciplinary actions during a particular [director's] tenure." *Id.*

In *Warren*'s second trip to this Court, we considered a State employee's dismissal for a violation of his agency-employer's policy against unbecoming personal conduct by driving his patrol vehicle while off duty and with an open bottle of liquor in the trunk. *Warren v. N.C. Dep't of Crime Control & Pub. Safety* ("*Warren II*"), 267 N.C. App. 503, 506-10 (2019). Under the first two prongs, we held the employee violated the policy and that the violation was UPC. *Id.* at 506-08. But, at the third prong, we held there was no just cause for the employee's termination, in part because

> the disciplinary actions [the] respondent has taken for unbecoming conduct typically resulted in either: a temporary suspension without pay, a reduction in pay, or a demotion of title. In fact, where the conduct was equally or more egregious than that of petitioner (i.e., threats to kill another person, sexual harassment, assault), the employee was generally subjected to disciplinary measures other than termination.

Id. at 509.

Here, DSS does not challenge the ALJ's findings that

> 21. During Romm's nineteen years as Director of Currituck DSS, Romm dismissed three individuals for engaging in unacceptable personal conduct. Each of these employees had engaged in either a pattern or a series of unacceptable personal conduct repeatedly over a period of time. One employee lied to Romm for months regarding an unauthorized destruction of case records. A second employee refused to perform a core duty of her position. [] Romm fired that employee when the employee failed to perform a second core duty involving the safety of children and after the supervisor advised the employee of the serious consequences that could result from her continued refusal to perform her duties. A third employee falsely reported, written and verbally, the status of cases over several months.
>
> 22. [] Ro[m]m never terminated anyone for unacceptable personal conduct based solely on a one-time incident. She never terminated anyone for unacceptable personal conduct based on something the employee said in a private conversation.
>
> . . . .
>
> [Conclusion of law] 46. In this case, it was undisputed that neither [] Hurd nor [] Romm had encountered a similar conduct violation at Currituck DSS in the past. Neither [] Hurd nor [] Romm had dismissed any employee based on a single incident of misconduct in the past. In fact, prior disciplinary practices at Respondent demonstrated that dismissal was not ordinarily imposed for a single act of misconduct, and generally an employee would only be

> dismissed following a warning and repetition of some act of misconduct.

While we do not compare for all purposes the relative egregiousness of Ayers's use of a racial slur to previously dismissed DSS employees' dishonesty and dereliction of job duties, we conclude these prior instances of UPC establish the "relevant denominator[.]" *Wetherington II*, 270 N.C. App. at 199. DSS has not historically imposed dismissal as the discipline for an employee's first instance of UPC. Since Ayers's dismissal for a single instance of UPC is contrary to DSS historical practice, this factor weighs against the existence of just cause to dismiss Ayers.

E. Balancing the Equities

Having analyzed each of the *Wetherington* factors, we reach the "irreducible act of judgment[,]" *Carroll*, 358 N.C. at 669, of whether DSS had just cause to dismiss Ayers.

DSS implores us to accord deference to its determination of just cause. Specifically, it argues Hurd "was best positioned to determine the impact of Petitioner's misconduct" based on her education and training, as well as in that "[s]he is of long tenure in that DSS and was selected by her predecessor for her integrity and judgment[.]" It further argues, "[a]s the supervisor, witness to the slurs, and principal investigator, [Hurd] had to rely on her judgement [sic] and discretion in determining whether harm was caused. The ALJ failed to give her sufficient deference in the challenged Conclusions of Law." However, "[the ALJ] . . . owe[d] no deference to [Hurd's] conclusion of law that [] just cause existed" and was "free to substitute [her] judgment for that of [Hurd] regarding the legal conclusion of whether just cause existed for [DSS's] action." *Harris*, 252 N.C. App. at 102.

We likewise review the ALJ's legal conclusion de novo. *See*, *e.g.*, *Wetherington II*, 270 N.C. App. at 190. There is no "formulaic approach" for this determination. *See Watlington*, 261 N.C. at 770. Although not every *Wetherington* factor must favor the existence of just cause for it to exist,[13] *e.g.*, *id.* at 770-72 (determining just cause existed despite a lack of resulting harm), we may not ignore the absence of factors. *See Wetherington II*, 270 N.C. App. at 190 ("[The disciplining agency] could not rely on one factor while ignoring the others.").

---

13. Thus, DSS is correct when it argues "actual harm is not necessary to support a decision to terminate under the law."

We hold DSS failed to meet and carry its burden of proving it had just cause to dismiss Ayers for her UPC. In doing so, we do not "compar[e] the misconduct in this case to the misconduct in . . . cases in which our appellate courts have held just cause for dismissal existed" or did not exist, *Watlington*, 261 N.C. at 770, but hold only "upon an examination of the facts and circumstances of [this] individual case[,]" as found by the ALJ and supported by substantial evidence. *Carroll*, 358 N.C. at 669. Ayers's use of a racial slur in the workplace, even when not directed at a particular person and seemingly without the intent to convey racial animosity, was a severely unprofessional and insensitive choice. But the ALJ did not, and we cannot, ignore the considerable circumstances in mitigation: Ayers immediately and consistently recognized and regretted the wrongfulness of her conduct, DSS has not shown any harm had resulted by the time it terminated Ayers, Ayers had an otherwise unblemished employment history, and DSS has not historically dismissed employes for a single instance of UPC. In other words, despite the severity and seriousness, DSS has not established why appropriately addressing Ayers's UPC required it to deviate from its historical disciplinary practices where Ayers's UPC was an aberrant incident for which she readily accepted responsibility and felt remorse, especially where no actual harm resulted.

To conclude our just cause analysis, we address one more argument from DSS. It argues that

> to suggest that an agency tasked with protecting minority children is not harmed when a State employee says the N-word to her supervisor when trying to determine the race [of] a family receiving critical services[] is disingenuous to the equal rights movement and jurisprudence. Discipline amounting to nothing more than a slap on the wrist is a slap in the face to that policy and to all people receiving services therefrom. This [C]ourt should not cosign such inexplicable leniency and should instead draw a judicial line in the sand about what is and what is not appropriate within our governmental agencies.

Reasonable people can disagree about whether "the equal rights movement and jurisprudence" is best served by DSS's desired zero-tolerance policy[14] or one that offers those who engage in UPC an opportunity to learn from their mistakes and earn a second chance. But any "judicial

14. DSS acknowledges that "Hurd, by her actions, was setting 'a very strong zero tolerance standard[.]' "

line in the sand" has already been drawn on the far side of DSS's preferred option: "the better practice, in keeping with the mandates of both Chapter 126 and our precedents, [is] to allow for *a range of disciplinary actions* in response to an individual act of [UPC], rather than the categorical approach" that DSS sought to employ. *Wetherington I*, 368 N.C. at 593 (emphasis added). Since DSS has not shown just cause to dismiss Ayers for this individual act of UPC, its disciplinary action must fall elsewhere on this range.

F. ALJ's Alternative Discipline

We briefly mention the ALJ's alternative discipline.

> Under [N.C.G.S. § 126-34.02(a)(3)], the ALJ has express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's *de novo* review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief."
>
> Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and "balanc[es] the equities," the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions.

Harris, 252 N.C. App. at 109 (second, third, and fourth alterations in original); *see* N.C.G.S. § 126-34.02(a)(3) (2023).

Here, the ALJ ordered DSS to "retroactively reinstate Petitioner to the same or similar position she held prior to her dismissal with full back pay, suspend Petitioner for two weeks without pay, and order Petitioner to attend additional cultural diversity and racial sensitivity . . . training." Ayers does not contest that DSS had just cause to impose this form of discipline, and DSS does not argue it had just cause for discipline less than dismissal but greater than this alternative. Thus, the adequacy of this discipline is not before us, and we express no opinion on it.

G. Attorney Fees

We do not reach DSS's attorney fees argument. Pursuant to its authority, the ALJ ordered DSS to reimburse Ayers the cost of reasonable attorney fees. *See* N.C.G.S. § 126-34.02(e) (2023) ("The Office of Administrative Hearings may award attorneys' fees to an employee where reinstatement or back pay is ordered[.]"); *see generally Rouse v. Forsyth Cnty. Dep't of Soc. Servs.*, 373 N.C. 400 (2020); *see also Hunt v. N.C. Dep't of Pub. Safety*, 266 N.C. App. 24, 32, *disc. rev. denied*, 373 N.C. 60 (2019) ("A[n] [ALJ's] decision to grant attorneys' fees is discretionary."). DSS argues only that we should reverse the ALJ's award of attorney fees based on the merits. Since we uphold the ALJ's decision that Ayers prevails on the merits, we do not reach this argument. *Id.*

CONCLUSION

Reviewing de novo, based on the individual facts and circumstances of this case as reflected in the ALJ's findings of fact supported by substantial evidence, we conclude DSS failed to meet and carry its burden of proving it acted with just cause to dismiss Ayers. We affirm the ALJ's final decision.

AFFIRMED.

Judge TYSON concurs in result only.

Judge COLLINS dissents by separate opinion.

COLLINS, Judge, dissenting.

Petitioner was the supervisor for the Child Protective Services Unit at the Currituck County Department of Social Services ("DSS"). When responding to an inquiry from her supervisor, the DSS Director, as to what the racial demarcation "NR" meant on an intake form that had been completed by a social worker, Petitioner responded either "nigra rican" or "nigger rican." Petitioner initially laughed about the comment but became apologetic and embarrassed soon afterward. The sole issue before this Court is whether Petitioner's unacceptable personal conduct amounted to just cause for her dismissal. Because I believe Petitioner's unacceptable personal conduct was just cause for dismissal, I dissent from the majority opinion.

This Court has articulated a three-part analytical approach to determine whether just cause exists to support a disciplinary action against a career State employee for alleged unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012).

Here, there is no question that Petitioner engaged in the misconduct DSS alleged and that Petitioner's misconduct falls within one of the categories of unacceptable personal conduct. The only issue is whether that unacceptable personal conduct amounted to just cause for her dismissal.

"Just cause must be determined based upon an examination of the facts and circumstances of each individual case." *Wetherington v. N.C. Dep't of Pub. Safety*, 270 N.C. App. 161, 193, 840 S.E.2d 812, 834 (2020) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)). In examining the facts and circumstances of each individual case, an "appropriate and necessary component" of a decision to impose discipline on a career State employee is the consideration of certain factors, including: "the severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

Taking the first two factors together, the violation is severe precisely because of the subject matter involved. "Far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African-Americans. 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' . . . ." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)); *see Granger*

v. Univ. of N.C. at Chapel Hill, 197 N.C. App. 699, 706, 678 S.E.2d 715, 719 (2009) (quoting *Spriggs)*.

Furthermore, the harm, both resulting[1] and potential, was significant. Petitioner's conduct eroded the Director's trust in Petitioner's motives and judgment. Petitioner's conduct also negatively affected her African-American co-worker's ability to trust Petitioner's judgment and accept guidance from Petitioner. Moreover, DSS has policies prohibiting individuals from using demeaning or inappropriate terms or epithets and telling off-color jokes concerning race. DSS has a duty to enforce these policies, and to further its stated goal of supporting parents by respecting each family's cultural, racial, ethnic, and religious heritage in their interactions with the family and the mutual establishment of goals. Finally, Petitioner's unacceptable personal conduct exposed DSS to vulnerability for negligent retention and supervision liability and violated DSS's compliance with the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000d, *et seq.*, which could jeopardize its receipt of federal funding.

There was no evidence in this case of discipline imposed in other cases involving similar violations in this or similar DSS offices. Thus, the fourth factor need not be considered. *See Wetherington*, 270 N.C. App. at 189-90, 840 S.E.2d at 831 (courts must consider "any factors for which evidence is presented"). Nonetheless, this case is similar to *Granger*, wherein an employee was dismissed for uttering a racial slur to a subordinate. 197 N.C. App. at 706-07, 678 S.E.2d at 719-20 ("By uttering this epithet in the workplace, where Petitioner was overheard by one of her subordinates, Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability.").

Although this appears to have been an isolated incident by Petitioner, a single act of unacceptable personal conduct can present just cause for any discipline, up to and including dismissal. *See Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17 ("One act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." (citations omitted)). When the facts and circumstances are considered together, I believe Petitioner's unacceptable personal conduct was just

1. "No showing of actual harm is required to satisfy definition (5) of [unacceptable personal conduct], only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (citing *Eury v. Emp't Sec. Comm'n*, 115 N.C. App. 590, 610-11, 446 S.E.2d 383, 395-96, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). The ALJ's conclusion in this case that Petitioner's unacceptable personal misconduct did not cause Respondent actual harm as a basis for concluding there was no just cause to dismiss Petitioner is thus erroneous.

cause for Petitioner's dismissal. I would thus reverse the ALJ's decision to award reinstatement and attorney's fees and affirm DSS's decision to terminate Petitioner.

DAN KING PLUMBING HEATING & AIR, LLC, PLAINTIFF
v.
AVONZO HARRISON, DEFENDANT

No. COA23-752

Filed 2 April 2024

1. Judges—trial judge—hearing on motion before judge's term ended—no written order—trial court's discretion to appoint new judge

In a legal dispute arising from the plumbing and HVAC installation services that plaintiff business provided for defendant customer, where the appellate court in a prior appeal remanded the case to the trial court for further fact-finding, and where the original trial judge subsequently held a hearing on plaintiff's motion to amend the judgment in the matter (filed after the appellate court entered its opinion but before the trial court reheard the case on remand) just before the judge's term ended, although the judge stated at the hearing how she would have ruled on plaintiff's motion, there was no evidence in the record that the judge had prepared a written order that was ready to be signed upon her term's expiration. Therefore, the trial court was entitled to exercise its discretion to appoint a new trial judge to hold a new hearing and enter a written ruling on the unresolved motion.

2. Courts—trial court—interpretation of instructions for remand—discretion to order new trial on specific issues

In a legal dispute arising from the plumbing and HVAC installation services that plaintiff business provided for defendant customer, where defendant counterclaimed that plaintiff engaged in unfair and deceptive trade practices (UDTP) by selling him duplicate warranties, and where the appellate court in a prior appeal remanded the matter for "further fact-finding" on defendant's UDTP claim (and, specifically, on the issue of whether defendant could have discovered the duplicate warranties through reasonable diligence), the trial court did not abuse its discretion on remand by ordering a new trial on the UDTP claim. The appellate court's instructions could not

have been a directive for the trial court to make new findings without a new trial, since the appellate court emphasized that there were no jury findings made and no evidence presented on the reasonable diligence issue in the first trial. Additionally, where defendant had also counterclaimed for breach of contract under three theories, and where the appellate court explicitly remanded for a new trial on defendant's breach of contract claim under one theory only (failure to perform in a workmanlike manner), the trial court did not abuse its discretion by complying with the appellate court's order because trial courts may in their discretion order a partial new trial on just one issue or part of a claim.

Appeal by plaintiff from an order entered 25 April 2023 by Judge Matt Newton in Mecklenburg County District Court. Heard in the Court of Appeals 24 January 2024.

Hull & Chandler, P.A., by Nathan M. Hull, for Plaintiff-appellant.

Devore, Acton, & Stafford, P.A., by Joseph R. Pellington, for Defendant-appellee.

WOOD, Judge.

On 18 January 2022, this Court rendered an opinion on issues arising from these parties' dispute pertaining to plumbing services rendered by Dan King ("Plaintiff") for Avonzo Harrison ("Defendant"). *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 281 N.C. App. 312, 869 S.E.2d 34 (2022) ("*Dan King Plumbing I*"). Plaintiff contends the trial court erred in its interpretation of this Court's remand orders in *Dan King Plumbing I*. For the reasons stated below, we affirm the trial court's order.

I. Factual and Procedural History

The source of the parties' dispute is Plaintiff's installation of an HVAC system in Defendant's home. Plaintiff began work in November 2017, and the plumbing work was completed and passed final inspection on 4 December 2017. *Dan King Plumbing I*, 281 N.C. App. at 314–15, 869 S.E.2d at 39–40. In August 2018, Plaintiff filed a small claims action against Defendant for monies owed for services Plaintiff rendered. *Id.* at 317, 869 S.E.2d at 41. A magistrate dismissed the action, and Plaintiff appealed to the district court. In November 2018, Defendant filed a counterclaim against Plaintiff, "alleging various misrepresentations and

contractual breaches." *Id.* at 318, 869 S.E.2d at 41. In an amended counterclaim, Defendant added claims for breach of contract, unfair and deceptive trade practices, fraud, and breach of the implied warranty of workmanship. Ultimately, the case proceeded to trial with Judge Paulina Havelka ("Judge Havelka") presiding, after which a "jury returned a verdict in favor of Defendant on all breach of contract claims and findings of fact concerning the UDTP [unfair and deceptive trade practices] claims. The jury awarded Defendant damages in the amount of $15,572 for the breach of contract and $15,000 for injuries associated with the UDTP claims." *Id.* at 318, 869 S.E.2d at 42.

After trial, in February 2020, Judge Havelka held an additional hearing "to determine whether the facts found by the jury amounted to UDTP as a matter of law." *Id.* On 11 March 2020, Judge Havelka entered a "written judgment in favor of Defendant, awarding him damages of $15,572 plus interest on the breach of contract claims . . . . The judgment noted that none of the jury's findings amounted to unfair or deceptive trade practices[ ] and dismissed all of the parties' remaining claims with prejudice." *Id.* at 319, 869 S.E.2d at 42. Both parties appealed.

In adjudicating the parties' appeal, this Court first determined whether the jury's findings amounted to UDTP, which Defendant argued Plaintiff committed "in three respects: (1) by superimposing Mr. Harrison's signature on the amended contract; (2) by selling him duplicate warranties [the "duplicate warranties claim"]; and (3) by misrepresenting the completeness of the work via the installation checklist." *Id.* at 319–21, 869 S.E.2d at 42–43. Specifically, this Court "examine[d] two corollary doctrines under our UDTP caselaw—the 'aggravating circumstances' doctrine, and the 'reliance' doctrine." *Id.* at 319–20, 869 S.E.2d at 42. This Court affirmed Judge Havelka's rulings as to the superimposition of Defendant's signature and the installation checklist—that neither allegation of misconduct constituted a UDTP claim. *Id.* at 324, 328, 869 S.E.2d at 45, 48. As for the sale of duplicate warranties, this Court first held "the aggravating circumstances doctrine is not triggered." *Id.* at 325, 869 S.E.2d at 46. Second, this Court applied the reliance doctrine to the claim, examining whether Defendant's reliance on Plaintiff's misrepresentation was reasonable. *Id.* This Court held:

> [*W*]*e are unable to determine based on the record* whether Defendant would have discovered the existence of the duplicate warranties through reasonable diligence at the time of the original contract, and *we do not have the benefit of any jury findings on this issue*. During trial, *no evidence* was presented regarding whether the existence

> of HVAC manufacturer warranties is considered "common knowledge" (especially to a layperson); *no evidence* was presented regarding how it was that Defendant ultimately came to discover the existence of the manufacturer warranties; and *no evidence* was presented regarding whether it was a common practice in the HVAC industry to sell parts warranties for products that were already covered by a manufacturer warranty.

Id. at 326, 869 S.E.2d at 47 (emphasis added). Ultimately, this Court held Judge Havelka erred in her determination that Defendant's duplicate warranties claim failed as a matter of law and therefore "remand[ed] for further fact-finding on the issue of Defendant's reasonable diligence in discovering the existence and coverage of the duplicate warranties." *Id.* at 327, 869 S.E.2d at 47.

In *Dan King Plumbing I*, this Court also addressed Plaintiff's argument "that the trial court erred in failing to grant a directed verdict on Defendant's breach of contract claims." *Id.* at 331, 869 S.E.2d at 50. This Court clarified Defendant's position that Plaintiff "committed a breach of contract in three main respects: (1) by installing different equipment than was originally called for (such as the water heaters); (2) by charging a higher price than was originally called for; and (3) by performing substandard work, such as on the re-piping and insulation projects" (the "workmanship claim"). *Id.* Plaintiff argued that "in order to bring a proper claim for failure to construct in a workmanlike manner, [Defendant] must put on expert testimony to establish the relevant standard of care." *Id.* at 332, 869 S.E.2d at 50. This Court agreed with Plaintiff, stating, "at least some expert evidence must be presented to sustain a claim such as this." *Id.* at 332, 869 S.E.2d at 51. This Court noted that at trial, "Defendant did not offer any expert testimony to demonstrate that the plumbing work was not performed in a workmanlike manner. Instead, Defendant offered his own lay-testimony" which this Court held was inadequate as a matter of law to prove Defendant's workmanship claim. *Id.* at 335, 869 S.E.2d at 52. Accordingly, this Court stated, "We reverse and remand for a new trial *on this claim*." *Id.* (Emphasis added). As for Defendant's two other breach of contract claims, this Court held, "sufficient evidence was presented to allow these claims to proceed to the jury," and therefore, "the trial court did not err in refusing to grant a directed verdict on Defendant's remaining breach of contract claims." *Id.* Specifically, this Court "remand[ed] for a new trial on Defendant's claim for failure to perform in a workmanlike manner under a construction or building contract." *Id.* at 331, 869 S.E.2d at 50.

Subsequent to the filing of this Court's opinion in *Dan King Plumbing I*, and with the trial court having taken no further action on remand, Plaintiff filed a "motion to amend judgment to conform to appealate [sic] opinion including motion for a new trial" on 21 October 2022. In it, Plaintiff requested:

> [F]urther findings of fact [to] be added to the Judgment in this matter in compliance with . . . the Opinion or other corrective action[,] . . . entry of directed verdict against Defendant's breach of contract claim as provided in . . . the Opinion and order a new trial on the breach of contract claim which was not divided out as separate an[d] independent from the breach relate to workmanship, or otherwise resolve outstanding issues in this case.

On 13 December 2022, Judge Havelka held a hearing on the motion. During that hearing, she discussed her interpretation of this Court's ruling in *Dan King Plumbing I*:

> I assure you, the only thing I need to redo on the unfair and deceptive is rewrite the facts that needed to be in there the first go-round[.]
>
> . . .
>
> My fault that I didn't have enough facts there for the unfair and deceptive. But I assure you, I have no – I'm so familiar with this case.
>
> . . .
>
> And yes, I agree that there is no other option but to try the workmanship claim on the breach of contract. I'm not changing my mind on the unfair and deceptive.
>
> I think what the Court of Appeals did is basically nudge me, and say, judge, you knew better than to sign that order. You needed more facts. And that's exactly what I intend on doing.

However, Judge Havelka did not prepare or file a written order on Plaintiff's "motion to amend judgment," and the matter was assigned to Judge Matt Newton (the "trial court"), who held a new hearing on 1 March 2023 on Plaintiff's motion. During that hearing, Plaintiff's counsel argued, "Regarding the issue of findings of fact [pertaining to the UDTP duplicate warranties claim], the Court of Appeals specifically stated add findings of fact, it did not state have a new trial." The trial

court disagreed with Plaintiff's counsel's interpretation of this Court's ruling in *Dan King Plumbing I*, stating:

> So I think that we patently disagree on our interpretation of the Court of Appeals' opinion inasmuch as the issue pertaining unfair and deceptive trade practices and more particularly the reliance element to establish an unfair and deceptive trade practice claim for duplicate warranty here. I don't understand why they would -- the Court of Appeals would ask so if not for a change in ruling, and to remand for findings or fact via a jury trial.
>
> I don't understand why it would be remanded in the way it was and why they would request -- specifically request more testimony. Inasmuch as the testimony that was requested, they referenced evidence needing to be presented pertaining to whether the existence of HVAC manufacturer warranties are considered common knowledge, regarding -- so evidence regarding how Defendant ultimately came to discover the existence of manufacturer's warranties; evidence of whether it was common practice in the HVAC industry to sell parts and warranties for products that were already covered by a manufacturer warranty. And also included other examples of relevant evidence such as warranty extending beyond a manufacturer's warranty.
>
> So whether that occurs in this instance, whether the Plaintiff provided a warranty as a member of the local community and its relevance and so forth. I am at a loss to understand why there would be that particular or those particular instances of the need for additional testimony if it was something that was to be pursued outside the context -- at least on that particular issue -- outside the context of a de novo trial.
>
> At the same time, inasmuch as the directed verdict is concerned, it's my understanding after reading the Court of Appeals' decision that the reversible error was because no expert testimony was provided. And I think that that was very clear. The desire for there to be expert testimony to be provided to make a more clearer or for the court to make a more clearer decision on whether a directed verdict is necessary or would be applicable here.

> And in the absence of that, this court isn't prepared to proceed forward.

Ultimately, in a written order filed 25 April 2023, the trial court denied Plaintiff's motion and ordered "(1) a new trial on the proximate cause/reliance issue with respect to the duplicate warranties under the Defendant's unfair and deceptive trade practices cause of action; [and] (2) a new trial on the Defendant's workmanship breach of contract cause of action." Plaintiff filed notice of appeal on 26 April 2023.

II. Analysis

A. Appellate Jurisdiction

Plaintiff appeals as of right pursuant to N.C. Gen. Stat. 7A-27(b)(3)(d), which states that "appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [g]rants or refuses a new trial." Here, the trial court entered an order on Plaintiff's "motion to amend judgment to conform to [appellate] opinion including motion for a new trial" in which it ordered a new trial. Accordingly, the trial court's order is appealable as of right under N.C. Gen. Stat. 7A-27(b)(3)(d).

B. Trial Court's Action in Prior Judge's Absence

[1] Plaintiff argues the trial court was not authorized to enter an order on his motion because Judge Havelka's term had ended, and the trial court did not follow the proper procedures to finish its work on the case.

First, Plaintiff argues Judge Havelka left an order waiting to be signed and should have been recalled and commissioned to complete her work on the case. N.C. Gen. Stat. § 7A-53 provides:

> No retired judge of the district or superior court may become an emergency judge except upon the judge's written application to the Governor certifying the judge's desire and ability to serve as an emergency judge. *If the Governor is satisfied that the applicant qualifies under G.S. 7A-52(a)* to become an emergency judge and the applicant is physically and mentally able to perform the official duties of an emergency judge, the Governor shall issue to the applicant a commission as an emergency judge of the court from which the applicant retired.

N.C. Gen. Stat. § 7A-53 (2023) (emphasis added). Second, Plaintiff argues the trial court should have followed the procedures outlined in N.C. R. Civ. P. 63, including tasking the chief judge of the district with handling the issues on remand. N.C. R. Civ. P. 63 provides:

> If by reason of . . . expiration of term, . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . .
>
> > (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

Here, Plaintiff provides no argument or evidence regarding whether Judge Havelka would have qualified pursuant to N.C. Gen. Stat. § 7A-52(a) to be appointed as an emergency judge or that the Governor would have appointed her. Most importantly, there is no evidence in the Record that Judge Havelka prepared an order that was ready to be signed. She held a hearing on Plaintiff's motion which requested that she act pursuant to this Court's opinion in *Dan King Plumbing I*. During that hearing, she said how she *would rule* on the motion, but she did not enter an order.

"A judgment is 'entered' when it is 'reduced to writing, signed by the judge, and filed with the clerk of court.' An announcement of judgment in open court constitutes the rendition of judgment, not its entry." *West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573–74 (1998) (quoting N.C. R. App. P. 58). "[A]n oral ruling announced in open court is 'not enforceable until it is entered.' " *In re Thompson*, 232 N.C. App. 224, 227, 754 S.E.2d 168, 171 (2014) (quoting *West*, 130 N.C. App. at 756, 504 S.E.2d at 574). There is no evidence Judge Havelka entered an order or that she drafted an order and left it for the chief district court judge to sign after her term ended. Thus, the trial court was entitled to exercise its discretion and hold a new hearing on the unresolved motion and enter its own ruling on the matter.

C. The Trial Court's Order on Plaintiff's Motion to Amend Judgment

[2] Plaintiff next argues the trial court erred in granting a new trial on the duplicate warranties claim because this Court in *Dan King Plumbing I* merely remanded the issue for "further fact-finding on the

issue of Defendant's reasonable diligence in discovering the existence and coverage of the duplicate warranties." *Dan King Plumbing I*, 281 N.C. App. at 327, 869 S.E.2d at 47. Plaintiff also argues the trial court erred in granting a new trial on Defendant's workmanship claim because Defendant's breach of contract claim was not separated into distinct verdicts or theories but rather combined as one question on the verdict sheet.

Regarding matters "left to the discretion of the trial court," our Supreme Court has stated:

> [A]ppellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

First, we address the trial court's grant of a new trial on the duplicate warranties claim. Plaintiff argues the trial court merely should have made or added findings of fact to support Judge Havelka's original determination that the jury's findings regarding Defendant's duplicate warranties claim did not amount to UDTP as a matter of law. Specifically, Plaintiff argues this Court's order on remand for "further fact-finding on the issue of Defendant's reasonable diligence" was a directive to the *trial court* to make further findings of fact.

"Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has on the marketplace. Based upon the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates this section." *United Lab'ys, Inc. v. Kuykendall*, 102 N.C. App. 484, 490-91, 403 S.E.2d 104, 109 (1991).

Here, the trial court did what is directed by *Kuykendall*. The jury reached its verdict, making findings of fact relevant to Defendant's UDTP claims. The trial court, equipped with the jury's resolution of the facts, found:

> It is decreed that the acts Plaintiff committed as enumerated in Verdict Issue #8, Issue #9, Issue #10, and Issue #11

> do not, as a matter of law, constitute unfair or deceptive trade practices or acts, and therefore no Judgment is entered in accordance with the Jury's Verdict for violations of N.C. Gen. Stat. § 75-1.1 by Plaintiff.

(Capitalization modified for ease of reading). In reviewing Judge Havelka's judgment, and specifically, the issue of whether Defendant's reliance on Plaintiff's misrepresentation was reasonable, this Court stated, "we do not have the benefit of any jury findings on this issue." *Dan King Plumbing I*, 281 N.C. App. at 326, 869 S.E.2d at 47. This Court then noted that "[d]uring trial, no evidence was presented regarding" various issues of fact relevant to whether Defendant's reliance was reasonable. *Id.* at 327, 869 S.E.2d at 47. Therefore, the trial court could not have made the factual findings which this Court deemed essential to Defendant's duplicate warranties claim. Accordingly, the trial court did not abuse its discretion in ordering a new trial on the "reliance issue with respect to the duplicate warranties" claim.

Second, we address the trial court's grant of a new trial on Defendant's workmanship claim. Plaintiff argues the "Court of Appeals made clear that [Plaintiff's] motion for directed verdict should have been granted regarding [Defendant's] workmanship claim."

Plaintiff's interpretation of this Court's opinion in *Dan King Plumbing I* is the opposite of what this Court held. This Court specifically stated, "We reverse and remand for a new trial *on this claim*," referring to "Defendant's claim for failure to perform in a workmanlike manner under a construction or building contract." *Id.* at 331, 335, 869 S.E.2d at 50, 52. Immediately thereafter, this Court stated:

> "As for Defendant's remaining breach of contract claims—failure to provide the correct water heater called for in the contract, and charging a higher price than called for—we conclude sufficient evidence was presented to allow these claims to proceed to the jury. . . . We accordingly hold that the trial court did not err in refusing to grant a directed verdict on Defendant's remaining breach of contract claims.

Id. at 335, 869 S.E.2d at 52.

"A court granting a new trial may in its discretion grant a partial new trial on one issue rather than a new trial on all issues." *Myers v. Catoe Const. Co.*, 80 N.C. App. 692, 696, 343 S.E.2d 281, 283 (1986). Accordingly, the trial court complied with this Court's order on remand

as to Defendant's breach of contract claim and did not abuse its discretion in ordering a new trial as to one particular issue or theory under the claim.

III. Conclusion

For the foregoing reasons, we conclude the trial court did not err by holding a new hearing and entering an order on Plaintiff's motion to amend judgment to conform to this Court's prior opinion in the absence of the original judge presiding over this matter. We further conclude the trial court did not abuse its discretion in granting a new trial on the proximate cause/reliance issue with respect to the duplicate warranties under the Defendant's UDTP cause of action and Defendant's workmanship breach of contract cause of action.

AFFIRMED.

Judges TYSON and ZACHARY concur.

FRANKLIN GARLAND, PLAINTIFF
v.
ORANGE COUNTY, ORANGE COUNTY BOARD OF COMMISSIONERS, DEFENDANTS
and
TERRA EQUITY, INC., DEFENDANT-INTERVENOR

No. COA23-588

Filed 2 April 2024

1. Appeal and Error—motion to partially dismiss defendant's appeal—motion to dismiss plaintiff's cross-appeal—plaintiff's petition for certiorari

In an action filed by plaintiff-landowner challenging a county board's rezoning of land located adjacent to plaintiff's property, where the trial court granted plaintiff's motion to enforce a settlement agreement he claimed to have entered into with defendant-company (the party who applied for the rezoning), plaintiff's motion to partially dismiss defendant's appeal was denied where, although defendant did not properly notice appeal from two interlocutory orders denying its motions to dismiss and for summary judgment, appellate review of those orders was permissible under N.C.G.S. § 1-278 because they involved the merits of the case and necessarily affected the trial court's final judgment. Further,

defendant's motion to dismiss plaintiff's cross-appeal was granted where plaintiff did not give timely notice of cross-appeal within the required ten-day period. Additionally, plaintiff's petition for a writ of certiorari to permit review of his cross-appeal was denied.

2. Contracts—settlement agreement—formation—statutory requirements—signature by party or designee—acceptance versus counter-offer

In an action filed by plaintiff-landowner challenging a county board's rezoning of land located adjacent to plaintiff's property, the trial court erred in granting plaintiff's motion to enforce a settlement agreement he claimed to have entered into with defendant-company (the party who applied for the rezoning). Although defendant's counsel sent an email memorializing the proposed settlement terms and promising to draft a settlement agreement for the parties to sign, this email reflected, at best, an agreement to agree. Even if the email had supported the formation of a contract, it did not comply with the statutory requirements for mediated settlement agreements because defendant did not sign it, there was no evidence that defendant's counsel was a designee for purposes of the statute, and, at any rate, defense counsel's name typed at the bottom of the email did not constitute an electronic signature. Further, plaintiff never accepted defendant's settlement offer given that he replied to the email with a counter-offer proposing revisions to the agreement.

3. Civil Procedure—Rule 41—relation back—lawsuits challenging rezoning decision—different causes of action asserted

In plaintiff-landowner's third lawsuit challenging a county board's rezoning of land located adjacent to plaintiff's property, the trial court erred in declining to dismiss the lawsuit as untimely where, under Civil Procedure Rule 41(a)(1), the suit did not relate back to plaintiff's previous lawsuit, which he filed within the applicable statute of limitations and then voluntarily dismissed. Although the complaints in both lawsuits requested injunctive relief and contained similar allegations, plaintiff's new complaint requested a declaratory judgment stating that the rezoning was arbitrary and capricious and that it violated his due process rights, whereas his prior complaint challenged the rezoning on completely different grounds (namely, that it violated the local zoning ordinance, the county's "Mission Statement," and the board of county commissioners' "Goal and Priorities").

Appeal by defendant-intervenor from order entered 13 September 2022 by Judge Allen Baddour in Superior Court, Orange County. Heard in the Court of Appeals 28 February 2024.

Davis Hartman Wright, LLP, by R. Daniel Gibson, for plaintiff-appellee.

James Bryan, Joseph Herrin, and John L. Roberts, for defendants-appellees Orange County and Orange County Board of Commissioners.

Fox Rothschild LLP, by Kip D. Nelson, Matthew Nis Leerberg, and Nathan Wilson, and Manning Fulton & Skinner P.A., by Judson A. Welborn, for intervenor-appellant Terra Equity, Inc.

ARROWOOD, Judge.

Terra Equity, Inc. ("defendant") appeals from order granting Franklin Garland's ("plaintiff") motion to enforce a settlement agreement. On appeal, defendant argues (1) the trial court erred by enforcing the settlement agreement, (2) plaintiff did not have standing to bring the underlying suit, and (3) the trial court erred by denying its motion to dismiss and motion for summary judgment. For the following reasons, we reverse the trial court and remand for dismissal of the action.

I. Background

This dispute involves the zoning of three parcels of land adjacent to plaintiff's property ("parcels 1, 2, and 3"), on which plaintiff operates a truffle tree nursery and orchard. In January 2018, the Orange County Board of Commissioners ("the Board") zoned approximately 195 acres of property, including parcels 1 and 2, as Master Plan Developmental Conditional Zoning ("MPD-CZ"); parcel 3 was zoned as Rural Residential. On 15 June 2020, defendant applied to rezone all three parcels as a new MPD-CZ district. On 15 and 22 September 2020, the Board held public hearings regarding the rezoning application and allowed public comment through 24 September 2020. The Board approved the application on 20 October 2020. In the decision, the Board approved a 50-foot reduction in the 100-foot required setback between plaintiff's property and the development, which defendant did not request until the public comment period had closed.

On 16 December 2020, plaintiff and other individuals filed a complaint challenging the Board's approval of the rezoning. On 4 March

2021, the Orange County Superior Court held that the plaintiffs in the initial lawsuit lacked standing and dismissed the suit with prejudice which was affirmed.

On 18 December 2020, plaintiff, acting pro se, filed a second complaint challenging the rezoning decision. In that complaint, plaintiff sought "to enjoin the Defendants from proceeding with the aforementioned project" and sought "injunctive relief because there is no other adequate remedy at law to preclude the violation[s]." Plaintiff alleged that the proposed development "is in violation of the UDO[,] . . . the Orange County Mission Statement[,] . . . [and] the Board of County Commissio[ners'] Goal and Priorities." The complaint also alleged that "Defendants have failed to perform environmental investigations and impact studies of Plaintiff's property." Plaintiff ultimately requested a permanent injunction "prohibiting Orange County from enforcing the Ordinance Amending the Orange County Zoning Atlas . . . and allowing development of the three parcels[.]" On 19 February 2021, plaintiff voluntarily dismissed his second lawsuit.

On 10 August 2021, Plaintiff filed a third complaint against Orange County and the Board. In this complaint, plaintiff sought to "challenge the rezoning of three parcels" and requested "a declaratory judgment that the Board of Commissioners' rezoning of the three parcels . . . was arbitrary and capricious, and . . . violated the Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, and the Law of the Land Clause of the North Carolina Constitution and is therefore, illegal, null, and void." The third complaint alleged that "the Board of Commissioners failed to address, discuss, and otherwise evaluate the compatibility and suitability of the proposed RTLP development" and "failed to comply with the requirements of its own zoning ordinance, the Orange County UDO" to support its claim of arbitrary and capricious zoning. Plaintiff further alleged that "[t]he Board . . . nor Orange County Staff made no investigation, findings, or recommendations regarding potential water quality impacts relating to the pond located on the Garland Property[,] . . . the increase in commercial vehicle traffic and related air pollution that would affect the pond and Orchard[,] . . . [or] the amount and flow of stormwater runoff to Plaintiff Garland's Property[.] Plaintiff also include facts regarding the alleged due process violation, such as the Board's decision to reduce the 100-foot, no-build setback between the parties' properties that occurred after the public comment period closed.

Defendant, as well as Orange County, filed a motion to dismiss the action, and the trial court denied the motions on 1 December 2021. Defendant then filed a motion for summary judgment on 31 January

2022, and the trial court granted the motion on all issues except the dispute regarding the 100-foot buffer on 3 May 2022.

The parties attended mediation in an attempt to reach settlement on the remaining setback issue. On 21 July 2022, defendant's counsel sent an email "to memorialize the terms of the parties' settlement reached at today's mediated settlement conference" and promising to draft a settlement agreement to circulate "for review and signature[.]" The following day, defendant's counsel sent plaintiff's attorney a proposed settlement agreement. On 29 July 2022, plaintiff's attorney sent an email with changes to the proposed settlement agreement. Defendant's counsel communicated that defendant required plaintiff to execute the agreement by 5:00 p.m. on 1 August 2022.

On 8 August 2022, defendant's attorney sent an email stating that defendant would proceed to trial unless plaintiff could agree to the "current settlement structure." On 11 August 2022, plaintiff's counsel sent additional changes to the proposed settlement agreement. Plaintiff's counsel sent another email on 16 August 2022 agreeing to the initial draft agreement defendant's counsel sent on 22 July 2022, and defendant refused to sign the agreement.

Plaintiff moved to enforce the settlement agreement, and the trial court granted the motion on 13 September 2022. Defendant appealed from the trial court's order on 7 October 2022. On 13 March 2023, plaintiff filed a notice of cross-appeal from the 3 May 2022 order granting partial summary judgment.

Plaintiff later filed a motion to partially dismiss defendant's appeal on 17 July 2023, and defendant filed a motion to dismiss plaintiff's cross-appeal on 19 July 2023. On 23 February 2024, five days prior to the date scheduled for oral argument, plaintiff filed a petition for writ of certiorari, and defendant timely responded.

II. Discussion

A. Motions

[1] Before reaching the merits of defendant's appeal, we address: (1) plaintiff's motion to partially dismiss defendant's appeal, (2) defendant's motion to dismiss plaintiff's cross-appeal, and (3) plaintiff's petition for writ of certiorari.

1. Plaintiff's Motion to Partially Dismiss Appeal

Plaintiff moved to partially dismiss defendant's appeal on the grounds that it did not properly notice appeal of the trial court's orders

denying defendant's motion to dismiss and partially denying defendant's motion for summary judgment.

Pursuant to North Carolina statute, "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C.G.S. § 1-278 (2023).

> This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to [N.C.G.S.] § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Tinajero v. Balfour Beatty Infrastructure, Inc., 233 N.C. App. 748, 758 (2014) (citation omitted).

Here, the trial court's denial of the motions to dismiss and for summary judgment were interlocutory, and defendant appropriately waited until final judgment to appeal those orders. Under N.C.G.S. § 1-278, the orders denying the motions involved the merits and necessarily affected the judgment because had they been granted, the trial court would not have ordered to enforce the settlement agreement. *See In re Ernst & Young, LLP*, 191 N.C. App. 668, 672–73, (2008), *aff'd in part, modified in part and remanded on other grounds*, 363 N.C. 612 (2009) ("The order denying intervenor's motion to dismiss was an intermediate order that involved the merits and affected the final judgment because if it had been granted, the trial court would not have issued the Order to Comply."). We therefore deny plaintiff's motion.

2. Defendant's Motion to Dismiss Cross-Appeal

Next, defendant argues that plaintiff's cross-appeal is untimely. On 7 October 2022, defendant appealed from the trial court's 13 September 2022 order enforcing the settlement agreement, which was a final judgment in the action below. Plaintiff did not file notice of cross-appeal until 13 March 2023. Plaintiff cites as a basis for the delayed filing his assertion that defendant failed to properly notice the appeals of the intermediate orders below. However, as discussed above, defendant's appeal encompassed the orders denying defendant's motion for summary judgment and motion to dismiss under N.C.G.S. § 1-278. Therefore, plaintiff had 10 days from defendant's appeal to file any notice of cross-appeal. N.C. R. App. P. 3(c)(3) ("If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within

ten days after the first notice of appeal was served on such party."). Because plaintiff filed his notice of cross-appeal after 17 October 2022, his cross-appeal was not timely, and we grant defendant's motion to dismiss the cross-appeal.

3. Plaintiff's Petition for Writ of Certiorari

Finally, plaintiff's petition for writ of certiorari argues that this Court should issue certiorari because (1) plaintiff was not on notice that defendant sought to appeal interlocutory orders, (2) plaintiff acted promptly when he was put on notice, (3) the Court will already be reviewing the summary judgment order, and (4) plaintiff's appeal presents meritorious issues. As plaintiff acknowledges, certiorari is "an extraordinary writ" this Court has discretion to issue. *Cryan v. Nat'l Council of Young Men's Christian Ass'ns*, 384 N.C. 569, 570 (2023). "When contemplating whether to issue a writ of certiorari, our state's appellate courts must consider a two-factor test. That test examines (1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ." *Id.* Extraordinary circumstances generally require "a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, (2020)). After review of plaintiff's petition, in our discretion, we deny plaintiff's petition and address defendant's remaining arguments.

B. Settlement Agreement

[2] Having disposed of the procedural issues, we now address the substantive issues raised by the appeal. Defendant first contends that the trial court erred in enforcing the settlement agreement because there was no settlement agreement. We agree.

For purposes of appellate review, "[a] motion to enforce a settlement agreement is treated as a motion for summary judgment[.]" *Williams v. Habul*, 219 N.C. App. 281, 288 (2012) (citations and internal quotation marks omitted). "A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Smith v. Young Moving and Storage, Inc.*, 167 N.C. App. 487, 492–93 (2004) (quoting *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829 (2000)) (internal quotation marks omitted). Matters of contract interpretation are questions of law this Court reviews de novo. *Powell v. City of Newton*, 200 N.C. App. 342, 344 (2009) (citations omitted).

Here, defendant's counsel sent an email on 21 July 2022 "to memorialize the terms of the parties' settlement reached at today's mediated settlement conference" and promising to draft a settlement agreement to circulate "for review and signature[.]" While plaintiff argues this email evidences an agreement, there are numerous reasons the email is insufficient to support the formation of a contract.

First, because the email contemplates a future agreement for signature, it is at best an agreement to agree. *See Boyce v. McMahan*, 285 N.C. 730, 734 (1974) (holding that a document "to enter into a preliminary agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date" was insufficient to create an enforceable contract).

Even assuming *arguendo* that this email would have been sufficient to support a contract formation, it does not comply with statutory requirements for mediated settlement agreements. North Carolina statute requires that "[n]o settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection . . . shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought or signed by their designees." N.C.G.S. § 7A-38.1(l). Thus, in order for the email in this case to be enforceable, the statute requires it to be signed by defendant or defendant's designees. Defendant's trial counsel included his name below the body of the email, a common practice in email correspondence. Plaintiff argues this constitutes a signature under the Uniform Electronic Transactions Act ("UETA"), which requires that the involved parties have agreed, based on the context and surrounding circumstances, to conduct a transaction by electronic means. N.C.G.S. § 66-315(b). Here, given defendant's counsel's provision within the email that he would send a future draft of the agreement for signature, it is clear that defendant did not intend to execute the settlement agreement via an email electronic signature. Thus, UETA does not apply.

Furthermore, N.C.G.S. § 7A-38.1(l) requires a signature on the mediated settlement agreement by defendant or defendant's designees, and here, defendant's counsel is the only name the email contains. Defendant itself did not sign the email correspondence, and nothing in the record supports plaintiff's contention that defendant's counsel was a designee for purposes of the statute. Therefore, the 21 July 2022 email fails to meet the statutory requirements to create an enforceable mediated settlement agreement.

Finally, plaintiff did not agree to the terms of defendant's proposed settlement agreement. The day after the 21 July email, defendant's

counsel sent plaintiff's attorney a proposed settlement agreement that required the parties' signatures. On 29 July 2022, plaintiff's attorney sent an email with changes to the proposed settlement agreement, effectively rejecting defendant's offer and proposing a new agreement. Defendant's counsel communicated that defendant required plaintiff to execute the agreement it drafted by 5 p.m. on 1 August 2022, and plaintiff did not accept the settlement offer by that date; thus, the offer was withdrawn.

On 8 August 2022, defendant's attorney renewed their initial offer, stating that defendant would proceed to trial unless plaintiff could agree to the "current settlement structure." On 11 August 2022, plaintiff's counsel sent additional changes to defendant's proposed settlement agreement, again rejecting defendant's offer and proposing a new agreement. Plaintiff's counsel later sent an email on 16 August 2022 agreeing to defendant's initial draft, but because plaintiff had rejected defendant's offer and counteroffered with revisions to the agreement, this action did not constitute an acceptance. *See Normile v. Miller*, 313 N.C. 98, 104 (1985) ("This qualified acceptance was in reality a rejection of the plaintiff-appellants original offer because it was coupled with certain modifications or changes that were not contained in the original offer. . . . Additionally, defendant-seller's conditional acceptance amounted to a counteroffer to plaintiff-appellants."). For each of the foregoing reasons, we find that the trial court erred in entering an order to enforce a settlement agreement.

C. Motion to Dismiss

[3] Defendant next argues that the trial court erred in denying its motion to dismiss. We agree.

Defendant contends that plaintiff lacked standing, and his third lawsuit fell outside the applicable statute of limitations. N.C.G.S. § 1-54.1 (limiting challenges to "any ordinance adopting or amending a zoning map or approving a conditional zoning district rezoning request" to 60 days). Even if we assume *arguendo* plaintiff had standing, his third lawsuit was not timely.

The Board approved defendant's application to rezone on 20 October 2020. While plaintiff filed his second lawsuit within the statute of limitations on 18 December 2020, he voluntarily dismissed his suit on 19 February 2021. Plaintiff then filed his third lawsuit on 10 August 2021, outside the statute of limitations.

Plaintiff argues that his third complaint was timely because his voluntary dismissal extended the statute of limitations under Rule of Civil

Procedure 41(a)(1), which states, in relevant part, that "[i]f 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[.]" N.C.G.S. § 1A-1, Rule 41(a)(1). However, the rule applies only when the new action "relates back" to the voluntarily dismissed action—when the new lawsuit is "based upon the same claim as the original action. . . . If the actions are fundamentally different, or not based on the same claims, the new action is not considered a continuation of the original action." *Brannock v. Brannock*, 135 N.C. App. 635, 639–40 (1999) (cleaned up); *see also Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 284 (2007) ("This Court has long held that the Rule 41(a) tolling of the applicable statute of limitations applies only to the claims in the original complaint, and not to other causes of action that may arise out of the same set of operative facts.").

Here, plaintiff's third lawsuit filed 10 August 2021 does not relate back to his second lawsuit dismissed on 19 February 2021. In the 10 August 2021 complaint, Plaintiff identified two causes of action: arbitrary and capricious rezoning and violation of his due process rights. In the original complaint, plaintiff simply stated that the proposed development "is in violation of the UDO[,] . . . the Orange County Mission Statement[,] . . . [and] the Board of County Commissio[ners'] Goal and Priorities." The new complaint alleged that "the Board of Commissioners failed to address, discuss, and otherwise evaluate the compatibility and suitability of the proposed RTLP development" and "failed to comply with the requirements of its own zoning ordinance, the Orange County UDO" to support its claim of arbitrary and capricious zoning.

The original complaint alleged that "Defendants have failed to perform environmental investigations and impact studies of Plaintiff's property[,]" and the new complaint similarly alleged that

> [t]he Board . . . nor Orange County Staff made no investigation, findings, or recommendations regarding potential water quality impacts relating to the pond located on the Garland Property[,] . . . the increase in commercial vehicle traffic and related air pollution that would affect the pond and Orchard[,] . . . [or] the amount and flow of stormwater runoff to Plaintiff Garland's Property[.]

Even if we read these allegations as broadly similar, plaintiff in the original complaint sought "to enjoin the Defendants from proceeding with the aforementioned project" and sought "injunctive relief because

there is no other adequate remedy at law to preclude the violation[s]." In the new complaint, plaintiff sought to "challenge the rezoning of three parcels" and requested "a declaratory judgment that the Board of Commissioners' rezoning of the three parcels . . . was arbitrary and capricious, and . . . violated the Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, and the Law of the Land Clause of the North Carolina Constitution and is therefore, illegal, null, and void." While the new complaint also requested a permanent injunction "prohibiting Orange County from enforcing the Ordinance Amending the Orange County Zoning Atlas . . . and allowing development of the three parcels[,]" plaintiff made no reference in his initial complaint to the causes of action alleged in the new complaint. Nowhere in the original complaint does plaintiff allege the Board acted in an arbitrary and capricious manner; plaintiff alleged the Board violated its own policies, but this allegation does not itself state a claim for arbitrary and capricious rezoning. Further, the original complaint contained no relevant factual or legal allegations supporting a due process violation.

The third complaint does not contain the same claims as the second complaint, thereby negating the ability to relate back to the timely complaint and meet the tolling requirements of Rule 41. Therefore, the complaint filed 10 August 2021 was untimely, and the trial court erred in denying the motion to dismiss.

III. Conclusion

For all the foregoing reasons, we hold the trial court erred in granting plaintiff's motion to enforce the settlement agreement and in denying defendant's motion to dismiss. Accordingly, we reverse and remand with instruction to dismiss plaintiff's third complaint with prejudice.

REVERSED AND REMANDED.

Judges COLLINS and STADING concur.

GRIFFING v. GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A.

[293 N.C. App. 243 (2024)]

JOHN GRIFFING, PLAINTIFF
v.
GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A., DEFENDANT/COUNTERCLAIMANT
v.
JOHN GRIFFING, COUNTERCLAIM DEFENDANT

No. COA23-710

Filed 2 April 2024

1. Appeal and Error—interlocutory order—denying motion to compel arbitration—substantial right—statutory right of appeal

In a legal dispute between a law firm and one of its former attorneys, the trial court's order denying the law firm's motion to compel arbitration was immediately appealable because: (1) such orders, though interlocutory, impact a substantial right that might be lost absent immediate appeal, and (2) the Arbitration Act specifically provides for an immediate right of appeal from orders denying motions to compel arbitration (N.C.G.S. § 1- 569.28(a)(1)).

2. Arbitration and Mediation—motion to compel arbitration—by nonparty to a contract—no claims arising from contract—no equitable estoppel

In a lawsuit where an attorney alleged that his former law firm had breached its duties under a series of contracts between them, the trial court properly denied the firm's motion to compel arbitration pursuant to an agreement memorializing plaintiff's purchase of a partnership interest in the company from which the firm leased office space. In certain circumstances, a signatory to a contract containing an arbitration clause may be equitably estopped from arguing against a nonsignatory's efforts to enforce the arbitration clause. Here, however, because none of the attorney's claims against the firm (a nonsignatory to the purchase agreement) asserted the breach of a duty created under the purchase agreement, the firm could not enforce the agreement's arbitration clause under an equitable estoppel theory.

3. Arbitration and Mediation—motion to compel arbitration—profit-sharing agreement—between law firm and two associates—"participating attorney" to agreement—neither an individual party nor third-party beneficiary

In a lawsuit where an attorney (plaintiff) alleged that his former law firm had breached its duties under a series of contracts between them, the trial court properly denied the firm's motion to

compel arbitration pursuant to an agreement detailing how the firm and two of its associates would share profits from a class action that the associates were working on. Plaintiff was not bound by the arbitration clause in that agreement because, although he had signed the agreement as a "participating attorney," the plain text of the agreement demonstrated that the true parties to it were the firm and the two associates; further, none of plaintiff's claims against the firm—including that the firm failed to reimburse him for expenses he advanced in the class action—arose from the agreement. Additionally, plaintiff was not obligated to arbitrate his claims as a third-party beneficiary to the agreement because any benefits he received from the profits made in the class action were incidental rather than directly intended under the agreement.

Appeal by defendant/counterclaimant from order entered 30 May 2023 by Judge Reginald E. McKnight in Gaston County Superior Court. Heard in the Court of Appeals 9 January 2024.

Pangia Law Group, by Amanda C. Dure, and Joseph L. Anderson, for plaintiff-appellee.

Bell, Davis & Pitt, P.A., by Edward B. Davis and Kevin J. Roak, for defendant-appellant.

ZACHARY, Judge.

This case returns to this Court upon the trial court's entry of a revised order following our vacatur and remand in *Griffing v. Gray, Layton, Kersh, Solomon, Furr & Smith, P.A.* ("*Griffing I*"), 287 N.C. App. 694, 883 S.E.2d 129, 2023 WL 2127574 (2023) (unpublished). Defendant Gray, Layton, Kersh, Solomon, Furr & Smith, P.A. ("Gray Layton"), a North Carolina law firm, appeals the trial court's order denying Gray Layton's motion to compel arbitration. After careful review, we affirm.

I. Background

This appeal concerns a series of four agreements between Gray Layton, Plaintiff John Griffing, and various third parties. The central issue before us is whether Plaintiff's claims against Gray Layton are subject to arbitration under the provisions of these agreements.

The first agreement ("the Shareholder Agreement") is between Plaintiff and Gray Layton. Plaintiff signed the Shareholder Agreement when he "joined Gray Layton as a shareholder on or about 6 March

2000." *Griffing I*, at *1. "The [S]hareholder [A]greement d[oes] not contain an arbitration clause." *Id.*

The second agreement ("the COBRA Properties Agreement") is between Plaintiff; COBRA Properties, L.L.P. ("COBRA Properties"); and its existing members. This agreement arose in conjunction with Gray Layton's offer to Plaintiff to join the firm:

> Together with its offer to join the firm, Gray Layton offered Plaintiff the option to buy into COBRA Properties, . . . the entity from which Gray Layton leased office space. On or about 20 April 2001, Plaintiff bought into COBRA Properties, and in August 2018, he purchased an additional interest in the partnership.

Id. Under the terms of the COBRA Properties Agreement, the members of COBRA Properties receive prorated shares of the net profits, including rental income. The COBRA Properties Agreement contains an arbitration clause; it provides that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled, if allowed by law, by arbitration[.]" By entering into the COBRA Properties Agreement, Plaintiff "agree[d] to be bound . . . as if he were an original signatory."

The third agreement ("the COBRA Lease") is the rental agreement pursuant to which Gray Layton leased office space from COBRA Properties. *Id.* Under the COBRA Lease, Gray Layton's office rent was scheduled to increase by three percent annually. *Id.* The COBRA Lease does not contain an arbitration clause. *Id.*

The fourth agreement ("the Class Action Agreement") is an intrafirm agreement between Gray Layton and two of its associate attorneys. Plaintiff signed the Class Action Agreement not as an individual party, but rather as a "participating attorney" within the terms of the contract:

> In 2012, the shareholders of Gray Layton "decided to accept a large class action case on a contingent fee basis." The Gray Layton shareholders entered into an agreement with two associates regarding the class action lawsuit, pursuant to which "[t]he individual shareholders in [Gray Layton] agreed to pay the expenses and overhead for the class action litigation." In addition, the associates agreed to "devote a substantial amount of time and attention" to the lawsuit in exchange for each receiving ten percent of the gross attorney's fees. Seventy percent of the gross fees were to be "divided in shares among the undersigned

> 'Participating Attorneys' "; Plaintiff signed the agreement as one such "participating attorney."

Id. (alterations in original). The Class Action Agreement contains an arbitration clause, which provides that "the parties agree to submit their dispute(s) to binding arbitration to be conducted in Gastonia, NC." *Id.*

As we detailed in *Griffing I*, the present case began once Plaintiff left Gray Layton:

> On 31 October 2019, Plaintiff left Gray Layton as a result of the financial burden of "carrying his overhead for his profit center" and "paying for firm overhead to the other shareholders." On 25 October 2021, Plaintiff filed a complaint in Gaston County Superior Court against Gray Layton, alleging breach of contract and failure to provide Plaintiff with a shareholder accounting or to allow Plaintiff to inspect Gray Layton's books and records.
>
> Concerning the breach of contract claim, Plaintiff asserted that Gray Layton "violated the shareholder agreements as well as other side agreements" by failing to: (1) buy back his stock in Gray Layton within sixty days of his departure from the firm; (2) buy back his stock "at the agreed upon price"; (3) "adequately compensate Plaintiff for the revenue stream he brought into the firm"; (4) "properly allocate overhead against the cost centers that used the services provided by the entire firm"; (5) pay the COBRA Properties partners "the 3% rent increases as required by the lease" between Gray Layton and COBRA Properties; and (6) reimburse Plaintiff for the expenses that he advanced for the class action lawsuit. Plaintiff attached to his complaint copies of the [Shareholder Agreement], the [COBRA Properties Agreement], the [COBRA Lease], and the [Class Action Agreement].

Id. (cleaned up).

Gray Layton filed an answer in which it generally denied Plaintiff's allegations, advanced several affirmative defenses, and asserted counterclaims for breach of contract and conversion. *Id.* at *2. Gray Layton also filed a motion to compel arbitration, *id.*, which included a motion to stay all proceedings pending arbitration. By order entered on 24 February 2022, the trial court denied Gray Layton's motion with prejudice, concluding that "this matter is not subject to arbitration[.]"

Following Gray Layton's appeal, this Court vacated and remanded the matter to the trial court because the "order contain[ed] no findings of fact evincing the rationale underlying the trial court's decision to deny Gray Layton's motion." *Id.* at *3 (cleaned up). As we explained:

> Plaintiff attached four agreements to his complaint, and he alleged with regard to the breach of contract claim that "Gray Layton has violated the [Shareholder Agreement] *as well as other side agreements*." Two of the four referenced agreements contained mandatory arbitration clauses. However, the court neglected to state which, if either, of the two it considered to be valid agreements to arbitrate between these parties or whether the disputes raised in this action fall within the scope of any such valid agreement.

Id. (cleaned up).

Post-remand, on 30 May 2023, the trial court entered a revised order containing additional findings of fact. The trial court found:

> 1. . . . Gray Layton moved to compel arbitration in the claim filed by Plaintiff . . . arising out of [Plaintiff]'s breach of contract action against Gray Layton seeking damages owed to [Plaintiff] as a result of expenses and overhead expended pursuant to the Shareholder Agreement between Gray [Layton] and [Plaintiff]. See Exhibit A, [the] Shareholder Agreement.
>
> 2. The basis of the breach of contract action arises out of the Shareholder Agreement entered into between Gray Layton and [Plaintiff] on March 6, 2000.
>
> 3. [Plaintiff] further alleged failures of Gray Layton to adequately compensate him for the revenue he brought into the firm; the failure to purchase [Plaintiff]'s stock in Gray Layton at the agreed upon price or time; the failure of Gray Layton to pay [COBRA] Properties, LLP partners rent increases required by the lease; and the failure to adequately compensate [Plaintiff] for his interest in the class action matter.
>
> 4. There is no arbitration clause in the Shareholder Agreement.
>
> 5. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. *See Hager*

> *v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 361, 526 S.E.2d 567, 575 (2019). Because the Shareholder Agreement between Gray Layton and [Plaintiff] lack[s] a binding arbitration agreement, it cannot serve as the basis to compel arbitration.
>
> 6. . . . Gray Layton also cited to three other agreements as grounds for its motion to compel arbitration: (1) the [COBRA Properties Agreement]; (2) the [COBRA Lease]; and (3) the Class Action [Agreement].
>
> 7. The [COBRA Properties Agreement] is entered into between [COBRA] Properties, LL[P] and [Plaintiff], individually. The Court finds that Cobra Properties, LL[P] is an entirely separate entity from the parties in this matter and no privity exists between the parties, nor does this dispute fall within the scope of the arbitration agreement contained in the Partnership Agreement. The Cobra Properties Partnership Agreement cannot compel arbitration in this matter.
>
> 8. The [COBRA Lease] contains no arbitration clause. Without a mutual agreement to arbitrate, arbitration may not be compelled. The [COBRA] Lease cannot compel arbitration.
>
> 9. The [Class Action Agreement] is entered into between Gray Layton and its [associate attorneys]. The court finds that the [Class Action Agreement] contains an arbitration clause, but it does not apply between firm partners; instead, detailing how the firm divides fees with the [associate attorneys]. Moreover, [Plaintiff] was not an individual party to the [Class Action Agreement]. The present dispute between [Plaintiff] and Gray Layton does not fall within the scope of the arbitration agreement within the [Class Action Agreement] and is not grounds to compel arbitration in this matter. *See Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 635, 610 S.E.2d 293, 296 (2005).

(Cleaned up).

Based on these findings of fact, the trial court again denied Gray Layton's motion to compel arbitration. Gray Layton timely filed notice of appeal.

II. Interlocutory Jurisdiction

[1] As was the case in *Griffing I*, the trial court's order denying Gray Layton's motion to compel arbitration is interlocutory "because it does not determine all of the issues between the parties and directs some further proceeding preliminary to a final judgment." *Jackson v. Home Depot, U.S.A., Inc.*, 276 N.C. App. 349, 354, 857 S.E.2d 321, 326 (2021) (citation omitted). "Ordinarily, interlocutory orders are not immediately appealable. However, this Court has previously determined that an appeal from an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Id.* (cleaned up).

In the "Statement of the Grounds for Appellate Review" section of its opening brief, Gray Layton has sufficiently demonstrated that the trial court's interlocutory order affects this substantial right. Additionally, Gray Layton correctly notes that the trial court's order is immediately appealable pursuant to N.C. Gen. Stat. § 1-569.28(a)(1) (2021) (providing an immediate right of appeal from "[a]n order denying a motion to compel arbitration"). Accordingly, this interlocutory order is properly before us.

III. Discussion

Gray Layton argues that the trial court erred by denying its motion to compel arbitration because this case "contains multiple valid arbitration clauses, and public policy favors arbitration." Specifically, Gray Layton argues that Plaintiff is bound to arbitrate his claims against Gray Layton by the arbitration clauses in the COBRA Properties Agreement and the Class Action Agreement. For the reasons that follow, we disagree.

A. Standard of Review

"North Carolina has a strong public policy favoring the settlement of disputes by arbitration." *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). "However, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. The party seeking arbitration bears the burden of proving the parties mutually agreed to the arbitration provision." *Jackson*, 276 N.C. App. at 356, 857 S.E.2d at 327 (cleaned up).

"The question of whether a dispute is subject to arbitration is an issue for judicial determination. A trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, which this Court reviews de novo." *Id.* (cleaned up). "On appeal, findings of

fact made by the trial court are binding upon the appellate court in the absence of a challenge to those findings." *Id.*

B. Analysis

"The determination of whether a particular dispute is subject to arbitration involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Id.* (cleaned up). The first step of this analysis—whether the parties had a valid agreement to arbitrate—is the dispositive issue in this case.

It is undisputed that neither the Shareholder Agreement nor the COBRA Lease contains an arbitration clause. Accordingly, Gray Layton seeks to enforce against Plaintiff one of the arbitration clauses appearing in either the COBRA Properties Agreement or the Class Action Agreement. Gray Layton's arguments are unpersuasive.

1. The COBRA Properties Agreement

[2] Gray Layton first argues that Plaintiff is bound to arbitrate his claims against Gray Layton by the arbitration clause in the COBRA Properties Agreement. In response, Plaintiff maintains that Gray Layton cannot enforce that arbitration clause against him because Gray Layton was not a party to that agreement. Gray Layton does not dispute that fact, but argues instead that the trial court erred by failing to consider whether Plaintiff is equitably estopped from denying his burdens under the COBRA Properties Agreement—including its arbitration agreement.

"A nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate." *Smith Jamison Constr. v. APAC-Atl., Inc.*, 257 N.C. App. 714, 717, 811 S.E.2d 635, 638 (2018) (cleaned up). "One such situation exists when the signatory is equitably estopped from arguing that a nonsignatory is not a party to the arbitration clause." *Id.* (citation omitted). "Estoppel is appropriate if in substance the signatory's underlying complaint is based on the nonsignatory's alleged breach of the obligations and duties assigned to it in the agreement." *Id.* (cleaned up).

Gray Layton focuses on Plaintiff's years of accepting the benefits of the COBRA Properties Agreement—namely, his share of the rent payments that Gray Layton has made to COBRA Properties. Yet in doing

so, Gray Layton overlooks the essential question of whether Plaintiff "asserted claims in the underlying suit that, either literally or obliquely, *assert a breach of a duty created by the contract containing the arbitration clause*." *Id.* at 718, 811 S.E.2d at 638 (citation omitted). Here, Gray Layton's argument fails.

In his complaint, Plaintiff primarily alleges that Gray Layton violated the Shareholder Agreement "as well as other side agreements[.]" The only allegation that plausibly concerns COBRA Properties is Plaintiff's assertion that Gray Layton "[f]ail[ed] to pay [the COBRA Properties] partners the 3% rent increases as required by the [COBRA L]ease." However, this is not an assertion of "a breach of a duty created by the contract containing the arbitration clause." *Id.* (emphasis omitted). The breach asserted is Gray Layton's alleged failure to pay the increased rent to COBRA Properties—a duty created by the COBRA Lease, which again, does not contain an arbitration provision—not Gray Layton's alleged failure to pay Plaintiff his share of rental income under the COBRA Properties Agreement. Neither does Plaintiff's complaint rely upon any alleged breach of duty created by the COBRA Properties Agreement.

Clearly, then, Plaintiff "is not attempting to assert claims against [Gray Layton] that are premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause." *Id.* at 720, 811 S.E.2d at 640. Accordingly, Gray Layton fails to show that Plaintiff should be equitably estopped from denying that his breach of contract claim is subject to the COBRA Properties Agreement's arbitration clause.

In sum: Gray Layton was not a party to the COBRA Properties Agreement, and Plaintiff is not attempting to assert claims against Gray Layton that are premised upon any duty created by the COBRA Properties Agreement. Therefore, Gray Layton cannot enforce the COBRA Properties Agreement's arbitration clause against Plaintiff.

2. The Class Action Agreement

[3] Gray Layton next argues that Plaintiff agreed to be bound as a signatory to the Class Action Agreement, which contains an arbitration clause. Gray Layton contends that the trial court "placed improper weight and stopped its analysis after finding that [Plaintiff] was not an 'individual party to the' Class Action Agreement." Unlike the COBRA Properties Agreement, it is undisputed that Gray Layton was a signatory to the Class Action Agreement.

Nonetheless, the plain text of the Class Action Agreement demonstrates that the parties to that intrafirm agreement were Gray Layton and the two associates who agreed to undertake the extensive class-action representation that was the subject of the contract. Moreover, the breach of contract alleged in Plaintiff's complaint that most closely falls within the ambit of the Class Action Agreement is the contention that Gray Layton "[f]ail[ed] to reimburse [Plaintiff] for the expenses he advanced in the class action matter." Although Plaintiff signed it as a participating attorney, the Class Action Agreement contains no provision that creates any right of reimbursement for a participating attorney's advanced expenses. It strains credulity to suggest that the arbitration provision contained in the agreement between Gray Layton and two of its associates regarding profit-sharing for the associates' class-action representation simultaneously manifests the agreement of one of Gray Layton's participating attorneys to arbitrate a claim that Gray Layton failed to reimburse him for advanced expenses.

Accordingly, as with the COBRA Properties Agreement, Plaintiff "is not attempting to assert claims against [Gray Layton] that are premised upon any contractual and fiduciary duties created by" the Class Action Agreement. *Id.* Plaintiff is therefore not bound, as a signatory to the Class Action Agreement, to arbitrate the claims he raises in the instant action, nor is he estopped from denying that he is bound by the arbitration clause in the Class Action Agreement.

In the alternative, Gray Layton argues that, as a third-party beneficiary to the Class Action Agreement, Plaintiff is bound to arbitrate the claims advanced in the case at bar.

"The third-party beneficiary doctrine usually applies to allow a third[ ]party to enforce a contract executed for [the third party's] direct benefit." *Jarman v. Twiddy & Co. of Duck, Inc.*, 289 N.C. App. 319, 326, 889 S.E.2d 488, 495 (2023). In order to assert rights under a contract as a third-party beneficiary, the third party "must show: (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the third party." *Michael v. Huffman Oil Co., Inc.*, 190 N.C. App. 256, 269, 661 S.E.2d 1, 10 (2008) (cleaned up), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 360 (2009). "When a party seeks enforcement of a contract as a third-party beneficiary, the contract must be construed strictly against the party seeking enforcement." *Id.*

Importantly, "our Courts have required [a third party] to show a direct—rather than incidental—benefit for purposes of invoking the

third-party beneficiary doctrine." *Jarman*, 289 N.C. App. at 327, 889 S.E.2d at 496. "A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person." *Id.* at 327–28, 889 S.E.2d at 496 (citation omitted). "[T]he determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." *Id.* at 328, 889 S.E.2d at 496 (cleaned up).

Here, as explained above, the direct beneficiaries of the Class Action Agreement are Gray Layton and the two associates with whom Gray Layton agreed to share profits. Further, despite Gray Layton's claim that Plaintiff "benefitted by sharing in any recovery stemming from the Class Action" Agreement, that benefit was not intended directly by the agreement between Gray Layton and its two associates. It is clear that Plaintiff cannot be considered a direct—rather than incidental—beneficiary of the Class Action Agreement.

Finally, the arbitration clause in the Class Action Agreement "do[es] not provide any direct benefit to Plaintiff[ ] or evidence any intent to provide a direct benefit to Plaintiff[.]" *Id.* at 328–29, 889 S.E.2d at 496. Construing the Class Action Agreement "strictly against the party seeking enforcement[,]" *Michael*, 190 N.C. App. at 269, 661 S.E.2d at 10 (cleaned up), we conclude that Gray Layton fails to show that Plaintiff is anything more than an incidental beneficiary. Plaintiff is therefore not bound by the Class Action Agreement's arbitration clause.

IV. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges STROUD and TYSON concur.

HUNTER HAVEN FARMS, LLC, PETITIONER
v.
THE CITY OF GREENVILLE BOARD OF ADJUSTMENT AND COASTAL PLAIN SHOOTING ACADEMY, LLC, RESPONDENTS

No. COA23-662

Filed 2 April 2024

Civil Procedure—dismissal for failure to join a necessary party — special use permit—failure to name city—waiver by participation

In a challenge to a city board of adjustment's decision to grant a special use permit for the construction of an indoor firearm range, although petitioner (the owner of an adjacent horse farm) failed to properly name The City of Greenville (City) as a respondent in its petition for writ of certiorari as required by N.C.G.S. § 160D-1402(d), the trial court erred by dismissing the petition for failure to name a necessary party. Here, the City was on notice of the petition, complied with the writ of certiorari, and appeared at the hearing on the motion to dismiss; therefore, the City's participation in the proceedings waived any defect in the petition.

Judge HAMPSON concurring by separate opinion.

Appeal by Petitioner from order entered 20 March 2023 by Judge Jeffrey B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 10 January 2024.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook, for Petitioner-Appellant.

Ward and Smith, P.A., by Paul A. Fanning and Clinton H. Cogburn, for Respondent-Appellee.

COLLINS, Judge.

Petitioner Hunter Haven Farms, LLC, appeals from a 20 March 2023 order dismissing its petition for writ of certiorari for failure to name The City of Greenville as a respondent as required by N.C. Gen. Stat. § 160D-1402(d). For the reasons stated herein, we reverse.

I. Background

Hunter Haven Farms, LLC ("Haven") owns and operates an educational horse riding and training farm in Greenville, North Carolina. Coastal Plain Shooting Academy, LLC ("Coastal") purchased property next to Haven to construct an indoor firearm range on the property. Coastal sought a Special Use Permit ("Permit") from the City of Greenville Board of Adjustment ("Board") to build the indoor firearm range. When the Permit application came on for a public hearing before the Board, Haven opposed Coastal's application. The Board approved Coastal's application and granted the Permit.

Haven filed a petition for writ of certiorari ("Original Petition") on 16 December 2022 in Pitt County Superior Court, asking the court to review the granting of the Permit. Haven's Original Petition named as respondents "The City of Greenville Board of Adjustment and Coastal Plain Shooting Academy, LLC." The Original Petition stated, "The Writ of Certiorari should direct the City to prepare and certify to this Court the complete records of the [Board's] hearing . . . regarding [Coastal's] request for approval of a [Permit] to operate an indoor firearm range." That same day, the Pitt County Clerk of Superior Court issued a Writ of Certiorari which named as respondents "The City of Greenville Board of Adjustment and Coastal Plain Shooting Academy, LLC." The writ ordered the City to do the following:

> Respondent City of Greenville, North Carolina shall prepare and certify to this Superior Court the complete record of all of the Board of Adjustment's proceedings relating in any way to its Order Granting a Special Use Permit . . . .
>
> Respondent City of Greenville, North Carolina shall cause a true copy of said records to be filed with the [Pitt] County Clerk of Superior Court within 60 days from and after service of a copy of this Writ of Certiorari and shall simultaneously serve a copy thereof on counsel for all parties and on any unrepresented parties.

The City was served with the Original Petition and the Writ of Certiorari on 5 January 2023.

On 25 January 2023, Coastal moved to dismiss the Original Petition under Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure, specifically arguing that the Original Petition "failed to name The City of Greenville . . . as a Respondent" as required by N.C. Gen. Stat. § 160D-1402(d) and that the "City is a necessary party and indispensable

party to this action." Haven filed an amended petition for writ of certiorari ("Amended Petition") on 10 February 2023 naming as respondents "The City of Greenville and Coastal Plain Shooting Academy, LLC."

The City complied with the Writ of Certiorari on 6 March 2023 by preparing, certifying, filing, and serving the record to the trial court and serving it on counsel for Haven and for the Board.[1] Coastal's motion to dismiss came on for hearing on 20 March 2023, and the trial court dismissed the Original Petition and Amended Petition with prejudice. Haven appealed to this Court.

II. Discussion

Haven argues that the trial court erred by dismissing their Original Petition and by dismissing their Amended Petition.

This Court conducts "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) (italics omitted).

A. Original Petition

Haven concedes that the case caption of the Original Petition erroneously named "The City of Greenville Board of Adjustment" instead of "The City of Greenville" as respondent but argues that the trial court erred by granting Coastal's motion to dismiss the Original Petition because the City's participation in the proceedings waived any procedural defect in the case caption in the Original Petition.

Pursuant to N.C. Gen. Stat. § 160D-1402, quasi-judicial decisions by a city's board of adjustment are subject to review by a superior court by proceedings in the nature of certiorari. N.C. Gen. Stat. § 160D-1402(a) (2023). Subsection (d) provides that "[t]he respondent named in the petition [for writ of certiorari] shall be the local government whose decision-making board made the decision that is being appealed . . . ." N.C. Gen. Stat. § 160D-1402(d) (2023). The petition for writ of certiorari must be filed "with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy of it is given[.]" N.C. Gen. Stat. § 160D-1405(d) (2023). A petitioner's failure to name a necessary party in its petition for writ of certiorari is fatal unless the proper respondent participates in the proceeding. *See MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjustment for City of Asheville*, 238 N.C. App.

1. Donald K. Phillips was the assistant city attorney who represented both the City and the Board.

432, 767 S.E.2d 668 (2014); *see also Azar v. Town of Indian Trail Bd. of Adjustment*, 257 N.C. App. 1, 809 S.E.2d 17 (2017).

"Necessary parties must be joined in an action." *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 727-28, 620 S.E.2d 312, 316 (2005) (citation omitted). A necessary party is one "so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered . . . without his presence as a party." *Id.* at 728, 620 S.E.2d at 316 (citation omitted). North Carolina Rule of Civil Procedure 12(b)(7) sets forth the defense of failure to join all necessary parties in a proceeding. Dismissal of an action under Rule 12(b)(7) is "proper only when the defect cannot be cured[,]" such as when the statute of limitations has expired and "any attempt to add [the necessary] party would have been futile." *Id.*

In *MYC Klepper*, petitioner's failure to name the city as a respondent in its petition for certiorari was cured by the City of Asheville's notice of the action and participation in the defense of the local board's decision before the trial court. 238 N.C. App. at 436-37, 767 S.E.2d at 671. There, the petitioner filed a petition for writ of certiorari seeking review of a decision made by a local board of adjustment. *Id.* at 435, 767 S.E.2d at 671. The petitioner erroneously named as respondent the local board instead of the city. *Id.* at 436, 767 S.E.2d at 671. The local board moved to dismiss the petition for lack of subject matter jurisdiction. *Id.* The trial court granted the petition and held a hearing on the merits of the local board's decision and the local board's motion to dismiss; the city participated in the hearing on the merits. *Id.* at 435-36, 767 S.E.2d at 671. The superior court affirmed the local board's decision but denied its motion to dismiss, finding that the city "was on notice of this action and participated in the defense thereof." *Id.* at 435-37, 767 S.E.2d at 671.

Addressing the local board's appeal of the denial of its motion to dismiss, this Court clarified that "[t]he defect in the petition in this case amounts to a failure to join a necessary party" and that "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Id.* at 436, 767 S.E.2d at 671 (citations omitted). Accordingly, this Court held that the "petitioner's failure to name the City of Asheville as respondent in the petition did not deprive the trial court of subject matter jurisdiction over the proceedings." *Id.* at 436-37, 767 S.E.2d at 671. We further held that the trial court did not err by denying the local board's motion to dismiss "[b]ecause the City's participation in the proceedings cured the defect in the petition[.]" *Id.* at 437, 767 S.E.2d at 671.

On the other hand, in *Azar*, petitioner's failure to name the Town of Indian Trail as a respondent in its petition for writ of certiorari was

not cured because the Town did not participate "in the hearings of [the] action[.]" 257 N.C. App. at 6, 809 S.E.2d at 20-21. There, the petitioner filed a petition for writ of certiorari seeking review of the local board of adjustment's denial of petitioner's request for a special use permit. *Id.* at 3, 809 S.E.2d at 19. The petitioner named as respondent the local board of adjustment instead of naming the Town. *Id.* The local board of adjustment moved to dismiss the action for, *inter alia*, failure to join a necessary party. *Id.* The superior court granted the motion to dismiss, concluding that the petition failed to comply with the applicable statute. *Id.*

On appeal, this Court noted that there had not been a hearing in the superior court to review the Town's zoning decision, and that the Town did not participate in the hearing on the local board's motion to dismiss. *Id.* at 6, 809 S.E.2d at 20. Distinguishing *MYC Klepper*, we held that, "[u]nlike the City of Asheville in *MYC Klepper*, the Town has not participated in the hearings of this action to waive [the petitioner's] failure to join them as a necessary party." *Id.* (citation omitted).

The case before us falls in between *MYC Klepper* and *Azar*. As in *MYC Klepper*, the City here "was on notice of this action." 238 N.C. App. at 437, 767 S.E.2d at 671. The record shows that: (1) Donald K. Phillips, in his capacity as the City's attorney, filed the record of the Board's proceedings *on himself*, in his capacity as the Board's attorney; (2) the Writ of Certiorari directed the "Respondent City of Greenville . . . to prepare and certify" the record of the Board's proceedings; and (3) the City complied with the Writ of Certiorari.

Furthermore, while both *MYC Klepper* and *Azar* are silent as to whether the city or town, respectively, prepared, certified, filed, and served the record of the local board's proceedings on the parties, the City in this case received the Writ of Certiorari and complied with it by preparing, certifying, filing, and serving the record on the parties.

Additionally, while, as in *Azar*, there was no hearing in the superior court to review the merits of the Board's decision, as in *MYC Klepper*, the City did participate in the hearing before the trial court on Coastal's motion to dismiss. Attorney Emanuel McGirt initially introduced himself to the trial court as appearing "on behalf of the Greenville Board of Adjustment." However, later in the hearing when the trial court asked if anyone had any response to Haven's argument against Coastal's motion to dismiss, Mr. McGirt responded on the City's behalf:

> I'll just say briefly, Your Honor, again, as the [C]ity's attorney the [C]ity does not oppose Coastal's motion to dismiss. And I would say that the [C]ity did not participate in

> this matter besides complying with the petition in producing the record.

Because the City was on notice of this action; complied with the Writ of Certiorari by preparing, certifying, filing, and serving the record to the trial court and serving it on counsel for Haven, for Coastal, and for the Board (who was the same counsel as for the City); appeared at the hearing on the motion to dismiss; and participated in the hearing on the motion to dismiss, we hold that the City waived any procedural defect caused by Haven's failure to join the City as a necessary party, and the trial court erred by dismissing the Original Petition. As we determine that the City's participation in the proceedings waived any procedural defect in the case caption in the Original Petition, we need not address Haven's remaining arguments.

III. Conclusion

As the trial court erroneously determined that the City did not waive any procedural defect caused by Haven's failure to join the City as a necessary party, the trial court erred by granting Coastal's motion to dismiss under Rule 12(b)(7). The order of the trial court is reversed, and the case is remanded for further proceedings.

REVERSED.

Judge THOMPSON concurs.

Judge HAMPSON concurs by separate opinion.

HAMPSON, Judge, concurring.

I write separately to note that I do not believe a municipality's compliance with a Writ of Certiorari to conduct the ministerial task of compiling and submitting the record of proceedings before the Board of Adjustment to the trial court in compliance with the court's order, standing alone, would constitute participation in the proceedings sufficient to waive any defect in the pleading. Central to *MYC Klepper*, was the finding in that case the municipality was "on notice of this action and participated *in the defense thereof*." *MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjustment for City of Asheville*, 238 N.C. App. 432, 437, 767 S.E.2d 668, 671 (2014).

In this case, though, the City's attorney—despite trying their best to limit their involvement on behalf of the City rather than the Board of Adjustment—illustrated the problem with wearing both hats. Unwittingly, by advocating for the City's non-opposition to the motion to dismiss, the attorney participated on behalf of the City in the defense of the case. This underscores that in situations where, and to the extent, a municipality and its Board of Adjustment are separate parties, strong consideration should be given to retaining or employing a separate counsel for the Board of Adjustment. Indeed, there are times when a Board of Adjustment might make decisions adverse to the municipality and at variance with municipal ordinances and require advice independent of that from an attorney representing the interests of the municipality and its governing board.

JACKIE GREGG KNUCKLES, SR., Administrator of the Estate of Jackie Gregg Knuckles, Jr., Petitioner
v.
AMINTA DENIESE SIMPSON, Respondent

No. COA23-257

Filed 2 April 2024

Estates—petition for determination of abandonment by heir at law—lack of willfulness—sufficiency of evidence

The trial court properly denied a father's petition for determination of abandonment by heir at law—which he filed in order to prevent his son's mother (the respondent) from inheriting from the estate of their son (who died intestate)—where the court's conclusion that respondent had not willfully abandoned her son was supported by its findings of fact, in turn supported by competent evidence, including that: when their son was two years old, petitioner took him from respondent and did not return him to respondent's care; respondent initially sought legal assistance in an effort to have her son returned; respondent made several attempts over the years to contact her son and establish a relationship with him but was unsuccessful; petitioner moved away with the son and did not inform respondent of their whereabouts; and respondent was attacked and threatened by petitioner's girlfriend if she attempted to make contact again.

Appeal by Petitioner from Order entered 31 August 2022 by Judge John O. Craig, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2023.

Myers Law Firm, PLLC, by Matthew R. Myers, for Petitioner-Appellant.

Whitaker and Hamer, PLLC, by Aaron C. Low, for Respondent-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Jackie Gregg Knuckles, Sr. (Petitioner) appeals from an Order denying a Petition for Determination of Abandonment by Heir at Law pursuant to N.C. Gen. Stat. §§ 28A-18-2(a) and 31A-2. The Record before us tends to reflect the following:

Petitioner is the biological father of Jackie Gregg Knuckles, Jr. (Decedent). Aminta Deniese Simpson (Respondent) is Decedent's biological mother. Decedent was born on 16 May 1992 and passed away on 14 March 2018. Petitioner was appointed administrator of Decedent's estate. On 9 December 2020, Petitioner filed a Petition for Determination of Abandonment by an Heir at Law (Petition). The Petition alleged Respondent "engaged in behavior, both omissions and commissions, which demonstrates a 'willful abandonment of the care and maintenance' of Jackie Gregg Knuckles, Jr., her son, such that any interest she may have in the Estate, as a matter of Intestate Succession, is forfeited pursuant to N.C. Gen[.] Stat. [§] 31A-2[.]" Respondent filed a Response on 8 February 2021 denying the material allegations of the Petition.

Respondent also attached an Affidavit to the Response. The Affidavit averred after Decedent's birth, Decedent lived with Respondent and her other children. Petitioner never lived with Respondent or her children. Respondent alleged Petitioner did not provide support for Decedent during the time Decedent lived with her. Instead, she filed a child support action against Petitioner. Petitioner initially denied paternity, but his paternity was later established by blood testing. Subsequently, the parties entered into a consent child support order. After Petitioner's paternity was established, Petitioner began to visit Decedent at Respondent's house. On or around 3 July 1994, Petitioner's brother picked Decedent up to take him to a pool party with Petitioner's family. After Decedent was not returned to Respondent that evening, Respondent contacted the

police and, subsequently, DSS to help return her son. However, in the absence of a custody order Respondent was informed neither the police or DSS would intervene. Respondent further asserted she then attempted to draft a Complaint using a self-help center to regain her son, but it was not filed because it was not in the proper form. Respondent attempted to go to Petitioner's home when she could to try to see her son but was threatened by his fiancée and friends. Respondent further alleged she had been beaten and intimidated by Petitioner and his acquaintances.

Respondent's affidavit also identified instances where she had seen or made contact with her son. When her son was seven or eight, Respondent saw her son walk into a convenience store where Respondent was working. She observed him go to condominiums nearby and later located her son and was able to see him. However, Petitioner moved away and Respondent was told he had moved to South Carolina. On a later occasion, Respondent discovered where her son was attending high school and visited him in the school office. At another point, Decedent contacted Respondent via Facebook. Respondent was not able to see her son again prior to his death. She did attend his funeral.

The Petition came on for hearing on 11 July 2022 in Mecklenburg County Superior Court. Following an evidentiary hearing, the trial court entered its Order on 31 August 2022. The trial court—having considered testimony, exhibits, arguments of counsel, memoranda, pleadings, and affidavits on file—found as fact:

> 1. The Petitioner, Gregg Knuckles, Sr. (hereinafter "the Petitioner"), is the duly appointed administrator of the Estate of Gregg Knuckles, Jr. (hereinafter "the Decedent"), which is involved in a wrongful death lawsuit pending in Mecklenburg County. Petitioner is also the natural father of the Decedent.
>
> 2. The Respondent is the natural mother of the Decedent.
>
> 3. The Petitioner brought this Petition for Determination of Abandonment by Heir at Law on December 9, 2020. The Respondent filed a response on February 9, 2021, which was accompanied by an Affidavit by Mother attached thereto as Exhibit "A".
>
> 4. The Court heard the testimony of the Petitioner, Petitioner's father (James Knuckles), Respondent, Respondent's sister (Malicia Miles), Respondent's pastor and friend (Eleanor Priester), and Respondent's daughter

(Asia Maria Miles) and reviewed exhibits submitted in the trial.

5. The Court finds that Decedent was taken from Respondent in July of 1994 by Petitioner when Decedent was two years old.

6. Respondent was about 20 years-old in July of 1994, and at the time was the single mother of two other young children and she was working at First Union and IHOP and was going to school at a community college to try and get her degree.

7. The Court finds that in July of 1994, there was a Child Support proceeding pending in Mecklenburg County with Respondent as Plaintiff and Petitioner as Defendant, Mecklenburg Civil Filing 93-CVD-7175, wherein Petitioner, as Defendant, was ordered to pay $40.00 per week in child support beginning on August 1, 1994.

8. Prior to this child support obligation taking effect, on the weekend preceding July 4, 1994, Petitioner took Decedent to a cookout when he was two years old and refused to return the child to Respondent and, as there was no custody order in place for the Decedent, the police refused to return Decedent to Respondent.

9. Respondent attempted to call the police and, on several occasions, went to Petitioner's parents' home to try and see the Decedent, and attempted to get help from the Mecklenburg County Self-help center, but never filed any custody papers.

10. Respondent was attacked and threatened with bodily harm if she attempted to contact the Petitioner or the Decedent by acquaintances of Petitioner, including his girlfriend "FiFi," and Respondent filed a police report regarding an assault by "FiFi" in January of 1995.

11. Respondent made efforts to locate the Decedent during his childhood and found Decedent and Petitioner on one occasion in February of 2004 but was unable to establish a relationship with Decedent despite some effort to do so and Petitioner and Decedent moved away thereafter and did not tell Respondent where they were.

> 12. Respondent has four other children other than Decedent that she raised to adulthood as a single parent despite sometimes having to work multiple jobs and being homeless at times.
>
> 13. The Court finds that Petitioner has not met its burden of proof by the greater weight of the evidence or by clear, cogent and convincing evidence that Respondent willfully intended to abandon the Decedent following the Decedent being taken from Respondent in July of 1994. Specifically, pursuant to *In re Estate of Lunsford*, 359 N.C. 382, 387, 610 S.E.2d 366, 370 (2005), Petitioner has not shown through the greater weight of the evidence that there was willful or intentional conduct on the part of the Respondent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child and thus Petitioner's Petition should be denied.

Based on these Findings of Fact, the trial court denied the Petition. Petitioner timely filed Notice of Appeal on 28 September 2022.

Issues

The issues on appeal are whether: (I) there is competent evidence to support the trial court's Findings of Fact; and (II) the Findings of Fact support the trial court's Conclusion Respondent did not willfully abandon Decedent and, thus, Respondent was not barred from inheriting from Decedent's estate under the Intestate Succession Act.

Analysis

Petitioner argues the trial court erred in denying his Petition. Petitioner contends Respondent should not be permitted to "reap an undeserved bonanza" from the estate of the parties' son. While Petitioner expends a lot of briefing re-arguing and re-characterizing the facts of this case, ultimately his arguments challenge the sufficiency of the evidence to support the trial court's Findings and the adequacy of those Findings to support the trial court's Conclusion that Petitioner failed to meet his burden of proof to show Respondent had willfully abandoned Decedent. Petitioner's arguments are consistent with our standard of review.

A trial court's findings of fact following a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000). Appellate review of the trial court's conclusions of law is de novo. *Id.* "The labels 'findings of fact' and 'conclusions of law' employed

by the lower tribunal in a written order do not determine the nature of our standard of review. If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion de novo." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) (citing *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011)).

I. Challenged Findings of Fact

Petitioner challenges Findings 5, 8, 9, 10, 11, and 13 as unsupported by competent evidence. Ultimately, Petitioner's arguments with respect to the trial court's factual findings amount to disagreements with the trial court's characterization of facts in evidence or are simply meritless. Nevertheless, we address each challenged Finding of Fact in turn. We do agree with Petitioner that Finding of Fact 13 is more properly deemed a Conclusion of Law and review it as such.

In Finding 5, the trial court found: "Decedent was taken from Respondent in July of 1994 by Petitioner when Decedent was two years old." However, Respondent's own testimony supports this Finding. Respondent testified numerous times during trial her son was "taken." Petitioner contends Decedent could not have been "taken" from Respondent because there was not a custody order in place. As such, Petitioner contends the parties had "equal rights to the child" and, therefore, he could not have "taken" the child from Respondent. However, the trial court made no finding Petitioner *illegally took* the child. Indeed, Respondent does not challenge the fact Petitioner took Decedent to a cookout on the weekend before 4 July 1994, from which Decedent was never brought back to Respondent. Further, Petitioner points to no evidence to show he ever returned or offered to return Decedent to Respondent or otherwise attempted to share custody of Decedent consistent with her "equal rights to the child." Thus, there is competent evidence in the Record to support Finding 5.

Finding 8 provides:

> Prior to this child support obligation taking effect, on the weekend preceding July 4, 1994, Petitioner took Decedent to a cookout when he was two years old and refused to return the child to Respondent and, as there was no custody order in place for the Decedent, the police refused to return Decedent to Respondent.

Petitioner contends only that the evidence does not support the portion of the Finding that the police refused to return Decedent

because there was no custody order in place. This argument ignores his prior challenge to Finding 5 in which he expressly relied on the fact there was no custody order in place. Nevertheless, this portion of the trial court's finding is supported by Respondent's affidavit, which the trial court considered. Petitioner makes no argument on appeal that the affidavit should not have been considered by the trial court. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Moreover, Respondent testified at the hearing "I called the cops several times . . . . Most times they told me I had to – either me or him had to file custody and go from there." Finding 8 is, thus, quite clearly supported by evidence in the Record.

The same is true for Finding 9. Finding 9 provides "Respondent attempted to call the police and, on several occasions, went to Petitioner's parents' home to try and see the Decedent, and attempted to get help from the Mecklenburg County Self-help center, but never filed any custody papers." This Finding is amply supported by both Respondent's testimony and affidavit—including testimony she went to the home of Petitioner's father "quite a few times" to try and see her son but was denied access to him.

Petitioner's challenge to Finding 10 is likewise unavailing. Finding 10 states: "Respondent was attacked and threatened with bodily harm if she attempted to contact the Petitioner or the Decedent by acquaintances of Petitioner, including his girlfriend 'FiFi,' and Respondent filed a police report regarding an assault by 'FiFi' in January of 1995." This Finding is also supported by Respondent's affidavit and testimony that FiFi assaulted her and FiFi and Petitioner's sister had threatened her. It is also supported by the police report Respondent filed after the assault, which was admitted into evidence.

Finally, Petitioner also attempts to challenge Finding 11. In Finding 11, the trial court found: "Respondent made efforts to locate the Decedent during his childhood and found Decedent and Petitioner on one occasion in February of 2004 but was unable to establish a relationship with Decedent despite some effort to do so and Petitioner and Decedent moved away thereafter and did not tell Respondent where they were." Again, this Finding is more than sufficiently supported by evidence in the Record. Petitioner's own testimony detailed his frequent relocations without telling Respondent where he was moving. Both Respondent's affidavit and testimony detailed Respondent tracking down Decedent at the condominium complex and visiting with her son. Thereafter, Petitioner moved away and Respondent did not know where Petitioner was living. Respondent's testimony and affidavit also sets out

her attempts to locate and contact Decedent. Thus, the trial court's factual findings are supported by evidence in the Record.

II. The Trial Court's Conclusion of Law

In Finding of Fact 13, the trial court concluded:

> The Court finds that Petitioner has not met its burden of proof by the greater weight of the evidence or by clear, cogent and convincing evidence that Respondent willfully intended to abandon the Decedent following the Decedent being taken from Respondent in July of 1994. Specifically, pursuant to *In re Estate of Lunsford*, 359 N.C. 382, 387, 610 S.E.2d 366, 370 (2005), Petitioner has not shown through the greater weight of the evidence that there was willful or intentional conduct on the part of the Respondent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child and thus Petitioner's Petition should be denied.

"Under the Intestate Succession Act, a parent may inherit from a deceased child if the child dies without a surviving spouse or lineal descendants." *In re Estate of Lunsford*, 359 N.C. 382, 386, 610 S.E.2d 366, 369 (2005) (citing N.C. Gen. Stat. § 29–15(3) (2003)). "If both parents survive the child under such circumstances, the child's estate is divided equally between them." *Id.* "Under N.C.G.S. § 31A–2, however, a parent who has 'wilfully (sic) abandoned the care and maintenance of his or her child' is barred from inheriting any portion of the child's estate unless the parent meets one of two statutory exceptions." *Id.* (citing N.C. Gen. Stat. § 31A–2). "Our wrongful death statute mandates that wrongful death proceeds be distributed 'as provided in the Intestate Succession Act,' and they are therefore subject to N.C.G.S. § 31A–2." *Id.* at 387, 610 S.E.2d at 369.

> For purposes of the Intestate Succession Act, parental abandonment has been defined as " 'wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.' " *McKinney v. Richitelli*, 357 N.C. 483, 489, 586 S.E.2d 258, 263 (2003) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)) (alteration in original). If a parent " 'withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance,' " such parent is deemed to have relinquished all parental

> claims and to have abandoned the child. *Id.* at 489–90, 586 S.E.2d at 263 (alteration in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608).

Id. at 387, 610 S.E.2d at 370.

> Abandonment has also been defined as " 'wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support.' " [*McKinney*] at 489, 586 S.E.2d at 263 (alteration in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). "Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608.

Id.

In a bench trial, a trial court's "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) (citations omitted). "The trial judge becomes both judge and juror, and it is [the judge's] duty to consider and weigh all the competent evidence before him." *Id.* The trial court "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Id.* "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712–13, 268 S.E.2d 185, 189 (1980) (citing *Knutton*, 273 N.C. 355, 160 S.E.2d 29 (1968)). The weight or credibility to be given to the evidence is ultimately within the discretion of the trial court. *Phelps v. Phelps*, 337 N.C. 344, 357–58, 446 S.E.2d 17, 25 (1994).

In this case, the trial court—citing specifically to *Lunsford*—ultimately found: "Petitioner has not shown through the greater weight of the evidence that there was willful or intentional conduct on the part of the Respondent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child[.]" The trial court determined that given the weight of the evidence Petitioner simply had not met his evidentiary burden to show Respondent engaged in willful or intentional conduct with a settled purpose of foregoing her parental duties and claims to the child. The trial court was plainly acting within

its discretion in affording more credibility and weight to Respondent's evidence. *Id.*

Moreover, the trial court's determination is supported by its evidentiary Findings of Fact. The trial court's evidentiary Findings of Fact demonstrate Petitioner took custody of Decedent and withheld him from Respondent for the rest of Decedent's life. Respondent made multiple attempts to find and visit with her son but was assaulted and threatened to stay away. When Respondent did locate Decedent, Petitioner moved away without telling Respondent. At the same time, the trial court found Respondent was raising four other children to adulthood while working multiple jobs and on occasion experiencing homelessness. The trial court was well within its discretion to conclude these facts did not support a determination Respondent had willfully abandoned Decedent.

Thus, the trial court's Findings of Fact support its ultimate determination that Petitioner failed to meet his burden to show Respondent had engaged in willful or intentional conduct with the purpose of foregoing her parental duties or claims. Therefore, the trial court's findings support the Conclusion Respondent had not willfully abandoned Decedent. Consequently, the trial court did not err in denying the Petition.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order denying Petitioner's Petition for Determination of Abandonment by Heir at Law is affirmed.

AFFIRMED.

Judges TYSON and CARPENTER concur.

NORTH CAROLINA CEMETERY COMMISSION, PLAINTIFF
v.
SMOKY MOUNTAIN MEMORIAL PARKS, INC. AND
SHEILA DIANE GAHAGAN, DEFENDANTS

No. COA23-761

Filed 2 April 2024

1. Cemeteries—sale of cemetery property—North Carolina Cemetery Act—minimum acreage statute—not void for vagueness—"cemetery" defined

After a corporation transferred two cemeteries to its sole shareholder, who then subdivided the property into five tracts and recorded surveys asserting that three of those tracts were not part of the cemeteries, the trial court properly granted summary judgment to the North Carolina Cemetery Commission in its lawsuit seeking to void the conveyance pursuant to the minimum acreage statute of the North Carolina Cemetery Act. The statute was not unconstitutionally vague given that it clearly defined "cemetery" as land "used or to be used" for cemetery purposes, and therefore the statute provided a person of ordinary intelligence a reasonable opportunity to understand what it was prohibiting when it forbade transfers of cemetery property that would result in a cemetery having less than thirty acres.

2. Cemeteries—sale of cemetery property—North Carolina Cemetery Act—minimum acreage statute—applicability—land designated for cemetery purposes

After a corporation transferred two cemeteries to its sole shareholder, who then subdivided the property into five tracts and recorded surveys asserting that three of those tracts were not part of the cemeteries, the trial court properly granted summary judgment to the North Carolina Cemetery Commission in its lawsuit seeking to void the conveyance pursuant to the minimum acreage statute of the North Carolina Cemetery Act, which forbids transfers of cemetery property that would result in a cemetery having less than thirty acres. All five tracts were subject to the minimum acreage requirement because they were "designated for cemetery purposes" under the Act where, in seeking licensure to operate the two cemeteries, the corporation and its shareholder had sent annual reports to the Commission that included all five tracts in their acreage calculation.

3. Cemeteries—sale of cemetery property—North Carolina Cemetery Act—enforcement of minimum acreage requirement—no unconstitutional taking

In an action where the North Carolina Cemetery Commission sought to void a transfer of cemetery land by a corporation to its sole shareholder (together, defendants) that violated the minimum acreage statute of the North Carolina Cemetery Act, which forbids transfers of cemetery property that would result in a cemetery having less than thirty acres, the Commission's enforcement of the minimum acreage requirement did not constitute a taking under the state or federal constitutions, but was instead a valid exercise of the State's police power. Not only did preserving the serenity and sanctity of cemeteries fall within the scope of the State's police power, but also the minimum acreage requirement was a reasonably necessary means for accomplishing that goal, since its enforcement did not completely deprive defendants of all beneficial uses of their property (because the entirety of the land that defendants sought to transfer could still be used to operate a for-profit cemetery).

4. Appeal and Error—conveyance of cemetery land—swapping horses on appeal—argument not advanced at trial

In an action where the North Carolina Cemetery Commission sought to void a transfer of cemetery land by a corporation to its sole shareholder (together, defendants) that violated the minimum acreage statute of the North Carolina Cemetery Act, defendants could not argue on appeal that the trial court should have granted summary judgment in their favor under the Marketable Title Act, since defendants did not raise this argument before the trial court and could not "swap horses" to "get a better mount" on appeal.

Appeal by defendants from orders entered 9 February 2023 by Judge William Coward in Jackson County Superior Court. Heard in the Court of Appeals 6 February 2024.

Maynard Nexsen PC, by David P. Ferrell and George T. Smith, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Jonathan H. Dunlap and Esther Manheimer, for defendants-appellants.

THOMPSON, Judge.

Defendants Smoky Mountain Memorial Parks, Inc. and Sheila[1] Diane Gahagan appeal from the trial court's order granting plaintiff's motion for summary judgment and denying their motion for summary judgment. On appeal, defendants contend that the applicable statute is void for vagueness, that the property in question was never dedicated for use as a cemetery, and that the statute as applied constitutes an unconstitutional taking. After careful review, we affirm.

I. Factual Background and Procedural History

The North Carolina Cemetery Commission (plaintiff) initiated these actions by filing complaints and notices of lis pendens, and issuing summonses against Smoky Mountain Memorial Parks, Inc. and Sheila Diane Gahagan (defendants) on 18 August 2021 in Swain and Jackson County Superior Courts.

Defendant Sheila Gahagan (Gahagan) was appointed as a receiver in a separate action that involved the previous owners of the two cemeteries at issue in the present case. In the prior receivership action, defendant Gahagan was ordered to develop a liquidation plan that included the sale of the two cemeteries; however, the bids received for the properties were deemed "unrealistic compared to the court's perceived value of the properties and potential income from the operations of the [c]emeteries." Instead, the court ordered that Gahagan transfer the properties to herself as payment for her services rendered as the receiver in that action.

By receiver deed executed 22 May 2013, defendant Gahagan "assign[ed] and transfer[red] all of her right, title and interest . . . of said cemeteries to Smoky Mountain Memorial Parks, Inc., a North Carolina Corporation, of which said [Gahagan] is the sole shareholder." Those deeds included the transfer of "18.67 acres, as shown on a plat . . . recorded in . . . [the] Swain County Public Registry" and "9.35 acres . . . as shown on a plat . . . recorded in . . . the office of the Register of Deeds for Jackson County . . . ." In her individual and official capacities, defendant Gahagan's signature is affixed to both documents under seal. Respectively, those cemeteries have since been named "Swain Memorial Park" and "Fairview Memorial Park."

From 2013 to 2020, defendants filed "Annual Report[s]" with plaintiff, wherein defendants stated that the "[t]otal [a]creage of cemetery"

1. The orders from which appeal is taken identified defendant Gahagan as "Shelia" in their captions; however, this appears to be a scrivener's error, as defendant Gahagan is referred to as "Sheila" within the orders and throughout the record on appeal.

was "18.67" acres for Swain Memorial Park. Similarly, from 2014[2] to 2020,[3] defendants filed these same "Annual Report[s]" with plaintiff, wherein defendants stated that Fairview Memorial Park consisted of "9.35" acres. These Annual Reports filed with plaintiff, and affixed with defendant Gahagan's signature, contain a disclaimer which states that:

> I hereby certify that this report is correct. Also, in accordance with [N.C. Gen. Stat. §] 65-69, I understand that *cemeteries may not sell, encumber, transfer or dispose of land that results in the cemetery having less than* [thirty] *acres*. I understand that any transaction in violation of [N.C. Gen. Stat. §] 65-69 is void. *Not voidable, void*.

(emphases added).

In 2020, Gahagan expressed a desire to leave the cemetery business and sought from plaintiff "written verification that land adjoining Fairview Memorial Park and Swain Memorial Park can be sold without restriction under the Cemetery Act as long as the actual cemetery is not disposed of." However, plaintiff informed Gahagan that "any sale of acreage associated with Fairview and Swain as known and licensed by [plaintiff would] be prohibited and void by statute if executed. We recognize Fairview as 9.35 acres and Swain as 18.67 acres *as noted in your letter*." (emphasis added).

On 25 June 2021, defendant Gahagan filed Articles of Dissolution for Smoky Mountain Memorial Parks, Inc., which went into effect on 1 July 2021. On 7 July 2021, contrary to plaintiff's warning that doing so would be in violation of the minimum acreage statute of the North Carolina Cemetery Act (Cemetery Act), defendant Smoky Mountain Memorial Parks, Inc. transferred the properties back to defendant Gahagan by warranty deed and recorded surveys that subdivided the properties into five separate tracts. Defendant Gahagan stated that three of these tracts were "not part of the cemeter[ies]" because they did not "contain burial lots or lots sold to be used as burial lots, mausoleums or columbarium[s] . . . ."

---

2. The "Annual Report[s]" filed in 2014 and 2015 indicate that Fairview Cemetery consisted of "9.34" acres, not 9.35. Assuming that these acreages are correct, they do not impact our analysis, as the Cemetery Act does not bar cemeteries consisting of less than thirty acres from *adding* land; it prohibits such cemeteries from "disposing of such lands." *See* N.C. Gen. Stat. § 65-69(d) (2023) (prohibiting cemeteries "which own or control a total of less than [thirty] acres" from "dispos[ing] of any of such lands").

3. Defendants' "Annual Report" for Fairview Memorial Park in 2019 is absent from the record.

On 18 August 2021, plaintiff filed complaints in Jackson County and Swain County Superior Court, seeking to void the conveyances of the subdivided properties pursuant to the minimum acreage statute of the Cemetery Act. On 26 and 27 October 2021, defendants filed motions to dismiss, answers, and counterclaims in Jackson County and Swain County Superior Courts, respectively. On 26 and 29 August 2022, defendants filed motions for summary judgment in Jackson County and Swain County Superior Courts, respectively. Plaintiff filed amended motions for summary judgment on 7 November 2022 in Jackson and Swain County Superior Courts.

While the cases were pending, on 26 February 2022, defendant Gahagan filed her "Annual Report" for the year 2021 with plaintiff; however, in this report, for the very first time, Gahagan asserted that Swain Memorial Park consisted of "5.32" acres, and that she "disagree[d] with [plaintiff's] interpretation of cemetery land."

The two complaints were consolidated for a hearing on 14 November 2022 in Jackson County Superior Court, and by order entered 9 February 2023, the court granted plaintiff's motions for summary judgment and denied defendants' motions for summary judgment. From this order, defendants filed timely written notice of appeal.

II. Analysis

Before this Court, defendants allege the following issues:

> 1. Whether the lower court erred in granting summary judgment in favor of [plaintiff] and denying [defendants]' summary judgment [motions][?]
>
> 2. Whether the lower court erred as a matter of law in permitting [plaintiff] to restrict the sale of [d]efendant[s'] private land which is proximate to [their] cemeteries where the property [plaintiff] seeks to restrict has never been used or dedicated for use as a cemetery[?]
>
> 3. Whether [plaintiff's] regulation of the property in question is a taking under the North Carolina and United States [C]onstitutions[?]
>
> 4. Whether the statute at issue is unconstitutionally void for vagueness as applied[?]
>
> 5. Whether [defendants] should be estopped from taking the position that the property in question is non-cemetery property[?]

> 6. Whether [defendants] should have been granted summary judgment under the Marketable Title Act[?]

We will address the dispositive issues, not necessarily in this order, in the analysis to follow.

A. Standard of review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation, internal quotation marks, and emphasis omitted).

B. Void for vagueness

[1] As a matter of first impression, this case requires our Court to interpret a statute, N.C. Gen. Stat. § 65-69, which defendants argue "is unconstitutionally void for vagueness as applied" because it "fail[s] to give a person of ordinary intelligence a reasonable opportunity to know how broadly th[e] term [cemetery] is to be applied." Therefore, we will address defendants' void for vagueness argument at the outset.

"A statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 186, 594 S.E.2d 1, 19 (2004) (citation, internal quotation marks, and brackets omitted). "The Constitution requires that the statute merely prescribe boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *Id.* (citation and internal quotation marks omitted).

N.C. Gen. Stat. § 65-69(d), which governs the "[m]inimum acreage; sale or disposition of cemetery lands[,]" provides that:

> The provisions of . . . this section relating to the requirement for minimum acreage shall not apply to those cemeteries licensed by [plaintiff] on or before [1 July 1967], which own or control a total of less than [thirty] acres of land; provided that such cemeteries shall not dispose

> of any of such lands. A nongovernment lien or other interest in land acquired in violation of this section is void.

N.C. Gen. Stat. § 65-69(d) (2023).

Here, defendants contend that " 'cemetery' is a defined term under the Act, meaning, in essence, property where human remains are interred or preserved." However, this is not the definition of "cemetery" pursuant to the statute, and it appears that defendants have adopted their own definition of "cemetery" contrary to the statutory definition set forth by our legislature in N.C. Gen. Stat. § 65-48(3). We do not articulate statutorily defined terms "in essence," nor do we condone defendants' misrepresentation of our legislature's statutory definition of "cemetery" in order to argue that the statute is void for vagueness because of the application of that term.

Defendants correctly identified the definition of "cemetery" earlier in their appellate brief, wherein they acknowledged that a cemetery "is defined in [N.C. Gen. Stat.] § 65-48(3)" as:

> 'Cemetery' means any one or a combination of more than one of the following in a place used or to be used and dedicated or designated for cemetery purposes:
>
> a. A burial park, for earth interment.
>
> b. A mausoleum.
>
> c. A columbarium.

N.C. Gen. Stat. § 65-48(3).

Defendants' argument on this point simply ignores the disjunctive "or" present in the statutory definition of "cemetery" and seems to misunderstand the nature of a cemetery, which, as plaintiff succinctly notes, includes plotted grave sites that are "used" and the remaining portion of the cemetery unplotted, "to be used." Indeed, just because there are not yet bodies in the ground does not mean that the property is not "a place used *or to be used* and dedicated or designated for cemetery purposes[.]" N.C. Gen. Stat. § 65-48(3) (emphasis added). Defendants' disingenuous attempt to construe the definition of the term "cemetery" to mean "in essence, property where human remains are interred or preserved" is contrary to the statutory definition *previously defined in defendants' appellate brief*, and does not pass muster.

We conclude that the minimum acreage statute in N.C. Gen. Stat. § 65-69(d) is not unconstitutionally vague because it provides "the person of ordinary intelligence a reasonable opportunity to know what is

prohibited" and "provide[s] explicit standards for those who apply the law" with "boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *Rhyme*, 358 N.C. at 186, 594 S.E.2d at 19 (citation, internal quotation marks, and brackets omitted). Those boundaries require that "a place used or to be used and dedicated or designated for cemetery purposes" that is "licensed by [plaintiff] on or before [1 July] 1967, which own[s] or control[s] a total of less than [thirty] acres of land . . . shall not dispose of *any such lands*." N.C. Gen. Stat. §§ 65-48(3), 65-69(d) (emphasis added). Having determined that the statute that governs this case is not unconstitutionally void for vagueness as applied, we will now address defendants' remaining arguments on appeal.

C. North Carolina Cemetery Act

[2] Alternatively, defendants contend that "[t]he [n]on-[c]emetery [p]roperty was never dedicated for use as a cemetery[,]" and that "[plaintiff] should be able to show when and how the property was dedicated for such use, and that both parties complied with the prevailing laws or statutes governing dedication." We disagree, as defendants have, again, ignored the definition of "cemetery" set forth by our legislature in making this argument.

"The best indicia of [legislative] intent [is] the language of the statute, the spirit of the act and what the act seeks to accomplish." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (citation and ellipsis omitted). "The process of construing a statutory provision must begin with an examination of the relevant statutory language." *Id.* "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Id.* (citation, internal quotation marks, and brackets omitted). "An unambiguous word has a definite and well[-]known sense in the law." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 148 (2017) (citation and internal quotation marks omitted). However, "[i]n the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000).

Defendants' assertion that the "[n]on-[c]emetery [p]roperty was never dedicated for use as a cemetery" and is therefore not subject to the minimum acreage statute simply ignores the "or" in N.C. Gen. Stat. § 65-48(3), which states that a cemetery is a "place used or to be used and dedicated *or designated* for cemetery purposes[.]" N.C. Gen. Stat. § 65-48(3) (emphasis added).

"[D]esignated" is not defined in the Cemetery Act, nor does "designated" have a "definite and well[-]known sense in the law." *Fid. Bank*, 370 N.C. at 19, 803 S.E.2d at 148 (citation omitted). However, Black's Law Dictionary defines "designate" as, "[t]o choose (someone or something) for a particular job or purpose." *Designate*, *Black's Law Dictionary* (11th ed. 2019). Therefore, the statute governs "a place used or to be used and dedicated or 'chose[n] for a particular job or purpose[,]' cemetery purposes."

Moreover, the Cemetery Act "established [plaintiff] with the power and duty to adopt rules and regulations to be followed in the enforcement of this Article." N.C. Gen. Stat. § 65-49. The Cemetery Act also provides that "[n]o legal entity shall engage in the business of operating a cemetery company . . . without first obtaining a license from [plaintiff]." *Id.* § 65-55. Finally, N.C. Gen. Stat. § 65-67 mandates that "[a]pplications for renewal license must be submitted . . . every year in the case of an existing cemetery company." *Id.* § 65-67.

Here, the record is replete with evidence that the entire 18.67 acres of Swain Memorial Park and 9.35 acres of Fairview Memorial Park were " 'chose[n] for a particular purpose[,]' cemetery purposes." Indeed, defendant Gahagan represented that Swain Memorial Park consisted of 18.67 acres, and Fairview Memorial Park consisted of 9.35 acres, when she became the owner of the cemeteries in 2013, and in defendants' Annual Reports to plaintiff, which allowed defendants to renew their licenses to operate the two for-profit cemeteries after Gahagan became the owner of the cemeteries in 2013.

Plaintiff is the entity that our legislature vested "with the power and duty to adopt rules and regulations to be followed in the enforcement of th[e Cemetery Act,]" and defendant was required to submit Annual Reports to plaintiff "every year" in order to "obtain[ ] a license" to "engage in the business of operating a cemetery company . . . ." *Id.* §§ 65-49, -55, -67. We conclude that defendants' representations to plaintiff in these Annual Reports constituted a "designat[ion]" for purposes of the Cemetery Act, as "the language of the statute, the spirit of the act and what the act seeks to accomplish[,]" are reconciled under this definition of "designated." *Wilkie*, 370 N.C. at 547, 809 S.E.2d at 858 (citation and ellipsis omitted).

For the aforementioned reasons, we hold that the entire 18.67 acres and 9.35 acres of the properties in question are "cemeter[ies,]" subject to the minimum acreage statute, because they were "*designated for cemetery purposes*[,]" N.C. Gen. Stat. § 65-48(3), through defendants' representations to plaintiff over the years that they sought licensure to operate the for-profit cemeteries.

D. Constitutional takings

[3] Defendants also contend that plaintiff's "application of [N.C. Gen. Stat.] § 65-69(d) to the [n]on-[c]emetery [p]roperty[4] constitutes a taking under the North Carolina [C]onstitution" or "a taking under the United States Constitution." Defendants argue that "[u]nder the 'ends' prong of *Responsible Citizens*, it is not within the State's police power to use [N.C. Gen. Stat.] § 65-69 to regulate property that is not voluntarily and intentionally dedicated[,]"[5] or in the alternative, that plaintiff's "application . . . constitutes a taking under the 'means' prong of *Responsible Citizens.*" *See, e.g.*, *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983) (establishing the "ends-means" analysis to determine whether an exercise of the police power is legitimate). We disagree, because plaintiff's enforcement of the Cemetery Act's minimum acreage requirement was a valid exercise of regulations pursuant to the police power of the State of North Carolina.

"A taking does not occur simply because government action deprives an owner of previously available property rights." *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989). "Determining if governmental action constitutes a taking depends upon whether a particular act is an exercise of the police power or of the power of eminent domain." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 854, 786 S.E.2d 919, 924 (2016) (citation and internal quotation marks omitted). "[T]he [S]tate must compensate for property rights taken by eminent domain; however, damages resulting from the proper exercise of the police power are noncompensable." *Id.* at 854, 786 S.E.2d at 925 (citation and brackets omitted).

"Under the police power, the government *regulates* property to prevent injury to the public." *Id.* at 854, 786 S.E.2d at 924 (emphasis in original). On the other hand, "[u]nder the power of eminent domain, the government *takes* property for public use because such action is advantageous or beneficial to the public." *Id.* (emphasis in original). However, "[p]olice power regulations must be enacted in good faith, and have appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." *Id.* (citation, internal quotation marks, and brackets omitted). "An exercise of

---

4. Defendants incorrectly contend that there is "cemetery" and "non-cemetery" property in the present case. As established above, the entire 18.67 acres of Swain Memorial Park and the entire 9.35 acres of Fairview Memorial Park were designated as cemeteries, subjecting them to the minimum acreage requirement of the Cemetery Act.

5. As established above, defendants designated the properties as cemeteries pursuant to the Cemetery Act's licensure requirements.

police power outside these bounds may result in a taking." *See id.* (referencing *Responsible Citizens* for the proposition).

"Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power." *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted). "First, is the object of the legislation within the scope of the police power?" *Id.* (citation omitted). "Second, considering all the surrounding circumstances and particular facts of the case[,] is the means by which the governmental entity has chosen to regulate reasonable?" *Id.* (citation omitted). We will address each of these inquiries in the analysis to follow.

i. Police power

Here, "[t]he societal benefits envisioned by the [Cemetery Act] [are] designed primarily to prevent injury or protect the health, safety, and welfare of the public." *Kirby*, 368 N.C. at 855, 786 S.E.2d at 925. By placing limitations on the minimum acreage of cemeteries in order to preserve the serenity and sanctity of these lands, "the government *regulates* property to prevent injury to the public." *Id.* at 854, 786 S.E.2d at 924 (emphasis in original). The government is not "*tak*[*ing*] property for public use because such action is advantageous or beneficial to the public." *Id.* (emphasis in original). Therefore, we conclude that the challenged "governmental action . . . is an exercise of the police power" of the State of North Carolina, not an exercise of "the power of eminent domain." *Id.* (citation omitted).

Moreover, "[o]ur Courts have long held that preservation of the sanctity of grave sites is a proper exercise of police power by the State of North Carolina." *Massey v. Hoffman*, 184 N.C. App. 731, 735, 647 S.E.2d 457, 460–61 (2007). Indeed, "[t]he sentiment of all civilized peoples . . . has held in great reverence the resting places of the dead as hallowed ground" and "[i]t is a sound public policy to protect the bur[ial] place of the dead." *Id.* at 735–36, 647 S.E.2d at 461 (citation and brackets omitted).

We conclude that the "object[s] of the legislation[,]" cemeteries, are "within the scope of the police power" of the State of North Carolina. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted). However, our takings analysis does not end here, as "[a]n exercise of police power . . . may [still] result in a taking." *Kirby*, 368 N.C. at 854, 786 S.E.2d at 924. Therefore, we must determine whether, after "considering all the surrounding circumstances and particular facts of the case[,] is the means by which the governmental entity has chosen to

regulate reasonable?" *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted).

ii. Reasonable interference with owner's property rights

To determine whether the means by which the governmental entity has chosen to regulate are reasonable, we conduct a two-pronged test: (1) "[i]s the statute in its application reasonably necessary to promote the accomplishment of a public good[,]" and (2) "is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" *Id.* at 261–62, 302 S.E.2d at 208 (citation omitted). A land-use regulation's interference with the property owner's rights is unreasonable when its application "has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted . . . ." *See id.* at 263, 302 S.E.2d at 209–10 (citation and emphasis omitted) (extending takings analysis under "an analogous situation[,]" zoning ordinances, to land-use regulations).

However, "the mere fact that a[ ] [land-use regulation] results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not [a] sufficient reason to render the" regulation invalid. *Id.* at 265, 302 S.E.2d at 210 (citation omitted). "[I]f an act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." *Massey*, 184 N.C. App. at 735, 647 S.E.2d at 460 (citation and internal quotation marks omitted).

In the present case, after "considering all the surrounding circumstances and particular facts of the case[,]" we conclude that "the means by which the governmental entity has chosen to regulate" are reasonable. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citation omitted). That is, "the [minimum acreage requirement of the Cemetery Act] in its application [is] reasonably necessary to promote the accomplishment of a public good[,]" and "the interference with [defendants'] right to use [their] property as [t]he[y] deem[ ] appropriate [is] reasonable in degree." *Id.* at 261–62, 302 S.E.2d at 208 (citation omitted).

We reach this conclusion because the minimum acreage requirement of the Cemetery Act does not have "the effect of completely depriving [defendants] of the beneficial use of [their] property by precluding all practical uses or the only use to which it is reasonably adapted . . . ." *Id.* at 263, 302 S.E.2d at 209–10 (citation and emphasis omitted). Defendants are still entitled to utilize the entirety of the property as part of a for-profit cemetery, pursuant to the Cemetery Act.

Our legislature determined that a regulatory scheme governing the minimum acreage of burial sites was necessary to preserve the sanctity and serenity of grave sites, and plaintiff's enforcement of the minimum acreage requirement of the Cemetery Act is not an unconstitutional taking, but a proper exercise of the police power by the State of North Carolina. As a "proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." *Massey*, 184 N.C. App. at 735, 647 S.E.2d at 460 (citation and internal quotation marks omitted).

For the aforementioned reasons, we conclude that plaintiff's enforcement of the Cemetery Act does not constitute a taking under the North Carolina or United States Constitutions, but is a valid exercise of the police power of the State of North Carolina.

E. Marketable Title Act

[4] Finally, defendants contend that the court "should have granted summary judgment in favor of [d]efendants under the Marketable Title Act." We disagree, as defendants made no argument before the trial court that the Marketable Title Act warranted summary judgment in their favor.

It is well established that, "the law does not permit parties to swap horses between courts in order to get a better mount" before an appellate court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Here, our careful "examination of the record discloses that the cause was not tried upon th[e] [Marketable Title Act] theory," *id.*, and we decline to address defendants' arguments regarding the Marketable Title Act.

III. Conclusion

For the aforementioned reasons, we conclude that N.C. Gen. Stat. § 65-69(d) is not void for vagueness as applied; that defendants designated the entirety of the Swain and Fairview Memorial Cemeteries for cemetery purposes through their representations to plaintiff, thus subjecting them to the minimum acreage statute of the Cemetery Act; and that the minimum acreage statute is not an unconstitutional taking, but a proper exercise of the police power of the State of North Carolina.

AFFIRMED.

Judges STROUD and FLOOD concur.

STATE v. HERNANDEZ

[293 N.C. App. 283 (2024)]

STATE OF NORTH CAROLINA
v.
ROBERTO ANASTASIO HERNANDEZ, DEFENDANT

No. COA23-832

Filed 2 April 2024

1. Search and Seizure—search warrants—probable cause—supporting affidavits—nexus between items sought and alleged crimes

In a prosecution for kidnapping and sex offenses against minors, the trial court did not commit plain error in denying defendant's motion to suppress video evidence obtained from media storage devices seized from his home—the site of the alleged crimes—where two separate search warrants were issued upon a proper determination of probable cause. The supporting affidavits attached to the warrant applications were not purely conclusory, but rather contained facts showing a nexus between the list of items to be seized and the alleged offenses sufficient for the magistrate to reasonably infer that the requested searches would reveal incriminating evidence. Further, the description of the electronic categories listed in the affidavits were sufficient to encompass the specific media storage devices recovered from defendant's home.

2. Constitutional Law—effective assistance of counsel—failure to object to admissible evidence—no prejudice

In a prosecution for kidnapping and sex offenses against minors, defense counsel was not ineffective for failing to object to evidence seized pursuant to search warrants, which were properly issued upon probable cause, because any objection would have been overruled and, thus, defendant could not demonstrate that he was prejudiced by his counsel's performance.

3. Constitutional Law—double jeopardy—sentencing—first-degree kidnapping—underlying sexual offense

In a prosecution for kidnapping and sex offenses against minors, the trial court violated defendant's right to be free of double jeopardy by subjecting him to multiple punishments for the same offense when it entered judgment upon his convictions for both first-degree kidnapping and the sex offenses that served to elevate the kidnapping charge to one of the first degree; therefore, the sentencing order was vacated and the matter was remanded for resentencing.

STATE v. HERNANDEZ

[293 N.C. App. 283 (2024)]

Appeal by defendant from judgments entered 20 January 2023 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 6 March 2024.

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

Sarah Holladay, for defendant-appellant.

FLOOD, Judge.

Roberto Anastasio Hernandez ("Defendant") appeals from convictions for three counts of statutory rape of a person who is fifteen years of age or younger, one count of statutory sex offense of a person who is fifteen years of age or younger, three counts of indecent liberties with a child, and one count of kidnapping. Defendant argues on appeal: (A) the trial court plainly erred in denying his motion to suppress the fruits of the two search warrants where the supporting affidavits failed to allege any nexus between the items sought and the crime being investigated; (B) Defendant alternatively received ineffective assistance of counsel ("IAC") where defense counsel failed to object at trial to the introduction of evidence related to Defendant's suppression motion; and (C) the trial court violated Defendant's right to be free of double jeopardy. After careful review, we conclude the affidavits supported a proper finding of probable cause, and as such the trial court did not plainly err, nor did Defendant receive IAC. Regarding Defendant's third argument, however, we conclude the trial court violated Defendant's right to be free of double jeopardy. We therefore vacate and remand the trial court's sentencing order for a resentencing hearing.

I. Factual and Procedural Background

In July 2020, J.G.[1]—a thirteen-year-old girl—reported to the police that Defendant, a family associate, took her from her family's home in the middle of the night and without her parents' permission, and drove her to his house. J.G. further reported that, at his residence, Defendant showed her a sex toy, asked her to wear a black dress, and vaginally raped her.

Based on J.G.'s report and after verifying Defendant's address, Officer Darrel Gray sought and obtained from a magistrate a search warrant

1. A pseudonym is used to protect the identity of the minor child in keeping with N.C. R. App. P. 42.

dated 29 July 2020 (the "July Warrant") for Defendant's address. Officer Gray's affidavit in support of the July Warrant (the "July Affidavit"), in the "Probable Cause" section, describes J.G.'s account of her alleged kidnapping from her parents' home by Defendant and her subsequent rape at Defendant's residence, as well as her account of what she saw at the residence. The July Affidavit further describes Officer Gray's six years of experience as a law enforcement officer with Dare County, and his seventeen years of law enforcement experience with the Coast Guard. Included under the "Items to be Seized" section of the July Affidavit are:

> a. Cellular telephones, tablets, gaming systems capable of recording and/or taking pictures and accessing or storing digital media files, and/or capable of internet access.
>
> b. Computers, and computer related storage media to include, but not limited to hard drives, CD disks, DVD disks, thumbdrives, memory sticks, iPods, personal digital assistant (PDA), flash media, diskettes, routers and other magnetic, electronic or optical media.
>
> c. Security cameras and any storage device associated with it.
>
> d. Any and all items that [J.G.] may have been in contact with to include but not limited to; bed sheets/ comforters, pillow cases, lamps, suspect clothing and vehicle seats for the purpose of obtaining fingerprints or DNA.
>
> e. Any and all items that [J.G.] described inside the residence that would show intimate knowledge [J.G.] was inside the residence and more specifically the suspect's bedroom, to include but not limited to; sexual toys as described the victim to be a penis shaped dildo, condoms, female clothing described as a black dress with shoulder straps, knives, long rifles and lamp.
>
> f. Any and all Records indicating the identity of the suspect and/or current residents or owners of the property being searched, including but not limited to: Utility bills or records, tax bills or records, mail bearing the address being searched, driver's license, passports and ID's issued by other countries.

Regarding these listed items, Officer Gray provided in the application for the search warrant that "[t]here is probable cause to believe that [the items to be seized] . . . constitute[] evidence of the crimes of second

degree kidnapping and statutory rape of a person who is thirteen, fourteen, or fifteen, and of the identity of a person participating in" said crimes. Officers executed the July Warrant and searched Defendant's residence, where they obtained, *inter alia*, a "hi-def recorder"—or DVR—connected to Defendant's home security cameras, a GoPro camera, and an SD card associated with the GoPro camera.

Officer Gray sought and obtained a second search warrant dated 4 August 2020 (the "August Warrant") to access the contents of the electronic items seized from Defendant's residence. The affidavit in support of the August warrant (the "August Affidavit") describes Officer Gray's experience as a law enforcement officer, and lists several items found in the residence that were to be searched, including cell phones, storage devices, and other electronic devices. The "Items to be Seized" section of the August Affidavit includes, among other digital items to be seized, "audio and video clips related to the above-described criminal activity and further described in this affidavit in support of the search warrant, for the above-described item(s)." Among the "above-described item(s)" are three SD cards, as well as two DVRs. The "Probable Cause" portion of the August Affidavit describes the reported kidnapping and rape of J.G., and states that Officer Gray "know[s] from [his] training and experience" that cellular phones are often used to record, discuss, or facilitate sex crimes.

Officers executed the August Warrant and searched the DVR as well as the SD card associated with the GoPro Camera. The DVR revealed a video of Defendant engaging in sexual acts with K.L.,[2] who, at the time, was a thirteen-year-old girl living with her mother in a rented room of Defendant's residence. On the SD card, officers found a video of Defendant having vaginal intercourse with W.R.,[3] who was an employee of Defendant's painting business and was, at the time of the recording, either fifteen or sixteen years of age.

Following the officers' execution of the August Warrant, Defendant was served with bills of indictment charging him with three counts of statutory rape of a child less than or equal to fifteen-years-old, one count of statutory sex offense with a child less than or equal to fifteen-years-old, three counts of indecent liberties with a child, and one count of first-degree kidnapping.

---

2. A pseudonym is used to protect the identity of the minor child in keeping with N.C. R. App. P. 42.

3. A pseudonym is used to protect the identity of the alleged victim in keeping with N.C. R. App. P. 42.

Prior to trial, Defendant filed several motions to suppress the digital evidence obtained by law enforcement. As to the July Warrant, Defendant alleged that the warrant was overbroad because it authorized seizure of, *inter alia*, the relevant DVR and SD card, when nothing in the July Affidavit indicated that such items were related to the crime being investigated. As to the August Warrant, Defendant alleged that the contents of the DVR and SD card should be suppressed as fruit of the poisonous tree, and because the August Affidavit failed to allege these devices were likely to contain evidence of the crime being investigated. Defendant further moved to suppress statements obtained from K.L. and W.R., alleging these statements were obtained solely as a result of unlawful seizure and search of the DVR and SD card.

This matter came before the trial court on 17 January 2023. At trial, before the first witness—W.R.—testified, Defendant objected and asked the trial court that he be heard on the motions to suppress, but the trial court overruled the objection. W.R. then testified, without objection from Defendant, that Defendant pressured her into sex on multiple occasions starting when she was fifteen-years-old, and that she had sex with him so as to keep her job with his painting business. The video showing Defendant performing sexual acts with W.R. was admitted and shown to the jury. Defendant objected to the video on the grounds that it was not dated and therefore did not necessarily show evidence of a crime, but did not object on the basis of suppression. After W.R. testified, the trial court heard Defendant's suppression motions, whereupon Defendant and the State agreed there were no factual issues requiring an evidentiary hearing. The trial court did not rule on the motion to suppress until the third day of the trial.

Prior to the trial court ruling on the motions to suppress, J.G. and K.L. each testified. J.G. testified, without objection, that Defendant came to her house at night and told her to come with him, and explained that she went with him because she thought he might be armed, and she feared for her family's safety. K.L. testified, without objection, that Defendant gave her marijuana and had sexual intercourse with her, and that he also demanded she give him oral sex, which she provided once. The DVR video that showed Defendant performing sexual acts with K.L. was admitted and shown to the jury, without objection.

Following testimonies from J.G. and K.L., the trial court denied Defendant's motions to suppress. In support of its denial, the trial court found that, as the July and August Affidavits in respective support of application for the July and August Warrants contain "affirmation[s] that the property that is sought to be located, searched, or seized constitutes

evidence of a crime and identifications of a person," there was probable cause to believe that the items sought in the search were relevant to the crime being investigated. The trial court further found that, as the Affidavits specify the firsthand account of an alleged victim of sexual assault, and describe details of the incident and the location of the alleged sexual assault as the location for the search, there was a "strong nexus" between the location of the search and the place where the alleged crime occurred, and therefore probable cause to issue the Warrants. The trial court noted that, "while certain items may have been [omitted] such as a conclusory affirmation that from [Officer Gray's] training[] and experience there may be evidence[,]" it was "commonsensical or reasonable" for the magistrate to have determined this information, and the magistrate had a "substantial basis for concluding that probable cause existed."

The trial court found, in the alternative, that the search was incident to lawful arrest because Defendant had been arrested and taken into custody upon execution of the July Warrant. The trial court also found, in the further alternative, that the statutory good faith exception applied where Officer Gray was acting upon a magistrate's order.

Following denial of Defendant's motions to suppress, Defendant testified on his own behalf. Defendant admitted to picking up J.G. from her family's home at night and bringing her to his home, but denied any sexual acts with her. Defendant admitted that the video showing him and K.L. depicted him touching her and kissing her inner thigh. Defendant further admitted to a sexual relationship with W.R., but claimed he believed she was sixteen at the time of the video recording found on the SD card.

After the close of evidence, the trial court instructed the jury and provided in its instructions, *inter alia*, that Defendant could be found guilty of first-degree kidnapping only if he removed J.G. from her home to facilitate the crime of statutory rape or indecent liberties. On 20 January 2023, the jury returned verdicts finding Defendant guilty on all counts, and the trial court thereafter entered eight separate written judgments—where it made no written findings—sentencing Defendant within the presumptive range for each offense to several consecutive sentences totaling 1,081 to 1,627 months' imprisonment. One of the judgments for indecent liberties was later amended to reflect the correct sentence of sixteen to twenty-nine months' imprisonment, instead of 240 to 348 months' imprisonment. On 24 January 2023, Defendant provided written notice of appeal, in which he mistakenly listed the date of entry of the trial court's judgments as 21 January 2023, rather than the correct date of 20 January 2023.

II. Jurisdiction

As an initial matter, Defendant's written notice of appeal contains a defect in its listing of the date of the trial court's judgments, and Defendant therefore failed to properly take appeal to this Court. *See* N.C. R. App. P. 4(b) (a notice of appeal shall "designate the judgment or order from which appeal is taken"); *see also State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011) ("A default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court." (citations omitted) (cleaned up)). In addition to his appellate brief, Defendant has filed a concurrent petition for writ of certiorari ("PWC"), in which he asks this Court to issue this discretionary writ to consider his claims on the merits.

As this Court has consistently provided, though we may issue a writ of certiorari to review a trial court's order or judgment when the right to prosecute an appeal has been lost by failure to adhere to appellate procedure, under N.C. R. App. P. 21(a)(1) the defendant's petition must show "merit or that error was probably committed below[.]" *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) (citation and internal quotation marks omitted).

Here, as explained in further detail below, we conclude Defendant in his PWC has demonstrated merit or that error was probably committed by the trial court. We therefore allow this discretionary writ and proceed to the merits of Defendant's appeal. *See Ricks*, 378 N.C. at 741, 862 S.E.2d at 839; *see also* N.C. R. App. P. 21(a)(1).

III. Analysis

Defendant presents three arguments on appeal: (A) the trial court plainly erred in denying his motion to suppress the fruits of the Warrants that failed to allege any nexus between the items sought and the crime being investigated; (B) Defendant alternatively received IAC, where trial counsel failed to object at trial to the introduction of evidence related to Defendant's suppression motion; and (C) the trial court violated Defendant's right to be free of double jeopardy. We address each argument, in turn.

A. Motion to Suppress

[1] Defendant argues the trial court plainly erred in denying his motion to suppress the evidence obtained as a result of the Warrants, as the Affidavits failed to allege any nexus between the items sought and the crime being investigated. After careful consideration, we disagree.

1. Standard of Review

As Defendant concedes, he failed to renew his suppression objections when the State admitted the relevant evidence before the trial court, and Defendant therefore failed to preserve this issue for our review. *See State v. Powell*, 253 N.C. App. 590, 593, 800 S.E.2d 745, 748 (2017) ("[T]o 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."). As we have consistently provided, however, "to the extent a defendant fails to preserve issues relating to his motion to suppress, we review for plain error if the defendant specifically and distinctly assigns plain error on appeal." *Id.* at 594, 800 S.E.2d at 748 (citation and internal quotation marks omitted) (cleaned up). Defendant here specifically and distinctly assigns plain error, and we therefore review the trial court's denial of Defendant's motion to suppress for plain error. *See id.* at 594, 800 S.E.2d at 748.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 334 (citation and internal quotation marks omitted). As plain error is to be "applied cautiously and only in the exceptional case, the error will often be one that seriously affects fairness, integrity or public reputation of judicial proceedings[.]" *Id.* at 518, 723 S.E.2d at 334 (citation and internal quotation marks omitted) (cleaned up). "In conducting plain error review, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress." *State v. Lenoir*, 259 N.C. App. 857, 860, 816 S.E.2d 880, 883 (2018) (citation omitted).

This Court reviews "an order denying a motion to suppress to determine whether the trial court's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the trial court's ultimate conclusions of law[,]" and "[w]e review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017) (citations and internal quotation marks omitted) (cleaned up).

"In determining whether probable cause exists to issue a search warrant, a magistrate must make a practical, common-sense decision

based on the totality of the circumstances, whether there is a fair probability that evidence will be found in the place to be searched[,]" and this Court accords "great deference" to a magistrate's determination of probable cause. *Id.* at 576, 803 S.E.2d at 416 (citation and internal quotation marks omitted) (cleaned up). This Court's role "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.* at 576, 803 S.E.2d at 416 (internal quotation marks omitted) (citation omitted).

2. Probable Cause for Issuance of a Search Warrant

Under the law of our State, for a search warrant to be properly issued to a police officer, "the facts set out in the supporting affidavit must show some connection or nexus linking" the items sought to alleged illegal activity. *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020). A supporting affidavit is sufficient and establishes probable cause where it gives the magistrate "reasonable cause to believe that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application[,]" and that those items "will aid in the apprehension or conviction of the offender." *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980); *see State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) ("A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched." (citation and internal quotation marks omitted)).

In determining whether an applying officer has demonstrated probable cause, a magistrate may "draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant[.]" *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991) (citation and internal quotation marks omitted). "To that end, it is well settled that whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation and internal quotation marks omitted) (cleaned up). While a magistrate may employ such reasonable inference in determining probable cause, he may not "lawfully issue a search warrant based on an affidavit that is 'purely conclusory' and that does not state the underlying circumstances allegedly giving rise to probable cause." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303–04 (2016) (quoting *Bright*, 301 N.C. at 249, 271 S.E.2d at 372).

Our Supreme Court's decision in *State v. Campbell* is illustrative of what may render an affidavit in support of a search warrant "purely conclusory." 282 N.C. 125, 127, 191 S.E.2d 752, 754 (1972). In *Campbell*,

the defendant appealed from the trial court's dismissal of his challenge to the competency of evidence, arguing that, as the affidavit in support of the search warrant application failed to demonstrate probable cause, the challenged evidence was impermissibly obtained. In holding that the affidavit did not provide a sufficient basis for a finding of probable cause, our Supreme Court concluded that the officer's affidavit in support of the warrant application was "purely conclusory[,]" as "[i]t detail[ed] no underlying facts and circumstances from which the issuing officer could find that probable cause existed [t]o search the premises described. The affidavit implicates those premises [s]olely as a conclusion of the affiant." *Id.* at 131, 191 S.E.2d at 756–57. In further support of this conclusion, our Supreme Court provided, "[n]owhere in the affidavit is there any statement that [the evidence sought was] ever possessed or sold in or about the dwelling to be searched[,]" *and* "[n]owhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of [the evidence sought] in the dwelling." *Id.* at 131, 191 S.E.2d at 757.

Although a search warrant may not properly issue where the supporting affidavit is purely conclusory, our Supreme Court's decision in *Allman* provides an apt illustration of how a supporting affidavit, while not *directly* establishing a connection between evidentiary items sought and illegal activity, may still be sufficient to establish the nexus necessary for a probable cause determination. 369 N.C. at 298, 794 S.E.2d at 305–06. In *Allman*, the defendant and two other individuals were pulled over while riding together in a car, and a subsequent search of the vehicle revealed a large quantity of marijuana and over $1,600 in cash. *Id.* at 292–93, 794 S.E.2d at 302. Following discovery of the marijuana and cash, an officer applied for a warrant to search the defendant's home for evidence of drug dealing, and provided in his supporting affidavit that, *inter alia*: (1) large quantities of drugs and cash were found in the vehicle; (2) two of the individuals occupying the vehicle had a history of drug-related criminal offenses; and (3) the occupants of the vehicle had lied to the arresting officers about where they lived. *Id.* at 295–96, 794 S.E.2d at 304–05. The affidavit also stated, "based on [the officer's] training and experience, that drug dealers typically keep evidence of drug dealing at their homes[.]" *Id.* at 295–96, 794 S.E.2d at 304. A magistrate issued the search warrant, a search of the defendant's residence revealed the presence of illegal drugs and drug paraphernalia, and the defendant was charged, tried, and convicted. *Id.* at 292–93, 296, 794 S.E.2d at 302, 305.

The defendant appealed from the trial court's denial of her motion to suppress evidence, arguing that the warrant was not supported by probable cause. *Id.* at 293, 794 S.E.2d at 302. This matter eventually came before our Supreme Court, and based on the facts contained in the affidavit when viewed in light of the officer's training and experience, the Court, while acknowledging that "nothing in [the officer's] affidavit directly linked [the] defendant's home with evidence of drug dealing[,]" provided that such "direct evidence" is not always necessary to establish probable cause. *Id.* at 297, 794 S.E.2d at 305. Our Supreme Court therefore concluded "it was reasonable for the magistrate to infer that there could be evidence of drug dealing" found at the defendant's residence, and found no error in the trial court's denial of the defendant's motion to suppress. *Id.* at 296–97, 794 S.E.2d at 305. Thus, an affidavit that is "purely conclusory" is insufficient to establish probable cause, *Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57, but one that draws a connection—even if indirectly—between an officer's training and experience and his belief that a search will yield incriminating evidence *is* sufficient to establish probable cause. *See Allman*, 369 N.C. at 295–96, 794 S.E.2d at 304–05.

In the instant case, Defendant challenges the trial court's oral finding that the Affidavits supported issuance of the Warrants for probable cause, and contends, more specifically, that the "trial court's findings of fact were not supported by competent evidence and its conclusions of law were neither supported by the evidence nor legally correct." We disagree with Defendant's contention.

The trial court in its eight written judgments made no written findings, but made extensive oral findings at the conclusion of trial. Defendant does not challenge on appeal the trial court's finding of a nexus between the location of the search—Defendant's residence and bedroom—and alleged criminal conduct. As such, relevant to this appeal is the trial court's finding that the State demonstrated probable cause to search and seize the Affidavits' "Items to be Seized," as the Affidavits contain "affirmation[s] that the property that is sought to be located, searched, or seized constitutes evidence of a crime and identifications of a person[.]"

The magistrate, in issuing the Warrants, relied on the information contained in each of the respective Affidavits, and we conduct our *de novo* review to determine whether, under the totality of the circumstances and per the content of the Affidavits, the magistrate "had a substantial basis for concluding that probable cause existed." *Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416 (citation and internal quotations

omitted); *see also Allman*, 369 N.C. at 293, 794 S.E.2d at 303. We consider the content of the July Affidavit and the August Affidavit, in turn.

a. *The July Affidavit*

Regarding issuance of the July Warrant, Defendant contends that, as the July Affidavit's "Probable Cause" section contains no mention of the electronic items listed in its "Items to be Seized" section, no explanation of why Officer Gray thought the listed items might be in the home and relevant to investigation, and no allegation that an electronic device was used in commission of the alleged crimes, the July Affidavit fails to establish any nexus between the alleged crime and the electronic items.

In support of the July Warrant application, the July Affidavit contains in its "Probable Cause" section a description of J.G.'s account of her alleged kidnapping from her parents' home by Defendant and subsequent rape at Defendant's residence, as well as of her account of what she saw at the residence. Further, the July Affidavit provides an attestation of Officer Gray's training and experience, and includes under its "Items to be Seized" section, in relevant part, the following electronic items:

> a. Cellular telephones, tablets, gaming systems *capable of recording and/or taking pictures* and accessing or storing digital media files, and/or capable of internet access.
>
> b. Computers, and computer related storage media to include, *but not limited to hard drives*, CD disks, DVD disks, thumbdrives, memory sticks, iPods, personal digital assistant (PDA), flash media, diskettes, routers and *other magnetic, electronic or optical media*.
>
> c. Security cameras and any *storage device associated with [them]*.

(Emphasis added). Regarding these electronic items, Officer Gray provided in the application for the July Warrant that there is probable cause to believe these items constitute evidence of the alleged crimes, as well as evidence of the perpetrator's identity. Upon executing the July Warrant, officers seized, *inter alia*, a DVR connected to Defendant's home security cameras, a GoPro camera, and an SD card associated with the GoPro camera.

As a threshold matter, while not fully developed in Defendant's brief on appeal, we address the sufficiency of the July Affidavit's description of the "Items to be Seized"—specifically, as it concerns the DVR and

relevant SD card. While the DVR and relevant SD card ultimately seized by officers were not listed by name in the July Affidavit as "Items to be Seized," our Supreme Court has provided that a "description of property is sufficient when it is as specific as the circumstances and nature of the activity that is under investigation permit." *State v. Kornegay*, 313 N.C. 1, 16, 326 S.E.2d 881, 894 (1985) (citation omitted). Given the "nature and circumstances" of this case, with the State's knowledge of Defendant's residence and the contents therein being derived solely from the account of J.G.—a minor and alleged sexual assault victim—the particularity of the July Affidavit's "Item to be Seized" descriptions "is all that can reasonably be expected" in a case of this nature, such that "security cameras and any storage device associated with [them]" sufficiently describes the DVR, and "storage media to include, but not limited to hard drives . . . and other magnetic, electronic or optical media" sufficiently describes the relevant SD card. *See id.* at 18, 326 S.E.2d at 895 ("The warrants and applications show the rough outline of [the] defendant's activities which is all that can be reasonably expected from the State in a case of this nature."). As the July Affidavit sufficiently describes the evidence seized, we now consider whether the State presented competent evidence of a nexus between said evidence and the criminal conduct alleged against Defendant. *See Bailey*, 374 N.C. at 335, 841 S.E.2d at 280.

Although the July Affidavit, like the affidavit in *Allman*, does not *directly* establish a connection between the items sought and the alleged criminal activity, *see Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05, it is unlike the affidavit in *Campbell* because the July Affidavit is not so lacking in underlying facts and circumstances such that a reasonably prudent magistrate could not find the existence of probable cause. *See Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57; *see Bright*, 301 N.C. at 249, 271 S.E.2d at 372. With its "Probable Cause" description of J.G.'s account of the alleged crime committed by Defendant and at his residence, the July Affidavit presented the underlying circumstances upon which Officer Gray premised his belief that probable cause existed to search Defendant's residence, and seize therein, as evidence of the criminal conduct alleged to have occurred *at the residence*, the listed "Items to be Seized." As such, like the affidavit in *Allman* and unlike the affidavit in *Campbell*, the July Affidavit presented to the magistrate the underlying circumstances allegedly giving rise to, and necessary for a proper determination of, probable cause. *See Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05; *see Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57.

In *Allman*, our Supreme Court concluded the supporting affidavit properly established probable cause to search for narcotics in the

defendant's home where it: (1) contained the underlying circumstances giving rise to probable cause; *and* (2) provided, "based on [the officer's] training and experience[,] that drug dealers typically keep evidence of drug dealing at their homes[.]" 369 N.C. at 295–96, 794 S.E.2d at 305; *see also Bright*, 301 N.C. at 249, 271 S.E.2d at 372. The July Affidavit's training and experience attestation, by contrast, contains no explanation of how Officer Gray's training and experience informed his belief that a search of Defendant's residence would reveal the electronic items, or that said items would aid in the apprehension or conviction of Defendant. Though this lack of explanation could suggest a deficient basis for a finding of probable cause, we do not find that the July Affidavit is "purely conclusory" such that issuance of the July Warrant was improper. *See Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57. Under our standard of review, while according "great deference" to his decision to issue the July Warrant, we must determine whether the magistrate properly found the existence of probable cause. *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434.

For a supporting affidavit to establish probable cause, it must give a magistrate reasonable cause to believe, with fair probability, "that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application[,]" and that those items "will aid in the apprehension or conviction of the offender." *Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *see also McKinney*, 368 N.C. at 164, 775 S.E.2d at 824. A supporting affidavit establishes such reasonable cause where, from the contents of the affidavit, "it was reasonable for the magistrate to infer" that a search would reveal evidence of the alleged crime. *Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. In assessing a magistrate's reasonable inferences, we contemplate not the considerations upon which "legal technicians" act, but rather "factual and practical considerations of everyday life on which reasonable and prudent persons . . . act[,]" and the reasonable inferences such persons draw therein. *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66 (citation omitted); *see also Riggs*, 328 N.C. at 221, 400 S.E.2d at 434; *Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824.

As set forth above, the July Affidavit presented to the magistrate the following circumstances related to Defendant's—at the time alleged—criminal conduct and in support of probable cause: Defendant, by J.G.'s account, kidnapped her from her parents' home and against her will, and took her to his residence, where he raped her. The July Affidavit further contained a list of electronic items sought as "Items to be Seized[,]" and in his application for the July Warrant, Officer Gray plainly articulated that there is probable cause to believe these items constitute evidence of

Defendant kidnapping and raping J.G. In light of our standard of review, we conclude the July Affidavit was such that the magistrate could infer a search of Defendant's residence would reveal the relevant electronic items, because a reasonable and prudent person, employing the practical and factual considerations of everyday life, would expect to find such electronic items in a personal residence. *See Riggs*, 328 N.C. at 221, 400 S.E.2d at 434; *see Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66. As we conclude the magistrate could draw this reasonable inference, and as the July Affidavit contained the underlying circumstances giving rise to a belief in the incriminating nature of the electronic items sought, we further conclude the magistrate had reasonable cause to believe, with fair probability, that the electronic items seized from Defendant's residence would be of an incriminating nature, and therefore aid in the apprehension or conviction of Defendant. *See Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *see also McKinney*, 368 N.C. at 164, 775 S.E.2d at 824.

Despite its failure to establish an explicit connection between Officer Gray's training and experience and his belief in the existence of probable cause, as the July Affidavit gave the magistrate the necessary reasonable cause, the July Affidavit was not "purely conclusory[.]" *Campbell*, 282 N.C. at 130–31, 191 S.E.2d at 756–57. Rather, according great deference to the magistrate's determination of probable cause, we conclude under the totality of the circumstances that the July Affidavit sufficiently established a nexus linking the electronic items sought to the illegal activity, and that the magistrate therefore had a substantial basis for concluding probable cause existed. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *see also Bailey*, 374 N.C. at 335, 841 S.E.2d at 280; *Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05.

Accordingly, the trial court's finding of fact that the State met its evidentiary burden is supported by competent Record evidence, which in turn supports the trial court's conclusion of law that the July Warrant was properly issued. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416. The trial court's denial of Defendant's motion to suppress the fruits of the July Warrant was not error, and certainly not plain error. *See id.* at 576, 803 S.E.2d at 416; *see also Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

b. *The August Affidavit*

Regarding issuance of the August Warrant, Defendant contends that, while the "Probable Cause" section of the August Affidavit contains Officer Gray's attestation that, based on his training and experience, he knows cellular phones are often used to record, discuss, or facilitate sex crimes, the August Affidavit contains no similar allegation regarding

computers, tablets, GoPro cameras, home security systems, or their associated storage devices. As such, according to Defendant, the August Affidavit failed to establish a nexus between the alleged crime and the videos retrieved from the DVR and SD card.

The August Affidavit, though identical to the July Affidavit in most respects, contains an additional "Items to be Searched" section where it lists the electronic items seized from Defendant's residence, including the DVR and relevant SD card. Further, the August Affidavit contains an updated "Items to be Seized" section, which includes, among other digital items to be seized, "audio and video clips related to the above-described criminal activity and further described in this affidavit in support of the search warrant, for the above-described item(s)." Regarding these digital items, Officer Gray provided in the application for the August Warrant that there was probable cause to believe the digital items constituted evidence of the crimes alleged against Defendant, as well as evidence of the perpetrator's identity. Finally, the "Probable Cause" section of the August Affidavit describes, just as in the July Affidavit, J.G.'s account—at the time alleged—of Defendant's crimes. New to this "Probable Cause" section, however, is an attestation to training and experience, where it states that Officer Gray knows, based on training and experience, that cellular phones are often used to record, discuss, or facilitate sex crimes.

In consideration of this relevant information, we conclude the August Affidavit properly establishes a nexus between the digital items and the alleged crimes, and that it does so with less need for reasonable inference as required with the July Affidavit. *See Bailey*, 374 N.C. at 335, 841 S.E.2d at 280. The August Affidavit, like the July Affidavit, describes J.G.'s account of the incident. Given this description, we conclude the August Affidavit presented to the magistrate the underlying circumstances giving rise to, and necessary for a proper determination of, probable cause. *See Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. Additionally, the August Affidavit contains a particularized attestation of Officer Gray's training and experience which, like the training and experience attestation in *Allman*, provides an explanation of how Officer Gray's training and experience informed his belief that a search would reveal the evidence sought, and that said evidence would aid in the apprehension and conviction of the alleged criminal. *See id.* at 295–96, 794 S.E.2d at 305. Although containing a more particularized attestation of Officer Gray's training and experience, the August Affidavit still requires our consideration of one point of reasonable inference—specifically, whether the magistrate could reasonably infer, from Officer Gray's knowledge that *cellular phones* are often used to record, discuss,

or facilitate sex crimes, that a search of *other* electronic items would reveal such incriminating evidence.

As a magistrate's reasonable inferences are viewed in light of the "factual and practical considerations of everyday life on which reasonable and prudent persons . . . act[,]" and not those of a legal technician, we conclude the magistrate could draw the necessary reasonable inferences to support a probable cause determination. *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66; *see also Riggs*, 328 N.C. at 221, 400 S.E.2d at 434. Officer Gray's attestation supported a reasonable belief the search of a cell phone would reveal relevant, incriminating evidence. From this attestation, the magistrate could reasonably infer that, as cell phones are often used to record sex crimes, so too are other electronic devices capable of recording audio and video footage. *See Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365–66; *see also Riggs*, 328 N.C. at 221, 400 S.E.2d at 434. As such, the magistrate had reasonable cause to believe a search of the listed electronic data storage devices—namely, the DVR and relevant SD card—would, with fair probability, reveal evidence that aids in the apprehension or conviction of Defendant. *See Bright*, 301 N.C. at 249, 271 S.E.2d at 372; *see also McKinney*, 368 N.C. at 164, 775 S.E.2d at 824.

The August Affidavit, like the affidavit in *Allman*, gave the magistrate reasonable cause to believe a search of the DVR and SD card would reveal evidence of Defendant's alleged crimes. *See Allman*, 369 N.C. at 295–96, 794 S.E.2d at 305. We therefore conclude, according great deference to the magistrate's determination of probable cause, that under the totality of the circumstances, the August Affidavit established a nexus linking the digital items sought to the illegal activity, and the magistrate therefore had a substantial basis to find probable cause. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *see also Bailey*, 374 N.C. at 335, 841 S.E.2d at 280; *see also Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. The trial court's finding of fact that the State met its evidentiary burden is supported by competent Record evidence, which in turn supports the trial court's conclusion of law that the August Warrant properly issued. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416. As such, we hold the trial court's denial of Defendant's motion to suppress the fruits of the August Warrant was not error, and certainly not plain error. *See id.* at 576, 803 S.E.2d at 416; *see also Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Ineffective Assistance of Counsel

[2] Defendant argues, "to the extent trial counsel's failure to lodge a proper objection negatively impacts this Court's determination of [the

motion to suppress issue], counsel rendered" IAC. We disagree and conclude Defendant did not receive IAC.

Under *Strickland v. Washington*, a defendant must satisfy a two-part test to show ineffective assistance of counsel: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[T]here is no reason for a court deciding an ineffective assistance of counsel claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. "IAC 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, 557 S.E.2d 500, 524 (2001) (citation omitted).

Here, as explained above, the July and August Affidavits supported the magistrate's finding of probable cause, such that issuance of the Warrants was proper. *See Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *see also Bailey*, 374 N.C. at 335, 841 S.E.2d at 280; *Allman*, 369 N.C. at 296–97, 794 S.E.2d at 304–05. Had Defendant's trial counsel objected to the introduction of the challenged evidence, the result of the proceeding would have been the same. Thus, we can discern from the Record on appeal that Defendant was not prejudiced by his counsel's performance, and he did not receive IAC. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *see Fair*, 354 N.C. at 166, 557 S.E.2d at 524. Defendant's IAC claim is dismissed.

C. Double Jeopardy

[3] Defendant argues the trial court violated his right to be free of double jeopardy by entering judgment on both the first-degree kidnapping charge and the underlying sexual offense charges. After careful review, we agree.

A sentence that was "unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise

invalid as a matter of law" may be reviewed by this Court even where no objection or motion was made before the trial court. N.C. Gen. Stat. § 15A-1446(d)(18) (2023). This Court therefore reviews *de novo* Defendant's allegation that he was deprived of his right to be free of double jeopardy. *See State v. Wright*, 212 N.C. App. 640, 642, 711 S.E.2d 797, 799 (2011). "Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Resendiz-Merlos*, 268 N.C. App. 109, 114, 834 S.E.2d 442, 446 (2019) (citation and internal quotation marks omitted).

Under both the United States and North Carolina Constitutions, the "right against double jeopardy . . . protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against *multiple punishments for the same offense*." *State v. Tripp*, 286 N.C. App. 737, 740, 882 S.E.2d 75, 78 (2022) (emphasis added) (citation and internal quotation marks omitted). The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years of age or older and without such person's consent, or any person under sixteen years of age and without the consent of such person's parent or legal custodian; (3) if the act was for the purposes of facilitating the commission of a felony. *See State v. Pender*, 243 N.C. App. 142, 147, 776 S.E.2d 352, 357 (2015). "Kidnapping in the first-degree occurs when the defendant does not release the victim in a safe place or the victim is seriously injured or sexually assaulted." *State v. Martin*, 222 N.C. App. 213, 220, 729 S.E.2d 717, 723 (2012) (citation omitted). North Carolina courts have long held that where a sexual offense charge is the sole basis for elevating a kidnapping charge to one of the first-degree, judgment cannot be entered on both the sexual offense and first-degree kidnapping charges. *See State v. Freeland*, 316 N.C. 13, 23–24, 340 S.E.2d 35, 41 (1986); *see State v. Barksdale*, 237 N.C. App. 464, 473–74, 768 S.E.2d 126, 132 (2014).

Here, the trial court instructed the jury that, for Defendant to be convicted of first-degree kidnapping, it must find:

> First, that [D]efendant unlawfully removed a person from one place to another.
>
> Second, that the person had not reached her sixteenth birthday, and her parent or guardian did not consent to this removal.
>
> Third, that [D]efendant moved that person for the purpose of facilitating [D]efendant's commission of statutory rape or indecent liberties.

> [F]ourth, that this removal was a separate and complete act independent of and apart from the statutory rape and/or indecent liberty.
>
> And fifth, that the person had been sexually assaulted.

As in prior cases where we and our Supreme Court have held the trial court violated a defendant's right to be free from double jeopardy, the trial court's instructions here were such that Defendant could only have been convicted of first-degree kidnapping on the basis of one of the sexual offense charges for which he was also convicted and sentenced. *See Martin*, 222 N.C. App. at 220, 729 S.E.2d at 723; *see also Freeland*, 316 N.C. at 23–24, 340 S.E.2d at 41; *Barksdale*, 237 N.C. App. at 473–74, 768 S.E.2d at 132.

We therefore conclude the trial court violated Defendant's right to be free from double jeopardy, and accordingly vacate the trial court's sentencing order and remand for a resentencing hearing. *See Tripp*, 286 N.C. App. at 740, 882 S.E.2d at 78; *see also Freeland*, 316 N.C. at 23–24, 340 S.E.2d at 41; *Barksdale*, 237 N.C. App. at 473–74, 768 S.E.2d at 132. At the resentencing hearing, the trial court may either resentence Defendant for second-degree kidnapping, or it may arrest judgment on the indecent liberties and statutory rape charges. *See Freeland*, 316 N.C. at 23–24, 340 S.E.2d at 41; *see also Barksdale*, 237 N.C. App. at 473–74, 768 S.E.2d at 132.

IV. Conclusion

The State presented substantial evidence to support a finding of probable cause for the magistrate's issuance of the Warrants, and Defendant therefore was not prejudiced by his counsel's failure to object to the introduction of the relevant evidence. Accordingly, we hold the trial court did not plainly err in denying Defendant's motion to suppress evidence and conclude Defendant did not receive IAC. We further conclude, however, the trial court violated Defendant's right to be free from double jeopardy, and we therefore vacate the trial court's sentencing order and remand for resentencing hearing.

NO PLAIN ERROR in part, DISMISSED in part, and VACATED and REMANDED in part.

Judges STROUD and CARPENTER concur.

STATE v. TAYLOR

[293 N.C. App. 303 (2024)]

STATE OF NORTH CAROLINA
v.
JILL HARDIE TAYLOR

No. COA23-423

Filed 2 April 2024

1. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial—Fourth Amendment—blood sample

In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, her appellate argument that her blood sample was taken in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures was not preserved. Defendant did not object to the admission of the resulting blood test results on constitutional grounds at trial, and while defendant filed a pretrial motion to suppress the blood test results on statutory grounds, she did not advance that argument on appeal.

2. Constitutional Law—Confrontation Clause—blood test report—expert testimony

In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, defendant's Confrontation Clause rights were not violated by the trial court's admission of a lab report prepared by a forensic scientist who did not testify. Constitutional limits on the admission of testimonial statements from absent witnesses were inapplicable because another forensic scientist—who had personally participated in the testing and reviewed the raw data generated to form her expert opinion—did testify at trial. Although defendant argued on appeal that the lab report lacked sufficient foundation due to issues with the blood sample's chain of custody, defendant neither cross-examined the testifying forensic scientist regarding the chain of custody nor objected to the lab report or testimony on that basis.

3. Evidence—other crimes, wrongs, or acts—evidence of previous impaired driving charges and other bad driving—probative value not outweighed by prejudicial effect

In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, the trial court did not err or abuse its discretion in admitting evidence

of defendant's previous impaired driving charges and other incidents of bad driving. Those prior acts—including three incidents of impaired driving under the influence of the same substance as in the instant matter—were sufficiently similar in nature and close in time to fall into the inclusive scope of Rule of Evidence 404(b). Further, these incidents were highly relevant on the issue of malice—an element of second-degree murder—and did not involve shocking or emotional facts, such that their probative value was not substantially outweighed by any danger of unfair prejudice pursuant to Rule of Evidence 403.

Appeal by Defendant from judgment entered 31 October 2022 by Judge James G. Bell in Columbus County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery and Lacy A. Hanson, for Defendant.

WOOD, Judge.

Jill Taylor ("Defendant") was driving very slowly or was stopped in the right lane of Highway 74 when the driver of a tractor trailer swerved to avoid her vehicle, causing the tractor trailer to crash into a tree and explode, killing the driver in the ensuing fire. A jury found Defendant guilty of second-degree murder based upon driving while impaired and reckless driving. On appeal, Defendant argues that her Fourth and Sixth Amendment rights were violated and that the State introduced evidence of malice in violation of Rule of Evidence 403. After careful review of the Record and applicable law, we hold Defendant received a fair trial free from prejudicial error.

I. Factual and Procedural History

On 18 February 2018 at approximately 8:30 p.m., Defendant was driving a red sedan east along U.S. Highway 74 just outside of Whiteville. Ricky Crocker ("Crocker") was also driving east along the same portion of highway just moments behind Defendant in a tractor-trailer truck loaded with cement curbing blocks. Crocker came upon Defendant's vehicle, collided with her stopped vehicle, and died as a result of the crash and ensuing fire.

Just prior to the collision, witnesses observed Defendant's car on Highway 74. Channing Glover ("Glover") came upon Defendant and saw her vehicle in the right lane driving very slowly, approximately five to ten miles per hour, despite a posted speed limit of seventy miles per hour along that section of the highway. Glover narrowly avoided a collision with Defendant by swerving around the left-hand side of her vehicle. Jonathan Highfill ("Highfill") was also driving east along Highway 74 when he saw Defendant's vehicle suddenly and completely stopped in the road in front of him without any turn signal or emergency flashers operating. Highfill was forced to swerve around the left-hand side of Defendant's vehicle to avoid colliding into it. He too narrowly avoided a collision.

Craig Clarke ("Clarke") was traveling westbound on Highway 74 with Tony Oxford ("Oxford") when he witnessed the tractor trailer being driven by Crocker colliding into Defendant's vehicle. He saw the tractor trailer, which was traveling approximately the speed limit, swerve towards the median and saw its trailer swing towards the shoulder. The "tail end" of the trailer swung around as the driver attempted to swerve to avoid a collision, and it "clipped" the rear left quarter panel of Defendant's vehicle, breaking the rear bumper, crumpling the trunk, and tearing off the left rear tire. According to the witnesses, Crocker did not reduce his speed before the collision. The cab of his tractor trailer hit a tree and exploded upon impact, and Crocker ultimately died in the ensuing fire.

Oxford was traveling in the car with Clarke at the time of the collision. Oxford is a retired law enforcement officer with twenty years of experience as a patrol officer, narcotics officer, and investigator. He was asleep at the time of the collision, but Clarke woke him up and told him he had just witnessed the accident and that the truck exploded. Clarke turned around in the median so that they could check on what had happened. They pulled up to the cab of the tractor trailer, which was fully engulfed in flames, and ran toward it to see if they could do anything to help. Oxford could see Crocker slumped over in the cab of the tractor trailer, and other people had already gathered at the truck to try to render aid to him.

Oxford noticed Defendant's vehicle in the ditch next to the woods and ran over to it. He saw Defendant in the driver's seat and tried to open the door. He could not open the driver's door, so he helped her crawl out of the passenger side. Immediately, Oxford smelled a distinct odor emitting from Defendant's car while helping her. Defendant told Oxford she had to have her purse, and after retrieving it, she carried

it with her and "cuddled it like a baby." Oxford asked Defendant if she was fine. She responded yes and then repeated at least a dozen times that she needed to call somebody to come get her. Oxford noticed that Defendant's speech was slow and slurred. He told her there was a man in the tractor trailer burning to death, and she once again stated she needed to go home. Defendant was stumbling as Oxford helped her over to his truck. He allowed her to sit in the front passenger seat of his truck, and he noted she had very distinct signs of dilated pupils, was lethargic, and occasionally nodded off and woke up again. He asked her a few times if she was hurt. She never mentioned any type of injury but continually asked to be taken home. Oxford left the truck for approximately fifteen minutes to check on the progress of those attempting to render aid to Crocker in the tractor trailer. When he returned to his truck, he noticed the same odor in his truck that was in Defendant's vehicle.

When a trooper checked on Defendant, Oxford told him that something was not right with her actions. He reported she was lethargic and had a lack of concern for everything going on. Oxford believed Defendant was impaired on a drug, although he smelled no alcohol or marijuana. Emergency medical technicians ("EMTs") arrived about an hour later, and Oxford told them she had no observable injuries but that he believed she was impaired due to drugs.

Three different EMTs evaluated Defendant. Caitlyn Soles ("Soles") was the first medical personnel to examine Defendant, who was still in the passenger seat of the truck. Soles noted Defendant had "dazed off" and was securing her purse to her chest like she did not want it to go anywhere. Defendant told Soles she could not remember what happened except that a truck hit her. Soles asked Defendant if she wanted to go to the hospital, and she said no. Soles walked Defendant to the ambulance, where Defendant stated she did not want her vital signs checked. Soles observed Defendant place her head into her purse two or three times and lift her head back up. While discussing what she should do with her medic, Reggie Morrison ("Morrison"), they made eye contact and indicated a mutual understanding that Defendant was doing drugs. Morrison noted Defendant's eyes were dilated and that she acted drowsy and confused whenever she lifted up her head from her purse. He believed Defendant was possibly impaired based on her behavior, drowsiness, and confusion as to her surroundings. Defendant was adamant with Morrison that she was not going to be transported to the hospital, despite his advice.

Cherie Register ("Register"), another EMT, approached Defendant while she was still in the passenger seat of the truck and observed

Defendant holding a purse and what looked like a hairspray can or some other type of aerosol can that she would hold up to her face. Register asked Defendant if she was the one driving the vehicle that got hit and if she was okay. Register noted that Defendant was sluggish-acting, slow to respond, and had "constricted" pupils, and she believed Defendant was under the influence of drugs or alcohol. She did not observe Defendant having any injuries. Register was startled by Defendant's complete lack of emotion considering everything going on around them. When Register told Defendant that Crocker did not make it out of the tractor trailer, she just said, "okay." Later, after Register helped remove Crocker's body from the cab of the tractor trailer, she went to the ambulance where Defendant was. Register observed that she would stick her nose into her purse and saw the same aerosol can in it that she was holding earlier.

N.C. Highway Patrol Officer G.S. Hooks ("Trooper Hooks") was the first State Trooper to arrive at the scene. As lead investigator in the case, he was responsible for collecting information from other State Troopers conducting the collision investigation. He interacted with Defendant for approximately fifteen minutes in total that night and did not form an opinion as to whether Defendant was impaired. Before Trooper Hooks approached Defendant, Register told him Defendant seemed to be impaired. As Trooper Hooks introduced himself to Defendant and asked her what happened in the collision, he observed that she was slow to speak and slow in her movements, such as when she slowly retrieved her license from her wallet.

When N.C. Highway Patrol Officer Victor Lee ("Trooper Lee") arrived at the scene, he observed Defendant in the ambulance placing her head into her purse like she was speaking into it. Trooper Lee asked Defendant how she was doing and what happened, and as she responded, he observed that she was lethargic and slow as though she did not have her wits about her. Trooper Lee looked through Defendant's purse and saw two aerosol cans of Dust-Off. He formed an opinion that Defendant's mental and/or physical faculties were appreciably impaired, probably due to inhaling the Dust-Off, causing him to decide to take her to the hospital to have her blood tested. He did not place Defendant under arrest but did handcuff her before driving her to the hospital in the passenger seat of his patrol vehicle. When they arrived, they remained seated in the vehicle, and Trooper Lee read to Defendant her implied consent rights and provided her with a written copy. Defendant consented to a blood draw. A hospital phlebotomist drew her blood and gave a sample of Defendant's blood to Trooper Lee, which he preserved in a safe until it could be transported to a lab for analysis. He then took Defendant outside the hospital and left her with Trooper Hooks, who

told her she was free to go. Trooper Lee did not believe he could arrest Defendant that evening because they did not have enough information as the investigation was ongoing, and he wanted to confer with the district attorney before charging her.

On 11 April 2018, a grand jury indicted Defendant for second-degree murder under N.C. Gen. Stat. § 14-17(b). Defendant's case was tried before a jury at the 10 October 2022 session of Columbus County Superior Court. At trial, N.C. Highway Patrol Officer Jim Ballard ("Trooper Ballard") was tendered as an expert witness in drug recognition. Trooper Ballard testified that based on his review of the facts of the case, including Defendant having stopped her vehicle in the highway for no apparent reason, her lack of emotion despite Crocker's death, the odor in her vehicle being the same as what Oxford smelled in his truck, and the Dust-Off aerosol cans found in her purse, he formed an opinion that Defendant's mental and physical faculties were appreciably impaired due to central nervous system depressants and inhalants. N.C. Highway Patrol Officer J.H. Dixon ("Trooper Dixon") was tendered as an expert in collision reconstruction and crash investigation. He testified he formed an opinion that the collision occurred because Defendant was driving too slowly or was stopped in the right lane. He determined that Defendant violated several traffic statutes, namely reckless driving, going slower than forty-five miles per hour on a highway, and stopping or parking on a highway. Trooper Dixon further determined Crocker also violated a traffic statute by failing to reduce speed to avoid a collision.

On 31 October 2022, the jury convicted Defendant of second-degree murder based on theories that Defendant was driving while impaired and reckless driving, causing Crocker's death. The same day, the trial court sentenced Defendant to an active term of imprisonment of 120-156 months. On 2 November 2022, Defendant timely filed written notice of appeal pursuant to N.C. Gen. Stat. § 15A-1444. All other relevant facts are provided as necessary in our analysis.

II. Analysis

A. Defendant's Blood Sample

[1] Defendant argues her blood sample was seized in violation of the Fourth Amendment of the U.S. Constitution and that the trial court committed plain error in admitting the blood test results. Defendant filed a pretrial motion seeking suppression of the blood test results due to alleged violations of N.C. Gen. Stat. § 20-16.2, pertaining to drivers' implied consent to chemical analysis. On 13 October 2022, the trial court denied the motion because it concluded law enforcement committed

no violations of N.C. Gen. Stat. § 20-16.2. Defendant concedes she did not object to the admission of the blood test results on constitutional grounds at trial. We must, therefore, determine whether Defendant has preserved this issue for our review.

N.C. R. App. P. 10(a)(4) provides, "an issue that was not preserved by objection noted at trial . . . 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." However, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (brackets omitted). In *Davis*, the trial court sentenced the defendant to terms of imprisonment for felony death by vehicle and felony serious injury by vehicle as well as second-degree murder and assault with a deadly weapon inflicting serious injury. *Id.* at 300, 698 S.E.2d at 67. The defendant did not object at the sentencing hearing. *Id.* On appeal before this Court, Defendant challenged his sentences, alleging unconstitutional violations of double jeopardy principles and of N.C. Gen. Stat. § 20-141.4(b) which, he argued, did not authorize both pairs of sentences. *Id.* This Court did not address the merits of the defendant's arguments because he did not preserve his objection to a purported double jeopardy violation at trial. *Id.* at 301, 698 S.E.2d at 67. The defendant appealed to our Supreme Court, which upheld this Court's dismissal of his double jeopardy claims but held that this Court erred in dismissing his statutory argument. *Id.* Thus, our Supreme Court differentiated between the preservation of a constitutional issue and a statutory issue on appeal.

We conclude that *Davis* is applicable to this case. Here, at trial, Defendant sought to suppress her blood test results solely on the basis of purported violations of N.C. Gen. Stat. § 20-16.2, but she does not renew that argument on appeal. Thus, we do not address her statutory argument. Because Defendant did not object at trial to admission of her blood test results on the basis of a purported Fourth Amendment violation, we hold she waived the argument. Therefore, we decline to address Defendant's constitutional argument here.

B. The Blood Analysis Report

[2] Defendant next argues the trial court erred in admitting the laboratory ("lab") report prepared and signed by Curtis Reinbold ("Reinbold"), a forensic scientist at the N.C. state crime lab in Raleigh, because he did not testify in violation of her Sixth Amendment right to confront witnesses against her. Specifically, Defendant argues that because Reinbold did not testify, it was impossible for her to cross-examine him

on subjects such as chain of custody of the blood sample and the reliability of his methods and results.

First, we determine whether Defendant preserved this purported constitutional error for review. We previously have noted that a constitutional objection must be raised before the trial court. *Davis*, 364 N.C. at 301, 698 S.E.2d at 67. Here, there were two lab reports admitted into evidence. State's Exhibit 24, a lab report prepared by Cierra Bell, a forensic scientist at the N.C. state crime lab, confirmed the presence of Difluoroethane, a highly impairing substance used in Dust-Off, in Defendant's blood. State's Exhibit 25, a lab report prepared by Reinbold, confirmed the presence of Alprazolam (commonly known as Xanax, which has the impairing effects of drowsiness and confusion), Amitriptyline, Bupropion, and Chlorcyclizine in Defendant's blood. When the State offered the exhibits as evidence, the trial court asked if Defendant had any objection, to which her counsel replied, "Yes, sir, Judge. Renew my objection under Sixth Amendment." The trial court noted the objection for the record and admitted the exhibits into evidence. Therefore, Defendant objected based on Sixth Amendment grounds at trial. Accordingly, this constitutional issue is preserved, and we will address the merits of her argument.

"We review an alleged violation of a defendant's constitutional right to confrontation *de novo*." *State v. Joyner*, 284 N.C. App. 681, 686, 877 S.E.2d 73, 79 (2022).

It is fundamental that the Sixth Amendment to the U.S. Constitution provides a defendant in "all criminal prosecutions" the right "to be confronted with the witnesses against him." U.S. Const. amend. VI (the "Confrontation Clause"). In a landmark Confrontation Clause case, *Crawford v. Washington*, the U.S. Supreme Court held that testimonial statements of a witness who is absent from trial may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004).

Confrontation Clause issues may arise in the application of the rules of evidence pertaining to expert witnesses. "The North Carolina Rules of Evidence allow for expert testimony 'in the form of an opinion, or otherwise,' if the expert's 'scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,' provided" that the witness is properly tendered as an expert in accordance with the rules of evidence. *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (quoting N.C. R. Evid. 702(a)). An

expert's opinion may be based on "facts or data . . . perceived by or made known to him at or before the hearing." N.C. R. Evid. 703. Significantly, if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, [they] need not be admissible in evidence." *Id.*

In *Ortiz-Zape*, our Supreme Court considered whether the Confrontation Clause was violated when a witness tendered as an expert in forensic science testified as to her opinion that a substance was cocaine based upon her independent analysis of testing performed by another analyst in her lab. 367 N.C. at 2, 743 S.E.2d at 157. In *Ortiz-Zape*, the court analyzed a U.S. Supreme Court case, *Bullcoming v. New Mexico*, which posed a similar question—whether a forensic lab report could be introduced for substantive purposes through the "testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 367 N.C. at 7, 743 S.E.2d at 160 (quoting *Bullcoming*, 564 U.S. 647, 652, 131 S. Ct. 2705, 2710, 180 L. Ed. 2d 610, 616 (2011)). The court in *Bullcoming* held "that surrogate testimony of that order does not meet the constitutional requirement." *Bullcoming*, 564 U.S. at 652, 131 S. Ct. at 2710, 180 L. Ed. 2d at 616. The court in *Ortiz-Zape* specifically noted that Justice Sotomayor, in her concurring opinion in *Bullcoming*, clarified that the case was *not* one in which the in-court witness was a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." 367 N.C. at 7, 743 S.E.2d at 160 (quoting *Bullcoming*, 564 U.S. at 672, 131 S. Ct. at 2722, 180 L. Ed. 2d at 629 (Sotomayor, J., concurring in part)).

Ultimately, the court concluded in *Ortiz-Zape* that "when an expert states her own opinion, without merely repeating out-of-court statements, the expert is the person whom the defendant has the right to cross-examine." 367 N.C. at 8, 743 S.E.2d at 161. The court found that conclusion is consistent with its holding in *State v. Fair* that "[i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence." 354 N.C. 131, 161–62, 557 S.E.2d 500, 521–22 (2001) (no Confrontation Clause violation where the in-court expert did not conduct the blood test herself but was able to determine the location on the victim's pants from which the DNA sample had been taken, an important foundation issue in the case). Therefore, the court in *Ortiz-Zape* specifically held that "[i]n such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible." 367 N.C. at 9, 743 S.E.2d at 161 (quotation marks omitted).

Here, this case is not one in which the expert witness testifying in court did not personally participate in the testing. Megan Keeler ("Keeler"), a forensic scientist at the N.C. state crime lab and also the State's expert witness, testified regarding State's Exhibit 25 that she "look[ed] at the raw data that was generated from the initial analysis by a coworker, and . . . review[ed] it like [she] would if [she] were the original viewer." Keeler explained:

> So there is an author of the report, which would be the analyst that samples and does the test, the process, and then there will be another analyst that's a peer reviewer, like I just spoke. They will check all of the paperwork and documentation and make sure that everything is in order, and then they will release the case if they agree. So two analysts have to agree with the results. The second analyst will be the reviewer and the final one to view the case and say it's good or it's not good, there is some things we need to review. And so I am trained as a reviewer and as an analyst. I will review the data just like I was the reviewer, and so I'm actually, like, looking at it as a third person in this case.

Keeler testified regarding lab protocols, "every test is done the same, providing [a] standardized result." She also testified that she "did some of the data processing in the drug case" and "performed the initial drug screening for the drug record," which means she prepared the blood sample for testing by conducting an "ELISA" analysis (enzyme-linked immunosorbent assay). She specified that Reinbold "wrote the report and made an opinion that I agreed with." Finally, Keeler testified there was an "issue" during the test with the barbiturate assay that required repeating the analysis which they successfully completed, thereby assuring correct data as a result. Specifically, she was the "coordinator" of the instrument, which meant that she assisted Reinbold in correcting the errant instrument by testing it, ensuring it was back in proper working order, and certifying it back into use.

Accordingly, Keeler did not merely repeat out-of-court statements. *Ortiz-Zape*, 367 N.C. at 8, 743 S.E.2d at 161. Although she did not sign the certification, she participated in preparing the blood sample for testing, was trained as a reviewer, reviewed the underlying data, and formed her own independent opinion as to the test results. *See Ortiz-Zape*, 367 N.C. at 7, 743 S.E.2d at 160; *Bullcoming*, 564 U.S. at 672, 131 S. Ct. at 2722, 180 L. Ed. 2d at 629. As an expert with personal knowledge of the processes involved and personal participation in the testing, she was the witness

whom Defendant had a right to cross-examine, and she was indeed subject to cross-examination at trial. Therefore, we hold that Defendant's constitutional right to confrontation was not violated in this case. Defendant argues that Reinbold's absence at trial leaves the lab report without adequate foundation because she could not cross-examine him regarding the blood sample's chain of custody. However, she neither attempted to cross-examine Keeler on this issue, nor objected for insufficient foundation based on a lack of chain of custody testimony. Thus, the trial court did not err in admitting State's Exhibit 25 into evidence.

C. Rule 404(b) Evidence

[3] Finally, Defendant argues the trial court erred in admitting evidence under Rule 404(b) of other crimes, wrongs, or acts, all involving suspected or actual charges of driving while under the influence, because such evidence failed the Rule 403 balancing test.

Our Supreme Court has specified the distinct standards of review when analyzing rulings applying Rule 404(b) and Rule 403:

> [W]e conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Rule 404(b) permits "[e]vidence of other crimes, wrongs or acts . . . . for purposes" other than proving a defendant acted in conformity with a given character trait, including "knowledge." N.C. R. Evid. 404(b). Although "Rule 404(b) is a clear general rule of *inclusion*[, it] . . . . is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 130–31, 726 S.E.2d at 159 (quotation marks omitted) (emphasis in original). Rule 403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." N.C. R. Evid. 403.

Here, Defendant made a pretrial motion seeking to prohibit or limit evidence of prior acts the State intended to introduce under Rule 404(b), arguing that their probative value was substantially outweighed by the danger of unfair prejudice because the jury inevitably would view

such evidence as propensity evidence, a risk that a limiting instruction would not resolve. The trial court orally denied the motion, stating it would "allow each of the DWI charges and other incidents of accidents and bad driving to be used by the [S]tate." On 13 October 2022, the trial court entered its written order in which it found that for each of the five prior acts:

> [T]here is sufficient evidence that the Defendant committed those acts, that the evidence is admitted for the proper purpose of malice, that the evidence is sufficiently similar and close in time and that upon conducting the Rule 403 balancing test, the probative value outweighs the prejudice to the Defendant and the Court finds that the evidence is admissible under Rule 404(b).

Defendant does not argue the trial court's findings are unsupported by the evidence, and we conclude sufficient evidence supported the trial court's written findings closely and accurately detailing the testimony regarding each of the five incidents. We further conclude the findings support the trial court's conclusion that the prior acts are sufficiently similar and close in time. As for similarity, all five prior acts involved suspected driving while under the influence. Four of the five incidents resulted in Defendant actually being charged for DWI.[1] Three of the five incidents specifically involved Dust-Off aerosol cans. It is hard to imagine evidence more probative of the required showing of malice for second-degree murder which is Defendant's deliberate disregard for human life as evidenced by her repeated instances of driving while impaired. *See* N.C. Gen. Stat. § 14-17(b). As for timing, the incidents occurred between 30 September 2017 and 18 February 2018. Defendant accrued these charges in a span of less than half a year, indicating that driving while impaired was not a one-time incident that occurred in the distant past and therefore not probative of Defendant's state of mind. Accordingly, we hold the trial court's findings supported its conclusions as to its Rule 404(b) ruling.

Finally, we hold the trial court did not abuse its discretion in its Rule 403 ruling. As noted, each of the five incidents were particularly probative of malice, an element the State must prove for a second-degree murder charge. Rule 404(b) specifically contemplates *including* evidence

---

1. In one incident, an officer arrived at the scene of a Domino's after responding to a call that a woman was passed out in a vehicle. The officer tried to pull Defendant over, and although she was not driving very fast, she ran three stop signs, and he ultimately decided to abandon the pursuit.

to show knowledge, which here includes Defendant's knowledge that inhaling impairing substances and driving a vehicle is inherently dangerous, showing utter disregard for human life. None of the prior incidents related to any particularly shocking or emotional facts that would have inflamed the jurors to return a guilty verdict against Defendant based on passion; rather, they were regular traffic incidents and DWI investigations. Accordingly, the trial court did not abuse its discretion in denying Defendant's motion based on Rule 403.

III. Conclusion

Because Defendant's pretrial motion did not raise any constitutional challenges and because she failed to preserve her Fourth Amendment challenge for appellate review by entering a timely objection at trial, we decline to review it now. We hold the trial court did not violate Defendant's Sixth Amendment confrontation right by admitting a blood analysis report where the testifying expert witness participated in the lab work and was available for cross-examination. We further hold the trial court did not err in its Rule 404(b) and Rule 403 rulings denying Defendant's objection to evidence of prior acts that demonstrated malice. Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges COLLINS and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
BRAYDEN DAVID WALKER

No. COA23-319

Filed 2 April 2024

1. Sexual Offenses—sexual exploitation of a minor—acting in concert—video recording of sexual activity—inference of common plan

In a prosecution for two counts of first-degree sexual exploitation of a minor, the State presented sufficient evidence from which a jury could conclude that defendant acted for the "purpose of producing material" portraying sexual activity with a minor by acting in concert with others, including: testimony relating that, prior to attending a party, a number of defendant's friends discussed a plan to find a girl at the party, have sex with her, and film it; and three cell phone videos recorded later that evening showing defendant and others variously engaging in or watching sexual activity with a minor. Defendant's behavior in the videos, including laughing and looking toward the phone, demonstrates that he was aware the recordings were being made and was actively participating in their production.

2. Sexual Offenses—jury instructions—first-degree sexual exploitation of a minor—second-degree sexual exploitation is not a lesser-included offense

In defendant's trial for first-degree exploitation of a minor, the trial court did not commit plain error by failing to instruct the jury on the offense of second-degree sexual exploitation of a minor because the latter offense—which requires an actual recording or photograph of sexual activity—is not a lesser-included offense of first-degree exploitation—which can be committed by the use or coercion of a minor to engage in sexual activity for the purpose of producing a visual representation of the activity, whether or not an actual recording is made.

3. Evidence—officer testimony—sexual exploitation of a minor—legally incorrect statement of elements—plain error analysis

There was no plain error in defendant's trial for first-degree sexual exploitation of a minor by the admission of an officer's testimony that the offense did not require a plan to film the sexual activity of a minor, which, although an inaccurate statement of the law,

was made on redirect in the broader context of clarifying the officer's responses to defense counsel's cross-examination about the officer's motive for how he questioned defendant after his arrest. Defense counsel had an opportunity to conduct a recross examination, and the trial court properly instructed the jury on the elements of the charged crime.

4. Criminal Law—jury instructions—sexual exploitation of a minor—inadvertent reference by trial court to sexual assault

There was no plain error in defendant's trial for two counts of first-degree sexual exploitation of a minor where the trial court, while instructing the jury on acting in concert, inadvertently misstated the offense as sexual assault rather than exploitation. The trial court otherwise properly instructed the jury on the offense and its elements, including correctly naming the charged crime as "sexual exploitation" three times during the instruction as a whole.

Appeal by Defendant from judgment entered 15 September 2022 by Judge Thomas H. Lock in New Hanover County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.

Christopher J. Heaney, for Defendant.

WOOD, Judge.

I. Factual and Procedural History

On Halloween night, 31 October 2018, Brayden Walker ("Defendant") gathered with a group of friends, at least some of whom were recently graduated from the same high school, comprised of Patrick Wise ("Wise"), Riley Crouch ("Crouch"), Corey Webster ("Webster"), Austen Montouri ("Montouri"), and Nicholas Foutty ("Foutty"). Throughout the night, the group consumed some combination of alcohol, marijuana, Xanax, and LSD.

Prior to attending a Halloween party, the group gathered at Webster's house where, according to Crouch, they made a plan to find a girl, have sex with her, and film it. Crouch previously had testified the plan was Webster's idea, not Defendant's, and that nobody told Defendant about the plan. Montouri testified that there was no formal meeting or plan and that recording the sexual acts was impromptu.

At the Halloween party, Crouch made eye contact with a girl, N.P., [1] and started talking to her. After fifteen to twenty minutes, Crouch and N.P. agreed to leave the party to go have sex alone at Webster's house. As Crouch and N.P. were leaving the party, Webster joined them. At Webster's house, N.P. had sex with Crouch and perhaps Webster.

The three then left Webster's and traveled to Foutty's house, where Walker and the other friends were hanging out, "winding down," and even starting to fall asleep. When Crouch and Webster arrived, however, the music was turned up and the friends starting partying once again. N.P. was the only female present, and Crouch gave her Xanax.

At some point, Crouch noticed Webster and N.P. come out of the bathroom, and N.P. began walking around Foutty's house topless. Crouch, while Defendant was standing next to him, began filming a video on Snapchat and shouted, "all gang on that shit," which Crouch testified meant everybody was engaging in sexual activity. Afterward, everybody went to the back porch, and no one was engaging in sexual activity at that time.

Some time later, Crouch noticed Defendant and Foutty engaging in sexual activity with N.P. on a couch, and Crouch began recording once more, shouting phrases such as, "dog game" and "we lit." Finally, Crouch noticed once more that Defendant and Foutty were still engaging in sexual activity with N.P. on the couch, and he recorded a third video. Crouch did not know how long Defendant and Foutty had been engaging in sexual activity with N.P. when he started recording. Foutty testified at trial that he was aware he was being recorded while having sex with N.P. Other friends in the group also recorded the sexual activity with N.P. while standing within a few feet of her, including Wise and Montouri, who admitted at Defendant's trial to doing so. Each of the three videos was approximately a minute or less.

In January 2019, law enforcement officers discovered videos of the men having sex with N.P. after they pulled over Crouch for an unrelated traffic stop pertaining to a drug investigation and confiscated his phone. On 7 September 2021, Defendant was indicted for two counts of first-degree sexual exploitation of a minor in violation of N.C. Gen. Stat. § 14-190.16 (2022).

Defendant's trial was held during the 12 September 2022 criminal session of the New Hanover County Superior Court. The jury found

1. Initials are used to refer to the girl to protect her identity pursuant to N.C. R. App. P. 42(b).

Defendant guilty of both counts. The trial court sentenced Defendant to two concurrent sentences of 72-147 months' imprisonment. On 20 September 2022, Defendant filed written notice of appeal. All other relevant facts are provided as necessary in our analysis.

II. Analysis

On appeal, Defendant argues there was insufficient evidence that he had a "purpose of producing material" portraying sexual activity with a minor. He further argues the trial court plainly erred in failing to instruct the jury on second-degree exploitation, allowing an officer to testify about an element of first-degree sexual exploitation of a minor, and stating the charged offense as "sexual assault" instead of "sexual exploitation" one time in its instructions to the jury. We address each argument in turn.

A. Sufficiency of the Evidence as to Defendant's Purpose

[1] Defendant argues the trial court erred in denying his motion to dismiss both charged counts of first-degree sexual exploitation of a minor. Specifically, Defendant argues there was insufficient evidence demonstrating he acted for the "purpose of producing material" portraying sexual activity with a minor because the evidence merely demonstrated he engaged in sexual activity with a minor which happened to be recorded. We disagree.

"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). Our Supreme Court has detailed the standard of review for a motion to dismiss:

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

State v. Barnett, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "Circumstantial evidence may be utilized to overcome a motion to dismiss even when the evidence does not rule out every hypothesis

of innocence." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826 (2015) (quotation marks omitted).

State statute provides that a person commits first-degree sexual exploitation of a minor if he, "knowing the character or content of the material or performance, . . . [*u*]*ses*, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity . . . for the purpose of producing material that contains a visual representation depicting this activity." N.C. Gen. Stat. § 14-190.16(a)(1) (emphasis added).

A defendant may be guilty of a crime by acting in concert with another who commits a crime. As our Supreme Court has explained:

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Acting in concert "may be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *In re J.D.*, 376 N.C. 148, 156, 852 S.E.2d 36, 43 (2020) (quotation marks omitted). "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975). "However, the mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." *In re J.D.*, 376 N.C. at 156, 852 S.E.2d at 43 (quotation marks and brackets omitted).

In the case *sub judice*, the trial court correctly instructed the jury regarding the elements of the crime:

> First, that the defendant used a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity. Vaginal intercourse is sexual activity;
>
> Second, that that person was a minor. A minor is an individual who is less than 18 years old and who is not married or judicially emancipated. Mistake of age is not a defense;

> And third, that the defendant knew the character or content of the material.

Over Defendant's objection, the trial court also correctly instructed the jury on acting in concert using the following language:

> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit first-degree sexual assault of a minor, each of them is guilty of the crime; however, a defendant is not guilty of a crime merely because the defendant is present at the scene even if the defendant may secretly approve of the crime or secretly intend to assist in its commission.
>
> To be guilty, the defendant must aid or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.

Here, whether or not the plan was specifically communicated to Defendant, Crouch's testimony was that at least he and possibly other members of the group had a preconceived plan to find a girl, have sex with her, and film it. The purpose of recording would have been clear when Crouch pulled out his phone and, in the first recording, shouted "all gang on that shit," announcing an intent for all or some of the friends to engage in sexual activity with N.P. with the knowledge that Crouch was recording. Defendant himself was standing next to Crouch in the first video, which would have made him aware of the group's intent to have sex with N.P. while Crouch recorded. Defendant did not have to state expressly that he had a "purpose to produce material" and indeed, such direct evidence is rare and unnecessary to sustain a conviction. *Winkler*, 368 N.C. at 576, 780 S.E.2d at 826; *Sanders*, 288 N.C. at 291, 218 S.E.2d at 357.

In the second video, N.P. can be seen performing oral sex on Foutty, who is sitting on the couch, while Defendant is behind her engaging in, or attempting to engage in, vaginal intercourse. Wise can be seen standing only feet away from them with his phone out, recording them. In the second and third videos, Defendant can be seen laughing, smiling, and looking towards his friends who are recording him, demonstrating he was aware they were recording and was actively participating in the group's intent to film sexual acts with a minor.

It was not necessary for Defendant to have formed or to have been aware of a preconceived plan to have sex with N.P. and to film it. The jury was entitled to infer from the "circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto" that Defendant formed the necessary intent to engage in sexual activity with N.P. for the purpose of producing the Snapchat recordings while he was in the midst of doing so. *In re J.D.*, 376 N.C. at 156, 852 S.E.2d at 43. Defendant was friends with the other members of the group. *Sanders*, 288 N.C. at 291, 218 S.E.2d at 357 (a defendant's relation to the actual perpetrators is relevant in proving one acted in concert with the perpetrators). His active participation in the sexual activity which others recorded, as shown by his smiling, laughing, and looking towards his friends as they recorded, demonstrates that he was more than present or merely approving of what was happening. *In re J.D.*, 376 N.C. at 156, 852 S.E.2d at 43. His actions tend to show that he was "acting together with another" or others who recorded the acts and who also had the purpose of producing the Snapchat videos within the meaning of N.C. Gen. Stat. § 14-190.16(a)(1). *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

Therefore, even presuming Defendant himself was not the principal who committed the crime, substantial evidence demonstrates he acted in concert with his friends by engaging in the sexual activity which they recorded with the knowledge they were recording it. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

B. No Instruction on Second-Degree Exploitation of a Minor.

[2] Defendant argues the trial court plainly erred in failing to instruct the jury on second-degree exploitation of a minor because it is a lesser-included offense of first-degree sexual exploitation. Defendant argues in the alternative that even if second-degree sexual exploitation is not a lesser-included offense, because any purported evidence of first-degree sexual exploitation was conflicting, the trial court was required to instruct the jury on second-degree sexual exploitation.

We review unpreserved issues pertaining to potential errors in the trial court's instructions to the jury for plain error. N.C. R. App. P. 10(a)(4); *see also State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Our Supreme Court has held:

> [A] trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction, and that the failure to do so is reversible error which is not

> cured by a verdict finding the defendant guilty of the greater offense. Only when the evidence is clear and positive as to each element of the offense charged and there is no evidence supporting a lesser included offense may the judge refrain from submitting the lesser offense to the jury.

State v. Montgomery, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995) (citation and quotation marks omitted). This Court has explained that "[i]n determining whether one offense is a lesser included offense of another, we apply a definitional test as opposed to a case-by-case factual test. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *State v. Hedgepeth*, 165 N.C. App. 321, 324, 598 S.E.2d 202, 205 (2004) (citations and quotation marks omitted).

A person commits first-degree sexual exploitation of a minor if he:

> (1) *Uses*, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

N.C. Gen. Stat. § 14-190.16(a) (emphasis added). A person commits second-degree sexual exploitation of a minor, however, if he "(1) [r]ecords, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or (2) [d]istributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17(a) (2022).

Here, Defendant's indictment stated he "did *use* and coerce and encourage a minor female" to engage in the sexual activity. (Emphasis added). Ultimately, the trial court instructed the jury on first-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.16(a)(1), specifically pertaining to the "use" of a minor for producing material. The trial court used North Carolina Pattern Jury Instruction ("NCPI Crim.") 238.21, titled "First Degree Sexual Exploitation of a Minor (Using or Employing a Minor to Engage in or Assist Others in Engaging in Sexual Activity)." NCPI Crim. 238.21. If the trial court had instructed the jury on second-degree exploitation of a minor, it would have used one of the two existing pattern jury instructions for the offense. One of the instructions pertains to producing material under N.C. Gen. Stat. § 14-190.17(a)(1), and the other pertains to circulating material under N.C. Gen. Stat. § 14-190.17(a)(2). *See* NCPI Crim. 238.22–22A. Of these, only the instruction pertaining to producing material would be relevant because there was no allegation that Defendant distributed, transported, exhibited, sold, purchased, exchanged, or solicited material under N.C. Gen. Stat. § 14-190.17(a)(2). Therefore, our analysis is limited to whether N.C. Gen. Stat. § 14-190.17(a)(1), regarding recording, photographing, filming, developing, or duplicating material, is a lesser-included offense of N.C. Gen. Stat. § 14-190.16(a)(1), regarding the use of a minor to produce material.

NCPI Crim. 238.21 lists, in pertinent part, the elements of first-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.16(a)(1) in the following manner: "First, that the defendant used a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity. . . . Second, that [the] person was a minor. And Third, that the defendant knew the character or content of the material." NCPI Crim. 238.21 (emphasis in original). In contrast, NCPI Crim. 238.22 lists the elements of second-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.17(a)(1) in the following manner: "First, that the defendant recorded, photographed, filmed, developed, or duplicated material that contains a visual representation of a minor engaged in sexual activity. And Second, that the defendant knew the character or content of the material." NCPI Crim. 238.22 (emphasis in original). Therefore, N.C. Gen. Stat. § 14-190.17(a)(1) requires that there be some type of recording, or in other words, that such illicit material actually was *in existence at some point*. Without an actual recording or photograph of the sexual activity, there would be nothing to prosecute and no violation of N.C. Gen. Stat. § 14-190.17(a)(1). In contrast, it is possible for one to violate N.C. Gen. Stat. § 14-190.16(a)(1) without successfully producing material. For example, if one used a

minor to engage in sexual activity for the purpose of producing material, and afterwards learned that the phone or camera failed to record (because, for example, the perpetrator forgot to press the "record" button or the device malfunctioned), he still would be in violation of N.C. Gen. Stat. § 14-190.16(a)(1) for using a minor to engage in sexual activity for the *purpose of producing material*, regardless of whether or not he successfully recorded it. As Defendant's counsel admitted to the trial court while objecting to an instruction on accomplice testimony:

> I also think that the crime can be committed without a recording actually taking place. If somebody, like I said, forg[o]t to turn the record button but you've engaged in this sexual activity for the purpose of creating a visual representation, I am not sure the recording is required. I think it goes more to the purpose of the sexual act.

The focus of first-degree sexual exploitation is the direct mistreatment of the minor or the production of material for sale or profit: *using*, *employing*, *inducing*, *coercing*, *encouraging*, or *facilitating* "a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity." N.C. Gen. Stat. § 14-190.16(a)(1). The focus of second-degree sexual exploitation, however, is the criminalization of the actions of one who is "merely" involved in the production or after-the-fact distribution of such material, without the requirement that the production of such material be for sale or pecuniary gain. Our Supreme Court made this point when it explained:

> Under the current statutory scheme, a defendant can be convicted of sexual exploitation of a minor in the event that he commits a variety of acts, with the defendant's conduct being subject to varying degrees of punishment depending upon the nature and extent of the defendant's involvement with the minor in question. . . . [T]he common thread running through the conduct statutorily defined as *second-degree sexual offense* [is] that the defendant had taken an active role in the production or distribution of child pornography without directly facilitating the involvement of the child victim in the activities depicted in the material in question. . . . [T]he acts necessary to establish the defendant's guilt of *first-degree sexual exploitation of a minor* can be categorized as involving either direct facilitation of the minor's involvement in sexual activity or the production of child pornography for sale or profit.

State v. Fletcher, 370 N.C. 313, 320–21, 807 S.E.2d 528, 534–35 (2017) (emphasis added).

Therefore, we hold that second-degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.17(a)(1) is not a lesser-included offense of N.C. Gen. Stat. § 14-190.16(a)(1). Thus, the trial court did not plainly err in failing to instruct the jury on second-degree sexual exploitation of a minor.

C. Officer's Testimony Regarding an Element of the Charged Offense

[3] Defendant next argues the trial court plainly erred in allowing an officer to testify that N.C. Gen. Stat. § 14-190.16(a)(1) merely requires filming the sexual activity with a minor rather than a preexisting plan to film the activity. Specifically, Defendant argues the officer's testimony improperly and inaccurately instructed the jury that Defendant merely being filmed having sex with N.P. constituted a violation of N.C. Gen. Stat. § 14-190.16(a)(1) and misdirected the jury's attention from the statute's requirement that the defendant have the intent to produce material. We disagree.

Because Defendant did not object to the testimony at trial, we review this issue for plain error. N.C. R. App. P. 10(a)(4); *see also Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence. The purpose of such a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "The trial court, not witnesses, must define and explain the law to the jury." *State v. Harrell*, 96 N.C. App. 426, 430, 386 S.E.2d 103, 105 (1989).

Here, defense counsel cross-examined the lead detective in the case, Sam Smith ("Detective Smith"), about a conversation he had with Crouch after he arrested him in October 2019. On redirect, the State drew Detective Smith's attention to defense counsel's questions, stating:

> [Y]our answer was that Mr. Crouch said that there was -- everybody that night knew that there was an agreement that [N.P.] was going to have sex with anyone they wanted to?

Detective Smith answered, "correct," and the State asked him, "And you said it was inferred. So what do you mean by that? Help us understand what you mean by that. He didn't exactly -- he didn't specifically

use the word 'plan'?" The State asked, "Explain what you meant by 'inferred'?" Detective Smith answered, "That there were other ways to say that there's a plan without saying 'This is the plan.' " The State then asked, "And you also said on cross-examination that you did not ask Riley Crouch any questions about filming that night?" Detective Smith answered, "Correct," and finally, the State asked him, "Why did you not ask Riley Crouch any questions about the filming of the sexual activity?" Detective Smith answered, "Because a violation of the statute doesn't require like the -- one, as I mentioned earlier, *it was clearly all filmed and the statute doesn't require a plan to film it, just that it's filmed.*" (Emphasis added).

The State's questions on redirect and Detective Smith's responses were clearly aimed at developing clarifying testimony about his responses to defense counsel on cross-examination and his reasoning and motive for how he questioned Crouch after his arrest. Detective Smith simply answered why he did not feel compelled to question Crouch regarding the filming of the sexual activity, and he gave a logical, albeit legally incorrect, response. Defense counsel then had an opportunity for recross-examination, after which the trial proceeded. Therefore, Detective Smith's testimony made sense in context and did not constitute improper instructions to the jury. The trial court properly instructed the jury on the elements of the charged crime. Accordingly, the trial court did not plainly err when it permitted Detective Smith to testify as he did.

D. Trial Court's Accidental Reference to the Charged Crime as Sexual Assault

[4] Defendant next argues the trial court's reference to the charged crime of first-degree sexual exploitation of a minor as "sexual assault" during its instruction to the jury on acting in concert constituted prejudicial error because it shifted the jury's attention from the specific intent requirement and to the sexual activity itself. We disagree.

Defendant cites *State v. Lee* for the proposition that any objection to an instruction preserves any alleged error with that instruction for appellate review. 370 N.C. 671, 811 S.E.2d 563 (2018). The court in *Lee* specifically stated:

> When a trial court agrees to give a *requested* pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection. A *request* for an instruction at the charge conference is sufficient compliance with the rule to warrant

> our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

370 N.C. at 676, 811 S.E.2d at 567 (brackets omitted) (emphasis added). Here, however, Defendant did not request the instruction; rather, he objected to it. The trial court inadvertently referred to the charged crime as sexual assault during its instruction on acting in concert:

> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit first-degree *sexual assault* of a minor, each of them is guilty of the crime.

(Emphasis added). Defendant objected to the trial court's proposed instruction on acting in concert: "I mean, I don't think the acting in concert is appropriate." Defendant, however, never objected when the trial court referred to the charged crime as sexual assault. Therefore, the rule stated by the court in *Lee* that any alleged error regarding a *requested* jury instruction is preserved as long as a Defendant at some point during the trial objected to the instruction does not apply here to preserve the issue for full appellate review. Accordingly, we review the issue for plain error. N.C. R. App. P. 10(a)(4); *see also Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

Our Supreme Court has held:

> The charge of the court must be read as a whole[,] in the same connected way that the judge is supposed to have intended it and the jury to have considered it. It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Hooks, 353 N.C. 629, 634, 548 S.E.2d 501, 505 (2001) (citation, ellipses, and brackets omitted).

Although the trial court misstated the charged crime once in its jury instruction regarding acting in concert, the trial court properly instructed the jury on the elements of the first count of first-degree sexual exploitation of a minor. It also correctly stated the elements of the charged crime for the second count of first-degree sexual exploitation of a minor.

Moreover, during its second instruction to the jury on acting in concert, the trial court correctly named the charged crime as "first-degree sexual exploitation of a minor." The jury, therefore, would have been aware of the correctly charged crime. A one-time, inadvertent misnomer, otherwise correctly stated three times, would not have confused the jury and does not constitute plain error in a jury instruction. Accordingly, read as a whole, the trial court correctly instructed the jury regarding the charged crime, notwithstanding a single misnaming of the offense. *Hooks*, 353 N.C. at 634, 548 S.E.2d at 505.

III. Conclusion

In summary, we hold there was sufficient evidence for the jury to convict Defendant of first-degree sexual exploitation of a minor. The trial court did not plainly err in failing to instruct on second-degree sexual exploitation of a minor, allowing the officer's testimony explaining his actions based on what he believed was an element of the crime, or inadvertently misnaming the charged offense once in its jury instructions, when read as a whole, the trial court otherwise correctly instructed the jury. We hold Defendant received a fair trial free from error.

NO ERROR.

Judges FLOOD and STADING concur.

DOUG TURPIN AND NICOLE TURPIN, PLAINTIFFS
v.
CHARLOTTE LATIN SCHOOLS, INC., CHARLES D. BALDECCHI, TODD BALLABAN, DENNY S. O'LEARY, MICHAEL D. FRENO, R. MITCHELL WICKHAM, COURTNEY HYDER, IRM R. BELLAVIA, PHIL COLACO, JOHN D. COMLY, MARY KATHERINE DUBOSE, ADAORA A. ERUCHALU, DEBBIE S. FRAIL, DON S. GATELY, ISRAEL K. GORELICK, JOY M. KENEFICK, KARIM LOKAS, JOHN T. MCCOY, KRISTIN M. MIDDENDORF, A. COY MONK IV, UMA N. O'BRIEN, DAVID A. SHUFORD, MICHELLE A. THORNHILL, FLETCHER H. GREGORY III, TARA LEBDA, AND PAIGE FORD, DEFENDANTS

No. COA23-252

Filed 2 April 2024

1. Contracts—breach—private school enrollment contract—termination by school—plain language

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' breach of contract claim was properly dismissed based on the plain and unambiguous language of the enrollment contract, which plaintiffs renewed each year, including the year after the school made the challenged changes. The contract established that the school "reserved the right" to discontinue enrollment if the school determined, in its sole discretion, that one of two conditions had been met: namely, that plaintiffs' actions rendered a positive, working relationship with the school impossible or seriously interfered with the school's mission.

2. Fraud—enrollment contract terminated by private school—curriculum challenge—alleged retaliation—elements not met

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim that the school committed fraud was properly dismissed where, although plaintiffs asserted that their child was expelled despite the school's assurances that plaintiffs' complaints would not lead to retaliation, school administrators did not make a false statement because the child's removal from school was an ancillary effect of the termination of the enrollment contract and was not a direct action taken against the child. Further, although plaintiffs asserted that they were misled about the purpose of an in-person meeting with school administrators, there was no

evidence that school personnel made a false representation or concealed a material fact.

3. Negligence—negligent misrepresentation—enrollment contract terminated by private school—curriculum challenge—assurances of non-retaliation

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent misrepresentation—based on plaintiffs' assertion that they justifiably relied on statements from school administrators that plaintiffs' complaints would not result in retaliation—was properly dismissed where plaintiffs failed to demonstrate that school officials owed them a duty of care, since such a duty is limited to situations involving a professional relationship in the context of a commercial transaction, which was not at issue in the instant case.

4. Unfair Trade Practices—enrollment contract terminated by private school—curriculum challenge—alleged retaliation—elements not met

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for unfair and deceptive trade practices (UDTP)—based on plaintiffs' assertion that school administrators were deceptive and unfair when they assured plaintiffs that their complaints would not lead to retaliation and instructed plaintiffs that they could raise future concerns—was properly dismissed where the claim could not be established through plaintiffs' related fraud claim, which the appellate court determined had no merit, and where the school's assurances pertained only to plaintiffs' initial presentation of their concerns to the school board and did not extend to plaintiffs' continued expression of the same concerns in perpetuity.

5. Emotional Distress—negligent infliction—enrollment contract terminated by private school—only intentional conduct alleged

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent infliction

of emotional distress was properly dismissed where plaintiffs based their claim on intentional conduct by a school administrator; only negligent conduct, not intentional conduct, may satisfy the negligence element of the claim.

6. Libel and Slander—defamation—private school curriculum dispute—school characterization of parents' concerns—accuracy

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' defamation claim—based on their assertion that school administrators mischaracterized plaintiffs' presentation to the school board as including racist accusations regarding the faculty and students—was properly dismissed where administrators accurately characterized the "gist or sting" of plaintiffs' allegations that the school was compromising its academic excellence by promoting diversity, equity, and inclusion among its faculty and student body; therefore, the administrators' statements did not constitute false statements.

7. Negligence—negligent retention or supervision—private school curriculum dispute—actions by school administrator—incompetency not shown

In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' claim for negligent supervision of the head of school was properly dismissed where the claim could not be proven by plaintiffs' related claims for fraud, unfair and deceptive trade practices, or defamation, all of which the appellate court determined had no merit, and where plaintiffs' assertion that the head of school had exhibited "animus" or "hostility" toward them was insufficient to establish incompetency or inherent unfitness.

Judge ARROWOOD concurring by separate opinion.

Judge FLOOD dissenting.

Appeal by plaintiffs from order entered 13 October 2022 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2023.

Ward and Smith, P.A., by Christopher S. Edwards, Alex C. Dale, and Josey L. Newman; Vogel Law Firm PLLC, by Jonathan A. Vogel; and Dowling Defense Group, LLC, by John J. Dowling III, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William A. Robertson, Jim W. Phillips, Jr., Jennifer K. Van Zant, and Kimberly M. Marston, for defendant-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith, B. Davis Horne, Jr., David R. Ortiz, for amicus curiae North Carolina Association of Independent Schools and the Southern Association of Independent Schools.

Melinda R. Beres for amicus curiae Concerned Private School Parents of Charlotte.

Envisage Law, by James R. Lawrence III, for amicus curiae Moms for Liberty Union County, Mecklenburg County, Wake County, Iredell County, Chatham County, Forsyth County, Guilford County, Buncombe County, Stanly County, New Hanover County, Onslow County, Bladen County, and Transylvania County.

THOMPSON, Judge.

Appeal by plaintiffs from the trial court's order granting in part and denying in part defendants' motion to dismiss the nine claims plaintiffs asserted against defendants, including fraud; unfair and deceptive trade practices; negligent misrepresentation; negligent infliction of emotional distress; negligent supervision and retention; slander; libel; breach of contract; and breach of implied covenant of good faith and fair dealing. The trial court denied defendants' motion to dismiss as to plaintiffs' ninth claim, breach of implied covenant of good faith and fair dealing, which plaintiffs subsequently voluntarily dismissed without prejudice. Upon careful review of the matters discussed below, we affirm.

I. Factual Background and Procedural History

In April 2022, Doug and Nicole Turpin (plaintiffs) filed suit against defendants Charlotte Latin Schools, Inc. (Latin); the Head of School, Charles Baldecchi (Baldecchi); the Head of Middle School, Todd Ballaban (Ballaban); and the school's board members (Board). On

18 July 2022, defendants filed a motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. When defendants' motion came on for hearing at the 20 September 2022 session of Mecklenburg County Superior Court, the allegations taken in the light most favorable to the plaintiffs tended to show the following:

Plaintiffs' children, O.T. and L.T.,[1] attended Latin (graded K-12) from the time they were in kindergarten through 10 September 2021, when defendants Baldecchi and Ballaban, during a meeting with plaintiff Doug Turpin, terminated the enrollment contract between Latin and plaintiffs.

Plaintiffs allege that up until the 2020-2021 school year, Latin provided a traditional, apolitical education. However, in June 2020, following the death of George Floyd, a letter was sent to Latin parents, faculty, and staff that plaintiffs felt indicated the school "was moving toward a curriculum, culture, and focus associated with a political agenda." That same month, parents, faculty, staff, and alumni began receiving a video series distributed by Latin entitled "Conversations About Race." On 4 July 2020, Baldecchi sent Latin parents, faculty, and staff a letter titled "My Reflections on the Fourth of July and My Journey Through Life as We Live History," wherein he recounted his participation in a high school prank that, "was not racially motivated" at the time, but "in today's lens, it is horrific."

During the 2020-2021 school year, plaintiffs and other Latin parents began to discuss their concerns about the communications they had received from the school, as well as changes in curriculum, reading materials, and classroom policies that they felt "were indicative of the adoption of a political agenda." Ultimately, the group of parents, including plaintiffs, who had begun calling themselves "Refocus Latin[,]" requested a meeting with the Board to address their concerns.[2]

In February 2021, plaintiffs entered into enrollment contracts with Latin for the 2021-2022 school year. In bold typeface, the enrollment contracts stated

> I understand that in signing this [e]nrollment [c]ontract for the coming academic year, my family and I understand the mission, values, and expectations of the School

1. Initials are used to protect the identities of the minor children.

2. Refocus Latin stated that their mission was to "[c]onfirm the foundational principles supporting a Mission based upon the stated core values and beliefs. We must hold fast to what is true and double down on what made the school successful for five decades."

> as outlined in the *Charlotte Latin School Parent-School Partnership* and agree to accept all policies, rules, and regulations of Charlotte Latin Schools, Inc., including those as stated and as referred to above.

(emphasis in original).

The enrollment contracts also state that "[i]f this [e]nrollment [c]ontract is *acceptable to you*, please 'sign' as directed below . . . . This shall constitute your signature in acceptance of this [e]nrollment [c]ontract and certifies that you have read the [c]ontract and understand it." (emphasis added). Both enrollment contracts were signed by plaintiff Nicole Turpin. The enrollment contracts acknowledge that "[t]his instrument shall be interpreted in accordance with the laws of the State of North Carolina."

Finally, the enrollment contracts state that, "I agree to uphold the Parent-School Partnership." The Parent-School Partnership provides, in pertinent part, that a

> positive, collaborative working relationship between the School and a student's parent/guardians is essential to the fulfillment of the School's mission. Therefore, *the School reserves the right to discontinue enrollment* if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission."

(emphasis added).

Moreover, the Parent-School Partnership states that, "[t]he School will uphold and enforce rules and policies detailed in the Family Handbook in a fair, appropriate[,] and equitable manner."[3]

In July 2021, Refocus Latin was invited to present their concerns to the Executive Committee of the Board. Prior to the meeting with the Board, two Refocus Latin parents met with the Board's Chair, Denny O'Leary, to express the group's apprehension about retaliation from Latin for participating in the presentation. O'Leary assured the parents that they would not be subjected to any retaliation "for the parent[s'] exercise of the contractual right to communicate concerns to Latin" and

---

3. According to plaintiffs' complaint, the Family Handbook for the 2021-2022 school year provided that "[t]he school will continue to review and update its programs in all areas."

asked the two Refocus Latin parents to communicate that message to the rest of the Refocus Latin parents, including plaintiffs.

On 24 August 2021, ten members of Refocus Latin,[4] including plaintiff Doug Turpin, brought their PowerPoint presentation to the Executive Committee of the Board, Baldecchi, and defendant Fletcher H. Gregory III. At the meeting, members of the Board, including O'Leary, again assured the group that there would be no retaliation against any parents for bringing their concerns about Latin before the Board. When the presentation concluded, O'Leary expressed her appreciation to the parents for their presentation, but advised the parents that neither the Board nor the administration of Latin would continue the dialogue about the concerns Refocus Latin had presented, that no response to the presentation would be provided, and that any future concerns the individual parents had should be taken to Latin's administrators.

On 25 August 2021, the day after the presentation, O'Leary sent an email to the ten participants, including plaintiff Doug Turpin, thanking them again for communicating their concerns to the Board and expressing her optimism about Latin and its future. On 29 August 2021, plaintiff Doug Turpin responded to O'Leary's email, thanking the Executive Committee of the Board for its time but also expressing his disappointment in the Board's decision not to continue the dialogue with Refocus Latin.

Following Refocus Latin's presentation to the Board, parents who had participated in the preparation of the presentation and had access to the PowerPoint emailed the PowerPoint presentation to other parents who had the same concerns as the parents of Refocus Latin. Between 1–2 September 2021, Baldecchi met with Latin faculty and staff via video calls and advised them that he was aware that the PowerPoint presentation had been obtained by other parents within the Latin community. He stated that the PowerPoint presentation was "just awful," "very hurtful," and that, "[o]ne reads it and cringes." He further stated that the parents' concerns about the curriculum and culture of Latin were a "lost cause," that Refocus Latin had met with the Board in "bad faith[,]" and that the presentation was "an attack on our community with the intention of ripping its fabric apart." Baldecchi advised faculty and staff not to engage with parents who communicated concerns with the curriculum and culture of Latin, but to "point them to me, please."

---

4. The Board restricted the number of parents who could attend the presentation to no more than ten.

One week later, on 7 September 2021, plaintiffs emailed Ballaban with concerns they had about L.T.'s sixth-grade Humanities class. L.T. had shared with plaintiffs some of the comments made by his teacher, which plaintiffs felt were "indoctrination on progressive ideology[,]" and plaintiffs also claimed that the teacher would no longer allow L.T. to pull down "his mask for just long enough to drink water[,]" nor would she allow L.T. to go to the bathroom "when he asks to do so." Out of fear of retaliation against L.T., plaintiffs requested that Ballaban not "address this with the teacher [plaintiffs] a[re] referencing in this email" until plaintiffs had first had a chance to discuss the matter with Ballaban directly.

On 8 September 2021, Ballaban responded to plaintiffs' email and stated that he would investigate the "serious claims" plaintiffs had made about the teacher and report back to plaintiffs in "a day or two . . . ." In response to plaintiffs' concern that the teacher might retaliate against L.T., Ballaban further assured plaintiffs that "[o]ur teachers do not retaliate and there will be no blowback, I assure you." Ballaban emailed plaintiffs later that same day, advised plaintiffs that he had looked into the matter "in depth[,]" and notified plaintiffs that he and defendant Baldecchi "would like to meet with [plaintiffs] in person about it" on 10 September 2021.

At the 10 September 2021 meeting between Baldecchi, Ballaban, and plaintiff Doug Turpin, Ballaban reported that he had spoken with L.T.'s Humanities teacher and she had denied plaintiffs' allegations regarding the class curriculum as "political indoctrination." During the meeting, Baldecchi said that the parents of Refocus Latin, and by association, plaintiffs, "believed that the school 'accepts students and hires faculty because of their color' and that students and faculty of color 'are also not up to the merit of the school.' " Thereafter, Baldecchi produced the enrollment contracts plaintiffs had signed in February 2021 and terminated the contracts. O.T. and L.T. were required to leave Latin that same day.

On 14 September 2021, an email was sent from "The Board of Trustees, Charlotte Latin School" to Latin families, faculty, and staff, wherein the Board stated that it "categorically rejects the assertion that diverse students and faculty have not earned their positions and honors at Latin and that diversity comes at the expense of excellence."

On 25 April 2022, plaintiffs filed suit against defendants, alleging fraud, unfair and deceptive trade practices, negligent misrepresentation, negligent infliction of emotional distress, negligent retention and supervision, slander, libel, breach of contract, and breach of implied covenant

of good faith and fair dealing. On 18 July 2022, defendants filed a motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The matter came on for hearing at the 20 September 2022 session of Superior Court, Mecklenburg County. By order entered 12 October 2022, the court granted defendants' motion with respect to the first eight counts of plaintiffs' complaint—fraud, unfair and deceptive trade practices, negligent misrepresentation, negligent infliction of emotional distress, negligent retention and supervision, slander, libel, and breach of contract—and denied defendants' motion with respect to the ninth count of breach of implied covenant of good faith and fair dealing. On 17 October 2022, plaintiffs voluntarily dismissed the remaining count, breach of implied covenant of good faith and fair dealing, without prejudice. On 18 October 2022, plaintiffs filed timely written notice of appeal from the court's 12 October 2022 order.

II. Analysis

Before this Court, plaintiffs allege the following issues:

1. Did Latin commit fraud, when despite its administrators' promise that [plaintiffs'] complaints would not generate blowback, the [plaintiff]s' children were expelled from Latin?

2. Did Latin's administrators negligently misrepresent their purpose for requesting a meeting with the [plaintiffs], when the [plaintiffs] were otherwise unable to learn the true purpose of the meeting?

3. Was expelling the [plaintiffs'] children an unfair or deceptive practice, in violation of [N.C. Gen. Stat.] § 75-1.1, when, despite encouraging the [plaintiffs] to engage in a frank dialogue, Latin expelled the [plaintiff]s' children as a result of their views?

4. Did Latin negligently inflict severe emotional distress on [plaintiff Nicole Turpin], when it expelled her children in the middle of a pandemic, removing them from the only school they'd ever known and their friends?

5. Did Latin negligently supervise or retain . . . [Baldecchi], when, following repeated attacks on the [plaintiffs], Baldecchi expelled their children?

6. Did Latin defame the [plaintiffs] when it accused a small, identifiable group of parents, which included the [plaintiffs], of harboring racist views?

7. Did Latin breach its enrollment contracts with the [plaintiffs], when those contracts allowed Latin to terminate its relationship with the [plaintiffs] only if [plaintiffs] made the relationship "impossible"?

We will address each of these alleged issues, not necessarily in this order, in the analysis to follow.

A. Standard of review

"The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established[;] [a]ppellate courts review de novo an order granting a Rule 12(b)(6) motion to dismiss." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). "The appellate court, just like the trial court below, 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." *Id.* (citation and internal quotation marks omitted).

B. Breach of contract

[1] On appeal, plaintiffs contend that they "sufficiently alleged a breach of contract, and the trial court was wrong to conclude otherwise" because "the court ignored the agreement's plain language and disregarded Latin's obligation to apply those agreements in good faith." We disagree, because the plain and unambiguous language of the enrollment contracts—and pursuant to the enrollment contracts, the Parent-School Partnership—allowed Latin to terminate plaintiffs' enrollment contracts at Latin's discretion.

"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." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015) (citation omitted). "The most fundamental principle of contract construction—is that the courts must give effect to the plain and unambiguous language of a contract." *Am. Nat'l Elec. Corp. v. Poythress Commer. Contractors, Inc.*, 167 N.C. App. 97, 100, 604 S.E.2d 315, 317 (2004) (citation and brackets omitted). "Whether or not the language of a contract is ambiguous . . . is a question for the court to determine." *Lynn v. Lynn*, 202 N.C. App. 423, 432, 689 S.E.2d 198, 205 (citation omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010). "In making this determination, words are to be given their usual and ordinary

meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.* (citation and internal quotation marks omitted). However, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, *must be enforced as written*." *Ricky Spoon Builders, Inc. v. EmGee LLC*, 286 N.C. App. 684, 691, 882 S.E.2d 110, 115 (2022) (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 385 N.C. 326, 891 S.E.2d 300 (2023) (emphasis added).

As discussed above, in the present case, the enrollment contracts provide that

> in signing this [e]nrollment [c]ontract . . . I understand the mission, values, and expectations of the School as outlined in the *Charlotte Latin School Parent-School Partnership* and agree to accept all policies, rules, and regulations of Charlotte Latin Schools, Inc., including those as stated and as referred to above.

(emphasis in original). The enrollment contracts go on to state that "[a]s the parent or legal guardian . . . I agree to uphold the Parent-School Partnership" which provides that a

> positive, collaborative working relationship between the School and a student's parent/guardians is essential to the fulfillment of the School's mission. Therefore, *the School reserves the right to discontinue enrollment* if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission.

(emphasis added).

Therefore, giving the words of the contract, "the School reserves the right to discontinue enrollment[,]" their "usual and ordinary meaning[,]" *Lynn*, 202 N.C. App. at 432, 689 S.E.2d at 205, whether Latin breached their contracts with plaintiffs by discontinuing enrollment turns on whether *Latin* "conclude[d] that the actions of [plaintiffs]" made a "positive, collaborative working relationship between the School" and plaintiffs "impossible[,]" or "seriously interfere[d] with the School's mission."

a. Impossibility of positive, collaborative working relationship

On appeal, plaintiffs contend that "[t]he trial court erred when it dismissed [plaintiff]s' breach of contract claim because plaintiffs "did

not make the required 'positive, collaborative working relationship' between themselves and Latin 'impossible.' " We disagree, because the plain language of the contract confers *Latin*, not plaintiffs, with the discretion to determine when such a relationship is impossible.

In their appellate brief, plaintiffs define "impossible" to mean "incapable of having existence or of occurring" or "not capable of being accomplished." (brackets omitted). Our Court has defined "[i]mpossible" as "not possible; that cannot be done, occur, or exist . . . ." *Morris v. E.A. Morris Charitable Found.*, 161 N.C. App. 673, 676, 589 S.E.2d 414, 416 (2003) (citation omitted), *disc. review denied*, 358 N.C. 235, 593 S.E.2d 592 (2004). However, we need not enter into such an unwieldy inquiry as to determine when a "positive, collaborative working relationship" between the parties became "impossible[,]" because the plain language of the contract establishes that *Latin* "reserved the right" to make such a determination. Again, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, *must be enforced as written*." *Ricky Spoon*, 286 N.C. App. at 691, 882 S.E.2d at 115 (citation, internal quotation marks, and brackets omitted) (emphasis added).

Here, the plain language of the contract establishes that Latin "reserved the right" to discontinue enrollment "if [Latin] conclude[d] that the actions of a parent/guardian ma[de] [a positive, collaborative working] relationship impossible or seriously interfere[d] with the School's mission." "[G]iv[ing] effect to the plain and unambiguous language of [the] contract[,]" *Am. Nat'l Elec. Corp.*, 167 N.C. App. at 100, 604 S.E.2d at 317 (citation omitted), a determination of whether a positive, collaborative working relationship with plaintiffs was impossible was left to the discretion of Latin—not to plaintiffs, not to this Court—but to *Latin*.

Moreover, as the amicus brief filed by the North Carolina Association of Independent Schools and the Southern Association of Independent Schools, a representative of "almost [ninety] independent schools across the State[,]" acknowledges, "[t]he private right of associations allows independent schools to define their values, mission[,] and culture as they see fit. Some schools may be conservative, others liberal, more in the middle."

We agree with amicus curiae; private schools provide alternatives to public education for parents who, for one reason or another, desire for their children to be educated outside of the public school system. Private schools' independence allows them to define their values,

missions, and cultures as they deem necessary. It allows private sectarian schools to engage in daily prayer and to teach classes on biblical issues. It also allows private military schools to prepare our youth for careers of service to our Nation's Armed Forces. This autonomy—to define their values, missions, and cultures—extends to private schools of all ideologies, religions, and perspectives, even those associated with "political agendas." Again, this is a benefit of private schools—indeed, the predominate *purpose* of private schools—not a detriment.

If this suit were allowed to proceed, speech at private schools would be chilled; there would be fewer educational opportunities for students—and fewer alternatives for parents. Private schools would avoid controversial subjects, such as the teaching of Creationism, simply to avoid protracted litigation such as the litigation in the instant case. After stripping away all of the heated arguments surrounding the school's curriculum, the dispositive issue in this case is straightforward; this is a simple matter of contract interpretation.

Plaintiffs renewed their enrollment contracts each school year, including the 2021-2022 school year, despite Latin indicating that, in plaintiffs' words, the school "was moving toward a curriculum, culture, and focus associated with a political agenda" beginning in June of 2020. For nearly a year prior to the termination of their enrollment contracts, plaintiffs made it clear that their worldview did not conform with that of Latin, and they were aware of this when they re-enrolled their children at Latin for the 2021-2022 school year in February 2021. As the aforementioned amicus brief notes, "the remedy if [plaintiffs] wish to associate with others [of their political views and preferences[5]] is to vote with their feet" and enroll their children in a different private school, one which more accurately reflects their worldview.

Today's dissent would undermine the aforementioned private right of associations, while simultaneously upending the "constitutionally guaranteed" freedom of contract. We note that absent from today's dissent is the plain language of the dispositive provision of the contract which, again, provides that, "*the School reserves the right* to discontinue enrollment *if it concludes* that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission." (emphases added).

---

5. This phrase appears on page ten of the amicus curiae brief filed by the North Carolina Association of Independent Schools and the Southern Association of Independent Schools.

While the dissent is correct to acknowledge that "[a] complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that [the] plaintiff is entitled to no relief under any state of facts which could be presented in support of their claim[,]" it simply ignores that the allegations of the complaint, treated as true, in the light most favorable to the non-moving party, affirmatively established that plaintiffs are not entitled to relief under any state of facts. The plain language of the contract necessarily defeated plaintiffs' claim for breach of contract.

For this reason, the trial court was correct in dismissing plaintiffs' claim for breach of contract pursuant to "the plain and unambiguous language of [the] contract." *Id.* (citation omitted).

b. Seriously interfere with the school's mission

Alternatively, in their appellate brief, plaintiffs assert that "[n]othing in the complaint would allow this Court to infer that . . . [plaintiffs] violated [Latin's] mission." We disagree because, again, the plain language of the contract provided that Latin—not plaintiff, not this Court—reserved the right to make such a determination.

Again, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, must be enforced as written." *Ricky Spoon*, 286 N.C. App. at 691, 882 S.E.2d at 115 (citation, internal quotation marks, and brackets omitted). As discussed at length above, whether "the actions of" plaintiffs "seriously interfere[d] with the School's mission"[6] was left to the discretion of Latin, and for the aforementioned reasons, the trial court did not err when it dismissed plaintiffs' claim for breach of contract.

C. Fraud

[2] Alternatively, plaintiffs argue that the trial court "erred when it dismissed [plaintiff]s' fraud . . . claim[]" because "[r]eading the complaint most favorably to [plaintiffs], they have alleged both a false statement and a misleading omission." Again, we disagree.

In their complaint, plaintiffs alleged "fraud in connection with Ballaban's false representations on [8 September] 2021" that (1) "Latin would not retaliate against [plaintiffs'] children for expressing their

6. In their complaint, plaintiffs allege that Latin's mission is "to encourage individual development and civility in our students by inspiring them to learn, by encouraging them to serve others, and by offering them many growth-promoting opportunities."

concerns" and (2) "that a proposed [10 September] 2021 in-person meeting . . . would *solely* be an opportunity for Baldecchi and Ballaban – consistent with the Parent-School Partnership – to answer and/or address [plaintiffs'] concerns, as those concerns were set forth in [plaintiff Doug Turpin]'s [7 September] 2021 email to Ballaban." (emphasis added). We will address both of these allegedly false representations in turn.

a. False representations

In order to bring a claim for fraud, a plaintiff must establish a "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387 (2007). "Additionally, any reliance on the allegedly false representations must be reasonable." *Id.* at 527, 649 S.E.2d at 387. "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 26, 581 S.E.2d 452, 458, *disc. review denied*, 357 N.C. 511, 588 S.E.2d 473 (2003).

i. False representation re: retaliation

In their complaint, plaintiffs claimed that "Ballaban made false representations in his [8 September] 2021 emails that Latin would not retaliate – when he stated, 'there will be no blowback, I assure you' – against [plaintiffs'] children for expressing their concerns." In their appellate brief, plaintiffs claim that "[b]y promising [plaintiff Doug Turpin] that L.T. would face no blowback, only to expel him, Ballaban—and, through Ballaban, Latin—made a false statement." However, this reasoning is a misapprehension of cause and effect.

When considering plaintiffs' claim for fraud, the trial court explicitly noted that, "I've read the Complaint, and I . . . interpret expulsion to be referring to discipline for the children. And there's absolutely nothing in the Complaint that alleges any behavior on the part of the children that resulted in the termination of the enrollment agreement." The court observed that "[i]t was . . . alleged to be [plaintiff]s' behavior that resulted in the termination of th[e] enrollment agreement."

As the trial court suggested, there was no "blowback" from the teacher towards plaintiffs' child, L.T., as a result of plaintiffs' expression of concern about the school's culture and curriculum. L.T.'s removal from the school was an *ancillary effect* of the termination of the enrollment contract *between plaintiffs and defendants*, not a retaliatory action

taken against L.T. by his teacher. Indeed, our independent review of the record reveals that the "blowback" contemplated by plaintiffs and Ballaban in the 8 September 2021 email specifically related to blowback from "the teacher [plaintiffs] a[re] referencing in this email[,]" not from Ballaban or Baldecchi.

For this reason, the trial court was correct to conclude that Ballaban did not make a false representation when he stated that "[o]ur teachers do not retaliate and there will be no blowback, I assure you."

ii. False representation re: purpose of 10 September meeting

Moreover, our careful review of the record makes clear that defendants made no representation that the nature and purpose of the 10 September 2021 meeting was *solely* an opportunity to address plaintiffs' concerns. The email from Ballaban on 8 September 2021 states in its entirety: "I have had a chance to review your email and look into the matter in depth. Chuck Baldecchi and I would like to meet with [plaintiffs] in person about it. I have copied [Baldecchi] and his assistant Michelle Godfrey, who can assist in finding us some time. Thank you."

Despite plaintiffs' assertion in their complaint that the 10 September 2021 meeting would "*solely* be an opportunity for Baldecchi and Ballaban consistent with the Parent-School Partnership – to answer and/or address [plaintiffs'] concerns," (emphasis added) no such representation was made in the 8 September 2021 email from Ballaban. While the 10 September meeting was scheduled as a result of plaintiffs' unrelenting objections to Latin's culture and curriculum, it was not the *sole* purpose of the meeting, nor did Ballaban ever make any representation that it was. For the aforementioned reasons, we conclude that plaintiffs have failed to plead a false representation as is necessary to bring a claim for fraud.

b. Concealment of material fact

Next, plaintiffs argue in their appellate brief that "Ballaban and Baldecchi's silence [was] misleading" and that they "had to accurately inform [plaintiff Doug Turpin] about the meeting's purpose" because they "owed [plaintiff Doug Turpin] a duty to speak." We disagree, because Baldecchi and Ballaban did not owe plaintiffs a duty to disclose.

"A duty to disclose arises in three situations. The first instance is where a fiduciary relationship exists between the parties to the transaction." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). The next two situations where a duty to disclose arises exist outside of a fiduciary

relationship (1) "when a party has taken affirmative steps to conceal material facts from the other[,]" or (2) "where one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Id.* at 298, 344 S.E.2d at 119.

Plaintiffs contend that Ballaban "had a duty to speak because he made the misleading statement, telling [plaintiff Doug Turpin] that he and Baldecchi 'would like to meet . . . in person about' [plaintiffs'] concerns." However, Ballaban did not make a misleading statement; Ballaban never stated that the meeting was to address plaintiffs' "concerns[,]" nor, as discussed above, that the 10 September 2021 meeting was "*solely*" to address plaintiffs' concerns. (emphasis added).

What Ballaban did state, as noted above, was that, "I have had a chance to review your email and look into the matter in depth. Chuck Baldecchi and I would like to meet with [plaintiffs] in person about it." Absent from the email correspondence between plaintiff Doug Turpin and Ballaban is any hypothetical itinerary or "purpose" for the meeting.

Ballaban had no duty to disclose the purpose of the 10 September meeting because there was not "a fiduciary relationship . . . between the parties to the transaction[,]" he did not take "affirmative steps to conceal material facts" about the purpose of the meeting, nor was there any allegation of a "latent defect in the subject matter of the negotiations . . . ." *Id.* at 297–98, 344 S.E.2d at 119. For the aforementioned reasons, plaintiffs have failed to allege a false representation or concealment of a material fact as is necessary to bring a claim for fraud. The trial court was correct in dismissing plaintiffs' claim for fraud pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

D. Negligent misrepresentation

[3] Plaintiffs also argue that they "have alleged a viable negligent misrepresentation claim against Ballaban" because he "falsely assured [plaintiffs] that L.T. would face 'no blowback' for [plaintiffs'] complaints[,]" plaintiffs "relied on that statement[,]" and "Ballaban owed [plaintiffs] a duty of care." Again, we disagree.

"The tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care." *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (citation and brackets omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 18 (2001).

Our Supreme Court has defined a breach of the duty of care, the fourth element of a negligent misrepresentation claim as, "[o]ne who, *in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest*, supplies false information for the guidance of others in their business transactions," and is therefore "subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Id.* at 534, 537 S.E.2d at 241 (emphasis in original).

Despite plaintiffs' assertion that "Latin and Ballaban owed [plaintiffs] a duty of care[,]" because Ballaban "held all the cards," in that he "ha[d] or control[led] the information at issue[,]" plaintiffs' argument is based on an incorrect characterization of our Court's analysis in *Rountree v. Chowan County*. In that case, our Court recognized that a duty of care giving rise to a claim for negligent misrepresentation "commonly arises within *professional relationships*." *See Rountree*, 252 N.C. App. 155, 160, 796 S.E.2d 827, 831 (2017) (emphasis added) (recognizing the duty of care has also been extended to real estate appraisers, engineers, and architects).

We went on to note that North Carolina courts "have also recognized, albeit in a more limited context, that a separate duty of care may arise between adversaries in a *commercial* transaction[,]" where "the seller owed a duty to the buyer during the course of negotiations 'to provide accurate, or at least negligence-free financial information' about the company" because the seller "was the only party who had or controlled the information at issue" and the buyer "had no ability to perform any independent investigation." *Id.* at 161, 796 S.E.2d at 832 (citation, internal quotation marks, and emphasis omitted) (emphasis added).

As our Court recognized in *Rountree*, the duty of care giving rise to a claim for negligent misrepresentation "commonly arises within *professional relationships*[,]" and "in a more limited context . . . between adversaries in a *commercial* transaction." *Id.* at 160–61, 796 S.E.2d at 831–32 (emphases added). Neither of these circumstances are present here.

Despite plaintiffs' assertion that Ballaban owed plaintiffs a duty of care because he "held all the cards" regarding "the relevant information" and plaintiffs "had no way to verify th[e no blowback] statement's accuracy[,]" we decline to extend our State's case law regarding the duty of care that gives rise to a claim for negligent misrepresentation to a *non-professional, non-commercial* dispute. For this reason, the trial court did not err in dismissing plaintiffs' claim for negligent misrepresentation.

E. Unfair or deceptive trade practices

[4] Plaintiffs also assert on appeal that the trial court erred when it dismissed their UDTPA claim because defendants' conduct was "deceptive" or in the alternative, that their conduct was "unfair." We disagree.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* "The determination as to whether an act is unfair or deceptive is a question of law for the court." *Id.*

a. Fraudulent conduct

At the outset, we note that plaintiffs' first ground for their UDTPA claim in the complaint is based upon their allegations of fraud. In fact, the allegations made pursuant to plaintiffs' UDTPA claim mirror the allegations made pursuant to their claim of fraud. "[A] plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred." *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991). "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts." *Id.* (citation omitted). However, as discussed above, defendants did not commit a fraud upon plaintiffs through any "false representations" or "concealment of material fact[s]," *Forbis*, 361 N.C. at 526–27, 649 S.E.2d at 387, and for this reason, their UDTPA claim on the ground of fraud fails.

b. Deceptive conduct

Next, plaintiffs contend that "[e]ven if Latin's conduct w[as] not fraudulent, it was still deceptive." In their complaint, plaintiffs alleged that defendants "engaged in . . . deceptive acts or practices" by the "immoral, unethical, oppressive, and unscrupulous acts of providing repeated, express assurances from Board members that there would be no retaliation against [plaintiffs] for their participation in the presentation to the Board" which "had the tendency to deceive, and did deceive, [plaintiffs] into preparing the PowerPoint document and presenting to the Board."

However, raising concerns about the school's curriculum and culture and participating in the 24 August 2021 presentation were not the reasons for defendants' termination of plaintiffs' enrollment contracts. Indeed, there have been no allegations that any of the other parents who

raised concerns about Latin's curriculum and culture or participated in the PowerPoint presentation, standing alone, were subject to "retaliation" by Latin. This discrepancy in outcomes lays bare the conclusion that it was plaintiffs *continuing* to raise concerns about Latin's curriculum and culture that led to the termination of their enrollment contracts.

Despite plaintiffs' contention on appeal that they "had received no fewer than three assurances that their complaints would not lead to retaliation[,]" the Board made no such assurance about their complaints. In reality, according to plaintiffs' own complaint, what members of the Board assured the parents associated with Refocus Latin was that "no parent who raises concerns about Latin's curriculum and culture will be subjected to retaliation[,]" that "any parent who participates in the presentation would be even more protected from being subjected to retaliation[,]" and that "Latin would not retaliate against any of the parents for raising concerns about Latin's curriculum and culture."

What was not promised by the Board was that Latin would allow a subset of the Refocus Latin parents to *continuously raise* the same *previously raised* concerns about the curriculum and culture of the school in perpetuity. The Board assured the parents that there would be no retaliation against them for *participating in the presentation or raising concerns about Latin's curriculum or culture*. Plaintiffs were given an opportunity to raise their concerns about Latin's curriculum and culture, and by their own complaint, acknowledge that plaintiff Doug Turpin participated in the presentation to the Board, as he "gave the presentation in a professional and civil manner . . . ."

For this reason, plaintiffs cannot demonstrate that Latin acted deceptively, nor did its promises have the tendency to deceive, when Latin assured plaintiffs that they would not be subject to retaliation for raising concerns about the school's culture and curriculum or participating in the PowerPoint presentation.

c. Unfair conduct

Next, plaintiffs claim in their appellate brief that "[e]ven if Latin's conduct w[as] neither fraudulent nor deceptive, it was unfair[,]" in that "[t]he way Latin, Baldecchi, and Ballaban expelled the [plaintiff]s' children satisfies the definition of unfairness." We disagree.

Our Supreme Court has established that in the context of a claim for UDTPA, 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." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000).

In the present case, we conclude that defendants did not engage in unfair conduct by instructing the Refocus Latin parents to bring any *future concerns* to the school's administrators. This is not what plaintiffs did in their 7 September 2021 email to Ballaban, wherein they raised *the same concerns* addressed in Refocus Latin's PowerPoint presentation from a few weeks earlier. In their 7 September email, plaintiffs raised concerns about "a very left wing progressive viewpoint that we think i[s] improper for a teacher to be espousing to children[,]" that plaintiffs were "looking for the traditional classical education we were promised, not an indoctrination on progressive ideology[,]" and "that is not what we believe should be taught at Latin and not what we signed up for."

The concerns raised in the 7 September 2021 email from plaintiffs to Ballaban were not new concerns, they were *the same concerns* that the Refocus Latin parents had previously expressed, and defendants' termination of plaintiffs' enrollment contracts did not "offend[] established public policy" nor was the practice "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers" as is necessary to establish an unfair act giving rise to a claim for unfair and deceptive trade practices. *Id.* For these reasons, we affirm the trial court's dismissal of plaintiffs' claim for unfair and deceptive trade practices.

F. Negligent infliction of emotional distress

[5] Plaintiffs also allege that the trial court "prematurely judged [plaintiff]s' NIED claim" because Baldecchi "should have known that [plaintiff Nicole Turpin] could suffer severe emotional distress based on his decision to expel her children" or that he "should have known that his conduct would cause [plaintiff Nicole Turpin] severe mental anguish even though she did not attend the [10 September] meeting . . . ." They further contend that "the unintended effects from intentional acts may negligently cause harm." We disagree.

To bring a claim for negligent infliction of emotional distress, a plaintiff must allege that "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 582–83 (1998) (citation omitted). However, "[a]llegations of intentional conduct . . . even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 149, 746 S.E.2d 13, 19 (2013).

In their complaint, plaintiffs claimed that "Baldecchi's failure to follow a duty to use ordinary care to protect [plaintiff Nicole Turpin] from

injury or damage was a proximate cause of [plaintiff Nicole Turpin]'s severe emotional distress." On appeal, plaintiffs argue that "[w]hile Baldecchi may have intended to expel O.T. and L.T., [plaintiff]s' NIED claim focuses on the negligent effects of Baldecchi's conduct[,]" and "other courts have recognized the unintended effects from intentional acts may negligently cause harm." However, this argument is unavailing, and plaintiffs cite to non-binding authority from Kansas to support their proposition that "the unintended effects from intentional acts may negligently cause harm."

In this jurisdiction, the relevant inquiry when evaluating an NIED claim is not whether the actions of the defendant led to *negligent effects*, the relevant inquiry is whether the defendant engaged in *negligent conduct*, and "[a]llegations of intentional conduct, such as these, even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Id.* Baldecchi did not *negligently* terminate the enrollment contracts, he did so intentionally. For this reason, the trial court did not err in dismissing plaintiffs' claim for negligent infliction of emotional distress.

G. Defamation

[6] Next, plaintiffs argue that "the trial court should not have dismissed [plaintiff]s' defamation claims" because "Baldecchi and the Board falsely claimed that the Refocus Latin parents had made racist accusations about faculty and students." We disagree, because Baldecchi and the Board's characterizations of the PowerPoint presentation and its contents were not materially false.

"In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. L'Eggs Prods. Inc.*, 84 N.C. App. 1, 10–11, 351 S.E.2d 834, 840 (1987). "If a statement is substantially true it is not materially false." *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 68, 846 S.E.2d 647, 677 (2020). "It is not required that the statement was literally true in every respect." *Id.* "Slight inaccuracies of expression are immaterial provided that the statement was substantially true[,]" meaning that the "gist or sting of the statement must be true even if minor details are not." *Id.*

"The gist of a statement is the main point or heart of the matter in question." *Id.* "The sting of a statement is the hurtful effect or the element of the statement that wounds, pains, or irritates." *Id.* (emphasis omitted). "The gist or sting of a statement is true if it produces the same

effect on the mind of the recipient which the precise truth would have produced." *Id.* at 68–69, 846 S.E.2d at 677 (emphasis omitted).

Here, the first statement that plaintiffs contend was defamatory comes from the 10 September 2021 meeting between plaintiff Doug Turpin, Baldecchi, and Ballaban, wherein Baldecchi made a "known false statement" to plaintiff Doug Turpin, when he characterized the PowerPoint presentation by the Refocus Latin parents. Plaintiffs contend that Baldecchi's characterization of the PowerPoint presentation, that "the school accepts students and hires faculty because of their color" and that "those students and faculty of color" were "not up to the merit of the school[,]" "was false, and Baldecchi knew it was false when he uttered the statement because he had a copy of the PowerPoint document . . . ."

Alternatively, plaintiffs contend that a 14 September 2021 email from the Board to Latin families, faculty, and staff, wherein the Board stated that it "categorically rejects the assertion that diverse students and faculty have not earned their positions and honors at Latin and that diversity comes at the expense of excellence[,]" was "false, and the Board Defendants knew it was false when they published the statement because . . . they each had a copy of the PowerPoint document . . . ."

On appeal, plaintiffs contend that "[b]oth statements mischaracterize Refocus Latin's views on Latin's culture and curriculum and falsely accuse Refocus Latin—and with it, [plaintiffs]—of harboring negative views about Latin's *current* faculty and student body." In order to determine whether Baldecchi's and the Board's characterizations of Refocus Latin's position in the PowerPoint was "materially false" so as to give rise to a claim for defamation, *id.*, 375 N.C. at 68, 846 S.E.2d at 677, we must consider the assertions made in the 24 August 2021 PowerPoint presentation to the Board and whether the statements of Baldecchi and the Board capture the "gist or sting" of the PowerPoint presentation. *Id.*

In the PowerPoint presentation, Refocus Latin asserted their "[r]eal [c]oncerns" were that "[t]he weighting of DEI and Critical Theory on a 'culturally responsive education' eventually erodes the quality of student, quality of curriculum, quality of teacher and the academic rigor at the school[,]" and one reason "why [they] have [this concern]" is because "[a]dmissions is weighting diversity over academic excellence, particularly in [the] [Upper School]." Moreover, the PowerPoint expressed concerns that Latin was "moving away from education[al] meritocracy in line with progressive concepts of restorative justice and equity[,]" and that "DEI goals [were] superseding optimizing evaluations for admitting most qualified students and hiring most qualified faculty."

We need not exhaustively chronicle the claims made in the PowerPoint presentation, as the aforementioned statements from the PowerPoint presentation are sufficient to demonstrate that neither Baldecchi's statements to plaintiff Doug Turpin in the 10 September 2021 meeting, nor the contents of the 14 September 2021 email from the Board to the parents, faculty, and staff were "materially false[,]" as they accurately characterize the "gist or sting" of the Refocus Latin PowerPoint presentation. *Id.* As defendants succinctly note, defendants' "statements rejected a premise that Refocus Latin explicitly asserted in its PowerPoint — that Latin was compromising with respect to the academic excellence of its faculty and students by promoting DEI."

For this reason, we conclude that defendants did not make a false statement when characterizing the assertions of the Refocus Latin PowerPoint presentation, and the court did not err in dismissing plaintiffs' claims for defamation.

H. Negligent retention or supervision

[7] Finally, plaintiffs contend that "the trial court should have denied [defendants'] motion to dismiss the [plaintiff]s' negligent supervision claim" because Baldecchi "committed fraud[,]" "violated the UDTPA[,]" and "defamed the [plaintiffs]. Each of these claims satisfies the negligent supervision's first element."

To bring a claim for negligent retention or supervision, a plaintiff must prove

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in "oversight and supervision," . . . ; and (4) that the injury complained of resulted from the incompetency proved.

Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (citation and emphasis omitted). "[I]ncompetency, is not confined to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow-servant . . . ." *Walters v. Durham Lumber Co.*, 163 N.C. 536, 542, 80 S.E. 49, 52 (1913) (citation and internal quotation marks omitted).

As discussed at length in the analysis above, plaintiffs' contentions that Baldecchi "violated the UDTPA[,]" that he "defamed [plaintiffs][,]" and that "he committed fraud" are incorrect. Baldecchi did not commit fraud, violate the UDTPA, or defame plaintiffs and, therefore, plaintiffs have failed to establish the "specific negligent act on which the action is founded." *Medlin*, 327 N.C. at 591, 398 S.E.2d at 462 (citation omitted).

Moreover, plaintiffs argue that "their complaint alleges incompetency" because "Baldecchi expressed animus toward Refocus Latin and its goals and objectives" and in doing so "expressed hostility toward the Refocus Latin parents, including the [plaintiffs]." They contend that this "hostility should be sufficient to support the inference that he was incompetent." However, plaintiffs cite to no authority to support their proposition that "animus" or "hostility" necessarily entails incompetency.

Our courts have recognized incompetency where employment or retention of employment is *dangerous* to others, by previous specific acts of careless or negligent conduct, or by inherent unfitness; *Walters*, 163 N.C. at 541–42, 80 S.E. at 51–52, allegations of "animus" or "hostility" alone are insufficient to prove negligence by the employee, inherent unfitness, or that retention of the employee is dangerous to others.

Consequently, plaintiffs have failed to allege the necessary elements to bring a claim for negligent retention or supervision, that Baldecchi committed a "negligent act on which the action is founded[,]" or "incompetency" on his behalf. *Medlin*, 327 N.C. at 591, 398 S.E.2d at 462 (citation omitted). For this reason, the trial court did not err in dismissing plaintiffs' negligent retention or supervision claim.

III. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in dismissing plaintiffs' claims for breach of contract, fraud, negligent misrepresentation, unfair and deceptive trade practices, negligent infliction of emotional distress, defamation, or negligent retention or supervision pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The order of the trial court is affirmed.

AFFIRMED.

Judge ARROWOOD concurs by separate opinion.

Judge FLOOD dissents by separate opinion.

ARROWOOD, Judge, concurring.

I concur with the majority opinion. I agree that plaintiffs failed to sufficiently allege a breach of contract because the plain and unambiguous language in the enrollment contracts, which state that "the School reserves the right to discontinue enrollment if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission[,]" allowed the school to terminate plaintiffs' 2021 enrollment contracts at its discretion. Because I believe that allowing this case, in its current state, to advance further would severely undermine the fundamental right to freely contract in North Carolina, which is a bedrock principle of North Carolina law, I write separately to highlight those concerns.

With respect to contractual agreements, North Carolina "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 (2000). Thus, absent such policies or prohibitive statutes, it is beyond question that parties can contract as they see fit and that courts must enforce those contracts *as written* to preserve that fundamental right. *See Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228 (1985); *see also Am. Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 350 (1986) ("Freedom of contract . . . is a fundamental right included in our constitutional guarantees." (citations omitted)). In my view, these enrollment contracts between a private school and those who wish to attend that school do not violate any public policy, statutory prohibitions, or protections.

Therefore, this is a case of basic contract interpretation. Plaintiffs entered into two enrollment contracts with the school for the 2021–2022 school year, one for each of plaintiffs' children. Those contracts—in plain and simple language—expressly *reserved the school the right to discontinue enrollment* if it concluded plaintiffs (1) made the working relationship between them and the school impossible or (2) seriously interfered with the school's mission. Thus, as the majority opinion explains, the school's determination of whether either condition occurred was left to the sole discretion of the school—not plaintiffs and not this Court. Accordingly, the trial court was correct in dismissing plaintiffs' claim for breach of contract.

I also echo the majority opinion in that recognizing plaintiffs' claims as legally sound under Rule 12(b)(6) would threaten longstanding precedents regarding the fundamental right of private parties to contract freely. Specifically, I believe such recognition would embolden parents

who disagree with their children's private schools on divisive social issues to file lawsuits that would otherwise be deemed meritless and disposed of via our basic contract principles. For example, parents opposed to the faith-based curriculum of a private Christian school could enroll their child with the intent to challenge the school's religious practices. Assuming the school took steps to defend its faith-based mission by discontinuing their enrollment, as in the present case, the parents could file a complaint that applied plaintiffs' legal theories as the footing for the suit. Consequently, such litigation would undercut fundamental contract freedoms relied upon by our State's approximately ninety (90) private schools—both secular and religious.

The dissent contends that plaintiffs' complaint sufficiently alleged breach of contract in part because the school violated the agreement to "uphold and enforce rules and policies . . . in a fair, appropriate and equitable manner." This contention is perhaps legally sensible under the claim for breach of implied covenant of good faith and fair dealing; however, I note that the trial court denied the defendants' motion on those grounds, but the plaintiffs voluntarily dismissed that claim on 17 October 2022 to pursue this appeal. Thus, under the present posture of this appeal, this theory cannot save plaintiffs from this result.

FLOOD, Judge, dissenting.

The line between the right to terminate a private contract and a contract breach is sometimes mercurial. While the majority would draw that line at the point at which Plaintiffs were accused of certain behaviors in violation of provisions of their private school enrollment contracts, I conclude that the mandates of a Rule 12(b)(6) review are such that we must decline to draw that line prematurely. I respectfully dissent.

When reviewing a Rule 12(b)(6) motion to dismiss, "this Court affirms or reverses the disposition of the trial court—the granting of the Rule 12(b)(6) motion to dismiss—based on [our] review of whether the allegations of the complaint are sufficient to state a claim." *Thomas v. Village of Bald Head Island*, 290 N.C. App. 670, 673, 892 S.E.2d 888, 891 (2023) (citation and internal quotation marks omitted). In conducting such review, the allegations of the complaint are "treated as true" and the facts are viewed in the light most favorable to the plaintiffs. *Rollings v. Shelton*, 286 N.C. App. 693, 696, 882 S.E.2d 70, 72 (2022); *see also Robertson v. City of High Point*, 129 N.C. App. 88, 90, 497 S.E.2d 300, 302, *disc. rev. denied*, 348 N.C. 500, 510 S.E.2d 654 (1998) ("[A] motion

to dismiss for failure to state a claim upon which relief may be granted is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory." (citation and internal quotation marks omitted) (cleaned up)).

"A complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that [the] plaintiff is entitled to no *relief under any state of facts which could be presented in support of the claim*." *Norton v. Scot. Mem'l Hosp., Inc.*, 250 N.C. App. 392, 399, 793 S.E.2d 703, 709 (2016) (citation and internal quotation marks omitted); *see also Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (providing that granting of a Rule 12(b)(6) motion is appropriate only "if it appears certain that [the] plaintiffs could prove no set of facts which would entitle them to relief under some legal theory[,]" or "no law exists to support the claim made" (citations omitted)). In *Norton*, applying our relevant scope of review to the trial court's dismissal under Rule 12(b)(6) of the plaintiffs' claim for intentional infliction of emotional distress ("IIED"), we reversed the trial court's order, and provided the

> [p]laintiffs' IIED claims may later be determined to be insufficient to go to the jury, but that issue is not before us. Based solely upon the allegations on the face of their complaint, [the p]laintiffs should be provided the opportunity, afforded by the Rules of Civil Procedure, to discover and "to disclose more precisely the basis of both the claim and defense and to define more narrowly the disputed facts and issues." The trial court's dismissal under Rule 12(b)(6) of [the p]laintiff's IIED allegation against [the defendant] was premature, and is reversed.

250 N.C. App. at 400, 793 S.E.2d at 709 (citing *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 443, 364 S.E.2d 380, 384 (1988)).

A plaintiff sufficiently states a claim for breach of contract when he alleges, "(1) the existence of a contract between [the] plaintiff and [the] defendant, (2) the specific provisions breached, (3) the facts constituting the breach, and (4) the amount of damages resulting to [the] plaintiff from such breach." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 108–09, 834 S.E.2d 404, 418 (2019) (citing *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977)).

Here, under the scope of our Rule 12(b)(6) review, it is our duty to determine only whether Plaintiffs' allegations, on the face of their Complaint, are sufficient to state a claim for breach of contract. *See*

Thomas, 892 S.E.2d at 891; *see Norton*, 250 N.C. App. at 400, 793 S.E.2d at 709. Treating the allegations in Plaintiffs' Complaint as true, and viewing the facts in the light most favorable to Plaintiffs, Plaintiffs made such allegations that they sufficiently stated a claim for breach of contract. *See Rollings*, 286 N.C. App. at 696, 882 S.E.2d at 72; *see Robertson*, 129 N.C. App. at 90, 497 S.E.2d at 302.

As to the existence of a contract, Plaintiffs' Complaint alleged that the "Enrollment Agreements were valid contracts" between Plaintiffs and Defendants, which "included the Parent-School Partnership." *See Intersal, Inc.*, 373 N.C. at 108–09, 834 S.E.2d at 418. As to the specific provisions breached and the facts constituting the breach, Plaintiffs' Complaint further alleged that Defendants violated the "binding promise to educate the children during the 2021–22 school year" and the agreement to uphold and enforce rules "in a fair, appropriate and equitable manner[,]" because Plaintiffs were punished for exercising their ability to "involve the appropriate administrator . . . when a question/concern arises . . . ." *See id.* at 108–09, 834 S.E.2d at 418. As to the damages incurred resulting from the breach, the Complaint alleged that Plaintiffs incurred compensatory damages, "including but not limited to actual damages equating to the loss of their payment and tuition and fees for the 2021–22 school year[,]" and consequential damages "incurred as a result of being compelled, without prior notice, to change their children's schools a few weeks into the new 2021–22 school year." *See id.* at 108–09, 834 S.E.2d at 418.

Treating these factual allegations as true, Plaintiffs sufficiently stated a claim for breach of contract, because they alleged: (1) the existence of a contract; (2) the particular provisions breached; (3) the facts constituting breach; and (4) the amount of damages resulting from such breach. *See Intersal, Inc.*, 373 N.C. at 108–09, 834 S.E.2d at 418. While Plaintiffs' Complaint did not address the provision of the contract governing the possibility of disenrollment, viewing the alleged facts as true and in a light most favorable to Plaintiffs, the allegations demonstrate specific contractual guarantees that Plaintiffs claim were violated by Defendants, which is all that is required to sufficiently state a claim for breach of contract. *See id.* at 108–09, 834 S.E.2d at 418.

As provided by the majority, "North Carolina courts recognize that freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, must be enforced as written." *Ricky Spoon Builders, Inc. v. EmGee LLC*, 286 N.C. App. 684, 691, 882 S.E.2d 110, 115 (2022), *disc. rev. denied*, 385 N.C. 326, 891 S.E.2d 300 (2023) (citation and internal quotation marks

omitted) (cleaned up). Although the majority assesses Plaintiffs' conduct as making impossible a "positive, collaborative working relationship between the School[,]" or alternatively, as "seriously interfer[ing] with the School's mission[,]" such that Defendants were justified in their termination of Plaintiffs' enrollment contracts, I conclude that this determination is premature as it necessarily involves findings of fact. At this stage in the proceeding and under our scope of review of a trial court's Rule 12(b)(6) dismissal of a claim, treating the factual allegations *as true* and viewing them *in the light most favorable to Plaintiffs*, it is this Court's duty *only* to determine whether Plaintiffs presented allegations such that they sufficiently stated a claim for breach of contract. It is not within our appellate purview to determine at this stage in the proceeding whether Defendants were justified in their termination of Plaintiffs' enrollment contracts. *See Thomas*, 892 S.E.2d at 891; *see Rollings*, 286 N.C. App. at 696, 882 S.E.2d at 72; *see Robertson*, 129 N.C. App. at 90, 497 S.E.2d at 302.

As set forth above, I conclude Plaintiffs sufficiently stated a claim for breach of contract, and therefore conclude that the trial court's dismissal under Rule 12(b)(6) of Plaintiffs' breach of contract claim against Defendants was premature. *See Intersal, Inc.*, 373 N.C. at 108–09, 834 S.E.2d at 418; *see Norton*, 250 N.C. App. at 400, 793 S.E.2d at 709. Plaintiffs "should be provided the opportunity, afforded by the Rules of Civil Procedure, to discover and to disclose more precisely the basis of both [the] claim and defense and to define more narrowly the disputed facts and issues[,]" and I would thus reverse and remand the trial court's order as to Plaintiffs' breach of contract claim. *Norton*, 250 N.C. App. at 400, 793 S.E.2d at 709 (citation and internal quotation marks omitted). For these reasons, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2024)

603 GLENWOOD, INC. v. 616 GLENWOOD, LLC No. 22-943	Wake (20CVS5286)	Reversed and Remanded
BAXTER v. N.C. STATE HIGHWAY PATROL TROOP F DIST. V No. 23-605	N.C. Industrial Commission (TA-29211)	Affirmed
EDENS v. CITY OF HAMLET No. 23-773	Richmond (22CVS56)	Affirmed
GUARASCIO v. GUARASCIO No. 23-616	Pasquotank (22SP105)	Affirmed
HUNTER v. HUNTER No. 23-937	Madison (23CVD186)	Affirmed
IN RE A.J.C.R. No. 23-973	Mecklenburg (19JT313) (19JT314)	Affirmed
IN RE B.L. No. 23-861	Robeson (19JT238)	Affirmed
IN RE E.M. No. 23-884	Yancey (22JB51)	Vacated and Remanded
IN RE E.P. No. 23-709	Durham (20J136)	Dismissed
IN RE H.A.M. No. 23-852	Cumberland (21JT244)	Affirmed
IN RE J.F. No. 23-777	Mecklenburg (20JT434-437)	Affirmed
IN RE K.-G.L.S. No. 23-869	Pitt (22JT105)	Affirmed
IN RE K.D. No. 23-805	Durham (19J68)	Affirmed
IN RE K.P. No. 23-701	Cleveland (22JT15)	Reversed and Vacated

IN RE K.R. No. 23-532	Wake (22JA210) (22JA211) (22JA212)	Affirmed
IN RE M.C.L. No. 23-784	Wake (21JT133) (21JT47-48)	Affirmed
IN RE M.G.B. No. 23-877	Alamance (20JT155) (20JT156) (20JT46)	Affirmed
IN RE M.J.W. No. 23-717	Moore (22JT60) (22JT61)	Affirmed
IN RE M.M.D. No. 23-934	Cumberland (20JT390)	Dismissed
IN RE M.R.B. No. 23-825	Chatham (21JT45)	Affirmed
IN RE R.S.W. No. 23-482	Yadkin (20JT49)	Affirmed.
IN RE S.M.V. No. 23-958	Carteret (21JT41)	Affirmed
IN RE Z.A. No. 23-782	Orange (21JT3) (21JT4)	Affirmed
LAWING v. MILLER No. 23-858	Guilford (18CVD1024)	Dismissed in Part; Remanded in Part
RISUENO v. PURDUE PHARMA, INC. No. 23-842	Wilson (22CVS1641)	Reversed
STATE v. CORNWELL No. 23-36	Catawba (18CRS1848-49) (18CRS52417)	VACATED IN PART; APPEAL DISMISSED IN PART
STATE v. DAVIDSON No. 23-258	Cumberland (17CRS50999)	No Plain Error in Part; No Error in Part; Dismissed Without Prejudice in Part

STATE v. HARRELL No. 23-583	Wake (18CRS207555)	No Error
STATE v. JOHNSON No. 23-874	Robeson (20CRS52567-68) (20CRS52572)	Reversed and Remanded
STATE v. SWEAT No. 23-609	Montgomery (22CRS50009-10)	Appeal Dismissed; Certiorari Granted For Limited Purpose of Correcting Clerical Error.
STATE v. THOMPSON No. 23-643	Rutherford (20CRS52371)	No Error in part, No Plain Error in part, and Dismissed in part.
STATE v. WALKER No. 23-963	Dare (21CRS51368)	Dismissed
STATE v. WHITE No. 23-596	Guilford (19CRS67313-14) (19CRS69762) (21CRS28730)	No Error
TAKSA v. CRULL No. 23-753	Lincoln (22CVS327)	Affirmed

BOST v. BROWN

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

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

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

No. COA23-855

Filed 16 April 2024

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

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

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

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

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

FLOOD, Judge.

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

I. Facts and Procedural Background

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

II. Jurisdiction

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

III. Standard of Review

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

---

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

N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc.*, 233 N.C. App. 652, 654, 758 S.E.2d 27, 30 (2014) (citation and internal quotation marks omitted). Where an appeal is bereft of disputed issues of material fact, "[o]ur only inquiry is whether [a party is] entitled to judgment as a matter of law." *McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572 (1990) (citation omitted).

IV. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

HERNANDEZ v. HAJOCA CORP.

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

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

No. COA23-1001

Filed 16 April 2024

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

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

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

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

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

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

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

TYSON, Judge.

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

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

II. Jurisdiction

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

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

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

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

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

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

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

III. Issues

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

IV. Standard of Review

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

V. Analysis

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

The Act provides:

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

N.C. Gen. Stat. § 97-9 (2023).

The Act further provides:

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

N.C. Gen. Stat. § 97-10.1 (2023).

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

REVERSED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

IN THE MATTER OF L.C.

No. COA23-759

Filed 16 April 2024

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

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

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

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

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

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

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

Jeffrey William Gillette for respondent-appellant caretaker.

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

FLOOD, Judge.

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

I. Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

II. Jurisdiction

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

III. Analysis

A. Respondent-Caretaker's Standing to Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

N.C. Gen. Stat. § 7B-101(3) (2023).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Respondent-Mother's Appeal

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

1. Standard of Review

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

2. Findings of Fact

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Neglect

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Because the trial court's findings of fact do not support its conclusion Layla is neglected due to the lack of findings addressing impairment of the juvenile or substantial risk of impairment, we vacate the adjudication of neglect and remand for the trial court to make additional findings of fact to address whether and how Respondent-Mother's drug abuse, mental or emotional impairment, or threatening behavior have harmed Layla or have placed her at a substantial risk of harm. Although the findings of fact are not sufficient to indicate that Layla suffered physical, mental, or emotional impairment, or that there is a substantial risk of such impairment, the evidence in the Record could potentially support such findings. We therefore must vacate the trial court's adjudication order and remand for the trial court to make appropriate findings of fact regarding any impairment of Layla or substantial risk of impairment. *See In re J.C.*, 380 N.C. 738, 747, 869 S.E.2d 682, 688 (2022) ("Without commenting on the amount, strength, or persuasiveness of the evidence contained in the record, we merely conclude that we cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper 'clear, cogent, convincing' standard of proof would be 'futile,' so as to compel us to conclude that 'the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination.' " (citation and internal quotation marks omitted)).

IV. Conclusion

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

VACATED and REMANDED.

Judges STROUD and STADING concur.

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

No. COA22-725

Filed 16 April 2024

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WOOD, Judge.

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

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

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

II. Procedural Posture and Standard of Review

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

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

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

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

1. Plaintiffs abandon their monopolies clause claim on appeal.

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

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

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

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

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

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

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

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

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

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

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

III. Analysis

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

A. Taking Under the Emergency Management Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Constitutional Taking

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

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

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

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

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

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

The court in *Kirby* next determined whether NCDOT acted appropriately pursuant to its police power or whether its actions constituted a taking of land without just compensation. Specifically, at issue in *Kirby* was whether the NCDOT's actions under the Map Act constituted a "valid, regulatory exercise of the police power, not the power of eminent domain[.]" *Id.* at 852, 786 S.E.2d at 923. "Determining if governmental action constitutes a taking" for constitutional purposes "depends upon whether a particular act is an exercise of the police power or of the power of eminent domain." *Id.* at 854, 786 S.E.2d at 924 (quotation marks omitted). In exercising police power, "the government *regulates* property to prevent injury to the public." *Id.* (emphasis in original). "Police power regulations must be enacted in good faith, and have appropriate

and direct connection with that protection to life, health, and property which each State owes to her citizens." *Id.* (brackets omitted). As for the power of eminent domain, "the government *takes* property for public use because such action is advantageous or beneficial to the public. . . . [T]he state must compensate for property rights taken by eminent domain." *Id.* at 854, 786 S.E.2d at 924–25 (emphasis in original).

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

C. Fruits of Labor

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

D. Attorneys' Fees

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

N.C. Gen. Stat. § 132-9(a) provides:

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

(Emphasis added).

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

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

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

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

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

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

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

E. Equal Protection

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and GRIFFIN concur.

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

No. COA22-919

Filed 16 April 2024

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

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

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

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

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

STROUD, Judge.

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

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

I. Background

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

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

II. Directed Verdict and JNOV

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

A. Standard of Review

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

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

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

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

B. Interpretation of Restrictive Covenants Generally

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

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

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

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

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

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

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

C. Restrictive Covenants regarding Animals

The primary relevant provisions are:

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

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

D. Evidence regarding "Household Pets"

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

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

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

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

1. Plaintiffs' Evidence regarding "Household Pets"

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

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

2. Defendant's Evidence regarding "Household Pets"

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

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

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

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

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

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

3. Definition of "Household Pets"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Evidence regarding Commercial Purposes

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

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

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

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

The *Hobby* Court first noted

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Summary

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

III. Conclusion

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

REVERSED and REMANDED.

Judges WOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
TYRON LAMONT DOBSON

No. COA23-568

Filed 16 April 2024

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

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

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

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

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

EMANCIPATE NC, by Elizabeth Simpson, amicus curiae.

ZACHARY, Judge.

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

I. Background

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

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

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

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

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

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

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

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

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

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

II. Discussion

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

---

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

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

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

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

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

A. Standard of Review

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

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

B. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED.

Judges MURPHY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
ROBERT LEE GRANT, III

No. COA23-656

Filed 16 April 2024

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

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

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

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

Stephen G. Driggers for Defendant-Appellant.

COLLINS, Judge.

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

I. Procedural Background

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

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

II. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

NO PREJUDICIAL ERROR.

Judges WOOD and GORE concur.

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

No. COA23-665

Filed 16 April 2024

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

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

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

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

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

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

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

CARPENTER, Judge.

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

I. Factual & Procedural Background

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

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

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

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

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

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

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

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

II. Jurisdiction

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

III. Issue

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

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

IV. Analysis

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

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

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

A. Rule 60(b)(1)

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Rule 60(b)(6)

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

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

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

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

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

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

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

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

V. Conclusion

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

AFFIRMED.

Chief Judge DILLON and Judge MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 APRIL 2024)

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

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

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

AGUILAR v. MAYEN

[293 N.C. App. 474 (2024)]

NOE ROSAS AGUILAR, PLAINTIFF
v.
DILCIA ROSIBEL CHIRINOS MAYEN, DEFENDANT

No. COA23-700

Filed 7 May 2024

Child Custody and Support—sole custody to mother—finding of adequate child care by all parties—insufficient basis for ruling

An order awarding sole custody of a minor child to her mother was vacated where the only finding of fact upon which the trial court based its decision stated that the child had been well cared for—initially by her mother during her first year of life and then jointly by her mother, her father, and her father's wife during the next six months. Although substantial evidence supported a finding that the mother took good care of the child, the full finding that all of the parties provided adequate care, absent other findings, did not support a conclusion that it was in the child's best interests to grant custody only to the mother. The matter was remanded for the trial court to make further findings or, in its discretion, to conduct a new hearing.

Appeal by Plaintiff from an order entered 27 February 2023 by Judge William C. Farris in Edgecombe County District Court. Heard in the Court of Appeals 7 February 2024.

Miller & Audino, LLP, by Jay Anthony Audino, for Plaintiff-appellant.

Narron & Holdford, P.A., by I. Joe Ivey, for Defendant-appellee.

WOOD, Judge.

Noe Rosas Aguilar ("Father") appeals the trial court's order granting sole custody of the parties' minor child to Dilcia Rosibel Chirinos Mayen ("Mother"). For the reasons stated herein, we vacate and remand.

I. Factual and Procedural History

Mother and Father are the biological parents of a daughter, Mariana, who was born in June 2021. Father and Mother met after he employed Mother's husband to do drywall work in his house. Father learned Mother's husband had recently arrived in the United States from Honduras and needed help. Father gathered clothes for the family and

was planning to give them to Mother's husband when he learned Mother's husband had been "locked up" after an immigration appointment and detained for approximately three months. Although married since 2008, Father began an affair with Mother while her husband was detained by immigration authorities. During that time, Father gave Mother money and at least one bag of clothes, helped to pay her bills, and eventually bought her a house. After immigration authorities released Mother's husband, he returned to live with her, but became physically abusive to her, causing her to separate from him.

Approximately one month after their relationship began, Mother noticed Father drove luxury cars and asked him what he really did for work. According to Mother, he told her he sold drugs, and Mother told him she did not want to spend time with him anymore. However, Father continued to visit her every day. Father was arrested and went to prison for selling drugs some time in 2017. After Father's release from jail, he continued to financially provide for Mother. He visited her every day to provide money and food and continued to help pay her bills.

According to Mother, Father eventually became abusive to her. Specifically, she testified he once slapped her after she told him she wanted him to leave her house. She further testified he saw her talking to a neighbor, got jealous, grabbed a machete and threatened her with it, threw her on the ground, and hit her bottom with the machete.

Father's wife, Brittany, discovered his affair with Mother in May 2021, approximately one month before Mariana was born. Father then ended the affair. The last time Father saw Mother prior to Mariana's birth was at the baby shower, approximately three weeks prior to Mariana's birth. After her birth, Mother told Father he should do what he can to see his daughter. She testified he said he did not want his name on the birth certificate because it would cause problems with Brittany.

In addition to Mariana, Mother's two children from a prior relationship lived in the home with her, a ten-year-old daughter, and a seventeen-year-old son. Mother worked at a bar called Jazmin on Thursday, Friday, Saturday, and sometimes Sunday nights, going to work approximately between 7 p.m. and 9 p.m. and returning home between 1:00 a.m. and 3:00 a.m. Father testified Mother drank heavily at work and outside of work, brought different men home and drank with them, and would be hungover until at least lunch. He further testified Mother's son took care of Mariana and Mother's other daughter while she was not home. Following a report of neglect of the children in Mother's home, the Wilson County Department of Social Services filed a

safety assessment on 20 April 2022 in which it reported no safety issues existed in Mother's home and closed the case.

Mother filed for child support in 2022 and submitted to DNA testing for Mariana to prove Father's paternity. Mother testified Father called her from a private number and told her if she tried to get child support from him, he would do everything he could to take custody of Mariana.

On 7 June 2022, approximately two weeks after Mother filed for child support, Father filed a complaint, requesting temporary custody of Mariana, an *ex parte* custody order, and drug testing of Mother. Father alleged Mother was involved in illegal substance use and trafficking as well as prostitution. Along with his complaint, Father attached three exhibits which were affidavits from three of Mother's coworkers generally reaffirming Father's allegations that Mother was involved in illegal drug- and sex-related activities. The same day, the trial court entered an *ex parte* order granting custody of Mariana to Father.

A law enforcement officer accompanied Father to serve the custody complaint and to take custody of Mariana from Mother. Mother "became irate" and yelled at them. The officer served her with the complaint but left Mother's home without Mariana. On 8 June 2022, Father filed a motion to show cause for Mother's alleged contempt of court for refusing to give him custody and for a warrant directing law enforcement to take physical custody of Mariana. The trial court entered an order requiring Mother to appear for a show cause hearing and issued the requested warrant that same day. Father and law enforcement officers returned to Mother's home with the warrant and took custody of Mariana from Mother.

On 27 June 2022, Mother filed an answer to Father's complaint and a counterclaim for custody of Mariana. The return hearing on the *ex parte* order was set for the same day. The parties entered a consent order granting Father temporary custody of Mariana and granting Mother supervised visitation for two hours per week pending a hearing on the *ex parte* order. On 11 July 2022, the parties entered a consent order whereby they would share legal and physical custody of Mariana on a temporary basis until a hearing on permanent custody.

On 13 September 2022, Mother obtained an *Ex Parte* Domestic Violence Protective Order against Father. On 20 September 2022, Father filed another motion for an *ex parte* emergency custody order and motion for modification of custody of Mariana. On 26 September 2022, the trial court entered an order directing Father and Mother to sign up for and only communicate through Our Family Wizard, jointly

attend Mariana's medical appointment scheduled for 10 October 2022, follow all medical recommendations, and inform each other of all medical appointments. The trial court further ordered Mother to provide a Medicaid card for Mariana to Father. The trial also modified the existing *Ex Parte* Domestic Violence Protective Order to allow the parties to exchange the minor child with each other, provided Father's wife was not present. On 6 October 2022, the parties entered a consent order restricting Father's and Mother's contact with each other and allowing contact only during their exchanges of Mariana and also dismissing Mother's pending domestic violence action against Father.

The permanent custody trial was held on 30 and 31 January 2023. Father and Mother both presented testimony and evidence at the hearing. Father testified that when he first gained custody of Mariana, she was pale and had very dark coloration around her eyes. However, both symptoms improved after Father put her to bed earlier and on a more regular schedule. Father also admitted photos into evidence depicting Mariana: facing forward in a car seat while in Mother's custody despite her doctor's notes recommending, she have a rear-facing car seat; lying in a crib with a blanket, pillow, and stuffed animals despite her doctor's notes recommending "no soft bedding in crib"; drinking sugary drinks such as Capri Sun and holding screens close to her face. Father testified he limited Mariana's screen time to thirty minutes per day, causing Mariana to throw tantrums, and he made sure screens were farther away from her face. He further testified he gave her water and limited the juice content in her drinks.

Mariana's medical records showed that Mother had taken Mariana to her nine-month checkup during which she was evaluated for diaper rash and given a prescription cream. The nurse practitioner told Mother she could refer Mariana to a dermatologist if she switched the primary care provider on her Medicaid card. Brittany testified Mother never sent the cream to Father after he gained custody of Mariana in June 2022. Brittany testified the diaper rash healed when Mariana was with Father and her but worsened when she was with Mother. To the contrary, however, Mother testified it was Father and Brittany who contributed to the diaper rash because the rash always appeared when Mariana was returned to her.

On 9 June 2022, the day after Father obtained custody of Mariana, Father took her to a doctor, where he learned Mother had not taken Mariana to a doctor's appointment between her two-week checkup and nine-month checkup. Mother had missed an appointment that was scheduled for 2 September 2021. Mariana was behind on her immunizations

and received five during this appointment. Mariana's medical notes from an appointment on 13 July 2022 disclosed she was well-developed, well-nourished, and had good hygiene and normal grooming.

Father testified he formed a positive relationship with Mariana. Father plays with her and helps with changing her diapers, feeding her, and putting her to bed; and she waits for him at the door when he returns from work. Father converted his dining room into a playroom for Mariana. Brittany testified that Father has a supportive extended family who help and are involved with taking care of Mariana.

Mother testified she rents a two-bedroom home for herself and her three children. Mother is from Honduras, has a fourth-grade education, and does not speak, read, or write English. She is not in the United States legally, does not have a Social Security number, and drives her car without a license.

Mother testified she loves Mariana, has a good relationship with her, and knows how to treat her. Mother took her to an emergency room regarding the much talked about diaper rash shortly after she received Mariana back from Father, after him having had exclusive physical custody of Mariana for one month. Mother also testified she has an adult babysitter who is always able to take care of her children. According to Mother, she was the primary caretaker, and Father was not involved in Mariana's life from the day she was born until he filed for custody a year later. She believes Father only filed for custody because she filed for child support. According to Mother, Brittany constantly interferes with her relationship with Father and Mariana. Mother conceded she did not sign up for Our Family Wizard or provide Father with a copy of the Medicaid card despite the trial court's order requiring her to do so.

Maria Perez, a friend and coworker of Mother, testified Mother never engaged in prostitution or selling drugs. She further testified Mariana is a healthy and happy baby who loves her mother and is always happy when Father returns her to Mother. Jennifer Hernandez, Mariana's babysitter, testified Mother was always very good to Mariana and takes very good care of her. She further testified Mother is fully capable of caring for Mariana by herself.

At the end of the two-day permanent custody trial, the trial court verbally stated its findings and ruling on the record:

> I do find that the child is in good health and has been properly cared for all of her life, comma, solely by her mother for the first year of her life, and jointly by her mother and father and his wife for the next six months of her life. I

> do include, as a matter of law and order, that custody of Marianna be awarded to the mother and that the father be awarded visitation every other Friday from 6 p.m. until Monday at 6 p.m. All exchange is to take place at the Wilson County Sheriff's Department.
>
> When the child starts school, prekindergarten or kindergarten, the father may pick up the child from her school every other Friday and return the child to school on Monday. If the father is unable to use his weekend visitation, he shall then notify the mother as far in advance as possible. Neither parent may remove Marianna from North Carolina without written permission from the other parent.
>
> Counsel, I'm not going to order any holiday visitation. If you two lawyers and your clients agree, you can make such things a part of the order; otherwise, they'll just have to celebrate when they have her. We got to start cooperating in this world.

The trial court entered its written order on 27 February 2023. The order contained two findings of fact relevant to its decision:

> 3. That the minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months.
>
> 4. That it would be in the minor child's best interest that her care, custody and control be placed with the Mother with the Father having substantial visitation.

The trial court ordered:

> 1. That the Mother shall have sole custody of the minor child.
>
> 2. That the Father shall have visitation with the minor child every other Friday at 6:00 p.m. until Monday at 6:00 p.m.
>
> 3. . . . When the child starts pre-K or kindergarten, the Father may pick the minor child up from school every other Friday and return the child to school on Monday morning. The Father shall notify the Mother as far in advance as possible if he is not able to exercise his visitation.

Father entered a written notice of appeal on 28 March 2023.

II. Analysis

On appeal, Father argues: (1) the evidence does not support Finding of Fact 3 because Mariana was not well cared for by Mother; (2) the findings of fact do not support the trial court's conclusion that it is in Mariana's best interest for Mother to have sole custody of her; (3) the trial court's failure to grant custody to Father was manifestly unsupported by reason; and (4) the trial court's failure to establish a holiday schedule for Mariana was manifestly unsupported by reason. We address each issue in turn.

A. Standard of Review

"[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 526 (2016) (brackets omitted). If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order. *Id.*

B. Finding of Fact 3

Father argues the trial court erred when it made Finding of Fact 3 because he contends Mother did not take good care of Mariana because of issues with her health, physical safety, and emotional wellbeing.

A careful review of the record reveals substantial evidence supporting the trial court's finding that Mariana is well taken care of by Mother. Mother testified she was the primary caretaker for Mariana and knew how to take care of her. The Wilson County Department of Social Services had investigated Mother's home after receiving a report of neglect and found no safety issues in Mother's home. Mariana's medical records were introduced into evidence and showed she was well-developed, well-nourished, and had good hygiene and normal grooming. Two witnesses for Mother, a coworker and former babysitter, testified Mother loved Mariana, takes good care of her, and does not engage in illegal activity related to drugs or prostitution. Although Father raises potential concerns such as a photo depicting Mariana in a forward-facing car seat and in a bed with a blanket, pillows, and stuffed animals despite doctor's recommendations to the contrary, "the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Scoggin*, 250 N.C. App. at 118, 791 S.E.2d at 526. We hold substantial evidence supports the trial court's finding that Mariana was well taken care of by Mother.

C. Mother's Sole Custody of Mariana

We now address Father's next two arguments that the trial court erred together: the trial court's conclusion that it is in Mariana's best interest to grant Mother sole custody and its failure to grant custody to Father.

It is a "fundamental principle that in a contest between parents over the custody of a child the welfare of the child at the time the contest comes on for hearing is the controlling consideration." *Hardee v. Mitchell*, 230 N.C. 40, 42, 51 S.E.2d 884, 885 (1949). N.C. Gen. Stat. § 50-13.2 provides in pertinent part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, *the court shall consider all relevant factors* including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. *An order for custody must include written findings of fact that reflect the consideration of each of these factors* and that support the determination of what is in the best interest of the child. Between the parents, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent."

N.C. Gen. Stat. § 50-13.2(a). "The tender years doctrine was a legal presumption that benefitted mothers in custody disputes by giving mothers custody all other factors being equal, simply based on the fact that a mother is the natural custodian of her young." *Dixon v. Gordon*, 223 N.C. App. 365, 369, 734 S.E.2d 299, 302 (2012) (quotation marks omitted) (noting the tender years doctrine has been abolished and quoting N.C. Gen. Stat. § 50-13.2(a)). N.C. Gen. Stat. § 50-13.2 further provides:

> An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.

N.C. Gen. Stat. § 50-13.2(b).

Here, Finding of Fact 4, stating it is in Mariana's "best interest that her care, custody and control be placed with the Mother" is essentially a conclusion of law. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) ("[I]f a finding of fact is essentially a conclusion of law[,] it will be treated as a conclusion of law which is reviewable on appeal.") (quotation marks, brackets, and ellipsis omitted). That leaves only Finding of Fact 3 as the sole finding of fact upon which the court based its decision to grant Mother sole custody. Although substantial evidence supports the trial court's finding that Mariana was well cared for by Mother, the trial court further found that Father and Brittany also took good care of Mariana. In other words, the trial court found that Mother, Father, and Brittany *all* provided good care for Mariana: "[T]he minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months." This finding of fact does not explain why it is in Mariana's best interests that Mother be granted sole custody of Mariana. We do not express an opinion on whether sole or joint custody is appropriate or even on which party is the best-suited to exercise sole custody if the trial court sees fit to order sole custody. We do, however, hold that the trial court's finding that all parties provided adequate care for Mariana, in the absence of other findings, does not support its conclusion that Mother should be granted sole custody.

The transcript is replete with evidence from which findings could be made regarding whether sole or joint custody is appropriate and a visitation schedule that is in Mariana's best interest. The trial court indeed may have *considered* all relevant factors as required by N.C. Gen. Stat. § 50-13.2(a), but it failed to "include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child" as required by the statute. Accordingly, we vacate the trial court's order and remand the matter to the trial court for it to make sufficient findings of fact to support its conclusion of law that it is in Mariana's best interest to grant Mother sole care, custody, and control. Due to the length of time that has passed since the entry of the custody order, the circumstances of the parties and the minor child may have changed, and the trial court may, in its discretion, conduct a hearing to take additional evidence.

D. Holiday Schedule

Father argues the trial court's failure to establish a holiday schedule was manifestly unsupported by reason. Instead of entering a holiday schedule, the trial court allowed the parties to agree on a holiday schedule or, alternatively, celebrate the holidays when they had physical

custody of the child. Because we are vacating the trial court's order and remanding for entry of a new order, we need not address this issue.

III. Conclusion

While the trial court's finding that Mariana was well cared for by Mother is supported by substantial evidence, its sole finding does not support its conclusion that Mariana's best interest is served by granting Mother sole custody of the minor child. We vacate the trial court's custody order and remand the matter to the trial court to make written findings of fact in accordance with N.C. Gen. Stat. § 50-13.2(a). In its discretion, the trial court may hold a hearing to receive additional evidence to aid in making its custody determination. It is so ordered.

VACATED AND REMANDED.

Judges COLLINS and GORE concur.

DARLA MARIE CARBALLO, Plaintiff
v.
CHRISTIAN WEBER CARBALLO, Defendant

No. COA23-796

Filed 7 May 2024

1. Child Visitation—denial of visitation to parent—best interests of child—statutorily required findings fact made

In an order modifying child custody, the district court did not err by denying a mother specified visitation with her two children, both teenagers, and instead allowing the children the option to determine—with guidance from their therapists—the amount of contact they should have with their mother, where the court complied with the provisions of N.C.G.S. § 50-13.5(i) by making detailed findings of fact that forced visitation with the mother would not be in the children's best interests.

2. Child Visitation—delegation of authority—surplusage

In an order modifying child custody, the district court did not improperly delegate its authority when it gave the children, both teenagers, sole discretion regarding potential visitation with their mother. Any such delegation was mere surplusage since the court

had properly denied visitation with the mother after finding that it would not be in the children's best interests.

Appeal by Plaintiff from order entered 20 December 2022 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 20 March 2024.

Robinson & Lawing, LLP, by Christopher M. Watford, for Plaintiff-Appellant.

Dozier Miller Law Group, by Allison P. Holstein, Kelly A. Nash, and James R. Pennacchia, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Darla Carballo appeals from the trial court's order granting Defendant Christian Carballo permanent primary legal and physical custody of their minor children and denying her visitation. Plaintiff argues that the trial court denied her visitation without making the requisite findings of fact pursuant to N.C. Gen. Stat. § 50-13.5(i), and that the trial court improperly delegated its judicial authority by allowing the children discretion to determine whether to have visitation with her. Because the trial court found that visitation with Plaintiff was not in the children's best interests and any delegation of discretion to the children to determine whether to have visitation with Plaintiff was mere surplusage, we affirm.

I. Background

Plaintiff and Defendant were married in 1999, were separated in 2016, and are now divorced. Plaintiff and Defendant share three children together: Easter, born in October 2003; Owen, born in July 2006; and James, born in October 2009.[1] The trial court entered a consent order for permanent child custody ("Consent Order") on 4 December 2018 granting Plaintiff and Defendant joint legal and physical custody of the children. The trial court entered an order appointing a parenting coordinator that same day.

Defendant filed a motion for ex parte emergency custody or, in the alternative, a temporary parenting arrangement on 17 November 2020, alleging that Plaintiff "has committed acts of physical and emotional

1. We use pseudonyms to protect the identity of the children. *See* N.C. R. App. P. 42. Easter is no longer a minor and is not subject to the custody order.

abuse against the minor children," and that "[t]he children are presently refusing to go to [Plaintiff's] house, refusing to call, or participate in the visitation/custody schedule with her or at her home." Defendant also filed a motion to modify the Consent Order, seeking sole permanent legal and physical custody of the children. In support of his motions, Defendant specifically alleged:

> On November 6, 2020, [Plaintiff] yelled at [James] about his homework such that [James] started crying, shaking, and put his fist in his mouth. When [Owen] tried to intervene, [Plaintiff] pushed her down forcefully. [Plaintiff] then told her boyfriend to call the police. A police officer responded, and during the call for service the officer said that there wasn't enough evidence to charge anyone because there was no "immediate threat". [Plaintiff] became smug and was heard laughing and taunting [Easter] while the children were crying. The next day she said it was her "right to punish" the children.

The trial court entered an order the next day granting Defendant emergency custody of the children, limiting Plaintiff's visitation to FaceTime and phone calls, and scheduling a return hearing.

Plaintiff filed an answer and objection to Defendant's motion for ex parte emergency custody or a temporary parenting arrangement and motion to modify the Consent Order on 23 November 2020. Plaintiff subsequently filed an amended answer and objection on 8 December 2020. The trial court appointed the Council for Children's Rights as Guardian ad Litem and Custody Advocate for the children on 14 December 2020.

Plaintiff filed a motion to modify the Consent Order on 22 December 2020, alleging that "[Defendant] continuously puts [Plaintiff] in a negative light to the children to a point where it has alienated the children from [her,] causing her to have an extremely strained relationship with the minor children[,]" and that "[t]he children have repeatedly refused to visit with [her]." Plaintiff also filed a motion for contempt, alleging that "[Defendant] refuses to allow [Plaintiff] to have reasonable communication with the minor children when they are in his care."[2] Defendant filed a response to Plaintiff's motions.

At the request of the parenting coordinator, the trial court entered an order appointing a family therapist on 10 March 2021.

---

2. Plaintiff also filed various other motions, which are not relevant to this appeal.

Plaintiff filed a motion on 12 April 2021 for ex parte emergency custody or, in the alternative, a temporary parenting arrangement. Plaintiff alleged that "[t]he children have become more resistant, hostile, angry and entitled against [her,]" and that "[t]his sense of entitlement has been fostered and generated from [Defendant's] constant apathetic and complacent attitude against [Plaintiff] and [Plaintiff's] relationship with the children." The trial court denied the motion without a hearing, finding that Plaintiff had failed to allege facts that met the criteria for ex parte emergency custody.

After a return hearing on the emergency custody order and Defendant's motion for a temporary parenting arrangement, the trial court entered a temporary custody order on 5 May 2021 granting Defendant primary physical custody of the children and Plaintiff visitation every other weekend. The order also allowed the parties "reasonable telephone and/or video contact with the children while in the other parent's care." The family therapist resigned by email on 10 September 2021 on the grounds that "[Defendant] stated that the children are unwilling to continue facilitated visits with [Plaintiff] and he did not believe he could make them comply[,]" and that the case plan was "non-workable without everyone's commitment." Plaintiff filed motions for contempt on 8 April 2022 and 9 August 2022, alleging that "[Defendant] has failed to facilitate reasonable telephone contact as required."

After several hearings, the trial court entered an order modifying the Consent Order on 20 December 2022, granting Defendant permanent primary legal and physical custody of the children and denying Plaintiff "specific visitation with the children[,]" but allowing the children "to determine, with the assistance of their therapists, what contact and/or visitation they should have with [Plaintiff], if any." Plaintiff appealed.

II. Discussion

Plaintiff argues that the trial court denied her visitation without making the requisite findings of fact pursuant to N.C. Gen. Stat. § 50-13.5(i), and that the trial court improperly delegated its judicial authority by allowing the children discretion to determine whether to have visitation with her.

A. Standard of Review

When reviewing a trial court's decision to modify an existing custody order, we determine whether the trial court's findings of fact are supported by substantial evidence. *Malone-Pass v. Schultz*, 280 N.C. App. 449, 463, 868 S.E.2d 327, 339 (2021). "Substantial evidence is such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (quotation marks and citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted). "Unchallenged findings of fact are binding on appeal." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 526 (2016). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254 (citation omitted). Conclusions of law are reviewed de novo. *Padilla v. Whitley de Padilla*, 271 N.C. App. 246, 247, 843 S.E.2d 650, 651 (2020).

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). "[The trial court] has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." *Id.* at 625, 501 S.E.2d at 902 (quotation marks and citation omitted). "An abuse of discretion is shown only when the court's decision 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) (quotation marks and citation omitted).

B. N.C. Gen. Stat. § 50-13.5(i)

[1] Plaintiff argues that "the trial court's order vesting Owen and James sole discretion over visitation is a *de facto* order for no visitation for which the trial court failed to make the required findings under [N.C. Gen. Stat.] § 50-13.5(i)." (capitalization altered).

"A noncustodial parent's right of visitation is a natural and legal right which should not be denied unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *Johnson v. Johnson*, 45 N.C. App. 644, 646-47, 263 S.E.2d 822, 824 (1980) (quotation marks and citation omitted). "In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration." *Id.* (citation omitted).

N.C. Gen. Stat. § 50-13.5(i) provides:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2023). "Thus, before the trial court may completely deprive a custodial parent of visitation, the statute requires a specific finding either (1) that the parent is an unfit person to visit the child or (2) that such visitation rights are not in the best interest of the child." *Paynich*, 269 N.C. App. at 279, 837 S.E.2d at 436 (citations omitted).

Here, the trial court made the following findings of fact:

> 76. This is [a] very unusual case, in that the adult nature of the children and their vehemently expressed desire outweighs the conventional wisdom and research that the children should have a relationship with both parents. The [c]ourt, with this order, does not preclude a relationship with [Plaintiff] and also believes that to be in the children's best interest but not forced visitation.
>
> . . . .
>
> 78. As best interest attorneys for the children, [the Council for Children's Rights] registered concerns for the children's mental health if visitation is forced, and formally recommended that [Plaintiff] be awarded no specific visitation at this time unless requested and agreed upon by the children.
>
> 79. The [c]ourt cannot make a finding that [Plaintiff] is not a fit and proper parent; however, it is not in the children's best interests to have forced visitation or contact with [Plaintiff] at this time.
>
> 80. Rather, it is in the children's best interests for them to have no specified visitation with [Plaintiff], but that they may have reasonable visitation and/or contact with [Plaintiff] at the discretion of the children and their therapists' recommendations.
>
> 81. It is in the best interest of these children that they determine, with the assistance of their therapists, what, if any, visitation or contact they have with [Plaintiff].

The trial court made detailed findings, including that "it is in the children's best interests for them to have no specified visitation with [Plaintiff]," and thus complied with N.C. Gen. Stat. § 50-13.5(i) prior to denying Plaintiff visitation. In support of these findings of fact, the trial court also made the following unchallenged findings of fact:

> 51. The middle child [Owen] shows symptoms of PTSD, at least in part, as a result of the dysfunctional relationship with [Plaintiff].
>
> 52. [James], the youngest child, has shown signs of distress, which is manifested in him chewing on his shirts, not being able to sleep alone (even at [Defendant's] home), and the cessation of funny, happy behavior. After visitation ceased with [Plaintiff] in August 2021, [James] has ceased chewing on his shirts, is able to sleep in his own room by himself, and has resumed his silly, happy behavior (like playing the kazoo).
>
> 53. The children have been exposed to hyper-derogatory comments about their father from [Plaintiff] and her parents.
>
> 54. The children have repeatedly complained about racist and homophobic comments made by [Plaintiff] and her family, and these issues were repeatedly addressed in therapy and with the parent coordinator. [Defendant] is Filipino, and the children are bi-racial, such that they internalize [Plaintiff's] comments personally. Additionally, [Plaintiff] texted [Easter] on their 18th birthday about a cake she had bought and the following: "*I transfer money into your account and you can use that however you woukd [sic] like- donate to queer organization, use for senior trip-whatever you would like*". Unfortunately, this message, which the [c]ourt believes was meant to be a sincere show of acknowledgement and interest in [Easter's] life, was not received as such which further demonstrates a tone-deafness on [Plaintiff's] part.
>
> . . . .
>
> 56. The children are very close to one another and to [Defendant]. This is a result of the stressors from [Plaintiff] and not from any intentional manipulation.
>
> . . . .

> 65. [Plaintiff] has been more aggressive and argumentative with professionals than most parents in those professionals' experience, which leads the court to believe that she also communicates, or has in the past with her children in a similar manner.

The trial court's findings of fact support its conclusions of law that "[i]t is not in the children's best interest for [Plaintiff] to have specific visitation with the children at this time"; "[i]t is not in the children's best interest to be forced to visit with [Plaintiff]"; and "[i]t is reasonable in this case for the children to determine, with the assistance of their therapists, what contact and/or visitation they should have with [Plaintiff], if any."

As the trial court made the requisite findings of fact prior to denying Plaintiff visitation, and the findings of fact and conclusions of law are supported by the unchallenged findings of fact, the trial court did not abuse its discretion by denying Plaintiff visitation.

C. Delegation of Judicial Authority

[2] Plaintiff also argues that "the trial court improperly delegated its judicial authority over visitation by allowing the minor children the sole discretion to determine whether they would have any contact with [Plaintiff]." (capitalization altered). However, the trial court denied Plaintiff visitation after finding that visitation was not in the children's best interests. In light of the trial court's authority to deny visitation pursuant to N.C. Gen. Stat. § 50-13.5(i), any delegation of discretion to the children to determine whether to have visitation with Plaintiff is "mere surplusage[.]" *Routten v. Routten*, 374 N.C. 571, 579, 843 S.E.2d 154, 159 (2020). As the trial court denied Plaintiff visitation pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court did not improperly delegate its judicial authority by allowing the children discretion to determine whether to have visitation with Plaintiff.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

GABBIDON BUILDERS, LLC AND LEONARD GABBIDON, QUALIFIER, PETITIONERS,
GABBIDON CONSTRUCTION, LLC AND LEONARD GABBIDON, QUALIFIER, PETITIONERS
v.
NORTH CAROLINA LICENSING BOARD FOR GENERAL CONTRACTORS, RESPONDENT

No. COA23-1010

Filed 7 May 2024

Witnesses—subpoenaed witnesses—virtual testimony permitted—due process—notice and opportunity to cross-examine

At a hearing before the Licensing Board of General Contractors regarding petitioners (two companies and their "qualifier" for licensing purposes) and their alleged violations of North Carolina general contracting law, the Board did not deprive petitioners of due process by allowing five subpoenaed witnesses to appear virtually rather than in person. Firstly, neither the Board's regulations nor the provisions governing subpoenas found in Civil Procedure Rule 45 prohibit subpoenaed witnesses from testifying virtually. Secondly, petitioners received advance notice of the hearing, including notice that several witnesses would appear virtually; had an opportunity to be heard at the hearing; and not only had the opportunity to cross-examine each witness, but did in fact cross-examine three of them. Furthermore, because each party bears the burden of subpoenaing witnesses that it wishes to make appear, petitioners themselves should have subpoenaed the virtual witnesses if they wanted these witnesses to testify in person.

Appeal by petitioners from order entered 24 May 2023 by Judge Karen E. Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 March 2024.

Banks Law, PLLC, by F. Douglas Banks, for petitioners-appellants.

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

ZACHARY, Judge.

This case arises from various complaints submitted to the North Carolina Licensing Board for General Contractors ("the Board") regarding Petitioners Gabbidon Builders, LLC, Gabbidon Construction, LLC, and Leonard Gabbidon, which are alleged to have acted in violation

of the North Carolina General Statutes regulating general contractors in this State. Petitioners appeal from the superior court's order (1) affirming the Board's final decisions revoking the building licenses of Petitioners Gabbidon Builders, LLC, and Gabbidon Construction, LLC, and (2) revoking Petitioner Leonard Gabbidon's ability to act as a qualifying party. After careful review, we affirm.

I. Background

Gabbidon Builders, LLC, is a South Carolina limited liability company registered to do business in North Carolina; Leonard Gabbidon "is the [r]egistered [a]gent and corporate member" of Gabbidon Builders. Gabbidon Construction, LLC, is a North Carolina limited liability company; Leonard Gabbidon "is the registered agent and member" of Gabbidon Construction. In order to be licensed to engage in general contracting in the State of North Carolina, an applicant must identify an associated individual who has passed the general contractor examination; this individual is referred to as a "qualifier" or a "qualifying party[.]" N.C. Gen. Stat. § 87-10(b) (2023). Leonard Gabbidon is the qualifying party for Gabbidon Builders and Gabbidon Construction.

On 22 December 2021, the Board issued a notice of hearing against Gabbidon Builders and Leonard Gabbidon in which it alleged "gross negligence, incompetency and/or misconduct in the practice of general contracting" in violation of N.C. Gen. Stat. § 87-11(a). On 1 February 2022, the Board issued an amended notice of hearing against Petitioners Gabbidon Construction and Leonard Gabbidon, again alleging "gross negligence, incompetency and/or misconduct in the practice of general contracting" as well as "fraud or deceit in obtaining a license" in violation of N.C. Gen. Stat. § 87-11(a). Both matters were scheduled to come on for a single hearing before the Board on 20 April 2022.

Prior to the hearing, the Board subpoenaed a number of witnesses to "appear and testify" before the Board at the hearing. On 14 April 2022, the Board notified counsel for Petitioners that "[s]everal of the Board's witnesses" would be "appearing virtually." Upon Petitioners' request, on 18 April 2022, the Board identified five of its subpoenaed witnesses who would be making virtual appearances.

On 19 April 2022, Petitioners moved to exclude virtual testimony in both matters. Petitioners' motions were heard by the Board at the commencement of the hearing on 20 April 2022. The Board denied the motions, and proceeded with the hearing.

On 27 April 2022, the Board entered its final decisions, in which it (1) revoked the licenses of Petitioners Gabbidon Builders, LLC, and

Gabbidon Construction, LLC; (2) revoked Petitioner Leonard Gabbidon's ability to act as a qualifying party for an applicant for a license to practice general contracting; and (3) assessed costs of $30,000 against Petitioners in each matter.

On 26 May 2022, Petitioners filed petitions for judicial review of both final decisions with the Mecklenburg County Superior Court. In each case, Petitioners raised various arguments challenging the admission of virtual testimony, among other issues. On 18 July 2022, the Board filed a motion to consolidate the matters, which the superior court granted on 29 September 2022.

On 12 April 2023, the consolidated matters came on for hearing in Mecklenburg County Superior Court. On 24 May 2023, the superior court entered an order affirming the Board's final decisions. Petitioners timely filed notice of appeal.

II. Discussion

Petitioners advance several arguments on appeal, all of which stem from the same basic concern: that the Board committed reversible error by "allowing the virtual testimony of witnesses who failed to comply with subpoenas." We disagree.

A. Standard of Review

Under the Administrative Procedure Act ("APA"), the superior court's scope of review of an agency final decision is limited:

> 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).

The APA also provides two different standards of review, depending on the type of error asserted:

> In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

Id. § 150B-51(c).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." *Id.* § 150B-52. "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases." *Id.* "Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the [superior] court utilized the appropriate scope of review and, if so, whether the [superior] court did so correctly." *Ingram v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contr'rs*, 269 N.C. App. 476, 480, 839 S.E.2d 74, 77 (2020) (citation omitted).

In this appeal, Petitioners assert only errors of law.[1] Accordingly, the de novo standard of review is appropriate. N.C. Gen. Stat. §§ 150B-51(c); -52.

When conducting de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Herron v. N.C. Bd. of Exam'rs for Eng'rs & Surveyors*, 248 N.C. App. 158, 165, 790 S.E.2d 321, 327 (2016) (cleaned up). "In cases reviewed under [N.C. Gen. Stat. §] 150B-51(c), the [superior] court's

1. Petitioners asserted additional fact-based errors below, but they do not raise these issues in their brief on appeal, and those issues are therefore abandoned. *See* N.C. R. App. P. 28(b)(6).

findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52.

B. Analysis

As a threshold matter, we recognize that the superior court properly utilized the de novo standard of review when considering Petitioners' law-based challenges to the Board's final decision. We therefore proceed to our de novo review of the superior court's order for the asserted errors of law.

Petitioners argue on appeal that the Board deprived them of due process by allowing subpoenaed witnesses to appear virtually. "The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be at a meaningful time and in a meaningful manner." *Peace v. Emp. Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (cleaned up). Further, "the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy." *Id.*

The APA provides that "[i]n preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with" Rule 45 of the Rules of Civil Procedure. N.C. Gen. Stat. § 150B-39(c). Rule 45, in turn, provides that a subpoena shall contain "[a] command to each person to whom it is directed to attend and give testimony[.]" *Id.* § 1A-1, Rule 45(a)(1)(b). In addition, the Board's regulations provide procedures for the issuance of "subpoenas for the attendance and testimony of witnesses[.]" 21 N.C. Admin. Code 12A.0827(a) (2023). Petitioners thus argue that "the Board's procedures required the subpoenaed witnesses to appear" and that Petitioners "clearly had the right to confront and cross-examine each witness in person."

However, Petitioners provide no citation to authority in support of their contention that a subpoenaed appearance must be "in person." The superior court correctly recognized that, while "there are no procedures for virtual testimony[,]" the Board's regulations and Rule 45 neither provide for *nor prohibit* witnesses from testifying virtually.

The APA also provides:

> Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for

> the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

N.C. Gen. Stat. § 150B-40(a). "In the case at bar, there is no dispute that the Board complied with the above-stated statutory requirements, providing proper notice and an opportunity for [Petitioners] to be heard at the formal hearing." *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 7, 569 S.E.2d 287, 293 (2002), *appeal withdrawn*, 357 N.C. 163, 579 S.E.2d 577 (2003).

The superior court found as fact that "Petitioners received notice of the hearings before the Board and the opportunity to be heard" and that "Petitioners had the opportunity to cross-examine every witness[ ] and indeed did cross-examine [three of the] witnesses who appeared virtually[.]" Petitioners even acknowledge in their brief that they "were still afforded the opportunity to cross-examine the witnesses[.]"

Nonetheless, Petitioners posit that the fact that they had "the opportunity to cross-examine the witnesses" cannot serve as the basis for "excus[ing] the Board's willingness to allow its own witnesses to avoid lawfully issued subpoenas and the corresponding disregard of the required procedures that govern the hearings of the Board." In response, the Board correctly observes that "[t]here is no provision in [Rule 45], North Carolina statute, or case law, that allows a party to challenge the validity of, or compliance with, a subpoena for witnesses that were not subpoenaed for the complaining party's case-in-chief." Indeed, our Supreme Court has occasionally reminded appellants that each party bears the burden of subpoenaing witnesses that it wishes to make appear and testify. *See*, *e.g.*, *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 385 (1981) ("If [the] plaintiff desired to call [the] defendant as a witness she should have had a subpoena issued for him or asked for an order of the court requiring him to be present."); *Fed. Reserve Bank v. Whitford*, 207 N.C. 267, 269, 176 S.E. 584, 585 (1934) ("If the plaintiff desired the testimony of the Federal Reserve Agent, it should have subpœnaed him as a witness or have taken his deposition.").

So, too, here: if Petitioners' case were so reliant upon the *in-person* testimony of these virtual witnesses—each of which Petitioners had the opportunity to cross-examine at the hearing—then Petitioners themselves should have subpoenaed these witnesses. This is particularly so if, as Petitioners assert, allowing witnesses to testify virtually would prejudice Petitioners to the point of a due-process deprivation. As counsel for the Board argued to the superior court, the Board could have

released its witnesses from its subpoenas, or "told witnesses they don't have to come or appear virtually at all," and Petitioners would have had "no redress" in that event.

As previously stated, it is beyond dispute that Petitioners had sufficient notice and opportunity to be heard at the hearing before the Board. That the Board did not compel its witnesses to appear in the manner that Petitioners preferred is not a concern that rises to the level of a deprivation of Petitioners' right to due process. Petitioners' argument is overruled.

III. Conclusion

In its order on appeal, the superior court utilized the appropriate standard of review, and did so properly. Therefore, we affirm the superior court's order affirming the final decisions of the Board.

AFFIRMED.

Judges WOOD and THOMPSON concur.

DEBBIE HAYTHE, Plaintiff
v.
JAMES HAYTHE, JR., Defendant

No. COA23-792

Filed 7 May 2024

1. Divorce—alimony—equitability—classification of dependent and supporting spouse—sufficiency of findings

In awarding alimony to plaintiff pursuant to N.C.G.S. § 50-16.3A(a), the trial court did not err in determining that plaintiff was a dependent spouse and defendant was a supporting spouse where unchallenged findings of fact stated that plaintiff would have a shortage of more than $3,000 per month without support while defendant had earned more money than plaintiff throughout their marriage and currently had income in excess of his own expenses. Likewise, the court's determination that an award of alimony to plaintiff would be equitable was supported by unchallenged findings that addressed relevant factors, including that plaintiff had depleted her retirement account during the marriage to cover defendant's taxes and purchase of a car.

2. Divorce—alimony—discretion regarding award—additional findings required for amount

The trial court did not abuse its discretion in awarding plaintiff a lump sum alimony payment where unchallenged findings of fact stated that defendant had minimal money with which to make monthly payments but had received over $80,000 in equitable distribution proceeds from the sale of the marital home. However, remand for the entry of additional findings was necessary because the court failed to set forth its reasons for the amount of the award as required under N.C.G.S. § 50-16.3A(c).

3. Divorce—alimony—attorney fees—additional findings required as to reasonableness of award

The trial court did not err in awarding attorney fees in an alimony action where it determined that plaintiff was a dependent spouse and entitled to receive alimony and then found that: plaintiff's monthly expenses exceeded her income, she had to borrow money to retain an attorney for her post-separation support hearing, the retainer was exhausted in that proceeding, and plaintiff represented herself in the equitable distribution hearing because she could not afford counsel. However, remand was necessary for entry of findings of fact supporting the amount of the award, including about the time expended and skill required by plaintiff's counsel, and whether the hourly rates charged were reasonable and customary for the type of work performed.

4. Divorce—equitable distribution—share of marital home sale proceeds held in trust proper

The trial court did not err in ordering that defendant's portion of the proceeds from the sale of the marital home be held in trust in the interest of pending litigation pursuant to N.C.G.S. § 50-20(i) where the issue of alimony had been continued and plaintiff's civil contempt motion against defendant for nonpayment of post-separation support had not yet been resolved.

5. Contempt—civil—present ability to pay—findings sufficient

In finding defendant in contempt for failure to comply with a post-separation support order, the trial court's determination that he had the present means and ability to make the required payments was supported by unchallenged findings of fact that defendant was and would continue to be employed as a nurse, had a monthly net income of over $4,000, and had received more than $80,000 in equitable distribution proceeds from the sale of the marital home.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from order entered 17 January 2023 by Judge Joseph Williams in District Court, Union County. Heard in the Court of Appeals 6 March 2024.

No brief filed for pro se plaintiff-appellee.

Plumides, Romano & Johnson, PC, by Richard B. Johnson, for defendant-appellant.

ARROWOOD, Judge.

James Haythe, Jr. ("defendant") appeals from the trial court's order on alimony, contempt, and attorney's fees. Defendant contends the trial court erred by ordering defendant to pay a lump sum alimony award and $12,625.00 in attorney's fees, and the trial court abused its discretion by enjoining defendant's equitable distribution award and finding defendant in contempt. We decide the issues as follows.

I. Background

Defendant and Debbie Haythe ("plaintiff") were married on 25 December 2008 and separated on 16 March 2020. Plaintiff initiated this action by filing a complaint on 14 October 2020, including claims for post-separation support ("PSS"), alimony, equitable distribution, and attorney's fees. On 7 December 2020, defendant filed an answer, including affirmative defenses and a counterclaim.

The trial court conducted a hearing on plaintiff's complaint on 3 June 2021. The trial court entered an order on 4 June 2021 requiring defendant to pay plaintiff $850.00 per month in PSS and an additional $100.00 per month towards PSS arrears of $6,800.00. The trial court determined that defendant had a surplus each month and was able to pay PSS.

On 1 October 2021, defendant filed a motion for interim distribution and injunctive relief due to plaintiff's failure to pay the monthly mortgage on the marital home. On 15 December 2021, the trial court entered an order for interim distribution and injunctive relief, requiring the immediate sale of the marital home with any proceeds to be placed in defendant's attorney's trust account pending further order. The marital home was subsequently sold, and the parties netted $165,852.11 in proceeds plus a $5,000.00 deposit, which were placed in the trust account.

Plaintiff's claim for alimony and both parties' claims for equitable distribution came on for trial on 5 April 2022. The trial court denied defendant's motion to dismiss plaintiff's alimony claim, and because plaintiff was not prepared to continue on the alimony claim, the trial court proceeded with the parties' equitable distribution claims. After the trial but before the trial court issued an order, plaintiff filed a motion for order to show cause alleging that defendant failed to comply with the 4 June 2021 order requiring defendant to pay plaintiff PSS.

The trial court issued an order on 11 July 2022 on equitable distribution of the parties' property. The trial court concluded that the net value of the marital residence would be equitably distributed between the parties, and the order specified that plaintiff's $85,426.06 share should be released to her from defendant's attorney's trust account. However, the trial court also instructed that defendant's attorney was to hold defendant's $85,426.05 share in trust until plaintiff's contempt motion for nonpayment of PSS was resolved.

Defendant filed a financial affidavit and notice of hearing on 20 July 2022. The trial court filed a notice of hearing on 8 August 2022, setting the hearing date for 25 August 2022. Plaintiff filed a motion to continue on 17 August 2022, to which defendant filed an objection. On 18 August 2022, the trial court allowed plaintiff's motion and filed an order to continue the case to 23 September 2022. The trial court filed notices of the hearing on 22 August 2022 and 8 September 2022. Plaintiff filed a financial affidavit on 14 September 2022, including attachments concerning her income tax returns, property interests in Texas, bank statements, and the marital residence.

The trial court conducted a hearing on 23 September 2022. Plaintiff testified that defendant's income was higher than hers during their marriage, and his income paid for their marital expenses. Plaintiff described her role and duties as a housewife and pastor's wife, and she testified that defendant did not ask her to seek employment, though she on occasion held temporary jobs. Plaintiff further told the court that she used her retirement savings and annuities to help defendant pay off his debt, and when defendant left their home, she had only $600.00 left in those accounts. She explained that she was not eligible for Social Security from her previous employment as a teacher, so she would have to collect Social Security through defendant. Plaintiff testified that defendant had paid only a total of $1,050.00 in PSS, and she had accrued $16,130.00 in attorney's fees throughout the litigation.

Defendant testified that plaintiff used some of her retirement funds to support their marital expenses, such as paying his church's taxes and

for a car, and plaintiff assumed his credit card debt for purchases he'd made during the marriage. Defendant confirmed he had not paid plaintiff more than $1,050.00 in PSS. Evidence regarding the parties' incomes was introduced, showing that defendant made a range of approximately $62,000.00 to $77,000.00 each year from 2019 through 2021, and plaintiff made $7,359.00 in 2019 and $3,554.00 in 2020. Defendant told the trial court that plaintiff was certified as a teacher and had previously worked at Walmart, but plaintiff had refused to find employment during the marriage. Defendant also testified that he was in the negative each month, but on cross-examination, he admitted he did not have a negative balance on his bank statements in evidence.

On 22 November 2022, Judge Williams sent a letter to the parties summarizing the trial court's decision and reasoning.

The trial court filed an order on alimony, contempt, and attorney fees on 17 January 2023. The trial court found the following relevant findings of fact:

> 16. That just prior to the parties' separation, Defendant left the marital residence and was gone for weeks.
>
> 17. That Defendant abandoned Plaintiff and withdrew his love and affection from Plaintiff without just cause.
>
> 18. That Defendant, shortly after the parties' separation, and while Plaintiff was still living in the marital residence, shut off the utilities (lights, water, cable, and sanitation) to the marital residence without notice to Plaintiff. This was during the middle of a pandemic.
>
> . . . .
>
> 22. That Plaintiff was a faithful and dutiful wife.
>
> 23. That Plaintiff cleaned the house, washed the parties' clothes, and prepared Defendant's dinners.
>
> . . . .
>
> 25. That Plaintiff assisted Defendant in his work as a minister.
>
> . . . .
>
> 27. That Plaintiff brought into the marriage some savings from a job she performed in Texas as a teacher and used those monies in the marriage to help support the family,

purchase vehicles for Defendant and pay off some church taxes that belonged to Defendant.

28. That Plaintiff only had $600 in her retirement account on the date of separation.

. . . .

30. That Plaintiff did not work for some years after she married Defendant.

. . . .

34. That Plaintiff is currently unemployed.

. . . .

37. That Plaintiff was and is substantially dependent on Defendant to maintain the lifestyle to which she was accustomed.

38. That Defendant was employed as a nurse on the parties' date of separation.

39. That at all times during the marriage, Defendant earned more money than Plaintiff.

. . . .

49. . . . Defendant has minimal money with which to pay alimony on a monthly basis.

50. That each party received over $80,000 in equitable distribution proceedings.

51. That Defendant, thus, has the means and ability to pay Plaintiff alimony as a lump sum.

. . . .

59. That Plaintiff is a dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A, and Defendant is a supporting spouse within the meaning of that statute.

60. That during the course of the parties' marriage, Defendant was the primary means of financial support for Plaintiff.

61. That Defendant has the ability to pay support and the resources of Plaintiff are not adequate to meet her

reasonable needs considering the factors set forth in N.C. Gen. Stat. § 50-16.2A(b).

62. That Defendant has willfully failed to provide Plaintiff sustenance according to his means and ability and has rendered Plaintiff's condition intolerable and life burdensome and thus he owes an obligation to pay alimony to Plaintiff.

63. That Defendant will continue being employed as a nurse and Plaintiff's ability to start teaching, again after long periods of not being a teacher, is probably not likely.

. . . .

65. That since the entry of the Order on Post Separation Support, Defendant has only paid $1,050 to Plaintiff.

. . . .

68. That Defendant is in willful contempt of the Court's Post-separation Order as he had the means and ability to comply with the order but has willfully refused to do so.

69. That Defendant currently owes $13,580 in post-separation support to Plaintiff.

. . . .

73. That Plaintiff was unable to pay for Mrs. McBeth's continued legal services, and due to her non-payment, she had to represent herself in an equitable distribution proceeding.

74. That after she received an award from the proceeding, Plaintiff paid Mrs. McBeth to be her lawyer for the alimony hearing.

75. That Mrs. McBeth charged Plaintiff at the rate of $300 an hour. The total fees incurred by Plaintiff was $12,625.

76. That the fees incurred were reasonable and necessary for Plaintiff to present her claim and meet Defendant on an equal basis.

The trial court also made the following relevant conclusions of law:

3. That the Defendant is the supporting spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(5), and the Plaintiff

is the dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(2).

4. That Plaintiff is actually and substantially dependent upon Defendant for her maintenance and support and is substantially in need of maintenance and support from Defendant.

5. That Defendant is able to pay the amount designated herein.

6. An award of alimony is equitable after considering all relevant factors.

7. The amount of alimony awarded is fair and just to all parties.

8. The Defendant is in willful civil contempt of Court as shown by clear, cogent and convincing evidence.

9. That Plaintiff is entitled to an order requiring Defendant to pay her reasonable attorney fees.

10. That Plaintiff is an interested party proceeding in good faith.

11. That Plaintiff had and still has insufficient means to defray the expense of meeting Defendant as a litigant on substantially even terms.

12. That the terms of this Order are fair and reasonable, and the Defendant is capable of complying with them.

The trial court ordered defendant to pay $40,000.00 in alimony, $13,580.00 to purge himself of contempt for non-payment of PSS, and $12,262.00 in attorney fees to plaintiff from the assets held in his attorney's trust account.

Defendant filed notice of appeal on 24 January 2023.

II. Discussion

Defendant contends the trial court erred by ordering defendant to pay lump sum alimony and $12,625.00 in attorney's fees, abused its discretion by restraining defendant's equitable distribution award, and erred by finding defendant in contempt. We disagree but remand for further findings of fact to support the amount of the lump sum alimony payment.

A. Alimony

The trial court's determination of whether a spouse is entitled to alimony is reviewed de novo. *Barrett v. Barrett*, 140 N.C. App. 369, 371 (2000) (citing *Rickert v. Rickert*, 282 N.C. 373, 379 (1972)). The trial court's determination of the amount, duration, and manner of payment of alimony is reviewed for abuse of discretion. *Id.* (citing *Quick v. Quick*, 305 N.C. 446, 453 (1982)). "[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 (2015) (citation omitted). "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." *Koufman v. Koufman*, 330 N.C. 93, 97 (1991) (citations omitted).

[1] In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony, and "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" N.C.G.S. § 50-16.3A(a) (2023).

"The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony[,]" and the court must consider "all relevant factors," including

> [t]he relative earnings and earning capacities of the spouses . . . [t]he ages and the physical, mental, and emotional conditions of the spouses . . . [t]he amount and sources of earned and unearned income of both spouses; . . . [t]he standard of living of the spouses established during the marriage; . . . [t]he duration of the marriage; . . . [t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses[;] . . . [t]he contribution of a spouse as homemaker; . . . [t]he relative needs of the spouses; . . . [and any] other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

N.C.G.S. § 50-16.3A(b).

On appeal, defendant challenges findings of fact 51, 59, 61, and 62 as well as conclusions of law 3 through 7, 11, and 12 regarding the alimony award. Defendant challenges the trial court's finding that plaintiff was a

dependent spouse. To be a dependent spouse, one must be either "actually substantially dependent upon the other spouse" or "substantially in need of maintenance and support from the other spouse." N.C.G.S. § 50-16.1A(2) (2023). Defendant does not challenge the trial court's findings regarding plaintiff's income and monthly expenses, and thus, the trial court's finding that "Plaintiff would have a shortage of $3,319.02 per month" is binding on appeal. "This in and of itself supports the trial court's classification of her as a dependent spouse." *Barrett*, 140 N.C. App. at 372 (citing *Phillips v. Phillips*, 83 N.C. App. 228, 230 (1986) ("The trial court found that plaintiff had monthly expenses of $1,300 and a monthly salary of $978. That leaves her with a deficit of $322 a month. From these facts, the trial court could have found that plaintiff was both actually substantially dependent on defendant and substantially in need of defendant's support.")).

However, "[j]ust because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse." *Barrett*, 140 N.C. App. at 373 (citation omitted). "A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Id.* (citing *Beaman v. Beaman*, 77 N.C. App. 717, 723 (1985)). Unchallenged findings 37 through 49 pertain to defendant's income and expenses, and they are binding on appeal. The trial court's findings that "Plaintiff was and is substantially dependent on Defendant to maintain the lifestyle to which she was accustomed[,]" defendant earned more money than plaintiff during the marriage, and his current monthly income exceeded his expenses, even if only slightly, adequately support its classification of defendant as the supporting spouse.

The trial court clearly considered relevant factors in its determination that an alimony award for plaintiff was equitable. Along with considering the previous marital lifestyle, unchallenged findings 11 through 36 show that the trial court considered the earned and unearned incomes of the parties, their assets and needs, plaintiff's contribution as homemaker, the marital dynamics, and the parties' ability to earn money. Specifically, plaintiff depleted her retirement account throughout the marriage, using the funds to pay defendant's church's taxes and purchase him a car. Plaintiff had only $600.00 remaining in her retirement account upon the parties' separation. These findings support the trial court's decision that an alimony award for plaintiff was equitable.

[2] Defendant also challenges the lump sum alimony award of $40,000.00 and finding of fact 51 that he has the means and ability to pay the alimony as a lump sum. In determining the amount of alimony, "[c]onsideration must be given to the needs of the dependent spouse,

but the estates and earnings of both spouses must be considered. It is a question of fairness and justice to all parties." *Kelly v. Kelly*, 167 N.C. App. 437, 441 (2004) (citations and internal quotation marks omitted). The trial court exercised its discretion in its decision by considering the relevant factors as described above. Although the trial court found that defendant "has minimal money with which to pay alimony on a monthly basis[,]" the trial court also found that he received over $80,000.00 in equitable distribution proceedings that remained in his attorney's trust account. Thus, this unchallenged finding supports the trial court's determination that defendant had the ability to pay a lump sum for alimony.

Defendant further contends that the trial court did not provide any reasoning for how it determined a $40,000.00 lump sum award. We agree. "The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C.G.S. § 50-16.3A(c); *see also Hartsell v. Hartsell*, 189 N.C. App. 65, 76 (2008) ("With respect to the $650.00, the trial court made only a finding that plaintiff had the ability to pay that amount, but provided no explanation as to why it had concluded that defendant was entitled to that specific amount."). While it may be possible to deduce the trial court's reasoning for the $40,000.00 award from the order and record, it is not up to us to do so; therefore, we remand for further findings as to how the court determined the specific amount it ordered to be paid. In sum, the trial court did not err in awarding alimony to plaintiff, nor did it abuse its discretion in determining defendant was able to pay a lump sum. However, we remand for additional findings on how the trial court reached its $40,000.00 award.

B. Attorney Fees

[3] Whether a spouse is entitled to attorney's fees is reviewed de novo. *See Barrett*, 140 N.C. App. at 374 (citing *Clark v. Clark*, 301 N.C. 123, 136 (1980)). "The amount awarded will not be overturned on appeal absent an abuse of discretion." *Id.* at 375 (citing *Spencer v. Spencer*, 70 N.C. App. 159, 169 (1984)). "A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Id.* at 374 (citing *Clark*, 301 N.C. at 135–36).

Our holding regarding alimony satisfies the first two requirements: plaintiff is a dependent spouse and is entitled to receive alimony. We now must determine whether plaintiff had the means to defray the costs of litigation. Defendant challenges findings of fact 73 through 76 that plaintiff was unable to continue to pay attorney's fees and represented

herself in the equitable distribution case, plaintiff received the funds from equitable distribution and paid her attorney, and the $300.00 per hour rate for a total of $12,625.00 was reasonable and necessary for plaintiff's representation. The trial court found, and defendant does not challenge, that plaintiff was unemployed, her monthly expenses exceeded her income, and that she had to borrow money from family members to retain her attorney for the PSS hearing. The findings of fact show that plaintiff depleted her retainer on the PSS hearing, and after the PSS hearing, the record is clear that plaintiff represented herself in the equitable distribution proceeding because she could not afford to continue to pay her attorney. Viewed together, these findings support that plaintiff was unable to pay the costs of litigation, and the trial court did not err in awarding plaintiff attorney's fees.

Defendant argues that there was not competent evidence to support the amount of fees awarded because the fee affidavit was not admitted into evidence and thus the breakdown of the fees is unknown. We believe the record supports the amount of fees awarded. Plaintiff testified regarding invoices she had received for her attorney's work; she stated that she received separate invoices for $3,080.00, $4,025.00, $525.00, and $4,999.00, billed at $300.00 per hour. These amounts total $12,629.00. The trial court found plaintiff incurred $12,625.00 in attorney fees and ordered defendant to pay the same. However, "in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable, the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369 (1989). Because the trial court did not include these findings of fact in its order, we remand for further findings in accordance with this opinion.

C. Restraining Equitable Distribution

[4] Defendant next contends that the trial court erred in restraining the funds he received through equitable distribution. We disagree.

The trial court continued the issue of alimony at the 5 April 2022 hearing for equitable distribution, and the trial court acknowledged that plaintiff had a right to enforce the delinquent PSS payments. On 25 May 2022, plaintiff filed her motion for order to show cause, alleging that defendant should be held in contempt for his non-payment of PSS. The trial court's 11 July 2022 order instructed that defendant's attorney "is to continue to hold in his trust account Mr. Haythe's $85,426.05 in proceeds until Mrs. Haythe's Contempt Motion for nonpayment of [PSS] is

resolved." The trial court had the authority to order such a restraint in the interest of pending litigation. *See* N.C.G.S. § 50-20(i) (2023) ("The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property."). This instruction ensured that defendant would be able to comply with any future orders requiring defendant to make payments to plaintiff. Therefore, we hold that the trial court did not err in ordering defendant's portion of the proceeds from the sale of the marital home to be held in trust.

D. Contempt

[5] An aggrieved party may initiate a proceeding for civil contempt pursuant to N.C.G.S. § 5A-23 by motion

> giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

N.C. Gen. Stat. § 5A-23(a1) (2023). "When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions." *Shumaker v. Shumaker*, 137 N.C. App. 72, 77 (2000) (citing *Adkins v. Adkins*, 82 N.C. App. 289 (1986)).

Our statutes describe civil contempt as "[f]ailure to comply with an order of a court" as long as

> (1) [t]he order remains in force;
>
> (2) [t]he purpose of the order may still be served by compliance with the order;
>
> (2a) [t]he noncompliance by the person to whom the order is directed is willful; and
>
> (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order."

N.C.G.S. § 5A-21(a) (2023). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Watson v. Watson*, 187 N.C. App. 55, 66 (2007) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118 (2002)).

Defendant challenges the court's finding that "he had the means and ability to comply with the order but has willfully refused to do so." Here, the trial court's unchallenged findings show that defendant was employed as a nurse when the parties separated, he will continue to be employed as a nurse, he has a net income of $4,100.79 per month, and he received over $80,000.00 in equitable distribution proceedings. The trial court also found that since the order on PSS entered 4 June 2021, defendant has paid only $1,050.00 to plaintiff. These findings indicate that defendant had the means to comply or take reasonable measure to enable him to comply with the order, and the finding that defendant was in contempt of the order is supported by competent evidence. Thus, the trial court did not err in finding defendant was in contempt.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order and remand for additional findings regarding the reasoning for the $40,000.00 alimony award as well as additional findings regarding the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney in the $12,625.00 award of attorney fees. In doing so the trial court may rely upon the record before it or in its discretion take additional evidence necessary to make the additional required findings.

AFFIRMED IN PART AND REMANDED FOR ADDITIONAL FINDINGS IN PART.

Judge COLLINS concurs.

Judge TYSON concurs in result in part and dissents in part.

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

I concur with the majority's conclusion to remand: (1) the unsubstantiated $40,000 lump sum award for additional findings of fact and for the reasoning to support the specific amount and basis for the award, and (2) the reasons for denying Defendant any access to his equitable

distribution marital home proceeds. N.C. Gen. Stat. § 50-16.3A(c) (2023). I also concur in the result with the majority's opinion to vacate the award of attorney's fees and remand.

I. N. C. Gen. Stat. § 50-16.3A(b)

"The court *shall* exercise its discretion in determining the amount, duration, and manner of payment of alimony[,]" and the court *must* consider "all relevant factors," including, *inter alia*:

> (2) The relative earnings and *earning capacities* of the spouses;
>
> (3) The *ages and the physical, mental, and emotional conditions of the spouses*;
>
> (4) The amount and sources of earned *and unearned income* of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> (5) *The duration of the marriage*;
>
> . . .
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> . . .
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The *relative needs* of the spouses;
>
> . . .
>
> (15) *Any other factor* relating to the economic circumstances of the parties that the court finds to be just and proper.

N.C. Gen. Stat. § 50-16.3A(b) (2023) (emphasis supplied).

Plaintiff is a college graduate with over seventeen years of teaching experience in Texas. She retains a 4,000 square feet home as separate property in Texas, occupied by her brother, whose "rent" does not cover the mortgage, taxes, insurance, and maintenance expenses. The trial court found Plaintiff used marital funds to pay these expense shortfalls on this home, while exclusively occupying the marital home for over eighteen months, allowing the mortgage to go into default and not paying for utilities she solely consumed. She incurred significant credit card debt in her own name that was considered marital debt.

Plaintiff was born in 1957 and married Defendant in 2008. Their childless marriage continued for approximately eleven years. The record evidence shows Plaintiff abandoned Defendant and the marital home to return to Texas to care for an ailing relative, while Defendant suffered significant health issues himself, yet he returned to school to gain certification and employment as a nurse.

Uncontradicted evidence and testimony shows, despite the shortage of and full-time teaching positions remaining vacant in the Charlotte metro area, and even substitute teaching jobs available paying $150.00 per day, Plaintiff chose to work part-time at Walmart at $11.00 per hour.

Admitted evidence shows Defendant testified Plaintiff was certified as a teacher and had previously worked at Walmart, but Plaintiff had refused to find employment during the marriage. Defendant also testified his income was negative against expenses each month.

Defendant has no home of his own and rents an apartment. The trial court denied Defendant any deductions from his paycheck as allowed expenses, except mandated taxes and deductions.

The majority's opinion improperly affirms the district court's finding of fact asserting Defendant was in willful contempt for not fully paying post separation support. No evidence supports either his ability or willful refusal to pay, after the trial court ordered his share of funds from the sale of the marital residence to be withheld in trust, yet incredibly finding, as the majority's opinion agrees, he had access to those same funds to pay. While "[c]onsideration must be given to the needs of the dependent spouse, . . . the estates and earnings of both spouses must be considered. It is a question of fairness and justice to all parties." *Kelly v. Kelly*, 167 N.C. App. 437, 441, 606 S.E.2d 364, 368 (2004) (citations and internal quotation marks omitted). I respectfully dissent.

II. Amount of Attorney's Fees

North Carolina follows the "American Rule" with regard to awarding attorney's fees against an opposing party. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 23-25, 776 S.E.2d 699, 704-05 (2015). Applying the "American Rule", our Supreme Court held over 50 years ago that each litigant is required to pay its own attorney's fees, unless a statute or express agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972); *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817-18 (1980) (personal property lease agreement); *see also WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 258, 644 S.E.2d 245, 250 (2007) (a commercial real property lease agreement); N.C. Gen Stat. § 42-46(i)(3) (2023) (allows recovery of reasonable attorney's fees in connection with residential rental agreements).

The majority's opinion cites the standard to support an award of attorney's fees in alimony cases. "A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g. alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citing *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980)).

"Just because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse." *Id.* at 373, 536 S.E.2d at 645 (citation omitted). It is undisputed Plaintiff received over $85,000 in untaxed marital home sales proceeds through Defendant's efforts and expenses and used portions of her equally awarded proceeds to pay her attorney, while Defendant continues to be denied *any* access to his rightful share.

The majority's opinion errs and accepts Plaintiff's testimony as sufficient evidence to approve an award of attorney's fees. *Id.* Here, and unlike the facts in *Barrett*, the trial court failed to receive or admit the attorney's fee affidavit into evidence. *Id.* at 375, 536 S.E.2d at 647. The district court merely relied upon Plaintiff's unsupported testimony regarding invoices for fees she had purportedly received from her withdrawn attorney. From this unsupported testimony, the trial court purported to find and conclude: "That the fees incurred were reasonable and necessary for Plaintiff to present her claim and meet Defendant on an equal basis." Yet, and despite the absence of the required fee affidavit and remand for findings, the majority's opinion, baldly, and without basis, erroneously concludes: "We believe the record supports the amount of fees awarded."

This Court has listed the required findings "in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable[,] the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) (citation omitted).

The trial court failed to make any mandated findings: (1) of counsel's rates, as should be set forth in a sworn affidavit; (2) whether those rates were comparable and reasonable for the work done by others in the legal market; (3) the subject matter of the case; (4) the experience of the attorney; (5) whether the specific work done and the amounts charged by counsel was reasonable and necessary; and, (6) whether the fees and costs incurred by Plaintiff were reasonable and necessary for the case. *Id.*

Plaintiff submitted insufficient evidence of all these factors. There was no affidavit submitted or admitted to evidence. The trial court used Plaintiff's unsupported testimony regarding her purported attorney's bills. The district court erred by not making required findings of necessity and reasonableness "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Id.*

Additional evidence must be presented and received to support these findings and conclusions.

III. Contempt

The district court improperly held Defendant to be in willful contempt. The majority's opinion errs by affirming this unsupported finding and conclusion.

A. Standard of Review

The majority's opinion correctly states: "When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions." The majority's opinion impermissibly omits the complete standard of review. This Court "review[s] the trial court's conclusions of law in a civil contempt order *de novo*." *Walter v. Walter*, 279 N.C. App. 61, 66, 864 S.E.2d 534, 537 (2021) (citation omitted).

B. Analysis

Our General Statutes permit a trial court to hold a party in civil contempt if the "noncompliance by the person to whom the [civil contempt]

order is directed is *willful*." N.C. Gen. Stat. § 5A-21(a)(2a) (2023) (emphasis supplied). "With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order." *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (citation omitted). "Willfulness in matters of this kind involve[ ] more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted).

Defendant challenges the following finding of fact: "That Defendant is in willful contempt of the Court's Post-Separation Order as he had the means and ability to comply with the order but has willfully refused to do so." The majority's opinion then affirms the willful contempt because "the unchallenged findings of fact show that [D]efendant was employed as a nurse when the parties separated, he will continue to be employed as a nurse, he has a net income of $4,100.79 per month, and he received over $80,000.00 in equitable distribution proceedings."

The undisputed evidence and findings show Defendant initially made the ordered post separation support payments to Plaintiff. Also, Plaintiff had sole access and exclusive use of the marital home and failed to make mortgage payments or to pay utilities for over eighteen months, until the lender threated to foreclose after expiration of a COVID-19 forbearance.

Defendant had initially made the mortgage payments, while Plaintiff was in exclusive possession. Defendant's motion to sell the marital residence to protect over $170,000.00 in accrued equity from foreclosure was continued three times on Plaintiff's counsel's motions for continuance, opposed by Defendant. After these delays, Plaintiff's counsel then abruptly moved and was allowed to withdraw the same day by the district court.

Plaintiff was provided immediate access to all of her one-half equitable distribution share of the marital residence sale's proceeds, accrued through Defendant's motion and efforts. The trial court ordered the entirety of Defendant's one-half share of equitable distribution proceeds held in trust while Plaintiff's continued motions were pending in the district court. The evidence shows and the district court further found: "That given the aforementioned figures, Defendant has minimal money with which to pay alimony on a monthly basis."

Defendant did not have the present means or ability to pay, and his partial failures to pay cannot be construed as willful. N.C. Gen. Stat. § 5A-21(a)(2a). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so."

Watson v. Watson, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (citation omitted); *Blevins* 137 N.C. App. at 103, 527 S.E.2d at 671 ("With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order."). "Willfulness . . . imports a bad faith disregard for authority and the law." *Forte*, 65 N.C. App. at 616, 309 S.E.2d at 730. The willful civil contempt finding is unsupported, erroneous, and properly reversed. *Id.*

IV. Conclusion

I concur in the result to vacate and remand the attorney's fees award. Plaintiff's unsupported testimony about her attorney's bills, who had previously sought to withdraw representation only to remain on the case, and larded attorney's fees does not provide sufficient evidence to support the award in the absence of an affidavit and supported findings. *Cotton*, 94 N.C. App. at 369, 380 S.E.2d at 421.

The district court's holding Defendant in willful contempt is wholly unsupported, properly vacated, and remanded to the trial court in the face of its ordered denial of Defendant's access to any of his own funds, and its other supported findings holding "Defendant has minimal money with which to pay alimony on a monthly basis." *Blevins*, 137 N.C. App. at 103, 527 S.E.2d at 671; *Forte*, 65 N.C. App. at 616, 309 S.E.2d at 730. I respectfully dissent.

HOAGLIN v. DUKE UNIV. HEALTH SYS., INC.

[293 N.C. App. 517 (2024)]

MICHAEL C. HOAGLIN, M.D., PLAINTIFF
v.
DUKE UNIVERSITY HEALTH SYSTEM, INC. D/B/A DUKE UNIVERSITY HOSPITAL AND JOSHUA SETH BRODER, M.D., DEFENDANTS

No. COA23-546

Filed 7 May 2024

1. Contracts—employment—incorporation of corrective action procedures—alleged breach of procedures—genuine issue of material fact

In an action brought by plaintiff against his former employers after he was fired from his medical residency, the trial court erred by granting summary judgment to defendants on plaintiff's breach of contract claim where there was a genuine issue of material fact regarding whether defendants breached their procedures for corrective action when terminating plaintiff. First, since the corrective-action procedures were expressly included in the contract (via a hyperlink and direct reference), they were incorporated into the employment contract; therefore, summary judgment could not be granted to defendants on the basis that the procedures were not part of the contract. Second, where the parties' competing evidence about whether the corrective action protocols were followed gave rise to genuine issues of material fact, defendants were not entitled to judgment as a matter of law on this claim.

2. Disabilities—employment termination—discrimination—"qualified individual"—no prima facie claim

In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency after he sought a reasonable accommodation for his depression, the trial court properly granted summary judgment to defendants regarding plaintiff's discrimination claim because plaintiff was not a "qualified individual" for purposes of the claim. Where the terms of employment required plaintiff to work solely for his employer and nowhere else, the employment limitation was an "essential function" of participating in the residency program, and, where plaintiff violated his contract by working a second job as a driver-for-hire, there was no reasonable accommodation that defendants could provide that would enable plaintiff to perform that function.

3. Disabilities—employment termination—failure to accommodate—request granted

In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency after he sought a reasonable accommodation for his depression, the trial court properly granted summary judgment to defendants regarding plaintiff's failure-to-accommodate claim. Since defendants granted plaintiff's request by promising to adjust his schedule so he did not have to work more than five consecutive days, there was no genuine issue of material fact regarding whether defendants refused to provide reasonable accommodation, despite plaintiff's argument that the accommodation was never implemented since plaintiff was terminated soon afterward.

4. Disabilities—employment termination—retaliation—termination soon after request for accommodation—genuine issue of material fact

In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency less than a month after he sought a reasonable accommodation for his depression, the trial court erred by granting summary judgment to defendants regarding plaintiff's retaliation claim where there was a genuine issue of material fact regarding whether a "causal link" existed between plaintiff's protected action—his request for reasonable accommodation—and his termination shortly afterward.

5. Attorney Fees—motion to compel discovery—motion allowed—fees disallowed—abuse of discretion analysis

In an action brought by plaintiff against his former employers (defendants) for wrongful termination, although plaintiff's motion to compel discovery was successful, the trial court did not abuse its discretion by denying plaintiff's motion for attorney fees concerning discovery where the trial court made its decision after considering arguments from counsel and conducting an in-depth in-camera review of the documents for which defendants had claimed privilege and, therefore, the decision was not arbitrary or manifestly unsupported by reason.

Appeal by Plaintiff from order entered 27 October 2022 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 28 November 2023.

Bailey & Dixon, LLP, by J. Heydt Philbeck, Sr., BrennerBondourant, by Lawrence H. Brenner, & Brown, Goldstein & Levy, LLP, by Gregory P. Care, admitted pro hac vice, & Anthony May, admitted pro hac vice, for Plaintiff-Appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert A. Sar, Jefferson Palmer Whisenant, Savannah Singletary, & Vanessa Nicole Garrido, for Defendant-Appellee.

CARPENTER, Judge.

Michael C. Hoaglin, M.D. ("Plaintiff") appeals from the trial court's grant of summary judgment to Duke University Health System, Inc., ("Duke") and Joshua Seth Broder, M.D. (collectively, "Defendants"). On appeal, Plaintiff argues the trial court erred by: (1) granting Defendants summary judgment; and (2) denying his request for attorneys' fees concerning his successful motion to compel. After careful review, we affirm in part and reverse in part.

I. Factual & Procedural Background

This case concerns a hospital's decision to terminate a resident from the hospital's emergency-medicine residency program, an educational program for medical doctors. Defendant Duke is the hospital, and Plaintiff is the terminated resident. On 3 July 2018, Plaintiff sued Defendants for breach of contract and violations of the Americans with Disabilities Act (the "ADA").

On 16 November 2020, Plaintiff moved to compel Defendants to produce documents for which Defendants claimed privilege. On 31 March 2021, the trial court granted Plaintiff's motion. On 26 August 2021, Plaintiff filed a motion for sanctions and attorneys' fees concerning discovery. After conducting an in-camera review of the documents for which Defendants claimed privilege, the trial court denied Plaintiff's request for attorneys' fees.

On 30 June 2022, both parties moved for summary judgment. The evidence presented at the summary-judgment hearing tended to show the following. In April 2016, Plaintiff signed a contract outlining the terms of his employment with Duke (the "Contract"). Among other things, the Contract states that Plaintiff's sole source of compensation must be the program stipend, and not from other unapproved work: "this shall be the Trainee's sole source of compensation." The Contract also states that:

> During the term of this Agreement, the Trainee's appointment is conditional upon satisfactory performance of all Program elements by the Trainee. If the actions, conduct, or performance, professional, academic, or otherwise, of the Trainee are deemed by the Hospital, Office of Graduate Medical Education or Program Director to be inconsistent with the terms of this Agreement, the Hospital's standards of patient care, patient welfare, or the objectives of the Hospital or Program educational expectations, or if such actions, conduct, or performance reflects adversely on the Program or Hospital or disrupts operations at the Program or Hospital, corrective action may be taken by the Hospital, Director of Graduate Medical Education and/or Program Director as set forth in the Corrective Action and Hearing Procedures for Associate Medical Staff (a copy of which is available online at www.gme.duke.edu).

The parenthetical following the Corrective Action and Hearing Procedures for Associate Medical Staff (the "Procedures") includes a hyperlink to the Procedures. The Procedures include various protocols concerning notices, hearings, and appeals within Duke's corrective-action process.

By January of 2017, Defendants received several grievances concerning Plaintiff, including the following: "[Plaintiff] did not listen to concerns, was rude, and discharged a patient too soon"; Plaintiff made perceived racist comments concerning hairstyle; Plaintiff asked a patient questions deemed too personal; Plaintiff performed a pelvic exam that a patient described as an "absolutely unacceptable" experience; and Plaintiff exhibited "unprofessional behavior."

Plaintiff, however, points to several instances in which Defendants spoke highly of Plaintiff's performance, including: "[Plaintiff] is doing very well"; "[Plaintiff] has all of the skills he will ultimately need"; and Plaintiff is on track to "graduate the program." Duke employees made these last two statements thirty-one days and sixteen days, respectively, before Plaintiff's termination.

In February 2017, Plaintiff saw a counselor at Duke for depression. On 1 March 2017, Plaintiff completed Duke's Reasonable Accommodation Request Form concerning his depression. After receiving Plaintiff's request, Defendants agreed to "ensure that this need is observed." Specifically, Defendants committed to Plaintiff that he would not be "scheduled for more than 5 days in a row." Plaintiff does not allege that Defendants failed to meet this assurance.

On 22 March 2017, Defendants documented additional concerns about Plaintiff's behavior, including: Plaintiff having a "second job driving for Uber"; Plaintiff sleeping in hospital call rooms while "rent[ing] his apartment out on AirBnB"; and Plaintiff "rent[ing] his car out online" and using the hospital fatigue cab for regular transportation. When asked about his alleged other incomes, Plaintiff responded, "[n]o, this is all I do. It's not like I have a secret job or something."

On 30 March 2017, Defendants terminated Plaintiff's employment because of "institutional policy violations." Plaintiff appealed his termination to a hearing panel, and on 1 May 2017, the panel unanimously voted to uphold the termination. On 23 May 2017, Defendants notified Plaintiff of the final determination. Plaintiff and Defendants offer competing evidence as to whether Defendants complied with the Procedures when they terminated Plaintiff.

On 27 October 2022, the trial court granted Defendants summary judgment, dismissing Plaintiff's claims. On 23 November 2022, Plaintiff filed written notice of appeal.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the trial court erred by: (1) granting Defendants summary judgment; and (2) denying Plaintiff's request for attorneys' fees concerning his successful motion to compel.

IV. Analysis

A. Summary Judgment

We review appeals from summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). 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)).

Summary judgment is appropriate when "there is no genuine issue as to any material fact," and a party is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). Concerning summary judgment, courts "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). "Since this rule provides a somewhat drastic

remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Indeed, receiving summary judgment has the same effect as winning at trial—without going to trial. *See id.* at 533, 180 S.E.2d at 829 ("The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.").

1. Breach of Contract Claims

[1] In his first argument, Plaintiff asserts that the trial court erred by granting Defendants summary judgment concerning his breach-of-contract claims. To support this, Plaintiff argues that (1) the Contract incorporated the Procedures, and (2) he presented evidence that Defendants breached the Procedures. After careful review, we agree with Plaintiff.

a. Incorporation

"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." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. Cal. Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)). Contract "construction is a question of law for the court." *Story v. Stokes*, 178 N.C. 409, 411, 100 S.E. 689, 690 (1919). Incorporation, the idea that a document referenced in a contract can become part of the contract, *see Incorporation by Reference*, Black's Law Dictionary (11th ed. 2019), is a question of construction and thus, a question of law, *see Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83–84 (1985).

We considered contract incorporation in *Walker*, where an employee received a "handbook" from his employer. 77 N.C. App. at 259, 335 S.E.2d at 84. The handbook "apparently promised" that it would "become more than a handbook . . . it w[ould] become an understanding . . . ." *Id.* at 260, 335 S.E.2d at 84 (quoting the handbook). The *Walker* Court was "aware that a growing number of jurisdictions recognize that employee manuals purporting to set forth causes for termination may become part of the employment contract even in the absence of an express agreement." *Id.* at 259, 335 S.E.2d at 83.

Nonetheless, we stated that "the law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not

become part of the employment contract unless expressly included in it." *Id.* at 259, 335 S.E.2d at 83–84. Therefore, the "contract did not, under our law, include the Handbook." *Id.* at 260, 335 S.E.2d at 84.

We again considered contract incorporation in *Supplee v. Miller-Motte Business College, Inc.*, 239 N.C. App. 208, 211, 768 S.E.2d 582, 587 (2015). There, the plaintiff signed a program-enrollment agreement that was "subject to all terms and conditions set forth in the Catalog." *Id.* at 211, 768 S.E.2d at 587. We held that the enrollment agreement "incorporated the terms and conditions set forth in the . . . student catalog," which therefore "became a part of the contract between defendants and [the plaintiff]." *Id.* at 219–20, 768 S.E.2d at 592.

Here, the Contract states that "corrective action may be taken . . . as set forth in the [Procedures.]" Because the "conditions set forth in the Catalog" were incorporated into the *Supplee* contract, *see id.* at 219–20, 768 S.E.2d at 592, likewise, the requirements "set forth in the [Procedures]" were incorporated into the Contract.

The Contract could have incorporated the Procedures with more force: For example, the Contract could have stated that "the procedures are incorporated into this contract," or "the procedures are part of this contract." Nonetheless, the Contract incorporated the Procedures because under *Supplee*, the Procedures were "expressly included" in the Contract. *See id.* at 219–20, 768 S.E.2d at 592. Accordingly, concerning Plaintiff's breach-of-contract claims, failure to incorporate the Procedures was not a basis upon which the trial court could grant Defendants judgment, as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

b. Breach of the Procedures

Next, we must discern whether there are any genuine issues of material fact concerning Plaintiff's breach-of-contract claims. *See id.* A breach-of-contract claim requires a material breach, *see Fletcher v. Fletcher*, 123 N.C. App. 744, 752, 474 S.E.2d 802, 807–08 (1996), and whether a breach is material is a question of fact, *see Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 302, 672 S.E.2d 691, 695 (2009).

Here, the Procedures include various protocols concerning notices, hearings, and appeals within Duke's corrective-action process. And concerning Plaintiff's breach-of-contract claims, Plaintiff and Defendants offer competing evidence as to whether Defendants followed the Procedures when they terminated Plaintiff. For example, Plaintiff

offered evidence that Defendants denied him an impartial appeals panel, as guaranteed by the Procedures, and Defendants offered evidence that Plaintiff's appeals panel was indeed impartial.

Because we "must view the presented evidence in a light most favorable to the nonmoving party," *see Dalton*, 353 N.C. at 651, 548 S.E.2d at 707, genuine issues of material fact remain in this case—specifically, whether Defendants breached the Procedures and, if so, whether the breaches were material, *see Charlotte Motor Speedway*, 195 N.C. App. at 302, 672 S.E.2d at 695. Therefore, the trial court erred when it granted Defendants the "drastic remedy" of summary judgment concerning Plaintiff's breach-of-contract claims, as Defendants were not entitled to "judgment as a matter of law" because genuine issues of material fact remain. *See Kessing*, 278 N.C. at 534, 180 S.E.2d at 830; N.C. Gen. Stat. § 1A-1, Rule 56(c).

2. ADA Claims

Next, Plaintiff challenges the trial court's grant of summary judgment concerning his three ADA claims: one alleging discrimination, one alleging failure to accommodate, and one alleging retaliation. We disagree with Plaintiff concerning the first two claims, but we agree with him concerning his final claim of retaliation.

The ADA prohibits certain employers from discriminating against disabled employees because of their disabilities. *See* 42 U.S.C. 12112(a). Courts analyze ADA claims under the *McDonnell Douglas* burden-shifting framework. *See Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 223 (4th Cir. 2019); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677–78 (1973).

Under *McDonnell Douglas*, a plaintiff must first show a prima-facie ADA claim. *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). If the plaintiff is successful, the burden shifts to the defendant to show a "legitimate, nondiscriminatory explanation which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Id.* If the defendant is then successful, "the plaintiff bears the ultimate burden of proving that [the plaintiff] has been the victim of intentional discrimination." *Id.*

a. Discrimination Claim

[2] A prima-facie discrimination claim under the ADA requires: (1) a disabled plaintiff; (2) who was a "qualified individual"; (3) who suffered an adverse employment action because of a disability. *See Jacobs v. N.C.*

Admin. Off. of the Cts., 780 F.3d 562, 572 (4th Cir. 2015). Here, there is no dispute about whether Plaintiff is disabled or whether he suffered an adverse employment action. The parties only dispute whether Plaintiff is a "qualified individual."

A qualified individual is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (quoting 42 U.S.C. § 12111(8)). To establish that he is qualified, Plaintiff must show "(1) that he could satisfy the essential eligibility requirements of the program, i.e., those requirements 'that bear more than a marginal relationship to the [program] at issue, and (2) if not, whether any reasonable accommodation by [Defendants] would enable' [P]laintiff to meet these requirements." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012) (quoting *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994)) (first alteration in original). In making these determinations, courts give deference to medical schools. *See id.* at 463 (noting that courts are in poor position to assess academic performance). We are in an equally poor position to assess medical practice, so similar deference applies in a medical-residency context. *See id.*

A qualified-individual analysis is a two-part question: (1) Are the employee's obligations "essential"? And (2) can the employee satisfy the obligations, regardless of employer accommodation? *See id.* at 462. We will begin Plaintiff's qualified-individual inquiry by analyzing his contractual obligations, specifically, his obligation to work solely for Duke.

i. Essential Function

"Under the ADA, '[a]n essential function is a fundamental job duty of the position at issue. The term does not include marginal tasks, but may encompass individual or idiosyncratic characteristics of the job.' " *Allen v. City of Raleigh*, 140 F. Supp. 3d 470, 482 (E.D.N.C. 2015) (quoting *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 88 (1st Cir. 2012)) (alteration in original). "[C]onsideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, the description shall be considered evidence of the essential functions of the job." 42 U.S. C. § 12111(8). "[C]ourt[s] give[] a 'significant degree' of deference to an employer's business judgment about the necessities of a job." *Jones*, 696 F.3d at 88 (quoting *Jones v. Walgreen Co.*, 679 F.3d 9, 14 (1st Cir. 2012)).

Here, the Contract states that Plaintiff's stipend from Duke "shall be the Trainee's sole source of compensation. Except for approved and authorized extracurricular activities, the Trainee shall not accept from any other fee of any kind for service." First, Plaintiff argues that this is a limit on Defendant's responsibility to pay, rather than a limit on Plaintiff's ability to work outside of the Program. We disagree.

If Plaintiff's reading was correct, the second sentence would be superfluous; if the stipend language is simply a limit on Duke, there is no need to double down and state that "*Trainee* shall not accept from any other fee of any kind for service." *See United States v. Butler*, 297 U.S. 1, 65, 56 S. Ct. 312, 319, 80 L. Ed. 477, 488 (1936) ("These words cannot be meaningless, else they would not have been used."); *Kungys v. United States*, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550, 99 L. Ed. 2d 839, 857 (1988) (plurality opinion) (stating that "no provision should be construed to be entirely redundant"). Therefore, the Contract's compensation language limited Plaintiff's ability to work outside of the Program because otherwise, the second sentence would be redundant.

Second, we think adherence to this limitation was an "essential function" of Plaintiff's job. Defendants distilled this limitation to a contractual clause, which tends to show the essential nature of the limitation. *See* 42 U.S.C. § 12111(8). Indeed, if Plaintiff's obligation to work solely for Duke was merely marginal, why include it in the Contract? *See id.* Asked another way, would Defendants have allowed Plaintiff into the Program if Plaintiff's participation was contingent on his ability to simultaneously work elsewhere? That Plaintiff lied to Defendants about driving for Uber and renting his apartment is instructive. Because Plaintiff's work limitation was contractual, *see id.*, and because we give "a 'significant degree' of deference to an employer's business judgment about the necessities of a job," *see Jones*, 696 F.3d at 88, we think Plaintiff's obligation to work solely for Duke was an essential function of participating in the Program.

ii. Ability to Perform

Under the second prong of the qualified-individual analysis, we must discern "whether any reasonable accommodation by [Defendants] would enable [P]laintiff" to perform his essential functions. *See Halpern*, 669 F.3d at 462. The Fourth Circuit has noted that "[a]n employee may be qualified when hired, but could fail either to maintain his qualifications or, more commonly, to meet his employer's legitimate expectations for job performance." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 514 (4th Cir. 2006). So in cases where an employee is fired, "the prima facie case requires the employee to demonstrate 'that he was

"qualified" in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.' " *Id.* at 514–15 (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979)).

Here, Plaintiff may have initially satisfied the essential function of working solely for Duke while in the Program; because Defendants admitted Plaintiff into the Program, Defendants must have thought so. But that is not the only inquiry. *See id.* at 514. The inquiry is also whether Plaintiff "maintain[ed] his qualifications," i.e., continued to honor his obligation to only work for Duke while in the Program.

The parties offer competing evidence concerning Plaintiff's performance in the Program—but the parties do not dispute that Plaintiff drove for Uber and rented his apartment through AirBnB while working at Duke. Then Plaintiff lied to Defendants about it. And relevant to our analysis, Defendants' reasonable accommodation—easing Plaintiff's workload—would not "enable [P]laintiff to meet" his sole-income commitment. *See Halpern*, 669 F.3d at 462. On the contrary, because Plaintiff's work hours were limited as an accommodation, he potentially had more time to drive for Uber.

Because we defer to medical professionals to determine when a person is "qualified," *see id.* at 463, we agree with Defendants concerning Plaintiff's ability, "with or without reasonable accommodation, [to] perform the essential functions of the employment position," *see Wilson*, 717 F.3d at 345. Put differently: Plaintiff did not perform the essential function of working solely for Duke while in the Program, and Defendants' accommodation had no bearing on Plaintiff's ability to do so. *See id.* at 345.

Therefore, Plaintiff cannot establish an element a prima-facie discrimination claim because he is not a "qualified individual." *See Jacobs*, 780 F.3d at 572. As Plaintiff cannot establish an element of prima-facie discrimination claim, the trial court did not err by granting Defendants summary judgment because Defendants were "entitled to a judgment as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c); *Jacobs*, 780 F.3d at 572.

b. Failure to Accommodate Claim

[3] To establish a prima-facie failure-to-accommodate claim under the ADA, Plaintiff must show: "(1) that he was an individual who had a disability within the meaning of the statute; (2) that [Defendants] had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position . . . ; and (4) that

[Defendants] refused to make such accommodations." *Wilson*, 717 F.3d at 345 (quoting *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 n.11 (4th Cir. 2001)).

The ADA does not provide an all-inclusive definition of the term "reasonable accommodation." Rather, it gives examples of what a " 'reasonable accommodation' may include," like "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations." 42 U.S.C. § 12111(9)(B). "[T]he range of reasonable accommodations is broad . . . ." *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004, 1011 (4th Cir. 2020).

The Fourth Circuit has explained that "what counts as a reasonable accommodation is not an *a priori* matter but one that is sensitive to the particular circumstances of the case." *Id.* "[W]hat will serve as a reasonable accommodation in a particular situation may not have a single solution, but rather, many possible solutions." *Id.* As long as the employer's chosen accommodation is reasonable, "not even a well-intentioned court may substitute its own judgment for the employer's choice." *Id.* at 1012.

Here, Defendants granted Plaintiff's accommodation request before terminating his employment. Specifically, Defendants committed to Plaintiff that he would not be "scheduled for more than 5 days in a row." Plaintiff does not allege that Defendants failed to meet their assurance, and "modified work schedules" are one of the codified examples of a reasonable accommodation. *See* 42 U.S.C. § 12111(9)(B).

Plaintiff does not argue that Defendants' accommodation was unreasonable. Rather, Plaintiff argues that Defendants' accommodation "was inconsequential . . . because [they] intended to fire" him. Indeed, Plaintiff argues that Defendants "never implemented the accommodations because they intended to terminate plaintiff instead."

But if we accept Plaintiff's argument, every employer who fires a qualified individual after granting an accommodation is subject to a failure-to-accommodate suit if the employee claims the employer ultimately intended to fire him. This cannot be so. *See Wilson*, 717 F.3d at 345 (stating that the fourth element of a failure-to-accommodate claim requires a *refusal* to make the accommodation). In our view, Plaintiff's argument may support a retaliation claim, but not failure to accommodate. *See id.* Concerning Plaintiff's failure-to-accommodate claim, the facts are clear: Defendants granted Plaintiff's accommodation request by promising not to schedule him to work more than five consecutive days. Plaintiff does not allege that Defendants broke this promise.

Accordingly, there is "no genuine issue" concerning the last element of Plaintiff's failure-to-accommodate claim. *See id.*; N.C. Gen. Stat. § 1A-1, Rule 56(c). Therefore, the trial court appropriately granted Defendants summary judgment concerning Plaintiff's failure-to-accommodate claim because Defendants were "entitled to a judgment as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

c. Retaliation Claim

[4] To establish a prima-facie retaliation claim under the ADA, Plaintiff must show: "(1) he engaged in protected conduct, (2) he suffered an adverse action, and (3) a causal link exists between the protected conduct and the adverse action." *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012) (citing *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 350 (4th Cir. 2011)). Here, there is no dispute about whether Plaintiff engaged in protected conduct by seeking accommodations or whether he suffered an adverse employment action when Defendants terminated him from the Program. The parties only dispute whether there is a genuine issue concerning a "causal link" between the two.

"A temporal connection between the protected conduct and the adverse employment action may be sufficient to present a genuine factual issue on retaliation." *Lamb v. Qualex, Inc.*, 33 F. App'x 49, 60 (4th Cir. 2002) (citing *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999)). "Indeed, '[a] close temporal connection between the two events is generally enough to satisfy the third element of the prima facie test.' " *Id.* (quoting *McClendon v. Ind. Sugars, Inc.*, 108 F.3d 789, 796–97 (7th Cir. 1997)).

Here, on 1 March 2017, Plaintiff completed Duke's Reasonable Accommodation Request Form concerning his depression. On 30 March 2017, Defendants terminated Plaintiff's employment because of "institutional policy violations." In other words, there was less than one month between "the protected conduct and the adverse employment action," which is usually "sufficient to present a genuine factual issue on retaliation." *See id.* Because we "must view the presented evidence in a light most favorable to the nonmoving party," *see Dalton*, 353 N.C. at 651, 548 S.E.2d at 707, we believe the "causal link" element of Plaintiff's prima-facie case is satisfied, *see Reynolds*, 701 F.3d at 154.

Therefore, the burden shifts to Defendants to show a "legitimate, nondiscriminatory explanation which, if believed by the *trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *See Ennis*, 53 F.3d at 58 (emphasis added). Accordingly, a question of material fact remains, and the trial court

erred by granting Defendants summary judgment concerning Plaintiff's retaliation claim. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

B. Attorneys' Fees

[5] In his final argument, Plaintiff asserts that the trial court erred by denying Plaintiff's request for attorneys' fees concerning his successful motion to compel. We disagree.

We review a trial court's decision to award or deny attorneys' fees under Rule 37 for abuse of discretion. *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). "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).

Normally when a motion to compel is granted under Rule 37, the trial court should award attorneys' fees to the moving party. N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2023). But a trial court need not award attorneys' fees if "the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." *Id*.

Here, there is nothing in the record to suggest that the trial court acted arbitrarily by denying Plaintiff's request for attorneys' fees concerning his successful motion to compel. The trial court "considered arguments of counsel" and conducted an in-depth, in-camera review of the documents for which Defendants claimed privilege, and the trial court decided, in its discretion, not to award attorneys' fees to Plaintiff. The trial court's decision was not "manifestly unsupported by reason," and therefore, the trial court did not abuse its discretion. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

V. Conclusion

We conclude that the trial court erred in granting Defendants summary judgment concerning Plaintiff's breach-of-contract and ADA retaliation claims, but the trial court did not err concerning the remainder of the summary-judgment order. And the trial court did not err by declining to award Plaintiff attorneys' fees concerning his motion to compel. Accordingly, we reverse the trial court's order in part, affirm in part, and remand.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges COLLINS and WOOD concur.

IN RE BARTKO

[293 N.C. App. 531 (2024)]

IN RE THE MATTER OF THE PETITION FOR REINSTATEMENT OF GREGORY BARTKO, PETITIONER

No. COA23-980

Filed 7 May 2024

1. Attorneys—petition for reinstatement of law license—active sentence for felonies not completed—citizenship not restored—dismissal upheld

The final decision of the Disciplinary Hearing Commission granting the North Carolina State Bar's motion to dismiss a disbarred attorney's petition for reinstatement of his law license was affirmed where, because petitioner was still serving an active federal sentence for numerous felonies involving mail fraud and securities fraud, he failed to show that he had "complied with the orders and judgments of any court relating to the matters resulting in the disbarment" or that he had his citizenship restored as required by the governing administrative rules of the State Bar.

2. Attorneys—petition for reinstatement of law license—declaratory relief requested—Administrative Procedures Act inapplicable

In a proceeding involving a disbarred attorney's petition for reinstatement of his law license, the Disciplinary Hearing Commission (DHC) did not err by dismissing petitioner's motion for declaratory relief, which he made pursuant to the Administrative Procedures Act (APA) seeking to declare a governing administrative rule of the North Carolina State Bar unconstitutional. The APA did not apply to disciplinary proceedings of attorneys, for which the legislature has provided a more specific administrative procedure, and the legislature has not delegated authority to the DHC to hear motions for declaratory relief under the APA.

3. Attorneys—petition for reinstatement of law license—final decision of Disciplinary Hearing Commission—State Bar Council not appropriate appellate forum

In a proceeding involving a disbarred attorney's petition for reinstatement of his law license, where petitioner attempted to appeal the final decision of the Disciplinary Hearing Commission (DHC) dismissing his petition to the State Bar Council, the Council did not err by dismissing the purported appeal because it had no appellate jurisdiction over the DHC decision, from which appeal by right is to the North Carolina Court of Appeals.

IN RE BARTKO

[293 N.C. App. 531 (2024)]

Appeal by defendant from orders entered 13 September 2023 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 2 April 2024.

The North Carolina State Bar, by Deputy Counsels J. Cameron Lee and Kathryn H. Shields, for the respondent-appellee.

Gregory Bartko, pro se for the petitioner-appellant.

TYSON, Judge.

Gregory Bartko ("Petitioner") appeals from orders dismissing his petition for reinstatement to the North Carolina State Bar (the "State Bar"). We affirm.

I. Background

Petitioner was licensed to practice law and admitted to the State Bar on 29 June 1988. Petitioner was convicted in the United States District Court for the Eastern District of North Carolina of one count of: conspiracy to commit mail fraud, selling unregistered securities, laundering money instruments, engaging in unlawful monetary transactions, making false statements, aiding and abetting the sale of unregistered securities, and obstructing the Securities and Exchange Commission's proceedings and four counts of: mail fraud and aiding and abetting mail fraud on 18 November 2010. *See United States of America v. Gregory Bartko*, 728 F.3d 327 (2013).

Petitioner tendered an affidavit and surrendered his license to practice law to the Wake County Superior Court on 4 January 2011. Petitioner was disbarred by order entered on 8 February 2011. Petitioner was sentenced to an active term of 23 years in the United States Bureau of Prisons, to be followed by a three-year term of supervised release with the United States Probation Office. He was ordered to pay restitution of $885,946.89 to more than 170 victims.

Petitioner was incarcerated at a United States Bureau of Prisons facility until 9 September 2020 when he was transferred to home confinement during the COVID-19 pandemic to serve out the remainder of his sentence. Petitioner is scheduled for release to the United States Probation Office on 21 June 2029.

Petitioner filed a verified petition seeking reinstatement of his license to practice law in North Carolina, along with a supporting memorandum with the Disciplinary Hearing Commission ("DHC") on 12 May 2023.

The State Bar moved to dismiss the petition pursuant to 27 N.C.A.C. 1B § .0129(a)(9). Petitioner also filed a motion for declaratory relief under the North Carolina Administrative Procedures Act seeking the DHC to declare, *inter alia*, 27 N.C.A.C. 1B § .0129(a)(3)(E) was unconstitutionally vague in violation of the Due Process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

The DHC granted the State Bar's motion to dismiss the petition on 17 July 2023. The same day the DHC entered an order denying Petitioner's motion for a declaratory ruling. Petitioner appealed both orders to the State Bar Council. The State Bar Council rejected all appeals.

Petitioner appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1); 84-28(h) (2023) ("There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals.").

III. Issues

Petitioner argues the DHC erred by: (1) granting the State Bar's motion to dismiss; (2) failing to convert the State Bar's Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment; (3) failing to address Petitioner's constitutional challenges; and, (4) refusing to consider Petitioner's verified statements on his ability and competence to carry out the responsibilities of a practicing lawyer. Petitioner further argues the N. C. State Bar Council erred in refusing to hear his appeal of the DHC orders.

IV. Standard of Review

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the [reviewing authority] need only look to the face of the [pleading] to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

"On appeal from a motion to dismiss under Rule 12(b)(6) this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and quotation marks omitted). This Court

"consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

V. The State Bar's Motion to Dismiss

[1] Petitioner argues the DHC erred in granting the State Bar's Rule 12(b)(6) motion to dismiss his petition for reinstatement. Our Administrative Code articulates the content of a petitioner's reinstatement petition to the State Bar and requires:

> (6) Petition, Service, and Hearing - The petitioner shall file a verified petition for reinstatement with the secretary and shall contemporaneously serve a copy upon the counsel. The petition must identify each requirement for reinstatement and state how the petitioner has met each requirement. The petitioner shall attach supporting documentation establishing satisfaction of each requirement. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission. The chairperson will within 14 days appoint a hearing panel as provided in Rule .0108(a)(2) of this Subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing panel and the time and place of the hearing, which will be conducted pursuant to the procedures set out in Rules .0114 to .0118 of this subchapter. The secretary shall transmit to the counsel and to the petitioner any notices in opposition to or concurrence with the petition filed with the secretary pursuant to .0129(a)(3)(A) or (B).

27 N.C.A.C. 1B.0129(a)(6).

The requirements Petitioner carries the burden to meet by "clear, cogent, and convincing evidence" are also set forth in our Administrative Code:

> (A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested

individuals file with the secretary notice of opposition to or concurrence with the petition within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to file with the secretary notice of opposition to or concurrence with the petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) *the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony*;

(F) the petitioner has complied with Rule .0128 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) *the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment*;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal

> education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;
>
> (L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. The petitioner is not permitted to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by petitioners who were disbarred after August 29, 1984;
>
> (M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund;
>
> (N) the petitioner paid all dues, Client Security Fund assessments, and late fees owed to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of disbarment.
>
> (O) if a trustee was appointed by the court to protect the interests of the petitioner's clients, the petitioner has reimbursed the State Bar all sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship;
>
> (P) the petitioner has properly reconciled all trust or fiduciary accounts, and all entrusted funds of which the petitioner took receipt have been disbursed to the beneficial owner(s) of the funds or the petitioner has taken all necessary steps to escheat the funds.

27 N.C.A.C. 1B.0129(3) (A)-(P) (emphasis supplied).

The DHC granted the State Bar's motion to dismiss on the grounds Petitioner failed to have "complied with the orders and judgments of any court relating to the matters resulting in the disbarment." 27 N.C.A.C.

1B.0129(a)(3)(H). Petitioner alleged he could comply with this provision. Petitioner failed to carry his burden to show he has completed his federal active and probationary sentences under "judgments of any court relating to the matters resulting in the disbarment." *Id.* Petitioner's argument is overruled.

The State Bar also alleged Petitioner has failed to comply with 27 N.C.A.C. 1B.0129(3)(E), which requires a petitioner to have had their citizenship restored if they have been convicted of a felony in support of its motion to dismiss. Petitioner was convicted of multiple felonies and is still serving his active federal sentence, to be followed by three years of mandatory probation, and his citizenship has not been restored.

The DHC did not err in granting the State Bar's motion to dismiss. In light of our holding, we need not address Petitioner's remaining arguments relating to the State Bar's motion to dismiss. Petitioner's allegations are insufficient "to state a claim upon which relief may be granted[,]" *Christmas*, 192 N.C. App. at 231, 664 S.E.2d at 652 (citation omitted), or to assert any grounds to carry his burden by "clear, cogent, and convincing evidence" to meet the requirements for reinstatement as forth in our Administrative Code. 27 N.C.A.C. 1B.0129(3).

VI. Constitutional Challenges Before the DHC

[2] Petitioner argues the DHC erred in dismissing his motion seeking a declaratory ruling concluding 27 N.C.A.C. 1B.0129(a)(3iE) is unconstitutional. Petitioner's argument is misplaced. "The Legislature has expressly and specifically delegated to the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar." *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 654, 596 S.E.2d 337, 341 (2004) (citations omitted).

The Administrative Procedures Act "is a statute of general applicability, and does not apply where the Legislature has provided for a more specific administrative procedure to govern a state agency." *Id.* (citation omitted). Petitioner asserts the DHC was required to apply N.C. Gen. Stat. § 150B-4(a) (2023). The Administrative Procedures Act is not applicable to the DHC in Petitioner's motion for a declaratory ruling. The Legislature has not delegated authority to the DHC to hear motions for declaratory relief under the Administrative Procedures Act. *Id.*

VII. Appellate Jurisdiction of the State Bar Council

[3] Petitioner argues the State Bar Council erred in dismissing his appeal of the dismissal of his motion for a declaratory ruling. Our General Statutes provide: "There shall be an appeal of right by either

party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." N.C. Gen. Stat. § 84-28(h). The State Bar Council did not err in dismissing Petitioner's purported appeal. *Id.*

VIII. Conclusion

Petitioner has not complied with execution and terms of the judgment and completed his federal sentence, and he has not had his citizenship restored following serving his sentence. The DHC does not have jurisdiction to hear motions for declaratory relief under the Administrative Procedures Act. The DHC did not err in dismissing Petitioner's petition and motion. The State Bar Council did not have appellate jurisdiction over a final order of the DHC. *Id.* The orders of the DHC and State Bar Council are affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and GORE concur.

IN RE D.J.Y.

No. COA23-1079

Filed 7 May 2024

Juveniles—delinquency—petition—jurisdictional requirements—court counselor's approval for filing—court counselor's signature

The adjudication and disposition orders in a juvenile delinquency case were vacated where, because the section of the juvenile petition indicating whether the juvenile court counselor approved the petition for filing was left completely blank and did not contain the court counselor's signature, the trial court lacked subject matter jurisdiction to adjudicate the juvenile delinquent and to enter the subsequent disposition order.

Appeal by the juvenile from orders entered 30 August 2023 by Judge Chris Sease in Rowan County District Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for the juvenile-appellant.

WOOD, Judge.

The juvenile ("Dawson")[1] appeals the order of the trial court adjudicating him delinquent and its subsequent disposition order. Because the juvenile court counselor did not approve the juvenile petition for filing and did not sign the relevant portion of the juvenile petition, the trial court lacked subject matter jurisdiction to adjudicate the juvenile delinquent and, consequently, lacked jurisdiction to enter a disposition order.

I. Factual and Procedural History

On 1 June 2023, a juvenile petition was filed alleging Dawson committed the offense of injury to personal property in violation of N.C. Gen. Stat. § 14-160(b) (classifying wanton and willful injury to personal property of another causing damage in excess of $200.00 as a Class 1 misdemeanor) with an offense date of 16 May 2023. The section of the juvenile petition titled "decision of court counselor regarding the filing of the petition" was left blank. Therefore, the box indicating "approved for filing" and the box for the court counselor's signature were blank as well. The trial court held the adjudication and disposition hearings on 25 August 2023. The court counselor was not present at the hearings.

On 16 May 2023, as Sarah Terry ("Terry") was leaving the school where her daughter attends, Dawson pulled up behind her driving erratically and "giving [her] the finger." Terry followed Dawson home and asked to speak with his parents, and Dawson began swearing at her. Dawson offered to give Terry his phone to speak to his mother, but Terry did not want to speak with her at that moment because there was too much "yelling" and "chaos." Terry testified she gave his phone back[2] to him and that Dawson then punched the passenger side rear door of her vehicle causing $1,300.00 of damage. Following the hearing, the trial court adjudicated Dawson delinquent for having committed the Class 1 misdemeanor offense of injury to personal property. Dawson gave oral notice of appeal in open court.

---

1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

2. Dawson testified he was not screaming at her, and that Terry threw his phone, breaking it.

On 30 August 2023, the trial court entered a written adjudication order finding Dawson delinquent. The same day, the trial court entered the disposition order placing Dawson on supervised probation for six months, requiring him to cooperate with the Youth Development Initiatives Life Skills Academy for six months, and ordering that he pay $200.00 in restitution.

II. Analysis

Dawson argues the trial court lacked subject matter jurisdiction over the petition because the court counselor did not approve the juvenile petition for filing in accordance with N.C. Gen. Stat. § 7B-1702. Dawson argues that therefore, the adjudication and disposition orders are void. We agree.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). "The sufficiency of a juvenile petition is a jurisdictional issue that this Court reviews *de novo*." *In re J.F.*, 237 N.C. App. 218, 221, 766 S.E.2d 341, 344 (2014).

"When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court." *In re B.D.W.*, 175 N.C. App. 760, 761, 625 S.E.2d 558, 560 (2006). "An order is void *ab initio* only when it is issued by a court that does not have jurisdiction." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986).

First, a juvenile court counselor must conduct a preliminary inquiry analyzing whether "the facts contained in the [juvenile] complaint . . . state a case within the jurisdiction of the court," whether the complaint is legally sufficient, and whether "the matters alleged are frivolous." N.C. Gen. Stat. § 7B-1701(a). Next, "[t]he juvenile court counselor shall decide . . . whether a complaint shall be filed as a juvenile petition, handled as a juvenile consultation for a vulnerable juvenile, or handled in some other manner authorized by this Article." N.C. Gen. Stat. § 7B-1703(a). One option the juvenile court counselor has is to "divert the juvenile pursuant to a diversion plan." N.C. Gen. Stat. § 7B-1706(a). If the juvenile court counselor decides to divert the juvenile, he or she may refer "the juvenile to any of the following resources: (1) An appropriate public or private resource; (2) Restitution; (3) Community service; (4) Victim-offender mediation; (5) Regimented physical training; (6) Counseling; (7) A teen court program, as set forth in subsection (c) of this section." *Id.* The juvenile court counselor also "may enter into a diversion contract with the juvenile and the juvenile's parent, guardian, or custodian," provided that

the juvenile court counselor made "a finding of legal sufficiency" of the juvenile complaint and with the "the consent of the juvenile and the juvenile's parent, guardian, or custodian." N.C. Gen. Stat. § 7B-1706(a)–(b). Successful completion of the diversion contract ensures that the juvenile complaint will not proceed before the court as a juvenile petition. *See* N.C. Gen. Stat. § 7B-1706(b).

If the juvenile complaint is to proceed as a petition to an adjudication hearing, the juvenile court counselor must approve it for filing. "[I]f the juvenile court counselor determines that a complaint should be filed as a petition," then he or she "*shall include on it . . . the words 'Approved for Filing', shall sign it*, and shall transmit it to the clerk of superior court." N.C. Gen. Stat. § 7B-1703(b) (emphasis added). The court counselor "*shall* complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor." N.C. Gen. Stat. § 7B-1703(a) (emphasis added).

Side two of the AOC-J-323 form, the standardized juvenile delinquency petition form, contains a section titled "decision of court counselor regarding the filing of the petition." The court counselor can check box one, "approved for filing," or box two, "not approved for filing." This Court has held "that a petition alleging delinquency that does not include the signature of a juvenile court counselor, or other appropriate representative of the State, and the language 'Approved for Filing,' . . . fails to invoke the trial court's jurisdiction in the subject matter." *In re T.K.*, 253 N.C. App. 443, 448, 800 S.E.2d 463, 467 (2017). In so holding, this Court reasoned that finding a juvenile court counselor's approval for filing to be a jurisdictional prerequisite would promote the purposes of the juvenile delinquency system enumerated in Juvenile Code Section 7B-1500:

> (1) To protect the public from acts of delinquency.
>
> (2) To deter delinquency and crime, including patterns of repeat offending:
>
> a. By providing swift, effective dispositions that emphasize the juvenile offender's accountability for the juvenile's actions; and
>
> b. By providing appropriate rehabilitative services to juveniles and their families.
>
> (3) *To provide an effective system of intake services for the screening and evaluation of complaints* and, in appropriate cases, where court intervention is not

> necessary to ensure public safety, to refer juveniles to community-based resources.
>
> (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.

Id. at 447–48, 800 S.E.2d at 467 (emphasis in original) (quoting N.C. Gen. Stat. § 7B-1500).

Here, the section of the juvenile petition to indicate the juvenile court counselor's approval or disapproval for filing was left completely blank. There was no box checked, and the court counselor did not include his signature in this section. Thus, on its face, the juvenile petition was fatally deficient and did not vest subject matter jurisdiction in the trial court. Accordingly, the adjudication and disposition orders are void *ab initio* because the trial court lacked jurisdiction to enter them. Moreover, it is impossible to determine whether the juvenile court counselor intended to approve the filing of a petition or to divert the juvenile pursuant to N.C. Gen. Stat. § 7B-1706(a).

The State argues this Court should review the entire record to determine whether it reveals the court counselor approved the petition for filing. The State cites *In re Register*, 84 N.C. App. 336, 352 S.E.2d 889 (1987) for the proposition that there must be a total absence of evidence in the record that the court counselor conducted the initial assessment of the petition. In that case, this Court stated, "There is nothing in the record to indicate that the intake counselor made any preliminary inquiry or evaluation." *In re Register*, 84 N.C. App. at 346, 352 S.E.2d at 894. However, this Court analyzed the juveniles' claim of selective prosecution, noting that the proper intake process was not conducted because there was no evidence an "intake counselor" conducted the required preliminary evaluation. Thus, this Court determined, the district attorney improperly "injected" himself into the case because the intake counselor did not initially disapprove of the filing of the petition. *Id.* at 343–44, 352 S.E.2d at 892–93. Therefore, this Court's holding in *In re Register* is not relevant to the question of whether the absence of a court counselor's approval of a juvenile petition for filing is necessary for a district court to obtain subject matter jurisdiction.

Moreover, subsequent to *In re Register*, this Court in *In re T.K.* held that the "juvenile court counselor's role in signing and approving

a petition for delinquency *is the only indication on the face of a petition* that a complaint against a juvenile has been screened and evaluated by an appropriate authority." 253 N.C. App. at 448, 800 S.E.2d at 467 (emphasis added). Here, the State requests we determine whether the court counselor approved a petition for filing based on his or her signature in the verification section of the petition. First, the verification requirement is separate and distinct from the requirement that a court counselor approve a juvenile petition for filing, and it appears in a separate portion of statute. N.C. Gen. Stat. § 7B-1803(a). Second, the court report, which in this case indicates the court counselor conducted a Youth Assessment & Screening Instrument assessment and gang assessment, among other assessments, is also a separate requirement of the court counselor's intake responsibilities pursuant to N.C. Gen. Stat. § 7B-1702 (requiring that the court counselor consider certain criteria and "conduct a gang assessment for juveniles who are 12 years of age or older"). Furthermore, the court report was introduced at disposition, as is the proper time to introduce the court report, and not considered at adjudication. Notwithstanding, a court counselor's court report does not satisfy the requirement that, if a court counselor "determines that a complaint should be filed as a petition," he or she "shall include on it . . . the words 'Approved for Filing' [and] shall sign it." N.C. Gen. Stat. § 7B-1703(b).

Accordingly, the State's arguments fail.

III. Conclusion

Because the court counselor did not approve the juvenile petition for filing by signing the relevant portion of the juvenile petition, the trial court lacked subject matter jurisdiction over the petition. Accordingly, the adjudication and disposition orders are void *ab initio*. Thus, the adjudication and disposition orders are vacated, and the juvenile petition is dismissed. It is so ordered.

VACATED AND DISMISSED.

Judges ARROWOOD and FLOOD concur.

IN RE D.R.F.

[293 N.C. App. 544 (2024)]

IN THE MATTER OF D.R.F., JR.

No. COA23-473

Filed 7 May 2024

1. Constitutional Law—First Amendment—anti-threat statute —true threat exception—subjective and objective intent considered

In a juvenile delinquency proceeding for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court did not err in denying a motion to dismiss the petition on First Amendment grounds after determining that a juvenile's statement that he was "going to shoot up" his school constituted a true threat, thus falling into a limited exception to the constitutional prohibition on criminalizing the content of speech. A true threat, defined as an objectively threatening statement communicated with subjective intent to threaten, was shown by testimony from the juvenile's fellow students regarding the three pertinent but non-dispositive factors—the context, the language deployed, and the reaction of the listeners—in that the threat was made at school as students were leaving class for lunch; was explicit and made in a serious tone of voice; and caused fear among listeners, along with an offer from another student to "bring the guns."

2. Threats—anti-threat statute—true threat—sufficiency of the evidence

In a juvenile delinquency proceeding for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court did not err in denying a motion to dismiss the petition on sufficiency grounds where the State presented substantial evidence that the juvenile's statement that he was "going to shoot up" his school constituted a true threat, which requires proof of both objectively threatening content and a subjective intent to threaten. The juvenile verbally communicated his threat to a group of students waiting to go to lunch after class and was overheard by at least two students who took the threat seriously. The statute only requires that the threatening communication be made to a person or group—not that the person or group themselves be threatened.

3. Juveniles—delinquency—disposition continued—secure custody pending disposition

Following the adjudication of a juvenile as delinquent for threatening mass violence on educational property (a criminal offense per

N.C.G.S. § 14-277.6), the district court abused its discretion by continuing disposition under N.C.G.S. § 7B-2406 without good cause or extraordinary circumstances shown by the State and by holding the juvenile in secure custody pending disposition pursuant to N.C.G.S. § 7B-1903(c) without a legitimate purpose. As a result, that portion of the juvenile's adjudication order was vacated.

Appeal by Juvenile from Orders entered 28 November 2022 by Judge David V. Byrd in Yadkin County District Court. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Deputy Solicitor General Lindsay Vance Smith, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Juvenile-Appellant.

HAMPSON, Judge.

Juvenile D.R.F., Jr. (Daniel[1]) appeals from a Juvenile Adjudication Order finding he committed the offense of Communicating a Threat to Commit Mass Violence on Educational Property and adjudicating him as a delinquent juvenile and a Juvenile Level 2 Disposition Order placing him on 12 months of probation and committing him in secure custody for seven days. The Record before us tends to reflect the following:

On 26 May 2022—after two prior Juvenile Petitions in the case alleging similar facts had previously been filed and dismissed in the case—a Deputy with the Yadkin County Sheriff's Office filed a verified Juvenile Petition. The Petition alleged Daniel had threatened to commit an act of mass violence on educational property in violation of N.C. Gen. Stat. § 14-277.6. The Petition was heard by the trial court on 2 June 2022.

At the outset of this hearing, the trial court, with consent of the parties, conducted a consolidated first appearance, probable cause, and adjudication hearing. The parties agreed the trial court could record and consider the evidence presented in support of the State's showing of probable cause as the State's evidence for adjudication. At this hearing, the State presented testimony from three other students: Samantha, Jillian, and Gerald.[2]

---

1. A pseudonym for the Juvenile stipulated to by the parties.

2. Pseudonyms employed by the parties.

Samantha, Jillian, and Gerald each testified that they were in a chorus class with Daniel at a local high school during the spring semester of 2022. Samantha testified there were approximately 15 to 17 students in the class. On 6 January 2022, the students were gathered near the exit of the auditorium after the chorus class waiting to go to lunch. Samantha saw Daniel talking with a group of other students. She heard Daniel say "that he was going to shoot up the school." Samantha could not identify any of the other students. Samantha testified the statement made her feel "[f]rightened like I was really scared." She reported Daniel's statement to the School Resource Officer.

Jillian testified she "heard someone say, 'I will bring the guns.' " Jillian further testified Samantha told her she heard Daniel "say that he was going to shoot up the school[.]" Jillian "was scared because I don't want to be in the next school to get shot up." She made a report to the School Resource Officer after lunch.

Gerald testified he heard Daniel state: "that they was going to shoot up the school." Like Samantha, he did not know the other students. He testified that hearing the statement made him feel "sick to my stomach[,]" meaning scared. Over Daniel's objection, Gerald testified about a separate incident with Daniel where Daniel had threatened Gerald by text message and told Gerald he was going to make a "diss track." Gerald further testified Daniel then made "a video about blowing my brains out and others." This was why Gerald's sense of fear was heightened when he heard Daniel's comment. Gerald described Daniel's tone of voice as "serious." Gerald did not see anyone's reaction to the statement but did not hear anyone laugh.

Following this testimony, the trial court found there was probable cause to proceed to adjudication. Daniel, through counsel, denied the allegations in the Petition. The State rested on the evidence presented through the testimony of Samantha, Jillian, and Gerald.

At the close of the State's evidence, Daniel, through counsel, moved to dismiss the Petition for insufficient evidence. The trial court denied the motion and the parties presented arguments. Daniel's trial counsel argued there was insufficient evidence Daniel communicated a threat to commit mass violence on educational property. Daniel's trial counsel also argued there was no evidence Daniel's statement constituted a true threat and, as such, was protected speech under the First Amendment to the United States Constitution.

Following trial counsel's argument, the trial court rendered its adjudication finding beyond a reasonable doubt Daniel had committed

the offense of Communicating a Threat to Commit Mass Violence on Educational Property. The State requested the trial court continue disposition for seven days while Daniel was held in secure custody. Daniel's trial counsel objected to Daniel being held in secure custody. The trial court continued disposition and required Daniel to be held in secure custody for seven days pending disposition.

The disposition hearing was held on 9 June 2022. The trial court orally ordered Daniel placed on juvenile probation for 12 months. The trial court further ordered Daniel to intermittent detention of an additional seven days suspended upon Daniel's completion of 50 hours of community work. The trial court also noted Daniel's oral Notice of Appeal.

On 28 November 2022, the trial court entered its written Juvenile Adjudication Order and Juvenile Level 2 Disposition Order. In the written Juvenile Adjudication Order, the trial court found:

> The juvenile made a "true threat" to shoot up the school. Each student witness who heard the juvenile's threat testified that they took the threat seriously. One witness testified that it made him "sick to his stomach" with fear. Although one witness did not believe that the threat would be carried out immediately, she believed that it would be carried out. The Court finds that a reasonable hearer would objectively construe the statement as an actual threat causing fear. The Court further finds the juvenile subjectively intended the statement to be construed as a threat. Indeed, another student told the juvenile that he "would bring the gun." There is no evidence that there was any laughter or joking at the time that the threat was made. Further, the juvenile's prior making of a video threatening a fellow student tends to show his intent that the statement be construed as a threat.

The trial court's Adjudication Order also noted the continuance of disposition and placement of Daniel in secure custody for seven days pending disposition. The trial court's Juvenile Level 2 Disposition Order was entered consistent with its prior orally-rendered ruling. Daniel timely filed written Notice of Appeal from both the Juvenile Adjudication Order and the Juvenile Level 2 Disposition Order on 8 December 2022.

Issues

The issues on appeal are whether: (I) there was sufficient evidence Daniel's statement that he was going to shoot up the school constituted a true threat to survive dismissal on constitutional grounds; (II) there was

sufficient evidence Daniel committed the offense of Communicating a Threat of Mass Violence on Educational Property to survive a motion to dismiss; and (III) the trial court abused its discretion by continuing disposition and placing Daniel in secure custody pending disposition.

Analysis

I. True Threat

[1] Daniel first argues the trial court's failure to dismiss the Petition and its adjudication of him as delinquent based on his statement he was going to shoot up the school constitutes a violation of his First Amendment right of free speech. Specifically, Daniel argues there was insufficient evidence his statement was objectively threatening to his listeners or that he had the subjective intent to threaten violence. As such, Daniel contends the State presented insufficient evidence his statement constituted a true threat. He asserts, then, the State failed to establish his statement was not protected speech under the First Amendment.

" 'The standard of review for alleged violations of constitutional rights is de novo.' " *State v. Shackelford*, 264 N.C. App. 542, 551, 825 S.E.2d 689, 695 (2019) (quoting *State v. Roberts*, 237 N.C. App. 551, 556, 767 S.E.2d 543, 548 (2014)). "Under the de novo standard, this Court 'considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Id.* (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)). " '[I]n cases raising First Amendment issues ... an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.' " *State v. Taylor*, 379 N.C. 589, 608, 866 S.E.2d 740, 755 (2021) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L. Ed. 2d 502 (1984)). "Independent whole record review does not empower an appellate court to ignore a trial court's factual determinations. In this regard, an appellate court is not entitled to 'make its own findings of fact and credibility determinations, or overrule those of the trier of fact.' " *Id.* (quoting *Desmond v. News and Observer Publ'g Co.*, 375 N.C. 21, 44, n.16, 846 S.E.2d 647, 662, n.16 (2020)).

"Under the First Amendment, the State may not punish an individual for speaking based upon the contents of the message communicated." *Id.* at 605, 866 S.E.2d at 753. Our Supreme Court "recognizes that there are limited exceptions to this principle, as the State is permitted to criminalize certain categories of expression which, by their very nature, lack constitutional value." *Id.* One such limited exception is when the criminalized speech constitutes a "true threat." *See id.* at 598-599, 866 S.E.2d at 748.

The United States Supreme Court appears to have first applied the term "true threat" in its per curiam opinion in *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969). It later explained: " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003) (citations omitted). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' " *Id.* at 359-60, 123 S. Ct. 1536, 1548, 115 L. Ed. 2d 535 (citations omitted).

Here, the Petition alleged Daniel had communicated a threat of mass violence on educational property in violation of N.C. Gen. Stat. § 14-277.6. This Court has specifically recognized the true threat analysis is applicable to this anti-threat statute to guard against the use of Section 14-277.6 to infringe upon First Amendment rights. *In re Z.P.*, 280 N.C. App. 442, 445, 868 S.E.2d 317, 319 (2021). We observed: "The United States Supreme Court has concluded that an anti-threat statute requires the government to prove a 'true threat.' " *Id.* (citing *Watts*, 394 U.S. at 708, 89 S.Ct. at 1401. We further noted: "That Court has explained that a true threat, for purposes of criminal liability, depends on both how a reasonable hearer would objectively construe the statement and how the perpetrator subjectively intended her statement to be construed." *Id.* (citing *Elonis v. United States*, 575 U.S. 723, 737-38, 135 S.Ct. 2001, 2010, 192 L. Ed. 2d 1 (2015)).

Our Supreme Court defines "a true threat as an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group." *Taylor*, 379 N.C. at 605, 866 S.E.2d at 753. "[I]n order to determine whether a defendant's particular statements contain a true threat, a court must consider (1) the context in which the statement was made, (2) the nature of the language the defendant deployed, and (3) the reaction of the listeners upon hearing the statement, although no single factor is dispositive." *Id.* at 600-01, 866 S.E.2d at 750.

More recently, in *Counterman v. Colorado*, the United States Supreme Court has expounded further on the true threats analysis. The Court again acknowledged: "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes." *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 2111, 216

L. Ed. 2d 775 (2023). The Court first held under a true threats analysis, the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.* Second, it held that "a mental state of recklessness is sufficient." *Id.* As such, "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* at 69, 143 S. Ct. at 2111-12.

In this case, Daniel argues the State failed to present any evidence of the context in which Daniel made the alleged threat. Daniel contends the State was required to prove the exact contents of the alleged threat, the context in which Daniel was speaking, and identify or call as witnesses the students to whom Daniel was directly speaking. Daniel asserts the trial court could thus only speculate as to whether the alleged threat constituted a true threat.

In *In re Z.P.*, this Court analyzed whether a student's alleged threat "to blow up the school" objectively constituted a true threat for purposes of a delinquency petition alleging a threat of mass violence on educational property. *Z.P.*, 280 N.C. App. at 446, 868 S.E.2d at 319. This Court summarized the evidence in that case:

> Three of Sophie's classmates (Madison, Tyler, and Caleb) each testified to hearing Sophie threaten to blow up the school, though none of them testified that they thought she was serious when she made the threat.
>
> Madison testified that Sophie talked about bombing the school. Madison testified that she did not think Sophie was serious when making the statement, and Madison did not report the threat to any adult.
>
> Tyler testified that Sophie "said something about a bomb" and said "she was going to blow up the school." Tyler offered in a joking manner to help her build the bomb and stated that he "thought it was just a joke."
>
> Caleb also heard Sophie's threat about blowing up the school but was equivocal about his perception of Sophie's seriousness, stating that her statement was "either [ ] a joke or it could be serious."

Id.

Ultimately, this Court concluded the evidence there did not rise to sufficient objective evidence of a true threat. Instead, we determined:

> The State's evidence may create a suspicion that it would be objectively reasonable for Sophie's classmates to think Sophie was serious in making her threat. But we do not believe that the evidence is enough to create an inference to satisfy the State's burden. Indeed, none of Sophie's classmates who heard her statement believed that Sophie was serious, with most of them convinced that she was joking. She had made outlandish threats before, never carrying out any of them.

Id. at 446, 868 S.E.2d at 319-20.

While the facts of *Z.P.* are somewhat similar to those in this case, they differ in key aspects. Indeed, the State's evidence did provide evidence of the context in which Daniel's alleged threat was made. The evidence showed a group of students was gathered waiting to leave their chorus class to go to lunch when Daniel made the statement that he was "going to shoot up the school." Two student-bystanders—Samantha and Gerald—testified consistent with each other that they heard the statement. Samantha was scared enough to report the threat right away. Gerald testified it made him sick to his stomach. He further testified Daniel's tone sounded serious. Although Gerald did not see any reaction from other students, he did not hear any laughter. Indeed, to the contrary, a third bystander—Jillian—who did not hear Daniel's statement, testified she heard another student respond that they would "bring the guns." When she told Samantha about that statement and learned of Daniel's, she too was scared.

Unlike the student-witnesses in *Z.P.*, who all heard the alleged threat to blow up the school and believed it to be a joke or were at least equivocal, the student-witnesses in this case did not testify they thought Daniel was joking or that his statement might have been perceived as a joke. To the contrary, the evidence was that Daniel sounded serious. The evidence further demonstrated Daniel's comment elicited the further comment from a student offering to "bring the guns," which was overheard by the third student-witness and, itself, caused her alarm. Applying the factors set out in *Taylor*, the evidence tended to reflect that, in the context of a school setting, Daniel threatened to conduct a school shooting in a serious tone and students overhearing the threat took it seriously and were scared. *See Taylor*, 379 N.C. at 600-01, 866 S.E.2d at 750. The response to Daniel's statement was not laughter but another student's offer to bring the guns. Thus, there was evidence that Daniel's statement was objectively threatening. *See id.*

Moreover, there was evidence Daniel had "some subjective understanding of the threatening nature of his statements." *Counterman*, 600 U.S. at 69, 143 S. Ct. at 2111. The evidence showed Daniel directed his statement that he was going to shoot up the school while in a group of 15 to 17 other students during school hours. The statement was able to be overheard by Samantha and Gerald and made in a serious tone. Gerald also testified to a prior incident in which Daniel directed threats toward him, including a video of Daniel blowing Gerald's brains out. At a minimum, this evidence meets the *Counterman* standard of a conscious disregard by Daniel of a substantial risk that his communications would be viewed as threatening violence.[3] *Id.*

Thus, there was sufficient evidence of a true threat presented by the State in this case. Therefore, the trial court's proceeding on the Petition was not an infringement of Daniel's First Amendment rights. Consequently, the trial court did not err by denying Daniel's Motion to Dismiss the Petition on this basis.

II. Sufficiency of the Evidence

[2] Daniel makes a separate argument that the State failed to present sufficient evidence he directed a threat at any specific person or persons. Thus, Daniel contends the trial court erred in failing to dismiss the Petition for insufficiency of the evidence to meet the elements of Communicating a Threat to Commit Mass Violence on Educational Property. We disagree.

> This Court reviews de novo a trial court's denial of a motion to dismiss for insufficiency of the evidence to determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *In re T.T.E.*, 372 N.C. 413, 420, 831 S.E.2d 293 (2019) (quoting *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753 (2008)). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327–328, 677 S.E.2d 444 (2009)). All evidence is

3. *Counterman* was decided after Daniel's appellate counsel filed their Appellant's Brief in this Court. In Reply Briefing, Daniel's appellate counsel provides a thoughtful discussion of *Counterman* and its impact on this case. However, appellate counsel does not dispute the applicability of the *Counterman* standard to this case.

> viewed "in the light most favorable to the State and the State receives the benefit of every reasonable inference supported by that evidence." *Id.*

Matter of J.D., 376 N.C. 148, 155, 852 S.E.2d 36, 42 (2020).

Here, the Petition alleged Daniel threatened to commit an act of mass violence on educational property in violation of N.C. Gen. Stat. § 14-277.6. N.C. Gen Stat. § 14-277.6 provides: "A person who, by any means of communication to any person or groups of persons, threatens to commit an act of mass violence on educational property or at a curricular or extracurricular activity sponsored by a school is guilty of a Class H felony." N.C. Gen. Stat. § 14-277.6(a) (2021). The State's evidence reflected Daniel verbally communicated his threat to shoot up the school to a group of students as they waited to go to lunch after class, which was overheard by Samantha and Gerald, who both took the threat seriously. This evidence is sufficient to meet each of the elements of N.C. Gen. Stat. § 14-277.6.

Defendant contends the State was required to present evidence the person or persons to whom the threat was directed were, themselves, threatened. Defendant posits that because there was no evidence as to the identity of the individuals in the group of students with Daniel and no testimony from those students, the State cannot prove anyone was threatened. Daniel further argues as there was no evidence Daniel specifically intended to threaten Samantha or Gerald, the evidence does not support a finding Daniel willfully threatened them with shooting up the school.

However, nothing in the statute requires a threat of mass violence to be directed only at the person or persons threatened. To the contrary, the statute requires only the communication of the threat to a person or group—not that the person or group themselves be threatened. Daniel made the threat to a group of students in a manner that could be overheard by other students. Moreover, the fact that Samantha and Gerald were bystanders who overheard the threat is of no moment. As students at the school, they would reasonably believe they were among those under threat of a school shooting.

Thus, the State presented sufficient evidence that Daniel committed the offense of Communicating a Threat to Commit Mass Violence on Educational Property in violation of N.C. Gen. Stat. § 14-277.6. Therefore, the trial court did not err in denying Daniel's Motion to Dismiss. Consequently, the trial court did not err in adjudicating Daniel as a delinquent juvenile.

III. Secure Custody Pending Disposition

[3] Daniel contends the trial court abused its discretion by continuing disposition and placing Daniel in secure custody pending disposition. Specifically, Daniel contends there was no good cause shown to continue disposition and no articulated valid basis to hold him in secure custody pending disposition. We agree.

For its part, the State offers no substantive argument to counter Daniel's. Rather, the State first argues Daniel failed to preserve this issue for appeal because Daniel did not designate this ruling in his Notice of Appeal. However, the trial court's written Juvenile Adjudication Order expressly contains the ruling continuing disposition and placing Daniel in secure custody for seven days. Daniel filed written Notice of Appeal from this Juvenile Adjudication Order. Thus, Daniel's Notice of Appeal necessarily included the trial court's ruling continuing disposition and placing Daniel in secure custody. The State's argument is entirely without merit. The State further argues that this issue is moot as Daniel has served the seven days in secure custody prior to disposition. The State's argument is, again, baseless. We have previously held a similar temporary secure custody order is reviewable on appeal even after its expiration and is properly before us on the grounds that it "is capable of repetition, yet evading review." *In re Z.T.W.*, 238 N.C. App. 365, 373, 767 S.E.2d 660, 666 (2014).

We review the trial court's ruling continuing the disposition hearing and placing Daniel in temporary secure custody pending disposition for an abuse of discretion. *See id.* at 374, 767 S.E.2d at 667. An abuse of discretion occurs "in the event that a court's actions are manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations and internal quotations omitted).

Under N.C. Gen. Stat. § 7B-2406:

> The court for good cause may continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-2406 (2021). Further, under N.C. Gen. Stat. § 7B-1903(c): "When a juvenile has been adjudicated delinquent, the

court may order secure custody pending the dispositional hearing . . ." N.C. Gen. Stat. § 7B-1903(c) (2021).

In this case, after adjudicating Daniel delinquent, the trial court announced it was moving to disposition. The State requested disposition be continued:

> Your Honor, the State will request that the disposition be delayed and hold the juvenile in custody for seven days prior to disposition and I will tell the Court there is a reason for that. He has been adjudicated delinquent on three prior communicating threats. One being another count of disorderly conduct at school. He was on probation for communicating threats when this happened. Obviously, if it was alluded to, I didn't want to allude to it since we are now in a disposition or prior to disposition. Obviously, if there is any time to take this serious it is now. Unlike other ones, there is no history, but this there is history. I will show you the proof. He is a level II with four points. I will show you the approved complaints. Again, this is a pattern of conduct that needs to be stipend [sic], so I will ask Your Honor to waive disposition for seven days in order for the juvenile to be held in secure custody. Thank you.

Defense counsel indicated they were ready to proceed with disposition and while they did not object to the continuance if the State was not ready to proceed, they objected to secure custody pending disposition.

There was no indication by the State that additional time was required to receive additional evidence, reports, assessments, or other information needed in the best interests of the juvenile or to allow for a reasonable time for the parties to conduct expeditious discovery. Thus, there was no good cause for a continuance under N.C. Gen. Stat. § 7B-2406. Moreover, neither the State nor the trial court identified any extraordinary circumstance justifying the continuance. To the contrary, the continuance of the disposition hearing was for the sole purpose of placing Daniel in secure custody as punishment *prior* to any disposition hearing and not for any legitimate purpose in aid of disposition. On appeal, the State has offered no rationale for holding Daniel in secure custody pending disposition. *Compare In re Z.T.W.*, 238 N.C. App. at 375, 767 S.E.2d at 667 (justification for secure custody pending out of home placement justified by juvenile's school suspension, anger-related difficulties, and his disobedience while living at home and trial court's

reasoning juvenile would receive education, medication, and treatment while in secure custody).

Thus, there was no valid basis demonstrated to continue disposition and place Daniel in secure custody pending disposition. Therefore, the trial court abused its discretion by continuing disposition and placing Daniel in secure custody pending disposition. Consequently, we vacate that limited part of the trial court's Juvenile Adjudication Order.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's adjudication of Daniel as delinquent. However, we vacate that portion of the trial court's Juvenile Adjudication Order continuing disposition and placing Daniel in secure custody for seven days pending disposition. As Daniel makes no argument on appeal regarding the Juvenile Level 2 Disposition Order, we also affirm the disposition.

AFFIRMED IN PART; VACATED IN PART.

Judges STROUD and GORE concur.

IN THE MATTER OF J.O.

No. COA23-744

Filed 7 May 2024

1. Child Abuse, Dependency, and Neglect—permanency planning order—waiving future hearings—clear, cogent, convincing evidence—recitation of standard required

After a minor child was adjudicated dependent, a permanency planning order granting guardianship to his foster parents and ceasing reunification efforts with his mother was vacated, where the trial court waived future permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) but failed to state—either in open court or in the written order—that its findings were supported by clear, cogent, and convincing evidence as required under the statute. The matter fell under the Indian Child Welfare Act (ICWA), but because section 7B-906.1(n) also applied to the case and imposed the same high evidentiary standard for factual findings as ICWA, it was unnecessary to determine whether ICWA also required the court to recite that

standard in its order. The matter was remanded for entry of a new order stating the correct standard for the court's findings of fact.

2. Appeal and Error—preservation of issues—permanency planning—fitness and constitutional status as parent—issue not raised in trial court

At a permanency planning hearing for a dependent child, the child's mother failed to preserve for appellate review her argument that the trial court erred in granting guardianship to the child's foster parents without first finding that the mother was unfit or that she had acted inconsistently with her constitutionally protected status as a parent. The record showed that the mother had the opportunity to raise her constitutional argument before the trial court—because she had notice prior to the hearing that the court would be considering a recommendation to grant guardianship of the child—but that she failed to do so.

3. Child Abuse, Dependency, and Neglect—permanency planning order—guardianship granted to foster parents—visitation left to guardians' discretion—error

After the trial court awarded guardianship of a dependent child to his foster parents at a permanency planning hearing, the court abused its discretion by ordering that the mother's visitation with the child be left to the guardians' discretion. The order was vacated so that, on remand, the trial court could enter a new order specifying the duration and frequency of any visitation and stating whether such visitation would be supervised.

Appeal by respondent from order entered 28 April 2023 by Judge Tessa Shelton Sellers in District Court, Graham County. Heard in the Court of Appeals 2 April 2024.

Leo Phillips for petitioner-appellee Graham County Department of Social Services.

Richard Croutharmel for respondent-appellant.

STROUD, Judge.

Respondent appeals from a permanency planning order ceasing reunification efforts with her minor child and placing the minor child in guardianship with his foster parents. Because the trial court's order waived future review hearings and granted guardianship of the child

without making findings by clear, cogent, and convincing evidence as required by North Carolina General Statute Section 7B-906.1(n) and left Mother's visitation entirely in the Guardians' discretion, we vacate the order and remand for further proceedings and entry of a new order consistent with this opinion.

I. Background

Josh[1] was born in Graham County, North Carolina in March of 2021. On or about 3 March 2021, the Graham County Department of Social Services ("DSS") filed a juvenile petition alleging Josh as neglected and dependent. DSS alleged Josh did not "receive proper care, supervision, or discipline" from Mother and "lives in an environment injurious to" his welfare. While no drug screen was conducted on Mother or Josh at birth, Josh showed signs of drug withdrawal, such as fever and he was "very jittery." DSS identified Mother's felony charge of assault by strangulation and misdemeanor charge of child abuse as to one of her other children in the petition in support of its argument for obtaining custody of Josh. On or about 3 March 2021, the trial court entered an Order for Nonsecure Custody (capitalization altered), finding Josh "is an Indian Child and a member of or eligible for membership in the Eastern Band of Cherokee tribe" and placed Josh with DSS.

After an 18 August 2021 hearing, the trial court entered an adjudication order on 16 November 2021 adjudicating Josh as dependent, keeping Josh in the custody of DSS, and allowing Mother "up to 8 hours of unsupervised visitation with [Josh] on Tuesdays of each week." The trial court concluded that "the Indian Child Welfare Act [("ICWA")] applies in this matter." The disposition hearing was continued to and heard on 7 December 2021, and on 31 January 2022 Josh was ordered to remain in the custody of DSS, with Mother's unsupervised visitation to continue.

On 2 August 2022, the trial court held a review hearing and entered an order allowing Mother to continue exercising visitation with Josh and requiring Mother to allow DSS and the Eastern Band of Cherokee Indians ("EBCI") to observe her home to determine its "fitness for visitation." The order required Mother to "allow [DSS] and EBCI into the home every week thereafter until September 6, 2022 to continue to assess the home's fitness[.]" Visitation would continue at DSS until Mother provided her new address to DSS. Further, the visitations between Josh and Mother were to "take place between . . . [M]other and [Josh] only. The maternal great grandfather . . . may be present when visits are occurring in Graham County." The trial court also required Mother to enroll in the

1. A pseudonym is used for the minor child.

"parents as teachers program" and not to "transport [Josh], unless she is in a safe vehicle, with appropriate child safety seats, and the vehicle has passed a safety inspection[.]"

On 5 October 2022, the trial court entered a "Visitation Hearing Order" (capitalization altered), to determine "whether . . . [M]other's visitation should be expanded[,]" but ordered visitation remain the same. Throughout the case, the cleanliness and safety of Mother's home were central issues, as indicated by the exhibits and Mother's own testimony. The trial court found that "Melody Turner, a tendered expert in Indian Culture and Child Rearing" "attempted to inspect [Mother's] trailer a number of times" and during a 25 January 2022 home inspection, found Mother's home "stacked up with boxes and trash filling the living room, kitchen, and the bedroom." Additionally, "[t]he floors were dirty and covered with trash and bags of stuff from stores where trash was spilling out of the trash cans." Mother was then "provided with a list of things that needed to be cleaned up and addressed" and Mother "failed to comply with the list[.]" DSS and EBCI then attempted to conduct an inspection on 11 May 2022, but Mother cancelled the appointment; on 20 May 2022 an inspection occurred, but Mother "had made little progress on correcting the safety concerns provided to . . . Mother in February." Mother eventually moved to a new apartment after she was evicted from her trailer for reasons which included the major damage she had caused to the trailer. Mother "took a long time to set the apartment up with furniture" and "over time [the apartment] continued to deteriorate" with "clutter and trash . . . continu[ing] to pile up and fill the apartment" and "[t]he kitchen . . . full of things that a busy toddler could find and place that toddler in danger" and "mountains of laundry and trash from food items."

In addition to the housing issues, Mother was ordered "[t]hat visitation shall take place between . . . [M]other and [Josh] only. The maternal great grandfather . . . may be present when visits are occurring in Graham County." Also, the trial court had ordered that Mother's older son, age 18, not to be in contact with Josh, due to the trial court's concern that the other child "has a violent past with a number of concerns by [DSS] for inappropriate behavior including to sexual proclivities toward animals and violent assaults." One of Josh's custodians testified that on at least one occasion she saw Mother, Josh, and Mother's older son together despite the court order prohibiting the older son's presence.

Finally, the condition of Mother's car was another factor the trial court considered in determining guardianship. Specifically, Mother had "an expired tag and malfunctioning brake lights" and, more relevant to

this case, had "massive amounts of trash and food in the car almost covering the child's safety seat in both the front and back portions of the car." While there were other parts of Mother's case plan discussed in the trial court's order, the condition of Mother's housing, concerns involving her older child, and safety and health concerns of her car were the main issues.

On 21 February 2023, the court ordered a continuance for the next permanency planning hearing, which set the new hearing for 8 March 2023. DSS submitted a Court Report prior to the 8 March 2023 hearing which recommended the primary plan be changed to guardianship, and EBCI submitted a report on 2 March 2023 agreeing with the guardianship recommendation.

The matter came for hearing on 8 March 2023, and the trial court entered an order on 28 April 2023 which decreed:

> [T]hat the primary permanent plan be changed to guardianship.
>
> That a guardianship be granted to [Guardians].
>
> That [Guardians] shall be granted the authority to authorize medical, dental, psychiatric, psychological and educational services for [Josh].
>
> That . . . Mother shall have visitation with [Josh] at the discretion of the Guardians.
>
> No further review shall be scheduled at this time.

Mother appeals.

II. Indian Child Welfare Act

[1] Mother first argues "[t]he trial court reversibly erred by failing to comply with the procedural requirement of the [ICWA] to make findings of fact by the clear and convincing evidentiary standard." As Mother contends the trial court failed to make findings by clear and convincing evidence, as required by ICWA, she is arguing the trial court failed to follow a statutory mandate. Thus, "the error is preserved and is a question of law reviewed *de novo*." *In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.*

ICWA is a federal law which establishes "minimum Federal standards for the removal of Indian children from their families and the

placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *In re E.G.M.*, 230 N.C. App. 196, 199, 750 S.E.2d 857, 860 (2013) (citing 25 U.S.C. § 1902 (2012) (quotation marks and brackets omitted)). North Carolina statutes and caselaw set specific standards for permanency planning orders. *See In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) ("This Court's 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." (citation, quotation marks, and brackets omitted)). But if ICWA also applies to the case, and ICWA sets a higher standard than the North Carolina statutes, the higher standard prevails:

> where the [ICWA] provides a higher standard of protection to the Indian family than is otherwise provided by state law, the ICWA standard prevails. Where applicable state law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under the ICWA, the state law prevails.

In re E.G.M., 230 N.C. App. at 199, 750 S.E.2d at 860 (citations, quotation marks, and brackets omitted). Mother argues that ICWA sets a higher standard for this case, based upon its requirement for a specific finding supported by "clear and convincing" evidence:

> No foster care placement may be ordered in such proceeding in the absence of a determination, *supported by clear and convincing evidence*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e) (2023) (emphasis added).

The trial court did not state, either in open court or in the written order, whether its findings were supported by clear and convincing evidence. The only finding addressing the standard was "[t]he court makes these findings in the best interest of the juvenile."

DSS argues the trial court must state that it has applied the standard of clear and convincing evidence in an adjudication hearing but need not apply the same standard to a permanency planning hearing, and the trial court had previously entered an adjudication order based upon clear, cogent, and convincing evidence. DSS is correct that an adjudication order must be based upon clear and convincing evidence, and the order must so state. *See* N.C. Gen. Stat. § 7B-805 (2023) ("The allegations

in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence."). "Pursuant to N.C. Gen. Stat. § 7B-807 (2007), the court is required to recite the standard of proof the court relied on in its determination of neglect." *In re A.S.*, 190 N.C. App. 679, 688, 661 S.E.2d 313, 319 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009). In contrast, the findings in a disposition order or permanency planning order may be based upon a preponderance of the evidence, *unless* the order waives additional hearings required by North Carolina General Statute Section 7B-906.1(n) and if so, the trial court must then make certain findings by "clear, cogent, and convincing evidence." *See* N.C. Gen. Stat. § 7B-906.1(n) (2023).

But we need not address whether ICWA requires the trial court to state in the order that it made the finding as required by 25 United States Code Section 1912(e) by clear, cogent, and convincing evidence, as North Carolina General Statute Section 7B-906.1(n) requires the findings in the order on appeal to be made by clear, cogent, and convincing evidence as well. *See id.* The trial court's order waived future hearings under North Carolina General Statute Section 7B-906.1(n) and ordered "guardianship be granted to [Guardians]" and "[n]o further review shall be scheduled at this time." Because the trial court's order waived future hearings, the trial court was required to make specific findings by "clear, cogent, and convincing" evidence under North Carolina General Statute Section 7B-906.1(n):

> (n) Notwithstanding other provisions of this Article, the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of permanency planning hearings, *or order that permanency planning hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following*:
>
> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that permanency planning hearings be held every six months.

> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.
>
> The court may not waive or refuse to conduct a hearing if a party files a motion seeking the hearing. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with subsection (n) of this section that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

Id. (emphasis added).

Although the trial court's order did not make the findings required by North Carolina General Statute Section 7B-906.1(n), the trial court ordered that "no further review shall be scheduled at this time," effectively waiving permanency planning review hearings every six months as required by North Carolina General Statute Section 7B-906.1(a). *See* N.C. Gen. Stat. § 906.1(a) (2023) ("Review or permanency planning hearings shall be held at least every six months thereafter [the initial permanency planning hearing]."). In addition, the trial court granted guardianship to Guardians and left visitation with Mother entirely to their discretion. Based upon the evidence and record before the trial court, the trial court could have made findings as required by North Carolina General Statute Section 7B-906.1(n), but we cannot determine from the order exactly what the trial court intended to do.

Therefore, as the trial court was required to use the clear and convincing standard under North Carolina General Statute Section 7B-906.1(n), and the trial court did not recite the standard in open court or in its written order, we must vacate and remand for the trial court to make appropriate findings under the clear and convincing evidence standard.

III. Constitutionally Protected Status as a Parent

[2] Mother next argues that "[t]he trial court reversibly erred by placing Josh in the guardianship of the foster parents without making a finding that . . . Mother was unfit or that her conduct had been inconsistent with her constitutionally protected status as a parent."

"Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (citation, quotation marks, and brackets omitted). Further, "[p]rior to granting guardianship of a child to a nonparent, a district court must clearly address whether the respondent is unfit as a parent or if his conduct has been inconsistent with his constitutionally protected status as a parent." *Id.* (citation, quotation marks, and brackets omitted). Finally, "a parent's right to findings regarding her constitutionally protected status is waived if the parent does not raise the issue before the trial court." *Id.* at 304, 798 S.E.2d at 430-31 (citation omitted). "We review a conclusion that the natural parent's conduct was inconsistent with her constitutionally protected right de novo, and determine whether it is supported by clear and convincing evidence." *In re B.R.W.*, 278 N.C. App. 382, 392, 863 S.E.2d 202, 211, *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022) (citation, quotation marks, and brackets omitted).

While Mother did not explicitly raise a constitutional objection at the permanency planning hearing, she argues (1) she was not afforded an opportunity to raise an objection at the hearing, citing *In re R.P.*, 252 N.C. App. 301, 798 S.E.2d 428 (2017), or (2) "Mother did object with her testimony and arguments requesting the trial court return custody of Josh to her." In *R.P.*, this Court held the father's failure to object did not waive his right to challenge the constitutional finding since "the trial court determined at the 9 February 2016 permanency planning review hearing that it would 'proceed with guardianship at the *next* date.' " *Id.* at 305, 798 S.E.2d at 431 (emphasis in original). Despite this determination, "[a]t the next hearing, on 17 March 2016, the trial court would not allow any evidence to be presented concerning guardianship, stating that guardianship had been determined at the prior hearing" and the 17 March hearing was "strictly limited to the issue of visitation." *Id.* But here, Mother was not prevented from presenting evidence concerning guardianship and she had notice of the recommendations from DSS and EBCI to grant guardianship to Guardians prior to the hearing.

Our Supreme Court has recently addressed the issue of preservation of a constitutional argument as to the parent's right to custody of a child. *See In re J.N.*, 381 N.C. 131, 133-34, 871 S.E.2d 495, 497-98 (2022); *see also In re J.M.*, 384 N.C. 584, 603-04, 887 S.E.2d 823, 835-36 (2023). In *In re J.N.*, the respondent argued his constitutional argument was automatically preserved. *See In re J.N.*, 381 N.C. at 133, 871 S.E.2d at 497. The Court held the issue was not automatically preserved for appellate review and the respondent had notice the hearing was for the purpose of changing the primary plan from reunification to guardianship since

"DSS filed a court report in which it stated that reunification was not possible" and recommended guardianship; DSS also specifically argued at the hearing guardianship was proper. *Id.* at 133, 871 S.E.2d at 498. Finally, the Court held

> [i]n turn, respondent's argument focused on the reasons reunification would be a more appropriate plan. Despite having the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, respondent failed to do so. Therefore, respondent waived the argument for appellate review.

Id.

In *In re J.M.*, our Supreme Court similarly held

> the guardian ad litem filed a report prior to the permanency planning hearing recommending that reunification be removed as the primary plan inasmuch as the cause of Nellie's injuries remained unexplained. When the trial court announced at the hearing that it was contemplating eliminating reunification from the permanent plan, it gave the parties a thirty-minute recess to consider their responses. Notwithstanding the pre-hearing notice that reunification would be on the table and the 30-minute recess, respondents at no point during the permanency planning hearing argued that the proposed changes to the permanent plan would be improper on constitutional grounds. Consequently, they did not preserve the issue for appellate review.

In re J.M., 384 N.C. at 604, 887 S.E.2d at 836 (citation, quotation marks, and brackets omitted).

Here, DSS filed a Court Summary for the scheduled 21 February 2023 court date with the following "Summary and Recommendations"[2]:

> 1. That the Permanent Plan be changed to Guardianship with a Concurrent Plan of Custody at this time;
>
> 2. That Guardianship be granted to the current placement providers . . . at this time;

---

2. The hearing date was continued by order of the trial court and the hearing was ultimately held on 8 March 2023.

> 3. That [Guardians] shall be responsible for the placement and care of the juvenile and shall provide or arrange for the physical placement of the juvenile in their discretion;
>
> 4. That [Guardians] be granted the authority to authorize necessary medical, dental, psychiatric, psychological, and educational or assessment services for the juvenile;
>
> 5. That . . . [DSS] has made reasonable and active efforts to return the juvenile to the home;
>
> 6. That the return of the juvenile to the home at this time would be contrary to his best interest;
>
> 7. That if Guardianship is granted at this time, that visitation with . . . Mother occur at the discretion of Guardians and that . . . Mother comply with orders of the court.

In addition, EBCI presented a report dated 2 March 2023 for the hearing and stated in its "Summary and Recommendations" (capitalization altered) that "[t]he Tribe agrees with [DSS] recommendations to change the permanency plan to Guardianship with [Guardians]."

Mother had an opportunity to raise her constitutional argument for the same reasons as the respondents in *In re J.N.* and *In re J.M.* since DSS and EBCI both filed court reports recommending Josh be placed in guardianship with the foster parents and specifically argued in support of this recommendation at the hearing. *See In re J.N.*, 381 N.C. at 133-34, 871 S.E.2d at 497-98; *see also In re J.M.*, 384 N.C. at 603-04, 887 S.E.2d at 835-36. Further, while Mother testified extensively, presented her own witnesses, and her counsel argued during closing arguments "I believe that changing the plan [from reunification to guardianship] at this point in time based on all of her progress would, would be a miscarriage of justice for her when she has worked so hard to . . . get this child back in her life[,]" she did not contend guardianship would be improper on constitutional grounds or that Mother was a fit and proper parent. While this Court has previously considered these actions by Mother as sufficient to preserve her constitutional argument, *see In re B.R.W.*, 278 N.C. App. 382, 397, 863 S.E.2d 202, 214, *aff'd*, 381 N.C. 61, 871 S.E.2d 764, our Supreme Court's most recent cases hold that where the respondent-parent has notice prior to the hearing that the trial court will be considering a recommendation to grant guardianship of the child, the respondent-parent must make a specific constitutional argument regarding her parental rights before the trial court to preserve a constitutional argument on appeal. *See In re J.N.*, 381 N.C. at 133-34,

871 S.E.2d at 497-98; *see also In re J.M.*, 384 N.C. at 603-04, 887 S.E.2d at 835-36. Thus, we hold Mother failed to preserve her argument as to her constitutionally protected status as a parent and decline to address this issue.

IV. Visitation

[3] Finally, Mother argues "[t]he trial court abused its discretion by ordering . . . Mother's visits with Josh be in the discretion of the guardians." DSS concedes Mother is correct, and we agree.

A dispositional order is reviewed for an abuse of discretion. *See In re S.G.*, 268 N.C. App. 360, 374, 835 S.E.2d 479, 489 (2019). Under North Carolina General Statute Section 7B-905.1,

> (a) An 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.
>
> . . . .
>
> (c) 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 (2023).

Here, the trial court ordered Mother to have "visitation with the juvenile at the discretion of the Guardians." As the trial court provided no conditions as to visitation, including the frequency and length of visitations, and whether they will be supervised or unsupervised, we remand this issue to the trial court. *See id.*; *see also In re J.D.R.*, 239 N.C. App. 63, 76, 768 S.E.2d 172, 180 (2015) ("In the present case, we find that the trial court impermissibly delegated its judicial function to [the f]ather. . . . Therefore, we remand in order that the trial court can make findings and conclusions relating to visitation rights that comport with this opinion.").

V. Conclusion

Mother also raised other arguments on appeal, including that the trial court failed to make the statutorily required findings to place Josh in guardianship and to cease reunification efforts. Since we have already determined we must vacate the trial court's order and remand for entry of a new order as discussed above, we need not address Mother's arguments regarding cessation of reunification efforts. On remand, the trial court shall enter a new order stating the standard of clear and convincing evidence for any findings as required by ICWA under 25 United States Code 1912(e), and North Carolina General Statute Section 7B-906.1(n). In addition, the trial court shall set out the specific frequency and duration of any visitation and whether visitation will be supervised or unsupervised. On remand, the trial court shall hold a hearing prior to entry of the new order to receive evidence as to the current circumstances as relevant to the new order.

VACATED AND REMANDED.

Judges TYSON and GORE concur.

IN THE MATTER OF M.G.B., T.J.B., H.E.D., JUVENILES

No. COA23-853

Filed 7 May 2024

1. Child Abuse, Dependency, and Neglect—permanency planning—refusal to acknowledge sexual abuse—lack of progress on case plan—findings

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court's findings of fact regarding the grandmother's lack of sufficient progress on her case plan—regarding mental health services, disengaging from her relationship with the father, sex abuse education, ability to see reality with regard to the sex abuse, and acting appropriately during visitation with the children—were supported by sufficient evidence.

2. Child Abuse, Dependency, and Neglect—permanency planning —reunification efforts ceased—language mirroring ground for termination—no misapprehension of law

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not misapprehend the law or apply an inappropriate standard by including in one of its findings a reference to the definitions of neglect and abuse in N.C.G.S. § 7B-101 and by stating that the children would be at a substantial risk of repetition of that abuse and/or neglect if returned to the grandmother's care. Although the grandmother argued that the court improperly invoked a ground for termination of parental rights before eliminating reunification as a permanent plan, the likelihood of further harm to the children was a relevant consideration to the permanency planning decision. Further, the trial court properly addressed the statutory factors regarding reunification contained in N.C.G.S. § 7B-906.2(d), and its findings were supported by sufficient evidence.

3. Child Abuse, Dependency, and Neglect—permanency planning —reunification efforts ceased—burden shifting alleged

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not improperly place the burden of proof on the grandmother to show that she had made sufficient progress to warrant reunification, where its findings of fact reflected the grandmother's failure to obtain educational resources to parent vulnerable children and that the conditions that led to the children's removal had not been alleviated and, as a result of these findings, the court determined that the children would not be safe in the grandmother's home.

4. Child Abuse, Dependency, and Neglect—permanency planning —reunification efforts ceased—refusal to acknowledge sexual abuse—lack of progress on case plan

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother,

who had custody of the children, refused to acknowledge—the trial court did not abuse its discretion by ceasing reunification efforts with the grandmother after determining that she had failed to make sufficient progress on her case plan. Although the grandmother did complete some aspects of her case plan and mostly had positive visits with the children, she failed to complete specific therapy recommendations, to disengage from her relationship with the father, to obtain parenting education to assist her in supporting a child who is the victim of sexual abuse and, most importantly, she continued to insist that the father never sexually abused one of the children despite overwhelming evidence.

5. Appeal and Error—preservation of issues—permanency planning order—guardian ad litem duties—automatic preservation

In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children, although the grandmother did not argue before the trial court that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties, the issue was automatically preserved for appellate review because, even though N.C.G.S. § 7B-601(a) (listing a GAL's duties in a juvenile case) does not explicitly direct a trial court to perform a specific act—such as making written findings regarding a GAL's performance—since the trial court is directed by statute (section 7B-906.1(c)) to consider a GAL's information at a permanency planning hearing, the relevant statutory sections in combination create a statutory mandate sufficient to automatically preserve an issue challenging a GAL's efforts.

6. Child Abuse, Dependency, and Neglect—permanency planning—guardian ad litem's duties—sufficiency

In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children—one of whom tested positive for a sexually-transmitted disease that the trial court had previously determined was caused by the father sexually abusing the child, a determination the grandmother refused to accept—there was no merit to the grandmother's contention that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties by not maintaining adequate communication with the grandmother and by not sufficiently investigating the case. The evidence demonstrated that the GAL conducted monthly visits with the children, spoke to their foster parents, asked the children about their wishes, submitted written reports at each hearing, and made a recommendation to the

court regarding a permanent plan, all in an effort to determine the best interests of the children. Although the GAL only spoke to the grandmother twice after juvenile petitions were filed and the children were removed from her home, the GAL saw the grandmother interact with the children at several visits and there is no indication that additional communication would have changed the GAL's recommendation, particularly since the grandmother continued to insist that the father had not sexually abused one of the children.

7. Child Abuse, Dependency, and Neglect—permanency planning—reunification efforts ceased—reasonableness of efforts by social services

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—there was sufficient evidence to support the trial court's determination that the department of social services (DSS) made reasonable efforts toward reunification with the grandmother, including offering assistance to obtain and pay for court-ordered mental health services, which the grandmother rejected. Where the court gave DSS discretion to expand the grandmother's visitation time beyond the minimum amount ordered by the court, the decision of DSS not to expand visitation was not unreasonable based on the grandmother's problematic behavior during existing visitation, including talking about the case in front of the children and asking if they wanted to come home.

Appeal by Respondent Grandmother from Order entered 2 June 2023 by Judge Larry D. Brown, Jr., in Alamance County District Court. Heard in the Court of Appeals 2 April 2024.

Jamie L. Hamlett for Petitioner-Appellee Alamance County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for Respondent-Appellant Grandmother.

Matthew D. Wunsche for Guardian ad Litem.

HAMPSON, Judge.

Factual and Procedural Background

This case arises from Respondent-Grandmother's (Grandmother) appeal from the trial court's Permanency Planning Order ceasing reunification efforts and endorsing a primary plan of adoption with a secondary plan of guardianship. The record reveals the following:

In 2020 Holly, Thomas, and Mary,[1] respectively four years old, three years old, and an infant at that time, were originally adjudicated neglected due to their mother's substance abuse and domestic violence between their parents. Grandmother is the paternal grandmother of the children. Following the original adjudication, the trial court granted Grandmother full legal and physical custody of Thomas. In 2021, the trial court granted Grandmother and the children's father (Father) joint custody of Holly and Mary. When granting custody, the trial court found that Grandmother had been essentially the children's parent for the majority of their lives and had a strong bond with her grandchildren. The children lived in Grandmother's home with Father and their paternal great uncle (Uncle).

In July 2021, Holly began experiencing discomfort and itching around her stomach, vaginal discharge, and the frequent need to urinate. On 4 August 2021, Holly tested positive for gonorrhea. Father subsequently tested positive for gonorrhea. Father denied allegations of sexual abuse, attempting to explain Holly's infection by speculating that transmission could have occurred through a towel or toilet seat. On 7 August 2021, the Alamance County Department of Social Services (DSS) received the report of Holly's positive test and gave Grandmother the option for the children to stay in the family home only if Father and Uncle would not be present. Grandmother had the children placed with a family friend because she did not want Father or Uncle to be "without entertainment" and "without cable."

Grandmother denied the possibility of sexual abuse. On 9 August 2021, without consulting DSS, Grandmother picked the children up from the family friend and took them to UNC Hospital for medical testing. She told medical staff she wanted the children tested for "venereal diseases" because she believed Holly's gonorrhea test was inaccurate and she wanted to clear the names of the men in the household.

During this examination, Holly presented with "redness, swelling, and abnormal discharge" in the vaginal area and again tested positive for gonorrhea. Mary also presented with abnormal discharge, but neither

1. The juveniles are referred to by the parties' stipulated pseudonyms.

she nor Thomas tested positive for any sexually transmitted diseases. After the examinations, DSS instructed hospital staff to release the children to the family friend, not Grandmother, who had become uncooperative and was detained by UNC police.

On 10 August 2021, DSS filed petitions alleging the children were neglected juveniles and Holly was an abused juvenile. The petitions alleged Grandmother was "persistent that nobody hurt the children and was in denial regarding [Holly] having [g]onorrhea." The petitions further detailed DSS's concerns that Grandmother was "not placing the physical or emotional well-being of the juveniles first" and that the children were "at risk of significant emotional and/or physical harm" if they were returned to Grandmother's care.

Holly submitted to a forensic interview in August and a subsequent Child Medical Evaluation in September 2021. During these interviews, she stated "Daddy hit me" and pointed to her vaginal area when asked where he hit her. She also stated that her father had touched her with his "ding ding," and that he had touched her genitals.

The trial court adjudicated all three children neglected and Holly abused in an order filed 16 February 2022.[2] Grandmother testified at the adjudication hearing that she believed that Holly had contracted gonorrhea from a toilet seat or towel and that she did not believe that Father had abused Holly. Based on expert testimony the trial court rejected Grandmother's explanations for Holly's contraction of gonorrhea, finding that Holly had been sexually abused by Father.

The trial court placed the children in DSS custody. It ordered monthly visitation with Grandmother and instructed her not to speak with the children about the issues involved with the case. The trial court did not at this time order Grandmother to participate in treatment or parental education.

That same month DSS developed a case plan and visitation plan for Grandmother. In the case plan, DSS requested that Grandmother obtain a mental health assessment, refrain from using illicit substances, and attend sex abuse classes. Grandmother signed the visitation plan but refused to sign her case plan as she did not believe she had done anything wrong. She completed the Darkness to Light online sexual abuse

2. The previous appeal in this case, *In re M.G.B.*, 287 N.C. App. 694, 883 S.E.2d 226, 2023 WL 2126139 (2023) (unpublished) addressed Father's appeal of the adjudications of Thomas and Mary. We affirmed the trial court's adjudication that they were neglected.

class on 22 March 2022, but she told social workers she had not learned anything because the course did not contain information that was new to her. Grandmother's visitation with the children during this period went well. The social workers noted that she brought them food and gifts, that she interacted well with the children, and the children seemed to love Grandmother.

On 30 March 2022, Grandmother received a psychological assessment, performed by her own therapist at the UNC Health Pain Management Center. As part of this assessment, the therapist addressed various questions provided by DSS. The assessment notes that Grandmother suffers from depression and anxiety and, though she has a history of sexual trauma and was likely triggered by Holly's diagnosis, the therapist did not believe her psychological disorders impacted her ability to care for the children. However, she did note her belief that Grandmother's trust in her son impacted her ability to examine facts. The report also notes that Grandmother was "defensive," felt that she was the victim in this situation, and continued to believe that Holly had contracted gonorrhea through contact with a toilet seat. The therapist recommended that Grandmother continue working with her via outpatient therapy sessions.

The trial court held a permanency planning hearing on 13 April 2022. It found that Grandmother "continues to deflect and minimize," "support[s] her son's narrative" and "assert[s] herself as the victim." At the hearing she "verbally attacked and blamed" the social worker involved with the children's removal, stating that he was the reason the children were removed.

The trial court reviewed the psychological examination report and found concerns regarding its usefulness. Among the trial court's concerns were that the report had been conducted by a pain management clinician, focused primarily on pain management, and was performed by a clinician who had a longstanding relationship with Grandmother. The trial court was also concerned that the therapist did not have sufficient information to make the assessment: she only spoke with Grandmother and did not indicate that she had reviewed any documentary evidence regarding the case. Grandmother did not inform the therapist that her son had been criminally charged or that the trial court had found that Holly had contracted gonorrhea through sexual contact and, instead, allowed her to believe an investigation was pending, possibly impacting her ability to make an educated diagnosis and treatment plan given Grandmother's continuing denial that sexual contact had occurred.

The trial court found that Grandmother was acting in a manner inconsistent with the health and safety of the juveniles, but was making sufficient progress under her plan.[3] It endorsed a primary plan of reunification and a secondary plan of guardianship, and ordered that Grandmother attend sex abuse classes or support groups, "receive an assessment to address issues of sexual abuse concerns," receive therapy on how to parent a child who has been sexually abused, and that she receive a new psychological evaluation.

Between this and the next permanency planning hearing, Grandmother received two psychological evaluations, each recommending, among other things, that Grandmother incorporate Dialectical Behavioral Therapy ("DBT") into her treatment. She visited the children monthly, as allowed by the trial court, bringing them food and toys. She continued to deny that sexual abuse had occurred, including reporting to a social worker that she did not believe her son had done anything wrong.

A second permanency planning hearing was held on 30 November 2022. The court found that Grandmother remained an unsafe caretaker for the children because she continued to refuse to acknowledge the likelihood that her son assaulted Holly. The court ordered a primary plan of adoption and a secondary plan of reunification. The trial court ordered Grandmother cooperate with the recommendations of the two new evaluations and again ordered her to attend sex abuse classes or support groups.

Between that hearing and the permanency planning hearing from which this appeal arises, held on 26 April 2023,[4] Grandmother did not undergo DBT as ordered. She testified that she contacted numerous providers but was unable to pay for their services as they did not accept her health insurance. She initially rejected offers from DSS to assist in paying for her treatment before ultimately attending two intake sessions with a therapist. This therapist determined that Grandmother did not require DBT services, but made that assessment without reviewing prior assessments, documentation, or court filings, relying only on information provided by Grandmother.

At the hearing, Grandmother testified that she continued to believe Holly had contracted gonorrhea through contact with a toilet seat

3. Mother and Father remained parties to the juvenile case and at this and subsequent permanency planning hearings were found to have made insufficient progress until their parental rights were terminated in April 2023. Neither are party to this appeal.

4. Mother's and Father's parental rights were terminated on 21 April 2023.

and that if a jury convicted her son she would still not believe he had harmed Holly.

The trial court found that Grandmother failed to obtain DBT services, had not participated in educational training, parenting courses, or support groups to help her parent a child who had been neglected or sexually abused, and that her refusal to accept that Father had abused Holly restricts her ability to render safe and appropriate decisions on behalf of the minor children. The court found that Grandmother had failed to make progress in a reasonable period of time and ordered a primary plan of adoption and secondary plan of guardianship, ceased reunification efforts with Grandmother, and eliminated visitation. Grandmother filed timely written notice of appeal.

Issues

Grandmother identifies a number of issues for our review. Accordingly we address: (I) the trial court's findings of fact regarding aspects of Grandmother's progress on her case plan; (II) the trial court's alleged misapprehensions of law in finding an inapplicable ground for termination and placing the burden of proof upon Grandmother; (III) the trial court's conclusion that reunification should be removed from the permanent plan; (IV) whether the guardian ad litem properly discharged its duties; and (V) whether DSS made reasonable efforts toward reunification.

Analysis

Following a juvenile adjudication and initial disposition, the trial court holds a permanency planning hearing within 90 days and then subsequent hearings at least every six months. N.C. Gen. Stat. § 7B-906.1(a) (2023). At each permanency planning hearing, the trial court must adopt concurrent primary and secondary permanent plans, most commonly selecting from among reunification of the juvenile with their parents, adoption, guardianship with relatives or others, or custody to a relative or other suitable person. *In re J.M.*, 384 N.C. 584, 593, 887 S.E.2d 823, 829 (2023); N.C. Gen. Stat. § 7B-906.2. Reunification must be the primary or secondary plan unless the permanent plan has been achieved or the trial court (1) made written findings specified by N.C. Gen. Stat. § 7B-901(c) at the initial disposition hearing; (2) made written findings under 7B-906.1(d)(3) at a review hearing or earlier permanency planning hearing; or, as in this case, (3) makes written findings in the permanency planning order that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b). The written findings are not required to track the

statutory language verbatim, but they "must make clear that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *J.M.*, 384 N.C. at 594, 887 S.E.2d at 830 (quoting *In re H.A.J.*, 377 N.C. 43, 49, 855 S.E.2d 464, 470 (2021)).

In this case, the trial court found that reunification efforts with Grandmother "clearly would be unsuccessful and would be inconsistent with the juveniles' health or safety." In support of this conclusion, it found that Grandmother had failed to meet the children's needs by not participating in services to help her address Holly's sexual abuse, refusing to believe abuse had taken place, failing to cooperate with or follow recommendations of her psychological evaluations, and engaging in inappropriate conversations in the presence of the children.

Grandmother argues that she made sufficient progress on her case plan such that the trial court's conclusion that reunification would clearly be unsuccessful is unsupported. In doing so she challenges the trial court's conclusions, as well as a number of individual factual findings.

When reviewing a permanency planning order, we examine "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 A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) (citing *In re H.A.J.*, 377 N.C. at 49, 855 S.E.2d at 469). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* Uncontested findings of fact are binding on appeal. *Id.* "The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *Id.* at 410, 861 S.E.2d at 825-26.

I. Factual findings

[1] Grandmother contests a significant portion of the trial court's findings of fact but groups her arguments into five primary categories. She argues that the evidence does not support the trial court's findings that she: (1) did not complete DBT therapy or mental health services; (2) did not complete a sex abuse education class; (3) cannot see reality, cannot admit her son abused Holly, and prioritizes herself and her son over her grandchildren; (4) has not disengaged from her son; and (5) acted inappropriately during visitation. Grandmother argues that she "basically complied" with the court's orders to complete a mental health evaluation, attend therapy, and attend a sex abuse education class. Our review of the record on appeal shows that the trial court's relevant findings of

fact were supported by testimony and other evidence and support its conclusion that Grandmother has failed to make reasonable progress and its elimination of reunification as a permanent plan.

A. Therapy

Grandmother argues that the evidence did not support a finding that she did not complete mental health services as directed in the court's previous permanency planning orders. She argues that she continued to engage in therapy with her regular therapist and that while she never engaged in Dialectical Behavior Therapy (DBT), her failure to do so was not willful. A review of the obligations imposed by the trial court's orders and Grandmother's efforts to fulfill those obligations is helpful in evaluating the trial court's findings.

In its 16 February 2022 order adjudicating the children abused and neglected, the trial court declined to order Grandmother to participate in mental health treatment. However, DSS developed a case plan in which it requested that Grandmother, among other tasks, obtain a mental health assessment. Though she refused to sign the case plan, she submitted to her first psychological assessment on 30 March 2022, performed by her regular therapist at the UNC Health Pain Management Center. The trial court reviewed this assessment at the 13 April 2022 permanency planning hearing, finding that she had withheld key information from the assessor and ordering that she undergo another evaluation.

Grandmother underwent two subsequent evaluations. The first was conducted in sessions throughout July and August 2022. She underwent a second evaluation in October 2022 as she requested to have her own assessment completed. Each of these evaluations included interviews, psychological testing, and the review of documentary records including court documents from this case. The first evaluation recommended that Grandmother initiate counseling services with a provider experienced in working with personality disorders and noted that Grandmother may benefit from incorporating DBT into her treatment "to help her learn how to perceive things accurately and regulate strong emotions." The second recommended that Grandmother engage in DBT "to improve her interpersonal effectiveness, emotion regulation, distress tolerance, and ability to focus on current environment." Each recommended that the DBT therapist be given a copy of the respective assessments. The trial court reviewed these evaluations during the 30 November 2022 permanency planning hearing and ordered that Grandmother cooperate with the recommendations made in both reports.

Grandmother testified that she attempted to secure DBT, contacting "probably over 40 different people, institutions," but was unable to secure treatment because none of those providers accepted her health insurance. She ultimately located a DBT provider and underwent an assessment. In an email to DSS, this DBT provider explained that she was not qualified to conduct a "clinical forensic evaluation," which would involve examining past assessments and evaluating the subject over time. Instead, she conducted a "clinical mental health assessment," which did not involve a review of outside documents and was meant to establish "a picture of the client as they present at the time of the assessment." Under these parameters, the provider found that Grandmother did not meet criteria for any diagnosis in the DSM-5 and did not recommend follow-up DBT treatment.

While Grandmother's argument touches on several of the trial court's enumerated factual findings, she ultimately contests the trial court's finding that she "knowingly, willfully and intentionally refused to get DBT services designed to assist her." It is undisputed that Grandmother never obtained DBT as recommended in both evaluations. However, Grandmother argues that her failure to undergo DBT was not willful, but rather the result of financial difficulties.

At the hearing, the DSS supervisor acknowledged that Grandmother's insurance and financial resources had been an obstacle to obtaining DBT, but detailed the department's efforts to help her arrange therapy. In particular, DSS located a provider who offered services at $40 per session. Grandmother testified that she could not afford this provider for two sessions per month, even with DSS paying half the cost.

The trial court considered Grandmother's testimony and rejected her claim that she could not afford these services. It noted that these costs were low with DSS assistance and that Grandmother continued to pay for cable television. Additionally, the DBT provider Grandmother chose for her assessment charged $100 per hour before DSS assistance. Because evidence supports the trial court's finding that Grandmother could afford DBT, we are bound by that finding. *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) ("If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal.").

Nor did Grandmother's evaluation by the DBT provider satisfy her obligation. Both of Grandmother's evaluations recommending DBT explicitly recommended that the provider be given a copy of those evaluations, and the trial court ordered they be provided to give the DBT practitioner all information relevant to assessing and diagnosing

Grandmother. These assessments were made with the assistance of court filings and included information about Grandmother's denial of any sexual abuse by Father despite the trial court's finding that abuse had occurred—facts that Grandmother had previously failed to disclose in her first psychological evaluation that the trial court found insufficient. Receiving a DBT assessment that did not include a review of these evaluations did not discharge Grandmother's obligation to seek out DBT.[5]

B. Disengaging from Grandmother's relationship with Father

The trial court found that Grandmother had failed to disengage from her relationship with her son. The October 2022 psychological assessment recommended that Grandmother "disengage from [Father] in order to show that she is willing to put the needs of her grandchildren over her need to keep an open mind about [his] guilt or innocence." The recommendations of Grandmother's psychological evaluations were incorporated into the 26 January 2023 permanency planning order.

By her own admission, Grandmother has not disengaged from Father:

> Q: Do you have—do you have any kind of communication with your son?
>
> A: Yeah, I speak to him every now and then, yeah.
>
> Q: Okay. Do you talk about this case?
>
> A: He doesn't really like to talk about the case, because he hadn't seen his children in so long, and it's stressful.
>
> . . .
>
> Q: You have not disengaged from [Father,] have you?
>
> A: No, my son hasn't even been to criminal court yet. And I know this is a different court, but at this point, it's looking like we weren't even gonna get the kids anyway, so it didn't matter.

Grandmother argues that the directive is too vague, particularly because the court only ordered that she "cooperate with the

---

5. Grandmother argues "the evidence is clear that [the DBT provider] would not accept [outside documents]" and that Findings of Fact 69 and 76, finding that "[Grandmother] had not provided [the DBT provider] with the two psychological assessments that the Court had given permission to release to the provider" must therefore be struck. It is uncontested that Grandmother did not provide the DBT provider with outside documentation. We disagree that these findings imply that Grandmother refused to provide documents to a provider who would otherwise review them and decline to strike the findings.

recommendation of the Psychological evaluation[s]," rather than explicitly ordering that she disengage from Father, and only one of her evaluations included that recommendation. She cites caselaw addressing requirements of clarity in court orders. *Nw. Bank v. Robertson*, 39 N.C. App. 403, 411, 250 S.E.2d 727, 731 (1979); *Spears v. Spears*, 245 N.C. App. 260, 284, 784 S.E.2d 485, 500 (2016) (citing *Morrow v. Morrow*, 94 N.C. App. 187, 189, 379 S.E.2d 705, 706 (1989) ("A judgment must be complete and certain, indicating with reasonable clearness the decision of the court, so that such judgment may be enforced.")). But Grandmother does not appear to be confused by the trial court's directive: when asked if she had disengaged from her son she answered that she had not and testified as to the topics of their conversations.

Moreover, we do not believe these cases, which address final judgments being rendered void for uncertainty, are apposite to this context. Even if Grandmother were not ordered to disengage from her relationship with Father, choosing to maintain communication with the man who sexually abused a child is relevant to the trial court's decision to allow reunification with that child and her siblings. "In choosing an appropriate permanent plan . . . the juvenile's best interests are paramount." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015). "The court may consider any evidence . . . 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). Grandmother's admitted maintenance of an ongoing relationship with Father, despite the recommendation of her mental health evaluation, is relevant to the determination of the children's best interests.

This failure to disengage is particularly relevant given that the court's primary concern with returning the children to Grandmother is her refusal to accept that Father sexually abused Holly. Whether or not the trial court clearly ordered her to disengage, continuing to associate with Father is an important consideration in determining if Grandmother can safely parent the children. The trial court did not err in finding that Grandmother failed to disengage from her relationship with Father.

C. Sex abuse education

Grandmother argues that the trial court's findings related to her failure to complete sex abuse education are unsupported. The trial court found that Grandmother had failed to follow the recommendations of her psychological evaluations by refusing to seek educational opportunities to learn about parenting a child who has been the victim of sexual abuse. It also found that she had "never participated" in such parenting

courses or related support groups and that she failed to obtain education on parenting "children who have been exposed to other environmental chaos such as parents with a substance abuse problem by participating in support groups or non-offender's education."

Grandmother argues that her completion of the Darkness to Light online course renders these findings unsupported. We agree, to the extent that the trial court found that Grandmother had never participated in parenting courses. However, after her completion of that course, the trial court continued to order that she seek out additional educational opportunities, which she did not do.

Grandmother presented her certificate of completion of the Darkness to Light course on 22 March 2022, following the children's adjudication. In the following permanency planning order, the trial court recognized her completion of this class and noted that she was "compliant" with the DSS recommendation, but still ordered that she "attend sex abuse classes/support groups and receive an assessment to address issues of sexual abuse concerns." Both of Grandmother's psychological evaluations, each performed after her completion of the Darkness to Light course, recommended that she receive additional education regarding parenting a child who has been sexually abused. The next permanency planning order also recognized Grandmother's completion of Darkness to Light, but noted her as only partially compliant with this DSS recommendation and again ordered she attend sex abuse classes. It is clear that the trial court found Grandmother's completion of Darkness to Light insufficient, as she stated she did not gain any knowledge from the class, and it ordered her, as recommended by DSS and her psychological evaluators, to obtain additional education and counseling. Grandmother does not argue that she did so.

To the extent that the trial court found that Grandmother had completed no sex abuse education, those findings are struck. Its findings that she did not obtain additional education as ordered are, however, supported by competent evidence.

D. Ability to see reality

Grandmother contests the court's findings regarding her ability to see reality. The trial court found that Grandmother's refusal to believe that Father abused Holly "calls into question [her] ability to face reality." It found that she refused to believe "any problem exists in this case," that she would prioritize Father's needs over the children and allow him to have contact with the children, demonstrated a lack of rational

judgment, and generally that her testimony indicated she chose to see things as she would like them to be, rather than recognizing reality.

Grandmother argues that "there was no testimony at the hearing that [she] had problems seeing reality" and that one of Grandmother's psychological evaluations stated that she "appears to have good reality testing." This argument ignores the fact that the trial court's findings are based entirely on Grandmother's consistent refusal to accept the possibility that Father sexually abused Holly. From Holly's initial diagnosis through the final permanency planning hearing, where Grandmother testified that she believed Holly contracted the disease from a toilet seat, that she had gonorrhea "bacteria" but not an infection, and that she would not believe Father had abused Holly even if he were convicted by a jury, Grandmother has rejected the overwhelming evidence of Holly's abuse in favor of unsupported conjecture. The trial court's finding that Grandmother refuses to accept the reality of Holly's abuse is supported by the evidence.

Grandmother also argues that, because she testified that she would still keep Father away from the children despite this belief, the trial court could not have found she could not be a safe caregiver. The trial court's concerns on that front stem not only from Grandmother's inability to accept that Father abused Holly, but because she testified that she would only keep the children away from Father because of the risk of DSS taking custody of the children—not because of the danger represented by Holly's abuser. Additionally, she had prioritized Father's needs over those of the children in the past, most notably by sending the children to live with a relative rather than having Father leave the home.

Even assuming the trial court's belief that Grandmother would allow Father to have contact with the children is unsupported, the danger to the children comes not only from that contact, but from a sexually abused child being raised by a caretaker who does not believe that she was abused and refuses to seek out education or other assistance in parenting an abused child. The trial court's findings that Grandmother would not be a safe caregiver are supported by the evidence.

E. Visitation

Finally, Grandmother contests the trial court's findings regarding her visitation with the children. Grandmother's visitation with the children was indeed largely positive: DSS observed that Grandmother brought the children toys and food, and she got along with the children well. However, the trial court found that Grandmother engaged in conversations with the children about returning home and also spoke to the social worker about the unfairness of the case. These findings were

supported by the testimony of the DSS supervisor. The children were present on at least one occasion during which Grandmother asked the supervising social worker a question about the case.

Grandmother argues that the evidence does not support the trial court's finding that her visitation was inappropriate because the majority of the evidence shows that her interactions with the children were appropriate and enriching. But the trial court's findings were supported by evidence of specific inappropriate conversations with the children or the supervising social worker. The trial court did not err in making these findings.

II. Misapprehensions of law

Grandmother argues that the permanency planning order in this case was insufficient to support the cessation of reunification as a permanent plan because the trial court misapprehended the law. She argues first that the trial court erred by finding a ground for termination of parental rights, which is inapplicable to the permanency planning process, and second that the trial court inappropriately placed an evidentiary burden upon her.

A. Termination ground

[2] Grandmother's argument that the trial court erred by finding an inapplicable termination ground rests in the language used in one of its Findings of Fact. Finding of Fact 122 states:

> [Grandmother's] actions have resulted in the abuse and/or neglect of the minor children [within] the meaning of 7B-101. The children would be at a substantial risk of repetition of abuse and/or neglect if returned to her care now or in the foreseeable future. [Grandmother] has shown this Court her son is her main priority and not the well-being of these Minor Children.

Grandmother argues that this finding reflects the statutory language of the "neglect" ground for terminating parental rights. She seems to argue that the court in effect issued a ruling terminating her parental rights, in a misapprehension of its role at the time without safeguards inherent to the termination process, such as the application of a clear and convincing evidentiary standard. N.C. Gen. Stat. § 7B-1109(f).

It is unclear from Grandmother's briefing which part of this finding is "language directly related to the neglect termination ground," but there appear to be two possibilities.

The first is the trial court's citation of the statutory definitions of abuse and neglect under Section 7B-101, as those definitions are incorporated into our termination statute:

> The court may terminate the parental rights upon a finding . . . the parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a). However, the use of Section 7B-101's definitions of abuse and neglect does not imply that the trial court was applying standards more appropriate for a termination context. Section 7B-101 provides definitions for terms used throughout the entirety of the Abuse, Neglect, and Dependency Subchapter of our Juvenile Code. N.C. Gen. Stat. § 7B-101 ("As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings[.]"). Among other terms, this section defines "abused juvenile" and "neglected juvenile" for use throughout the entire Subchapter, including abuse, neglect, and dependency adjudications. *See*, *e.g.*, *In re K.L.*, 272 N.C. App. 30, 39, 845 S.E.2d 182, 190 (2020) (citing § 7B-101(1) to define "abused juvenile" when reviewing the adjudication of a minor).

It is also possible that Grandmother takes issue with the trial court's finding that "[t]he children would be at a substantial risk of repetition of abuse and/or neglect if returned to her care now or in the foreseeable future" as language too similar to that used in termination proceedings. In order to terminate parental rights upon the ground of neglect, a trial court must "consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect" and may find the neglect ground if the evidence shows "a likelihood of future neglect by the parent." *In re M.S.E.*, 378 N.C. 40, 48, 859 S.E.2d 196, 205 (2021). But just because the likelihood of future neglect or abuse is relevant to the termination of parental rights does not render it *irrelevant* to a permanency planning ruling, nor does the trial court's consideration of such imply that the trial court is applying an improper standard to its analysis. During a permanency planning hearing, the task of the trial court is to adopt the permanent plans the court finds are in the juvenile's best interest. N.C. Gen. Stat. § 7B-906.2(a). The possibility that a neglected juvenile faces a substantial risk of future neglect upon reunification is a relevant consideration in determining whether reunification is appropriate.

In order to eliminate reunification as a permanent plan, the trial court was required to make written findings "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) "As part of that process, the trial court is required to make written findings 'which shall demonstrate the degree of success or failure toward reunification[.]' " *In re L.E.W.*, 375 N.C. 124, 129, 846 S.E.2d 460, 465 (2020) (citing N.C. Gen. Stat. § 7B-906.2(d)). These findings include:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d). The trial court does not need to make a verbal recitation of the statutory language, but "the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013).

Here, the trial court's order reflects that it made this consideration. It found facts as to each of the Section 906.2(d) factors: that Grandmother remained available to the court, but that she was not participating or cooperating with the plan, nor was she making progress, and was acting in a manner inconsistent with the health and safety of the children. Each of these findings was supported by evidentiary findings, including those regarding her failure to undergo DBT, attend classes on parenting victims of sexual abuse and, most importantly, her refusal to acknowledge the fact that her son had sexually abused Holly. There is no indication the trial court applied an inappropriate standard to its analysis.

Grandmother's own briefing, in its argument on a separate issue, acknowledges the overlapping considerations between termination and permanency planning, identifying our Supreme Court's reliance on termination precedent to affirm an order ending reunification efforts because "[i]t stands to reason that evidence sufficient to support the

termination of parental rights is sufficient to support the less dramatic step of removing reunification from a permanent plan." *In re J.M.*, 384 N.C. at 602, 887 S.E.2d at 835. The trial court properly addressed the considerations required to end reunification efforts and did not err by considering the possibility of future neglect when determining the best interests of the children.

B. Burden shifting

[3] Grandmother also argues that the trial court impermissibly placed the burden of proof upon her at the permanency planning hearing. During a permanency planning hearing, the court is tasked with determining the best interest of the child. N.C. Gen. Stat. § 7B-906.2(a). Accordingly, "neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings." *In re E.A.C.*, 278 N.C. App. 608, 617, 863 S.E.2d 433, 439 (2021).

In one of its Findings of Fact, the trial court found:

> [Grandmother] failed to obtain educational courses for parenting "children who have been exposed to other environmental chaos such as parents with a substance abuse problem by participating in support groups or non-offender's education." [Grandmother] is unable to provide this Court with any proof she is in a better position than she was over a year and a half ago concerning raising a child who has been sexually abused and how to provide them with the care and services "they need to ensure their emotional wellbeing." [Grandmother] has not provided any evidence to this Court that she is better positioned now, than a year ago, to help these minor children deal with the trauma they have faced in their lives.

We disagree that the trial court's language here implies that a burden of proof was placed on Grandmother. While the wording is perhaps inartful, it is clear from the context of this finding that the trial court did not place a burden on her. First, the trial court's finding that Grandmother had not provided evidence that she is "better positioned" is in the same paragraph as the finding that she had not obtained educational resources to enable her to parent vulnerable children. This is part of determining whether Grandmother "is making adequate progress within a reasonable period of time under the plan." N.C. Gen. Stat. § 7B-906.2(d)(1). The trial court ordered Grandmother in its two previous permanency planning orders to seek out additional educational

resources to assist her in parenting the children. This finding simply acknowledges that she has not done so.

Second, this paragraph is one of the trial court's 124 Findings of Fact detailing the history of the case and Grandmother's participation in it. These findings make clear that the trial court weighed the evidence before concluding that the reasons for the children's removal still existed and that Grandmother had not made sufficient progress in creating a safe environment such that reunification was in the children's best interest. Following each of the three previous hearings—the dispositional hearing and the two prior permanency planning hearings—the trial court determined that the children were not safe in Grandmother's home because of her unwillingness to accept that Holly had been abused or to participate in education or therapy that would aid in parenting abused or neglected children. The trial court is, in this finding and others, recognizing that sufficient improvement has not been made that would now render the home safe for the children where before it was not.

III. Removal of reunification from permanent plan

[4] Grandmother argues that she substantially complied with her case plan and that the trial court narrowly focused on a handful of issues, ignoring her overall progress, and erred in ordering the cessation of reunification efforts. We review the trial court's elimination of reunification from the permanent plan for abuse of discretion. *In re J.H.*, 373 N.C. 264, 267-68, 837 S.E.2d 847, 850 (2020). A trial court abuses its discretion when its ruling is so arbitrary it could not have been the result of a reasoned decision. *Id.*

The trial court's binding findings of fact show that Grandmother failed to make sufficient progress on her case plan. It is true that her visitation with the children was largely positive, she maintained her ongoing therapy sessions with the therapist at her pain management clinic, completed the Darkness to Light program, and took at least an initial step to be evaluated for DBT. However, she failed to make use of the DBT resources provided by DSS to find a provider in compliance with the trial court's orders, seek out adequate education or support in parenting a child who is the victim of sexual abuse, or disengage from her relationship with Father.

Most importantly, Grandmother continues to insist that Father never sexually abused Holly. This standing alone could be enough to support the trial court's order ceasing reunification. In *In re G.D.C.C.*, our Supreme Court reviewed a similar situation. 380 N.C. 37, 867 S.E.2d 628 (2022). In that case the mother refused to believe her older daughter,

Nadina, had been sexually abused by her father. 380 N.C. at 41-42, 867 S.E.2d at 631. The mother maintained that Nadina was making up the allegations, refused to believe she had been sexually abused, and consistently failed to acknowledge her children's special needs resulting from the abuse. *Id.* She also failed to demonstrate any ability to recognize threats to her younger daughter, Galena, despite completing her case plan in its entirety. *Id.* Much like Grandmother in this case, she "failed to acknowledge any concern with her ability to parent and protect the children, failed to accept any responsibility for her actions, and continued to deny that she had done anything wrong." *Id.* "After years of professional, court, and DSS involvement, the issues that led to Galena's removal remained: respondent still could not protect her children from threats and thus could not provide them an environment that was not injurious to their welfare." *Id.* at 42, 867 S.E.2d at 632. Our Supreme Court held this was sufficient for the trial court to find a probability of future neglect and terminate the mother's parental rights to Galena, regardless of the fact that she had completed her case plan. *Id. See also In re D.W.P.*, 373 N.C. 327, 339–40, 838 S.E.2d 396 (2020) (holding that the respondent-mother's inability to recognize and break patterns of abuse by her fiancé against her child supported a neglect determination, despite the progress made in her parenting plan).[6]

As in those cases, Grandmother refuses to recognize that Holly was the victim of abuse. Despite overwhelming evidence, she rejected the trial court's determination that sexual abuse had occurred and continued to assert, including in her testimony at the final permanency planning hearing, that Holly had contracted gonorrhea from a toilet seat and the misunderstanding that she "had the bacteria but not the infection." Although she claims she would not allow Father access to the children because of the risk DSS would retake custody of them, it is clear that she does not understand or admit the danger Father represents or the harm he has already caused. Like the respondents in *G.D.C.C.* and *D.W.P.*, whatever progress Grandmother has made on her case plan has not been sufficient to allow her to provide a safe home for the children. Additionally, Grandmother has failed to complete aspects of her plan, including obtaining DBT and sexual assault education, designed to help her do so.

The trial court did not abuse its discretion in ordering that reunification efforts be ceased.

---

6. As discussed above, although both *G.D.C.C.* and *D.W.P.* are cases involving the termination of parental rights, evidence sufficient to support termination is also sufficient to support an order ceasing reunification efforts. *In re J.M.*, 384 N.C. at 602, 887 S.E.2d at 835.

IV. GAL Investigation

[5] Grandmother argues that the guardian ad litem ("GAL") failed to adequately perform its duties. Grandmother does not appear to have raised this issue before the trial court. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1). In her reply brief, Grandmother does not argue that this issue was raised, but that it is automatically preserved because it stems from a statutory mandate.

"[W]hen a trial court acts contrary to a statutory mandate . . . the right to appeal the court's action is preserved." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Such mandatory statutes are "legislative enactments of public policy which require the trial court to act, even without a request to do so[.]" *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988). This exception to the preservation requirement of Rule 10(a) is limited to mandates directed to the trial court either: "(1) by requiring a specific act by the trial judge; or (2) by requiring specific courtroom proceedings that the trial judge has authority to direct[.]" *In re E.D.*, 372 N.C. 111, 119, 827 S.E.2d 450, 456 (2019) (internal citations omitted) (rejecting respondent's argument that inpatient commitment statute's directive that respondent be examined by a physician upon arrival at 24-hour facility is an automatically preserved statutory mandate). In the second category, the statute must leave "no doubt that the legislature intended to place the responsibility on the judge presiding at the trial." *Id.* at 121, 827 S.E.2d at 457 (citing *Ashe*, 314 N.C. at 35, 331 S.E.2d at 657).

Under N.C. Gen. Stat. § 7B-601(a):

> The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

This is a directive to the GAL and does not appear to mandate that the trial judge perform a specific act or direct a courtroom proceeding. The trial court is directly tasked only with appointing the GAL to represent the juvenile. The statute narrates the GAL's responsibilities, rather than making an explicit command to the trial court such as mandating written findings as to the GAL's performance.

However, we have held previously the combination of N.C. Gen. Stat. § 7B-906.1(c), which requires the trial court at a permanency planning hearing to consider information from the GAL, and N.C. Gen. Stat. § 7B-601(a), which lists the GAL's duties, to create a statutory mandate automatically preserving the right of appeal on this issue. *In re J.C.-B.*, 276 N.C. App. 180, 192, 856 S.E.2d 883, 892 (2021). This is in keeping with the best interest of the children as the paramount goal of permanency planning and our observation that the best interest question is "more inquisitorial in nature than adversarial," rendering the production of any competent, relevant evidence ultimately the responsibility of the trial court. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992).

[6] Upon the filing of a petition alleging a juvenile is abused or neglected, the trial court must appoint a guardian ad litem to represent the juvenile. N.C. Gen. Stat. § 7B-601(a). The guardian ad litem "stands in the place of the minor who is not *sui juris*," *In re J.H.K.*, 365 N.C. 171, 175, 711 S.E.2d 118, 120 (2011), and is tasked with the duties under Section 7B-601(a) noted above, including investigating to determine the facts and the needs of the juvenile and protecting and promoting the juvenile's best interests. The GAL's representation of the juvenile's interests is integral to the process such that the failure to appoint a GAL creates a presumption of prejudice requiring reversal. *In re R.A.H.*, 171 N.C. App. 427, 431, 614 S.E.2d 382, 385 (2005). Failure by the GAL to fulfill their statutory duties may also require reversal. *See In re J.C.-B.*, 276 N.C. App. at 192, 856 S.E.2d at 892.

In this case, the GAL filed written reports with the trial court at the adjudication hearing and each of the three subsequent permanency planning hearings. These reports reflect that the GAL volunteer conducted monthly visits with the children at their foster home and additional monthly phone calls with their foster parents. They include detailed information concerning the health and well-being of the children, including their psychological and physical health, their educational development, their relationships with their foster parents and each other, and their wishes regarding remaining in the foster home. In its report to the court prior to the permanency planning hearing that is the subject of this appeal, the GAL recommended the court adopt a

primary permanent plan of adoption and a secondary permanent plan of guardianship.

Grandmother's criticism of the GAL's performance stems from two primary concerns: first, that the GAL did not maintain adequate communication with Grandmother, and second, that the GAL did not sufficiently investigate the children's wishes.

Grandmother notes that the GAL maintained contact with her following the initial adjudication and placement of the children in her home but argues that the GAL's contact with her was inadequate once the children were removed from her care following the filing of the petition in August 2021. After the petition was filed, the GAL spoke with Grandmother by telephone twice and had no other contact with her.

Beyond Section 7B-601(a)'s listing of the duties of the GAL, we have little guidance as to what constitutes sufficient investigation. Grandmother directs us to the GAL Attorney Practice Manual published by our Administrative Office of the Courts, which instructs GAL volunteers to "interview parents and family members." In *R.A.H.* we held there was a presumption of prejudice when a GAL was not appointed prior to a termination hearing as that meant no field investigation had been performed, and neither the child nor the respondent-mother had been interviewed prior to the hearing. 171 N.C. App. at 431, 614 S.E.2d at 385 (2005).

Unlike in that case, the GAL here not only had consistent contact with the children but spoke with Grandmother: twice by phone following the removal of the children from her home, and, as Grandmother describes, on numerous occasions prior to that. These included at least three home visits during which the GAL had the opportunity to see Grandmother interact with the children. The GAL also had access to DSS reports noting that Grandmother's visitation with the children was largely positive.

Moreover, Grandmother makes no argument as to the effect additional contact with her would have had on the GAL's determination of the children's best interests, and we cannot identify any way its recommendation was prejudiced by the lack of additional conversation. More contact would not have changed the fact that Grandmother, as the GAL flags for the trial court's attention, "continues to contest the allegations in the petition" and "stated under oath during the recent TPR hearing that she believed [Holly] contracted gonorrhea by sliding down a toilet seat that was contaminated."

Grandmother also argues that the GAL failed to adequately investigate the children's wishes as to where they would like to live, comparing

this case to our decision in *In re J.C.-B.* "One of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court." *In re J.C.-B.*, 276 N.C. App. at 192, 856 S.E.2d at 892.

J.C.-B. is distinguishable from this case. In that case, the sixteen-year-old juvenile, Jacob's, visitation with his mother was at issue. The GAL provided the trial court with letters from therapists giving conflicting advice: two expressed the opinion that Jacob should not be allowed contact with his mother, while the most recent recommended Jacob be allowed to decide when he would like to resume visitation. *Id.* at 193-94, 856 S.E.2d at 892. The GAL did not communicate Jacob's wishes to the trial court, which ordered no visitation with the mother "until recommended by the juvenile's therapist." *Id.* at 183, 856 S.E.2d at 887. We held that the GAL had failed to adequately investigate Jacob's wishes and convey them to the trial court. *Id.* at 194, 856 S.E.2d at 893.

Rather than providing sufficient evidence for the trial court to determine whether visitation was in Jacob's best interest, the GAL simply provided the court with conflicting recommendations from therapists—including one that recommended deferring to Jacob's wishes—with no indication the GAL had asked his preference. The trial court then vested discretion in one of the therapists to determine when visitation was appropriate, meaning that not only did the GAL fail to properly investigate, but the trial court improperly delegated its authority. *Id.*

In this case, the GAL did investigate the children's wishes, finding that Holly and Thomas both loved their foster family and loved living in their foster home, and that Mary was too young to express her wishes. While Grandmother argues the GAL should have more granularly investigated whether the children wished to return to her care, we do not believe the GAL was required to do so nor do we believe that information was necessary to the trial court's decision. In *J.C.-B.* the juvenile was sixteen years old (as we note in that case, approaching the age of majority), the record reflected an expressed desire in the past to maintain contact with his mother, and one of his therapist's letters explicitly recommended that he be allowed to decide whether to resume visitation. 276 N.C. App. at 194, 856 S.E.2d at 892-93. The trial court did not have sufficient evidence to determine Jacob's visitation, information which the GAL should have conveyed.

Here, the children are significantly younger and have expressed their wishes regarding their current home. There are no conflicting recommendations by service providers requiring more detailed information from the children. The trial court had sufficient evidence to make its

ruling. Even if the children had expressed a desire to return to live with Grandmother, "[t]he expressed wish of a child of discretion is . . . never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference." *Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E.2d 129, 142 (1978). A statement from a 2-, 4-, or 6-year-old that they would like to live with Grandmother, who continues to deny that the oldest was sexually assaulted, would not have changed the trial court's decision as to the children's best interest in this case.

V. Reasonable efforts of DSS

[7] Grandmother last argues that DSS did not make reasonable efforts toward reunification in that it did not provide adequate visitation or help in obtaining DBT. Although DSS argues that Grandmother also failed to argue this issue before the trial court and preserve it for appeal, the trial court was required to make related findings and conclusions:

> Unless reunification efforts were previously ceased, at each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county department of social services were reasonable. In every subsequent permanency planning hearing held pursuant to G.S. 7B-906.1, the court shall make written findings about the efforts the county department of social services has made toward the primary permanent plan and any secondary permanent plans in effect prior to the hearing. The court shall make a conclusion about whether efforts to finalize the permanent plan were reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(c). Accordingly, we consider whether the trial court's findings of fact support its conclusion that "[t]he Alamance County Department of Social Services has made reasonable efforts to eliminate the need for removal of the juveniles[.]" *In re A.P.*, 281 N.C. App. 347, 354, 868 S.E.2d 692, 698 (2022).

"Our General Assembly requires social service agencies to undertake reasonable, not exhaustive, efforts towards reunification." *In re A.A.S.*, 258 N.C. App. 422, 430, 812 S.E.2d 875, 882 (2018). "Reasonable efforts" are the "diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18).

The trial court, in its Finding of Fact 21, found that DSS's reasonable efforts to achieve reunification included, among other services: assessing the children's needs, contacting providers, counseling and supporting the family, meeting with Grandmother to develop a service agreement and visitation plan, providing monetary assistance for the children's care, and making referrals to service providers. Grandmother does not contest this finding but argues that DSS failed to provide reasonable efforts in that it did not expand her visitation or provide adequate assistance in obtaining DBT.

In its adjudication and disposition order, filed 16 February 2022, the trial court ordered that DSS provide Grandmother with one hour of monthly visitation with the children. In its subsequent orders, filed 18 May 2022 and 26 January 2023, the trial court continued to order one hour of monthly visitation, but gave DSS discretion to increase visitation. Grandmother argues that the failure of DSS to do so, despite visitation going well was "insufficient reasonable effort toward [Grandmother's] visits with her grandchildren." Grandmother's argument ignores DSS's stated concerns about her behavior at visitation, including bringing the case up with the attending social worker and asking the children if they wanted to come home. It also ignores DSS testimony that Grandmother's visits were routinely allowed to last longer than the scheduled hour. While a failure to provide court-ordered visitation may impact a reasonable efforts determination, *see In re C.C.G.*, 380 N.C. 23, 35, 868 S.E.2d 38, 47 (2022), we do not hold that DSS exercising its discretion and declining to expand visitation beyond that required by the trial court amidst concerns about Grandmother's behavior during visits was a failure to exercise reasonable efforts toward reunification.

Grandmother's briefing also suggests offhand that the trial court improperly delegated control over visitation. However, allowing DSS to expand visitation beyond a minimum ordered by the trial court is not an impermissible delegation of judicial authority. *In re K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 591 (2020).

Nor were DSS's efforts to assist Grandmother in obtaining DBT insufficient. As discussed above, DSS contacted multiple providers on Grandmother's behalf and offered to pay for half the cost of services. While Grandmother testified that she could not afford DBT sessions as none of the suggested providers accepted her insurance and would cost a hundred dollars or more each session, DSS located a provider that would cost $40 per session and offered to pay half of that fee. The trial court rejected Grandmother's testimony that she could not afford $40 per month to attend bi-weekly sessions and found that she willfully

refused to engage in mental health treatment. DSS made reasonable efforts to assist Grandmother, but she rejected its assistance.

Conclusion

For the foregoing reasons, we affirm the trial court's permanency planning order ceasing reunification efforts.

AFFIRMED.

Judges ZACHARY and THOMPSON concur.

KAREN JONES, JONATHAN WAYNE CORN, JAN FRANKLIN CORN, AND JESSICA CORN AS MOTHER AND GUARDIAN AD LITEM OF V.E.C. AND J.R.C. (MINORS), PLAINTIFFS
v.
ALBERT HOGAN CORN, JOYCE A. CORN, KENNETH GREGORY CORN, AND GLENDA SUE CORN, DEFENDANTS

No. COA23-927

Filed 7 May 2024

1. Deeds—reformation—mistake of draftsman—legal mistake—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which two siblings (defendants) sought reformation of a deed concerning a tract of land based on their assertion that the deed did not reflect their parents' intention, the trial court did not err by denying defendants' motion for judgment notwithstanding the verdict after the jury determined that the deed did not require reformation. Despite defendants' contention that the drafting attorney made a scrivener's error, the evidence when viewed in the light most favorable to plaintiffs showed instead that the attorney made a legal error, for which reformation was not appropriate.

2. Deeds—grantor capacity—at time of signing the deeds—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that their parents lacked capacity to execute two deeds concerning their home and a separate tract of land, the trial court properly denied defendants' judgment notwithstanding the verdict after the jury determined that the parents lacked capacity to execute the deeds. Although there was

conflicting evidence regarding whether the parents suffered from hallucinations at the time they signed the deeds, it was the jury's role to weigh the evidence, which, when viewed in the light most favorable to plaintiffs, supported the jury's verdict on capacity.

3. Deeds—undue influence—factors—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that two other siblings (defendants) exerted undue influence over their parents regarding the execution of two deeds (for the parents' home and for a separate tract of land), the trial court properly denied defendants' motion for judgment notwithstanding the verdict after the jury determined that defendants unduly influenced their parents and benefitted from that influence. Resolving any contradictions in the evidence in plaintiffs' favor, evidence regarding the parents' age and weakness and the clear benefit to defendants of the effect of the deeds supported the jury's determination on this issue.

4. Conversion—estate dispute—ownership of lockbox—rental income from home—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that two other siblings (defendants) converted the contents of a lockbox owned by their parents and rental income from the parents' home after their deaths, the trial court properly denied defendants' motion for judgment notwithstanding the verdict where the evidence, viewed in the light most favorable to plaintiffs, supported the jury's determination that one defendant converted the lockbox contents—because it had not been gifted to him as he asserted—and that both defendants converted the home's rental income—because the deed granting them the home was invalid.

5. Deeds—estate dispute—motion for new trial granted—trial court's discretion—lack of evidence

In a dispute between siblings over their parents' estates, in which various claims were raised regarding the parents' execution of two deeds (one for their home and the other for a separate tract of land), the trial court did not abuse its discretion by granting defendants' motion for a new trial where the court made a reasoned decision after determining that there was insufficient evidence to support several of the jury's verdicts (regarding mental capacity, undue influence, and conversion).

Cross appeals by Plaintiffs and Defendants from order entered 6 June 2023 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 14 March 2024.

James W. Lee, III, for Plaintiffs-Appellants-Appellees.

Barbour, Searson, Jones & Cash, PLLC, by W. Scott Jones & W. Bradford Searson, for Defendants-Appellees-Appellants.

CARPENTER, Judge.

Both parties appeal from the trial court's order denying Defendants' motion for judgment notwithstanding the verdict ("JNOV") and granting Defendants' motion for a new trial. After careful review, we affirm the trial court's order.

I. Factual & Procedural Background

This appeal is about siblings disputing their parents' estate. On 15 August 2019, brothers Albert Corn and Kenneth Corn sued their siblings, Karen Jones, Jonathan Corn, and Jan Corn, as well as V.E.C. and J.R.C.,[1] the grandchildren of their deceased brother, Chris Corn, for reformation of a deed. On 16 August 2019, in a separate case, Karen, Jonathan, Jan, V.E.C., and J.R.C. sued Albert and Kenneth for "lack of capacity/undue influence," "distribution of trust property," conversion, and breach of fiduciary duty. On 4 March 2022, the trial court consolidated the cases for trial.

Trial evidence tended to show the following. Albert Corn ("Father") and Jeanette Corn ("Mother") were married and had six children: Albert and Kenneth ("Defendants"), Karen, Jonathan, Jan, and Chris ("Plaintiffs").[2] On 14 March 2008, Father and Mother executed two trusts (the "Trusts"). Father was the grantor of one Trust, and Mother was the grantor of the other. Upon the death of Father and Mother, both Trusts named Defendants as co-trustees, and both Trusts mandated an equal distribution of Trust assets among Plaintiffs and Defendants.

Also on 14 March 2008, Father and Mother executed two wills (the "Wills"). Under both Wills, Father and Mother bequeathed their property to each other. Under both Wills, the surviving spouse bequeathed his or

1. V.E.C. and J.R.C. are minors.

2. The trial court referred to Albert and Kenneth as the defendants and Karen, Jonathan, Jan, V.E.C., and J.R.C. as the plaintiffs. For consistency, we will do the same.

her "tangible personal property" to Plaintiffs and Defendants. And under both Wills, the surviving spouse bequeathed his or her residuary estate, meaning all undisposed "real and personal property," to his or her Trust.

Father died 31 August 2015; Mother died 19 August 2016. But before their death, in 2014, Father and Mother hired attorney Nicole Engel to further advise them about estate planning and property ownership. Attorney Engel is a certified elder-law specialist. Defendants accompanied Mother and Father to their initial meeting with attorney Engel. After meeting with Father, Mother, and Defendants, attorney Engel instructed attorney Margaret Toms to prepare deeds (the "Deeds") for Father and Mother concerning their home (the "Home") and a separate tract of land (the "Tract"). Attorney Toms prepared the deeds.

In the Home Deed, Father and Mother granted themselves a 99% share of the Home, and they granted each Defendant a .5% share of the Home. Father, Mother, and Defendants held the Home as joint tenants with right of survivorship. In other words, if Defendants outlived Father and Mother, Defendants would own the Home upon the death of Father and Mother.

In the Tract Deed, on the other hand, Father and Mother granted each of their Trusts a 49.5% share of the Tract, and they granted each Defendant a .5% share of the Tract. Like the Home, the Tract was held in joint tenancy with right of survivorship. But unlike the Home, Father and Mother's deaths would not change the Tract's ownership: The Tract would remain titled 49.5% to Father's Trust, 49.5% to Mother's Trust, and 1% to Defendants. In other words, the Tract would not become the exclusive property of Defendants upon Father and Mother's deaths.

After executing the Deeds, attorney Engel sent a "follow-up" letter to Father and Mother. In the letter, attorney Engel stated the following: "Thus, because you individually and as trustees of your revocable trusts have retained majority ownership interest in your real property, the [United States Department of Veterans Affairs] will consider that you have resources equal to the tax value of your ownership interest in your real property."

Unhappy with the results of the Tract Deed, Defendants asked for reformation because the Tract Deed did not match Father and Mother's intent. Defendants sought to reform the Tract Deed to reflect Father and Mother, individually, as grantees, rather than their Trusts as grantees. Put differently, Defendants sought to reform the Tract Deed to reflect Father and Mother's intention for the Tract to be owned exclusively by Defendants after Father and Mother's deaths.

On the other hand, unhappy with both Deeds, Plaintiffs contended that the Deeds were invalid because (1) Father and Mother lacked capacity to consent to the Deeds, and (2) Defendants procured the Deeds through undue influence. And because the Home Deed was invalid, Plaintiffs argued that Defendants necessarily converted rental income from the Home after the death of Father and Mother.

Attorney Engel testified that Father and Mother intended for the Tract to pass to Defendants after Father and Mother passed. Attorney Engel also testified that Father and Mother "probably would not have known, you know, the fact that if [the Tract] stayed in the trust[, it] would not accomplish that goal." Attorney Engel continued: "between Margaret and I, Margaret Toms, we did make a mistake in that deed. And that didn't accomplish what the Corns' intention was."

Dr. MaryShell Zaffino, Father's primary-care provider from 2014 through 2015, never noted concerns about Father's mental health. Dr. Jennifer Wilhelm was Mother's primary-care provider from 2012 through 2015, and she noted that Mother had anxiety and depression.

Plaintiff Jan stated that Father was more depressed towards the end of his life. Further, she stated that Father experienced hallucinations after his 2014 heart surgery. But Plaintiff Jan also stated that, until his death, Father knew what property he owned, where his property was, and who his relatives were. Plaintiff Jan stated that Mother suffered from anxiety.

Plaintiff John stated that Father lacked capacity to execute the Deeds, and he said that Mother had "a lot of depression." Plaintiff Karen also thought Father lacked capacity to execute the Deeds; she also said that Father sometimes hallucinated. But Plaintiff Karen stated that, until his death, Father knew what property he owned, where his property was, and who his relatives were. Plaintiff Karen said Mother was depressed, and that Mother took several medications, which could disorient her.

Plaintiffs could visit Father and Mother until their deaths; their access to Father and Mother was unmitigated. Attorney Engel did not suspect that Father and Mother were unduly influenced by anyone.

In addition to the Home and the Tract, the parties also disputed the contents of a lockbox (the "Lockbox"). Plaintiff Jonathan purchased the Lockbox for Father and Mother. Plaintiff Jonathan said that he put approximately $80,000 of Father and Mother's cash into the Lockbox, and he never saw the Lockbox again. Defendant Kenneth said that

Father, before his death, gifted him the Lockbox, so Defendant Kenneth did not report the Lockbox to Father's estate.

On 8 March 2022, at the close of Plaintiffs' case, Defendants moved for directed verdicts concerning all of Plaintiffs' claims. The trial court denied the motion. At the close of their case, Defendants renewed their directed-verdict motions concerning Plaintiffs' claims and moved for directed verdict concerning their reformation claim. The trial court denied Defendants' motions.

On 10 March 2022, the jury found the following: Father and Mother lacked capacity to execute the Deeds; Defendants unduly influenced Father and Mother to execute the Deeds; the Tract Deed did not require reformation; Defendants converted rental income from the Home; Defendant Kenneth, but not Defendant Albert, converted the Lockbox and its contents; and Defendants owed punitive damages to Plaintiffs.

On 16 March 2022, Defendants moved for JNOV "as to all claims and issues, except the issues of [Defendant Albert] and the [Lockbox], and, in the alternative, for a new trial." On 6 June 2023, the trial court denied Defendants' motion for JNOV and granted Defendants' motion for a new trial.

Orders granting or denying either JNOV or a new trial do not require the trial court to make findings of fact. *See Williams v. Allen*, 383 N.C. 664, 670–72, 881 S.E.2d 117, 121–22 (2022); N.C. Gen. Stat. §§ 1A-1, Rules 50, 59 (2023). Nonetheless, in its order denying JNOV and granting a new trial, the trial court found there was insufficient evidence to support the following jury verdicts: that Father lacked mental capacity to sign the Deeds; that Mother lacked mental capacity to sign the Deeds; that the Deeds were procured by Defendants' undue influence; and that Defendants converted property from Plaintiffs.

On 3 July 2023, Plaintiffs filed notice of appeal. On 11 July 2023, Defendants filed notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(3)(d) (2023) (providing this Court jurisdiction over appeals from orders in which a superior court "[g]rants or refuses a new trial").

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Defendants' motion for JNOV; or (2) granting Defendants' motion for a new trial.

IV. Analysis

A. Motion for JNOV

On appeal, Defendants argue that the trial court erred by denying its motion for JNOV. We disagree.

We review JNOV rulings de novo. *Hewitt v. Hewitt*, 252 N.C. App. 437, 441, 798 S.E.2d 796, 799 (2017). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210, 137 S. Ct. 855, 860, 197 L. Ed. 2d 107, 115 (2017). The jury's role is to "weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove. It [is] the province of the jury to believe any part or none of the evidence." *Daniels v. Hetrick*, 164 N.C. App. 197, 204, 595 S.E.2d 700, 704–05 (2004).

But under certain circumstances, a trial court may usurp the jury's role via JNOV. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). A party can request JNOV by "mov[ing] to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . ." *Id.* JNOV "shall be granted if it appears that the motion for directed verdict could properly have been granted." *Id.*

A motion for JNOV "is essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368–69, 329 S.E.2d 333, 337 (1985) (citing *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E.2d 897, 902 (1974)). "Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted." *Id.* at 369, 329 S.E.2d at 337 (citing *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)).

A directed verdict, and thus JNOV, "is appropriate only when the issue submitted presents a question of law based on admitted facts where no other conclusion can reasonably be reached." *Ferguson v. Williams*, 101 N.C. App. 265, 271, 399 S.E.2d 389, 393 (1991) (citing *Seaman v. McQueen*, 51 N.C. App. 500, 503, 277 S.E.2d 118, 120 (1981)). JNOV is a high hurdle:

> the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant, 313 N.C. at 369, 329 S.E.2d at 337–38 (citing *Farmer v. Chaney*, 292 N.C. 451, 452–53, 233 S.E.2d 582, 584 (1977)).

Here, the trial court denied Defendants' JNOV motion concerning their claim for reformation and concerning Plaintiffs' claims for lack of capacity, undue influence, and conversion. We will address each claim in that order.

1. Reformation

[1] There are "three circumstances under which reformation could be available as a remedy: (1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman." *Janice D. Willis Revocable Tr. v. Willis*, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012) (citing *Crawford v. Willoughby*, 192 N.C. 269, 271, 134 S.E. 494, 495 (1926)). Mistake of law is not a basis for reformation. *See Mims v. Mims*, 305 N.C. 41, 61, 286 S.E.2d 779, 792 (1982).

Here, Defendants asserted that the draftsman of the Tract Deed, attorney Toms, made a scrivener's error in drafting the Tract Deed by listing the Trusts as grantees. Rather than their Trusts, Father and Mother should have been listed as grantees. To support this assertion, Defendants offered testimony from attorney Engel, who stated that "between Margaret and I, Margaret Toms, we did make a mistake in that deed. And that didn't accomplish what the Corns' intention was."

Viewing the evidence in the light most favorable to Plaintiffs, however, attorney Toms' error can also be reasonably construed as a legal error. In her follow-up letter, attorney Engel stated that Father and Mother retained a majority ownership in the Home and the Tract, "individually and *as trustees of [their] revocable trusts*." In fact, the text of the Trust Deed lists the Trusts as grantees. Attorney Engel's letter, coupled with the text of the Trust Deed, signal that attorney Toms understood who she listed as grantees—but she, and attorney Engel, misunderstood the legal consequences of doing so.

Therefore, resolving inconsistencies in Plaintiffs' favor, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, it is reasonable to conclude that

attorney Toms made a legal error, *see Ferguson*, 101 N.C. App. at 271, 399 S.E.2d at 393, which does not support reformation, *see Mims*, 305 N.C. at 61, 286 S.E.2d at 792. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning reformation because it is reasonable to conclude that reformation of the Tract Deed is inappropriate. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1).

2. Lack of Capacity

[2] A grantor of property must have capacity, and a grantor's capacity requirement is the same as a testator's. *See Gilliken v. Norcom*, 197 N.C. 8, 9, 147 S.E. 433, 433 (1929) ("The law recognizes the same standard of mental capacity for testing the validity of both deeds and wills, although it is suggested that perhaps a court would scrutinize a deed more closely than a will."); *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993) (stating the capacity standard for wills).[3]

A grantor has capacity if he: "(1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate." *See id.* at 145, 430 S.E.2d at 925 (citing *In re Will of Shute*, 251 N.C. 697, 699, 111 S.E.2d

---

3. At oral argument, Plaintiffs pointed to *Woody v. Vickrey*, 276 N.C. App. 427, 857 S.E.2d 734 (2021) and asserted that grantors require a higher level of capacity than testators. They do not.

We recognize that we used slightly different language to define grantor capacity in *Woody*. *See id.* at 441, 857 S.E.2d at 744 (citing *Hendricks v. Hendricks*, 273 N.C. 733, 734, 161 S.E.2d 97, 98 (1968)) ("The capacity required to execute a deed includes: (1) understanding the nature and consequences of making a deed; (2) comprehending its scope and effect; and (3) knowing what land he is disposing of and to whom and how."). But in *Woody*, we merely paraphrased the applicable rule and applied it to a deed–grantor scenario. *See id.* at 441, 857 S.E.2d at 744.

We did not create a new rule; the rule for grantor capacity remains the same as the rule for testator capacity. *See Gilliken*, 197 N.C. at 9, 147 S.E. at 433. Understanding "the nature and consequences of making a deed" and the deed's "scope and effect," *see Woody*, 276 N.C. App. at 441, 857 S.E.2d at 744, is no different than "know[ing] the manner in which [the testator] desires his act to take effect" and "realiz[ing] the effect his act will have upon his estate," *see In re Will of Jarvis*, 334 N.C. at 145, 430 S.E.2d at 925; and "knowing what land he is disposing of and to whom and how," *see Woody*, 276 N.C. App. at 441, 857 S.E.2d at 744, is no different than "comprehend[ing] the natural objects of his bounty" and "understand[ing] the kind, nature and extent of his property," *see In re Will of Jarvis*, 334 N.C. at 145, 430 S.E.2d at 925.

Although our state Supreme Court hinted that "a court would scrutinize a deed more closely than a will," that scrutiny is in pursuit of "the same standard of mental capacity." *See Gilliken*, 197 N.C. at 9, 147 S.E. at 433. Our paraphrasing of an applicable rule should not be read as creating a new one. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (noting that we cannot overrule our state Supreme Court).

851, 853 (1960)). A lack of any element creates a lack of capacity, *see In re Will of Shute*, 251 N.C. at 699, 111 S.E.2d at 853, but grantors are presumed to have capacity, *see In re Will of Buck*, 130 N.C. App. 408, 412–13, 503 S.E.2d 126, 130 (1998).

A challenger cannot establish lack of capacity without evidence concerning the grantor's capacity when the grantor executed the deed. *In re Est. of Whitaker v. Holyfield*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (2001) (quoting *In re Will of Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130). General statements about a grantor's deteriorating health, alone, are insufficient to show a lack of capacity. *In re Will of Buck*, 130 N.C. App. at 412–13, 503 S.E.2d at 130.

First, we must dispense with Plaintiffs' contention that Father and Mother misunderstood the result of signing the Deeds; a misunderstanding of legal consequences does not create a lack of capacity. *See In re Will of Farr*, 277 N.C. 86, 92, 175 S.E.2d 578, 582 (1970).

Next, we must wrestle with two competing presumptions: (1) the presumption of capacity, *see In re Will of Buck*, 130 N.C. App. at 412–13, 503 S.E.2d at 130; and (2) the presumption that the jury got the capacity question correct, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. To be sure, without more, Plaintiffs' statements concerning Father and Mother's deteriorating health do not refute the presumption of capacity. *See In re Will of Buck*, 130 N.C. App. at 412–13, 503 S.E.2d at 130. But Plaintiffs offered more: They testified that Father and Mother suffered from hallucinations.

Defendants and Plaintiffs both offered evidence that undermined the premise that Father and Mother hallucinated when they executed the Deeds. For example, Plaintiff Karen stated that until his death, Father knew what property he owned, where his property was, and who his relatives were. And as another example, Father's primary-care provider from 2014 through 2015 never noted any concerns about Father's mental health, and Mother's primary-care provider from 2012 through 2015 only noted that Mother had anxiety and depression.

Indeed, based on the evidence, the likelihood that Father and Mother both lacked capacity via hallucination seems slim. But we are reviewing a denial of JNOV; it was the jury's role to weigh the evidence—not ours. *See Daniels*, 164 N.C. App. at 204, 595 S.E.2d at 704–05 (noting that it is the jury's role to "weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove").

Resolving every contradiction in Plaintiffs' favor, evidence of Father and Mother's declining health—coupled with evidence that they suffered from hallucinations—supports the trial court's denial of JNOV concerning capacity. *See Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. In other words, the jury could have reasonably concluded that the parents hallucinated when they executed the Deeds, and the trial court was therefore correct in denying Defendants' motion for JNOV concerning capacity. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1).

3. Undue Influence

[3] "There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *In re Will of McNeil*, 230 N.C. App. 241, 245, 749 S.E.2d 499, 503 (2013) (quoting *In re Sechrest*, 140 N.C. App. 464, 469, 537 S.E. 2d 511, 515 (2000)). Undue influence is a high standard. *See In re Will of Jones*, 362 N.C. 569, 574, 669 S.E.2d 572, 577 (2008). It is:

> a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

Id. at 574, 669 S.E.2d at 577 (quoting *In re Will of Turnage*, 208 N.C. 130, 131–32, 179 S.E. 332, 333 (1935)).

There is no bright-line test to spot undue influence. *In re Will of Andrews*, 299 N.C. 52, 54–55, 261 S.E.2d 198, 200 (1980). But the North Carolina Supreme Court has listed seven factors to consider when determining whether a person was unduly influenced:

> 1. Old age and physical and mental weakness.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see him.
>
> 4. That the will is different from and revokes a prior will.
>
> 5. That it is made in favor of one with whom there are no ties of blood.
>
> 6. That it disinherits the natural objects of his bounty.
>
> 7. That the beneficiary has procured its execution.

Id. at 55, 261 S.E.2d at 200 (quoting *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915)).

Here, similar to our capacity analysis, we must consider competing high standards: (1) the high standard for undue influence, *see id.* at 55, 261 S.E.2d at 200; and (2) the high standard for granting JNOV, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. Plaintiffs could visit Father and Mother until their deaths, and attorney Engel did not suspect that Father and Mother were unduly influenced. Plaintiffs, however, offered evidence concerning other *Andrews* factors. Concerning the first factor, Father and Mother were elderly and mentally weak. Concerning the sixth factor, both Deeds favored Defendants over Plaintiffs. And concerning the seventh factor, Defendants accompanied Father and Mother to their initial meeting with attorney Engel.

As we must give Plaintiffs the "benefit of every reasonable inference that may legitimately be drawn from the evidence," *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, a jury could reasonably conclude that Defendants unduly influenced Father and Mother, and that Defendants benefitted from such influence, *see In re Will of McNeil*, 230 N.C. App. at 245, 749 S.E.2d at 503. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning undue influence. See N.C. Gen. Stat. § 1A-1, Rule 50(b)(1).

4. Conversion

[4] Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 531–32, 551 S.E.2d 546, 552 (2001) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). In short, conversion requires "(1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2008).

a. The Lockbox

Here, under both Wills, Father and Mother bequeathed their property to each other. Under both Wills, the surviving spouse bequeathed his or her "tangible personal property" to Plaintiffs and Defendants. And under both Wills, the surviving spouse bequeathed his or her residuary estate, meaning all undisposed "real and personal property," to his or her Trust. Both Trusts provided for equal distribution of Trust assets among Plaintiffs and Defendants.

Plaintiffs offered no evidence that they owned the Lockbox before Father's death. If Father owned the Lockbox at his death, however, Plaintiffs were ultimately entitled to an equal distribution of the Lockbox and its contents after Mother's death. Arguing that Plaintiffs were not entitled to a portion of the Lockbox, Defendant Kenneth said that Father gifted him the Lockbox before Father died. So taking Defendant Kenneth's testimony as true, he could not convert the Lockbox from Plaintiffs because Plaintiffs never owned the Lockbox. *See Bartlett Milling*, 192 N.C. App. at 86, 665 S.E.2d at 489.

But in reviewing a JNOV denial, we do not take Defendants' testimony as true. *See Ferguson*, 101 N.C. App. at 271, 399 S.E.2d at 393. Rather, we must look to see if another "conclusion can reasonably be reached." *See id.* at 271, 399 S.E.2d at 393. Here, there was another reasonable conclusion: Defendant Kenneth lied; Father did not gift him the Lockbox. And that conclusion was for the jury to reach—not us. *See Daniels*, 164 N.C. App. at 204, 595 S.E.2d at 704–05.

Thus, giving Plaintiffs the "benefit of every reasonable inference that may legitimately be drawn from the evidence," *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, a reasonable jury could conclude that Father did not gift the Lockbox to Defendant Kenneth, and thus the Lockbox, and its contents, should have been equally distributed among Plaintiffs and Defendants after Father and Mother's death. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning conversion of the Lockbox. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38.

b. Rental Income from the Home

As detailed above, the jury concluded the Home Deed was invalid due to lack of capacity and undue influence, and the trial court correctly upheld that conclusion. The jury also concluded that Defendants converted rental income from the Home after the death of Father and Mother. The trial court upheld that conclusion, too. Because it was correct for the trial court to uphold the jury's conclusion on the Home Deed, it was necessarily correct for the trial court to uphold the jury's conclusion concerning conversion of income from the Home.

In the Home Deed, Father and Mother ostensibly granted themselves, individually, a 99% share of the Home, and they granted each Defendant a .5% share of the Home. In their Wills, Father and Mother bequeathed their property to each other, with the surviving spouse bequeathing his or her residuary estate, meaning all undisposed "real and personal property," to his or her Trust. And both Trusts provided

for equal distribution of Trust assets among Plaintiffs and Defendants. Father died 31 August 2015, and Mother died 19 August 2016.

With an invalid Home Deed, the Home therefore remained in the grantors' name, i.e., with Father and Mother. Thus, after Father and Mother died, the Home eventually passed equally to Plaintiffs and Defendants: First, the Home passed to Mother after Father's death; second, the Home passed to Mother's Trust after Mother's death; third, and finally, the assets in Mother's Trust, including the Home, were to be equally distributed among Plaintiffs and Defendants.

Therefore, because there was enough evidence for the jury to invalidate the Home Deed, there was enough evidence for the jury to find that Defendants converted the Home income. *See Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. More specifically, there was enough evidence to show that (1) Plaintiffs were entitled to a portion of the Home, including income from the Home, and (2) Defendants deprived Plaintiffs their share of the Home income. *See Bartlett Milling*, 192 N.C. App. at 86, 665 S.E.2d at 489. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning conversion of the Home income. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38.

B. Motion for New Trial

[5] We now move to Plaintiffs' argument on appeal. Plaintiffs contend that the trial court erred by granting Defendants' motion for a new trial. We disagree.

"It is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case." *Shute v. Fisher*, 270 N.C. 247, 253, 154 S.E.2d 75, 79 (1967). Accordingly, unless bound by statutory obligation, "the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice." *Id.* at 253, 154 S.E.2d at 79. Following these principles, Rule 59 of the North Carolina Rules of Civil Procedure allows a trial court to grant a new trial when the evidence is insufficient "to justify the verdict." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) (2023).

Unlike the usurping nature of JNOV, *see id.* § 1A-1, Rule 50(b)(1), a new trial gives the parties another chance to present their case—and it gives the jury another chance to resolve the case, *see id.* § 1A-1, Rule 59(a)(7). Thus, a new trial does not raise the same concerns as JNOV. *See Pena-Rodriguez*, 580 U.S. at 210, 137 S. Ct. at 860, 197 L. Ed. 2d at 115.

"Where no question of law or legal inference is involved," we review a trial court's decision to grant a new trial for abuse of discretion. *In re Will of Herring*, 19 N.C. App. 357, 359, 198 S.E.2d 737, 739 (1973); *see also In re Will of Buck*, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999) (reaffirming that "the uniform standard for appellate review of rulings on Rule 59(a)(7) motions for a new trial for insufficiency of the evidence" is abuse of discretion).

Here, the trial court granted Defendants' motion for a new trial because it found there was insufficient evidence to support the jury verdicts. Therefore, we will review the trial court's order for abuse of discretion. *See In re Will of Herring*, 19 N.C. App. at 359, 198 S.E.2d at 739.

"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 J.R.*, 250 N.C. App. 195, 201, 791 S.E.2d 922, 926 (2016) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)). Indeed, "it is plain that a trial judge's *discretionary* order pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 59 . . . may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982).

A trial court's decision to grant a new trial on all issues, rather than a portion of the issues, is also discretionary. *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911). A trial court will typically grant a partial new trial "when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others, and it is perfectly clear that there is no danger of complication." *Id.* at 253, 73 S.E. at 165.

Here, in its order granting a new trial, the trial court found that there was insufficient evidence to support the following jury verdicts: that Father lacked mental capacity to sign the Deeds; that Mother lacked mental capacity to sign the Deeds; that the Deeds were procured by undue influence by Defendants; and that Defendants converted property from Plaintiffs.

Given the detailed de-novo analysis required to discern whether Defendants cleared the high JNOV hurdle, we cannot say that it was an abuse of discretion—that it was arbitrary—for the trial court to grant a new trial due to insufficient evidence. *See In re J.R.*, 250 N.C. App. at 201, 791 S.E.2d at 926; N.C. Gen. Stat. § 1A-1, Rule 59(a)(7). Our review of the record indicates a dearth of evidence supporting lack of capacity, undue influence, and conversion. Thus, the trial court's decision to grant a new trial was the result of a reasoned decision and, therefore, not

an abuse of discretion. *See In re J.R.*, 250 N.C. App. at 201, 791 S.E.2d at 926. And because capacity, undue influence, and conversion are not "entirely separable" from the other issues in this case, the trial court did not abuse its discretion by granting a new trial on all issues. *See Table Rock Lumber*, 158 N.C. at 253, 73 S.E. at 165.

Therefore, the trial court did not abuse its discretion by granting Defendants' motion for a new trial because this is not the "exceptional case[] where an abuse of discretion is clearly shown." *See Worthington*, 305 N.C. at 484, 290 S.E.2d at 603.

V. Conclusion

We conclude that the trial did not err by denying Defendants' motion for JNOV or by granting Defendants' motion for a new trial.

AFFIRMED.

Judges STROUD and COLLINS concur.

KELVIN J. JONES, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DEFENDANT

No. COA23-591

Filed 7 May 2024

1. Tort Claims Act—negligence—duty to protect from foreseeable harm—inmate assaulted in prison

In an action filed against the Department of Public Safety (defendant) by a former inmate (plaintiff) seeking damages under the Tort Claims Act for injuries he suffered after another inmate assaulted him in prison, the Industrial Commission's decision and order awarding damages to plaintiff was upheld on appeal because the Commission did not err in concluding that defendant had notice—and, therefore, should have anticipated—that a violent altercation between plaintiff and the other inmate was likely to occur. Competent evidence supported the Commission's findings, including that: an officer overseeing plaintiff's cellblock overheard a heated verbal exchange between plaintiff and the other inmate, had a "bad feeling that something [was] go[ing] to happen," and asked her supervisor to assign an additional officer to her area because of

the tension between the two inmates; and that the officer's supervisor did not take any action to investigate or otherwise address the situation after the officer raised her concerns.

2. Appeal and Error—notice of appeal—timeliness—cross-appeal —action brought under Tort Claims Act

In an appeal filed by the Department of Public Safety challenging the Industrial Commission's award of damages to a former inmate (plaintiff) on his claim brought under the Tort Claims Act, plaintiff's cross-appeal—challenging some of the Commission's factual findings—was dismissed as untimely, since he failed to file his notice of cross-appeal within thirty days after the Commission entered its decision and order, as required under N.C.G.S. § 143-293 (governing appeals under the Tort Claims Act). Although section 143-293 specifically allows parties to appeal a decision and order within thirty days of receiving it, nothing in the record showed that plaintiff received the decision and order later than the day that the Commission entered it. Further, plaintiff could not argue that Appellate Rule 3(c) governed the timeliness of his appeal where, under Appellate Rule 18 (governing the timing for appeals from administrative tribunal decisions "unless the General Statutes provide otherwise"), section 143-293 was controlling.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant and cross-appeal by Plaintiff from Decision and Order entered 4 April 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 February 2024.

Fidelity Law Group, by John B. Riordan, for Plaintiff-Appellee/ Cross-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorneys General C. Douglas Green and Gregory L. Rouse, II, for Defendant-Appellant/ Cross-Appellee.

COLLINS, Judge.

The North Carolina Department of Public Safety ("Defendant") appeals from a Decision and Order entered by the North Carolina Industrial Commission awarding Kelvin Jones ("Plaintiff"), a former inmate at Maury Correctional Institution, damages for injuries he

sustained from being assaulted by another inmate. Defendant argues that "[t]he Industrial Commission erred when it concluded that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur." (capitalization altered). Plaintiff cross appeals, arguing that certain findings of fact were erroneous. For the reasons stated below, we hold that the Commission did not err by concluding that Defendant "had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and [his assailant] was likely to occur." Accordingly, we affirm the Decision and Order. However, because Plaintiff's notice of appeal was untimely, we dismiss his cross-appeal.

I. Background

Plaintiff was an inmate in the Blue Unit at Maury Correctional Institution. The Blue Unit consists of six cell blocks, which are divided into two sides and connected by a hallway. There is a sliding door at the end of the hallway that allows access to a circular area, and there is a control booth within the circular area that operates the sliding door. Maury Correctional Institution's policy was to assign two officers to each side of the Blue Unit, except during mealtimes when one officer would monitor the cell blocks while the other officer would supervise the dining hall or hallway. A third officer would be assigned to the control booth and was required to remain in the control booth at all times.

On 24 May 2015, Officer Chiara Booker was assigned to the side of the Blue Unit where Plaintiff was held. Before dinner, Booker overheard Plaintiff and another inmate, Paul Thorton, speaking to each other in raised voices. After Plaintiff had spoken to a third inmate, Thorton appeared behind Plaintiff and said, "You wonder why I'm standing behind you. That's my brother. Anything go on with him, I'm involved." Plaintiff responded, "I don't f[**]k with you. Why you bothering me? Man, I don't have no dealings with you, period."

After this verbal altercation, Plaintiff and Thorton left the cell block to go to the dining hall. Although Booker did not overhear any specific threats, she had "a bad feeling that something [was] gonna happen[.]" Booker reported the verbal altercation to her supervisor, Sergeant Jocilyn Pryor, and requested additional officers to her side of the Blue Unit due to the tension between Plaintiff and Thorton. Pryor did not further investigate Booker's report, did not separate Plaintiff and Thorton, and did not assign additional officers to the area. Booker also approached the officer assigned to the control booth that day and asked him to switch positions with her because she "had not seen a situation

like that occur or anything," and "it was just a lot of tension and [she] didn't want to be the lone female in the middle of two men in a[n] altercation[.]" The officer did not do so.

As Plaintiff and Thorton were returning to the cell block from the dining hall, Booker saw Thorton strike Plaintiff in the face with a "homemade shank." Plaintiff turned around and began running into the hallway as Thorton chased him. Booker attempted to call for backup and pull out her pepper spray but fell to the ground in the process.

When Plaintiff and Thorton ran into the hallway, Officer Shaneka Hyman approached and instructed them to stop; however, Thorton continued to chase Plaintiff. Plaintiff fell to the ground, and Thorton struck him three or four times in the head with the shank. Hyman sprayed Thorton with pepper spray; Thorton struck Plaintiff once more before returning to the cell block. Plaintiff was taken to the hospital and treated for stab wounds to his forehead and left cheek, and positional vertigo.

Plaintiff filed a claim for damages under the Tort Claims Act. After a hearing, the deputy commissioner entered a decision and order denying Plaintiff's claim. Plaintiff appealed to the Full Commission, and the Commission entered a Decision and Order on 4 April 2023 concluding that Plaintiff had proven all the essential elements of negligence and awarding Plaintiff $15,000 in damages.

Defendant appealed to this Court, and Plaintiff cross appealed.

II. Discussion

A. Defendant's Appeal

[1] Defendant argues that "[t]he Industrial Commission erred when it concluded that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur." (capitalization altered). Although Defendant frames this issue as a challenge to a conclusion of law, the arguments laid out in its brief effectively challenge the Commission's findings of fact as well as its conclusion that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur. Accordingly, we will address both.

"[T]he findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2023). "Appellate review is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision." *Taylor v. N.C. Dep't of Corr.*, 88 N.C. App. 446, 448, 363 S.E.2d 868, 869 (1988) (citation

omitted). Unchallenged findings of fact are binding on appeal. *Gentry v. N.C. Dep't of Health & Hum. Servs.*, 242 N.C. App. 424, 426, 775 S.E.2d 878, 880 (2015). Conclusions of law are reviewed de novo. *Nunn v. N.C. Dep't of Pub. Safety*, 227 N.C. App. 95, 98, 741 S.E.2d 481, 483 (2013).

The Tort Claims Act permits recovery if the plaintiff can show that he sustained an injury that was proximately caused by a negligent act of a named State employee who was acting within the course and scope of his employment. N.C. Gen. Stat. § 143-291(a) (2023). "[T]he Tort Claims Act . . . waive[s] the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant." *Williams v. N.C. Dep't of Just.*, 273 N.C. App. 209, 217, 848 S.E.2d 231, 238 (2020) (quotation marks and citation omitted). "Since the Tort Claims Act is in derogation of sovereign immunity it must be strictly construed, and its terms must be strictly adhered to." *Id.* (citations omitted).

"Actions to recover for the negligence of a State employee under the Tort Claims Act are guided by the same principles that are applicable to other civil causes of action." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998) (citation omitted). To recover upon a claim for negligence under the Tort Claims Act, a plaintiff must prove that (1) defendant owed plaintiff a duty of care; (2) the actions or failure to act by the named employees of defendant constituted a breach of duty; (3) the breach was the actual and proximate cause of the injury; and (4) plaintiff suffered damages as a result. *Bryson v. N.C. Dep't of Corr.*, 169 N.C. App. 252, 253, 610 S.E.2d 388, 389 (2005).

"A duty is defined as an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Davis v. N.C. Dep't of Hum. Res.*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995) (quotation marks and citation omitted). "A breach of the duty occurs when the person fails to conform to the standard required." *Id.* (quotation marks and citation omitted). The Department of Public Safety "is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another." *Taylor*, 88 N.C. App. at 452, 363 S.E.2d at 871. However, the Department of Public Safety does owe a "duty of reasonable care" to protect inmates "from reasonably foreseeable harm." *Id.* at 451, 363 S.E.2d at 871.

Here, the Commission made the following unchallenged findings of fact:

> 6. While performing rounds on E Cellblock before dinner on 24 May 2015, Ms. Booker heard Plaintiff and Mr. Thorton speaking in raised voices. According to Plaintiff, Mr. Thorton appeared behind Plaintiff while walking to his cell after Plaintiff had spoken with another inmate. Mr. Thorton told Plaintiff that the other inmate Plaintiff had spoken with was Mr. Thorton's "brother," which Plaintiff believed indicated that Mr. Thorton and the other inmate were members of the same gang. As a result, Plaintiff told Mr. Thorton that Plaintiff and Mr. Thorton should stay out of each other's business. After the verbal altercation, Plaintiff and Mr. Thorton left the cellblock to go to the dining hall. Although Ms. Booker did not overhear any specific threats of violence during the verbal exchange between Plaintiff and Mr. Thorton, she had a "bad feeling that something [was] go[ing] to happen."
>
> 7. After overhearing the verbal exchange, Ms. Booker approached her supervisor, Sergeant Pryor, regarding her concerns. Specifically, Ms. Booker requested that backup be assigned to her area due to the tension between Plaintiff and Mr. Thorton. Sergeant Pryor took no action following the conversation with Ms. Booker, as she did not assign an additional officer, attempt to speak with Plaintiff or Mr. Thorton, or order that Plaintiff and Mr. Thorton be detained or separated.

As these findings are unchallenged, they are binding on appeal. *Gentry*, 242 N.C. App. at 426, 775 S.E.2d at 880. Nonetheless, these findings are supported by competent evidence. Booker testified to the following: Plaintiff and Thorton engaged in a "really loud" verbal altercation, and she had "a bad feeling that something [was] gonna happen[.]" Booker went to her supervisor, Pryor, and spoke to her "directly" about the altercation. Booker specifically requested additional officers to her side of the Blue Unit "[b]ecause [she] was gonna need some help just in case something happened." Pryor did not further investigate Booker's report, did not separate Plaintiff and Thorton, and did not assign additional officers to the area.

Defendant challenges the italicized portions of the following findings of fact:

> 12. Captain Brandon Connor—a lieutenant at [Maury Correctional Institution] was not present at the time of the assault but provided testimony regarding [Maury

> Correctional Institution's] policies and procedures. . . . According to Captain Connor, if one of his subordinates came to him indicating that they believed a credible threat had been made, he would "listen to [them] and go from there and make a determination," including personally looking into the matter. However, Captain Connor indicated that although he believed a superior officer should personally look into their subordinates' assertions that they believed an assault may occur, Sergeant Pryor did not violate [Maury Correctional Institution's] policies by taking no action after Ms. Booker reported her concerns. . . .
>
> . . . .
>
> 15. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that *Defendant's staff were on notice that a violent altercation between Plaintiff and Mr. [Thorton] was likely to occur*. Specifically, Ms. Booker overheard a heated conversation between Plaintiff and Mr. Thorton, which she believed was likely to result in additional confrontation between the two. Ms. Booker's concerns were reported to her supervisor, at which time Ms. Booker requested additional staff to deal with a potential conflict.
>
> 16. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that *although Defendant was on notice of the likelihood of a violent altercation*, Defendant took no actions to prevent such an altercation. Defendant, including through Sergeant Pryor, took no steps to separate Plaintiff and Mr. Thorton or to further investigate the situation, even though such action could have been taken between the time of the argument before dinner and the assault after dinner. The Full Commission finds Defendant's failure to take any action was a failure to safeguard Plaintiff from reasonably anticipated danger. The Full Commission assigns no weight to Captain Connor's opinion that Sergeant Pryor's failure to take any action was reasonable, as it was his opinion was contradicted by his testimony that superior officers should personally investigate concerns raised by subordinates.

The unchallenged portions of these findings—including that "Defendant's failure to take any action was a failure to safeguard

Plaintiff from reasonably anticipated danger"—are binding on appeal. *Gentry*, 242 N.C. App. at 426, 775 S.E.2d at 880. The challenged portions of these findings are supported by Findings of Fact 6 and 7 and the evidence supporting those findings. Booker also testified that she told the officer assigned to the control booth "to pay attention and look at what's going on because [she] just didn't feel right, like it just – [she] felt like it was a lot of tension." Booker asked that officer to switch positions with her because she "had not seen a situation like that occur or anything," and "didn't want to be the lone female in the middle of two men in a[n] altercation[,]" but the officer did not do so. As the challenged portions of Findings of Fact 15 and 16 that Defendant was on notice of the likelihood of a violent altercation are supported by competent evidence, those findings are binding on appeal.

Defendant specifically objects to the Commission giving no weight to Captain Connor's opinion that Pryor's failure to take action was reasonable. However, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Wise v. Alcoa, Inc.*, 231 N.C. App. 159, 162, 752 S.E.2d 172, 174 (2013) (quotation marks and citation omitted). When asked what he would do if a subordinate officer "were to come to [him] and say that they have perceived what they believe to be a credible threat, that something bad may happen involving particular or specific inmates," Connor testified that he "would listen to 'em and go from there and make a determination." Connor further testified:

> [PLAINTIFF]. Would you further investigate the issue to determine if further action needs to be taken?
>
> [CONNOR]. If it needs to be, yes.
>
> [PLAINTIFF]. Okay. And would you, as a result of that, would you at least confirm whether the officer's request for backup is justified?
>
> [CONNOR]. Yes.
>
> [PLAINTIFF]. And would you personally see that the matter is looked into to assess whether further action needs to be taken?
>
> [CONNOR]. Yes.

Despite this testimony, Connor also testified that Pryor's failure to further investigate Booker's report, separate Plaintiff and Thorton, or assign additional officers to the area conformed with Maury Correctional Institution's policies and procedures. The Commission found that

Connor's contradictory testimony was not credible and assigned no weight to it, and "[i]t is not the role of this Court to make *de novo* determinations concerning the credibility to be given to testimony, or the weight to be given to testimony." *Id.* at 164, 752 S.E.2d at 175.

Defendant next challenges the Commission's conclusion of law that "Defendant had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and Mr. Thorton was likely to occur." Defendant distinguishes the facts in the present case with those in *Taylor*, arguing that "[t]he Industrial Commission erred in relying upon *Taylor* to draw its conclusions."

In *Taylor*, the plaintiff was placed into a cell with an inmate who was associated with two other inmates with whom the plaintiff had fought. 88 N.C. App. at 448, 363 S.E.2d at 869. The plaintiff asked the officer not to place him in the cell, but the officer refused. *Id.* The plaintiff was physically and sexually assaulted for approximately an hour following his placement in the cell. *Id.* The noise level on the cell block was above average because the plaintiff was "hollering for the [officer]" and other inmates were "boosting" or "agitating" the assailant. *Id.* at 450, 363 S.E.2d at 870. The officer assigned to the cell block failed to investigate the excessive noise level and failed to make his normal rounds during this time. *Id.* at 449, 363 S.E.2d at 870. This Court held that the "defendant had a duty of reasonable care to protect the plaintiff from reasonably foreseeable harm[,]" and that "the defendant was negligent in failing to exercise proper care in this case." *Id.* at 451, 363 S.E.2d at 871.

While the facts supporting the Commission's finding in *Taylor* that the defendant was on notice that the plaintiff was in danger are perhaps more cogent than the facts here, *Taylor* does not preclude a finding and conclusion in this case that Defendant had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and Mr. Thorton was likely to occur.

The Commission found as fact that Defendant was put on notice that a violent altercation was likely to occur; Defendant failed to heed that warning; and Defendant took no steps to further investigate the situation or to prevent such altercation. "Thus, while we recognize that the [Department of Public Safety] is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another, the evidence below supported the Commission's findings and conclusions of negligence in this particular case." *Taylor*, 88 N.C. App. at 451-52, 363 S.E.2d at 871. Accordingly, the Commission did not err by awarding Plaintiff damages for the injuries he sustained from the assault.

B. Plaintiff's Appeal

[2] Plaintiff argues that the Commission erred by finding that Booker acted reasonably in response to the assault and that he failed to establish that Defendant had insufficient personnel assigned to the area in which the assault occurred. We first consider whether we have jurisdiction to consider Plaintiff's appeal.

Rule 18 of the North Carolina Rules of Appellate Procedure governs "[t]he times and methods for taking appeals from an administrative tribunal . . . unless the General Statutes provide otherwise, in which case the General Statutes shall control." N.C. R. App. P. 18(b)(1). N.C. Gen. Stat. § 143-293 governs appeals under the Tort Claims Act and provides, "Either the claimant or the State may, within 30 days after receipt of the decision and order of the full Commission, to be sent by registered, certified, or electronic mail, but not thereafter, appeal from the decision of the Commission to the Court of Appeals." N.C. Gen. Stat. § 143-293.

Here, the Commission entered its Decision and Order on 4 April 2023. Plaintiff filed his notice of appeal on 12 May 2023, after the thirty-day period had expired. Although the statute provides that a party may appeal within thirty days after *receipt* of the decision and order, there is nothing in the record indicating that Plaintiff received the Decision and Order later than 4 April 2023. *See Goins v. Sanford Furniture Co.*, 105 N.C. App. 244, 245, 412 S.E.2d 172, 173 (1992) (dismissing appeal as untimely where "[t]he record . . . [did] not indicate whether notice of the award was mailed" and therefore "the appellant was required to file notice within thirty days from the date of the award").

At oral argument, Plaintiff argued that under N.C. R. App. P. 3(c), he had ten days from when Defendant filed and served its notice of appeal to file his notice of appeal. However, an appeal from an administrative agency is governed by N.C. R. App. P. 18, not N.C. R. App. P. 3. Pursuant to N.C. R. App. P. 18(b)(1), the timeliness of Plaintiff's appeal is governed by N.C. Gen. Stat. § 143-293. Under N.C. Gen. Stat. § 143-293, Plaintiff's notice of appeal was untimely because it was filed more than thirty days after receipt of the Decision and Order. *See Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing cross-appeal as untimely because the timeliness of defendant's appeal was governed by N.C. Gen. Stat. § 97-86, not N.C. R. App. P. 3, as it was an appeal from an administrative agency).

Because Plaintiff's notice of appeal was untimely, this Court is without jurisdiction to consider his appeal.

III. Conclusion

The Commission did not err by concluding that Defendant "had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and Mr. Thorton was likely to occur." Accordingly, we affirm the Decision and Order. However, because Plaintiff's notice of appeal was untimely, we dismiss his cross-appeal.

AFFIRMED IN PART; DISMISSED IN PART.

Judge CARPENTER concurs.

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

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

I concur in the majority's opinion to dismiss Plaintiff's cross-appeal due to Plaintiff's untimely notice of appeal. "[T]he appellant was required to file notice within thirty days from the date of the award." *Goins v. Sanford Furniture Co.*, 105 N.C. App. 244, 245, 412 S.E.2d 172, 173 (1992); *see Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing cross appeal as untimely because the timeliness of the defendant's appeal from an administrative agency was governed by N.C. Gen. Stat. § 97-86, not N.C. R. App. P. 3). Plaintiff's notice was filed more than thirty days after receipt of the Full Commission's Decision and Order. N.C. Gen. Stat. § 143-293 (2023); N.C. R. App. P. 18(b)(2).

I. Standard of Review

"[T]he Tort Claims Act is in derogation of [North Carolina's] sovereign immunity[,] it must be strictly construed, and its terms must be strictly adhered to." *Williams v. N.C. Dep't of Justice*, 273 N.C. App. 209, 217, 848 S.E.2d 231, 238 (2020) (citation omitted); *see* N. C. Gen. Stat. § 143-291(a) (2023).

The majority's opinion improperly reviews: "Defendant's failure to take any action was a failure to safeguard Plaintiff from reasonably anticipated danger" as a finding of fact and concludes this "finding of fact" is binding on appeal. The labels "findings of fact" and "conclusions of law" of a lower tribunal in a written order do not determine the nature of our standard of appellate review. *See Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

"[A]ny determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and quotation marks omitted). This finding of fact is actually a conclusion of law and is properly reviewed *de novo* by this Court.

The Industrial Commission's conclusions of law are reviewed *de novo*. *Nunn v. N.C. Dep't of Pub. Safety*, 227 N.C. App. 95, 98, 741 S.E.2d 481, 483 (2013) (citation omitted).

II. Sovereign Immunity-State Tort Claims Act

Our Supreme Court has held, "[i]t has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (citations omitted) (emphasis in original).

The State Tort Claims Act is a specific and limited statutory waiver by the General Assembly of North Carolina's "*absolute and unqualified*" sovereign immunity. *Id.* The statute expressly limits cognizable and viable claims to those arising "as a result of the negligence of any . . . employee . . . of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a) (2023) (emphasis supplied).

The General Assembly's inclusion of "if a private person would be liable" clause is a substantive statutory limiting requirement. *See Frazier v. Murray*, 135 N.C. App. 43, 48, 519 S.E.2d 525, 529 (1999) ("Tort liability for negligence attaches to the state and its agencies under the Tort Claims Act only where the State [], if a private person, would be liable to the claimant." (citation omitted)).

Our Supreme Court recently held and re-affirmed "the 'private person' language contained in N.C.G.S. § 143-291(a) imposes a substantive, rather than a procedural, limitation upon the types of claims that are cognizable under the State Tort Claims Act." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 52, 881 S.E.2d 558, 574 (2022) (citation omitted).

The State, through the Department of Public Safety, "is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another[.]" *Taylor v. N.C. Dep't of Correction*, 88 N.C. App. 446, 452, 363 S.E.2d 868, 871 (1988). Plaintiff must prove duty, breach thereof, proximate causation, and damages. *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729-30 (2015) (citation omitted); *see Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

The State correctly argues: "The Industrial Commission erred when it concluded that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur," when properly reviewed as a conclusion of law. I respectfully dissent.

III. Proximate Cause and Foreseeability

Any party asserting a negligence claim carries the burden to establish and prove duty, breach of duty, proximate cause, and damages, and absence of contributory negligence. Proximate cause is defined as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred," and that it could be reasonably foreseen and probable under the circumstances. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 710, 365 S.E.2d 898, 901 (1988) (citation omitted).

"The criminal acts of a third party are generally considered unforeseeable and independent, intervening causes absolving a defendant of liability. . . , For this reason, the law does not generally impose a duty to prevent the criminal acts of a third party." *Bridges v. Parrish*, 366 N.C. 539, 742 S.E.2d 794 (2013) (citations omitted).

Competent evidence supports the Commission's findings and correct conclusions that both: (1) Officer Booker had acted reasonably in response to the arguments and threats and also during the assault; and, (2) Plaintiff had failed to establish Defendant had assigned insufficient personnel for the conditions and to the area in which the assault occurred. These findings and conclusions are unchallenged and binding upon appeal.

IV. Plaintiff's Contributory Negligence

"[T]he Tort Claims Act . . . waive[s] the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee *and the injured person is not guilty of contributory negligence*, giving the injured party the same right to sue as any

other litigant." *Williams*, 273 N.C. App. at 217, 848 S.E.2d at 238 (emphasis supplied).

While the State, by and through its employees, may owe a duty of reasonable care to protect non-contributory inmates from reasonably foreseeable harms, Plaintiff's negligence claim must be reviewed for alleged breach and proximate cause in light of Plaintiff's own participation, actions, and culpability as a bar to recovery. The State may be liable for negligence, through a prison employee, when he or she has notice an unprovoked assault is likely to occur and fails to take proper precautions to safeguard the non-contributory prisoner, Plaintiff is also responsible for his actions in provoking and bringing the assault about and to show he "*is not guilty of contributory negligence*." *Id.* (emphasis supplied). Plaintiff's undisputed participation and prolonged actions in arguing with and provoking Thorton, participating in and bringing about the assault and resulting injuries, is a contributory absolute bar and precludes any award in his favor. *Id.*

The Industrial Commission found and concluded Officer Booker had acted reasonably in response to the potential of an assault by reporting Plaintiff's and Thorton's behaviors she had observed, attempting to call for backup and pulling out and and discharging her pepper spray, as Plaintiff and Thorton persisted in their illegal affray. Officer Shaneka Hyman was also present, approached and instructed the inmates to stop. When Plaintiff fell to the ground, Hyman also sprayed Thorton with pepper spray.

Plaintiff purports to argue on appeal that the Industrial Commission erred by finding that Officers Booker and Hyman had acted reasonably in response to the prospect of and during the assault. We all agree Plaintiff did not timely appeal and this Court lacks jurisdiction to address this argument. The Full Commission's finding and conclusion on this issue is binding on appeal.

Plaintiff also failed to timely appeal, and we also all agree this Court lacks jurisdiction to address the issue of whether State had assigned insufficient personnel for the conditions and to the area in which the assault occurred, Nonetheless, the majority's opinion erroneously asserts Officer Booker's conduct and actions and the adequate staffing levels are separate issues from whether Sergeant Pryor had notice that an assault was likely to occur, which is the unsupported basis for the Industrial Commission's award.

The Commission erred by concluding the State, as Defendant through his actions, "had notice, and reasonably should have anticipated,

that a violent interaction between Plaintiff and Mr. Thorton was likely to occur. " The State, through its Department of Public Safety and its correctional facilities, "is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another." *Taylor*, 88 N.C. App. at 452, 363 S.E.2d at 871. The award is properly reversed.

V. Damages

The Industrial Commission failed to consider and factor medical care and treatment Plaintiff received and expenses incurred by the State into its conclusion to award damages. The Full Commission found, "Plaintiff has experienced physical and emotional pain and suffering, ongoing bouts of intermittent vertigo, and scarring on his forehead and cheek." Based upon this finding, the Industrial Commission concluded, without setting forth any specificity or basis in support of its conclusion, "Plaintiff is entitled to a reasonable award of $15,000.00 for his injuries, pain and suffering, and scarring."

Plaintiff testified concerning his pain and suffering and showed his scars at the hearing. No competent medical evidence was admitted on the nature and extent, or prognosis of Plaintiff's injuries to support the conclusion of this specific award, which is solely based on Plaintiff's unsupported testimony.

VI. Conclusion

Plaintiff failed to show any breach of duty, proximate cause, or medical proof or enumeration of damages to support the Full Commission's conclusions underlying the award. The Full Commission also failed to consider Plaintiff's conduct, actions and role in contributing to and bringing about the assault and his resulting injuries, or whether his actions were consistent with the agency's and institution's rules and policies as a guest of the State and its taxpayers.

No competent medical evidence supports the extent, prognosis of Plaintiff injuries and no consideration of Plaintiff's care and treatment at State expense was adjudicated to support the Full Commission's award. This award is erroneous and is properly reversed. I respectfully dissent.

DOUGLAS HOYT McMILLAN, PLAINTIFF
v.
JANESHA A. FAULK, INDIVIDUALLY, AND SHELLY D. McMILLAN, INDIVIDUALLY, DEFENDANTS

No. COA23-827

Filed 7 May 2024

1. Appeal and Error—interlocutory orders—denial of motion to dismiss—collateral estoppel—no showing of a substantial right

In an action stemming from a custody dispute, the mother's interlocutory appeal from the partial denial of her motion to dismiss the father's tort and civil conspiracy claims on collateral estoppel grounds was dismissed where the mother did not assert the presence of the same factual issues in both trials or the possibility of inconsistent verdicts and thus failed to show that a substantial right would be affected absent immediate review.

2. Appeal and Error—interlocutory orders—denial of motion to dismiss—collateral estoppel—no showing of a substantial right

In an action stemming from a custody dispute, a social worker's interlocutory appeal from the partial denial of her motion to dismiss the father's tort and civil conspiracy claims on collateral estoppel grounds was dismissed where the father's allegations concerned the social worker's acts outside the scope of her work and occurring after her professional involvement with the father's child had ended. Neither the same factual issues nor the possibility of inconsistent verdicts was shown, and accordingly, the social worker failed to demonstrate that a substantial right would be affected absent immediate review.

3. Appeal and Error—interlocutory orders—dismissal of civil conspiracy claims—no argument of a substantial right

In an action stemming from a custody dispute, the father's interlocutory appeal from the dismissal of his civil conspiracy claims against the mother and a social worker was dismissed where the father made only a bare assertion that a substantial right would be affected absent immediate review because the appellate court does not construct such arguments for appellants.

Appeal by Defendants and cross-appeal by Plaintiff from orders entered 31 January and 8 February 2023 by Judge Patrick T. Nadolski

in Forsyth County Superior Court. Heard in the Court of Appeals 23 January 2024.

Morrow, Porter Vermitsky & Fowler, PLLC, by John C. Vermitsky, for Plaintiff-Appellee/Cross-Appellant.

Constangy, Brooks, Smith & Prophete, LLP, by William J. McMahon, IV, and Robin E. Shea, for Defendant-Appellant/Cross-Appellee Janesha A. Faulk.

Christopher L. Beal for Defendant-Appellant Shelly D. McMillan.

COLLINS, Judge.

All parties appeal from an order granting in part and denying in part Defendants' motions to dismiss Plaintiff's complaint in an action stemming from a custody dispute that has spawned multiple appeals to this Court. Defendants Janesha A. Faulk ("Faulk") and Shelly D. McMillan ("Mother") argue that Plaintiff Douglas Hoyt McMillan ("Father") is collaterally estopped from asserting his claims and, therefore, the claims should have been dismissed.[1] Father argues that the trial court erred by dismissing his claim for civil conspiracy. As the order from which the parties appeal is interlocutory, and no party has demonstrated that the order affects a substantial right, the appeals are dismissed.

I. Background

Father and Mother met in 2007, married in 2009, and separated in 2010. Their daughter, "M,"[2] was born shortly before Father and Mother separated. M's custody arrangements have been intermittently contested since December 2010 and eventually became the subject of an appeal to this Court, which affirmed a March 2018 custody order awarding legal and primary physical custody to Mother and secondary physical custody to Father. *See McMillan v. McMillan*, 267 N.C. App. 537, 833 S.E.2d 692 (2019).

---

1. Mother additionally noticed appeal from the trial court's order denying her motion for reconsideration. However, Mother does not argue any error arising from that order on appeal. Accordingly, Mother's appeal from that order is deemed abandoned. *See* N.C. R. App. P. 28(a).

2. Initials are used to protect the identity of the juvenile involved in this case. *See* N.C. R. App. P. 42(b).

On 1 February 2018, the Forsyth County Department of Social Services ("FCDSS") began an investigation after M reported concerns about visiting Father. As part of the investigation, Faulk, a social worker with FCDSS, interviewed Mother, Father, and M, and visited Mother's and Father's homes. FCDSS also obtained authorization for a Child and Family Evaluation, from which the evaluator opined that M "has chronically been subjected to conflict and disagreement between her parents," and that M's exposure to the conflict "reaches the level of emotional abuse." Faulk and an FCDSS social worker supervisor met with Mother and Father in early June 2018 to discuss the evaluation and develop an agreement to limit M's exposure to the harmful conditions. However, M reported that Father did not abide by the agreement and, in late June 2018, M's pediatrician reported to FCDSS that M was experiencing functional abdominal pain likely triggered by psychological distress.

On 3 July 2018, FCDSS filed a juvenile petition alleging that M was an abused and neglected juvenile. After hearing the parties' arguments, the juvenile court entered an order on 29 April 2019, concluding that M was an abused and neglected juvenile.[3] The juvenile court conducted permanency planning hearings on 20 November 2019, 24 February 2020, and 19 August 2020. After the August 2020 permanency planning hearing, the juvenile court terminated its jurisdiction and ordered that Mother's and Father's custodial rights shall revert to those specified in the March 2018 custody order.

On 6 April 2022, Father initiated this action by filing a complaint asserting claims for abuse of process against Faulk, malicious prosecution and negligent infliction of emotional distress against Mother, and intentional infliction of emotional distress and civil conspiracy against Faulk and Mother. Father alleged that Faulk and Mother worked together to undermine his relationship with M, and that Faulk acted outside the scope of her employment to assist Mother in securing custody of M.

Faulk and Mother each filed a motion to dismiss Father's claims pursuant to the doctrine of collateral estoppel and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The trial court heard Faulk's and Mother's motions to dismiss on 5 December 2022 and entered an order on 31 January 2023, granting the motions as to Father's claim for civil conspiracy against Faulk and Mother and denying the motions as to Father's other claims. All parties appealed.

---

3. Father appealed the order adjudicating M abused and neglected, which this Court affirmed. *See In re M.M.*, 272 N.C. App. 55, 845 S.E.2d 888 (2020).

II. Discussion

A. Appellate Jurisdiction

The order on appeal granting in part and denying in part Defendants' motions to dismiss Plaintiff's complaint is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory order is immediately appealable "where the order deprives the appellant of a substantial right which would be lost without immediate review." *Whitehurst Inv. Props., LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (citations omitted). "To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (quotation marks and citation omitted).

For the reasons set forth below, the parties have failed to demonstrate that the challenged order affects a substantial right.

1. Mother's appeal

[1] Mother argues that the trial court's failure to address the issue of collateral estoppel affects a substantial right.

"[D]enial of a motion to dismiss premised on . . . collateral estoppel does not automatically affect a substantial right[.]" *Whitehurst*, 237 N.C. App. at 95, 764 S.E.2d at 489 (emphasis and citations omitted). The party seeking review must show that "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at 96, 764 S.E.2d at 490 (citation omitted).

Mother's brief offers no facts or argument that the same factual issues would be present in both trials or that the possibility of inconsistent verdicts exists. Thus, Mother has failed to confer appellate jurisdiction to review the trial court's order. *See Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438. Accordingly, Mother's appeal is dismissed.

2. Faulk's appeal

[2] Faulk also argues that the trial court's order affects a substantial right based on collateral estoppel. Specifically, Faulk argues that the reasonableness of her actions has already been judicially determined, and that there is a risk of inconsistent verdicts if this case proceeds to trial because the trial court might find that Faulk acted unreasonably.

In support of her assertion, Faulk focuses on several orders that were issued during the juvenile proceedings concerning M. In those orders, the juvenile court consistently found that FCDSS "made efforts to eliminate the need for placement, reunify the child and family and to obtain timely permanence for the child[,]" and that those efforts were reasonable. Faulk argues that the juvenile court's findings apply to her individually because she acted as FCDSS' principal agent for M's case. However, the juvenile court distinguished between Faulk as an individual social worker, other FCDSS employees, and FCDSS as an organization throughout those orders. Furthermore, the juvenile court cited multiple employees' actions in its findings that FCDSS made reasonable efforts to eliminate the need for placement, reunify the child and family, and to obtain permanence for the child. Thus, the juvenile court's findings that FCDSS' efforts were reasonable cannot be read as a judicial determination that Faulk's individual actions were reasonable.

Even if the juvenile court's findings applied to Faulk individually, Faulk has failed to show that there is a risk of inconsistent verdicts if the present case were allowed to proceed. The juvenile court's inquiry was limited to determining whether FCDSS' efforts "to eliminate the need for placement, reunify the child and family and to obtain timely permanence for the child" were reasonable; it was not tasked with evaluating whether all of Faulk's actions were reasonable while she was assigned to the case. Indeed, Father argues that his claims arise, at least in part, from Faulk acting outside the scope of her employment and from Faulk's actions after she was no longer the social worker assigned to M's case. Thus, even if this case proceeds to trial and the trial court finds that Faulk acted unreasonably, such a finding would not be inconsistent with the juvenile court's orders.

Because Faulk has failed to show that the same factual issues would be present in both trials, and that the possibility of inconsistent verdicts on those factual issues exists, Faulk has failed to show that the trial court's order affects a substantial right. *See Whitehurst*, 237 N.C. App. at 96, 764 S.E.2d at 490. Accordingly, Faulk's appeal is dismissed.

3. Father's cross-appeal

[3] Father argues that the dismissal of his civil conspiracy claim affects a substantial right because it would "greatly affect the manner in which the trial progresses by broadening the evidence available" to him. However, Father makes no argument in support of this assertion, and this Court will not "construct arguments for or find support for appellant's right to appeal from an interlocutory order" on our own initiative. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Thus, Father has failed to confer appellate jurisdiction to review the trial court's order. *See Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438. Accordingly, Father's cross-appeal is dismissed.

B. Petition for Writ of Certiorari

Father petitioned this Court to issue the writ of certiorari to review whether his civil conspiracy claim was properly dismissed. Father argues that the writ should issue in the interest of judicial economy. As none of the parties' appeals are properly before this Court, reviewing Father's appeal is not in the interest of judicial economy. Accordingly, Father's petition for writ of certiorari is denied.

III. Conclusion

For the foregoing reasons, no party has shown that the trial court's interlocutory order affects a substantial right. Accordingly, their appeals are dismissed.

DISMISSED.

Judges ZACHARY and MURPHY concur.

REAL TIME RESOLUTIONS, INC. (RTR), ROGER TOWNSEND & THOMAS, PC,
PLAINTIFFS/PETITIONERS
v.
STEPHEN COLE AND WIFE, DONNA COLE, DEFENDANTS/RESPONDENTS

No. COA23-464

Filed 7 May 2024

Statutes of Limitation and Repose—foreclosure—ten years—from date of acceleration—action barred

The trial court properly concluded that petitioner's non-judicial foreclosure action was barred by the statute of limitations in N.C.G.S. § 1-47(3) where the action was filed more than ten years after the note holder exercised its right of acceleration, as evidenced by the affirmative invocation of the right in a notice to the borrower that stated the full amount of the note was due and payable in full unless the default was cured on or before a date certain. Where the trial court misidentified the year of the payable date in two of its findings (but related the correct year elsewhere in the order), the matter was remanded for correction of the clerical errors.

Appeal by petitioners from order entered 1 December 2022 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 April 2024.

The Law Office of John T. Benjamin, Jr. P.A., by John T. Benjamin, Jr. and Jordan M. Latta, and McMichael Taylor Gray, LLC, by Brian Campbell, for petitioner-appellant Yakte Properties, LLC.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Surane Law Group PLLC, by James W. Surane, for respondents-appellees.

GORE, Judge.

The dispositive question in this appeal is whether the applicable statute of limitations set forth in N.C.G.S. § 1-47(3) bars petitioner's foreclosure action. We conclude that it does. Accordingly, we affirm the trial court's Order denying non-judicial foreclosure of the subject property but remand for correction of clerical errors noted herein.

I.

On or about 23 June 2006, respondent Stephen E. Cole executed a Home Equity Credit Line Agreement and Disclosure Statement ("HELOC

Agreement") governing his Home Equity Credit Line Account ("Account") with Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender ("Countrywide"). Mr. Cole executed a promissory note with a principal credit limit of $360,000 (herein "Note"). Under the terms of the Note, Mr. Cole promised to repay all amounts loaned together with a variable interest rate starting at 8.75% per annum on the unpaid balance. To secure the Note, Mr. Cole and wife Donna L. Cole (collectively, "respondents"), executed a deed of trust pledging their home as security for the repayment funds lent from their HELOC Account.

In 2008, respondents fell behind on payments under the Note. By written notice dated 7 April 2008 ("7 April 2008 Notice"), Countrywide alerted Mr. Cole that the Account was "in serious default because the required payments have not been made." The 7 April 2008 Notice stated, in relevant part:

> You have the right to cure the default. To cure the default, on or before May 12, 2008, Countrywide must receive the amount of $4,362.28 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before May 12, 2008.
>
> The default will not be cured unless Countrywide receives "good funds" in the amount of $4,362.28 on or before 12 May 2008. . . . Countrywide reserves the right to accept or reject a partial payment of the total amount due without waiving any of its rights herein or otherwise. For example, if less than the full amount that is due is sent to us, we can keep the payment and apply it to the debt but still proceed to foreclosure since the default would not have been cured.
>
> If the default is not cured on or before May 12, 2008, the mortgage payments **will be accelerated** with *the full amount remaining accelerated and becoming due and payable in full*, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property.

Respondents made no payments to the Account between the 7 April 2008 Notice and the 12 May 2008 deadline dictated therein. Rather, an $11,636.84 payment was made to the Account on 18 July 2008, followed by a $1,752.28 payment on 15 August 2008. The 15 August 2008 payment was the last ever made to the Account, and none were made in response to a second Notice of Intent to Accelerate from Countrywide dated 5 November 2008.

Petitioner Yakte Properties, LLC, commenced this non-judicial foreclosure action to foreclose on respondents' property by filing a Notice of Hearing on Foreclosure of Deed of Trust on 15 November 2018 through petitioner's assigned trustee, Satterfield Legal, PLLC. Petitioner served an Amended Notice of Hearing on Foreclosure of Deed of Trust on respondents on 31 May 2019, filed on 3 June 2019. Petitioner filed an Affidavit of Indebtedness on 5 August 2019.

This matter came to be heard before the Assistant Clerk of Superior Court, Mecklenburg County, as a Contested Hearing. The Assistant Clerk entered an Order Authorizing Foreclosure on 12 September 2019 granting petitioner the right to proceed to foreclosure ("Clerk's Order"). The Clerk's Order explicitly states that respondents "contested the foreclosure, noting that the foreclosure sale is barred by the statute of limitations and challenging the standing of the Lender to foreclose[.]"

Respondents filed a Notice of Appeal on 17 September 2019 appealing the Clerk's Order. The matter came on to be heard in Superior Court, Mecklenburg County, pursuant to respondent's appeal of the Clerk's Order on 14 October 2021. After a hearing on the matter, and in an Order filed 1 December 2022, the trial court found that "there is ongoing confusion about the holder of the Note[,]" that petitioner "never adequately explained the discrepancy in the documents as to who was the holder of the note," and "[t]he conflicting or otherwise concealed or missing documentation makes the identity of the holder of the note uncertain." Further, the trial court concluded as a matter of law:

> 20. The language of the Notice from Countrywide sent to the Borrowers in April 2008 constitutes a valid acceleration of the Note.
>
> 21. Under N.C.G.S. § 1-47 there is a ten-year statute of limitation for when the power of sale by foreclosure may commence.
>
> 22. The provisions of *In re Brown*, 771 S.E.2d 829 (NC Ct. App. 2015) control, which holds that if a promissory note is accelerated, the statute of limitation runs from the date of acceleration forward for ten years from the acceleration date.
>
> 23. In the present case, the date of acceleration was May 12, 2008, and therefore under the *In re Brown* decision the statute of limitations had run prior to the Notice of Hearing filed on or after November 13, 2018 by the Petitioners and

> as such the petition to foreclose is barred under the relevant statute of limitations.
>
> 24. [Petitioner's] actions were improperly filed after the statute of limitations had expired.

Petitioners filed written notice of appeal to this Court from the trial court's Order on 28 December 2022.

The trial court's 1 December 2022 Order denying petitioner's request for foreclosure, and dismissing the foreclosure petition, is a final judgment on all remaining claims asserted by petitioner in this non-judicial foreclosure brought under N.C.G.S. § 45-21.16. Appeal therefore lies to this Court pursuant to N.C.G.S. § 7A-27(b).

II.

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50 (2000) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re Adams*, 204 N.C. App. 318, 321 (2010) (quotation marks and citation omitted). "Unchallenged findings of fact are presumed correct and binding on appeal." *In re Frucella*, 261 N.C. App. 632, 635 (2018) (citation omitted). "[T]he trial court's conclusions of law are reviewable *de novo*." *Id.* (citation omitted).

III.

We elect to first review the trial court's conclusion of law that petitioner's "actions were improperly filed after the statute of limitations had expired." On appeal, petitioner asserts the trial court erred in ruling that the 10-year statute of limitations set forth in N.C.G.S. § 1-47(3) bars its petition for a non-judicial foreclosure of respondents' property. We disagree.

North Carolina General Statutes § 1-47 sets a ten-year statute of limitations to commence a foreclosure action. The statute provides:

> For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, *within ten years* after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

N.C.G.S. § 1-47(3) (2023) (emphasis added).

> In order for a foreclosure to be barred under this section, two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and (2) the possession of the mortgagor during the entire ten-year period. These two requirements must be coexistent.

In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 484 (1987) (citation omitted). "[T]he statute of limitations . . . begins on the date of maturity of the loan[ ] *unless* the note holder or mortgagee *has exercised* his or her *right of acceleration*." *In re Brown*, 240 N.C. App. 518, 522 (2015) (emphasis added). An "acceleration" is "[t]he advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately." *Acceleration*, Black's Law Dictionary (8th ed. 2004). "[I]f payment on a promissory note is accelerated, the power of sale . . . begin[s] to run on the date of acceleration." *Brown*, 240 N.C. App. at 522.

As a preliminary matter, we presume without deciding that petitioner satisfied all essential elements to bring an action for non-judicial foreclosure of the subject property under N.C.G.S. § 45-21.16(d). Further, the second element of § 1-47(3), "possession of the mortgagor during the entire ten-year period[,]" *Lake Townsend*, 87 N.C. App. at 484; *see* § 1-47(3), is not in dispute. The parties dispute the date of acceleration, and thus, the date from which the clock started on the 10-year statute of limitations under § 1-47(3). To this effect, petitioner challenges the trial court's findings of fact 6–9 as unsupported by competent evidence in the record:

> 6. On April 7, 2008 Lender provided Borrowers with a notice of acceleration.
>
> 7. The Notice was clear and without reservation and provided that if Borrowers did not cure their default by May 12, 2012 it would in fact be accelerated.
>
> 8. Borrowers did not cure the default by the May 12, 2012 deadline and the debt was therefore accelerated on that date under the conditions set forth by Countrywide under the terms of the Acceleration Notice.
>
> 9. [Respondents] offered no argument that the Note was subsequently reinstated following the acceleration by Countrywide.

Petitioner argues, and respondents concede, that findings of fact 7 and 8 misidentify the cure date as 12 May *2012*, rather than the correct

date of 12 May *2008*. We agree but determine that the correct year—2008—is listed elsewhere under finding fact 4 and is supported by the plain language of the 7 April 2008 Notice as it appears in the record. These typographical mistakes are appropriately classified as clerical errors, which when viewed in isolation, do not disturb the validity of the entire Order. *See State v. Taylor*, 156 N.C. App. 172, 177 (2003) (cleaned up) ("Clerical error has been defined as an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.").

Additionally, finding of fact 8 states, "Borrowers did not cure before the May 12, 2012[,] deadline and the debt was therefore accelerated on that date[,]" but the 7 April 2008 Notice states respondents may cure "on or before" that date. Therefore, if acceleration occurred, it would have happened the next day (13 May 2008). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845 (2008) (citation omitted). Accordingly, we remand for correction of clerical errors appearing in findings of fact 7 and 8.

Next, we address the trial court's conclusions of law 23 and 24, which indicate respondents' failure to cure the default on their HELOC Account—on or before 12 May 2008—resulted in the note holder's acceleration of the entire loan amount, and thus, started the clock on the relevant 10-year statute of limitations under § 1-47(3).

> It appears to be well settled that a provision in a bill or note accelerating the maturity thereof on nonpayment of interest or installments, or other default, at the option of the holder, requires some affirmative action on the part of the holder, evidencing his election to take advantage of the accelerating provision, and that until such action has been taken the provision has no operation. In other words, some positive action on the part of the holder is an essential condition for the exercise of his option and a mere mental intention to declare the full amount due is not sufficient. This rule requires objective evidence of an election to exercise the option.

Shoenterprise Corp. v. Willingham, 258 N.C. 36, 39–40 (1962) (internal quotation marks and citation omitted). That is, "[t]he exercise of the option to accelerate maturity of a note should be in a manner so clear and unequivocal as to leave no doubt as to the holder's intention." *Vreede v. Koch*, 94 N.C. App. 524, 527 (1989) (quotation marks and

citation omitted). "The rationale is that the acceleration clause is for the sole benefit and security of the creditor[,] and he must elect to take advantage of it." *Id.* (citation omitted).

Here, the 7 April 2008 Notice contains this clear statement: "[i]f the default is not cured on or before May 12, 2008, [then] the mortgage payments **will be accelerated** with *the full amount remaining accelerated* and becoming due and payable in full[.]"

The Notice does not employ verbs such as "might" or "may" in reference to acceleration. The Notice uses the term "will," which indicates inevitability. The only reference to a *possibility* is foreclosure and sale of the subject property at a later proceeding should respondents fail to cure the default. Thus, acceleration is not a *possible* future event—it is *guaranteed* to occur if respondents do not tender "'good funds' in the amount of $4,362.28 on or before May 12, 2008."

Respondents failed to cure the default on their Account by the specified date—12 May 2008. Thus, we determine that acceleration of the loan occurred the next day (13 May 2008). *Cf. Vreede*, 94 N.C. App. at 527 (quotation marks and citation omitted) (holding that a note holder must, in no uncertain terms, affirmatively invoke its option to accelerate maturity of a note, and "a mere threat to commence suit" following notice of default "is not sufficient either to set in motion the limitations statute or to establish an earlier maturity date for any purpose."); *Lake Townsend*, 87 N.C. App. 481, 486 (1987) (emphasis added) (determining that language in a note and deed of trust that states, "the holder of this Note *may* declare the entire sum due and payable[,]" is a statement of the note holder's "*right to* accelerate payment on the entire amount of the note[,]" but is not sufficient by itself to show that the note holder had in fact "exercised this right[ ]" to accelerate.). Because petitioner did not file its first Notice of Hearing on Foreclosure of Deed of Trust until 15 November 2018—approximately 10 years and 6 months after acceleration of the full loan amount—petitioner's action for non-judicial foreclosure of respondents' property is time barred under § 1-47(3).

IV.

We hold that the 7 April 2008 Notice contained "clear and unequivocal" language "as to leave no doubt as to the holder's intention[,]" *Vreede*, 94 N.C. App. at 527; "If the default is not cured on or before May 12, 2008, the mortgage payments **will be accelerated** with *the full amount remaining accelerated* and becoming due and payable in full[.]" Thus, we determine that petitioner filed this non-judicial foreclosure action outside the applicable 10-year statute of limitations under § 1-47(3).

Having concluded that petitioner's action is time-barred, it is unnecessary to reach the parties' remaining arguments. We, therefore, affirm the trial court's Order and remand for correction of clerical errors appearing therein.

AFFIRMED IN PART AND REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges STROUD and TYSON concur.

TIMOTHY WILLIE SCOTT, PLAINTIFF
v.
ALECIA MANN SCOTT, DEFENDANT

No. COA23-263

Filed 7 May 2024

1. Child Custody and Support—modification of custody—consent order—statutory authority—child's best interests

A district court had subject matter jurisdiction to modify a consent order as to child custody despite the provision in that order requiring the parties to mediate or arbitrate any disagreement regarding "major decisions" before submitting it to the court because no agreement or contract can deprive the district court of its statutory authority to protect a child's best interests. Moreover, the appellant—here, the mother—did not seek mediation or arbitration in the district court, and thus she waived any appellate review of that issue.

2. Appeal and Error—record—lack of transcript—duty of appellant to complete

It is the duty of the appellant to ensure that the record on appeal is complete, and because the appellant—here, the mother—failed to include a transcript of the proceedings in the record, the appellate court could not consider her argument that the district court's findings of fact were not supported by the evidence.

3. Child Custody and Support—change of circumstances—conclusions of law supported by findings of fact

In a proceeding to modify custody, where the district court's findings of fact were that the child was not able to stay with the

mother on the joint custody schedule set by consent and experienced adverse personality and demeanor changes as a result of those living arrangements, the court's conclusions of law that there had been a substantial and material change in circumstances affecting the child's welfare warranting a custody modification were supported.

Appeal by defendant from order entered 21 November 2022 by Judge Christy T. Mann in District Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2023.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for plaintiff-appellee.

The Blain Law Firm, P.C., by Sabrina Blain, for defendant-appellant.

STROUD, Judge.

Defendant Mother appeals from the trial court's order modifying child custody and argues the trial court lacked jurisdiction to modify custody because the parties had not attended mediation. She also contends the trial court did not make sufficient findings of fact to support its conclusions of law that a substantial change in circumstances affecting the welfare of the child had occurred. The consent order's provision regarding attending "mediation or arbitration" to resolve disagreement on decisions about "the general health, welfare, religious training, education and development of the child" before "submitting the issue to the court" did not create a "condition precedent" to the trial court's jurisdiction to modify child custody. Mother did not challenge any of the trial court's findings of fact as unsupported by the evidence, and those findings support the trial court's conclusions of law. We therefore affirm the trial court's order.

I. Background

Mother and Father were married in 2015 and separated in 2019. One child, Tom,[1] was born to the marriage in 2015. Father filed an action seeking child custody[2] and on 12 July 2021, the trial court entered a

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

2. Our record does not include any pleadings or other documents in the case prior to the Consent Order. We note that the pleadings should be included in the Record on appeal. *See* N.C. R. App. P. 9(a)(1)(d) ("The printed record in civil actions . . . shall contain . . . copies of the pleadings[.]").

"Consent Order: Permanent Child Custody" (capitalization altered) (the "Consent Order"). The Consent Order granted joint legal and physical custody of Tom to the parties and set out a detailed schedule for "regular parenting time" and "summer/holiday parenting time" (capitalization altered) for each parent and many provisions regarding decision-making, access to records and information, communications, and other issues. The Consent Order did not include findings of fact and both parties consented that they "waive any challenge or appeal of this Order based upon lack of Findings of Fact or Conclusions of Law."

As relevant to this appeal, the Consent Order's decree regarding "Legal Custody" provided as follows:

> The parties shall share joint legal custody of the minor child. Mother and Father shall work together to decide issues of lasting significance for the minor child. The parties shall cooperate with each other, consult in good faith with each other and endeavor to agree on all major decisions regarding the minor child, including, medical treatment, dental treatment, religion, counseling, extracurricular activities, and all other major decisions. If the parties are unable to agree on major decisions regarding the general health, welfare, religious training, education and development of the child, the parties shall timely attend mediation or arbitration before submitting the issue to the court.

On 25 March 2022, Father filed a motion to modify child custody and child support. He alleged "substantial and material changes in circumstances affecting the welfare of the minor child" which required modification of the custody provisions of the Consent Order. Generally, Father alleged Mother's employment schedule had changed, requiring her to spend substantial time away from home, and she had failed to advise Father of her travel schedule or "offer him the right of first refusal to care for the minor child." He alleged that in mid-January of 2022, Mother relied on the paternal grandparents to care for the child, and Mother then left North Carolina from 25 January 2022 until 21 March 2022. The child lived primarily with Father while Mother was out of North Carolina. He also alleged the "parties' ability to communicate has deteriorated," as shown by Mother's failure to notify Father regarding her travels and her "offensive and/or vulgar messages" to him.

On 25 August 2022, Mother filed a reply to Father's motion, in which she denied some allegations of Father's motion and admitted others. As relevant to this appeal, in response to Father's allegations regarding

changes of circumstances justifying a modification of custody, Mother admitted that "a change of circumstances exists," although she did not admit all the facts as alleged by Father. Mother also asked the court to recalculate child support. Mother did not object to Father's filing of his motion to modify custody based on his failure to first request mediation or arbitration, nor did she make any request to attend mediation or arbitration.[3]

On 29 August 2022, the trial court held a hearing regarding Father's motion for modification of custody and child support, and the trial court entered its "Modification of Child Custody Order" (capitalization altered) (the "Modification Order") on 21 November 2022.[4] Mother timely filed notice of appeal from the Modification Order.

II. Appellate Jurisdiction

Mother's brief states the trial court's order is a "final judgment on the merits" and appeal lies to this Court under North Carolina General Statute Section 7A-27(b). However, the Modification Order addressed only child custody, leaving issues of child support and attorney's fees raised by both Father's motion and Mother's reply unresolved. That means the Modification Order is an interlocutory order, as it fails to resolve the entire controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). "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). But under North Carolina General Statute Section 50-19.1, this Court has jurisdiction to consider Mother's appeal, because the Modification Order is

3. We note the Local Rules of Family Court in Mecklenburg County require mediation of motions to modify custody. Rule 7A.3 provides "[t]he Parties to all custody and visitation cases, including modifications motions shall receive from the Court an order for custody mediation and parent education with specific dates for attendance and deadlines for completion." *See* Mecklenburg Cnty. Family Ct. R. 7A.3. The trial court can waive mediation under Rule 7A.6. *See* Mecklenburg Cnty. Family Ct. R. 7A.6. Considering the deficiencies in the record before this Court and the lack of a transcript, we realize it is entirely possible the parties attended mediation as required by the Local Rules, although this mediation would have occurred *after* the filing of Father's motion to modify custody, not before.

4. The Modification Order states it was "[a]nnounced in open court on February 17, 2022 and signed this the 18 day of November, 2022." It was filed on 21 November 2022. Since the hearing was held on 29 August 2022, we assume the reference to February 17, 2022 is a clerical error, but this date does not affect our analysis.

a final order as to child custody. *See* N.C. Gen. Stat. § 50-19.1 (2023) ("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, the validity of a premarital agreement as defined by G.S. 52B-2(1), 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 G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.").

III. Jurisdiction of Trial Court to Modify Custody

[1] Mother first contends the "trial court was without jurisdiction to modify the Consent Order . . . because of a condition precedent contained therein with which Father did not comply." (Capitalization altered.)

A. Standard of Review

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

B. Analysis

Mother did not raise any objection regarding jurisdiction before the trial court. But we recognize the issue of subject matter jurisdiction can be raised at any time, even for the first time on appeal. *See Standridge v. Standridge*, 259 N.C. App. 834, 835, 817 S.E.2d 463, 464 (2018). In addition, parties cannot confer jurisdiction by consent.[5] *See id.* at 836, 817 S.E.2d at 464 (noting "if a court does not have subject matter jurisdiction over a claim, the parties cannot confer jurisdiction on the court by their agreement to have the court rule on their case").

Mother seeks to rely on cases addressing contractual rights to argue the trial court lacked subject matter jurisdiction to modify child custody. For example, Mother cites *Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc.*, 307 N.C. 342, 298 S.E.2d 357 (1983), regarding contractual conditions precedent:

> Conditions precedent "are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract

5. Although Mother argues the trial court lacked jurisdiction to modify child custody, the Statement of Jurisdiction in the Record on Appeal states that "The parties acknowledge that the Mecklenburg County District Court had personal and subject matter jurisdiction."

> duty, before the usual judicial remedies are available." 3A A. Corbin, Corbin on Contracts § 628, at 16 (1960).

Id. at 350, 298 S.E.2d at 362. Mother also cites *Davis v. Davis*, 78 N.C. App. 464, 337 S.E.2d 190 (1985), where this Court held that although the wife had waived alimony in the parties' separation agreement, the trial court properly entered a consent order which required the husband pay her medical expenses based on the consent of both husband and wife:

> The principle is well-established that "a consent judgment is a contract between the parties entered upon the record with the approval and sanction of the court," *Coastal Production Credit v. Goodson Farms*, 71 N.C. App. 421, 422, 322 S.E.2d 398, 399 (1984), and "must be construed in the same manner as a contract to ascertain the intent of the parties." *Bland v. Bland*, 21 N.C. App. 192, 195, 203 S.E.2d 639, 641 (1974).

Id. at 469, 337 S.E.2d at 192 (brackets omitted). Mother argues the provision of the Consent Order requiring the parties to go to mediation or arbitration "before submitting the issue to the court" to resolve any disagreements regarding "major decisions regarding the minor child, including, medical treatment, dental treatment, religion, counseling, extracurricular activities, and all other major decisions" is a "condition precedent" to the trial court's exercise of subject matter jurisdiction. In her reply brief, Mother clarifies that her

> argument is that *Father* cannot file a motion to modify because he has not complied with the condition precedent. As soon as Father complies with the condition precedent he can file. In the meantime, if there is some emergency or if someone with standing, who has complied with the condition precedent or is not subject to the condition precedent files to modify, the Court's jurisdiction is unaffected.

(Emphasis in original.) Based on the reply brief, Mother's argument seems not to be that the trial court lacks jurisdiction but instead that Father did not have standing to file a motion to modify unless he has complied with the "condition precedent." Either way, Mother's argument is entirely misplaced.

First, child custody issues are uniquely within the purview of the trial court, despite contractual agreements between a mother and father. This Court has explained:

> [w]hile it is clear that a husband and wife may bind themselves by a separation agreement, it is equally clear that "no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants." *Baker v. Showalter*, 151 N.C. App. 546, 551, 566 S.E.2d 172, 175 (2002) (quoting *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963)). Such separation agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." *Hinkle v. Hinkle*, 266 N.C. 189, 195, 146 S.E.2d 73, 77 (1966). This is so because "the welfare of the child is the 'polar star' which guides the court's discretion in custody determinations." *Evans v. Evans*, 138 N.C. App. 135, 141, 530 S.E.2d 576, 580 (2000).

Mohr v. Mohr, 155 N.C. App. 421, 425-26, 573 S.E.2d 729, 732 (2002) (brackets omitted). Although the provision regarding mediation or arbitration was included in a consent order, not a separation agreement or other contract between the parties, it still does not create a jurisdictional bar of any sort to the trial court's ruling on a motion to modify custody, nor does it prevent either Mother or Father from filing a motion to modify custody. Had either parent requested mediation or arbitration before the hearing on the motion for modification, the trial court could have ruled on that request, but neither party raised this issue before the trial court.

Mother did not ask for mediation or arbitration before the trial court. Instead, she admitted many allegations of Father's motion for modification. Mother has therefore waived review of any issue as to the lack of arbitration or mediation before the trial court's modification of custody. *See* N.C. R. App. P. 10 ("In 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.").

The Consent Order's provisions created no jurisdictional prerequisite of mediation or arbitration before Father could file a motion to modify custody or for the trial court to address modification of custody. Mother did not present any request for mediation or arbitration before the trial court, so she has waived any argument on appeal regarding the lack of mediation or arbitration as to child custody.

IV. Findings of Fact

[2] Mother next contends "the trial court made insufficient findings of fact to support its conclusions of law that a substantial change in circumstances affecting the welfare of the child had occurred." (Capitalization altered.)

Our understanding of Mother's argument in her primary brief is that she has not challenged any of the trial court's findings of fact as unsupported by the evidence, although in her brief she "assigns error and challenges" fifteen of the trial court's findings. Instead, Mother argues as to each finding the trial court should have made more or different findings. Father also understood Mother's brief as failing to challenge the findings as unsupported by the evidence. Father notes that under North Carolina Rule of Appellate Procedure 9(c), Mother cannot challenge the findings on the record before us because she did not provide a transcript of the hearing and included only one of the fourteen exhibits admitted at trial. In her reply brief, Mother responds that "Father misconstrues Mother's arguments" as being that the findings by the trial court were "too meager to support its Conclusions of Law, which are together insufficient to support its Orders." Mother clarifies that she *did* contend "that the challenged [findings of fact] are unsupported by the record." She also states Father "did not participate in the construction of the record" but he only "kicks back' and simply states: 'no transcript. But that is not enough."

But it is enough. Father is correct: without a transcript, we must accept the trial court's findings of fact as supported by the evidence. It is well-established that the *appellant* – not the appellee – has the duty to ensure that the record is complete. *See Fox v. Fox*, 283 N.C. App. 336, 354-55, 873 S.E.2d 653, 667 (2022) ("Relatedly, under North Carolina Rules of Appellate Procedure 7, 9, and 11, the burden is placed upon the appellant to commence settlement of the record on appeal, including providing a verbatim transcript if available." (citation, quotation marks, and brackets omitted)). Even if we interpreted Mother's arguments as addressing the sufficiency of the evidence to support the findings, Mother did not include the transcript from the hearing in the record on appeal. Without the transcript, we must assume the trial court's findings are supported by the evidence. This Court addressed the same issue in *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003):

> Plaintiff further argues that there was insufficient evidence to support the trial court's findings concerning the effect of the substantial change in circumstances on the minor child. Plaintiff failed to include in her appeal

> a transcript of the evidence presented to the trial court. Nor was a transcript of the evidence included in plaintiff's previous appeal of this matter to the Court. "If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a)(1) (2003). Similarly, Rule 9 of the North Carolina Rules of Appellate Procedure requires the appellant to include in the record on appeal "so much of the evidence . . . as is necessary for an understanding of all errors assigned." N.C.R. App. P. 9(a)(1)(e) (2003). It is the duty of the appellant to ensure that the record is complete. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Without the transcript, we are unable to review plaintiff's argument that the trial court erred in making findings of fact that are unsupported by the evidence. *See Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997) (concluding that, where the appellant failed to include relevant portions of the transcript on appeal, the Court would not engage in speculation as to potential error by the trial court). We therefore overrule this assignment of error.

Id. at 389-90, 576 S.E.2d at 414. We also note Mother did include one trial exhibit in the record on appeal: 525 pages of the minor child's unredacted medical records. These records are replete with personal information regarding the parties, including addresses, phone numbers, and email addresses, as well as the personal medical information of the minor child. We have *sua sponte* sealed the record on appeal to protect the minor child. *Cf. Frazier v. Frazier*, 286 N.C. App. 565, 566, 881 S.E.2d 839, 840 (2022) ("Plaintiff, as the appellant, bore the burden of ensuring that the record on appeal was complete, properly settled, in correct form, and filed." (citation and quotation marks omitted)). Unfortunately, Mother did include in the record confidential medical records of the child, confidential records of a child abuse investigation by Wake County Child Protective Services ("CPS") and the Nash County Department of Social Services ("DSS"), and records including voluminous personal identifying information of the child and the parties. "This

Court has *sua sponte* sealed the record to protect the personal identifying information and confidential medical information of the child to the extent we can." *Id.* We remind the parties and counsel that filings in this Court are freely available online and they should take care to protect the minor child's privacy in any future proceedings before the trial court or any appellate court.

We cannot review the findings of fact based on the record before this Court, and Mother's argument is without merit.

V. Conclusions of Law

[3] Mother also contends the trial court's "Conclusions of Law are unsupported by the Findings of Fact and thus do not support the Court's Orders." In support of this argument, purportedly challenging all ten of the trial court's conclusions of law,[6] Mother cites a few snippets from cases but she makes no argument connecting these snippets to the trial court's conclusions of law. In her reply brief, Mother clarifies that "there is no [finding of fact] shedding light on the way in which the parties were unable to follow the custodial arrangements, or indeed that the custodial arrangements were not followed."

Mother's argument overlooks the trial court's actual findings of fact. The trial court's findings of fact shed more than enough light on the changes in circumstances, including the ability of the parties to follow the custodial arrangements in the Consent Order after "the first few months" following entry of the Consent Order. Specifically, in January of 2022, Mother requested help from the paternal grandparents to keep the child when she had to "go out of state for work." The grandparents agreed to keep Tom during Mother's custodial time. Shortly after Mother left the state, Father and the grandparents agreed Tom would live exclusively with Father. The trial court also made findings regarding the changes in the child's "personality and demeanor" since the Consent Order's entry. Specifically, the trial court found the child had become "less trusting, disrespectful, fearful, angry, and throws temper tantrums." The trial court found the child's living arrangements in the joint custodial situation had "become disruptive" and "had an adverse effect on the minor child." The trial court further noted the parties had been "unable to co-parent" and "their communication is ineffective and

6. We assume Mother does not actually object to the trial court's conclusion that *she* is a "fit and proper person[ ] to share the permanent legal care, custody, and control of the parties' aforesaid minor child" or the conclusion that she is a "fit and proper person to have secondary custody with reasonable and liberal visitation with the minor child."

can become hostile and disruptive," with a "negative impact on the minor child."

The trial court's findings support its conclusions of law, and particularly its conclusions that "there has been a substantial and material change in circumstances affecting the welfare of the minor child which warrants the Court to modify the existing child custody provisions of the Consent Order" and that it is in the child's best interest to grant joint legal custody to both parties and primary physical custody to Father.

VI. Conclusion

The trial court had subject matter jurisdiction to enter the Modification Order as the Consent Order did not create any jurisdictional prerequisite for filing a motion to modify custody. Even assuming the Consent Order contemplated mediation or arbitration before filing a motion to modify custody, neither party requested mediation or arbitration. The trial court's unchallenged findings of fact support its conclusions of law, so we affirm the Modification Order.

AFFIRMED.

Judges MURPHY and FLOOD concur.

JASON M. SNEED, PLAINTIFF
v.
CHARITY A. JOHNSTON (SNEED), DEFENDANT

No. COA23-446

Filed 7 May 2024

1. Appeal and Error—preservation of issues—equitable distribution order—challenge to findings—specific arguments required

In an appeal from an equitable distribution order, in which the trial court distributed to plaintiff's ex-wife (defendant) a sum of money equal to one-half of the value of plaintiff's law firm, plaintiff's generalized assertion that numerous of the court's findings of fact were unsupported by the evidence was insufficient—standing alone and in the absence of specific arguments as to each finding's deficiency—to preserve for appellate review his challenge to those findings.

2. Divorce—equitable distribution—marital property—valuation of law firm—appraisal evidence

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court's determination of the value of the law firm was based on its findings, which in turn were based not only on the testimony and report of the business appraiser that the court had appointed to value the business as of the date of separation, but also on plaintiff's testimony and various other exhibits submitted into evidence. Plaintiff had ample opportunity to contest the appraiser's valuation methods, but repeatedly ignored the appraiser's communications, and provided no evidence demonstrating a clear legal error in the court's determination.

3. Divorce—equitable distribution—law firm—goodwill—classification as marital property

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court's decision to classify the law firm, including goodwill, as entirely marital property, was supported by its findings of fact, which in turn were supported by competent evidence such as the testimony and a report of the appraiser who had been appointed by the trial court to provide a valuation of the firm as of the date of separation.

4. Divorce—equitable distribution—law firm—valuation at time of distribution—decrease in value—abuse of discretion analysis

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court did not abuse its discretion by failing to distribute the decrease in value of the law firm—as generally alleged by plaintiff—where neither party offered credible evidence of a specific valuation of the business at the date of distribution or any evidence to counter the valuation provided by the business appraiser who had been appointed by the court to value the firm as of the date of separation.

5. Divorce—equitable distribution—motion to re-open evidence—trial court's discretion

The trial court did not abuse its discretion in an equitable distribution matter by denying plaintiff's motion to re-open the evidence after resting his case, where, although plaintiff argued that he was entitled to submit additional evidence due to the nearly seven-month delay between the close of the evidence and entry of judgment, plaintiff did not identify any prejudice to him that resulted from the delay.

6. Divorce—equitable distribution—credit for overpayment of child support—separate issue

In an equitable distribution matter, plaintiff's argument that the trial court failed to credit him for overpayment of child support when making a distributive award to his ex-wife (defendant) was more properly addressed in a separate child support proceeding in district court.

7. Divorce—equitable distribution—calculation of award—ability to pay

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court did not err in calculating the amount of the award where it had properly classified plaintiff's personal goodwill in the law firm as marital property and where no credible evidence was submitted of a decrease in value of the law firm as of the date of distribution. Further, the court's determination of plaintiff's ability to pay the distributive award was supported by evidence regarding plaintiff's employment, income, expenses, and assets.

Appeal by Plaintiff from Orders entered 30 September 2022 and 17 October 2022 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 24 January 2024.

Miller Bowles Cushing, PLLC, by Nicholas L. Cushing, for Plaintiff-Appellant.

Connell & Gelb PLLC, by Michelle D. Connell, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Jason M. Sneed (Plaintiff) appeals from an Equitable Distribution Order and Judgment awarding Charity A. Johnston (Defendant) a distributive award of $1,550,000 representing one-half the value of Plaintiff's law firm, as well as requiring Plaintiff to reimburse Defendant for certain costs of a business appraiser, and an Order Denying Plaintiff/Husband's Motion to Strike and Motion to Reopen Evidence. The Record before us tends to reflect the following:

The parties in this case were formerly husband and wife. The parties married on 17 August 1996, separated on 5 January 2015, and divorced on 8 March 2016. In 2011, during the marriage, Plaintiff started a law firm, Sneed, PLLC. On 2 May 2019, the trial court entered a Consent Order Re Business Appraiser, appointing Greg Reagan of Reagan FV, LLC to value Sneed, PLLC at the date of separation. On 26 July 2019, the parties subsequently entered into a Consent Order, which resolved all issues related to equitable distribution except for "the classification, valuation, and distribution of Sneed, PLLC and all assets owned by Sneed, PLLC[.]"[1]

Initially, in the summer of 2019, Plaintiff communicated with Reagan and provided him with financial documents concerning Sneed, PLLC. On 25 September 2019, Reagan provided both parties with a draft valuation of Sneed, PLLC, which indicated its value as of the date

1. The parties have not included this Consent Order in the Record on Appeal. As such, we are unable to discern whether the trial court ordered an equal or unequal distribution of marital and divisible property, the factors considered, or how the division of the value of the law firm at issue in this case fits into the equitable distribution of the totality of the parties' marital estate. Instead, the parties appear to have agreed to carve out the law firm from other assets and liabilities, and simply sought the trial court to classify the firm, value the firm, and divide it. As such, this is the limited lens through which we analyze this case.

of separation was $3,220,000. From September 2019 to January 2020, Reagan attempted to contact Plaintiff numerous times to obtain financial documents and get his assistance in valuing Sneed, PLLC. Plaintiff, however, repeatedly ignored Reagan, declined to send him information, and refused to pay his portion of Reagan's fee. Instead, Defendant paid the balance owed to Reagan.

On 6 March 2020, Reagan provided both parties with a final Calculation of Value of Sneed, PLLC. Reagan provided the parties with a final invoice for the valuation services on 10 April 2020. Over the following three months, Reagan sent monthly correspondence to Plaintiff regarding his final invoice, all of which went unanswered. Counsel for Defendant also sent a letter to Plaintiff regarding the appraisal and outstanding balance. Although Plaintiff acknowledged receiving this letter, he did not respond to any of the issues raised in the letter. Finally, on 14 October 2020, Defendant paid the outstanding balance for Reagan's service. On 14 December 2020, Defendant hired Reagan to perform a Valuation of Sneed, PLLC as of 5 January 2015—the date of separation.

The trial court heard this matter over two days in December 2021. At trial, Plaintiff testified that at the time of trial the value of Sneed, PLLC was either negative or zero due to an outstanding credit line. Reagan testified as an expert witness for Defendant. Reagan valued Sneed, PLLC at $3,100,000 as of the date of separation. He testified ten percent of Sneed, PLLC's goodwill value was enterprise goodwill, while the remaining ninety percent was personal goodwill attributable to Plaintiff.

On 30 September 2022, the trial court entered an Equitable Distribution Order and Judgment (the Equitable Distribution Order). The Order included 75 Findings of Fact detailing the trial court's valuation and distribution process. Ultimately, the trial court accepted Reagan's date of separation value of Sneed, PLLC of $3,100,000. The trial court further found its value included a valuation of the goodwill of Sneed, PLLC of $302,436 enterprise goodwill and $2,688,321 personal goodwill. The trial court did not find a date of distribution value of the firm. Instead, it expressly found Plaintiff "has failed to provide the [c]ourt with any credible value of Sneed, PLLC as of the date of separation or as of the date of trial."

The trial court ordered Plaintiff to pay a distributive award to Defendant of $1,550,000—representing one-half of the date of separation value of Sneed, PLLC—payable in monthly installments of $8,611.11 per month over a fifteen-year period. Additionally, the trial court ordered Plaintiff to pay $8,520.64 to reimburse Defendant for payments Defendant made to Reagan under the initial appointment order.

On 12 January 2022, Plaintiff filed a Motion to Strike Testimony and Reports of Court-Appointed Expert Greg Reagan. On 27 July 2022, Plaintiff filed a Motion to Reopen Evidence. The trial court entered an Order denying both Motions on 17 October 2022. Plaintiff timely filed Notice of Appeal on 25 October 2022 from both the 30 September 2022 Equitable Distribution Order and the 17 October 2022 Order Denying the Motion to Strike and Motion to Reopen Evidence.

Issues

The issues are whether: (I) the trial court's Findings of Fact were supported by competent evidence; and whether the trial court erred by (II) valuing Sneed, PLLC at $3,100,000; (III) classifying Sneed, PLLC as marital property; (IV) failing to distribute the decrease in the value of Sneed, PLLC; (V) denying Plaintiff's Motion to Reopen Evidence; (VI) failing to credit Plaintiff for his child support overpayment; and (VII) ordering Plaintiff to pay a distributive award of $1,550,000.

Analysis

I. Trial Court's Findings of Fact

[1] Plaintiff challenges the trial court's Findings of Fact 23, 30, 31, 37, 40-47, 50, 52-54, 56-65, 67, 69, and 72-74 in the Equitable Distribution Order. However, Plaintiff fails to make any specific argument as to each challenged Finding or to explain how or why he believes the challenged Findings to be deficient.

This Court considered a similar challenge to findings of fact—made in the context of a ruling by an Administrative Law Judge—in *Rittelmeyer v. University of North Carolina at Chapel Hill*, 252 N.C. App. 340, 799 S.E.2d 378 (2017). There, we determined:

> Because petitioner has failed to specifically raise an argument on appeal to any particular finding of fact, has failed to direct us to any particular portion of the record to consider a challenge to even one finding of fact, has failed to address any particular finding of fact as not supported by the evidence, and has failed to raise any issues with the findings of fact which she contends are material, we conclude that petitioner has abandoned her argument challenging the findings of fact.

Id. at 351, 799 S.E.2d at 385.

This Court has also considered a similar failure to explain the basis for a challenge to findings of fact in *Wall v. Wall*, 140 N.C. App. 303,

312, 536 S.E.2d 647, 653 (2000). The defendant in *Wall* argued the trial court did not consider adverse tax consequences in its equitable distribution order. *Id.* This Court held "[defendant] does not direct us to any evidence in the voluminous transcript which relates to the tax consequences he discusses in his brief. . . Defendant has the burden of showing that the tax consequences of the distribution were not properly considered, and he has failed to carry that burden." *Id.*

Similarly, here, Plaintiff's brief merely states: "For the reasons further discussed below, [Plaintiff] specifically challenges the trial court's findings of fact . . . Additionally, [Plaintiff] challenges the trial court's conclusions of law 2, 3, 4, 6, 7, 8, 9 and 11." Although Plaintiff alludes to arguments regarding these Findings and Conclusions, he does not make specific arguments in support of each. A generalized assertion the Findings "lack competent evidentiary support," standing alone, is not sufficient to preserve this argument for appellate review. *See Rittelmeyer*, 252 N.C. App. at 351, 799 S.E.2d at 385. Consequently, we reject this argument, except to the extent specific Findings are challenged within other arguments.

II. Valuation of Sneed PLLC

[2] "The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest. If it does, the valuation will not be disturbed." *Stowe v. Stowe*, 272 N.C. App. 423, 428, 846 S.E.2d 511, 516 (2020) (quoting *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985) (citation omitted)). This Court in *Poore* noted "[t]he valuation of each individual practice will depend on its particular facts and circumstances[,]" and directed trial courts to consider the following components of a practice: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270. "[T]he requirements and standard of review set forth [in *Poore*] apply to valuation of other business entities as well, and we have extended the *Poore* standards to the valuation of a marital interest in a closely held corporation." *Offerman v. Offerman*, 137 N.C. App. 289, 293, 527 S.E.2d 684, 686 (2000) (alterations in original) (citations and quotation marks omitted).

Further, this Court held: "In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations

are based, preferably noting the valuation method or methods on which it relied." *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272. Our Supreme Court has cautioned, however, that trial courts should "value goodwill with great care, for the individual practitioner will be forced to pay the ex-spouse tangible dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements." *McLean v. McLean*, 323 N.C. 543, 558, 374 S.E.2d 376, 385 (1988) (citations and quotation marks omitted).

"The trial court determines the credibility and weight of the evidence." *Watson v. Watson*, 261 N.C. App. 94, 101, 819 S.E.2d 595, 601 (2018) (citation omitted). The fact finder has "a right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965); *see also Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994) (trial court is the "sole arbiter of credibility and may reject the testimony of any witness in whole or in part.").

In this case, Plaintiff contends the trial court erred in its valuation of Sneed, PLLC by allowing Reagan to testify and accepting his reports into evidence; denying Plaintiff's Motion to Strike Testimony and Reports; and finding Reagan's calculations to be credible and relying on his testimony and report to value Sneed PLLC. Plaintiff's argument, however, ignores substantial evidence showing he repeatedly refused to cooperate with Reagan in his capacity as the court-appointed business appraiser. Based on the evidence presented at trial, the trial court made numerous Findings of Fact regarding Plaintiff's refusals to cooperate with Reagan and his violations of court orders, including the following:

> 51. At trial, [Plaintiff] objected to Mr. Reagan testifying in this matter on the grounds that Mr. Reagan was initially appointed as an expert by the Court, and then subsequently retained by [Defendant] as her expert to value Sneed, PLLC as of the parties' date of separation. The [c]ourt heard arguments from [Plaintiff] and [Defendant's] attorney on this point. Additionally, the [c]ourt received testimony from Mr. Reagan on this matter as well.
>
> 52. The [c]ourt does not find any bad faith or improper behavior on the part of [Defendant] or Mr. Reagan by virtue of [Defendant] hiring Mr. Reagan in December of 2020 to perform a Valuation of Sneed, PLLC. By December of 2020, [Plaintiff] had refused to communicate with Mr. Reagan

> *for over fifteen (15) months despite repeated efforts from Mr. Reagan to communicate with [Plaintiff]*, and despite numerous attempts from [Defendant's] attorney to facilitate communication between [Plaintiff] and Mr. Reagan.
>
> 53. The [c]ourt appointed a neutral appraisal [sic] to value the business and provide helpful information to the court regarding the January 5, 2015 date of separation value and the present day value of Sneed, PLLC. [Plaintiff], by his actions, prohibited Mr. Reagan from providing a present-day valuation of Sneed, PLLC. In fact, had [Defendant] not paid Mr. Reagan's invoice in February of 2020, the [c]ourt finds that it is unlikely that any appraisal—be it a Calculation of Value or Valuation—would have been completed with respect to Sneed, PLLC.
>
> 54. The [c]ourt finds that [Plaintiff] has unclean hands as it relates to his dealings with Mr. Reagan, specifically, [Plaintiff's] interference with Mr. Reagan's ability to produce a present date valuation of Sneed, PLLC.
>
> . . . .
>
> 56. The [c]ourt finds that [Plaintiff] has not been prejudiced by [Defendant] hiring Mr. Reagan to perform a Valuation of Sneed, PLLC. [Plaintiff] had several opportunities to speak with Mr. Reagan regarding his company. [Plaintiff] provided Mr. Reagan with the underlying financials supporting Mr. Reagan's Valuation of Sneed, PLLC. [Plaintiff] was provided with a copy of Mr. Reagan's Valuation of Sneed, PLLC over four months prior to the trial of this matter.

These Findings were supported by evidence including emails and testimony documenting Plaintiff's repeated failures to respond to Reagan's attempts to contact him, pay Reagan's invoices as ordered by the trial court, or cooperate with Reagan in a timely manner. Together, these Findings make clear Plaintiff was a significant impediment to Reagan's timely and accurate valuation of Sneed, PLLC. Given this evidence, the trial court was within its discretion to accept Reagan's testimony and valuation. Therefore, we conclude the trial court did not err in allowing Reagan to testify, accepting his reports into evidence, and denying Plaintiff's Motion to Strike.

Plaintiff also challenges the methodology Reagan used in making his valuation of Sneed, PLLC. "[T]he trial court must determine whether the

methodology underlying the testimony offered in support of the value of a marital asset is sufficiently valid and whether that methodology can be properly applied to the facts in issue." *Robertson v. Robertson*, 174 N.C. App. 784, 785-86, 625 S.E.2d 117, 119 (2005) (quoting *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577-78 (2002)). "There is no single best method for assessing that value, but the approach utilized must be sound[.]" *Walter*, 149 N.C. App. at 733, 561 S.E.2d at 577 (citations and quotation marks omitted). This Court has stated when valuing a business, a trial court should consider: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270.

At trial, Plaintiff did not object to Reagan being tendered as an expert witness in accounting, forensic accounting, and business valuation. Reagan testified in detail about the process he undertook to value Sneed, PLLC, including his analysis of revenue trends, cash flow, discount rates, goodwill, and depreciation expenses. He also testified to his consideration of various methodologies and his reasoning for using the income approach and applying the capitalization of cash flows method to value Sneed, PLLC. Based on Reagan's testimony, his report, Plaintiff's testimony, and various exhibits submitted into evidence, the trial court made thorough Findings to support its valuation of Sneed, PLLC at $3,100,000.

"Absent a clear showing of legal error in utilizing [an] approach, this Court is not inclined to second guess the expert and the trial court, which accepted and approved this determination." *Sharp v. Sharp*, 116 N.C. App. 513, 529, 449 S.E.2d 39, 47 (1994). Plaintiff has not provided evidence or pointed to anything in the Record rising to the level of "a clear showing of legal error" that would cast doubt upon the trial court's determination. Moreover, Plaintiff had ample opportunity to work with Reagan and raise any concerns he had with the valuation. Instead, Plaintiff ignored Reagan's repeated attempts at communication. The alleged flaws with Reagan's chosen approach do not rise to the level of clear legal error. Therefore, we conclude the trial court did not err in finding Reagan's calculations to be credible and relying upon them in determining the value of Sneed, PLLC.

III. Classification of Sneed PLLC

[3] Plaintiff contends the trial court erred by classifying Sneed, PLLC as entirely marital property. Specifically, Plaintiff argues the trial court should have concluded that at least 89.9% of the value of Sneed PLLC was his personal goodwill, and at most 10.1% was enterprise goodwill.

Thus, he contends his personal goodwill should be treated as his own separate property.

"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 the findings support the conclusions of law and ensuing judgment." *Blair v. Blair*, 260 N.C. App. 474, 478, 818 S.E.2d 413, 417 (2018) (quoting *Peltzer v. Peltzer*, 222 N.C. App. 784, 786, 732 S.E.2d 357, 359 (2012) (citation omitted)). "The determination of the existence and value of goodwill is a question of fact and not of law[.]" *Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271. "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. The trial court's findings need only be supported by substantial evidence to be binding on appeal." *Peltzer*, 222 N.C. App. at 786, 732 S.E.2d at 359 (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).

As an initial matter, under our statutes, "[i]t is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2021). Contrary to Plaintiff's assertion, our courts have consistently declined to draw a distinction between personal and enterprise goodwill. This Court addressed goodwill in a closely held corporation in *Poore*, 75 N.C. App. 414, 331 S.E.2d 266. In *Poore*, this Court addressed whether the trial court erred in valuing a defendant's professional association—a private, solo dental practice he had incorporated—including goodwill. There, the Court stated that although goodwill is "controversial and difficult to value," it is clear "that goodwill exists, that it has value, and that it has limited marketability." *Id.* at 420, 331 S.E.2d at 271 (citations omitted). There, this Court held "[i]n valuing the professional association, the court should clearly state whether it finds the practice to have any goodwill, and if so, its value, and how it arrived at that value." *Id.* at 422, 331 S.E.2d at 272. Further, "We agree that goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable distribution." *Id.* at 420-21, 331 S.E.2d at 271. Thus, goodwill may constitute part of the value of a marital asset, which is, in turn, subject to equitable distribution.

Here, the trial court made the following relevant Findings of Fact:

> 45. In arriving at the value of Sneed, PLLC, the [c]ourt considered evidence concerning the goodwill of the

> business. The [c]ourt made its determination of the existence of goodwill using the assistance of Mr. Reagan's expert testimony.
>
> 46. Mr. Reagan testified to using the Multi-Attribute Utility Method to assess goodwill existing in Sneed, PLLC, and after applying this methodology, Mr. Reagan testified to his conclusions of personal and business goodwill existing in Sneed, PLLC. The [c]ourt has accepted this testimony and methodology and determines that the value of Sneed, PLLC's goodwill as of January 5, 2015 was $2,990,757 with $302,436 representing enterprise good will [sic] of Sneed, PLLC and $2,688,321 representing personal goodwill.
>
> 47. The [c]ourt heard from both parties during the trial, and the [c]ourt finds that the testimony of the parties supports the goodwill calculations as made by Mr. Reagan and accepted by this [c]ourt.

These Findings are supported by competent evidence, including Reagan's report. Under the equitable distribution framework, these Findings support the trial court's Conclusion that Defendant was entitled to a distributive award of $1,550,000 representing her share of Sneed, PLLC.[2] The trial court, in line with our precedent, properly acknowledged the goodwill in Sneed, PLLC constituted marital property subject to distribution. We, therefore, affirm the trial court's classification.

IV. Decrease in Value of Sneed PLLC

[4] "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 the findings support the conclusions of law and ensuing judgment." *Blair*, 260 N.C. App. at 478, 818 S.E.2d at 417 (citation omitted). This Court applies an abuse of discretion

---

2. Plaintiff's argument regarding the value of goodwill attributable to himself would properly have been an argument made for unequal distribution. Under N.C. Gen. Stat. § 50-20(c), if a trial court determines an equal division of marital property is not equitable, then it shall consider various factors, including, among others, "[t]he difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party." N.C. Gen. Stat. § 50-20(c)(10) (2021). Moreover, the parties expressly agreed to a process whereby all of the marital property apart from the law firm would be distributed through equitable distribution, while the classification and valuation of Sneed, PLLC would be addressed by the trial court in this proceeding. Plaintiff makes no argument here that an equal distribution of the law firm (or the entirety of the marital and divisible estates) was not equitable.

standard, upholding the trial court's valuation if it "is a sound valuation method, based on competent evidence, and is consistent with section 50-21(b)." *Ubertaccio v. Ubertaccio*, 161 N.C. App. 352, 357, 588 S.E.2d 905, 909 (2003).

Under our statutes, "[d]ivisble property and divisible debt shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2021). However,

> [t]he requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist *only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution.*

Miller v. Miller, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990). This Court in *Miller* noted the parties had "ample opportunity to present evidence and have failed to do so[,]" and reasoned that "remanding the matter for the taking of new evidence, in essence granting the party a second opportunity to present evidence, would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing." *Id.*

Here, neither party offered a specific valuation of Sneed, PLLC at the date of distribution based on credible evidence. Defendant offered no evidence of divisible property nor of the value of the law firm. For his part, Plaintiff testified the present value of the law firm as of the date of trial was "a negative value." However, the trial court expressly stated: "I found Mr. Reagan and his evaluations to be credible and I do not find Plaintiff's offer on the value or negative value of [Sneed, PLLC] to be credible. . . I do not find that Plaintiff has provided the [c]ourt with any credible option for the value of the business." Accordingly, in its Order, the trial court made the following Finding of Fact:

> 40. [Plaintiff] testified that Sneed, PLLC held little value over and above the personal reputation and efforts of [Plaintiff]. The [c]ourt received evidence from [Plaintiff] concerning the performance of Sneed, PLLC from its inception in 2011 through the date of trial. While the court can see a decline in income of Sneed, PLLC since the date of separation, [Plaintiff] has failed to provide the [c]ourt with any credible value of Sneed, PLLC as of the date of separation or as of the date of trial. . .

In the absence of credible evidence supporting the value of an asset, the trial court is not obligated to make specific findings as to value. *Gratsy v. Gratsy*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754, *rev. denied*, 346 N.C. 278, 487 S.E.2d 545 (1997). Thus, without credible evidence from either party as to the value of Sneed, PLLC after the date of separation, the trial court properly valued the law firm based on the competent evidence before it. Therefore, the trial court did not abuse its discretion in valuing Sneed, PLLC.

V. Motion to Reopen Evidence

[5] "The trial court has discretionary power to permit the introduction of additional evidence after a party has rested." *State v. Jackson*, 306 N.C. 642, 653, 295 S.E.2d 383, 389 (1982) (citations omitted). "Whether the case should be reopened and additional evidence admitted [is] discretionary with the presiding judge." *McCurry v. Painter*, 146 N.C. App. 547, 553, 553 S.E.2d 698, 703 (2001) (quoting *Smith Builders Supply, Inc. v. Dixon*, 246 N.C. 136, 140, 97 S.E.2d 767, 770 (1957) (citations omitted)). "Because it is discretionary, the trial judge's decision to allow the introduction of additional evidence after a party has rested will not be overturned absent an abuse of that discretion." *Id.* An abuse of discretion is found "only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Manning v. Anagnost*, 225 N.C. App. 576, 579, 739 S.E.2d 859, 861 (2013) (quoting *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006)).

Plaintiff argues when there is a delay between the close of evidence and entry of judgment in an equitable distribution case that is "an extensive delay . . . it would be consistent with the goals of the Equitable Distribution Act that the trial court allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property." *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654. Plaintiff contends the delay here was prejudicial, and consequently the trial court erred by denying his Motion to Reopen Evidence. We disagree.

Here, the close of evidence in the equitable distribution matter occurred 10 December 2021. The trial court issued its ruling on 13 July 2022, approximately seven months later. Since *Wall*, this Court has addressed delays and concluded reopening the evidence was not warranted, even in some cases of extensive delays. *See*, *e.g.*, *White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004) (concluding a four-month delay was not prejudicial); *Britt v. Britt*, 168 N.C. App. 198, 202-03, 606 S.E.2d 910, 912-13

(2005) (sixteen-month delay did not necessitate a new trial); *Nicks v. Nicks*, 241 N.C. App. 487, 510-11, 774 S.E.2d 365, 381-82 (2015) (four and a half-month delay did not warrant a new trial).

In *Britt*, this Court articulated three factors to consider in determining whether a delay was prejudicial: (1) whether the delay was more than *de minimis*; (2) whether there were "potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order"; and (3) whether "potential changes in the relative circumstances of the parties warranted additional consideration by the trial court." 168 N.C. App. at 202, 606 S.E.2d at 912-13.

Plaintiff's Motion to Reopen the Evidence alleged his business was negatively affected by the Covid-19 pandemic, changes in "current market conditions" and the loss of "key personnel"; he suffered an "involuntary decrease in the revenue, income and/or profitability of his business"; and "involuntary changes" occurring after trial resulted in the decrease in value of Sneed, PLLC. However, Plaintiff's arguments ignore both the fact the equitable distribution trial was heard in December 2021, months after the onset of the Covid-19 pandemic, and none of the changes to his business bore any relation to the delay in entering the Equitable Distribution Order. The consistent teaching of our precedent is there is no abuse of discretion in denying a motion to reopen evidence where a party fails to "identify any way that the delay resulted in any prejudice to him." *Nicks*, 241 N.C. App. at 511, 774 S.E.2d at 381. Accordingly, we conclude the trial court did not abuse its discretion in denying Plaintiff's Motion to Reopen Evidence.

VI. Child Support Credit

[6] Plaintiff contends the trial court erred by failing to credit him for overpayment of child support. On 1 July 2020, the trial court entered an Order Re: Motion to Modify Child Support. That Order provided Plaintiff had overpaid in child support by $10,000 since August 2019 and stated the matter "shall be addressed at further court proceedings and court orders."

The issues in this case, and the underlying Orders from which Plaintiff appeals, are solely related to the distribution of the marital estate. Child support is a separate issue which is properly addressed in a child support proceeding in district court.

VII. Distributive Award

[7] Plaintiff contends the trial court erred in calculating the distributive award to Defendant. Plaintiff relies entirely on his previous arguments,

asserting the distributive award was incorrect because it improperly determined Plaintiff's personal goodwill in Sneed, PLLC was marital property and failed to include the decrease in the value of Sneed, PLLC occurring after the date of separation. For the reasons above, we have already rejected these arguments.

Plaintiff's contention is the trial court's Finding that he could afford distributive award payments of $8,611.11 per month was not supported by competent evidence. We disagree.

As the trial court noted, it received and reviewed "numerous admitted exhibits concerning [Plaintiff's] employment, income, and expenses, including but not limited to, [Plaintiff's] employee earnings records and his personal and business bank account statements." This evidence is sufficient to support the trial court's Finding that Plaintiff can afford the distributive award. Thus, the trial court did not err by distributing Defendant's share of Sneed, PLLC in the form of a distributive award. Therefore, Defendant was entitled to a distributive award of $1,550,000 payable in monthly installments of $8,611.11. Consequently, the trial court did not err in entering its equitable distribution of Sneed, PLLC.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Equitable Distribution Order and Judgment and Order Denying Plaintiff/Husband's Motion to Strike and Motion to Reopen Evidence.

AFFIRMED.

Judges CARPENTER and GORE concur.

STATE v. BOYD

[293 N.C. App. 665 (2024)]

STATE OF NORTH CAROLINA
v.
PHILLIP EUGENE BOYD

No. COA23-984

Filed 7 May 2024

Search and Seizure—anticipatory search warrant—probable cause—nexus between drug activity and residence—totality of the circumstances

In a drug trafficking case, the trial court properly denied defendant's motion to suppress drugs and drug paraphernalia found at his residence where an investigator's affidavit and application for an anticipatory search warrant contained facts giving rise to a reasonable inference that defendant was involved in criminal activity and establishing a nexus between that activity and the residence, including information law enforcement obtained from a confidential informant, controlled buys, and vehicle surveillance. Based on the totality of the circumstances and giving deference to the magistrate, issuance of the warrant to search defendant's property was supported by probable cause.

Appeal by defendant from order entered 6 March 2023 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General, Tamara Zmuda, for the State.

Grace, Tisdale & Clifton, P.A., by Michael A. Grace, for the defendant-appellant.

TYSON, Judge.

Phillip Eugene Boyd ("Defendant") pleaded guilty to two counts of attempted drug trafficking, one for cocaine and for marijuana, reserving his right to appeal denial of his motion to suppress from a judgment entered upon a plea of guilty. We affirm the trial court's ruling on Defendant's motion to suppress.

I. Background

Durham Police Investigator C.B. Franklin applied for and received an anticipatory search warrant on 10 April 2019, authorizing the search of property located at 3712 Lucknam Lane, Durham, N.C. 27707 ("Lucknam Lane"). Investigator Franklin's application and affidavit laid out the following:

In August 2018, Durham Vice and Narcotics Unit Investigators received information from a confidential informant ("CI"), asserting he had purchased trafficking-level quantities of cocaine from a man named "Pete" and from "Pete's" brother. Investigators later determined "Pete" was a man named Frederick Earl Smith ("Smith") and Defendant is his brother. The CI asserted Smith had acted as a middleman. The CI would contact Smith to request drugs. Smith would obtain the drugs from Defendant. Smith would schedule a meeting at a predetermined location, often a gas station, with the CI. Smith would often arrive in either a Ford F-150 pick-up truck or a Lexus Sedan vehicle, with Defendant driving the vehicle. Smith was the only individual to exit the vehicle to perform the transaction. While the CI only interacted with Smith, he claimed to have seen Defendant present on multiple occasions during the transactions, and asserted he would be able to visually identify him.

In October 2018, Durham Police Investigators performed a controlled buy, wherein officers directed the CI to contact Smith and arrange a buy. Smith arrived at the buy site in a newer model white Ford F-150 with the North Carolina license plate PCM-****. Smith exited the passenger side of the vehicle, approached the CI, and conducted the cocaine sale before returning to the vehicle. Investigators identified the vehicle as registered to Marietta Poole Boyd, Defendant's wife, with the registered address listed as 3712 Lucknam Lane. Investigator Franklin also confirmed the Ford F-150 pick-up truck was being parked and kept at Lucknam Lane.

On 12 March 2019, investigators applied for and received a tracking tag order to be installed on the Ford F-150 pick-up registered to Defendant's wife. The transmitted information indicated the Ford pick-up made frequent short stops at gas stations, often located in high crime and high narcotic areas, throughout Durham. This activity was consistent with the CI's previous statements regarding the use of gas stations as drug sales and delivery meeting sites. Additionally, the Ford pickup would often return to Lucknam Lane for notably short periods of time between stops before leaving again.

On 5 April 2019, investigators conducted direct surveillance of the Ford pickup using four two-man teams in unmarked police vehicles. Investigators were able to identify Defendant as the driver of the Ford F-150 pickup as he left Lucknam Lane. Investigators followed Defendant while he performed numerous short stops, often at gas stations, throughout the Durham area. Despite close surveillance, investigators did not directly witness any drug sales, but they confirmed much of the "short stay traffic" appeared to be drug related.

Investigators contacted the CI to direct the setup of another controlled buy. The CI arranged a meeting with Smith to purchase 9 ounces of cocaine for $8,700. Smith agreed to the sale and told the CI he would call on 10 April 2019 when he was ready to deliver and complete the sale.

Based upon the facts above, investigators believed controlled substances were being stored at Lucknam Lane. Officers applied for an anticipatory search warrant to search the property located at Lucknam Lane, if either Defendant or Smith completed the controlled buy expected to occur on 10 April 2019.

The arranged meeting with Smith occurred on 10 April 2019. Investigators were able to confirm Defendant was present and driving the white Ford F-150 pickup. Investigators executed the search warrant and law enforcement seized large amounts of U.S. currency, a currency counter, cocaine, marijuana, and assorted drug paraphernalia. Defendant was subsequently indicted on trafficking in cocaine and marijuana.

On 13 November 2019, Defendant moved to suppress evidence deriving from the anticipatory search warrant issued for the property located at Lucknam Lane. The trial court informed the parties of its denial of Defendant's motion to suppress on 8 December 2022 and filed the order 6 March 2023. Defendant preserved his right to appeal by objecting to the trial court's denial of his motion to suppress and entered a plea of guilty on 5 April 2023. Defendant gave an oral notice of appeal the same day and filed a written notice of appeal on 14 April 2023.

II. Jurisdiction

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2023). Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Motion to Suppress

Defendant argues the trial court erred by denying his motion to suppress evidence obtained from an anticipatory search warrant and asserts the search warrant lacked probable cause to support the warrant to search his residence.

A. Standard of Review

This Court's review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact 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).

"[C]onclusions of law are reviewed *de novo* and must be legally correct." *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, (2008) (citations omitted). "We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017).

B. Analysis

Defendant argues Investigator Franklin's affidavit and application failed to support a finding of probable cause to authorize the search of Defendant's residence, located at Lucknam Lane. We disagree.

Both the State and Federal Constitutions protect against unreasonable searches and seizures and require that warrants only be issued upon a showing of probable cause. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20. To determine whether probable cause existed, courts examine the totality of the circumstances known to the magistrate at the time the search warrant was issued. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984).

Under the "totality of the circumstances" test, an affidavit is sufficient to support probable cause "if it supplies reasonable cause to believe [ ] the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Howard*, 259 N.C. App. 848, 851, 817 S.E.2d 232, 235 (2018) (citing *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256).

Further, "this Court must pay great deference and sustain the magistrate's determination [of probable cause] if there exist[s] a substantial basis . . . to conclude [the] articles searched for were probably present."

State v. Hunt, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002). Lastly, a finding of probable cause does not require certainty, but rather only a substantial chance of criminal activity. *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015).

As is required for when an officer seeks a search warrant of a residence in connection to illegal activity observed outside the residence, "the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity. Such a connection need not be direct, but it cannot be purely conclusory." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020).

The Supreme Court of North Carolina recently determined a search warrant authorizing the search of a residence was supported by probable cause, even though the officer's affidavit only alleged an occupant of the residence participated in a sale of illegal drugs earlier in the day in another location. *Id.*, 374 N.C. at 338, 841 S.E.2d at 282. In *Bailey*, a detective witnessed the driver of a Jeep vehicle, the occupants of which he was familiar with due to previous drug activity, pull into an isolated parking lot. *Id.* at 333, 841 S.E.2d at 279. A woman exited another vehicle and entered the Jeep for roughly 30 seconds before returning to her vehicle. *Id.* Based upon his training, the detective believed a narcotics transaction had occurred. *Id.*

The detective followed the woman's vehicle and pulled her over after several traffic violations. *Id.* The woman admitted she had purchased and possessed heroin. *Id.* While this was occurring, another detective followed the Jeep back to, what the detectives knew to be, the occupant's residence. *Id.* Based on the information above, the detectives obtained a search warrant for the property. *Id.*

The key factor, which supported the search of the residence in *Bailey*, was the detectives' ability to demonstrate some nexus between the residence and the criminal activity. *Id.* at 338-39, 841 S.E.2d at 282. The Court explained it is not necessary for the officers to show direct criminal activity at the residence, but officers do need to demonstrate more than simply asserting the defendant visits or resides at the property. *Id.*

Here, Investigator Franklin's affidavit and application supports the conclusion of a substantial chance of evidence related to drug trafficking being present at Defendant's residence, located at Lucknam Lane. Investigator Franklin's application contains several key pieces of information:

1) Investigators identified the white Ford F-150 pickup used in an illegal drug sale with the CI as being owned by Defendant's wife and registered at Lucknam Lane;

2) Investigators confirmed cocaine was being trafficked and sold out of the Ford F-150 pickup;

3) The Ford F-150 pickup was kept at Lucknam Lane;

4) Both Defendant and Marietta Poole Boyd, Defendant's wife, resided at Lucknam Lane;

5) The Ford F-150 pickup made frequent, short stops at gas stations and convenience stores throughout the Durham area, often located in high drug trafficking areas, and often left from and returned to Lucknam Lane in between said stops;

6) Defendant was observed living and operating out of the residence located at Lucknam Lane and in the manner described above;

7) Defendant had a known history of dealing drugs; and,

8) The CI's statements were consistent with the evidence independently collected by the investigators.

As in *Bailey*, these facts support a reasonable inference that Defendant was engaged in drug trafficking and establishes a nexus between the drug trafficking and Defendant's residence. *Id.* Defendant's frequent and short-in-time returns to Lucknam Lane in between his other stops throughout Durham, which inspectors believed were drug related, supplied a connection or nexus between the illegal activity committed outside of Lucknam Lane by Defendant and at the residence itself. This reasonable inference and nexus supports the conclusion that a substantial chance existed of evidence of drug trafficking being present at Defendant's residence. *Id.* Defendant's arguments are overruled.

IV. Conclusion

Under the totality of the circumstances and with deference given to the magistrate's determination of probable cause, we hold the trial court properly denied Defendant's motion to suppress. Defendant presented no prejudicial errors in his arguments on appeal. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and GORE concur.

STATE OF NORTH CAROLINA
v.
WILLIAM LOGAN BUCK, DEFENDANT

No. COA23-606

Filed 7 May 2024

1. Motor Vehicles—felony hit and run—motion to arrest judgment—meaning of "crash"—intent irrelevant

In defendant's trial for multiple charges arising from an incident in which he pursued and hit the victim (who was on foot) with his car, although defendant argued that he could not be convicted of both assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and felony hit and run with serious injury, the trial court was not required to arrest judgment on the felony hit and run charge where the use of the word "crash" in the charging statute (N.C.G.S. § 20-166(a)) did not denote an unintentional act but was defined in the statute as any event resulting in injury caused by a vehicle and, therefore, did not depend on the driver's intent. Further, because the statute was unambiguous, the rule of lenity did not apply.

2. Appeal and Error—preservation of issues—assault with deadly weapon—failure to move to arrest judgment

Defendant failed to preserve for appellate review his argument that the trial court erred by not arresting judgment on a charge of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI)—because, according to defendant, he could not be convicted of both that offense and felony hit and run with serious injury—where he did not move the court to arrest his AWDWIKISI judgment.

3. Motor Vehicles—felony hit and run with serious injury—"crash"—evidence of intent to hit victim with car

The State presented substantial evidence of each element of felony hit and run with serious injury pursuant to N.C.G.S. § 20-166(a) to survive defendant's motion to dismiss, including of defendant's intent to hit the victim with his car, based on testimony at trial that: at a planned drug transaction, after the victim took defendant's marijuana and ran away on foot, defendant accelerated his car, pursued the victim, and hit him with his car; defendant then got out of his car, searched the victim's pockets, took the marijuana and the victim's phone, and drove away. Despite defendant's argument that

the event did not qualify as a "crash" under the statute, the second element of the offense—that defendant knew or reasonably should have known that the vehicle was involved in a crash—was satisfied.

4. Assault—with deadly weapon with intent to kill inflicting serious injury—vehicle crash—felony hit and run a separate offense

The trial court properly denied defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI)—based on an incident in which defendant pursued and hit the victim (who was on foot) with his car—where defendant did not contest the sufficiency of the evidence concerning the elements of that offense but, rather, argued that he could not be convicted of both AWDWIKISI and felony hit and run with serious injury. However, the two offenses were not mutually exclusive and, thus, defendant could be convicted of both.

5. Criminal Law—jury instructions—felony hit and run—assault with deadly weapon—plain error analysis

In defendant's trial for multiple charges arising from an incident in which he pursued and hit the victim (who was on foot) with his car, the trial court did not plainly err by instructing the jury on both assault with a deadly weapon with intent to kill inflicting serious injury and felony hit and run with serious injury. The two offenses were not mutually exclusive and, therefore, the jury could be instructed on both offenses and defendant could be convicted of both.

6. Judgments—criminal—clerical error—wrong statutory subsection

After defendant was convicted of multiple offenses arising from an incident in which he pursued and hit the victim (who was on foot) with his car, where the judgment for felony hit and run with serious injury referenced the wrong statutory subsection, the matter was remanded for correction of the clerical error.

Appeal by Defendant from judgment entered 24 January 2023 by Judge G. Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander Hiram Ward, for the State.

Carolina Appeal, by Andrew Nelson, for Defendant-Appellant.

CARPENTER, Judge.

William Logan Buck ("Defendant") appeals from judgment after a jury convicted him of assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI"), felony hit and run with serious injury, and robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred by: (1) denying his motion to arrest judgment concerning his felony hit-and-run verdict; (2) failing to arrest judgment concerning his AWDWIKISI verdict; (3) denying his motion to dismiss his felony hit-and-run charge; (4) denying his motion to dismiss his AWDWIKISI charge; (5) instructing the jury that it could convict him for AWDWIKISI and felony hit and run; and (6) making a clerical error in his felony hit-and-run judgment. After careful review, we disagree with Defendant concerning his first five arguments, but we agree with Defendant concerning his final argument. Accordingly, we remand this case for the trial court to correct a clerical error. Otherwise, we discern no error.

I. Factual & Procedural Background

On 19 April 2021, a New Hanover County grand jury indicted Defendant with one count of each of the following: AWDWIKISI, felony hit and run with serious injury, and robbery with a dangerous weapon. The State began trying Defendant on 17 January 2023 in New Hanover County Superior Court.

Trial evidence tended to show the following. On 11 January 2021, Demetrius Moss ("Victim") met Defendant in the Martin Luther King Center parking lot in Wilmington, North Carolina. Defendant intended to sell marijuana to Victim. Defendant was seated in his car when Victim approached. Instead of purchasing marijuana from Defendant, Victim grabbed Defendant's marijuana and ran.

Defendant then accelerated his car, pursued Victim, and hit Victim with his car. The crash-data recorder from Defendant's car showed that directly before the collision with Victim, Defendant's "accelerator percentage" was 99%, which investigating officer Eric Lippert described as "pedal to the medal" and "probably as high as it goes."

After Defendant struck Victim with his car, Defendant exited his car, went through Victim's pockets, removed the marijuana and Victim's phone, and drove away. After twelve surgeries, Victim spent over two months in the hospital recovering from a broken tibia, fibula, and pelvis.

At the close of the State's evidence and again at the close of all evidence, Defendant moved to dismiss all charges. The trial court

denied both motions. The trial court instructed the jury on all charges; Defendant did not object to the instructions.

The jury convicted Defendant of each charge. Following the jury's guilty verdicts, Defendant moved to arrest judgment concerning only the felony hit-and-run verdict. The trial court denied the motion.

The trial court then entered three judgments. In the first judgment, the trial court sentenced Defendant to a term of between seventy-three and one hundred months of imprisonment for AWDWIKISI. In the second judgment, the trial court sentenced Defendant to a term of between thirteen and twenty-five months of imprisonment for felony hit and run with serious injury. The second judgment, however, noted that the jury found Defendant guilty of subsection "20-166(E)." In the third judgment, the trial court sentenced Defendant to a term of between sixty-four and eighty-nine months of imprisonment for robbery with a dangerous weapon. The trial court set the second and third judgments to run concurrently with the first. On 3 February 2023, Defendant filed written notice of appeal.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Defendant's motion to arrest judgment concerning his felony hit-and-run verdict; (2) failing to arrest judgment concerning his AWDWIKISI verdict; (3) denying Defendant's motion to dismiss his felony hit-and-run charge; (4) denying Defendant's motion to dismiss his AWDWIKISI charge; (5) instructing the jury that it could convict Defendant for AWDWIKISI and felony hit and run with serious injury; and (6) making a clerical error in Defendant's felony hit-and-run judgment.

IV. Analysis

A. Arrest of Judgment

[1] Defendant argues that the trial court erred by failing to arrest judgment concerning his convictions for felony hit and run with serious injury and AWDWIKISI. After careful review, we disagree.

"Whether to arrest judgment is a question of law, and '[q]uestions of law are reviewed *de novo* on appeal.' " *State v. Curry*, 203 N.C. App. 375, 378, 692 S.E.2d 129, 134 (2010) (quoting *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 635, 684 S.E.2d 709, 720 (2009)) (alteration in original). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal."

State v. Williams, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

A trial court must arrest a judgment when:

> it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, [or] (5) the judgment.

State v. Perry, 291 N.C. 586, 589, 231 S.E.2d 262, 265 (1977).

1. Felony Hit and Run with Serious Injury

Concerning his motion to arrest judgment for his felony hit-and-run conviction, Defendant argues that, under subsection 20-166(a), a "crash" cannot be intentional. *See* N.C. Gen. Stat. § 20-166(a) (2021). Therefore, according to Defendant, it was erroneous for the jury to convict him of AWDWIKISI, an intentional crime, and to also find that he crashed into Victim, because a "crash" is unintentional. We disagree with Defendant.

The meaning of "crash" requires us to interpret section 20-166. *See id.* In statutory interpretation, "[w]e take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804). And when a statute "contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974).

Under subsection 20-166(a), it is a felony for a driver of a vehicle "involved in a crash" that causes serious bodily injury to leave the scene of the crash. S*ee* N.C. Gen. Stat. § 20-166(a). A "crash" is "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous." *Id.* § 20-4.01(4c).

The General Assembly has not defined "any," so it keeps its ordinary meaning: comprehensive. *See id.*; *Reg'l Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990) ("Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used."); *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (stating

that we look to dictionaries to discern a word's common meaning); *Any*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining "any" as "one or some indiscriminately of whatever kind").

Here, Defendant's car caused Victim's injuries. The only dispute is about the relevance of Defendant's intent while driving his car. The statutory definition is clear: A crash is "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load." *See* N.C. Gen. Stat. § 20-4.01(4c). The General Assembly chose not to discriminate between intended events and unintended events; therefore, so long as there is injury caused by a motor vehicle—intent is irrelevant. *See id.*; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*.

Defendant argues to the contrary. He asserts that because the General Assembly equates crashes to accidents, *see* N.C. Gen. Stat. § 20-4.01(4c), crashes must be unintentional. In other words, Defendant argues that because accidents are unintentional, crashes must be unintentional, too.

The General Assembly, however, defined crash—then equated accident to crash. *See id.* Whether the equation complies with the common understanding of accident is irrelevant because when a statute "contains a definition of a word used therein, *that definition controls*, however contrary to the ordinary meaning of the word it may be." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 203 (emphasis added). So when the General Assembly equated accident to crash, it gave accident the same legislative definition as crash, despite the commonly understood meaning of accident. *See id.* at 219, 210 S.E.2d at 203.

Accordingly, crash means "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load"—regardless of intent. *See* N.C. Gen. Stat. § 20-4.01(4c).

Defendant also asserts that the rule of lenity requires us to read crash more narrowly. Again, we disagree.

The rule of lenity "forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985). But "[t]he rule of lenity only applies when the applicable criminal statute is ambiguous." *State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002). Indeed, the "rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596, 81 S. Ct. 321, 326, 5 L. Ed. 2d 312, 319 (1961).

As detailed above, section 20-166 is clear; therefore, the rule of lenity does not apply. *See Cates*, 154 N.C. App. at 740, 573 S.E.2d at 210; *Callanan*, 364 U.S. at 596, 81 S. Ct. at 326, 5 L. Ed. 2d at 319. The trial court did not err by declining to arrest Defendant's felony hit-and-run judgment because a driver's intent is irrelevant concerning "crash." *See* N.C. Gen. Stat. § 20-166(a). Accordingly, there was no fatal error requiring the trial court to arrest Defendant's judgment. *See Perry*, 291 N.C. at 589, 231 S.E.2d at 265.

2. AWDWIKISI

[2] Standing on his misconception of "crash," Defendant asserts that if the trial court did not err by declining to arrest his felony hit-and-run judgment, the trial court must have erred in failing to arrest his AWDWIKISI judgment. We disagree.

"Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury" is guilty of AWDWIKISI. N.C. Gen. Stat. § 14-32(a) (2021).

Unlike his felony hit-and-run judgment, Defendant failed to move the trial court to arrest his AWDWIKISI judgment. And generally, "[i]n order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)).

In criminal cases, certain unpreserved issues qualify for "plain error" review, but issues regarding arresting judgments do not. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)) (noting that we "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence"). Accordingly, we need not review Defendant's motion-to-arrest argument concerning his AWDWIKISI judgment because his argument is unpreserved and does not involve jury instructions or admissibility of evidence. *See id.*

Defendant, however, asks us to use Rule 2 to address his AWDWIKISI argument. *See* N.C. R. App. P. 2. Under Rule 2, we may "suspend or vary the requirements or provisions of" our Rules of Appellate Procedure. *See id.* But we only invoke Rule 2 "to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d

298, 299–300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)).

Here, as detailed above, Defendant's intent argument fails: Convictions of AWDWIKISI and felony hit and run with serious injury are not mutually exclusive because assault is intentional, and a "crash" can also be intentional. *See* N.C. Gen. Stat. §§ 14-32(a), 20-4.01(4c), 20-166(a). This case is not the "exceptional circumstance" required to invoke Rule 2. *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299–300. Therefore, we dismiss Defendant's motion-to-arrest argument concerning his AWDWIKISI conviction.

B. Motions to Dismiss Charges

Next, Defendant argues that the trial court erred by denying his motions to dismiss. We review a denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). And under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319).

"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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

1. Felony Hit and Run with Serious Injury

[3] Defendant does not contest the sufficiency of the evidence concerning every element of felony hit and run with serious injury. Rather, Defendant echoes his motion-to-arrest argument: That the second element of felony hit and run with serious injury is not satisfied because "the event would not qualify as a 'crash' under section 20-166."

Felony hit and run with serious injury requires the State to prove that:

> (1) Defendant was driving a vehicle; (2) Defendant knew or reasonably should have known that the vehicle was involved in a crash; (3) Defendant knew or reasonably should have known that the crash resulted in serious bodily injury to or the death of another; (4) Defendant did not immediately stop his vehicle at the scene of the crash; and (5) Defendant's failure to stop was willful.

State v. Gibson, 276 N.C. App. 230, 240, 855 S.E.2d 533, 540 (2021) (citing N.C. Gen. Stat. § 20-166(a)).

As detailed above, Defendant's act qualifies as a crash. Further, the State satisfied the second element of felony hit-and-run by offering testimony that Defendant intentionally pursued and struck Victim with his car. *See id.* at 240, 855 S.E.2d at 540. Trial testimony about this event is substantial evidence because it is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant intentionally hit Victim with his car. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Concerning the remaining felony hit-and-run elements, "[i]t is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)); *State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017) (deeming an argument abandoned because the appellant did "not set forth any legal argument or citation to authority"). Because Defendant makes no argument concerning the sufficiency of evidence supporting the other elements of felony hit and run, all such arguments are abandoned. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394. Thus, the trial court did not err in denying Defendant's motion to dismiss his felony hit-and-run charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

2. AWDWIKISI

[4] Again, Defendant does not contest the sufficiency of the evidence concerning every element of AWDWIKISI. Defendant merely stands

on his same motion-to-arrest argument. He argues that if he committed felony hit and run with serious injury, he could not have committed AWDWIKISI. We disagree.

AWDWIKISI requires: "(1) [a]n assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) *not resulting in death*." *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640 (1968) (citing N.C. Gen. Stat. § 14-32).

As explained above, AWDWIKISI and felony hit and run with serious injury are not mutually exclusive. *See* N.C. Gen. Stat. §§ 14-32(a), 20-4.01(4c), 20-166(a). The State satisfied the assault prong of AWDWIKISI by offering testimony that Defendant purposefully pursued Victim and hit him with his car. *See Meadows*, 272 N.C. at 331, 158 S.E.2d at 640. Trial testimony about this event is substantial evidence because it is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant intentionally hit Victim with his car. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Because this is the only argument offered by Defendant, we will not address the remaining elements of AWDWIKISI. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394. Thus, we discern no error concerning the trial court's denial to dismiss Defendant's AWDWIKISI charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

C. Jury Instructions

[5] Next, Defendant argues that the trial court erred by giving jury instructions on felony hit and run and AWDWIKISI because it is impossible to be convicted of both crimes. We disagree.

Defendant did not object to the trial court's jury instructions, so he failed to preserve his jury-instruction argument for appeal. *See Regions Bank*, 206 N.C. App. at 298–99, 697 S.E.2d at 421. But because this issue involves jury instructions in a criminal case, we will review for plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

To find plain error, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, Defendant must demonstrate the error was "fundamental," which means the error probably caused a guilty verdict and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *State v. Lawrence*, 365 N.C. 506, 518–19, 723 S.E.2d 326, 334–35 (2012)). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C.

655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Concerning jury instructions, the trial court must accurately "instruct the jury on the law applicable to the substantive features of the case arising on the evidence." *State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983).

Once again, AWDWIKISI and felony hit and run with serious injury are not mutually exclusive. *See* N.C. Gen. Stat. §§ 14-32(a), 20-4.01(4c), 20-166(a). Accordingly, the trial court did not err in giving jury instructions on both and allowing the jury to convict Defendant of both. *See Robbins*, 309 N.C. at 776, 309 S.E.2d at 191. Because the trial court did not err, it certainly did not plainly err. *See Towe*, 366 N.C. at 62, 732 S.E.2d at 568.

D. Clerical Error

[6] Finally, Defendant argues that the trial court erred because the second judgment contains a clerical error. We agree.

When we discern a clerical error in a judgment, we remand so the trial court can comply with its "duty to make its records speak the truth." *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (quoting *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956)). A clerical correction on remand "does not constitute a new conviction or judgment." *Id.* at 738, 522 S.E.2d at 784.

Here, the second judgment noted that the jury found Defendant guilty of subsection "20-166(E)," rather than the appropriate subsection, (a). *See* N.C. Gen. Stat. § 20-166(a). Therefore, we remand for the trial court to correct the judgment to show a conviction under subsection 20-166(a). *See id.*; *Linemann*, 135 N.C. App. at 738, 522 S.E.2d at 784.

V. Conclusion

We conclude that the trial court did not err by declining to arrest Defendant's judgments, declining to grant his motions to dismiss, or by instructing the jury on both felony hit and run with serious injury and AWDWIKISI. But the trial court did commit a clerical error in its felony hit-and-run judgment. Accordingly, we remand only for the trial court to correct the clerical error.

REMANDED.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
JOHN WESLEY CROWDER, JR., DEFENDANT

No. COA23-833

Filed 7 May 2024

Indictment and Information—sufficiency—short-form indictment—second-degree forcible sexual offense—mens rea element

The trial court had jurisdiction to try defendant for second-degree forcible sexual offense, where the indictment alleged that defendant "unlawfully, willfully and feloniously" engaged in a sexual act with the victim, "who was at the time physically helpless." The indictment was not defective, since its language matched the language required by N.C.G.S. § 15-144.2(c) for short-form indictments alleging a sexual offense and was therefore sufficient to inform defendant of the mens rea element of the crime he was charged with—specifically, that he was aware of the victim's incapacity during the sexual act.

Appeal by defendant from judgment entered 6 June 2023 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 16 April 2024.

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

Melrose Law, PLLC, by Adam R. Melrose, for defendant-appellant.

DILLON, Chief Judge.

Defendant John Wesley Crowder, Jr., was convicted by a jury of second-degree forcible sex offense and other crimes. For the second-degree forcible sex offense conviction, Defendant was sentenced to 83 to 160 months of imprisonment.

Defendant appeals, contesting the trial court's jurisdiction over the second-degree forcible sex offense charge due to allegedly defective language in the indictment. For the reasoning below, we disagree and hold that the trial court properly exercised jurisdiction.

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

Section 14-27.27 of our General Statutes states that

> (a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
>
> …
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.27(a)(2) (2023).

Our General Statutes allow the use of a short-form indictment in charging a sexual offense crime, as follows:

> . . . it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a person who . . . was mentally incapacitated or physically helpless, naming the victim, and concluding as required by law.

N.C. Gen. Stat. § 15-144.2(c) (2023).

Here, the indictment alleges that Defendant "unlawfully, willfully and feloniously did engage in a sex offense with [A.P.], who was at the time physically helpless." This language essentially matches the language required by N.C. Gen. Stat. § 15-144.2(c).

Defendant, though, attempts to compare this indictment for second-degree *sexual assault* to an indictment for second-degree *rape* that our Court held to be insufficient in *State v. Singleton*, 285 N.C. App. 630, 632–34, 878 S.E.2d 653, 655–56 (2022), *writ of supersedeas allowed and disc. review granted*, 384 N.C. 37, 883 S.E.2d 445 (2023). In *Singleton*, we held the indictment was insufficient because it failed to comply with the language required by the second-degree rape short-form indictment statute. 285 N.C. App. at 634, 878 S.E.2d at 656.

The statute allowing for use of short-form indictments asserting a *rape* charge where the rape is based on an act occurring when the defendant knew the victim to be incapacitated, differs slightly from its counterpart statute allowing a short-form indictment to be used to charge a *sexual offense* charge where the sexual offense is based on an act when the defendant knew the victim to be incapacitated. Specifically,

N.C. Gen. Stat. § 15-144.1(c), which allows for a short-form indictment to be used for a rape charge, requires allegations that the defendant did *both* "carnally know" *and* "abuse" the victim. We held in *Singleton* that an indictment which merely alleged the defendant had engaged "in vaginal intercourse" with an incapacitated victim was sufficient to comply with the statutory requirement to include language that the defendant did "carnally know" the victim, but the language was otherwise deficient because it had failed to contain language charging the defendant did "abuse" the victim as well. *Singleton*, 285 N.C. App. at 634, 878 S.E.2d at 656.

However, N.C. Gen. Stat. § 15-144.2(c), which allows for a short-form indictment for sexual offense, merely requires language charging the defendant "did engage in a sexual offense" with an incapacitated victim. Unlike N.C. Gen. Stat. § 15-144.1(c), N.C. Gen. Stat. § 15-144.2(c) does not require language stating the defendant did "abuse" the victim.

We note N.C. Gen. Stat. § 15-144.1(c) and N.C. Gen. Stat. § 15-144.2(c) each require allegations that the defendant had acted "unlawfully, willfully, and feloniously" when he engaged in the assault. This language was included in the indictment charging Defendant. We conclude this statutory language used in the indictment in this case was sufficient to apprise Defendant of the *mens rea* element of the sexual offense charge for which he was convicted, namely, that he was aware of the victim's incapacitated state during the act. We, therefore, hold the trial court had jurisdiction to try him for that charge.

NO ERROR.

Judges TYSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JAMES CAMPBELL DOHERTY, DEFENDANT

No. COA23-820

Filed 7 May 2024

1. Animals—felony cruelty to animals—elements—cruelly beat—single kick in dog's stomach—sufficient

After an incident where defendant kicked his neighbor's dog in the stomach so hard that the dog suffered severe internal bleeding, the trial court in defendant's criminal prosecution properly denied his motion to dismiss a charge of felony cruelty to animals because the State presented substantial evidence that defendant "cruelly beat" the dog. Under the plain meaning of the statute defining the charged crime—and in accordance with the legislature's intent to protect animals from malicious cruelty—the term "cruelly beat" applies to "any act" that causes unjustifiable pain, suffering, or death to an animal, even if it is just one strike rather than repeated strikes. Therefore, defendant's single kick to the dog met this definition, especially given the life-threatening nature of the dog's resulting injuries.

2. Criminal Law—jury instruction—felony cruelty to animals—lesser included offense—plain error review not waived

In a prosecution for felony cruelty to animals, where defendant told the trial court during the charge conference that he did not object to the court's jury instructions, his affirmative non-objection was insufficient on its own to waive plain error review of his argument on appeal—that the court erred by failing to instruct the jury on the lesser included offense of misdemeanor cruelty to animals. Nevertheless, the court did not plainly err by deciding not to instruct the jury on the lesser offense, since the State presented substantial evidence that defendant committed the greater offense when he kicked his neighbor's dog in the stomach so hard that, absent emergency care, the dog likely would have died from severe internal bleeding.

Appeal by defendant from judgment entered 8 March 2023 by Judge Tonia A. Cutchin in Davie County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Haley Ann Cooper, for the State.

Reece & Reece, by Mary McCullers Reece, for defendant-appellant.

FLOOD, Judge.

Defendant James Campbell Doherty appeals from judgment entered 8 March 2023, arguing the trial court erred by (A) denying his motion to dismiss because a single kick to the dog was insufficient evidence to show a "cruel beating," and (B) failing to instruct the jury on the lesser included offense of misdemeanor animal cruelty. After careful review, we conclude a single kick was sufficient to show Defendant "cruelly beat" the dog because this interpretation of the statute adheres to the plain language and furthers the Legislature's intent to protect animals from malicious cruelty. We further conclude the trial court did not plainly err in failing to instruct on misdemeanor cruelty to animals because the State presented substantial evidence of each element of felony cruelty to animals.

I. Factual and Procedural Background

Glenda Wolff lived across the street from Defendant in a neighborhood in Advance, North Carolina. Ms. Wolff would typically walk her fourteen-year-old dachshund-beagle mix, Davis, "two to three times per day" around the cul de sac on which Ms. Wolff and Defendant lived. Ms. Wolff would typically walk Davis in a circle around the cul de sac, passing in front of Defendant's home. "Any time" Ms. Wolff or anybody else with a dog walked by Defendant's home, Defendant would activate the sprinklers in the yard.

On 13 November 2019, Ms. Wolff was walking Davis around the cul de sac and saw her neighbors, Mr. and Mrs. Einstein, driving towards her. Ms. Wolff stepped out of the road to let the Einsteins' car pass by. At the time their car was approaching, Ms. Wolff was standing directly in front of Defendant's yard. There are no sidewalks or curbs in the neighborhood, only a single lane road, and the yards bordering the road. Instead of driving by Ms. Wolff, the Einsteins stopped to talk to her and inquire about her husband who had recently had some health issues. While Ms. Wolff was talking to the Einsteins, the sprinklers came on in Defendant's yard. Then, Ms. Wolff noticed Defendant "run[] out of his house and across his lawn," approach Davis, and proceed to kick him in the stomach. After Defendant kicked Davis, he turned around and went back into his house.

Ms. Wolff called the police, who encouraged her to take Davis to the emergency veterinarian. After being kicked, Davis became "lifeless . . . limp . . . [and] couldn't walk [or] stand." Ms. Wolff took Davis to the emergency veterinarian where he was characterized as being in "shock" and diagnosed with internal bleeding. Davis was given an IV fluid resuscitation to restore blood tissue, a blood transfusion, and pain medication. Davis remained at the veterinary hospital for the night.

After Davis's diagnosis, Deputy Clayton Whittington with the Davie County Sheriff's Office took out charges against Defendant for felonious cruelty to animals.

On 6 January 2020, a Davie County Grand Jury indicted Defendant for felonious cruelty to animals. The matter came on for trial on 7 March 2023 in Davie County Superior Court. The State presented testimony of Ms. Wolff, Deputy Whittington, and Dr. Simmerson—the veterinarian who provided care for Davis.

Ms. Wolff testified to the above-described events that occurred on 13 November 2019. When asked about Defendant's actions that evening, Ms. Wolff testified that Defendant ran out of his house at a fast pace and said to her, "I told you to keep your dog off my property." At the time of the incident, Ms. Wolff was standing right at the end of Defendant's property, "half on the road and half on the grass." According to Ms. Wolff, Defendant kicked Davis so hard Davis "went up in the air and came down and yelped."

Ms. Wolff also testified to Davis's capabilities following the incident, representing to the trial court that, prior to Defendant kicking Davis, Davis could jump on the bed or the couch, but he was unable to jump after his injury and had to be lifted onto the bed or couch.

Deputy Whittington testified that, when he questioned Defendant about kicking Davis, Defendant said he "popped the dog with his toe." Defendant further told Deputy Whittington he had a "bad history with dogs" and had told Ms. Wolff to "stay off his property."

Dr. Simmerson testified that she performed an abdominal ultrasound on Davis the day after the incident. The ultrasound showed a large amount of blood in his abdominal cavity, a mass in his central liver, sludge in his gall bladder, and chronic kidney damage in both kidneys. Dr. Simmerson testified that she had concluded the bleeding in Davis's abdominal cavity was the result of blunt force trauma and consistent with being kicked in the stomach. Davis's remaining maladies were common in a dog of Davis's age and not attributed to any external

factors. When asked if, in her opinion, the injuries could have been life threatening had Davis not received emergency care, Dr. Simmerson responded, "definitely."

At the close of the State's evidence, Defendant made a motion to dismiss, arguing the State failed to present substantial evidence that Defendant "cruelly beat" Davis. The trial court denied the motion.

The sole evidence presented by Defendant was his own testimony. Defendant testified that he had repeatedly asked Ms. Wolff to keep Davis off his property. Defendant represented that he had "been attacked seven times by dogs" and had an extreme fear as a result. He further stated that he does not want "anything to do with [dogs] . . . I just stay away from them. If a dog is near when I'm outside, I go inside. . . I want no interaction with them because I'm afraid of being attacked again."

When asked to describe what happened on 13 November 2019, Defendant testified that he turned the sprinklers on in an attempt to prompt Ms. Wolff to move away from his property. When this did not work, Defendant stood on the front porch and twice asked Ms. Wolff to leave his yard. After Ms. Wolff did not heed this request, Defendant made a "feint charge" at Ms. Wolff and Davis to scare them away. This attempt likewise was unsuccessful and Defendant then found himself two feet away from Davis, and he "panicked and kicked [his] foot out to get the dog away." According to Defendant, Davis did not go into the air as Ms. Wolff testified, but retreated back from Defendant's yard to stand at Ms. Wolff's feet.

At the conclusion of Defendant's testimony, Defendant, through counsel, renewed his motion to dismiss for insufficient evidence that he "cruelly beat" Davis, which the trial court again denied.

On 8 March 2023, Defendant was found guilty of felony cruelty to animals and sentenced to five to fifteen months' imprisonment, suspended for twenty-four months' supervised probation. Defendant orally noticed his appeal at the conclusion of his trial.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final superior court judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

Defendant presents two issues on appeal: whether the trial court erred in failing to (A) dismiss the charge of felonious cruelty to animals because a single kick was insufficient to show Defendant "cruelly beat"

Davis, and (B) instruct the jury on the lesser included offense of misdemeanor cruelty to animals.

A. Motion to Dismiss

[1] Our standard of review for an appeal of a motion to dismiss a criminal charge is whether, when considering the evidence in the light most favorable to the State, "the State presented substantial evidence of each element of the offense charged and of the defendant's guilt." *State v. Allred*, 131 N.C. 11, 19, 505 S.E.2d 153, 158 (1998). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Schmieder*, 265 N.C. App. 95, 101, 827 S.E.2d 322, 327–28 (2019) (citation omitted). "[T]he State is entitled to every reasonable intendment and every reasonable inference to be drawn from this evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Coble*, 163 N.C. App. 335, 337, 539 S.E.2d 109, 111 (2004).

Defendant argues the State did not present substantial evidence that Defendant "cruelly beat" Davis because one single kick is insufficient to meet the dictionary definition of "beat," which is "to strike something repeatedly." The State argues the term "beat" should not be derived from its standalone interpretation as the statutorily defined "cruelly" modifies and characterizes "beat."

"In order to prove the offense of felony cruelty to animals, the State must present substantial evidence that a defendant did 'maliciously, torture, mutilate, maim, cruelly beat, disfigure, poison, or kill' an animal." *State v. Gerding*, 237 N.C. App. 502, 506–07, 767 S.E.2d 334, 337 (2014) (quoting N.C. Gen. Stat. § 14-360(b)). The statute defines "cruelly" as "*any* act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death." N.C. Gen. Stat. § 14-360(c) (emphasis added). The statute does not define "beat," and the term has likewise not been defined by the appellate courts of this State. This presents an issue of statutory interpretation that is one of first impression as to the definition of "cruelly beat."

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself. 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. Fletcher*, 370 N.C. 313, 326, 807 S.E.2d 528, 538 (2017). "Although courts often consult dictionaries for the purpose of determining the plain meaning of statutory terms," *id.* at 327, 807 S.E.2d at 538,

> [t]he definition of words in isolation [] is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. U.S. Postal Servs., 546 U.S. 481, 486, 126 S. Ct. 1252, 1257, 163 L. E. 2d 1079, 1087–88 (2006). If the statute is not clear and unambiguous, "[t]he intent of the Legislature controls the interpretation of the statute." *Fletcher*, 370 N.C. at 327, 807 S.E.2d at 539 (alteration in original) (citation omitted). "In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of the proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *Id.* at 327, 807 S.E.2d at 539 (citation omitted).

Thus, we first look to the plain meaning of "beat" to determine how the statute is to be applied. Defendant is correct in his assertion that The Merriam-Webster Dictionary defines beat as "to strike repeatedly." *See Beat*, The Merriam-Webster Dictionary (11th ed. 2022). There are, however, other definitions of beat that indicate a person can "beat" something even if they only apply one strike or blow. *See Beat*, Collins Dictionary ("if you beat someone or something you hit them very hard" and "to beat on, at, or against something means to hit it hard");[1] *see also Beat*, Dictionary.com ("a stroke or blow").[2] The Merriam-Webster Dictionary entry for "beat" includes a list of synonyms, one of which, "bash," is defined as "to strike violently." *See Bash*, The Merriam-Webster Dictionary.[3] The plain meaning of "beat," therefore, could be understood to mean both a hard hit or strike, or repeated strikes. "Beat" has not been exclusively defined as requiring repeated strikes.

Accordingly, "cruelly beat," can be applied to any act, such as a kick, that causes "unjustifiable pain, suffering, or death to an animal." *See* N.C. Gen. Stat. § 14-360(c). Further, this plain meaning comports

---

1. *Beat*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/beat (last visited 4 April 2024).

2. *Beat*, Dictionary.com, https://www.dictionary.com/browse/beat (last visited 4 April 2024).

3. *Bash*, The Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/bash (last visited 4 April 2024).

with the Legislature's clear intent in enacting this statute, which was to protect animals from *any* intentional and malicious act that may lead to "unjustifiable pain, suffering, or death." *See id.* The single act of kicking a dog so hard as to cause internal bleeding is certainly the type of behavior the statute intended to prevent and would meet the definition of "cruelly beat."

We therefore hold, under the plain meaning of the words, "cruelly beat" can apply to any act that causes the unjustifiable pain, suffering, or death to an animal, even if it is just one single act. To hold otherwise would allow a person to kick a dog so hard they suffer life-threatening injuries—such as the case here—but not be subject to felonious cruelty to animals because it was "just" one kick.

Defendant objects to this conclusion by arguing a single kick cannot support a conviction for felony cruelty to animals because a review of North Carolina case law "yields no convictions for acts comparable to a single kick." While not physically comparable to a single kick, this Court has, in an unpublished opinion, held that one single act was sufficient to show felony cruelty to animals where the defendant was alleged to have tortured a cat. *See State v. Ford*, 292 N.C. App. 111, 896 S.E.2d. 67 (2024) (unpublished); *see also* N.C. Gen. Stat. § 14-360(b) (2023) (a person is guilty of animal cruelty if they "maliciously, torture . . . cruelly beat, disfigure, poison, or kill an animal").

In *Ford*, the defendant was convicted for felony cruelty to animals based on torture after he intentionally ran over with his pickup truck the stroller in which a cat was sitting. *Id.* at *2. On appeal, the defendant argued the trial court erred in failing to grant his motion to dismiss because the legal definition of "torture" requires a course of conduct and "a single malicious act" was insufficient. *Id.* at *3. This Court disagreed, holding the Legislature, in the context of the animal cruelty statute, defined torture in the singular, and this definition—the same definition provided for "cruelly"—could clearly be applied to "any act," and the statute did not require a "course of conduct." *Id.* at *5–4.

Here, Defendant appears to be minimizing the effects of a "single kick" compared to, for example, being run over with a pickup truck. If the comparison was merely a kick versus being run over with a pickup truck, it would seem on its face that running over a cat is the more egregious offense. The cat in *Ford*, however, miraculously suffered no physical injuries but appeared to have lasting "emotional" injuries. *See id.* at *2. Here, Defendant's single kick to Davis caused severe, life-threatening injuries that would have likely resulted in Davis's death had Ms. Wolff not sought emergency care. As explained above, the Legislature clearly

intended to protect animals from unjustified pain, suffering, or death. The means of inflicting such injury seem to be less important than the actual injury itself.

Accordingly, the trial court did not err in denying Defendant's motion to dismiss because, under the plain meaning of the statute and in furtherance of the Legislature's intent, the State presented substantial evidence that Defendant "cruelly beat" Davis when he kicked Davis so hard as to cause internal bleeding. *See Fletcher*, 370 N.C. at 327, 807 S.E.2d at 539.

B. Lesser Included Offense

[2] As a threshold matter, while Defendant concedes he did not object to the jury instructions, he argues that the trial court's failure to instruct on misdemeanor animal cruelty as a lesser included offense amounted to plain error. On the other hand, the State argues Defendant's affirmative non-objection to the instructions was invited error. We disagree with the State as to invited error. We further disagree with Defendant that the jury instructions were plain error.

"[U]nder the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him[.]" *State v. Miller*, 289 N.C. App. 429, 432–33, 889 S.E.2d 231, 234 (2023) (citation and internal quotation marks omitted). "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *Id.* at 433, 889 S.E.2d at 234. Our appellate courts, however, have consistently held that failure to object to jury instructions *alone* is insufficient to waive plain error review. *See State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (holding the defendant's failure to object to the trial court's instructions waived appellate review of the issue except for plain error review); *see also State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000) (applying plain error where the defendant failed to object to the instructions even though he had "ample opportunity" to do so); *State v McLymore*, 279 N.C. App. 34, 36, 863 S.E.2d 807, 809 (2021) (applying plain error review where the defendant failed to object to jury instructions despite having "at least three opportunities to do so"); *State v. Harding*, 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018) (applying plain error review where the defendant "failed to object, actively participated in crafting the challenged instructions, and affirmed it was 'fine' "); *but cf. State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (holding a defendant invited error when he failed to submit instructions in writing

as required by statute *and* did not object despite being given the opportunity to do so); *State v. Thompson*, 359 N.C. 77, 103–04, 604 S.E.2d 850, 869–70 (2004) (invoking invited error where the trial court amended the defendant's proposed instructions with the defendant's consent *and* the defendant did not object when the instructions were read to the jury).

Here, Defendant did not object to the instructions on felonious cruelty to animals during the charge conference. Prior to the trial court reading the instructions to the jury, it asked if defense counsel had any objections to the verdict sheet or the jury instructions, to which defense counsel stated, "[n]o Your Honor. Thank you." This affirmative non-objection, on its own, is insufficient to show Defendant invited error. *See Hooks*, 353 N.C. at 633, 548 S.E.2d at 505. We therefore review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted). Having determined the appropriate standard of review to apply to this issue, we now turn to the merits of Defendant's argument.

"It is well settled that the trial court must submit and instruct the jury on a lesser included offense when . . . there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Wright*, 240 N.C. App. 270, 272, 770 S.E.2d 757, 759 (2015) (citation omitted). "The trial court is not[, however,] obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation omitted).

Here, the trial court instructed the jury that, to find Defendant guilty of felony cruelty to animals, it must find three elements:

> First, [D]efendant cruelly beat Davis, a dog. Cruelly is an act, omission or neglect causing or permitting unjustifiable pain[,] [s]uffering or death.

> Second, [D]efendant acted intentionally; that is, knowingly.
>
> And, third, that [D]efendant acted maliciously. To act maliciously means to act intentionally and with malice or bad motive. As used herein, to act with malice or bad motive is to possess a sense of personal ill will to activate or incite [D]efendant to act in a way to cause harm to the animal. It also means the condition of mind that prompts a person to intentionally inflict serious harm or injury to an animal, which proximally results in injury to the animal.
>
> . . . .
>
> If you find from the evidence, beyond a reasonable doubt, that one or about the alleged date, [D]efendant intentionally, maliciously and cruelly beat Davis, a dog, it would be your duty to return a verdict of guilty.

As explained above, there was sufficient evidence to support the jury's finding that Defendant was guilty of felonious cruelty to animals. The State presented substantial evidence that Defendant maliciously and intentionally kicked Davis, and Defendant presents no argument on appeal contesting this element. Further, the State also presented substantial evidence that one single kick showed Defendant "cruelly beat" Davis as defined by the statute. Finally, it is undisputed that Davis suffered severe, life-threatening injuries. Given the substantial evidence presented by the State, Defendant has not, and cannot, show that the jury likely would have found Defendant not guilty of felony cruelty to animals, and convicted Defendant for misdemeanor cruelty to animals had that instruction been submitted.

Accordingly, the trial court did not err, let alone plainly err, in failing to instruct on misdemeanor cruelty to animals where there was no dispute as to the evidence supporting felony cruelty to animals. *See Lucas*, 234 N.C. App. at 256, 758 S.E.2d at 679.

IV. Conclusion

We conclude the State presented substantial evidence that Defendant "cruelly beat" Davis, a dog, because one single kick does constitute "any act" that resulted in serious injuries or suffering, and the term "beat" does not require repeated strikes. We further conclude the trial court did not plainly err in failing to instruct on misdemeanor cruelty to animals.

NO ERROR.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
KWAME FERNANDERS, DEFENDANT

No. COA23-837

Filed 7 May 2024

1. Evidence—prior bad acts—uncharged offenses—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court erred by allowing defendant's girlfriend to give Rule of Evidence 404(b) testimony regarding an uncharged robbery and kidnapping committed by defendant, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the other evidence of his guilt was overwhelming, including testimony that defendant had been agitated and aggressive with the victim just before she was fatally shot, told his girlfriend to turn away just before the victim was shot, had the murder weapon in his hand just after the shooting, fled once he realized the victim had been killed, had attempted an armed robbery just before the fatal shooting, and afterward stated "if we get caught, it is going to be a shoot-out."

2. Evidence—lay opinion testimony—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court abused its discretion by allowing defendant's girlfriend to give lay opinion testimony pursuant to Rule of Evidence 701 identifying the gun depicted in video and photographic exhibits as the murder weapon, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the State presented other evidence of premeditation and deliberation, including that defendant possessed the murder weapon immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted an armed robbery just prior to the fatal shooting.

3. Evidence—repetitive video and photographic exhibits—unfair prejudice versus probative value—no abuse of discretion

In defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court did not abuse its discretion under Rule of Evidence 403 by admitting ten videos and five photographs of defendant's theft of a vehicle, because the probative value of this evidence was not outweighed by the danger of unfair prejudice where these exhibits were not unnecessarily repetitive but rather gave a full picture of defendant's role in the vehicle theft, assisted a witness's identification testimony, and connected defendant to evidence discovered during his arrest, namely, the murder weapon.

4. Criminal Law—motion to sever—no abuse of discretion—transactional connection and fair hearing

The trial court did not abuse its discretion in denying defendant's motion to sever a first-degree murder charge from a charge of possession of a stolen vehicle where there was a transactional connection between the two crimes as reflected by evidence that defendant came into possession of the stolen car about three hours before the murder, was in the stolen vehicle when he fatally shot the victim, and possessed the murder weapon during both crimes. Further, joinder of the offenses did not prevent defendant from receiving a fair trial in light of other substantial evidence demonstrating defendant's premeditation and deliberation in committing the murder charged, including that he possessed the gun immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted another armed robbery just prior to the fatal shooting.

5. Evidence—expert opinion testimony—ballistics analysis—scientific reliability—no abuse of discretion

In a murder prosecution, the trial court did not abuse its discretion in allowing expert opinion testimony under Rule of Evidence 702 that the gun seized during defendant's arrest was the weapon that fired the fatal shot killing a truck driver who defendant encountered on the roadside. The expert's testimony met all three prongs of the *Daubert* reliability test in that the expert: (1) explained the applicable scientific standards and procedures involved in matching a weapon to used casings and bullets fired, (2) testified that she followed those standards and procedures in the instant case in matching the gun seized from defendant to the cartridge casing found at the scene of the fatal shooting and the bullet recovered from the victim's body, and (3) described the facts and data she relied upon, including a comparison between results obtained from the investigation and those obtained from the test fires.

Judge STROUD concurring in result.

Appeal by defendant from judgment entered 8 September 2022 by Judge Martin B. McGee in Polk County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

GORE, Judge.

Defendant, Kwame Fernanders, appeals his conviction for first-degree murder and possession of a stolen vehicle. Defendant was sentenced to life imprisonment without possibility of parole for first-degree murder and the trial court arrested judgment for the conviction of possession of a stolen vehicle. Defendant seeks review of the trial court's multiple evidentiary rulings and its denial of his motion to sever the charges. Upon review of the briefs, the record, and case law, we conclude the trial court did not err.

I.

Defendant, his girlfriend Kayla Black, and his friend Quintae Edwards met and began driving in defendant's car from Greenville, South Carolina, late on 30 March 2016. Early in the morning on 31 March 2016, they stopped at a gas station. Defendant and Edwards left Black but soon returned driving a red Ford Mustang. They left defendant's car and drove off in the red Ford Mustang headed toward North Carolina. Different angles of video footage and still shots of the footage, admitted during trial, revealed defendant and Edwards had broken into Reliable Rides and stolen the red Ford Mustang from the facility. In the videos, defendant and Edwards were wearing the same clothes they were later sighted in just prior to the shooting; defendant was also seen with a gun and wearing a pair of brown and yellow work gloves.

At approximately 5:00 a.m., they stopped at a BP gas station in Polk County, North Carolina. The gas station was not open at the time, so they waited for it to open. Prior to the gas attendant opening the station, Black testified, and the gas attendant testified, that defendant wanted to rob the attendant, but Black had held him back from doing so. After

buying gas, Black drove the Ford Mustang towards the interstate with defendant seated in the front seat and Edwards seated in the back seat.

As they drove onto the ramp, they saw a "box truck" parked on the side of the ramp and stopped by it to get directions. Destry Horne was the driver of the truck and had stopped while in the middle of making a furniture delivery. Black testified she was trying to fix her GPS while defendant pulled down his window and began talking to Horne. Black testified Horne was polite and defendant was also talking politely, but defendant quickly became aggressive. Black heard Edwards say, "Do it, bro" from the back seat and defendant told Black to turn her head away.

Immediately after she turned her head, Black heard a gunshot and looked in time to see defendant pulling his arm with the gun in his hand back into the car. Black drove away quickly, and not long after, Horne was discovered unresponsive and bleeding in the truck. He was later pronounced dead from a gunshot wound. A police officer, who testified at trial, had seen the box truck and the Mustang parked around 5:40 a.m. as he drove by, but he did not investigate because it was common to see vehicles stopped at the on ramp. He was called to the scene approximately ten to fifteen minutes later. The police officer discovered a spent .40 caliber cartridge casing on the ground near the truck.

Police obtained the video footage from the BP gas station of the Mustang, defendant, Edwards, and Black, and issued images to the public to identify them. The police department's surveillance camera caught the Mustang driving by just after the shooting, headed towards South Carolina. Defendant, Black, and Edwards were recognized in a couple different locations as they drove south, and they evaded arrest while in Landrum, South Carolina, and Gainesville, Florida. While in South Carolina, they abandoned the Mustang and were later seen driving in a maroon Subaru. Prior to the arrest, Black testified at trial that she, defendant, and Edwards had broken into a college apartment and robbed college students. According to Black's testimony, one student was taken with her and defendant to an ATM to withdraw money. Black testified that defendant used the same gun during this break in and robbery that he used in the shooting.

Defendant, Edwards, and Black were later apprehended and arrested at a Best Western in Tallahassee, Florida on 4 April 2016. Police officers recovered a gun (located beside defendant at the time of arrest), the keys to the maroon Subaru, and recovered yellow and brown work gloves and twenty-seven .40 caliber Smith & Wesson Aguila rounds in the Subaru.

Defendant was charged with first-degree murder and possession of a stolen motor vehicle. Defendant filed a pre-trial motion to sever the charges for trial. The trial court denied defendant's motion and granted the State's motion to join the charges. Defendant renewed his motion to sever the charges at the close of the State's evidence and at the close of all the evidence. During trial, defendant made multiple specific objections: to the admission of video footage and still shots from the footage at Reliable Rides; to Black identifying defendant and his gun in the video footage and still shots from Reliable Rides; to Black's testimony of the robbery in Gainesville, Florida; to the State's tender of their expert, Coudriet, as a ballistics expert; and to Coudriet's opinion that the .40 caliber cartridge casing recovered from the scene was fired from the gun retrieved at defendant's arrest. The jury returned guilty verdicts for both charges. The trial court arrested judgment on the possession of a stolen motor vehicle conviction and sentenced defendant to life imprisonment without possibility of parole for the first-degree murder conviction. Defendant timely appealed the judgment.

II.

Defendant appeals of right pursuant to N.C.G.S §§ 7A-27(b) and 15A-1444(a). Defendant challenges multiple evidentiary rulings made by the trial court. Defendant argues the trial court erred with the following evidentiary rulings: (1) by admitting evidence of the Gainesville robbery through Kayla Black's testimony; (2) by allowing Kayla Black to identify the gun displayed in the video footage and photographs of the break in at Reliable Rides; (3) by admitting ten videos and five photographs from the break in at Reliable Rides; (4) by denying defendant's motion to sever the first-degree murder charge from the possession of a stolen motor vehicle charge; (5) by allowing the State's expert witness to testify the used .40 caliber cartridge casing, retrieved by the truck, was fired from the gun seized in defendant's hotel room; and (6) through the cumulative errors committed by the trial court. Defense counsel objected to and preserved each issue for review.

A.

[1] Defendant first argues the trial court erred by allowing Kayla Black to testify about the Gainesville robbery and kidnapping under Rule 404(b). Specifically, defendant argues the trial court erred by allowing the testimony as proof of defendant's identity and to show the chain of events that took place. "We review de novo the legal conclusion that the evidence is . . . within the coverage of Rule 404(b)." *State v. Pabon*, 380 N.C. 241, 257 (2022) (citation omitted). "[I]f an appellate court reviewing

a trial court's Rule 404(b) ruling determines . . . that the admission . . . was erroneous, it must then determine whether that error was prejudicial." *Id.* at 260.

Rule 404(b) is a rule of inclusion that "lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *State v. Beckelheimer*, 366 N.C. 127, 130 (2012) (quoting N.C. R. Evid. 404(b)) (internal quotation marks omitted). The list is broader than the specified purposes when the evidence "is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Id.* Courts constrain the inclusive nature of Rule 404(b) by balancing it with similarity and proximity. *Id.* at 131.

We presume, *arguendo*, the trial court erred by admitting the testimony about the robbery and kidnapping in Gainesville under Rule 404(b) and consider whether the error was prejudicial. Defendant has the burden to demonstrate "whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Pabon*, 380 N.C. at 260 (quoting N.C.G.S. § 15A-1443(a) (2021)).

In the present case, defendant fails to demonstrate "there is a reasonable possibility . . . a different result would have been reached at trial." *Id.* In fact, defendant articulates there is other evidence available to "directly tie [defendant] to the weapon both in North Carolina and Florida." The other evidence properly admitted includes: Black's testimony that defendant kept the gun on him and had the gun in his hand right after shooting Horne; the testimony of defendant's agitation and aggression prior to shooting Horne; testimony defendant had attempted to rob the gas attendant at the gas station just prior to the shooting; testimony that defendant had told Black to turn her head prior to shooting Horne; Black's testimony that they fled once they found out the shooting victim had died; the gun seized in the hotel where defendant was arrested; and Black's testimony defendant stated, "if we get caught, it is going to be a shoot-out." Accordingly, this other overwhelming evidence altogether suggests a reasonable jury could still come to the same conclusion without this Rule 404(b) evidence.

B.

[2] Next, defendant argues the trial court erred by allowing Black to identify the gun in the Reliable Rides video footage and photographs as a lay witness under Rule 701. She identified the gun in Reliable Rides footage as the same gun defendant used in the shooting of Horne. We

review challenges to Rule 701 for abuse of discretion. *State v. Thomas*, 281 N.C. App. 159, 177 (2021), *rev. denied*, 878 S.E.2d 808 (2022) (Mem.); *see State v. Williams*, 363 N.C. 689, 701 (2009) (cleaned up) ("We review for abuse of discretion, looking to whether 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."). If we determine the trial court erred by allowing the lay opinion testimony, we must then consider whether the error was prejudicial. *State v. Belk*, 201 N.C. App. 412, 418 (2009), *writ denied*, *rev. denied*, 364 N.C. 129 (2010) (Mem.).

Lay opinion testimony is acceptable when two factors are present. *Id.* at 414. The testimony must be "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [her] testimony or the determination of a fact in issue." *Id.* (quoting N.C. R. Evid. 701). This Court previously stated various factors to weigh when determining whether lay opinion testimony is proper. *Thomas*, 281 N.C. App. at 178–79 (quoting *Belk*, 201 N.C. App. at 415–16) (listing factors such as the "witness's familiarity," with what she is identifying, and her familiarity at the time the identified object was photographed; any "disguised" appearance in the images or during the incident; and the quality of the images or videos shown to the jury).

We do not weigh in on what factors support defendant's argument as opposed to the factors that support the State's argument, because even if there was an abuse of discretion, it was not prejudicial to the jury's verdict. Defendant does not carry his burden to demonstrate prejudice, by simply suggesting that without the opinion testimony, the jury could have "possibly" reached a different verdict for lack of premeditation and deliberation. The evidence in the record demonstrates Black saw defendant with the gun leading up to and immediately after the shooting. Black testified defendant told her to turn her head prior to shooting Horne, and that defendant had also attempted to rob a gas attendant just prior to the murder. Accordingly, we disagree with defendant's analysis asserting little evidence in the record supports the State's argument that defendant had "violence on his mind," and determine despite any presumed error under Rule 701, it was not prejudicial.

C.

[3] Next, defendant argues the trial court erred by allowing the State to admit ten videos and five photographs from Reliable Rides of defendant stealing the red Mustang. Defendant argues under Rule 403 that the probative value of the videos and images were substantially outweighed

by undue prejudice and cumulative evidence. We review challenges to a Rule 403 determination for abuse of discretion. *Beckelheimer*, 366 N.C. at 133. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." N.C. R. Evid. 403.

Defendant argues the repetition of the videos and the photographs were "unnecessarily repetitive" and "added nothing." He also argues the State's closing argument had the effect of causing the jury "to hold [defendant] accountable for being a person with violence on his mind." We disagree.

"Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs . . . lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285 (1988). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *Id.* at 283.

> Evidence which is offered solely for the purpose of creating sympathy for the accused . . . should be excluded. However, evidence which is otherwise competent and material should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible.

State v. Hudson, 218 N.C. 219, 231 (1940).

In the present case, defendant was indicted for possession of a stolen motor vehicle. The State called a manager from Reliable Rides to testify. Part of her testimony was to explain the various locations revealed in the videos, because the videos each displayed different angles of the business. The videos and photographs revealed who had stolen the vehicle and highlighted the gun and the gloves used during the incident. These items were later seized when defendant was arrested. The photographs were used by the State to capture moments from the videos and to question Black for identification purposes.

Having reviewed the exhibits admitted by the State, we determine they were not excessive nor unduly prejudicial when compared to their probative value. These exhibits gave a full picture of the incident as each video provided a different angle of the business and connected the evidence discovered during defendant's arrest. We determine any prejudicial nature or repetition did not substantially outweigh the probative value of the videos and photographs. The trial court did not abuse its discretion by admitting the exhibits over defendant's objections.

D.

[4] Defendant argues the trial court erred by denying his motion to sever the murder charge from the possession of a stolen vehicle charge. Defendant argues the joinder prevented him from having a fair trial on the murder charge, and now seeks a new trial. We review the trial court's denial of the motion to sever the charges for abuse of discretion. *State v. Knight*, 262 N.C. App. 121, 124 (2018).

The trial court considers whether the charges defendant seeks to sever have a "transactional connection" and "whether the defendant can receive a fair hearing" should the charges remain consolidated for trial. *State v. Larkin*, 237 N.C. App. 335, 349 (2014). To determine whether there is a transactional connection, we consider the following factors: "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *State v. Perry*, 142 N.C. App. 177, 181 (2001) (citation omitted).

In the present case, we disagree with defendant's assertion the charges lacked a transactional connection. Defendant came into possession of the Mustang around 2:30 a.m. and committed the shooting around 5:45 a.m the same morning. Defendant was in possession of a gun in the videos at Reliable Rides that looked similar to the gun discovered upon his arrest. Additionally, defendant was in possession of the stolen Mustang when he shot Horne. While it is possible to distinguish aspects of the charges, defendant has failed to show the trial court abused its discretion by denying the motion to sever.

Further, we disagree with defendant's assertion that the joinder of the charges prevented him from obtaining a fair trial. Defendant once again argues without this joinder the jury might not have found defendant premediated or deliberated the shooting. As previously discussed, other substantial evidence leading up to the shooting allows the jury to find the existence of premeditation and deliberation. Accordingly, the trial court did not abuse its discretion and defendant was not prevented from obtaining a fair trial by the joinder of charges.

E.

[5] Defendant argues the trial court abused its discretion by allowing the State's expert opinion under Rule 702. Specifically, defendant argues the expert's testimony was not based upon reliable methods and principles nor sufficient facts or data under Rule 702(a)(1) and 702(a)(3). These arguments are in opposition to the expert's testimony that the

.40 caliber cartridge casing found at the scene of the shooting was fired from the same gun seized during defendant's arrest in Florida. We review challenges to Rule 702 for abuse of discretion. *State v. Godwin*, 369 N.C. 604, 610–11 (2017). The ruling must be "manifestly unsupported by reason and . . . not . . . the result of a reasoned decision" for us to determine the trial court abused its discretion. *State v. Miller*, 275 N.C. App. 843, 848 (2020), *rev. denied*, *dismissed by* 377 N.C. 211 (2021) (Mem.).

North Carolina Rules of Evidence 702(a) states the requirements to admit an expert and admit their opinion:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

Also known as the *Daubert* reliability test, subsections (a)(1)–(a)(3) must all be demonstrated in the expert's testimony to be admissible. *State v. McGrady*, 368 N.C. 880, 890 (2016) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* (cleaned up). If there is "too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data . . . ." *Id.* (cleaned up).

Defendant argues the expert's testimony did not meet prongs (a)(1) and (a)(3). Defendant points to the portion of the expert's testimony in which she concluded the field test cartridge casings matched the .40 caliber cartridge casing found at the scene of the shooting. Defendant relies upon *State v. McPhaul* to support his contention that the expert failed to explain how the cartridges matched. 256 N.C. App. 303, 314–16

(2017). Having reviewed *McPhaul* and compared it to the transcripts in this case, we disagree with defendant's argument.

The State's expert not only explained the standards she had followed, but also explained how she had applied these standards within the context of the cartridges in the present case. Whereas, in *McPhaul*, the expert explained her procedures but then provided sparse answers to the basis for her conclusion. *Id.* at 315–16. In fact, the prosecutor provided more detail in his questions than the expert with her answers in *McPhaul*. *Id.* This amounted to the expert "implicitly ask[ing] the jury to accept her expert opinion." *Id.* at 316. Accordingly, the trial court did not abuse its discretion by determining the expert "applied the principles and methods reliably to the facts of the case, as required by Rule 702(a)(3)." *Id.*

Further, the trial court did not abuse its discretion by determining the expert's testimony was "based upon sufficient facts or data." N.C. R. Evid. 702(a)(1). The expert had a .40 caliber casing from the site of the shooting, the gun seized during defendant's arrest, and the bullet removed from Horne's body. The expert used the gun to conduct test fires and compare the test casings with the casing and bullet from the shooting scene and victim. The expert discussed the instruments and tests conducted with the evidence. Defendant argues about the expert's statement asserting there is no error rate in this type of ballistics testing, but defendant was given opportunity to discredit the expert during cross-examination on this very topic.

Additionally, defendant argues against the admission of the expert's opinion because it is "inherently subjective" and there were recent studies airing concerns with definitive statements from experts in the ballistic field due to its subjective basis. In support of this argument, defendant points to non-binding federal case law and a dissent in the *Miller* case. *See United States v. Ashburn*, 88 F. Supp. 3d 239, 243–44 (E.D.N.Y. 2015); *Miller*, 275 N.C. App. at 856–57 (2020) (Zachary, J., concurring in part and dissenting in part). However, defendant's argument is unpersuasive to this Court given his ability to vigorously cross-examine the expert witness and challenge her credibility on those very grounds. Indeed, on cross-examination, defendant exposed the inconsistencies in the ballistics field by further unpacking the expert's statement that there is no known error rate. Instead of an "impression of definitiveness," defendant cast doubt on the validity of the expert's opinion. That aside, it was within the purview of the jury to determine the weight and credibility of the expert's opinion. Defendant points to no North Carolina

case law to demonstrate that the purported lack of an error rate in the ballistics field negates the expert's opinion in this case.

When we consider the trial court's consideration of the evidence, multiple arguments, case law, and reports prior to making its determination, we cannot say its decision was "manifestly unsupported by reason." *Miller*, 275 N.C. App. at 848. The trial court allowed extensive voir dire of the expert by counsel; the trial court considered reports challenging the validity of the expert's approach to firearm tracing; the trial court limited the expert's testimony to not use the word "unique" or compare the tracing of the cartridges to fingerprints and signatures; and defendant was able to cross-examine the expert regarding the reliability of her methods and principles as applied to the evidence. These steps taken together demonstrate that the trial court properly determined threshold knowledge and qualifying admissibility and did not abuse its discretion by allowing admission of the expert's opinion.

Having considered defendant's multiple arguments, and having determined the combination of the trial court's decisions were not demonstrated to be abuses of discretion nor prejudicial, we disagree with defendant's argument of cumulative error. The trial court overruled multiple objections by discretionary means. Accordingly, defendant was not deprived of a fair trial.

III.

For the foregoing reasons, the trial court did not err nor prejudicially err.

NO ERROR.

Judge TYSON concurs.

Judge STROUD concurs in result.

STATE OF NORTH CAROLINA
v.
TODD GIBBS

No. COA23-566

Filed 7 May 2024

1. Indictment and Information—multiple indictments—identical counts of rape—date range—sufficiency of notice

In a prosecution for rape and sex offense in a parental role, the indictments charging defendant with three identical counts of second-degree forcible rape over a nearly six-month time span were not constitutionally defective because they provided sufficient notice to defendant of the charges against him. Where the incidents had taken place many years earlier against a minor victim and where time was not of the essence or a required element of the offense, any lack of specificity in the dates of each offense did not prejudice defendant and did not require dismissal. Further, there was sufficient evidence at trial to support the date range given in the indictments, based on the victim's testimony that defendant repeatedly abused her multiple times per week for months. Finally, the trial court expressly instructed the jury to assess whether the charged offense occurred three separate and distinct times within the date range.

2. Rape—second-degree forcible rape—sex offense in a parental role—constructive force—sufficiency of evidence

The State presented substantial evidence of each element of second-degree forcible rape and sex offense in a parental role sufficient to survive defendant's motion to dismiss for lack of evidence, including that defendant committed the offenses and used constructive force. Despite the lack of physical evidence, the victim testified that defendant—who was her stepfather at the time of the incidents—assaulted her multiple times per week for several months, that during the assaults she couldn't go anywhere because defendant would be on top of her and was larger in size, and that she felt intimidated and feared repercussions if she did not comply.

3. Criminal Law—rape and sex offense—multiple counts—jury instructions—separate and distinct incidents

In defendant's prosecution for three counts of second-degree forcible rape and one count of sex offense in a parental role, in

which one date range was given for each offense, the trial court did not plainly err by failing to instruct the jury to determine specific dates for each alleged act, since the State was not required to allege or prove specific dates for each offense. Further, the court expressly instructed the jury to consider each count separately, and defendant could not demonstrate prejudice because the victim testified to two separate instances of abuse along with a long pattern of being abused multiple times per week for several months.

4. Sentencing—rape and sex offense—consecutive sentences—no abuse of discretion

The trial court did not abuse its discretion by imposing consecutive sentences on defendant after he was convicted of three counts of second-degree forcible rape and one count of sex offense in a parental role where the court sentenced defendant in the presumptive range for each offense and, therefore, was not required to take into account mitigating evidence, and where there was no evidence in the record that the sentences were arbitrary or that they amounted to cruel or unusual punishment.

Appeal by Defendant from Judgments entered 11 January 2023 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

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

HAMPSON, Judge.

Factual and Procedural Background

Todd Gibbs (Defendant) appeals from Judgments entered pursuant to jury verdicts finding Defendant guilty of three counts of Second-Degree Rape and one count of Sex Offense in a Parental Role. The Record before us, including evidence presented at trial, tends to reflect the following:

In November of 2004, Beth Berry, a social worker with the Watauga County Department of Social Services (DSS), received a report alleging Defendant was abusing his stepchildren. This report was made by the

ex-husband of Defendant's then-wife. Berry testified she contacted J.H.[1] in the course of her investigation of the alleged abuse, during which it became known there were allegations Defendant had previously abused J.H. Berry testified J.H. confided in her that Defendant had repeatedly sexually abused her when he was her stepfather over an extended period of time. Her report indicated the abuse had occurred approximately eight years prior. After their conversation, Berry reported to the Sheriff's Office that J.H. had confirmed her own sexual abuse as a child, but she did not wish to press charges against Defendant at that time.

In the fall of 2020, Sergeant Lucas Smith with the Watauga County Sheriff's Office contacted J.H. after finding the 2004 report during an investigation of Defendant. On 26 October 2020, Sergeant Smith interviewed J.H. about the incidents documented in the report. Sergeant Smith testified J.H. had described the first two major incidents she could recall. The first involved Defendant performing oral sex on her after her seventh-grade science fair. The second involved Defendant forcibly raping her in a car after a visit to a Blockbuster Video store. J.H. also reported a subsequent pattern of abuse in which Defendant sexually abused her two to three times per week for an extended period of time. After this interview, Defendant was indicted for three counts of Second-Degree Rape and one count of Sex Offense in a Parental Role on or about 6 December 2021.

Defendant's case came on for trial on 9 January 2023. At trial, J.H. testified, consistent with her statement to Sergeant Smith, to two distinct instances of abuse: one involving oral sex when Defendant picked her up from a science fair when she was in the seventh grade and another in which Defendant sexually assaulted her in a car in the garage of their house after renting a movie from Blockbuster Video. J.H. testified that after these incidents, Defendant sexually abused her three to four times per week over the course of several months until sometime when she was fifteen years old and threatened Defendant if he "ever touched [her] again." This account was consistent with her interview with Sergeant Smith.

At the close of the State's evidence, Defendant renewed "all previous motions and objections made up and until this point" and moved to dismiss the case. The trial court denied these motions. At the conclusion of all evidence, Defendant again moved to dismiss the case. The trial court denied Defendant's motion. During the charge conference, Defendant made no objection to the jury instructions.

---

1. Although J.H. was an adult at the time of trial, she was a minor when the alleged offenses occurred, thus we refer to her using initials.

On 11 January 2023, the jury returned verdicts finding Defendant guilty on all four charges. The trial court sentenced Defendant to consecutive sentences of 63 to 85 months of imprisonment for each of the three Second-Degree Rape convictions and a consecutive term of 25 to 39 months of imprisonment for the Sex Offense in a Parental Role conviction. The trial court also ordered Defendant to pay a fine of $10,000 and recommended he receive psychiatric and psychological counseling. Defendant orally entered Notice of Appeal in open court on 11 January 2023.

Issues

The issues on appeal are whether the trial court erred by: (I) denying Defendant's Motion to Dismiss the Indictments; (II) denying Defendant's Motion to Dismiss for insufficiency of the evidence; (III) not instructing the jury that specific alleged acts must correspond to specific alleged dates; and (IV) sentencing Defendant to consecutive terms of imprisonment.

Analysis

I. Motion to Dismiss the Indictments

[1] Defendant contends the indictments were constitutionally deficient because they did not state "with certainty the acts that give rise to the offense with which Defendant is being charged." Specifically, Defendant contends the indictments did not give Defendant sufficient notice on which particular days within the date range alleged in the indictments the offenses occurred. Additionally, Defendant argues the indictments were fatally defective because the three counts of Second-Degree Rape were identical, such that a juror could not know what evidence pertained to which count.

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018) (quotation marks omitted) (quoting *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016)). "The purpose of the indictment is to put the defendant on 'notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense.' " *State v. Collins*, 245 N.C. App. 478, 486, 783 S.E.2d 9, 15 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985)). "Thus, '[i]f the indictment's allegations do not conform to the equivalent material aspects of the jury charge, this discrepancy is considered a fatal variance.' " *Locklear*, 259 N.C. App. at 380, 816 S.E.2d at

202-03 (alteration in original) (quoting *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016) (citation and quotation marks omitted)).

"Generally, an indictment must include a designated date or period within which the offense occurred." *Collins*, 245 N.C. App. at 486, 783 S.E.2d at 15 (citation omitted). However, our Supreme Court has repeatedly stated "the date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date." *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984); *see also State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). "[V]ariance between allegation and proof as to time is not material where no statute of limitations is involved." *State v. Burton*, 114 N.C. App. 610, 612, 442 S.E.2d 384, 385 (1994) (citations and quotation marks omitted).

In cases involving sexual assaults of children, our Supreme Court has relaxed the temporal specificity requirements the State must allege in the indictment. *Id.* at 613, 442 S.E.2d at 386.

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). "Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where . . . the allegations concern instances of child sex abuse occurring years before." *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386. Thus, "[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (citations omitted).

Our statutes support this "policy of leniency" by expressly providing no stay or reversal of a judgment on an indictment when time is not of the essence of the offense: "No judgment upon any indictment . . . shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved . . . nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly[.]" N.C. Gen. Stat.

§ 15-155 (2021). Further, "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." N.C. Gen. Stat. § 15A-924(a)(4) (2021).

In this case, Defendant was indicted for three counts of Second-Degree Forcible Rape pursuant to N.C. Gen. Stat. § 14-27.22. Our statutes provide: "A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.22(a)(1) (2021).[2] The indictments for these offenses alleged a date range of 2 October 1994 to 25 March 1995. Time is not of the essence nor a required element for Second-Degree Forcible Rape. Further, each count was charged as a felony, and "[i]n [North Carolina] no statute of limitations bars the prosecution of a felony." *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969). Defendant does not argue to the contrary.

Moreover, there was sufficient evidence presented at trial to support the indictment date range. At trial, J.H. testified about multiple specific incidents of forcible vaginal intercourse that occurred within the date range listed on the indictments. J.H. also testified to a pattern of abuse that continued two to three times per week for months. Such testimony is sufficient to support a conviction. This is consistent with our precedent rejecting similar arguments in cases where a victim testifies to a "long history of repeated acts of sexual abuse over a period of time, but does not give testimony identifying specific events surrounding each sexual act." *State v. Bullock*, 178 N.C. App. 460, 471, 631 S.E.2d 868, 876 (2006), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 708 (2007); *see also State v. Bates*, 172 N.C. App. 27, 35, 616 S.E.2d 280, 286 (2005).

Additionally, the trial court expressly instructed the jury to consider whether second-degree rape occurred three separate times within the date range, as well as whether the separate offense of sexual abuse in a parental role occurred. The trial court instructed the jury: "You will consider each charge or count separately. To differentiate the charge or count you are considering, you shall determine whether the alleged occurrence of one offense is at a time or date different from the other two alleged offenses." Thus, the instructions clarified the jury must find separate, distinct incidents of rape for each count. Therefore, we conclude the trial court did not err by denying Defendant's Motion to Dismiss the Indictments.

---

2. Formerly codified as N.C. Gen. Stat. § 14-27(a) (1994).

II. Motion to Dismiss

[2] We review the trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). However, "[u]pon 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. Fields*, 265 N.C. App. 69, 71, 827 S.E.2d 120, 122 (2019) (citation and quotation marks omitted), *review allowed*, *writ allowed*, 372 N.C. 705, 830 S.E.2d 816 (2019), *and aff'd as modified*, 374 N.C. 629, 843 S.E.2d 186 (2020). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). Evidence "need not be irrefutable or uncontroverted" to be substantial. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant contends the trial court erred in denying his Motion to Dismiss for insufficient evidence. For the charge of Second-Degree Forcible Rape, our statutes provide: "A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.22(a)(1) (2021). With respect to Sex Offense in a Parental Role, our statutes provide a person is guilty "[i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home[.]" N.C. Gen. Stat. § 14-27.31(a) (2021).

Defendant argues as to the Second-Degree Rape charges that the State did not present sufficient evidence that the alleged incidents occurred or that they were perpetrated by force. Defendant argues as to the Sex Offense in a Parental Role charge that the State did not present sufficient evidence that the alleged incidents occurred. Defendant was J.H.'s stepfather at the time of the alleged incidents; therefore, it was uncontested he was in a parental role with respect to J.H.

Defendant points to the lack of physical evidence and the fact J.H. had previously declined to prosecute these incidents. Our courts have repeatedly held victim statements and testimony alone are sufficient

evidence to support a conviction. *See*, *e.g.*, *Bates*, 172 N.C. App. at 35, 616 S.E.2d at 286; *Bullock*, 178 N.C. App. at 472, 631 S.E.2d at 876. In one such case, this Court held there is sufficient evidence to withstand a defendant's motion to dismiss in cases involving a long period of abuse "where a victim recounts a long history of repeated acts of sexual abuse over a period of time, but does not give testimony identifying specific events surrounding each sexual act." *Bullock*, 178 N.C. App. at 471, 631 S.E.2d at 877. There, this Court further acknowledged "the realities of a continuous course of repeated sexual abuse. While the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act . . . becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable." *Id.* at 473, 631 S.E.2d at 877. Here, J.H. testified in detail about the first two incidents of sexual assault by Defendant. She then described a pattern of sexual abuse occurring "three to four" times per week for several months. This testimony is sufficient, consistent with our precedent, to survive a motion to dismiss.

As to the issue of force, Defendant acknowledges force may be constructive.

> Constructive force in the form of fear, fright, or coercion suffices to establish the element of force in second-degree rape and may be demonstrated by proof of a defendant's acts which, in the totality of the circumstances, create the reasonable inference that the purpose of such acts was to compel the victim's submission to sexual intercourse.

State v. Parks, 96 N.C. App. 589, 593, 386 S.E.2d 748, 751 (1989). Our Supreme Court has noted "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987). "[W]here explicit threats or displays of force are absent, constructive force may nevertheless be inferred from the 'unique situation of dominance and control' which inheres in the parent-child relationship." *Parks*, 96 N.C. App. at 593, 386 S.E.2d at 751 (quoting *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681).

Contrary to Defendant's assertions, J.H.'s testimony was sufficient to establish constructive force. J.H. testified that during the alleged sexual assaults, Defendant "would be on top of [her] so [she] really didn't have really anywhere to go." She testified to feeling "intimidation" and stated she "definitely feared repercussions" if she did not comply. J.H. also testified to Defendant's size relative to her at that time, when

she was "smaller than average[.]" This testimony is in accord with our Supreme Court's recognition of the "unique situation of dominance and control" inherent in the relationship between a parent and child. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681. Further, this Court has consistently concluded there was sufficient evidence to support finding constructive force in cases in which juveniles testified to fear of retribution or control and manipulation on the part of the abuser. *See*, *e.g.*, *Locklear*, 172 N.C. App. at 254-55, 616 S.E.2d at 338; *State v. Strickland*, 318 N.C. 653, 656-57, 351 S.E.2d 281, 283 (1987); *State v. Morrison*, 94 N.C. App. 517, 522-24, 380 S.E.2d 608, 611-12 (1989). Thus, the State presented sufficient evidence to establish Defendant committed the acts alleged and used constructive force. Therefore, the trial court did not err in denying Defendant's Motion to Dismiss for insufficient evidence.

III. Jury Instructions

[3] Defendant acknowledges he did not object to the jury instructions at trial. Therefore, our review is limited to plain error. *See State v. Golder*, 374 N.C. 238, 244, 839 S.E.2d 782, 788 ("[A]n appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." (citation and quotation marks omitted)). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Defendant contends the trial court's jury instructions were prejudicial because there was no instruction "regarding the necessity for specific alleged date incidents for the alleged acts of vaginal intercourse." As we have already concluded, however, the State was not required to allege or prove specific dates for each instance of abuse.

Further, the trial court appropriately instructed the jury that it must find the State met its burden for each count of Second-Degree Rape charged. The trial court instructed the jury as follows:

> Now, the defendant has been charged with three counts of second-degree forcible rape. Each count alleges that the offense occurred on or about a date between October 2nd of 1994, and March 25th, 1995. You will consider each charge or count separately. To differentiate the charge or count you are considering, you shall determine whether the alleged occurrence of one offense is at a time or date different from the occurrence of the other two alleged offenses. That is, you must find beyond a reasonable doubt that each separate count was a separate occurrence of the alleged offense and that it occurred within the alleged time period. Again I remind you that you will consider each offense or count separately.

The jury was given clear, specific instructions that it must consider each count separately, and whether each alleged occurrence happened at different times or days from each other. Based on the instructions and J.H.'s testimony regarding two separate instances and a long pattern of abuse over the course of several months, we cannot conclude Defendant was prejudiced by the jury instructions or, consequently, that the trial court plainly erred in issuing its instructions.

IV. Consecutive Sentences

[4] When a defendant challenges the sentence imposed by the trial court, "our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1)). "It is well established that the decision to impose consecutive or concurrent sentences is within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion." *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 497, 692 S.E.2d 145, 154 (2010). "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. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted).

"This Court has held the trial court is required to take 'into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.' " *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (quoting *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)) (emphasis in original). Thus, when the trial court imposes presumptive sentences, it is not required to take into account mitigating evidence. *Id.*

Here, as Defendant acknowledges, the trial court imposed sentences within the presumptive range. It was thus within the trial court's discretion to impose concurrent or consecutive sentences. *Espinoza-Valenzuela*, 203 N.C. App. at 497, 692 S.E.2d at 154. There is nothing in the Record supporting the proposition that imposing consecutive sentences was arbitrary or could not have been the result of a reasoned decision. Moreover, "sentences that are within the statutory limits and impose consecutive sentences do not constitute cruel and unusual punishment." *State v. Handsome*, 300 N.C. 313, 317, 266 S.E.2d 670, 674 (1980) (citations omitted). Where a defendant is sentenced within the relevant statutory limits, "[t]here is . . . no merit to his contention that the [consecutive] sentences constitute cruel or unusual punishment." *State v. O'Neal*, 108 N.C. App. 661, 667, 424 S.E.2d 680, 683 (1993). Thus, Defendant has failed to show the trial court's decision to impose consecutive sentences was arbitrary or without reason, or that his consecutive sentences amounted to cruel or unusual punishment. Therefore, the trial court did not err in sentencing Defendant to consecutive terms of imprisonment. Consequently, the trial court, in turn, did not err in entering judgment against Defendant.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgments.

NO ERROR.

Judges GRIFFIN and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KENNETH DAVID GROAT, DEFENDANT

No. COA23-703

Filed 7 May 2024

1. Appeal and Error—waiver—motion to sever denied—failure to renew motion at trial

Defendant waived appellate review of the trial court's joinder for trial of one count of attempted first-degree kidnapping and multiple counts of sex offenses against juveniles where the court had denied defendant's motion to sever the charges, which he filed pretrial as required by N.C.G.S. § 15A-927(a)(1), but defendant then failed to renew his severance motion at the close of all evidence as required by N.C.G.S. § 15A-927(a)(2).

2. Kidnapping—sufficiency of evidence—attempt in the first degree

The trial court did not err in denying defendant's motion to dismiss a charge of attempted first-degree kidnapping where the State produced evidence that defendant—who had sexually abused and impregnated his stepdaughter when she was a minor—had threatened to kidnap his stepdaughter to a motel so they could "commit suicide together" and was arrested as he waited outside the now-adult daughter's workplace with duct tape, a handgun, and a knife in his car after the stepdaughter contacted law enforcement regarding defendant's unwanted text contact with her. In the light most favorable to the State, this was substantial evidence of an overt act by defendant—driving to and waiting outside the stepdaughter's workplace—with the intent to restrain and/or remove her without her consent to facilitate the felony of killing her.

Appeal by Defendant from judgment entered 18 October 2022 by Judge William H. Coward in Jackson County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

New Hanover County Public Defender, by Assistant Public Defender Max E. Ashworth, III, for Defendant-Appellant.

CARPENTER, Judge.

Kenneth David Groat ("Defendant") appeals from judgment after a jury convicted him of one count of attempted first-degree kidnapping, one count of statutory sex offense with a child fifteen years of age or younger, three counts of indecent liberties with a child, and three counts of statutory rape of a child fifteen years of age or younger. On appeal, Defendant argues the trial court erred by: (1) joining his charges for one trial; and (2) denying his motion to dismiss his attempted first-degree kidnapping charge. After careful review, we discern no error.

I. Factual & Procedural Background

On 18 June 2020, a grand jury indicted Defendant with two counts of indecent liberties with a child, one count of statutory sex offense with a child fifteen years of age or younger, and one count of statutory rape of a child fifteen years of age or younger. On 28 January 2021, a grand jury indicted Defendant with attempted first-degree kidnapping. On 15 March 2021, a grand jury indicted Defendant with one count of statutory rape of a child fifteen years of age or younger and one count of indecent liberties with a child. And lastly, on 15 November 2021, a grand jury indicted Defendant with an additional count of statutory rape of a child fifteen years of age or younger.

Before trial, the State filed a motion to join all of Defendant's charges for one trial, and Defendant filed a motion to sever, objecting to the joinder of his charges. The trial court granted the State's motion and denied Defendant's. Defendant did not renew his joinder objection at trial.

Trial evidence tended to show the following. In 2011, Defendant began dating the mother of A.C. and T.Q.[1] Defendant moved in with, and eventually married, A.C. and T.Q.'s mother.

A.C. was in the fifth grade during the following events. One night, Defendant laid "next to [A.C.]" and put "his hands in [A.C.'s pants]." Defendant asked A.C. to "get on top of [Defendant] and jump." On several other occasions, Defendant would "stick his hands in [A.C.'s] bra" and put his "mouth . . . on [A.C.'s] boobs" while she was sleeping. Defendant also digitally penetrated A.C.

T.Q. was twelve years old during the following events. One night, Defendant touched T.Q. "up [her] leg and . . . on [her] stomach and [her] arms. And then [she] saw him pull out his phone, and he lifted [her] pants

1. We use pseudonyms to protect the identity of the juveniles. *See* N.C. R. App. P. 42(b).

and underwear and took a photo of [her]." Days later, Defendant again "touch[ed T.Q.'s] arms, touch[ed her] legs[,] and . . . touch[ed her] breasts[,] lifting up [her] pants and underwear to look at everything." Defendant eventually started "try[ing] to have penetrative sex with [T.Q.]"

When T.Q. was thirteen years old, Defendant impregnated her. To cover up the abuse, Defendant convinced T.Q. to say that she "snuck off and had sex with some guy at [a] football game, and then [she] just became pregnant." T.Q. aborted the unborn child. Undeterred, Defendant continued to have sex with T.Q.

Defendant threatened to kill himself if T.Q. reported the abuse. He also threatened to kill T.Q. "so [they could] be together forever." Defendant also told T.Q. that if she said anything, "he would kidnap [T.Q.,] . . . go to a motel room, and then . . . commit suicide together."

On 20 January 2020, police arrested Defendant for the above abuse. Defendant posted bond and was released. As a condition of his bond, Defendant had to avoid any "contact w[ith] any minor under [the] age of sixteen" and "reside with [his] parents in Michigan while on release." Nonetheless, on 21 May 2020, Defendant texted T.Q. after his release, and T.Q. notified the police. The police then instructed T.Q. to ask Defendant to meet her at a Sonic restaurant near T.Q.'s work, in Sylva, North Carolina.

On 22 May 2020, police officers observed Defendant, in his car, parked "in the middle of the [Sonic] drive area facing [T.Q.'s workplace.]" The officers arrested Defendant. During the subsequent search of Defendant's car, officers found the following: binoculars, two rolls of duct tape, pepper spray, a pocketknife, two cell phones, a .22-caliber pistol, .22-caliber ammunition, a 40-pack of bottled water, a 15-pack of granola bars, two five-gallon jugs of gasoline, and a recent receipt for cable ties.

On 18 October 2022, the jury convicted Defendant of one count of attempted first-degree kidnapping, one count of statutory sex offense with a child fifteen years of age or younger, three counts of indecent liberties with a child, and three counts of statutory rape of a child fifteen years of age or younger. The trial court sentenced Defendant to between 1,072 and 1,616 months of imprisonment. On 1 November 2022, Defendant filed a written notice of appeal.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the trial court erred by: (1) joining Defendant's charges for a single trial; and (2) denying Defendant's motion to dismiss his attempted first-degree kidnapping charge.

IV. Analysis

A. Joinder of Charges for One Trial

[1] Defendant first argues that the trial court erred by joining his charges for one trial. We conclude that Defendant waived this argument.

In a criminal case, the State may join multiple charges to be adjudicated in one trial. *See State v. Bracey*, 303 N.C. 112, 116–17, 277 S.E.2d 390, 393–94 (1981). If the defendant believes the joinder is unfair, however, he may move to sever the charges. *See* N.C. Gen. Stat. § 15A-927(a)(1) (2023).

As a general rule concerning appellate review, the appellant must raise the issue at trial before we can consider it. *See, e.g.*, *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)). But motions to sever have a higher preservation hurdle: A motion to sever offenses must be made before trial, N.C. Gen. Stat. § 15A-927(a)(1), and if the trial court denies the motion, the "right to severance is waived by failure to renew the motion" at trial, *id.* § 15A-927(a)(2).

Concerning waiver of severance arguments, some of our caselaw appears to conflict with decisions of the North Carolina Supreme Court. *Compare State v. Silva*, 304 N.C. 122, 128, 282 S.E.2d 449, 453 (1981) ("Defendant here moved to sever prior to trial but did not renew that motion at the close of all evidence; therefore, he has waived any right to severance, [N.C. Gen. Stat.] § 15A-927(a)(2).") *with State v. Wood*, 185 N.C. App. 227, 231, 647 S.E.2d 679, 683 (2007) (reviewing the trial court's severance denial for abuse of discretion, despite the defendant's failure to renew his severance motion at trial).

We, however, cannot overrule our state's highest court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, we follow *Silva*, not *Wood*. *See Dunn*, 334 N.C. at 118, 431 S.E.2d at 180. And tracking nicely with the text of section 15A-927, the Court in *Silva* held that a defendant waives his severance arguments by failing to renew his severance motion at trial. *Silva*, 304 N.C. at 128, 282 S.E.2d at 453.

Here, Defendant moved pretrial to sever his charges, but he failed to renew his severance argument at trial. Therefore, Defendant waived his severance argument, and we decline to review the trial court's decision

to join Defendant's charges. *See* N.C. Gen. Stat. § 15A-927(a)(2); *Silva*, 304 N.C. at 128, 282 S.E.2d at 453.

B. Motion to Dismiss

[2] Next, Defendant argues that the trial court erred by denying his motion to dismiss his attempted first-degree kidnapping charge. After careful review, we disagree.

We review a denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Agustin*, 229 N.C. App. 240, 242, 747 S.E.2d 316, 318 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

"An attempted crime is an intentional 'overt act' done for the purpose of committing a crime but falling short of the completed crime." *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 453 (1999) (citing *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 192 (1982)). First-degree kidnapping requires: (1) confining, restraining, or removing from one place to another; (2) a nonconsenting person who is sixteen years or older; (3) to facilitate a felony; and (4) not releasing the person in a safe

place, seriously injuring the person, or sexually assaulting the person. *See State v. Oxendine*, 150 N.C. App. 670, 675, 564 S.E.2d 561, 565 (2002).

Here, the State offered the following trial testimony. Defendant threatened to kill T.Q. "so [they could] be together forever." Defendant also told T.Q. that if she said anything, "he would kidnap [T.Q.,] . . . go to a motel room, and then . . . commit suicide together."

Further, police officers arrested Defendant outside of T.Q.'s workplace. And during the subsequent search of Defendant's car, officers found binoculars, two rolls of duct tape, pepper spray, a pocketknife, two cell phones, a .22-caliber pistol, .22-caliber ammunition, a 40-pack of bottled water, a 15-pack of granola bars, two five-gallon jugs of gasoline, and a recent receipt for cable ties.

First, Defendant does not contest T.Q.'s age as of 22 May 2020, and testimony shows that T.Q. did not consent to go anywhere with Defendant, as she cooperated with police to apprehend him. Second, testimony that Defendant parked and waited outside of T.Q.'s workplace is evidence that Defendant targeted T.Q. Third, the duct tape found in Defendant's vehicle is evidence that Defendant intended to confine or restrain T.Q. Fourth, testimony that Defendant previously stated he wanted to kidnap T.Q. so they could "commit suicide together"—coupled with the seizure of, among other things, a handgun and a knife from Defendant's car—is evidence that Defendant intended to commit a felony by killing T.Q. And finally, testimony that Defendant parked and waited outside of T.Q.'s workplace is evidence of an " 'overt act' done for the purpose of" kidnapping T.Q. *See Broome*, 136 N.C. App. at 87, 523 S.E.2d at 453.

In sum, the above-mentioned evidence is substantial concerning each element of attempted first-degree kidnapping because a reasonable jury could accept it as "adequate to support a conclusion" that Defendant attempted to kidnap T.Q. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169; *Oxendine*, 150 N.C. App. at 675, 564 S.E.2d at 565; *Broome*, 136 N.C. App. at 87, 523 S.E.2d at 453. Accordingly, the trial court did not err by denying Defendant's motion to dismiss his attempted first-degree kidnapping charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

V. Conclusion

We conclude that Defendant waived his severance argument by failing to renew it at trial, and the trial court did not err by declining to dismiss Defendant's attempted first-degree kidnapping charge.

NO ERROR.

Judges TYSON and STADING concur.

STATE OF NORTH CAROLINA
v.
PHIL JAY HEYNE

No. COA23-224

Filed 7 May 2024

1. Evidence—lay witness testimony—rape trial—repressed memories—victim's recall—expert support not required

In a trial for first-degree rape involving an incident that took place years earlier when the victim was a minor, the trial court did not plainly err by allowing the victim to testify regarding her memories of the incident where, despite defendant's characterization of the victim's testimony as involving repressed memories—for which supporting expert testimony would be required—the victim did not testify that she had repressed memories or that she had recovered repressed memories but, instead, recalled certain parts of the incident as "really clear."

2. Evidence—lay witness testimony—rape trial—repressed memory—admitted for corroborative purposes

In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not plainly err when it admitted testimony, without expert support, of a friend of the victim's family stating that the victim had repressed her memory of the incident, since the family friend's testimony was not admitted for substantive purposes but, rather, as corroboration of the victim's substantive testimony, a distinction that the trial court made clear to the jury during instructions.

3. Evidence—lay witness testimony—rape trial—victim's advocate—calling memory loss "normal"—based on rational perception

In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not abuse its discretion by allowing the testimony of a domestic violence victim's advocate who described taking the victim to be interviewed by law enforcement and, after relating that the victim did not remember a lot of details, stated that the lack of details was "normal because it happened so long ago." Despite defendant's argument that there was no basis for this opinion, the trial court could have reasoned that the testimony was based on the rational perception that memories fade over time.

4. Criminal Law—first-degree rape trial—prosecutor's closing argument—victim's behaviors as responses to rape—reasonable inference

In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not abuse its discretion by allowing the prosecutor to comment during closing argument that the victim's eating disorder, self-harm, and nightmares were consistent and credible responses to having been raped. The statements were not asserted as fact but constituted reasonable inferences based on the facts in evidence and, even had the statements been improper, they amounted to a small portion of the State's closing argument and were not prejudicial to defendant.

Appeal by Defendant from judgment entered 30 August 2022 by Judge Lori I. Hamilton in Davie County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kristin J. Uicker, for the State-Appellee.

Mark Hayes for Defendant-Appellant.

COLLINS, Judge.

Defendant Phil Jay Heyne appeals from a judgment entered upon a jury verdict finding him guilty of first-degree rape. Defendant argues that the trial court plainly erred by admitting lay witness testimony of repressed memories without expert support, that the trial court erred by allowing certain lay witness opinion testimony, and that the trial court erred by allowing the prosecutor to make improper and prejudicial remarks during the State's closing argument. We hold that Defendant received a fair trial free from prejudicial error.

I. Background

In August 2017, Amber[1] contacted law enforcement to report that Defendant had sexually assaulted her in 2003 while she was at a sleepover with Defendant's daughter at Defendant's house. Defendant was indicted for first-degree rape in May 2019 and tried in August 2022.

1. A pseudonym is used to identify the prosecuting witness. *See* N.C. R. App. P. 42(b)(3).

Amber testified at trial to the following: When Amber was in the sixth grade, Defendant's daughter invited her to sleep over at her house. Amber's family had dinner with Defendant's family before the sleepover and then Amber's parents gave her a cell phone before leaving her at Defendant's house. Amber and Defendant's daughter played in the basement until Defendant's wife came downstairs and told them that it was time for bed. On their way up the stairs, Defendant's daughter informed Amber that they would be sleeping in separate rooms, which made Amber uncomfortable.

At some point during the night, Amber heard the bedroom door open and felt "a presence of somebody inside" the room. The person checked if Amber was asleep and then got into bed with her. The person began touching Amber's thigh and hip area, then turned her onto her back, got on top of her, and put his hand over her mouth. Amber opened her eyes and recognized that the person on top of her was Defendant. Defendant removed Amber's shorts and underwear and "put his penis in [her] vagina." Amber described feeling "a lot of pain" in her vaginal area and wanting to scream, but she "couldn't find a way to say anything." After Defendant stopped, he sat on the edge of the bed and told Amber that nobody would believe her and that "he would never do this to his own daughters because they were better than [she] was."

The next morning, Amber noticed blood on her sheets, which confused her. Defendant's wife then came into the room and insisted that Amber take a shower before returning home, but Amber "didn't want to be alone in that house anymore," so she refused. Defendant's wife attempted several more times that morning to convince Amber to shower before Amber's mother arrived and Amber left the house. Amber did not tell her parents the extent of what had happened at Defendant's house, mentioning only that she wanted to come home early because she had been uncomfortable sleeping in a bedroom by herself.

Amber testified that she developed disordered eating behaviors beginning in seventh grade, for which she sought treatment from a partial hospitalization program at UNC during the summer of 2009 before beginning college. During her first year of college, Amber attended an eating disorder support group and engaged in individual therapy with the counselor who led the support group. That spring, Amber told the counselor about the incident at Defendant's house after having seen Defendant's family in Walmart. Amber also told her parents and several other women about the incident, several of whom testified at trial about what Amber had told them.

Defendant testified that he had "zero recollection" of hosting Amber's family for dinner or Amber ever spending the night at his house. His wife and daughters also testified that Amber had never spent the night. Three other witnesses who had known Defendant for over 25 years each testified that Defendant had a reputation for being a truthful, law-abiding citizen.

The jury returned a verdict finding Defendant guilty of first-degree rape, and the trial court sentenced Defendant to 192 to 240 months' imprisonment. Defendant gave oral notice of appeal.

II. Discussion

A. Repressed Memory Testimony

[1] Defendant first argues that the trial court plainly erred by admitting lay witness testimony of repressed memories without expert support.

1. Standard of review

In criminal cases, an unpreserved error "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." N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice —that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted).

2. Analysis

Defendant argues that pursuant to this Court's holding in *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997), a party may not present lay witness testimony of repressed memories without accompanying expert testimony explaining the phenomenon of memory repression.

In *Barrett*, the plaintiff claimed that she had spontaneously recovered memories of sexual abuse that had occurred over 40 years earlier. 127 N.C. App. at 97, 487 S.E.2d at 804. This Court held that the "plaintiff may not express the opinion [that] she herself has experienced repressed memory[,]" and added that, "even assuming plaintiff were not to use the term 'repressed memory' and simply testified she suddenly . . . remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony on the subject of memory repression . . . ." *Id.* at 101, 487 S.E.2d at 806.

Our Supreme Court modified this rule in *State v. King*, 366 N.C. 68, 733 S.E.2d 535 (2012). In *King*, the defendant's teenage daughter was referred to therapy after she began suffering panic attacks and pseudoseizures. 366 N.C. at 69, 733 S.E.2d at 536. In therapy, the daughter initially denied having experienced any sexual abuse. *Id.* About three weeks later, the daughter experienced a "flashback" to an incident that had occurred when she was seven years old: she recalled getting out of the bathtub when the defendant "entered the bathroom, lifted her up against the wall, threw her on the floor, put his arm across her chest to hold her down, and raped her." *Id.* The daughter reported this memory to her therapist, which triggered an investigation resulting in criminal charges against the defendant. *Id.* at 70, 733 S.E.2d at 536.

The defendant filed a pretrial motion to exclude testimony about " 'repressed memory,' 'recovered memory,' 'traumatic amnesia,' 'dissociative amnesia,' 'psychogenic amnesia' or any other synonymous terms the witnesses may adopt." *Id.* at 70, 733 S.E.2d at 536-37. The trial court conducted an evidentiary hearing on the motion where the defendant and the State each presented expert testimony concerning the theory of repressed memory. *Id.* at 71, 733 S.E.2d at 537. After hearing the parties' arguments, the trial court determined that, although the expert testimony was admissible under North Carolina Evidence Rule 702, the evidence must be excluded under North Carolina Evidence Rule 403 because its probative value was outweighed by its prejudicial effect. *Id.* at 71-73, 733 S.E.2d at 538.

The State appealed, arguing that under *Barrett*, the trial court's decision to exclude the expert testimony would prevent the victim from testifying about the incident that had occurred when she was seven years old. *Id.* at 73, 733 S.E.2d at 539. On appeal, our Supreme Court disavowed the notion that all testimony based on repressed memory must be excluded unless it is accompanied by expert testimony. *Id.* at 78, 733 S.E.2d at 542. Explaining that *Barrett* "went too far," the Court clarified that, "if a witness is tendered to present lay evidence of sexual abuse, expert testimony is not an automatic prerequisite to admission of such evidence, so long as the lay evidence does not otherwise violate the statutes of North Carolina or the Rules of Evidence." *Id.* at 78, 733 S.E.2d at 541-42 (citation omitted).

The Court announced that a witness may testify as to their recollection of an incident, and "to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident," without expert support. *Id.* at 78, 733 S.E.2d at 542. However, unless qualified as an expert or supported by admissible expert testimony, a

witness "may not testify that the memories were repressed or recovered." *Id.*

In the instant case, Defendant argues that under *Barrett*, the entirety of Amber's testimony related to repressed and recovered memories, and therefore required expert testimony for support. However, in *King*, our Supreme Court relaxed the strict rule articulated in *Barrett*. Accordingly, we review the testimony presented at Defendant's trial to determine whether it required expert support under *King*.

At Defendant's trial, Amber testified as to her recollection of the night she spent at Defendant's house and that she did not immediately report the incident. When asked why she had not said anything for so long, Amber responded:

> I think there's several reasons. I think partially because I didn't have the words to say anything. I didn't know how to articulate what had happened. I think partially because once that first hour passed where I hadn't said anything, how could I possibly bring it up now? Once that first day passed, how do you bring it up? That first month, that first year. It felt like if I hadn't said anything that first moment when I saw my mom, then how could I ever say it to her? Like who could believe me?

Amber also explained the impetus behind her decision to come forward when she did:

> [STATE]. What caused you to finally come forward?
>
> [AMBER]. Well, I think understanding how eating disorders work now, my brain was really foggy from not eating for so long. And at some point in the spring of my freshman year of college when I was in a much healthier place, it all like flooded back. I remembered the rape and so I spoke with my therap[ist] about it first.
>
> [STATE]. When you say it all flooded back to you, was there a moment that this happened? Was there an accumulation? What was that?
>
> [AMBER]. Yes, I was actually in Wal[m]art. I had seen [Defendant's] family in Wal[m]art at some point. I hadn't seen them pretty much since sixth grade because they had not -- I don't know where they went. I don't know what school they ended up going to or anything like that. But

> I did see them. I don't know if it was that day or if it was after that day, but I was walking down the frozen food aisle with my mom and it just, all the sensations kind of came back and his face above me came back. I felt like I was kind of there in that moment.

Amber recounted what she said to her therapist after seeing Defendant's family in Walmart:

> [STATE]. You said at that time that you told [your therapist] the pieces of this incident that you recall. Do you remember here on the stand today what you told her happened that night.
>
> [AMBER]. I was really clear that there were pieces that I always remembered. Especially the night before and the morning after. Those pieces never left my brain. Those were the pieces that I was pretty open about always; that I had slept in the room by myself, that her mom had made me really uncomfortable by asking me to take a shower so many times. But the piece that I remember specifically was him above me and looking at the pink curtains and the sensations of my body. That kind of went with that.

Amber also described how she processed her memories of the incident:

> [STATE]. So you talked to your therapist about some other trauma-based approaches to help you process this?
>
> [AMBER]. Yes.
>
> [STATE]. Did you end up engaging in those things?
>
> [AMBER]. I did. I tried a couple of different things.
>
> [STATE]. And in doing those things, were you able to solidify more of your memory?
>
> [AMBER]. The best way I've solidified my memory is through talking. And the more I've shared the experience, the more some of those pieces that weren't connected, connected back. I did participate in a therapy called EMDR. And it did not really help me -- the goal of that therapy is not necessarily to remember the pieces. It's more to process the pieces.
>
> So in that moment -- I did that early in college, and that part didn't -- I don't know how to explain it. It didn't help

> me remember pieces, it helped me process the things I already remembered.

As Defendant concedes, at no point did Amber testify that she had repressed memories or that she had recovered repressed memories. Instead, Amber testified as to her recollection of the incident, and that she was "really clear that there were pieces that [she] always remembered." Under *King*, this type of testimony did not require expert support. *See id.*

[2] Defendant also argues that a portion of the State's evidence offered to corroborate Amber's substantive testimony referenced a repressed memory and was therefore inadmissible without expert support.

At trial, Barbara Layman, a family friend, testified about what Amber had told her about the incident:

> And she told me that in therapy she had remembered going to this family's house to spend the night with the daughter, and during the night the dad had come in and raped her. That she remembered that in therapy. And she told me details, like she remembered the time on the clock, the fact that they did not sleep -- the parents did not let the daughter and her sleep in the same room. She had to sleep in a separate room. That the dad told her that there was no point in her telling anybody because nobody would ever believe her. The mom really pushed for them to shower the next morning before she went home. And she said she remembered at the time, like, thinking all this stuff is really strange.

Layman added:

> And as it came back to her, more and more of it made sense, and she was just -- in one way, I think she was relieved because she finally had some answers. And then she was just terrified at how this had happened to her and how her memory had -- her subconscious had been so strong at protecting her that she had repressed this memory. But she was incredibly upset and had some really clear memories once it started coming back.

Even assuming arguendo that Layman's remark that Amber "had repressed this memory" was erroneously admitted, Defendant has failed to show "that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty."

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citations omitted).

Layman's testimony was not admitted as substantive evidence of Defendant's guilt but rather as corroboration for Amber's substantive testimony. The trial court explained this to the jury when Layman testified:

> Ladies and gentlemen, evidence has been received tending to show that at an earlier time, a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time, because it was not made under oath at this trial. If you believe the earlier statement was made and that it conflicts or is consistent with the testimony of the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

Defendant reiterated the trial court's instruction in his closing argument:

> And the State has presented multiple witnesses and they say that [Amber] told them that she was raped by [Defendant]. Now, there's a special jury instruction on this, because you need a special warning about these prior consistent statements, because the judge is going to tell you you are not to take those prior statements as truth, because they were not under oath. They're just something for your consideration, but not for the truth of what was said. So listen carefully.

Thus, the jury was properly instructed not to consider Layman's testimony as substantive evidence that Amber had experienced repressed memory. As jurors are presumed to follow the trial court's instructions, *State v. Parker*, 377 N.C. 466, 474, 858 S.E.2d 595, 600 (2021), we cannot say that the erroneous remark had a probable impact on the jury's verdict. Accordingly, admitting Layman's testimony did not amount to plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Lay Witness Opinion Testimony

[3] Defendant next argues that the trial court abused its discretion by allowing a lay witness to give certain opinion testimony.

"We review the trial court's decision to admit [lay opinion testimony] evidence for abuse of discretion, looking to whether 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. Delau*, 381 N.C. 226, 236-37, 872 S.E.2d 41, 48 (2022) (alteration in original) (citation omitted). A lay witness may testify in the form of "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [their] testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2022).

At trial, Jordan Hemmings, a domestic violence victim's advocate, testified about accompanying Amber to law enforcement:

> [STATE]. And so when you got to the police department, if you could walk the jury through what happened when you got there.
>
> [HEMMINGS]. So when we got there, we explained that we wanted to talk to an officer about the sexual assault that she -- that [Amber] wanted to report. Once we got there, we talked to an officer. I remember it was Logan Fox. We talked to her. [Amber] disclosed the sexual assault. I remember then she stated that it was -- it happened when she was twelve and she was brought in -- or she went to her friend's house for a sleep-over. And when she was asleep, she had been asleep for a short time and the friend's dad came in and took her clothes off and sexual assaulted her or raped her.
>
> And then she was very tearful. She was upset, obviously. She said she never went back to that home again. She didn't remember a lot of the details, which is normal because it happened so long ago.

Defendant argues that "Hemmings had no basis, personal or professional, for drawing any conclusions about what was 'normal.' "

Here, Hemmings described her experience with Amber at the police station and expressed her opinion that Amber's lack of detailed memory was normal because it happened so long ago. The trial court could reasonably have considered Hemmings' opinion was based on her rational perception that memories fade with time. Thus, the trial court did not abuse its discretion by admitting Hemmings' lay opinion testimony. *See id.*

C. Closing Argument

[4] Defendant finally argues that the trial court abused its discretion by overruling his objection to the prosecutor's remarks during the State's closing argument that Amber's eating disorder, issues with picking and cutting, and nightmares were consistent and credible responses to being raped.[2]

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). "When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper." *Id.* "Next we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations omitted).

"Generally, prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quotation marks and citation omitted). A prosecutor may not, however, argue "facts which are not supported by the evidence." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted).

Defendant objected after the following statement:

> What do we know about [Amber]? We know she had the eating disorder. We know she had extreme issues with excessive picking, with cutting, with nightmares. Are these consistent and credible responses to a 12-year-old being raped? Yes, absolutely they are.

Defendant argues that the prosecutor argued facts which are not supported by the evidence because no evidence was presented that

---

2. Defendant also argues in passing that the prosecutor improperly referenced repressed memories during the State's closing argument. However, Defendant did not timely object to the reference, and he does not argue on appeal that the trial court failed to intervene ex mero motu. *See State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) ("The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu." (citation omitted)). Thus, any argument based on the prosecutor's reference to repressed memories during closing argument is deemed abandoned. *See* N.C. R. App. P. 28(a).

Amber's behaviors were responses to rape. However, the prosecutor did not assert as fact that Amber's behaviors were responses to rape. The prosecutor recounted facts that were admitted into evidence: that Amber had an eating disorder, issues with picking and cutting, and nightmares. The prosecutor then argued a reasonable inference from these facts that Amber's behaviors may have been responses to a rape. Accordingly, the trial court did not abuse its discretion by overruling Defendant's objection.

Furthermore, even if the prosecutor's argument had been improper, the challenged statements comprised only two sentences of a closing argument that spanned 23 transcribed pages. The majority of the State's closing argument focused on bolstering Amber's credibility by highlighting the consistent version of events told by several of the State's witnesses at trial. Given the small role the challenged statements played in the State's closing argument, the remarks were not of such magnitude that their inclusion prejudiced Defendant. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

III. Conclusion

For the foregoing reasons, Defendant received a fair trial free from prejudicial error.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges HAMPSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
NELSON EMUEL MONTGOMERY, JR., DEFENDANT

No. COA23-720

Filed 7 May 2024

1. Criminal Law—possession—actual and constructive—firearm by a felon—methamphetamine—defendant directing third party to hide the items

The trial court properly denied defendant's motion to dismiss charges for possession of a firearm by a felon and possession of methamphetamine, where the State presented evidence that, on the day of his arrest, defendant made multiple phone calls from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the place where he was arrested. Defendant's phone calls reflected his intent to control the disposition and use of both the gun and the drugs, and therefore the calls constituted sufficient evidence that defendant constructively possessed the items. Additionally, given the location of the items at the scene of defendant's arrest, defendant's awareness of each item's specific location, and his efforts to conceal them, a jury could have also concluded that defendant actually possessed the items prior to his arrest.

2. Criminal Law—possession—firearm by a felon—methamphetamine—jury instructions—attempt—no plain error

In a prosecution for possession of a firearm by a felon and possession of methamphetamine, the trial court did not commit plain error by declining to instruct the jury on theories of attempt with respect to both charges. The State presented sufficient evidence to support convictions for both offenses under theories of actual and constructive possession, including recordings of multiple phone calls that defendant made from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the scene of his arrest. Furthermore, the State's evidence showed that the women had, in fact, moved the items by the time law enforcement approached her, and therefore there was no evidence suggesting that defendant merely attempted to constructively possess the items.

3. Criminal Law—jury's request to revisit evidence—no instruction by court to consider all other evidence—no abuse of discretion

In a prosecution for possession of a firearm by a felon and possession of methamphetamine, where the State played recordings for the jury of phone calls that defendant made from jail on the day of his arrest, the trial court did not abuse its discretion under N.C.G.S. § 15A-1233(a) when, in allowing the jury's request to replay one of the recordings during deliberations, it did not explicitly instruct the jury that it must also consider the rest of the evidence from trial. Even if the court had erred, defendant failed to show that such an error prejudiced him. Further, the court properly instructed the jury during the jury charge to consider all of the evidence, and the court scrupulously followed the requirements of section 15A-1233(a) during the replay of the recording.

Appeal by Defendant from judgment entered 31 January 2023 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Miranda Shanice Holley, for the State.

Stanley F. Hammer for defendant-appellant.

MURPHY, Judge.

Actual possession occurs when the accused has physical or personal custody of the item. Constructive possession occurs when the accused has both the power and intent to control its disposition or use. Where, as here, a defendant directs a third party to hide items at a location where he was arrested, the evidence is sufficient to show both that Defendant actually possessed the items at issue prior to his arrest and that he constructively possessed the items through the direction of the third party. And, with such evidence present, a trial court does not plainly err in omitting an unrequested instruction on attempt in its jury instructions.

Finally, a trial court does not abuse its discretion in allowing a jury's request to revisit evidence during deliberations simply because it did not explicitly and extemporaneously remind the jury that it must consider evidence outside the scope of its request. Here, where the jury was appropriately instructed that it should consider all the evidence during the jury charge and the trial court observed all statutory requirements associated with a replay of Defendant's recorded phone calls, no abuse of discretion occurred.

BACKGROUND

On 9 March 2020, Defendant was indicted for possession of a firearm by felon, possession of methamphetamine, and attaining habitual felon status. Defendant stood trial starting on 28 November 2022, during which the State presented testimony from a lieutenant of the Rutherfordton Police Department that he was present at the time of Defendant's arrest and was informed that Defendant had made a phone call from jail indicating he had left items behind at the location where he was arrested. Specifically, the officer noted that Defendant "made a few phone calls to a woman he referred to as Nikki, later determined to be Amy Nichole Hall. During those phone calls, he was adamant about picking up some belongings from the house he [was] arrested at, even describing where the items were and what they were on the back porch of the house."

For the purposes of illustrating and explaining the lieutenant's testimony, the State also presented recordings of the calls Defendant made from jail, all of which took place on the same day as the arrest. The calls, only portions of which were played for the jury, contained, *inter alia*, the following:

- Instructions from Defendant to Hall to "get my coat and that thing and some stuff in my coat."
- Defendant's statements that the location he was describing was where he was arrested.
- An expression of Defendant's belief that the police "don't even know I came on the back porch."
- A specific representation by Defendant that something was in the sleeve of the jacket.
- A conversation in which Defendant requested that Hall sell something with the intent that he get it back later.

After the calls were played for the jury, the lieutenant further testified that, after listening to the recorded calls, law enforcement obtained from Hall Defendant's jacket that he had left at the site of his arrest, and two clear bags were obtained from the left sleeve of the jacket. At the time Hall met with law enforcement, she had come from a nearby residence belonging to Glenesa Causby—an acquaintance of Defendant's referenced in the jail calls—and that another acquaintance of Defendant referenced in the calls, Paul Green, had stowed a firearm there. Finally, the lieutenant testified that a holster was discovered on the back porch of the house where Defendant was arrested.

Thereafter, a forensic chemist with the State Crime Lab testified that the plastic bag obtained from the sleeve of Defendant's jacket was found to contain methamphetamine.

Defendant moved to dismiss all charges at the close of the State's evidence, and the trial court denied the motion. At the close of all evidence, Defendant renewed his motion to dismiss, which the trial court again denied. Defendant did not request, nor did the trial court provide, instruction to the jury on any offenses beyond those with which Defendant was charged. During deliberations, the jury asked to rehear one of the recordings of Defendant's phone calls from jail, which the trial court allowed over Defendant's objection.

Defendant was convicted on all charges and appealed in open court.

ANALYSIS

On appeal, Defendant argues the trial court (A) erred in denying his motion to dismiss with respect to the two possession charges, (B) plainly erred in failing to instruct the jury on theories of attempt with respect to both possession charges, and (C) abused its discretion in permitting the jury to hear the recordings of Defendant in jail a second time. The trial court did not err in any respect.

A. Motion to Dismiss

[1] We review the trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. McKinnon*, 306 N.C. 288, 298 (1982). In evaluating the trial court's ruling, we must consider "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant[] being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98 (1980), *cert. denied*, 464 U.S. 865 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79 (1980). The evidence must be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences therefrom. *State v. Garcia*, 358 N.C. 382, 412-13 (2004), *cert. denied*, 543 U.S. 1156 (2005).

Defendant has challenged the sufficiency of the evidence with respect to both his possession of a firearm by felon charge and his possession of methamphetamine charge. Possession of a firearm by felon is governed by N.C.G.S. § 14-415.1, which provides that "[i]t 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 . . . ." N.C.G.S.

§ 14-415.1(a) (2023). Similarly, Defendant's methamphetamine possession was charged under N.C.G.S. § 90-95(a)(3), which provides that, "[e]xcept as authorized by this Article, it is unlawful for any person[]. . . [t]o possess a controlled substance." N.C.G.S. § 90-95(a)(3) (2023).

> Possession of any item may be actual or constructive. Actual possession occurs when the party has physical or personal custody of the item. Constructive possession occurs when the accused has both the power and intent to control its disposition or use. Circumstances which are sufficient to support a finding of constructive possession include close proximity to the [item] and conduct indicating an awareness of the [item], such as efforts at concealment or behavior suggesting a fear of discovery[.]

State v. Bradley, 282 N.C. App. 292, 296-97 (2022) (marks and citations omitted), *modified on other grounds and aff'd*, 384 N.C. 652 (2023).

Defendant argues that evidence of his possession of both a firearm[1] and methamphetamine were insufficient. However, evidence that he possessed both was present on the record. Defendant's jail calls reflect that he sought to control the disposition and use of both the gun and the methamphetamine by directing Hall to remove them from the scene of his arrest. The fact that Defendant used thinly veiled rhetoric—referring to the gun and drugs as the "thing" and the "stuff"—does not render the evidence of his awareness of the items any less valid, especially in light of his demonstrable cognizance of what and where they were through his specifically directing Hall to the sleeve containing the drugs. This was sufficient evidence from which a jury could have concluded Defendant constructively possessed both items. Furthermore, the location of the items at the point where Defendant was arrested, Defendant's cognizance of them, and his specific attempts to conceal them by removing them from the site of his arrest was sufficient evidence from which a jury could have concluded Defendant actually possessed the items prior to his arrest. The trial court did not err in denying Defendant's motion to dismiss.

B. Plain Error

[2] Defendant next contends the trial court plainly erred in failing to instruct the jury on theories of attempt with respect to both possession charges.

---

1. Defendant does not meaningfully contest his having been a felon at the time of the offense.

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing 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 of 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 or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660 (1983) (marks omitted). Our Supreme Court has said the following of entitlement to jury instructions:

> It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts. On the other hand, the trial court need not submit lesser included degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.

State v. Millsaps, 356 N.C. 556, 562 (2002) (marks, citations, and emphasis omitted).

There is nothing exceptional or lacking in fundamental fairness about this case, where the trial court did not put forth unrequested instructions for attempt with respect to the two possession offenses. Sufficient evidence existed on the record for both offenses, and the evidence could have supported a conviction on theories of either actual or constructive possession. While Defendant argues attempt instructions were warranted because he was "frustrated" in his direction of Hall's activity and therefore did not constructively possess anything through her, the State's evidence actually demonstrated that Hall had, in fact, moved the items by the time she was approached by law enforcement. There was therefore no evidence tending to show an attempted possession, and the trial court did not plainly err in omitting such an instruction.

C. Abuse of Discretion

[3] Finally, Defendant argues the trial court improperly allowed the jury to review one of the recordings of Defendant's calls during deliberations.

The statute governing a jury's requested review of evidence is N.C.G.S. § 15A-1233(a), which commits the determination to the discretion of the trial court:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C.G.S. § 15A-1233(a) (2023). Accordingly, "a court's ruling under [N.C.G.S.] § 15A-1233(a) . . . will be reviewed only for an abuse of discretion." *State v. McVay*, 174 N.C. App. 335, 340 (2005). "An abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations omitted).

Here, the only basis on which Defendant meaningfully contests the trial court's decision is the following excerpt from our Supreme Court's holding in *State v. Weddington*:

> When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C.G.S. § 15A-1233. *State v. Benson*, 323 N.C. 318[] . . . (1988). In addition, the trial court must instruct the jury that it must remember and consider the rest of the evidence. *State v. Watkins*, 89 N.C. App. 599[] . . . *disc. rev. denied*, 323 N.C. 179[] . . . (1988).

State v. Weddington, 329 N.C. 202, 208 (1991), *cert. denied*, *Weddington v. Dixon*, 508 U.S. 924 (1993). He argues that, because the trial court failed to independently instruct the jury that it was to consider the rest of the evidence, this omission *per se* constitutes an abuse of discretion.

However, this excerpt from *Weddington* was dicta. The issue in that case did not involve the absence of an instruction that the jury remember all of the evidence; and, in fact, the record on appeal made clear that such an instruction *was* given by the trial court. *Id.*; *see Berens v. Berens*, 284 N.C. App. 595, 601 (2022) ("The mandate itself is limited

to holdings made . . . in response to issues presented on appeal; any other discussions made within the opinion is *obiter dicta*."). This reading is reinforced by the fact that *State v. Watkins*, the case cited in *Weddington* alongside the aforementioned dicta, also contains no such holding.[2] Further, in the more than three decades since *Weddington*, no published decision has repeated such a proposition.

Finally, even if this portion of *Weddington* were not dicta, our caselaw subjects alleged abuses of discretion arising under N.C.G.S. § 15A-1233 to a prejudice analysis. *State v. Cannon*, 341 N.C. 79, 85 (1995) (holding that, even where the trial court violated the express statutory requirements of N.C.G.S. § 15A-1233(b), a defendant must show "a reasonable possibility that had the jury not been allowed to review [the evidence], a different result would have been reached"). Here, even if we were to accept that the trial court had erred by failing to instruct the jury to remember all previous evidence at trial, there is no reasonable possibility that the jury would have reached a different decision with the addition of such an instruction.

The jury was appropriately instructed that it should consider all the evidence during the jury charge, and the trial court scrupulously observed the requirements of N.C.G.S. § 15A-1233(a) during the replay. Without any further reason for a contrary conclusion, we hold the trial court did not abuse its discretion.

CONCLUSION

The trial court correctly denied Defendant's motion to dismiss, and Defendant has not established that the trial court plainly erred in omitting instructions on attempt or abused its discretion by allowing the jury to replay recordings of Defendant.

NO ERROR.

Judges ZACHARY and COLLINS concur.

---

2. *Watkins* held that such an instruction was *sufficient* to show no abuse of discretion, not that it was necessary. *State v. Watkins*, 89 N.C. App. 599, 605, *disc. rev. denied*, 323 N.C. 179 (1988) ("Defendant contends that by reading only Ms. Myers's testimony, the trial judge gave undue weight to her testimony and prejudiced his right to a fair trial. We do not agree. Immediately after the court reporter read Ms. Myers's testimony, the trial judge instructed the jury that they 'must consider and deliberate on all of the evidence and remember what the rest of the evidence was concerning that conversation.' Based on these instructions, we hold that the trial judge properly exercised his discretion in having the requested testimony read to the jury and that defendant's argument has no merit.").

STATE OF NORTH CAROLINA
v.
DEMETRIA L. NORMAN

No. COA23-471

Filed 7 May 2024

Search and Seizure—search warrant—probable cause—store burglary—video surveillance—unique vehicle characteristics

In a prosecution for multiple charges arising from the theft from a convenience store of cartons of cigarettes, cases of alcohol, twenty-six packs of state lottery tickets, along with the theft of cash from an ATM located there, the trial court properly denied defendant's motion to suppress evidence seized from his vehicle where sufficient other evidence supported issuance of a search warrant based on probable cause. After the burglary was reported to law enforcement, the investigating detective viewed relevant video surveillance footage and, as he was driving in the area, he spotted the same vehicle—based on its make and model, black rims, and missing bumper—that appeared to be associated with the burglary, and discovered that the vehicle displayed a fictitious out-of-state license plate. Despite defendant's argument that law enforcement officers remained in the curtilage of the residence where the vehicle was parked beyond an allowable period of time after an unsuccessful knock and talk, the officers were lawfully securing the vehicle and the scene after probable cause had already been acquired based on the totality of the circumstances, which established a fair probability that contraband related to the burglary would be found in the vehicle.

Judge WOOD dissenting.

Appeal by defendant from judgment entered 20 September 2022 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 14 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General, Robert P. Brackett, Jr., for the State.

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

TYSON, Judge.

Demetria L. Norman ("Defendant") appeals from judgments entered upon his guilty pleas to injury to real property, safecracking, felony breaking and entering, two counts of felony larceny after breaking and entering possession of burglary tools, and injury to personal property. We affirm.

I. Background

Fletcher Police Detectives Ron Diaz and Zach Tatham responded to a report of an Automatic Teller Machine (ATM) having been pried open at Mr. Pete's Market at 3:51 am on 12 February 2021. Mindy Messer, the store manager, also reported ten cartons of Marlboro Gold cigarettes, sixteen cases of alcohol, fifty dollars in quarters and twenty-six packs of North Carolina Lottery tickets were missing. Nate Hembre, an employee of Mr. Pete's Market, reported the store's ATM machine had contained approximately $2,600 in currency and was empty.

George Banks, an employee of the North Carolina State Lottery Commission, notified Detective Diaz on 17 February 2021 that someone had attempted to redeem one of the lottery tickets stolen from Mr. Pete's Market at the Edneyville General Store at 1:09 pm the previous day. Detective Diaz went to the Edneyville General Store, spoke to the manager on duty, and reviewed surveillance footage of the individual, who had attempted to redeem the stolen lottery ticket.

The surveillance video showed a black Dodge Durango vehicle with black rims and a missing front bumper pull into the Edneyville General Store parking lot. A female exited the vehicle, entered the station, and attempted to redeem the stolen lottery ticket. When the scratch-off ticket was rejected for payment, the woman exited the store, got back into the Durango, which left the parking lot and headed down Chimney Rock Road towards Hendersonville.

Detective Diaz left the Edneyville General Store traveling in the same direction on Chimney Rock Road as the Durango had traveled the day before. After travelling a short distance, he spotted a black Durango vehicle with black rims and a missing front bumper parked in the driveway of a residence located at 58 Stepp Acres Lane in Hendersonville. He parked his vehicle across the street and called his department for backup to perform a knock and talk at the residence. Detective Diaz ran the license plate displayed on the black Durango and learned the plate was issued in Maryland and was registered to a 2019 Dodge Ram pickup

truck, owned by EAN Holdings, a holding company for Enterprise Alamo National, the car rental company.

Detective Diaz called Fletcher Police Lieutenant, Daniel Barale and the Henderson County Sheriff's Office for assistance in conducting a knock and talk at 58 Stepp Acres Lane. Henderson County Sheriff's Deputies Jake Staggs and Josh Hopper were dispatched to the scene.

Detective Diaz planned to conduct a knock and talk to "see if [the occupants of 58 Stepp Acres Lane] could tell [him] anything about" the theft from Mr. Pete's Market. Detective Diaz walked in front of the black Durango parked in the driveway to the front door. Detective Diaz knocked on the door but no one answered. Detective Diaz testified he sensed the residence was occupied.

As Detective Diaz left the front porch, he walked back to his car around the rear of the Durango to re-confirm the Maryland license plate number displayed was consistent with his earlier view. Detective Diaz contacted Henderson County Communications to run another check on the license plate.

Detective Diaz waited for more than a minute to get a response from Henderson County Communications and walked around the Durango and looked into the driver's side window. He observed a pack of Marlboro Gold cigarettes on the dashboard and a 100X The Cash scratch-off lottery ticket on the front seat. He did not touch the vehicle nor attempt to open the door.

Detective Diaz returned to his office in Fletcher to draft a search warrant. Other officers remained on the scene to secure the Dodge Durango vehicle. Detective Sergeant Diaz spent more than one hour drafting application and affidavit for a search warrant. While drafting the application, Detective Diaz called one of the officers on the scene securing the Durango to read the Vehicle Identification Number ("VIN") through the windshield.

The officers on the scene ran the VIN from the Durango and determined the vehicle was registered to Defendant. Once Detective Diaz completed drafting the application and affidavit for the warrant, he drove to the magistrate's office in Hendersonville.

Lt. Barale ran Defendant's name through the Criminal Justice Law Enforcement Automated Data Services ("CJLEADS") and determined he was currently on supervised probation. Lt. Barale contacted Defendant's probation officer and received Defendant's telephone number. Lt. Barale called the telephone number and spoke with a woman, who identified

herself as April Atkinson. Atkinson would not put Defendant the phone or provide Defendant's location to Lt. Barale.

Lt. Barale believed both Atkinson and Defendant were present inside the residence. The Henderson County Communications Center received a call reporting an alleged assault at Griffin's Store at approximately 4:21 p.m., while the officers remained present on the scene. Griffin's Store is located approximately three miles from the scene at 58 Stepp Acres Lane.

Detective Tatham and Deputy Staggs responded to what was determined to be a fictitious assault report. Lt. Barale and Deputy Hopper remained continuously at 58 Stepp Acres Lane securing the Black Durango vehicle. At 4:32 p.m. a female, later identified as April Atkinson, emerged from the back door of the residence. She refused to speak with Lt. Barale and Deputy Hopper. Lt. Barale heard sounds from the front of the residence and saw a male he believed to be Defendant grabbing items from inside of the Durango. The individual fled on foot attempting to elude Lt. Barale. Lt. Barale noticed a prybar was located inside the bag removed from the Durango.

Lt. Barale returned toward the residence and found the pack of Marlboro Gold cigarettes and the 100X The Cash scratch off lottery ticket on the ground. Lt. Barale seized the pack of Marlboro Gold cigarettes and the 100X The Cash scratch off ticket. Lt. Barale and Deputy Hopper then performed a security sweep of the residence and located Defendant in the living room. Defendant's probation officer was contacted and a search was performed based upon Defendant's supervised probation status. The search yielded a stack of power tool boxes and a cutoff tool.

Lt. Barale notified Detective Diaz about what had occurred at the scene and Detective Diaz was granted arrest warrants for Defendant and Atkinson for felony conspiracy to break and enter a building to commit larceny and a search warrant for the Black Durango vehicle.

The search warrant for the Durango was executed on 18 February 2021. Officers located "multiple packs of Marlboro Gold cigarettes, cut-off metal wheel blades, ski masks, a pry-bar, a 'Jaws of Life' rechargeable battery, and other items."

Detective Diaz sought and obtained a search warrant seeking data from Cellco Partnership d/b/a Verizon Wireless for Defendant's cell phone number based upon information used to obtain the search warrant of the Durango and the arrest warrants for Defendant and Atkinson.

Detective Diaz received a letter from a confidential source on 9 March 2021, providing information related to multiple breaking and entering offenses allegedly committed by Defendant and Atkinson in North Carolina, South Carolina, and Georgia. Detective Diaz met with the confidential source, who alleged Defendant and Atkinson had broken into a store, cut into an ATM machine, and had removed $2,500 in currency. The source stated only one cut was required to open the ATM, and also asserted cigarettes and lottery tickets were stolen from the store.

The confidential source also provided information regarding how Defendant had completed the robbery, Defendant's identity as the suspect removing items from the Durango, and additional evidence of the crimes was stashed in the attic of the residence located at 58 Stepp Acres Lane.

Based upon this information Detective Sergeant Diaz applied for and was granted a third search warrant on 10 March 2021. The third search warrant was executed the same day and officers recovered in the attic: (1) six "Jaws of Life" devices of various sizes; (2) eighteen rechargeable batteries for "Jaws of Life" devices; (3) five cartons of Marlboro Gold and two cartons of Marlboro Gold 100s cigarettes; (4) twenty five packs of assorted lottery tickets; (5) an ATM cover panel; (6) two DVR systems with cut wires; (7) an endoscope; (8) a magnetic box with controlled substances inside; and, (9) other assorted items used in the preparation for burglaries. Every lottery ticket stolen from Mr. Pete's Market, except for the one that was attempted to be redeemed at the Edneyville General Store were also located in and recovered from the attic.

Defendant was indicted for injury to real property, safecracking, felony breaking and entering, two counts of felony larceny after breaking and entering, possession of burglary tools, and injury to personal property on 17 May 2021. Defendant filed a motion to suppress all evidence on 19 October 2021. The trial court denied Defendant's motion following a hearing by order filed 31 August 2022. Defendant filed an objection to the order on 2 September 2022.

Defendant pleaded guilty to all charges, while reserving his right to appeal the denial of his suppression motion, and was sentenced to two active consecutive 8 to 18 month sentences.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§§ 7A-27(b), 15A-1444(e), and 15A-979(b) (2023).

III. Issues

Defendant argues the trial court erred in denying his motion to suppress because officers had remained in and around the curtilage of his residence for too long after an unsuccessful knock and talk.

IV. Standard of Review

The scope of this Court's review of a trial court's order denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact 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. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (citation omitted).

"In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citation omitted). The trial court's conclusions of law are reviewed *de novo* on appeal. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

V. Analysis

Defendant argues the trial court erred in denying his motion to suppress. He asserts officers had unduly remained in and around the curtilage of his residence after an unanswered and unsuccessful knock and talk. Defendant challenges Detective Diaz's conduct in and around the black Dodge Durango vehicle after leaving the front porch following the unanswered knock and talk.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the pace to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment to the Constitution of the United States requires probable cause must be shown before a search warrant may be issued. *Id.* A reviewing court looks to the "totality of the circumstances" to determine whether probable cause existed to issue a search warrant. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984).

A. Probable Cause

Probable cause exists if:

> reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty.

Id. at 636, 319 S.E.2d at 256 (citations omitted).

An officer's application for a search warrant must be supported by an affidavit detailing "the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched." N.C. Gen. Stat. § 15A-244(3) (2023). The information contained in the affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citation omitted). A magistrate must "make a practical, common-sense decision," based upon the totality of the circumstances, whether "there is a fair probability that contraband" will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983).

Detective Diaz had probable cause to request a search warrant prior to observing in plain view a pack of Marlboro Gold cigarettes on the vehicle's dashboard and a 100X The Cash scratch off ticket on the front seat. Detective Diaz had located what he had reasonable suspicion to believe the vehicle used in attempting to redeem an identified lottery ticket stolen from Mr. Pete's Market.

This vehicle had been identified and recorded in the surveillance video from nearby Edneyville General Store the prior day. Detective Diaz had noticed the black Dodge Durango at the scene was missing a bumper and had black rims as depicted in the videos. This vehicle was located in the immediate area of the General Store in the same direction it had travelled after leaving the store. Detective Diaz also confirmed the Durango was displaying a fictitious out of state license tag.

B. Knock and Talk

Contrary to Defendant's arguments asserting Detective Diaz and the other officers had unduly lingered on the scene, our Supreme Court and this Court allows officers to secure a scene "to prevent any evidence located in the residence from being removed or destroyed[.]" *State*

*v. Treec*e, 129 N.C. App. 93, 94, 497 S.E.2d 124, 125 (1998); *see State v. McKinney*, 361 N.C. 53, 637 S.E.2d 86 (2006); *State v. Williams*, 116 N.C. App. 225, 447 S.E.2d 817 (1994).

This narrative and evidence was contained in the affidavit, which provided probable cause to issue the search warrant for the black Durango. A substantial basis, between the unique characteristics of: (1) the Durango being used in a crime in the nearby area the day before; (2) displaying an out-of-state and fictitious license plate; and, (3) its close proximity at the scene, exists both in time and location to the possession and attempted redemption of the stolen lottery ticket. Probable cause existed for the magistrate to issue the search warrant for the Durango, while officers secured and maintained the integrity of the scene. *Id.* Defendant's argument is overruled.

C. Inevitable Discovery

Presuming, without deciding, the evidence discovered by officers was obtained through illegal searches, as argued by Defendant, the State also argues the trial court correctly denied Defendant's motion to suppress based upon the "inevitable discovery" doctrine. Were we to agree Detective Diaz had no grounds to peer into the vehicle as he left the property to plainly view the Marlboro Gold cigarette pack or Lottery ticket inside the car, or to obtain the vehicle VIN number visible through the windshield from outside the car, officers had already acquired probable cause to search the vehicle. Probable cause was based upon the vehicle transporting the woman the prior day in the immediate vicinity to attempt to cash in a known stolen lottery ticket, and from the unique characteristics of the black Dodge Durango, viewed om the store's video. This vehicle also displayed a fictitious out-of-state license plate visible to officers from the public street in front of Defendant's residence.

Defendant argues *Collins v. Virginia*, 584 U.S. 586, 201 L. Ed. 2d 9 (2018) held the automobile exception to the warrant requirement did not apply where the automobile was parked within the curtilage of Defendant's home. The State counters, all incriminating items discovered in Defendant's vehicle and residence would have been discovered anyway if the officers had obtained the warrant earlier.

North Carolina has adopted the "inevitable discovery" rule which does not subject items discovered during a presumably illegal search to the exclusionary rule where the preponderance of the evidence shows law enforcement officers would have inevitably discovered the evidence by lawful means. *See State v. Garner*, 331 N.C. 491, 500, 417 S.E.2d 502, 506-07 (1992). With or without a warrant in hand, officers discovered

the black Durango vehicle with unique characteristics, that was shown in the store's video the previous day and displaying a false license plate, actually belonged to Defendant. He was also currently on probation and subject to warrantless searches. In addition, the items inside of the vehicle and residence directly associated with the break-in and robbery would have eventually been discovered and recovered in a unbroken sequence of events. Defendant's reliance on *Collins* is inapposite and overruled.

VI. Conclusion

Detective Diaz had acquired probable cause to seek the search warrant of the black Durango prior to the knock and talk based upon: (1) the vehicle's unique characteristics of the black rims and a missing front bumper; (2) its location in close proximity to where the stolen ticket was attempted to be redeemed; (3) the display of a fictious out of state plate on the vehicle; and, (4) the recentness of the attempted redemption of the stolen ticket to be granted a search warrant for the vehicle. The officers correctly and lawfully secured the vehicle and scene while the warrant was being sought and obtained.

Presuming, without deciding, the evidence discovered by officers was obtained through illegal searches, the trial court also correctly denied Defendant's motion to suppress based upon "inevitable discovery." Defendant was present at all times, while officers were securing the Durango vehicle and scene, awaiting the warrant, and he attempted to flee. Defendant was under active probationary supervision and subject to warrantless searches. The denial of Defendant's motion to suppress and the judgments entered upon Defendant's guilty pleas are affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON concurs.

Judge WOOD dissents.

WOOD, Judge, dissenting.

"At the [Fourth] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409,

1414, 185 L. Ed. 2d 495, 501 (2013) (citation and internal quotations omitted). The United States Supreme Court, and subsequent recognition by our Court, has established a line of precedent which emphasizes the importance of this constitutional protection. Consistent with the history and application of this principle, I respectfully dissent from the majority opinion finding the trial court properly denied Defendant's motion to suppress. For the reasons articulated below, I believe the officer violated Defendant's rights under the Fourth Amendment when he exceeded the scope of the knock-and-talk and performed a search of Defendant's curtilage, which contained his vehicle, without a warrant. Accordingly, I would hold the trial court erred in denying Defendant's motion to suppress.

I. Analysis

A. Probable Cause Pre-Knock-and-Talk

The majority holds that Detective Diaz had probable cause to request the search warrant of Defendant's vehicle even prior to seeing the Marlboro Gold cigarettes on the dashboard and a 100X The Cash scratch off ticket on the front seat. Prior to looking into the vehicle, the only evidence Detective Diaz had upon which to base probable cause to request a search warrant was a surveillance video showing a female who had attempted to redeem a stolen lottery ticket getting into the passenger seat of a black Durango with black rims and a missing front bumper, observation of a black Durango with black rims and a missing front bumper in a driveway the following day, the vehicle's proximity to the General Store where the attempted ticket redemption took place, and a fictitious license plate on the vehicle. The majority contends this evidence was sufficient for probable cause to obtain a search warrant of the vehicle for evidence of the burglary committed in another town. I disagree.

To establish probable cause for a search warrant, the supporting affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. Oates*, 224 N.C. App. 634, 641, 736 S.E.2d 228, 234 (2012). "Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990). Here, without the illegally obtained evidence, the "nexus" is greatly attenuated. The attempted redemption of a stolen lottery ticket by a passenger in a vehicle that had a fictitious license plate was insufficient to link the Durango to the burglary. The burglary occurred in a

different town almost a week prior. Based on the totality of the circumstances at that point, "common sense" would require additional inquiry prior to the issuance of a search warrant. It was not reasonable to infer that evidence from the burglary would be found in the Durango simply because a passenger in the vehicle attempted to cash a stolen lottery ticket the day prior. Therefore, Detective Diaz did not have probable cause to request a search warrant prior to the knock-and-talk.

B. The Knock-and-Talk

Generally, "the fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." *State v. Ellis*, 266 N.C. App. 115, 119, 829 S.E.2d 912, 915-16 (2019) (citations omitted). "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Jardines*, 569 U.S. at 5, 133 S. Ct. at 1414 (citation and internal quotations omitted). Included in this principle is the protection of a citizen's curtilage, "[w]e therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes. That principle has ancient and durable roots." *Id.* at 6, 133 S. Ct. at 1414 (citation and internal quotations omitted). It is undisputed that Detective Diaz and four other officers entered the curtilage of Defendant's home. Thus, the officers entered a constitutionally protected area where "privacy expectations are most heightened" and their subsequent actions must be lawfully justified. *Id.* at 7, 133 S. Ct. at 1415.

Among such justifications is the knock-and-talk exception. This exception recognizes that "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as the front door of a house." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8, 133 S. Ct. at 1415. "[L]aw enforcement may not use a knock and talk as a pretext to search the home's curtilage[,]" as "[t]his limitation is necessary to prevent . . . from swallowing the core Fourth Amendment protection of a home's curtilage." *State v. Huddy*, 253 N.C. App. 148, 152, 799 S.E.2d 650, 654 (2017) (citation omitted).

Here, Detective Diaz and another officer walked to the front door of the residence and knocked, but no one answered. Detective Diaz then left the front door, walked to the rear of the Durango to observe the

license plate, ran the plate number on the vehicle, and waited at the back of the vehicle for a response from dispatch. Detective Diaz then went to the driver's side of the vehicle, peered through the window, and observed a lottery ticket and a pack of cigarettes, which were similar to items stolen from Mr. Pete's Market. After these observations, Detective Diaz left the premises, returned to his office, and used this information to draft a search warrant. While at the office, Detective Diaz called one of the officers he left at the residence to secure the Durango and asked him to obtain the Vehicle Identification Number ("VIN") from it. The VIN was used to obtain the name of the registered owner, Defendant. Thereafter, Detective Diaz obtained a search warrant for the Durango.

Detective Diaz and the other officers undoubtedly exceeded the scope of the knock-and-talk. After no one answered the door, Detective Diaz and the other officers were required to leave the property. A "reasonably respectful citizen" would not find it appropriate to linger on the property and look through the window of a parked vehicle. *Huddy*, 253 N.C. App. at 152, 799 S.E.2d at 654. Therefore, absent a duly authorized search warrant, Detective Diaz unlawfully remained in the curtilage of Defendant's home and the evidence observed thereafter was improper.

Because the items were able to be viewed from outside of the vehicle, the trial court concluded, "[Detective Diaz] observed the '100 times cash' lottery ticket and the pack of Marlboro Gold cigarettes in plain view. The Defendant did not have any expectation of privacy for items in plain view from the window." The trial court's conclusion is contrary to well-established precedent. "In order for the plain view doctrine to apply, the officer must have been in a place where he had a right to be when the evidence was discovered." *Lupek*, 214 N.C. App. at 150, 712 S.E.2d at 918. "The plain view doctrine does not apply here because [the officer] was not in a place he was entitled to be when he discovered [the contraband]." *Ellis*, 266 N.C. App. at 123, 829 S.E.2d at 918. Similarly, the plain view doctrine is inapplicable here because Detective Diaz was not in a place where he was entitled to be when he observed the lottery ticket and cigarettes. The items were observable only after he unlawfully lingered on the curtilage of Defendant's home and peered into Defendant's vehicle.

Furthermore, while still unlawfully remaining on the property, an officer located the VIN by looking through the vehicles window, which enabled Detective Diaz to identify Defendant as the registered owner of the Durango. Similarly, in *Collins v. Virginia*, an officer walked to the top of defendant's driveway, removed a tarp that covered a motorcycle, ran the license plate and VIN numbers to determine if it was stolen, and

returned to his vehicle. *Collins v. Virginia*, 584 U.S. 586, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018). The Supreme Court held, "[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Id.* at 600, 138 S. Ct. at 1675. Further, "[the Fourth Amendment] certainly does not permit an officer physically to intrude on the curtilage, remove a tarp to reveal license plate and vehicle identification numbers, and use those numbers to confirm that the defendant committed a crime." *Id.* at 614 n.3, 138 S. Ct. at 1683 n.3. Consistent with such holding, the Fourth Amendment certainly did not permit the officer to remain on Defendant's curtilage, look through the window of the Durango to obtain the VIN, and use that information to identify Defendant. *Id.*

C. Inevitable Discovery

As an alternative basis for upholding the trial court's suppression order, the majority relies on the "inevitable discovery" rule. Under this rule, the question is whether the evidence associated with the break-in would have eventually been discovered through independent lawful means. *State v. Wells*, 225 N.C. App. 487, 491, 737 S.E.2d 179, 182 (2013). As a threshold matter, given that Detective Diaz did not have probable cause prior to the knock-and-talk, I disagree with the application of the inevitable discovery rule. Additionally, the remaining evidence supplied in the warrant, including the items associated with the burglary, the VIN, and Defendant's identity, would not have been discovered through independent lawful means. By eliminating the illegal search, not only did Detective Diaz not have probable cause, but he would only have knowledge that a vehicle with certain characteristics and a fictitious license plate transported a woman who attempted to redeem a stolen lottery ticket. This knowledge is vastly different than having the knowledge that the Durango contains items consistent with those from the burglary. Therefore, I respectfully disagree that inevitable discovery is applicable in this case. When viewed through a lens of independent and lawful circumstances, the application of the rule is unable to "eliminate the taint that led to the discovery and seizure of the [evidence] in the first instance." *Id.*

II. Conclusion

In sum, I would hold Detective Diaz did not have probable cause to apply for the search warrant of the Durango prior to the knock-and-talk. Detective Diaz's actions of walking to the rear of the vehicle, waiting at the rear, moving to the front side of the vehicle, and peering

into the driver-side window were not justified by the knock-and-talk exception, and therefore constituted an illegal search under the Fourth Amendment. Furthermore, the inevitable discovery doctrine is not applicable because Detective Diaz did not have probable cause and the other incriminating evidence could not have been discovered through independent lawful means. Accordingly, the evidence the officers obtained while on Defendant's property after the failed knock-and-talk should have been suppressed. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ROGELIO MARIN RAMIREZ

No. COA23-965

Filed 7 May 2024

1. Appeal and Error—preservation of issues—exclusion of evidence—no offer of proof

In a prosecution for second-degree sexual offense and second-degree rape, defendant failed to preserve for appellate review his argument that the trial court erred by sustaining an objection during the cross-examination of a detective about whether defendant had admitted to the alleged sexual assault where, although defense counsel noted his exception to the exclusion of that testimony, he did not make an offer of proof and the content and significance of the excluded evidence was not apparent from the record.

2. Evidence—lay opinion testimony—evidence excluded—no abuse of discretion

In a prosecution for second-degree sexual offense and second-degree rape, any error by the trial court in prohibiting defense counsel from asking a detective whether he found defendant truthful during their conversation was not prejudicial in light of the overwhelming evidence against defendant, including that: the victim awakened in her apartment after arriving home in an intoxicated state to find defendant engaged in vaginal intercourse with her; he later inserted his penis into the victim's mouth; multiple DNA samples taken from the victim's body as part of a sexual assault kit matched defendant; the victim's credit and debit cards were discovered in a search of defendant's car; and defendant's cellphone

contained video, photo, and location data placing him at the victim's apartment with her when the assaults occurred.

3. Judgments—criminal—clerical error—inclusion of term "forcible" on judgments

The erroneous inclusion of the term "forcible" on criminal judgments entered upon defendant's convictions for second-degree sexual offense and second-degree rape were mere clerical errors where the indictment, jury instructions, and verdict sheet for each charge correctly identified the offense for which defendant was tried and found guilty; accordingly, the matter was remanded for correction of the errors.

Appeal by Defendant from judgments entered 10 March 2023 by Judge David Hugh Strickland in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State-Appellee.

Drew Nelson for Defendant-Appellant.

COLLINS, Judge.

Defendant Rogelio Ramirez appeals from judgments entered upon guilty verdicts of second-degree sexual offense and second-degree rape. Defendant argues that the trial court erred by prohibiting defense counsel from soliciting a response from the detective as to whether Defendant admitted to the alleged assault and by excluding the detective's testimony that he did not believe Defendant was being truthful during their conversation, and that the written judgments contain clerical errors. Because Defendant failed to preserve his argument that the trial court erred by prohibiting defense counsel from soliciting a response from the detective as to whether Defendant admitted to the alleged assault, we dismiss in part. Furthermore, the trial court did not prejudicially err by excluding the detective's testimony that he did not believe Defendant was being truthful during their conversation, and we therefore find no prejudicial error in part. However, as the written judgments contain clerical errors, we remand the judgments to the trial court for correction of the clerical errors.

I. Background

The evidence at trial tended to show the following: On 14 December 2019, Deirdre Carroll and four friends went out for drinks. Throughout the evening, Carroll consumed alcohol until she was "really, really intoxicated" and was "swaying quite a bit [and] slurring her words[.]" Carroll's friend called an Uber at approximately midnight to take Carroll to her apartment a half-mile away. The driver dropped Carroll off at her apartment building and watched her walk inside; the driver observed that Carroll was very intoxicated and "could not stand up."

Carroll did not remember leaving the bar or arriving back at her apartment. However, Carroll eventually woke up naked on her couch and "[a] man [she] did not know had his penis inside of [her]." The man, later identified as Defendant, then "crawled up [her] body and stuck his penis in [her] mouth." At that point, Carroll lost consciousness.

Carroll woke up naked on her couch at approximately 8:00 a.m. with pain in her head, elbow, and vagina. Carroll fell back asleep, and when she woke up at approximately 10:00 a.m., she noticed matted blood on her head. Carroll went to the hospital and told the hospital staff that someone had "penetrated [her] both vaginally and orally." A nurse performed a sexual assault examination, and a sexual assault evidence kit was collected. Carroll had a head wound that required four staples; several bruises on her arm, elbow, and chest; red knuckles and a swollen thumb; and a small laceration on her vulva. A nurse "took photographs of the head wound, photographs of [her] entire body, with the various bruises, including [her] vulva . . . [and] did an internal examination." The nurse also collected DNA samples from Carroll's fingernails, knuckles, external genitalia, and vagina.

Detective Michael Melendez with the Charlotte Mecklenburg Police Department arrived at the hospital to speak with Carroll at approximately 2:30 p.m. Carroll told Detective Melendez that "someone had assaulted [her] in [her] apartment and [she] did not know who that person was." Carroll also told him that her credit card and debit card were missing from her wallet, and that there had been two unauthorized transactions on her credit card at a gas station and Waffle House. Carroll later informed Detective Melendez that her pleasure device was missing from her bedroom.

A detective reviewed surveillance footage from the Waffle House, and the surveillance footage showed that Defendant used Carroll's credit card at approximately 6:19 a.m. on 15 December 2019.

After receiving information on 17 December 2019 about a vehicle connected to the case, Detective Melendez went to the address to which the vehicle was registered. Detective Melendez asked Defendant about the unauthorized credit card transactions, and Defendant stated that Carroll told him he could use the credit card. Detective Melendez asked Defendant if he could search his vehicle, and Defendant consented. Carroll's credit card, debit card, and pleasure device were found in Defendant's car.

A search warrant was subsequently issued for Defendant's phone. Defendant's phone contained a video of Carroll sitting on the toilet in her bathroom, which had been recorded at 2:10 a.m. on 15 December 2019. The phone also contained a photograph of Carroll's driver's license, which had been taken at 2:45 a.m. on 15 December 2019. A report of Defendant's location was generated based on his phone's GPS coordinates. The report showed that Defendant remained at Carroll's apartment building from 12:18 a.m. until 3:18 a.m. on 15 December 2019. The report also showed that Defendant then went to a gas station and Waffle House.

The DNA samples collected from Carroll's fingernails, knuckles, external genitalia, and vagina matched Defendant's DNA.

Defendant was indicted for second-degree forcible sexual offense and second-degree forcible rape.[1] The jury returned guilty verdicts of second-degree sexual offense and second-degree rape. The trial court sentenced Defendant to 72 to 147 months' imprisonment for second-degree sexual offense and 72 to 147 months' imprisonment for second-degree rape. Defendant appealed.

II. Discussion

A. Whether Defendant Admitted to Alleged Assault

[1] Defendant first argues that the trial court erred by prohibiting defense counsel from soliciting a response from Detective Melendez as to whether Defendant admitted to the alleged assault. Defendant failed to preserve this argument for appellate review.

It is well settled that "[i]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of

1. Defendant was also indicted for second-degree forcible sexual offense, second-degree forcible rape, and second-degree kidnapping stemming from an unrelated alleged assault. However, Defendant was acquitted of these charges at trial.

proof is required unless the significance of the evidence is obvious from the record." *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007). Furthermore, "the essential content or substance of the witness'[s] testimony must be shown before we can ascertain whether prejudicial error occurred." *Id.* (citations omitted). "Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010) (citations omitted).

Here, defense counsel asked Detective Melendez, "I would assume that because we did not hear it during the direct examination, that Mr. Ramirez did not admit to having nonconsensual sex with Ms. Carroll correct?" The State objected to the question and asked to be heard outside the presence of the jury. After discussion, the trial court sustained the objection. Defense counsel noted the objection for the record but then proceeded to discuss other questions without making an offer of proof. We cannot engage in speculation as to how Detective Melendez would have answered the question, and Defendant's argument is thus dismissed.

B. Whether Detective Melendez Believed Defendant Was Being Truthful

[2] Defendant next argues that the trial court erred by excluding Detective Melendez's testimony that he did not believe Defendant was being truthful during their conversation.

We review the trial court's decision to exclude evidence for abuse of discretion. *State v. Mobley*, 206 N.C. App. 285, 288, 696 S.E.2d 862, 865 (2010). Evidentiary error does not necessitate a new trial unless the erroneous exclusion was prejudicial. *Jacobs*, 363 N.C. at 825, 689 S.E.2d at 865. To establish prejudice, a defendant must show that "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." N.C. Gen. Stat. § 15A-1443(a) (2023).

Even assuming arguendo that the trial court erred by excluding this testimony, Defendant cannot establish prejudice in light of the overwhelming evidence of his guilt. The evidence at trial tended to show that on 14 December 2019, Carroll consumed alcohol until she was "really, really intoxicated" and was "swaying quite a bit [and] slurring her words[.]" Carroll's friend called an Uber at approximately midnight to take Carroll to her apartment a half-mile away. Carroll did not remember leaving the bar or arriving back at her apartment. However, Carroll woke up naked on her couch and "[a] man [she] did not know

had his penis inside of [her]." The man, later identified as Defendant, then "crawled up [her] body and stuck his penis in [her] mouth." At that point, Carroll lost consciousness. Carroll went to the hospital the following morning, and a nurse performed a sexual assault examination and administered a sexual assault kit. The nurse collected DNA samples from Carroll's fingernails, knuckles, external genitalia, and vagina, which matched Defendant's DNA.

Defendant consented to a search of his vehicle, and Carroll's credit card, debit card, and pleasure device were found inside. A search warrant was subsequently issued for Defendant's phone. Defendant's phone contained a video of Carroll sitting on the toilet in her bathroom and a photo of Carroll's driver's license. The video had been recorded at 2:10 a.m. on 15 December 2019, and the photo had been taken at 2:45 a.m. on 15 December 2019. Furthermore, a report of Defendant's location was generated based on his phone's GPS coordinates. The report showed that Defendant remained at Carroll's apartment building from 12:18 a.m. until 3:18 a.m. on 15 December 2019. In light of this evidence, there is no reasonable possibility that, had the trial court admitted the testimony, a different result would have been reached at trial.

As Defendant has failed to establish prejudice from the trial court's ruling, the trial court did not prejudicially err by excluding Detective Melendez's testimony that he did not believe Defendant was being truthful during their conversation.

C. Clerical Errors in the Judgments

[3] Defendant argues, and the State concedes, that the written judgments contain clerical errors.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Palacio*, 287 N.C. App. 667, 687, 884 S.E.2d 471, 485 (2023) (quotation marks and citation omitted).

Here, Defendant was indicted for second-degree forcible sexual offense and second-degree forcible rape. Prior to trial, the trial court omitted the term "forcible" from the indictments at the State's request. The trial court properly omitted the term "forcible" from its jury instructions and the verdict sheets. The jury subsequently returned guilty verdicts of second-degree sexual offense and second-degree rape. However, the written judgments both contain the term "forcible." Accordingly, we remand the judgments to the trial court for correction of the clerical errors.

III. Conclusion

Defendant failed to preserve his argument that the trial court erred by prohibiting defense counsel from soliciting a response from Detective Melendez as to whether Defendant admitted to the alleged assault. Furthermore, the trial court did not prejudicially err by excluding Detective Melendez's testimony that he did not believe Defendant was being truthful during their conversation. However, the written judgments contain clerical errors. Accordingly, we dismiss in part and find no prejudicial error in part but remand the judgments to the trial court for correction of the clerical errors.

DISMISSED IN PART; NO PREJUDICIAL ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Chief Judge DILLON and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
ANTHONY RAYSHAWN SIMPSON

No. COA23-676

Filed 7 May 2024

Costs—attorney fees—opportunity to be heard—money judgment

In an assault and habitual felon status case, the trial court erred by failing to give defendant notice and an opportunity to be heard at sentencing before entering a money judgment against him for his counsel's fees under N.C.G.S. § 7A-455, where the interests of defendant and trial counsel were not necessarily aligned. Although the trial court addressed the issue of attorney fees with defense counsel in defendant's presence, the court did not inform defendant of his right to be heard on the issue and nothing in the record indicated that defendant understood that he had this right. Accordingly, the civil judgment for attorney fees was vacated and the matter was remanded to give defendant notice of his right to be heard on the issue.

Judge GRIFFIN dissenting.

Appeal by defendant from judgments entered 25 January 2023 by Judge John O. Craig, III in Rowan County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Michelle Abbott for defendant-appellant.

THOMPSON, Judge.

Defendant Anthony Rayshawn Simpson appeals from a civil judgment against him for the attorney's fees incurred by his court-appointed counsel. On appeal, defendant argues that the trial court erred by failing to provide him with notice and an opportunity to be heard on the issue of attorney's fees. After careful review, we vacate and remand the civil judgment for further proceedings on the issue of attorney's fees.

I. Factual Background and Procedural History

Defendant was incarcerated at Piedmont Correctional Institute in Salisbury, North Carolina, for an unrelated offense. On 14 November 2018, defendant was involved in a physical altercation with a detention officer at the facility, leading to defendant's indictment on 23 April 2019, for assault on a detention employee inflicting physical injury.

On 23 January 2023, the matter came on for hearing at the Criminal Session of Rowan County Superior Court. Following a two-day trial, defendant was found guilty upon a jury's verdict of assault on a detention employee inflicting physical injury. Pursuant to the jury's verdict, defendant then pled guilty to having attained habitual felon status.

Shortly thereafter, during sentencing, defense counsel raised the issue of attorney's fees with the court, without invoking the words "attorney's fees." The entire colloquy between defense counsel and the court on the issue of attorney's fees consisted of the following:

> [DEFENSE COUNSEL]: I'm appointed. I have about 18-and-a-half hours total.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: I had it as [$]1[,]202.50. If I can just add one thing. [Defendant] has been on good behavior throughout this trial. I just want the [c]ourt to take note.

THE COURT: Yes, certainly will note that.

The court did not inquire of defendant whether he *personally* wished to be heard on the issue of attorney's fees at this time. A few moments later, pursuant to the jury's guilty verdict and defendant's guilty plea to having attained habitual felon status, the court sentenced defendant to forty to sixty months in the custody of the North Carolina Division of Adult Correction *and* entered a civil judgment against defendant for attorney's fees:

> THE COURT: I'll assess the attorney['s] fee at $1,202.50 as well as the court costs, but they may go to a civil judgment. I will also recommend work release for [defendant] whenever he becomes eligible in the DAC.
>
> [DEFENSE COUNSEL]: We respectfully enter notice of appeal.
>
> THE COURT: All right. Note that, and I will appoint the Appellate Defender to represent [defendant]. Good luck to you, [defendant].

After defendant entered his oral notice of appeal, the proceeding concluded. From this civil judgment, defendant appeals.

II. Discussion

A. Appellate jurisdiction

At the outset, we note that defendant entered oral notice of appeal from the trial court's civil judgment for attorney's fees. Oral notice of appeal is insufficient to confer jurisdiction on our Court to review the trial court's order entering a civil judgment of $1,202.50 in attorney's fees against defendant. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008) (holding that a judgment for attorney's fees constituted a civil judgment and required written notice of appeal because "defendant was required to comply with Rule 3(a) of the [North Carolina] Rules of Appellate Procedure when appealing from those [civil] judgments").

However, defendant has filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. Under North Carolina Rule of Appellate Procedure 21(a)(1), this Court may issue a writ of certiorari to permit review "when the right to prosecute an appeal has been lost by failure to take timely action." *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (acknowledging an appellate court's authority to "review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely

manner"). This Court has issued a writ to review a civil judgment for attorney's fees despite the party's failure to file a written notice of appeal from the civil judgment. *See, e.g.*, *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018) (issuing the writ of certiorari when defendant failed to enter timely written notice of appeal).

In our discretion, we allow defendant's petition for certiorari, because defendant has presented a meritorious argument regarding the trial court's civil judgment of $1,202.50 in attorney's fees against him. *Id.* (issuing the writ of certiorari although "[i]t is less common for this Court to allow a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment[,] . . . [the defendant's] argument on the issue of attorney[']s fees is meritorious"). Certiorari should be allowed when "the ends of justice will be thereby promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924); *see, e.g.*, *State v. Hammond*s, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012) (issuing the writ of certiorari to avoid manifest injustice).

B. Attorney's fees

On appeal, defendant argues that the trial court "erred by entering a civil judgment for attorney's fees against [defendant] without providing him with notice and an opportunity to be heard." We agree.

"In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorney[']s fees incurred by their court-appointed counsel." *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906. "Before imposing a judgment for these attorney[']s fees, the trial court *must* afford the defendant notice and an opportunity to be heard." *Id.* (emphasis added). "Ordinarily, when a defendant is represented by counsel, notice to defendant's counsel that the court is taking up the issue would be sufficient to satisfy the requirement that the defendant must have notice and an opportunity to be heard." *Id.* at 522, 809 S.E.2d at 907.

However, "[w]hen the court is contemplating a money judgment against the defendant for attorney[']s fees . . . the interests of the defendant and trial counsel are not necessarily aligned." *Id.* at 522–23, 809 S.E.2d at 907. Therefore, to "avoid the risk that defendants are deprived of the opportunity to be heard in this context, we . . . hold that, before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel . . . trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. "*Absent a colloquy directly with the defendant on this issue*, the requirements of notice and opportunity to

be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* (emphasis added).

In setting forth the aforementioned law in *State v. Friend*, Judge (now Justice) Dietz relied upon two unpublished decisions where "the trial court did not ask the defendants if they wished to be heard." *Id.* at 522, 809 S.E.2d at 907. Instead, "the trial court in both cases stated that it was taking up the issue, questioned the defendants' counsel about the amount of fees to be awarded, and then announced that it was entering a judgment in the amount of those fees." *Id.* Our Court noted that "[i]n both cases, this Court held that [the] trial court's discussion with counsel did not provide the defendant with sufficient opportunity to be heard." *Id.*

We find this trio of cases dispositive to the issue raised by defendant in the present case, as the court *only* "questioned [defendant's] counsel about the amount of fees to be awarded, and then announced that it was entering a judgment in the amount of those fees[,]" without asking "defendant[ ]—personally, not through counsel—whether [he] wish[ed] to be heard on the issue." *Id.* at 522–23, 809 S.E.2d at 907.

In its appellate brief, the State argues that "the trial court did address the issue of attorney's fees with [defendant's] attorney in front of [defendant][,]" and defendant "could hear what was being said and could have objected." The State further contends that defendant had "a history during the trial of interjecting on issues that he thought were important[,]" as he had "spontaneously raised his hand to ask a question to the court." We find these arguments unavailing, as our caselaw instructs that the trial court "ask defendants—*personally, not through counsel*—whether they wish to be heard on the issue [of attorney's fees]." *Id.* at 523, 809 S.E.2d at 907 (emphasis added).

As noted above, the trial court did not engage in "a colloquy directly with [defendant] on th[e] issue [of attorney's fees]." *Id.* Therefore, we must determine whether there is "other evidence in the record demonstrating that [defendant] received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard." *Id.*

Upon our careful review of the record and transcript of the proceeding, we conclude that there is *not* "evidence in the record demonstrating that [defendant] received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard." *Id.*

There was no discussion of attorney's fees at trial until the aforementioned colloquy between *defense counsel* and the court at defendant's sentencing; nothing in the colloquy between *defense counsel* and the court would allow our Court to infer that defendant "received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard[,]" as required by our caselaw. *Id*. at 522–23, 809 S.E.2d at 906 (noting that "[b]efore imposing a judgment for these attorney['s] fees, the trial court *must* afford the defendant notice and an opportunity to be heard" on the issue of attorney's fees). In fact, the words "attorney's fees" were never invoked until the trial court entered the civil judgment for attorney's fees against defendant at the end of the trial.

III. Conclusion

For the aforementioned reasons, we conclude that the trial court did err by failing to provide defendant with notice and an opportunity to be heard on the issue of attorney's fees. Consequently, we vacate the civil judgment for attorney's fees and remand for further proceedings on that issue, specifically to give defendant notice of his right to be heard on the amount he would be charged for attorney's fees.

VACATED AND REMANDED.

Judge STROUD concurs.

Judge GRIFFIN dissents by separate opinion.

GRIFFIN, Judge, dissenting.

Initially, I would deny Defendant's petition for writ of certiorari because his notice of appeal did not comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure. *See State v. Bursell*, 372 N.C. 196, 198–99, 827 S.E.2d 302, 304 (2019) (explaining that "failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice" (citation and internal marks omitted)). However, since the majority reached the merits of Defendant's argument, I dissent for the reasons below.

In *State v. Friend*, this Court held "trial courts must provide criminal defendants, personally and not through their appointed counsel, with

an opportunity to be heard before entering a money judgment under [N.C. Gen. Stat.] § 7A-455." *State v. Friend*, 257 N.C. App. 516, 518, 809 S.E.2d 902, 904 (2018). To satisfy this right, trial courts, "before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, [] should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. This is because "[c]ounsel for defendants understand that, if they wish to be heard on an issue during an ongoing court proceeding, they can simply rise and ask the court for permission to be heard." *Id.* at 522, 809 S.E.2d at 907. However, the language directly below conditions this requirement by stating that

> [a]bsent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id. at 523, 809 S.E.2d at 907. There, "nothing in the record indicate[d] that [the defendant] understood he had" the right to be heard on the issue of attorney's fees. *Id.*

Thus, if there is not a direct colloquy, there must be other evidence in the record demonstrating a defendant (1) had notice, (2) was aware of the opportunity to be heard, and (3) chose not to be heard. The majority "conclude[s] that there is *not* 'evidence in the record demonstrating that [Defendant] received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard.' " I disagree.

Here, the record contains key differences that place this case within the other evidence standard of *Friend*. For example, Defendant raised his hand requesting to be heard during the trial proceedings. The trial court did not tell him that he had to speak through his counsel and allowed him to speak directly to the court. Additionally, Defendant was present in the courtroom when the trial court and counsel took up the issue of attorney's fees. The trial judge stated, "I'll assess the attorney fee at $1,202.50 as well as the court costs, but they may go to a civil judgment." Defendant remained silent during this exchange, but made a request to hug his wife shortly after, which the trial judge allowed. Given his willingness to speak up during sentencing, Defendant's silence on the issue is indicative of his choice to not be heard. Defendant's behavior shows his awareness that he could question the court about a variety of issues and chose not to question the attorney's fees.

Further, unlike in *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005), where the defendant was completely unaware of the total amount of fees, Defendant was put on notice of the total amount of attorney's fees imposed because the trial judge stated the amount in Defendant's presence.

Our precedent suggests a direct colloquy is the best practice. That practice was not employed by the trial court in this case. However, after surveying the relevant case law, the criteria for what constitutes sufficient evidence to meet the other evidence standard in *Friend* is undeveloped. Here, the record indicates there is other evidence reflecting the standard was met. I would deny Defendant's petition for writ of certiorari. On the merits, I would hold the trial court did not err and provided Defendant with sufficient notice and an opportunity to be heard.

STATE OF NORTH CAROLINA
v.
RONALD WAYNE VAUGHN, JR.

No. COA23-337

Filed 7 May 2024

1. Homicide—jury instruction—self-defense—section 14-51.4—stand-your-ground provision—causal nexus required

In a prosecution for first-degree murder, the trial court erred in concluding that defendant's possession of a weapon of mass death and destruction—a sawed-off shotgun—categorically disqualified him under N.C.G.S. § 14-51.4(1) from a jury instruction on the statute's stand-your-ground provision (as codified in N.C.G.S. § 14-51.3(a)(1)) and by failing to instead instruct the jury that, for such disqualification to apply, the State must prove the existence of an immediate causal nexus between defendant's possession of the shotgun and the confrontation during which he used deadly force. Further, there was a reasonable possibility that, had the court properly instructed the jury, it would have reached a different result at trial, given that: (1) the State explicitly (and erroneously) argued that the stand-your-ground provision was categorically inapplicable during closing arguments, and (2) the evidence—viewed in the light most favorable to defendant—tended to show that after being told to vacate his home, defendant: went inside the trailer, locked the door, and attempted unsuccessfully to contact 911; retrieved the

shotgun because he could not locate other potential means of protection; went onto his porch and told the victim and his mother to leave; and eventually insulted the victim's mother twice, at which point the victim took off his shirt, yelled "Let's end this," and rushed defendant, coming within five feet at the point defendant shot and killed him. This showing of prejudicial error entitled defendant to a new trial on first-degree murder.

2. Homicide—jury instruction—self-defense—section 14-51.4—defense of habitation—causal nexus required—no evidentiary support for instruction

In a prosecution for first-degree murder, the trial court erred in concluding that defendant's possession of a weapon of mass death and destruction—a sawed-off shotgun—categorically disqualified him under N.C.G.S. § 14-51.4(1) from a jury instruction on the defense of habitation (as codified in N.C.G.S. § 14-51.2) but nonetheless did not err by failing to instruct the jury on that defense because the evidence at defendant's trial did not support it. Specifically, while section 14-51.2 states that that the defense of habitation applies only where deadly force is used against a person who has, or is in the process of, unlawfully and forcefully entering a home—including its curtilage—the evidence here was that defendant, the victim, and the victim's mother were sitting in a car in the driveway—and thus within the curtilage—of defendant's home when the victim's mother gave defendant a notice to vacate. Because the victim had entered defendant's home lawfully and without force before he was killed, the defense of habitation was inapplicable.

3. Criminal Law—defenses—justification—possession of weapon of mass destruction

As to a charge of possession of a weapon of mass death and destruction (N.C.G.S. § 14-288.8), the trial court did not err in denying a requested jury instruction on justification because that defense has only been held to excuse—in narrow and extraordinary circumstances demonstrated by evidence of four required factors—a different offense, possession of a firearm by a felon (N.C.G.S. § 14-415.1). Moreover, any need for the appellate court to consider extending the applicability of the defense of justification was unnecessary because, even in the light most favorable to defendant, the evidence did not support all four required factors in his case.

Judge ZACHARY concurring by separate opinion.

Appeal by Defendant from judgments entered 24 November 2021 by Judge R. Gregory Horne in Lincoln County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State-Appellee.

Anne Bleyman for Defendant-Appellant.

COLLINS, Judge.

Defendant Ronald Vaughn, Jr., appeals from judgments entered upon guilty verdicts of first-degree murder and possessing a weapon of mass death and destruction. Defendant argues that the trial court erred by denying his requested jury instructions on the stand-your-ground provision and defense of habitation as to the first-degree murder charge, and the defense of justification as to the possession of a weapon of mass death and destruction charge.

In light of the Supreme Court's decision in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022), we hold that the trial court erred by denying Defendant's requested jury instruction on the stand-your-ground provision and that Defendant has met his burden of showing that the error was prejudicial. However, the trial court did not err by denying Defendant's requested jury instruction on the defense of habitation. Defendant is entitled to a new trial for the first-degree murder charge.

Furthermore, the trial court did not err by denying Defendant's requested jury instruction on the defense of justification, and we find no error in Defendant's conviction for possession of a weapon of mass death and destruction. Nonetheless, because Defendant's pre-trial confinement credit was assigned to the vacated first-degree murder judgment, we remand the possession of a weapon of mass death and destruction judgment for resentencing after his new trial so that his credits may be properly applied.

I. Background

The evidence at trial tended to show the following: Kimberly Ingram was the owner of a single-wide trailer in Lincolnton. Defendant rented the trailer from Ingram and lived there with two roommates. Ingram's son, Gary Somerset, was friends with Defendant and had been temporarily staying at the trailer for approximately a month.

On 25 August 2017, Defendant and Somerset were visiting Defendant's mother's residence. During this time, Ingram texted Defendant and asked him to call her. Ingram told Defendant that her boyfriend had choked her, and Defendant told her that she could stay at the trailer. Somerset was very upset and told Defendant's mother that "if he found out that . . . guy put his hands on his mama he was going to kill him." Defendant and Somerset returned to the trailer to meet Ingram. Defendant, Somerset, and Ingram were sitting in the living room and "[t]hings just started escalating"; Ingram said something that made Somerset mad about "an abusive situation with an ex-boyfriend," and then "names were being thrown around."

Defendant, Somerset, and Ingram then left the trailer for approximately twenty minutes to "calm down in a car ride[.]" During the car ride, Defendant told Somerset "that no one in his family loved him, that he didn't have anywhere to stay, that his own sister wouldn't let [him] stay with [her], and that 'Your own mother doesn't even care you about [sic].' " Ingram told Defendant that his statements were not true, that she loved Somerset, and that Somerset could stay anywhere she stayed. Defendant told Ingram that she should be more appreciative, and Ingram responded, "What? I don't think so. Wait a minute. This is getting way out of hand." Ingram then stated, "You know what? I think it's best if you guys move because I'm going to have to have my house back because I can't live with you all like this."

At that point, they pulled into the driveway. Ingram wrote Defendant a notice to vacate the trailer and handed it to him as he exited the car. Defendant "ripped it up [and] threw it in the air right in front of [Ingram's] face." Defendant stood on the porch and continued to argue with Ingram and Somerset as they sat in the car. Defendant "told them to leave multiple times, but they still weren't leaving."

Defendant eventually went inside the trailer and locked and latched the screen door. Defendant retrieved his iPad from the kitchen and tried to call 911, but his iPad "would not cooperate with [him.]" Defendant yelled, "Does anyone have a phone[,]" but "[n]o one answered [him]." Defendant "felt [he] had to grab something . . . [and] couldn't find any of the other things that [he] had intentionally just deliberately left lying around in case[.]" There was a lock-blade knife in the kitchen and an axe in the living room, but Defendant did not see those "in the panic." Defendant walked through the kitchen and living room and into the back bedroom where his roommate was sitting. The closet in the back bedroom was secured by a combination lock and contained a Winchester .410 caliber shotgun with a sawed-off barrel. Defendant attempted to

unlock the closet but could not remember the combination. Defendant's roommate input the combination, retrieved the shotgun, and handed it to Defendant.

Defendant walked back through the trailer, unlocked the screen door, and returned to the porch. Defendant then stated, "You all need to leave. You all should have done left. You all know you need to leave." After that, "there was still some more arguing and screaming about who was the rightful owner of the house and who needed to get out." Defendant asked Ingram and Somerset if they could talk and "let everything be okay[,]" and Ingram responded, "No, . . . it is what it is. I've got to have my house back." Defendant then said to her, "You're just a bitch." Somerset told Defendant not to disrespect Ingram, and Defendant replied, "She's a f[**]king bitch." At that point, Somerset exited the car, took his shirt off, yelled, "Let's end this[,]" and rushed towards Defendant. When Somerset was approximately five feet away, Defendant shot him in the chest with the shotgun. Somerset died at the scene.

A search warrant was subsequently issued for the trailer. A Winchester .410 caliber shotgun with a sawed-off barrel was found under a pillow on the bed in the back bedroom, and Winchester .410 shotgun shells were found on a coffee table in the living room. The length of the shotgun barrel was 9.87 inches, and the overall length was 17.22 inches.

Defendant was indicted for first-degree murder and possessing a weapon of mass death and destruction. The matter came on for trial on 15 November 2021. The jury returned guilty verdicts of first-degree murder and possessing a weapon of mass death and destruction. The trial court sentenced Defendant to life imprisonment without parole for first-degree murder and a concurrent sentence of 16 to 29 months of imprisonment for possessing a weapon of mass death and destruction. Defendant appealed.

II. Discussion

A. Stand-Your-Ground Provision/Defense of Habitation

Defendant argues that the trial court erred by denying his requested jury instructions on the stand-your-ground provision and the defense of habitation as to the first-degree murder charge.

"The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Hamilton*, 262 N.C. App. 650,

660, 822 S.E.2d 548, 555 (2018) (quotation marks and citation omitted). "Where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case[.]" *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018) (quotation marks, brackets, and citations omitted). In determining whether competent evidence sufficient to support a self-defense instruction has been presented, the evidence is taken as true and considered in the light most favorable to the defendant. *State v. Coley*, 375 N.C. 156, 159, 846 S.E.2d 455, 457 (2020). "Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018).

We review a trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). An error in jury instructions is prejudicial and requires a new trial 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." N.C. Gen. Stat. § 15A-1443(a) (2023). The burden to show prejudice is on the defendant. *Id.*

"[A]fter the General Assembly's enactment of [N.C. Gen. Stat.] § 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions." *State v. McLymore*, 380 N.C. 185, 191, 868 S.E.2d 67, 72 (2022). N.C. Gen. Stat. § 14-51.4 applies to "[t]he justification described in . . . [N.C. Gen. Stat.] § 14-51.3." N.C. Gen. Stat. § 14-51.4 (2023). Accordingly, "when a defendant in a criminal case claims perfect self-defense, the applicable provisions of [N.C. Gen. Stat.] § 14-51.3—and, by extension, the disqualifications provided under [N.C. Gen. Stat.] § 14-51.4—govern." *McLymore*, 380 N.C. at 191, 868 S.E.2d at 73.

Under N.C. Gen. Stat. § 14-51.3, "[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 another against the other's imminent use of unlawful force." N.C. Gen. Stat. § 14-51.3(a) (2023). N.C. Gen. Stat. § 14-51.3 also codifies the stand-your-ground provision and provides, in pertinent part, that a

person is justified in using deadly force and has no duty to retreat in any place he has the lawful right to be if: (1) he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself . . . or another[,]" or (2) "[u]nder the circumstances permitted pursuant to [N.C. Gen. Stat. §] 14-51.2." *Id.*

N.C. Gen. Stat. § 14-51.2 codifies the defense of habitation and provides, in pertinent part, that "the lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself . . . or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if" (1) "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered . . . [the] home[,]" and (2) "[t]he 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) (2023). The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home reasonably fears imminent death or serious bodily harm when using deadly force at home under the circumstances in section 14-51.2(b) while this presumption does not arise in section 14-51.3(a)(1). *Lee*, 370 N.C. at 675, 811 S.E.2d at 566.

However, the justification described in the stand-your-ground provision and the defense of habitation "is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4(1). In *State v. Crump*, this Court held that N.C. Gen. Stat. § 14-51.4(1) "does not require a causal nexus between the disqualifying felony and the circumstances giving rise to the perceived need for the use of force[.]" 259 N.C. App. 144, 145, 815 S.E.2d 415, 417 (2018), *rev'd on other grounds*, 376 N.C. 375, 851 S.E.2d 904 (2020), and *overruled by State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67. The Supreme Court reversed *Crump* on other grounds without addressing whether a causal nexus between the disqualifying felony and the circumstances giving rise to the perceived need for the use of force was required. *See Crump*, 376 N.C. at 393, 851 S.E.2d at 918. Subsequently, however, in *McLymore*, the Supreme Court overruled *Crump* on the causal nexus issue, holding that "in order to disqualify a defendant from justifying the use of force as self-defense pursuant to [N.C. Gen. Stat.] § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." 380 N.C. at 197, 868 S.E.2d at 77. To do so, "[t]he State must introduce

evidence that but for the defendant attempting to commit, committing, or escaping after the commission of a felony, the confrontation resulting in injury to the victim would not have occurred." *Id.* at 197-98, 868 S.E.2d at 77 (quotation marks and citation omitted). Where the State introduces such evidence, the existence of a causal nexus is a jury determination and the trial court must instruct the jury that "the State [is required] to prove an immediate causal nexus between a defendant's attempt to commit, commission of, or escape after the commission of a felony and the circumstances giving rise to the defendant's perceived need to use force." *Id.* at 187, 868 S.E.2d at 70.

Here, this Court's decision in *Crump* was the controlling precedent on the causal nexus issue at the time of trial as the Supreme Court's opinion in *McLymore* had not yet been issued. Thus, the trial court and the parties did not have the benefit of *McLymore* when this case was tried. The following discussion regarding the stand-your-ground provision, defense of habitation, and disqualifying felony took place during the charge conference:

> [THE STATE]: But I also think that under 14-51.4 [Defendant] is not allowed to have the stand-your-ground provision or defense of habitation because he was, number one, committing a felony at the time by possessing a weapon of mass death and destruction; and, number two, he provoked the use of force against him or herself by the statements that he made prior to using them. So I think that they get a self-defense instruction, but I don't think they get the instruction for 51.2 and 51.3 based on the plain language of 14-51.4.
>
> THE COURT: [Defense counsel], I'll hear you on that.
>
> [DEFENSE COUNSEL]: The people on this side do not love the *Crump* decision obviously. The *Crump* decision, I think in overbroad language by its terms sounds like it wipes out self-defense entirely. I'm thankful the [c]ourt is not taking that direction. But it does in interpreting 14-51.4 squarely point to 14-51.2 and 14-51.3 and says those justifications are not available . . . . And so if the [c]ourt finds that the evidence in this case in the light most favorable does not support the instruction because of *Crump*, then that is where it lands. However, we contend that *Crump* is written overbroadly and the self-defense itself survives.
>
> . . . .

> THE COURT: . . . . [M]y understanding of *Crump* is just that, that I believe self-defense survives, but obviously we have the prohibition with regard to those other defenses.
>
> Did you wish to be heard further about that, [defense counsel]?
>
> [DEFENSE COUNSEL]: I do not. I cannot make an argument interpreting *Crump* other than it's blocking 14-51.2 and .3 through 51.4. I want to and I don't see it.

After taking the matter under advisement overnight and further discussion the following morning, the trial court declined to give instructions on the stand -your-ground provision and the defense of habitation.

1. Stand-Your-Ground Provision

[1] In light of the Supreme Court's decision in *McLymore*, the trial court erred by concluding that Defendant's possession of a weapon of mass death and destruction categorically disqualified him under N.C. Gen. Stat. § 14-51.4(1) from a jury instruction on the stand-your-ground provision and by failing to instruct the jury that "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." *Id*. at 197, 868 S.E.2d at 77.

Furthermore, Defendant has met his burden of showing a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. First, the State specifically referenced the stand-your-ground provision during closing arguments and explicitly, yet erroneously, instructed the jury that it does not apply in this case:

> Now, let's talk about the law for just a minute. You heard during the opening remarks from His Honor about the potential defenses in this case. And I want to be clear before you go back there because you all are citizens, and I'm sure you all watch the news. And there's a lot of things in the headlines right now, especially right now. But this case and the law that you're going to hear is not -- I repeat not -- stand your ground. And the law you're going to hear in this case is not -- I repeat not -- the castle doctrine. Under our law in the state of North Carolina, it does not apply in this case, so you're not going to hear about it. The only law you're going to hear is the common law defense of self-defense. . . .

Additionally, the evidence viewed in the light most favorable to Defendant could have supported a jury determination that Defendant's use of deadly force was justified and that there was no causal nexus between the disqualifying felony and his use of deadly force. The evidence at trial tended to show that Defendant, Somerset, and Ingram were sitting in the living room and "[t]hings just started escalating[,]" and then "names were being thrown around." They left the trailer for approximately twenty minutes to "calm down in a car ride" but continued to argue in the car. Ingram told Defendant during the car ride that he needed to move out of the trailer. After pulling into the driveway, Ingram wrote Defendant a notice to vacate the trailer and handed it to him as he exited the car. Defendant "ripped it up [and] threw it in the air right in front of [Ingram's] face." Defendant stood on the porch and continued to argue with Ingram and Somerset as they sat in the car. Defendant "told them to leave multiple times, but they still weren't leaving."

Defendant eventually went inside the trailer and locked and latched the screen door. Defendant retrieved his iPad from the kitchen and tried to call 911, but his iPad "would not cooperate with [him.]" Defendant "felt [he] had to grab something . . . [and] couldn't find any of the other things that [he] had intentionally just deliberately left lying around in case[.]" Defendant retrieved the Winchester .410 caliber shotgun with a sawed-off barrel from the back bedroom.

Defendant returned to the porch and said, "You all need to leave. You all should have done left. You all know you need to leave." After that, "there was still some more arguing and screaming about who was the rightful owner of the house and who needed to get out." Defendant asked Ingram and Somerset if they could talk and "let everything be okay[,]" and Ingram responded, "No, . . . it is what it is. I've got to have my house back." Defendant then said to her, "You're just a bitch." Somerset told Defendant not to disrespect Ingram, and Defendant replied, "She's a f[**]king bitch." At that point, Somerset exited the car, took his shirt off, yelled, "Let's end this[,]" and rushed towards Defendant. When Somerset was approximately five feet away, Defendant shot him in the chest with the shotgun. Somerset died of a shotgun wound to the chest.

In light of this evidence, there is a reasonable possibility that, had the trial court instructed the jury on the stand-your-ground provision and causal nexus requirement, the jury would have determined that Defendant's use of deadly force was justified because he reasonably believed that such force was necessary to prevent imminent death to himself and that there was no causal nexus between Defendant's felonious possession of a weapon of mass death and destruction and his use of force.

Accordingly, the trial court prejudicially erred by failing to instruct the jury on the stand-your-ground provision and the causal nexus requirement. Defendant is thus entitled to a new trial for the first-degree murder charge.

2. Defense of Habitation

[2] As with the stand-your-ground provision, in light of the Supreme Court's decision in *McLymore*, the trial court erred by concluding that Defendant's possession of a weapon of mass death and destruction categorically disqualified him under N.C. Gen. Stat. § 14-51.4(1) from a jury instruction on the defense of habitation. Nonetheless, the trial court did not err by failing to give the requested defense of habitation instruction because the evidence did not support the instruction. *See State v. Hancock*, 248 N.C. App. 744, 748, 789 S.E.2d 522, 525 (2016) ("[A] trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for it." (quotation marks, brackets, and citation omitted)).

N.C. Gen. Stat. § 14-51.2 codifies the defense of habitation and provides, in pertinent part, that "the lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if" (1) "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered . . . [the] home[,]" and (2) "[t]he 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). "Home" is defined "to include its curtilage," N.C. Gen. Stat. § 14-51.2(a)(1) (2023), which includes the porch. *State v. Blue*, 356 N.C. 79, 89, 565 S.E.2d 133, 139 (2002).

Under the statute's plain language, the lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious bodily injury when using deadly force only if the person against whom the deadly force was used was *in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered* the occupant's home, including the curtilage of the home, and the occupant of the home knew or had reason to believe that the unlawful and forceful entry was occurring or had occurred. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." (citation omitted)).

Accordingly, if the person against whom the deadly force was used was entering or had entered the occupant's home lawfully and without force, the presumption afforded by the defense of habitation does not apply.

The statute's plain language comports with the historic understanding and justification for the defense. In *State v. Miller*, our Supreme Court explained:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family. . . . But the jury must be the judge of the reasonableness of defendant's apprehension.

267 N.C. 409, 411, 148 S.E.2d 279, 281 (1966) (quotation marks and citations omitted). Ten years later, our Supreme Court further explained that

> one of the most compelling justifications for the rules governing defense of habitation is the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose, other than to speculate from his attempt to gain entry by force that he poses a grave danger to them.

State v. McCombs, 297 N.C. 151, 157, 253 S.E.2d 906, 910 (1979) (citation omitted). Although N.C. Gen. Stat. § 14-51.2 expanded the defense of habitation to allow deadly force not only to prevent an unlawful entry but also to terminate an unlawful entry, the justification for protecting the occupants from an intruder's unlawful entry has remained.

Here, the evidence at trial showed that Defendant, Somerset, and Ingram were sitting in the living room when "[t]hings just started escalating[.]" Defendant, Somerset, and Ingram then left the trailer for approximately twenty minutes to "calm down in a car ride[.]" During the car ride, the parties continued arguing. Ingram then stated, "You know what? I think it's best if you guys move because I'm going to have to

have my house back because I can't live with you all like this." They then pulled back into the driveway. Ingram wrote Defendant a notice to vacate the trailer and handed it to him as he exited the car. At that point, Somerset had lawfully entered Defendant's home and thus the justification for the presumption afforded by the defense of habitation did not apply.

Accordingly, the trial court did not err by denying Defendant's requested jury instruction on the defense of habitation.

B. Defense of Justification

[3] Defendant also argues that the trial court erred by denying his requested jury instruction on the defense of justification as to the possession of a weapon of mass death and destruction charge.

Our Supreme Court held in *State v. Mercer* that "in narrow and extraordinary circumstances," justification may be available as a defense to a charge of possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1. 373 N.C. 459, 463, 838 S.E.2d 359, 362 (2020). Under *Mercer*, a defendant is entitled to a jury instruction on the defense of justification to the charge of possession of a firearm by a felon only where each of the following four factors is supported by evidence taken in the light most favorable to the defendant: (1) "the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury"; (2) "the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct"; (3) "the defendant had no reasonable legal alternative to violating the law"; and (4) "there was a direct causal relationship between the criminal action and the avoidance of the threatened harm." *Id.* at 464, 838 S.E.2d at 363.

Here, Defendant was charged with possessing a weapon of mass death and destruction under N.C. Gen. Stat. § 14-288.8, not with possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1. Thus, under *Mercer*, Defendant was not entitled to a jury instruction on the defense of justification. We need not decide whether to extend *Mercer*'s holding to a charge of possession of a weapon of mass death and destruction because here, even if the defense were available, there is no record evidence, when taken in the light most favorable to Defendant, to support all of the four factors set forth in *Mercer*.

Accordingly, the trial court did not err by denying Defendant's requested jury instruction on the defense of justification as to the possession of a weapon of mass death and destruction charge.

III. Conclusion

The trial court prejudicially erred by failing to instruct the jury on the stand-your-ground provision and causal nexus requirement as to the first-degree murder charge. However, the trial court did not err by denying Defendant's requested jury instruction on the defense of habitation. Defendant is entitled to a new trial for the first-degree murder charge.

Furthermore, the trial court did not err by denying Defendant's requested jury instruction on the defense of justification as to the possession of a weapon of mass death and destruction charge, and we find no error in Defendant's conviction for that charge. Nonetheless, because Defendant's pre-trial confinement credit was assigned to the vacated first-degree murder judgment, we remand the possession of a weapon of mass death and destruction judgment for resentencing after his new trial so that his credits may be properly applied.

NEW TRIAL IN PART; NO ERROR IN PART; REMANDED FOR RESENTENCING IN PART.

Judge MURPHY concurs.

Judge ZACHARY concurs by separate opinion.

ZACHARY, Judge, concurring.

I concur in the majority opinion. The defense of habitation, as set forth in N.C. Gen. Stat. § 14-51.2, is limited except as provided in that statute. Defendant is not entitled pursuant to the plain language of the statute to the requested jury instruction on the defense of habitation.

I write separately to emphasize that this Court "is an error-correcting body, not a policy-making or law-making one." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 739, 796 S.E.2d 529, 533 (2017) (cleaned up). Whether it was the intent of the General Assembly to foreclose the defense of habitation from cases such as that before us—in which the curtilage was lawfully entered—is beyond judicial inquiry. "It is the province of the lawmaking power to change or modify the statute, not ours. What the General Assembly has written it has written, and if it be not satisfied with its present writing it can write again." *State v. Whitehurst*, 212 N.C. 300, 305, 193 S.E. 657, 661 (1937) (cleaned up).

JAVA WARREN AND JANNIFER WARREN, PLAINTIFFS
v.
CIELO VENTURES, INC. D/B/A SERVPRO NORTH CENTRAL MECKLENBURG COUNTY, DEFENDANT

No. COA22-926

Filed 7 May 2024

Unfair Trade Practices—summary judgment—one-year limitation of liability clause

In an action brought by homeowners against a company hired to remediate damage from a water heater leak, the trial court erred in granting summary judgment in favor of the company on the homeowners' Unfair and Deceptive Trade Practices Act (UDTPA) claim because the one-year clause of limitations included in the work authorization contract had to yield to the applicable statutorily proscribed limits for UDTPA claims. Accordingly, the trial court's order was vacated and the matter was remanded for further proceedings.

Appeal by plaintiffs from order entered 19 May 2022 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2023.

Crawford Law Office, PC, by Derek Crawford, and the Cochran Firm, by Jeffrey Mitchell and Hugo L. Chanez, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, David L. Levy, and Kristy M. D'Ambrosio, for defendant-appellee.

STADING, Judge.

Java and Jannifer Warren ("plaintiffs") appeal from the trial court's order granting summary judgment for Cielo Ventures, Inc., conducting business as Servpro of North Central Mecklenburg County ("defendant"). The trial court ruled that the one-year limitation of liability clause in defendant's work authorization contract extended to claims made under North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"). N.C. Gen. Stat. § 75-1.1 (2023). For the reasons below, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. Background

On 8 July 2017, plaintiffs discovered their water heater leaked throughout their house. That same day, plaintiffs notified their homeowner insurance provider, Government Employees Insurance Company ("GEICO"), of the incident. GEICO operated through Homesite Insurance. After plaintiffs contacted GEICO, defendant's representatives conducted a preliminary inspection of the house on 10 July 2017. Defendant informed plaintiffs that the water leak resulted in extensive damage to the house, requiring them to "bring in the calvary," and start work immediately. Defendant recommended that plaintiffs get a hotel in the meantime.

Plaintiffs and defendant entered into an agreement entitled "Authorization to Perform Services and Direction of Payment" ("authorization contract"). Among other terms, the authorization contract contained a clause stating:

> NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION.

On 20 July 2017, plaintiffs visited the house and discovered defendant had completed minimal or no remediation work at all. Later inquiries revealed that another project preoccupied defendant. The unattended water damage allowed mold to proliferate throughout the house. Plaintiffs thus retained the services of another company, hoping to remediate the damage to their house. After the failed attempt, a certified industrial hygienist found visible mold throughout the house and concluded that the threshold for remediation had been surpassed. As a result, plaintiffs' house was demolished, for which Homesite Insurance compensated them.

On 9 July 2021, plaintiffs filed a claim under North Carolina's UDTPA against defendant. In response, defendant sought summary judgment, arguing that the claim was time-barred under the authorization contract. At the end of the hearing on the motion, the trial court granted summary judgment for defendant "based on the statute of limitations" as lessened by the authorization contract. Plaintiffs timely filed a notice of appeal challenging the trial court's order.

II. Jurisdiction

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

III. Analysis

Plaintiffs assert several reasons for their challenge to the trial court's grant of summary judgment for defendant. First, they contend that precedent rejects one-year limitation clauses for UDTPA claims as unreasonable. Second, they argue that N.C. Gen. Stat. § 75-16.2 (2023) precludes contractual time limitations of UDTPA claims, which proscribes a four-year statutory limitations period. As discussed below, because of the policy underpinning the UDTPA, we hold that the one-year clause of limitation contained in the work authorization contract does not apply to UDTPA claims and must yield to the statutorily prescribed limitation.

A. Summary Judgment Order

At first blush, the order granting summary judgment for the defendant lacks a prima facie rationale for its disposition. This Court may review only "what is in the record or in the designated verbatim transcript. . . ." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985) (citing N.C. R. App. P. 9(a)). It can know "only what appears of record on appeal. . . ." *State v. Perry*, 229 N.C. App. 304, 316, 750 S.E.2d 521, 531 (2013) (citation omitted). Even though such rationale is unnecessary to determine a summary judgment order's validity, explanations do not void the judgment "and may be helpful, if the facts are not at issue and support" it. *Danaher v. Joffe*, 184 N.C. App. 642, 645, 646 S.E.2d 783, 785 (2007) (citation omitted).

Here, the trial court orally explained that it "grant[ed] the motion for summary judgment . . . based on the statute of limitations." It reached that decision only "after hearing from [c]ounsel, reviewing the file in this matter, as well as the materials submitted by both parties[, and] additional attachments." (ellipses omitted). Upon review of the transcript, we conclude that the trial court based its grant of summary judgment for defendant on the authorization contract's one-year limitation of claims clause.

A party is entitled to summary judgment as a matter of law "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. . . ." N.C. R. Civ. P. 56(c). In response to an appeal of a trial court's order for summary judgment, we review *de novo* two "critical questions of law": whether "(1) there is a genuine issue of material fact and[ ] (2) whether the movant is entitled to judgment as a matter of law." *Manecke v. Kurtz*, 222 N.C. App. 472, 474–75, 731 S.E.2d 217, 220 (2012) (citations omitted). We assess the record's evidence "in the light most favorable to the non-mov[ant]." *Id.* (citation omitted). At issue is whether the one-year clause of limitation or the four-year statute

of limitation applies to plaintiffs' UDTPA claim. There is no genuine issue of material fact for us to resolve in this matter. Instead, we address whether case and statutory law compel the application of the time limitation provided by the work agreement or the UDTPA.

B. Statute of Limitations Precedent

Plaintiffs first argue that this Court's opinion in *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1 (1979) explicitly rejects enforcement of one-year limitation clauses for UDTPA claims as contrary to public policy. We ultimately agree that plaintiffs' UDTPA claim is not time-barred. However, we do not rely on *Holley* because a limitation of liability clause was not at the heart of its legal analysis. Rather, this Court was tasked with determining "the appropriate statute of limitations for the [UDTPA] . . . in the decade between 1969 and 1979." *Id.* at 234, 259 S.E.2d at 5. The question for this Court was whether a one-year or a three-year statute should apply to such claims. *Id.* at 239, 259 S.E.2d 1, 8 (1979). To arrive at its conclusion, the *Holley* Court analyzed "the statutory scheme by which North Carolina regulates unfair trade practices" and noted "that the General Assembly has subsequently extended this period to four years. . . ."[1] *Id.* at 234, 259 S.E.2d at 5. It applied canons of construction to choose the longer three-year statute when the applicable statute of limitations is an open question. *See id.* at 241, 259 S.E.2d at 8. While instructive, *Holley* does not address the precise issue before us: whether parties can contractually agree to a time limit for asserting claims under the UDTPA.

C. Legislative Purpose of the UDTPA

Defendant relies in part on *Steele v. Safeco Ins. Co. of Am.*, 223 N.C. App. 522, 735 S.E.2d 451 (2012) (unpublished table decision), to argue that a contractually shortened one-year limitation clause is reasonable for UDTPA claims. Regardless of *Steele*'s nonbinding dictum on this point, we hold that allowing limitations for such claims would circumvent the General Assembly's stated purpose in enacting the UDTPA. The more appropriate analysis lies in considering the UDTPA's statutory text, legislative purpose, and specific creation of a private right of action subject to a prescribed four-year statute of limitations. The General Assembly "establish[ed] an effective private cause of action for aggrieved consumers in this State . . . because common law remedies

1. While the *Holley* litigation was underway, the North Carolina General Assembly enacted a four-year bar to similar claims that did not apply to "any [then-]pending civil action." *Holley*, 43 N.C. App. at 239, 259 S.E.2d at 7–8 (quoting H.B. 238, 1979 Gen. Assemb., Reg. Sess. ch. 169, sec. 2 (N.C. 1979)).

had proved often ineffective." *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 403 (1981). Enacted in 1969[2] and amended in 1977,[3] North Carolina's UDTPA interdicts "unfair or deceptive acts" that affect intrastate "commerce." S.B. 515, 1969 Gen. Assemb., Reg. Sess. ch. 833 (N.C. 1969), *amended by* H.B. 1050, 1977 Gen. Assemb., Reg. Sess. ch. 747 (N.C. 1977). In 1979, the General Assembly further amended the state's UDTPA to bar "[a]ny civil action brought to enforce [its] provisions unless commenced within four years" of the alleged injury.[4] H.B. 238,

---

2. The relevant 1969 statutory text is as follows:

G.S. 75-1.1. Methods of competition, acts and practices regulated: legislative policy.

(a) Unfair methods of competition and *unfair or deceptive acts* or practices in the conduct of any trade or *commerce* are hereby declared unlawful, [and]

(b) The *purpose* of this Section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that *good faith and fair dealings* between buyers and sellers at all levels of commerce be had in this State[.]

S.B. 515, 1969 Gen. Assemb., Reg. Sess. ch. 833, sec. 1, subsec. b, ll.13–19 (N.C. 1969) (codified as amended at N.C. Gen. Stat. § 75-1.1(a)–(b)) (emphases added).

3. The relevant 1977 statutory text is as follows:

Section 1. G.S. 75-1.1(a) is rewritten to read as follows:

(a) *Unfair* methods of competition in or affecting *commerce*, and *unfair or deceptive acts* or practices in or affecting *commerce*, are declared unlawful.

Sec. 2. G.S. 75-1.1(b) is rewritten to read as follows:

(b) For purposes of this section, "*commerce*" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

H.B. 1050, 1977 Gen. Assemb., Reg. Sess. ch. 747 (N.C. 1977) (codified at N.C. Gen. Stat. § 75-1.1(a)–(b)) (emphases added).

4. The relevant 1979 statutory text is as follows:

Section 1. Chapter 75 of the General Statutes is amended as follows:

§ 75-16.2. Limitation of actions. — *Any* civil action brought under this Chapter to enforce the provisions thereof shall be barred *unless commenced within four years* after the cause of action accrues.

Sec. 2. This act is effective upon ratification but *shall not apply* to any *pending* civil action.

H.B. 238, 1979 Gen. Assemb., Reg. Sess. ch. 169 (N.C. 1979) (codified at N.C. Gen. Stat. § 75-16.2) (internal quotation marks and ellipses omitted) (emphases added).

1979 Gen. Assemb., Reg. Sess. ch. 169, sec. 1 (N.C. 1979) (ellipses omitted). "An action for unfair or deceptive practices is a creation of statute, and therefore *sui generis*, so the cause of action exists independently, regardless of whether a contract was breached." *Nelson v. Hartford Underwriters Ins.*, 177 N.C. App. 595, 608, 630 S.E.2d 221, 231 (2006).

Instead of a breach of contract claim, plaintiffs stated a claim under the UDTPA "distinct from other claims with respect to statutes of limitations." *See Page v. Lexington Ins.*, 177 N.C. App. 246, 251, 628 S.E.2d 427, 430 (2006) (applying a three-year statute of limitations to the breach of contract, breach of fiduciary duty, and bad faith claims, but treating the UDTPA claim as separate and distinct with a four-year limitations period); *see also Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (holding that applicable four-year and two three-year statutes of limitation, respectively, did not bar the plaintiffs' UDTPA, fraud, and negligence claims).

This Court has read a "deceptive" act under the UDTPA as any "practice [that] has the capacity or tendency to deceive" another party. *Walker v. Fleetwood Homes of N.C., Inc.*, 176 N.C. App. 668, 671, 627 S.E.2d 629, 631–32 (2006) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 362 N.C. 63, 653 S.E.2d 393 (2007). " 'Unfairness' is a broader concept than. . . 'deception.' " *Id.* An affirmative act of deception definitionally requires deceitful intent. *See* Deception, Black's Law Dictionary (11th ed. 2019). An unfair practice, on the other hand, "offends established public policy." *Id.* The practice may also be "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* (holding that a violation of regulatory statutes regarding warranty repairs for manufactured homes may support a UDTPA claim); *see also Morgan v. AT&T Corp.*, 168 N.C. App. 534, 540–41, 608 S.E.2d 559, 564 (2005) (holding that the plaintiff's UDTPA claim survived summary judgment when the defendant phone company continued to bill the plaintiff long after she canceled the contract).

In North Carolina, our courts have acknowledged the ability of parties to contractually shorten their claim limitations in some cases. *See, e.g.*, *Town of Pineville v. Atkinson/Dyer/Watson Archs., P.A.*, 114 N.C. App. 497, 499, 442 S.E.2d 73, 74 (1994) (two-year limitation); *Horne-Wilson, Inc. v. Nat'l Sur. Co.*, 202 N.C. 73, 161 S.E. 726 (1932) (one-year limitation); *Welch v. Phx. Assur. Co.*, 192 N.C. 809, 136 S.E. 117 (1926) (one-year limitation). Yet, in considering the claim at issue in this matter, we must pay deference to the legislative purpose of the UDTPA:

> To provide civil legal means to maintain ethical standards of dealings between persons engaged in business and . . .

> the consuming public within this State, to the end that good faith and dealings between buyers and sellers at all levels of commerce be had in this State.

N.C. S.B. 515 (1969) (brackets omitted), *amended by* N.C. H.B. 1050 (1977). Our courts thus look to whether the allegedly unfair action violates public policy and how the action affects consumers. *Walker*, 176 N.C. App. at 671, 627 S.E.2d at 631–32; *Morgan*, 168 N.C. App. at 540–41, 608 S.E.2d at 564. This public policy weighs against permitting contractual abrogation of the UDTPA statute of limitations.

Statutes of limitation compel rights of action within a reasonable time "to ensure that the opposing party has a fair opportunity to defend" against otherwise "stale claims." 51 Am. Jur. 2d *Limitation of Actions* § 17 (1970); *cf. id.* § 7 (2024). Statutes of limitation are public policy choices that "determine[e] of the point at which the right of a party to pursue a claim must yield to competing interests, such as the *unfairness* of requiring the opposing party to defend against" outdated claims. *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (emphasis added). They are pragmatically "blunt instruments" created by the General Assembly "to promote—not defeat—the ends of justice." *Id.* And so, this policy of repose yields "where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428, 13 L. Ed. 2d 941, 945, 85 S.Ct. 1050, 1055 (1965). Considering the foregoing, this Court will not construe the generalized one-year clause of limitation contained in the authorization contract as a bar to plaintiffs' claim asserted under North Carolina's UDTPA.

IV. Conclusion

The trial court erred in finding that plaintiffs' UDTPA claim was time-barred by the limitation included in the work authorization contract. Accordingly, we vacate the trial court's order granting summary judgment for defendant and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges WOOD and GORE concur.

WENNINGER v. WENNINGER

[293 N.C. App. 791 (2024)]

MYRA WENNINGER, PLAINTIFF
v.
LEE ARTHUR WENNINGER, DEFENDANT

No. COA23-741

Filed 7 May 2024

Parties—failure to join—necessary party—revocable trust—owner of property up for equitable distribution

In an equitable distribution action, where the parties had previously stipulated that certain assets were titled to a revocable trust, and where the trial court declined to distribute the trust property after correctly determining that it lacked jurisdiction to do so—because the property's true owner, the trust, was not a party to the action—the court's equitable distribution order was vacated as null and void because the court erred in failing to join the trust ex mero motu as a necessary party to the action, pursuant to Civil Procedure Rule 19.

Appeal by defendant from judgment and order entered 30 December 2022, and orders entered 25 January 2023 and 2 March 2023, by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 6 February 2024.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, and Kennedy Law Associates, PLLC, by Marsha C. Kennedy, for plaintiff-appellee.

Myers Law Firm, PLLC, by R. Lee Myers, for defendant-appellant.

ZACHARY, Judge.

Defendant Lee Arthur Wenninger ("Husband") appeals from (1) the trial court's judgment and order determining the issues of equitable distribution, alimony, and attorney's fees ("the Equitable Distribution Order"); (2) the trial court's order denying his motion to add the Myra Louise Wenninger Revocable Trust ("the Trust") as a necessary party to the action; and (3) the trial court's order denying his Rule 60(b) motion for relief from the Equitable Distribution Order. After careful review, we vacate and remand.

I. Background

Husband and Plaintiff Myra Wenninger ("Wife") were married in 2006, separated in 2019, and divorced in 2021. One child was born of the marriage.

On 18 September 2019, Wife initiated this action by filing a complaint for, *inter alia*, child custody, child support, alimony, equitable distribution, and attorney's fees. On 27 December 2019, Husband filed an answer and counterclaim for, *inter alia*, child custody, child support, equitable distribution, alimony, and attorney's fees. Husband and Wife filed equitable distribution affidavits on 24 January and 4 February 2020, respectively, and Wife filed a reply on 4 February 2020. On 17 May 2021, the trial court entered an order resolving the parties' claims for child custody and child support.[1]

On 25 April 2022, the trial court entered a final pretrial order containing the parties' stipulations and allegations as to whether certain items of property were marital or separate and, in some instances, proposed distributions. Among the items addressed by the parties were three bank accounts and one car that the parties agreed were titled to the Trust ("the Trust Property").[2] The parties stipulated that two of the bank accounts were marital property and should be distributed to Wife, but disputed the classification and distribution of the third bank account and the car, leaving those determinations for the trial court.

That same day, the issues of equitable distribution, alimony, and attorney's fees came on for hearing in Mecklenburg County District Court. Following the trial, on 20 July 2022, the trial court rendered its ruling in open court. When the trial court reached the Trust Property, it announced: "I've got a curve ball for y'all." The trial court determined that because the Trust Property was "not owned by the parties on the date of separation" but rather was owned by the Trust, which was "not a party to this lawsuit[,]" the court could not distribute any items of the Trust Property. However, the trial court considered that "[s]ome assets are in trust" in making its unequal distribution in favor of Wife.

On 4 November 2022, Husband filed a motion to join the Trust as a necessary party to the equitable distribution action, pursuant to N.C. Gen. Stat. § 1A-1, Rule 19.

---

1. The child custody and support order is not included in the record, but there appears to be no dispute that these claims were resolved and are not at issue in the present appeal.

2. No competent evidence was presented below regarding the trustees or beneficiaries of the Trust.

On 30 December 2022, the trial court entered the Equitable Distribution Order, in which it restated its earlier ruling, including its determination that it could not distribute the Trust Property because the Trust was not a party to the action. The trial court ordered an unequal distribution of the net marital estate, awarding 60% to Wife and 40% to Husband.

On 24 January 2023, Husband filed a motion for relief from the Equitable Distribution Order, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. Husband raised several arguments in his Rule 60 motion, including that the trial court incorrectly concluded that the Trust Property "could not be considered an asset of the marriage as it was not owned by the parties on the date of separation" and that the trial court's failure to join the Trust as a necessary party rendered the Equitable Distribution Order void.

The following day, the trial court entered its order denying Husband's Rule 19 motion ("the Rule 19 Order"). The trial court found as fact that it "rendered its verdict on July 20, 2022[,]" that neither Husband nor Wife "timely moved to join [the Trust] at any time prior to the verdict on the parties' respective claims for equitable distribution[,]" and that Husband filed his Rule 19 motion "over three months after the verdict was rendered by the [c]ourt." Accordingly, the trial court concluded that "Defendant failed to raise the defense of failure to join a necessary party prior to the verdict and such a defense cannot be raised after the verdict" and that "it is otherwise untimely to request a party be added."

On 27 January 2023, Husband timely filed notice of appeal from the Equitable Distribution Order.[3] On 6 February 2023, Husband amended his Rule 60 motion to include the Rule 19 Order as an exhibit. On 9 February 2023, Wife filed a response to Husband's Rule 60 motion, as well as a motion for sanctions. On 20 February 2023, Husband timely filed notice of appeal from the Rule 19 Order.

On 2 March 2023, the trial court entered its order denying Husband's Rule 60 motion ("the Rule 60 Order"). Husband timely filed notice of appeal from the Rule 60 Order on 15 March 2023.

II. Discussion

Husband raises several arguments on appeal, of which the dispositive argument is that the trial court erred by failing to add the Trust as a

3. Wife also filed timely notice of appeal; however, she does not raise any challenge to the Equitable Distribution Order and states in her appellate brief that she "withdraws her notice of appeal." *See* N.C. R. App. P. 37(e).

necessary party to the equitable distribution action. Because we agree with Husband on this dispositive issue, we need not reach the other issues he raises.

A. Standard of Review

"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 the findings support the conclusions of law and ensuing judgment." *Nicks v. Nicks*, 241 N.C. App. 487, 495, 774 S.E.2d 365, 372 (2015) (cleaned up). "By contrast," this Court reviews de novo "conclusions of law drawn by the trial court from its findings of fact[.]" *Brown v. Brown*, 288 N.C. App. 509, 516, 886 S.E.2d 656, 662 (2023) (citation omitted).

B. Analysis

Rule 19 of the North Carolina Rules of Civil Procedure governs the necessary joinder of parties and provides, in pertinent part:

> (a) Necessary joinder. -- Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.
>
> (b) Joinder of parties not united in interest. -- The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but *when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.*

N.C. Gen. Stat. § 1A-1, Rule 19(a)–(b) (2023) (emphasis added).

Our appellate courts have long recognized the distinction, for the purposes of joinder, between necessary and proper parties. "A necessary party is a party that is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without its presence as a party." *Geoghagan v. Geoghagan*, 254 N.C. App. 247, 249, 803 S.E.2d 172, 175 (cleaned up), *disc. review denied*, 370 N.C. 277, 805

S.E.2d 492 (2017). "This Court has also described a necessary party as one whose interest will be directly affected by the outcome of the litigation." *Id.* (cleaned up).

On the other hand, a proper party is "a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties." *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 439, 527 S.E.2d 40, 44 (2000) (citation omitted).

Although the trial court has discretion as to whether to add a proper party, the trial court has no discretion as to whether to add a necessary party. "Necessary parties *must* be joined in an action. Proper parties *may* be joined." *Id.* at 438, 527 S.E.2d at 44 (emphases added) (citation omitted). "When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action." *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202–03 (1983) (footnote omitted). "Any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person." *Id.* at 764, 304 S.E.2d at 203.

This Court has explained that Rule 19's "necessary joinder rules . . . place a mandatory duty on the [trial] court to protect its own jurisdiction to enter valid and binding judgments." *In re Foreclosure of a Lien by Hunters Creek Townhouse Homeowners Ass'n*, 200 N.C. App. 316, 318, 683 S.E.2d 450, 452 (2009) (citation omitted). "A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Id.* at 319, 683 S.E.2d at 453 (citation omitted). "Thus, if [the Trust] is a necessary party to the resolution of the instant matter, the trial court erred in failing to join [the Trust] and its [Equitable Distribution O]rder . . . is null and void." *Id.*

In this case, the trial court relied upon this Court's decision in *Nicks* to support its conclusion that it lacked jurisdiction to distribute the Trust Property. In *Nicks*, the trial court concluded that an LLC was marital property when, in fact, it was owned entirely by a trust rather than either spouse. 241 N.C. App. at 495, 774 S.E.2d at 372. The *Nicks* Court recognized that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with [the third party's] participation limited to the issue of the ownership of that property." *Id.* (citation omitted).

Consistent with *Nicks*, the trial court here appropriately recognized that the Trust was a necessary party to the equitable distribution action.

Because the parties stipulated that the Trust held title to the Trust Property, the Trust was "a necessary party to the equitable distribution proceeding," and the trial court correctly concluded that it would not have jurisdiction to distribute the Trust Property without the Trust being made a party to the proceeding. *Id.* (citation omitted).

Nevertheless, despite the trial court's apt recognition that the Trust was a necessary party, the trial court erred as a matter of law by failing to join the Trust *ex mero motu* as a necessary party to the equitable distribution action. Pursuant to Rule 19, the trial court has a "*mandatory duty* . . . to protect its own jurisdiction to enter valid and binding judgments." *Hunters Creek*, 200 N.C. App. at 318, 683 S.E.2d at 452 (emphasis added) (citation omitted). However, this mandatory duty does not absolve the trial court of its equally mandatory duty to classify and distribute property that all parties agree is subject to equitable distribution. *See* N.C. Gen. Stat. § 1A-1, Rule 19(b) ("[W]hen a complete determination of such claim cannot be made without the presence of other parties, the court *shall* order such other parties summoned to appear in the action." (emphasis added)).

Again, *Nicks* is instructive. The *Nicks* Court vacated the equitable distribution judgment and remanded the case because the trial court had inappropriately classified and distributed as marital property an LLC held in trust; notably, however, this disposition did not preclude the trial court from properly classifying and distributing the same property—the LLC held in trust—on remand. Rather, the *Nicks* Court repeatedly indicated that the proper procedure on remand would be to join the trust as a necessary party and resolve the equitable distribution accordingly. *See Nicks*, 241 N.C. App. at 499, 774 S.E.2d at 375 ("[O]ur decision to remand this case based on the failure to join the [t]rust as a necessary party necessarily vacates the trial court's valuation of [the LLC, and] provides ample opportunity for a proper de novo valuation of [the LLC] *once the* [*t*]*rust is properly joined as a necessary party* . . . ." (emphasis added)); *see also id.* at 500, 774 S.E.2d at 375 ("In short, it is clear from the record that *once the* [*t*]*rust*—which holds legal title to [the LLC] and the marital assets therein—*is joined as a necessary party to this action*, [the wife] will have a strong claim for the imposition of a constructive trust." (emphases added)).

Because the Trust was not joined as a necessary party, the Equitable Distribution Order "is null and void." *Hunters Creek*, 200 N.C. App. at 319, 683 S.E.2d at 453 (citation omitted). We therefore vacate the Equitable Distribution Order. In light of our disposition, we necessarily

also vacate the Rule 19 Order and the Rule 60 Order. Consequently, we need not reach Husband's remaining arguments.

III. Conclusion

For the foregoing reasons, the Equitable Distribution Order, the Rule 19 Order, and the Rule 60 Order are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Chief Judge DILLON and Judge FLOOD concur.

ELIZABETH AND JASON WHITE, PETITIONERS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES AND CHILDREN'S HOME SOCIETY OF NORTH CAROLINA, INC., RESPONDENTS

No. COA23-529

Filed 7 May 2024

Administrative Law—final agency decision—applicable standards of judicial review exceeded—adoption assistance benefits

In a proceeding regarding eligibility for federally funded adoption assistance benefits provided under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 as administered by the Department of Health and Human Services (DHHS), the superior court exceeded its limited authority upon judicial review in reversing the final agency decision of DHHS to deny benefits to a child's adoptive parents. The superior court's conclusion that the final agency decision was arbitrary, capricious, and an abuse of discretion rested on its reasoning that the adoptive parents' 2021 benefits application was denied only because respondents (DHHS and the child-placement agency) failed to adequately advise the adoptive parents about the availability of, and requirements for, those benefits at the time of the child's adoption in 2014. However, appellate review of the whole record revealed that the child never met the program's eligibility requirements, either at the time of his adoption or when the application was made seven years later, and that ineligibility was unrelated to any failure by respondents to advise the adoptive parents about the adoption assistance program.

Accordingly, the superior court's reversal of the final agency decision was reversed.

Judge TYSON dissenting.

Appeal by respondents from order entered 16 September 2022 by Judge William Long in Forsyth County Superior Court. Heard in the Court of Appeals 9 January 2024.

TBM LAW, PLLC, by Tiffany B. Massie, for petitioners-appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for respondent-appellant North Carolina Department of Health and Human Services.

Assistant County Attorney Erica Glass for respondent-appellant Forsyth County Department of Social Services.

Hill Evans Jordan & Beatty, PLLC, by Michele G. Smith, for respondent-appellant Children's Home Society of North Carolina, Inc.

ZACHARY, Judge.

This case concerns the superior court's limited standard of review when acting as an appellate tribunal upon a petition for judicial review from the final decision of an administrative agency pursuant to N.C. Gen. Stat. § 150B-43 (2023).

Respondents North Carolina Department of Health and Human Services ("DHHS"), Forsyth County Department of Social Services ("DSS"), and Children's Home Society of North Carolina, Inc., ("CHS") appeal from the superior court's order (1) reversing DHHS's final decision denying Petitioners Elizabeth and Jason White's request for adoption assistance benefits for their adopted child, "CW";[1] (2) awarding Petitioners ongoing and retroactive adoption assistance benefits; and (3) awarding attorney's fees to Petitioners. After careful review, we reverse the superior court's order, which reversed the final decision of DHHS.

1. We adopt the initials used by the parties to protect the identity of the juvenile.

I. Background

The subject matter of this appeal is the adoption assistance benefits program under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980. *See* 42 U.S.C. § 670 *et seq*. Although the adopted child in this case clearly has extensive needs, he does not meet the eligibility requirements for adoption assistance benefits under Title IV-E. In concluding otherwise, the trial court exceeded its limited authority under N.C. Gen. Stat. § 150B-43.

As this appeal relates to the State's determination of an adopted child's eligibility for Title IV-E adoption assistance benefits—an issue grounded in federal and state law—we begin with an overview of the applicable statutes, regulations, and agency guidance.

A. Applicable Legal Principles

Title IV-E provides federal funding for adoption assistance subsidies to States that develop a plan for a subsidy and maintenance program and obtain approval of that plan from the United States Secretary of Health and Human Services. 42 U.S.C. § 670.[2] Title IV-E requires that "[e]ach State having a plan approved under this part shall enter into adoption assistance agreements . . . with the adoptive parents of children with special needs." *Id*. § 673(a)(1)(A). DHHS supervises North Carolina's adoption assistance payments program. N.C. Gen. Stat. § 108A-25(a)(4).

"The primary goal of the [T]itle IV-E adoption assistance program is to provide financial support to families who adopt difficult-to-place children from the public child welfare system. These are children who otherwise would grow up in State foster care systems if a suitable adoptive parent could not be found." U.S. Dep't of Health & Hum. Servs., Admin. for Child., Youth & Fams., Pol'y Announcement, Log No. ACYF-CB-PA-01-01, at 12–13 (Jan. 23, 2001) ("Federal Policy Announcement"). "The [T]itle IV-E adoption assistance program, therefore, was developed to provide permanency for children with special needs in public foster care by assisting States in providing ongoing financial and medical assistance on their behalf to the families who adopt them." *Id*. at 2.

---

2. Between 2014, the year of CW's birth and adoption, and 2021, when Petitioners first applied for adoption assistance benefits, the relevant federal and state provisions were amended several times. *See*, *e.g.*, Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. 110-351, §§ 101(b), (c)(1), (c)(5), (f), 402, 122 Stat. 3949. As these amendments do not alter the substance of our analysis, for ease of reading, we refer to the laws and regulations currently in effect, except where indicated.

Title IV-E provides specific requirements that children with special needs must meet in order to qualify for adoption assistance benefits. 42 U.S.C. § 673(a)(2)(A). The numerous eligibility requirements differ based on the child's age and circumstances, *id.*, but at all times relevant to this appeal, a child was required to meet Title IV-E's definition of "a child with special needs" to be eligible for adoption assistance benefits, *id.* § 673(a)(1)(B), (c).

In considering whether a child is "a child with special needs" under Title IV-E, the State must determine, *inter alia*,

> that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section[.]

Id. § 673(c)(1)(B). The State must also conclude, subject to certain exceptions not applicable to the case before us, that "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section[.]" *Id.*

Additionally, for Title IV-E adoption assistance benefits to be available, the State agency and the prospective adoptive parents must enter into an adoption assistance agreement before the adoption becomes final. *See* Federal Policy Announcement, at 6 ("Title IV-E adoption assistance is available on behalf of a child if s/he meets all of the eligibility criteria and the State agency enters into an adoption assistance agreement with the prospective adoptive parent(s) **prior to** the finalization of the adoption."); *see also* 45 C.F.R. § 1356.40(b)(1) (2023) (requiring that any adoption assistance agreement "[b]e signed and in effect at the time of or prior to the final decree of adoption").

In addition to these federal laws and regulations—of which we have only articulated those pertinent to the present case—North Carolina laws and regulations also bear on a child's eligibility for adoption assistance benefits. DHHS and DSS have statutory authorization to administer the adoption assistance program "under federal regulations" and state rules promulgated by the Social Services Commission. N.C. Gen. Stat. § 108A-25(a). Further, our General Statutes provide:

> Adoption assistance payments for certain adoptive children shall be granted in accordance with the rules of the Social Services Commission to adoptive parents who adopt a child eligible to receive foster care maintenance payments or supplemental security income benefits; provided, that the child cannot be returned to his or her parents; and provided, that the child has special needs which create a financial barrier to adoption.

Id. § 108A-49(b).

At the time of CW's adoption in 2014, the North Carolina Administrative Code enumerated specific eligibility criteria for the receipt of adoption assistance benefits, including that "[t]he child is, or was, the placement responsibility of a North Carolina agency authorized to place children for adoption at the time of adoptive placement"; that "[t]he child has special needs that create a financial barrier to adoption"; and that "[r]easonable but unsuccessful efforts have been made to place the child for adoption without the benefits of adoption assistance[.]" 10A N.C. Admin. Code 70M.0402(a)(2)–(4) (2014).[3] The Administrative Code also included the requirement that "the adoptive parents must have entered into an agreement with the child's agency prior to entry of the Decree of Adoption." 10A N.C. Admin. Code 70M.0402(b)(4) (2014).

B. Factual and Procedural Background

CW was born prematurely in North Carolina on 28 May 2014. CW's mother exposed CW to various illegal substances in utero. On 31 May 2014, CW's mother relinquished her parental rights to CW to CHS for the purpose of adoption with prospective adoptive parents. CHS is a private, not-for-profit child-placement agency. In June 2014, CHS placed CW with Petitioners in a potential adoptive placement, which was formalized on 10 September 2014 following the termination of CW's putative biological father's parental rights. Petitioners formally adopted CW on 23 December 2014. At the time of the adoption, there had been no discussion of adoption assistance benefits, and no adoption assistance agreement established.

In the years since his adoption, CW has been diagnosed with attention-deficit/hyperactivity disorder and various ocular conditions.

---

3. Presently, the North Carolina Administrative Code explicitly incorporates by reference the eligibility criteria for adoption assistance benefits found in 42 U.S.C. § 673(a)(2). *See* 10A N.C. Admin. Code 70M.0402(a)(2) (2023).

CW has also been evaluated for possible autism spectrum disorder on multiple occasions.

In March 2021, Petitioners first discussed the possibility of receiving adoption assistance benefits with CHS's Infant Connections Program Supervisor. Petitioners and the CHS supervisor completed an adoption assistance eligibility checklist, and Petitioners submitted an application for adoption assistance on 10 May 2021. Upon receipt of the application, a DSS agent "inquired if there was a date scheduled for finalizing the adoption as 'the adoption agreement will have to be completed and signed prior to finalizing' the adoption." The CHS supervisor informed the DSS agent that "the adoption was finalized in 2014"; that "an adoption assistance application was not completed at that time"; and that "[t]his was a private adoption where [CHS] was the legal guardian prior to the adoption being finalized."

On 27 May 2021, DSS determined that CW "was not eligible for Adoption Assistance as his adoption was finalized in 2014 prior to entering into an adoption assistance agreement[.]" Petitioners appealed DSS's decision to DHHS, and a local hearing was held on 21 July 2021. On 23 July 2021, the local hearing officer affirmed DSS's decision.

On 28 July 2021, Petitioners filed a request for a state appeal, and DHHS held a state hearing on 22 September 2021. On 29 September 2021, the state hearing officer affirmed DSS's decision. Petitioners contested the state hearing officer's decision, and on 24 November 2021, the assistant chief hearing officer entered a final decision affirming DSS's decision.

On 21 December 2021, Petitioners filed a petition for judicial review in Forsyth County Superior Court pursuant to N.C. Gen. Stat. § 108A-79(k). Petitioners named DHHS, DSS, and CHS as respondents. On 12 September 2022, the matter came on for hearing. By order entered on 16 September 2022, the superior court concluded that "Respondents' decision to deny Petitioners' request for adoption assistance was erroneous, arbitrary, capricious and an abuse of discretion, and should be reversed[.]" The superior court also concluded: "Based on CW's past and present medical history and circumstances, CW qualified as a 'special needs' child in 2014, and he still meets those qualifications today . . . ."

Consequently, the superior court concluded that "Petitioners are entitled to receive adoption assistance both from the date of this Order, and retroactive assistance to December 23, 2014[.]" The superior court remanded the matter "to Respondents for a determination of the amount of adoption assistance to which Petitioners are entitled" and for the execution of "all necessary documents in order for Petitioners to receive

adoption assistance retroactive to December 23, 2014 and continuing thereafter as long as CW meets eligibility requirements[.]" The court also awarded Petitioners $10,750.00 in attorney's fees.

Respondents each filed timely notices of appeal. DHHS also filed a motion to stay execution of the superior court's order pending appeal, which the superior court denied by order entered on 16 December 2022.

II. Discussion

On appeal, Respondents each raise several arguments contending that the superior court's order must be reversed. For the reasons that follow, we agree.

A. Standard of Review

The North Carolina Administrative Procedure Act ("APA"), "codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). A party aggrieved by the final decision of an administrative law judge in a contested case has a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43.

Under the APA, the superior court's scope of review is limited:

> 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.

Id. § 150B-51(b).

The APA provides a reviewing court with two different standards of review, "depend[ing] on the nature of the challenge being addressed." *Christian v. Dep't of Health & Hum. Servs.*, 258 N.C. App. 581, 584, 813 S.E.2d 470, 472, *appeal dismissed*, 371 N.C. 451, 817 S.E.2d 575 (2018).

> In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(c).

When applying de novo review, a reviewing court "considers the matter anew and freely substitutes its own judgment for the agency's." *Christian*, 258 N.C. App. at 584, 813 S.E.2d at 472 (citation omitted). "Using the whole record standard of review, [a reviewing court] examine[s] the entire record to determine whether the agency decision was based on substantial evidence such that a reasonable mind may reach the same decision." *Id.* at 584–85, 813 S.E.2d at 472.

Under the whole record standard of review, "a reviewing court is not free to weigh the evidence presented to an administrative agency and substitute its evaluation of the evidence for that of the agency." *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality*, 385 N.C. 1, 3, 891 S.E.2d 83, 85 (2023) (citation omitted). "The 'whole record' test does not allow the reviewing court to replace the [agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo." *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977); *see also N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." N.C. Gen. Stat. § 150B-52. "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under [N.C. Gen. Stat. §] 150B-51(c), the [superior] court's findings of fact shall be upheld

if supported by substantial evidence." *Id.* On appeal from a superior court's order "reversing the decision of an administrative agency, our standard of review is twofold and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *McCrann ex rel. McCrann v. Dep't of Health & Hum. Servs., Div. of Mental Health, Developmental Disabilities & Substance Abuse Servs.*, 209 N.C. App. 241, 246, 704 S.E.2d 899, 903, *disc. review denied*, 365 N.C. 198, 710 S.E.2d 23 (2011).

B. Analysis

In that we are reviewing an order of the superior court acting as a reviewing court, our first task under the APA is to determine "whether the superior court applied the appropriate standard of review[,]" *id.*, as governed by the type of error asserted by Petitioners, *see* N.C. Gen. Stat. § 150B-51(c). In their petition for judicial review below, Petitioners argued that DHHS's final decision was (1) based on an error of law, in that Respondents misinterpreted 42 U.S.C. § 673; and (2) arbitrary, capricious and an abuse of discretion, in that this alleged statutory misinterpretation resulted in Respondents' failing "to fulfill their duty to inquire as to CW's eligibility [for adoption assistance benefits] and inform Petitioners." *See id.* § 150B-51(b)(4), (6). Accordingly, the interpretation of 42 U.S.C. § 673 is a question of law reviewed de novo. *Id.* § 150B-51(c). We review the question of whether DHHS's final decision was arbitrary, capricious, and an abuse of discretion using the whole record test. *Id.*

After careful review, we conclude that the superior court exceeded its limited authority when reviewing DHHS's final decision. Accordingly, we cannot say that "the superior court properly applied th[ese] standard[s]" of review. *McCrann*, 209 N.C. App. at 246, 704 S.E.2d at 903.

We begin with the superior court's conclusion, upon reviewing the whole record, that "Respondents' actions surrounding this matter were arbitrary and capricious and in bad faith." The superior court reached this conclusion by reasoning that "Petitioners did not meet the criteria for eligibility for adoption assistance when they applied ***only*** as a result of Respondents[']' failure to adequately advise Petitioners of the availability of adoption assistance and the requirements of the same." This is incorrect.

Our careful review of the whole record suggests that, although CW has extensive needs, he did not meet the specific eligibility requirements for adoption assistance benefits, either at the time of his initial adoption

in 2014 or when Petitioners submitted their application in 2021. Further, CW's ineligibility was not the result of any failure by CHS or DSS to adequately advise Petitioners about the program.

As stated above, federal and state law articulate specific eligibility requirements for adoption assistance benefits. Yet, the superior court determined that "CW would have been eligible to receive adoption assistance as of December 2014, and . . . it is clear that CW is still currently eligible to receive adoption assistance" without assessing whether CW met these requirements. For instance, there is no evidence in the record to suggest that CW was "eligible to receive foster care maintenance payments or supplemental security income benefits[,]" as required by our General Statutes. N.C. Gen. Stat. § 108A-49(b). By determining that CW was eligible for adoption assistance without satisfying this statutory requirement for eligibility, the superior court improperly "weigh[ed] the evidence presented to [DHHS] and substitute[d] its evaluation of the evidence for that of [DHHS]." *Sound Rivers*, 385 N.C. at 3, 891 S.E.2d at 85 (citation omitted).

Section 108A-49(b) also requires that "the child ha[ve] special needs which create a financial barrier to adoption." N.C. Gen. Stat. § 108A-49(b). As stated above, in the context of adoption assistance, a determination of "special needs" requires, *inter alia*, the presence of "a specific factor or condition . . . because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance[.]" 42 U.S.C. § 673(c)(1)(B). This determination also requires that "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section[.]" *Id.*; *see also* 10A N.C. Admin. Code 70M.0402(a)(4) (2014). In accord with these statutory and regulatory requirements, DHHS recognized in its final decision that "the evidence does not support that [CW] was 'un-adoptable' or hard to place due to special needs or that any efforts had to be made with other specialized adoption agencies or adoption exchanges in order to facilitate an adoption of [CW]."

Instead of "examin[ing] the entire record to determine whether [DHHS's] decision was based on substantial evidence such that a reasonable mind may reach the same decision[,]" *Christian*, 258 N.C. App. at 584–85, 813 S.E.2d at 472, the superior court made one finding of fact: "Respondents were well aware of CW's special needs prior to adoption, as CW received Medicaid from birth until shortly after the finalization of his adoption." The whole record does not support this finding, nor would this finding be dispositive of the legal issue of whether CW was "a child with

special needs" because this finding does not comport with the definition of the term "special needs" as used in the adoption assistance context.

Indeed, as regards these requirements, the superior court's determination of CW's eligibility is belied by the whole record. Not only was DHHS's decision "based on substantial evidence such that a reasonable mind may reach the same decision[,]" *Christian*, 258 N.C. App. at 584–85, 813 S.E.2d at 472, it is unreasonable to conclude that CW could not be placed with adoptive parents without adoption assistance when he *was*, in fact, placed with Petitioners without adoption assistance.

Moreover, because CW was plainly ineligible for Title IV-E adoption assistance benefits on these grounds, the whole record does not support the superior court's finding that "Petitioners did not meet the criteria for eligibility for adoption assistance when they applied ***only*** as a result of Respondents[']' failure to adequately advise Petitioners of the availability of adoption assistance and the requirements of the same." Accordingly, the superior court erred by concluding that "Respondents' actions were without substantial justification," or that DHHS's final decision was "not supported by the whole record and [wa]s arbitrary, capricious and an abuse of discretion."

The superior court also did not dispute the federal and state regulatory requirement that the adoption assistance application be signed and approved before the adoption became final. *See* 45 C.F.R. 1356.40(b)(1); 10A N.C. Admin. Code 70M.0402(b)(4) (2014). DHHS cited these regulations in its final decision and correctly observed that Petitioners' application did not comply with this requirement. Nonetheless, the superior court relied upon the existence of "extenuating circumstances"—namely, the perceived "arbitrary and capricious and bad faith" actions of Respondents—to conclude that "this matter [needed] to be re-opened and a subsequent determination [made] of CW's eligibility for adoption assistance."

North Carolina's appellate courts have never adopted or applied the "extenuating circumstances" doctrine when interpreting Title IV-E; however, other jurisdictions had adopted this doctrine prior to the 2001 issuance of the Federal Policy Announcement. As the Supreme Court of Pennsylvania explained in *Laird v. Department of Public Welfare*, a 1992 federal policy statement formed the basis for the extenuating circumstances doctrine. 23 A.3d 1015, 1024 (Pa. 2011). That earlier guidance "stated that adoptive parents would be eligible for a fair hearing if a state agency charged with the administration of adoption subsid[i]es failed to notify adoptive parents of the availability of subsidies[.]" *Id.*

The Federal Policy Announcement "clarified several outstanding adoption assistance questions, while also revoking fifteen previously issued policy statements and interpretations[,]" including the 1992 policy statement that formed the basis for the extenuating circumstances doctrine. *Id.* at 1025. Yet, as the *Laird* Court explained, the Federal Policy Announcement "did not abolish the extenuating circumstances doctrine; rather, it detailed various clarifications to it." *Id.*

Here, in its order, the superior court relied, in part, on the Federal Policy Announcement, describing its guidance as follows:

> a. Adoption agencies, whether public or private, have an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of adoption assistance.
>
> b. *Failure by the State agency to advise potential adoptive parents about the availability of adoption assistance is an extenuating circumstance*, which justifies a fair hearing and a subsequent grant of adoption assistance if the child meets the eligibility requirements.

(Emphasis added).

It is true that the Federal Policy Announcement states that "the State or local [T]itle IV-E agency is responsible for assuring that prospective adoptive families with whom they place eligible children who are under their responsibility are apprised of the availability of [T]itle IV-E adoption assistance." Federal Policy Announcement, at 13. But the superior court overlooked the very next paragraph, which explains how that responsibility dissipates in cases such as this, in which the child was adopted through a private adoption agency, such as CHS, without the involvement or knowledge of the State or local Title IV-E agency.

The Federal Policy Announcement explains:

> However, in circumstances where the State agency does not have responsibility for placement and care, or is otherwise unaware of the adoption of a potentially special needs child, it is incumbent upon the adoptive family to request adoption assistance on behalf of the child. *It is not the responsibility of the State or local agency to seek out and inform individuals who are unknown to the agency about the possibility of [T]itle IV-E adoption assistance for special needs children who also are unknown to the*

> *agency*. This policy is consistent with the intent and purpose of the statute, and that is to promote the adoption of special needs children who are in the public foster care system.

Id. (emphasis added). Additionally, the Federal Policy Announcement reiterates that "[t]he right to a fair hearing is a procedural protection that provides due process for individuals who claim that they have been wrongly denied benefits. *This procedural protection, however, cannot confer [T]itle IV-E benefits without legal support or basis*." *Id.* at 17 (emphasis added).

CW did not meet the eligibility requirements for adoption assistance in 2014, thus relieving CHS of any liability for a supposed "failure to adequately advise Petitioners of the availability of adoption assistance and the requirements of the same." Moreover, the Federal Policy Announcement makes clear that the superior court's conclusion that DHHS and DSS had an "affirmative duty to provide information to Petitioners related to the potential availability of adoption assistance" is erroneous. Indeed, at the judicial-review hearing, counsel for both DHHS and DSS explained that each respective agency was unaware of CW's private adoption through CHS.

Our dissenting colleague views this case as concerning "Respondents' duty to fully share and inform prospective adoptive parents of their knowledge of specific facts of a child's health conditions and needs and prognosis gained exclusively through their care, custody, and control over the child." *Dissent*, slip op. at *3. However, as DSS and DHHS make clear in their appellate briefs, "there is nothing in the record to indicate that either . . . DSS or DHHS were actually aware of the private adoption proceedings entered into by [CHS] and Petitioners prior to the finalization of CW's adoption in 2014." Indeed, nothing in the record supports the trial court's finding that "Respondents were well aware of CW's special needs prior to adoption, as CW received Medicaid from birth until shortly after the finalization of his adoption." In so finding, the superior court improperly imputed to DSS and DHHS knowledge of CW, his condition, and his adoption, and impermissibly exceeded its limited standard of review by making its own findings of fact that were not supported by the whole record. *See Sound Rivers*, 385 N.C. at 3, 891 S.E.2d at 85.

As for the period of "care, custody, and control over the child" on which our dissenting colleague focuses, *dissent* at *3, the record reflects that the period in which CHS had sole custody of CW before placing

him with Petitioners was between four days and three weeks, not six months. As the superior court correctly noted, CHS placed CW with Petitioners in June 2021, and the record reflects that when three-week-old CW was seen in the emergency department, Petitioners were present as "his adoptive parents[.]"

Rather than concerning any "affirmative duty" on the part of any of the Respondents "to use their knowledge and expertise and to share the information they have gained and the potential availability of means to defray costs and accomplish identified special needs[,]" as our dissenting colleague posits, *id.* at *8, this appeal is properly focused on the superior court's appropriate standards of review. DHHS's final decision reflected an accurate interpretation of the applicable federal and state statutes and regulations, and an appropriate application of the facts presented to the law. The superior court exceeded the limits of the applicable standards of review by concluding that CW was eligible for adoption assistance benefits, that "Respondents' actions were without substantial justification," and that there were extenuating circumstances justifying a reconsideration of CW's eligibility. The superior court did not properly apply the appropriate standards of review, and improperly "weigh[ed] the evidence presented to [DHHS] and substitute[d] its evaluation of the evidence for that of [DHHS]." *Id.* (citation omitted). Accordingly, the superior court's order reversing DHHS's final decision must be reversed.

In light of our disposition, we decline to address the arguments presented by CHS and DSS regarding whether the superior court lacked jurisdiction on appeal from DHHS's final decision to enter an order against those entities.

III. Conclusion

For the foregoing reasons, we reverse the superior court's order, which reversed the final decision of DHHS.

REVERSED.

Judge STROUD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Respondents, NC DHHS, CHS, and Forsyth County DSS failed to carry their burden to show any error and prejudice in the superior court's order. The order is properly affirmed.

The issue before us is simple: What duty, if any, did Respondents possess to disclose the potential availability of State and Federal adoption assistance benefits to Petitioners, prior to Petitioners' adoption of C.W.? C.W. was under CHS' and DSS' sole legal custody, care, and control and possessed expertise and specialized knowledge of these programs. The superior court correctly found CHS and DSS owed such duties, had failed to disclose, and are liable to Petitioners. The superior court reviewed the whole record, found, and concluded: "Based on C[.]W[.]'s past and present medical history and circumstances, C[.]W[.] qualified as a 'special needs' child in 2014, and he still meets those qualifications today[.]" I respectfully dissent.

I. Jurisdiction

The Superior Court possessed jurisdiction to hear the petition involving a final agency decision pursuant to N.C. Gen. Stat. § 108A-79(k) (2023). This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

II. Background

C.W.'s mother was addicted to and had ingested various illegal drugs, while he was *in utero*. C.W. was delivered prematurely at 34 weeks by Cesarean Section on 28 May 2014. C.W. weighed 5 pounds 11.7 ounces at birth. C.W. tested positive at birth for the presence of Cocaine, Opiates, Amphetamines, Benzodiazepines, and Marijuana. He was treated for the effects of premature delivery and the effects of the illicit drugs in his body and remained hospitalized for two weeks after birth. C.W. was diagnosed having Monofixation Syndrome, hyperopia, ptosis, and accommodative esotrapia. CHS gained exclusive care, custody, and control over C.W. shortly after he was born.

The superior court correctly found DSS became involved with C.W. by receiving an application for, seeking, and securing Medicaid benefits for him. C.W. remained within CHS' and DSS' legal care, custody, and control until his adoption by Petitioners was finalized 23 December 2014. Despite C.W.'s health and history at birth, and the treatments he had received while in CHS' legal custody, it is undisputed Petitioners received no disclosure or discussion of adoption assistance

benefits potentially available under 42 U.S.C. § 673(a)(2). *See* 10A N.C. Admin. Code 70M.0402(a)(2) (2023) (incorporating by reference the eligibility criteria for adoption assistance benefits found in 42 U.S.C. § 673(a)(2) (2018)).

Petitioners formally adopted C.W. on 23 December 2014. C.W. has been diagnosed with attention-deficit/hyperactivity disorder and various vision/ocular conditions. C.W.'s multiple evaluations also show potential autism spectrum disorders.

The whole record clearly shows, and the superior court correctly found: "Respondents were well aware of C[.]W[.]'s special needs prior to adoption, as C[.]W[.] received Medicaid from birth until shortly after the finalization of his adoption." The superior court also found and concluded: "C[.]W[.] would have been eligible to receive adoption assistance as of December 2014, and . . . it is clear that C[.]W[.] is still currently eligible to receive adoption assistance."

III. N.C. Gen. Stat. § 108A-49(b)

N.C. Gen. Stat. § 108A-49(b) requires "the child ha[ve] special needs which create a financial barrier to adoption." N.C. Gen. Stat. § 108A-49(b) (2023). This statute incorporates the Federal adoption assistance requirement that, a determination of "special needs" requires, *inter alia*, the presence of "a specific factor or condition . . . because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption [financial] assistance[.]" 42 U.S.C. § 673(c)(1)(B).

Respondents and the majority's opinion assert Petitioners cannot meet these statutory thresholds. I disagree. Theirs is an *ipso facto* argument, which seeks to excuse or obliterate Respondents' duty to fully share and inform prospective adoptive parents of their knowledge of specific facts of a child's health conditions and needs and prognosis gained exclusively through their care, custody, and control over the child.

This duty is particularly relevant when the prospective adoptive parents cannot access the relinquishing parent and do not know the child's family health history, genetic predisposition, or inherited traits. To use these statutes as purported authority to withhold or excuse failure to disclose critical health information needed and potential financial resources available to properly care for the child is an anathema to the very reasons these assistance programs exist.

As the superior court properly found and concluded, the "financial barrier to adoption" requirement only exists within the context

of and after full disclosure by CHS and DSS of all known and relevant information about the child's health and conditions and prognosis to the prospective parents in order to enable them to assess needs and available resources, and to make an informed decision. N.C. Gen. Stat. § 108A-49(b) (providing the "financial barrier to adoption" requirement). This is particularly true with a newborn or infant child, as here, where the child's medical history, evaluations, and prognosis lies solely and exclusively with Respondents.

The superior court properly focused on what CHS and DSS knew or should have known and failed to disclose about C.W.'s condition, needs, and prognosis before and, at a minimum, between his birth in May 2014 and his adoption by Petitioners the following December. Respondents, not Petitioners, had a contract with C.W.'s mother before, during, and after his birth and exercised exclusive control over his medical care and treatments until he was formally placed with Petitioners in September 2014. Respondents continued to exercise legal custody and control over C.W. until his adoption was completed in December 2014. The superior court correctly rejected Respondents' specious argument that Petitioners could not satisfy this required "financial barrier to adoption" without Petitioners first being fully informed by Respondents. N.C. Gen. Stat. § 108A-49(b).

IV. Assistance application be signed and approved prior to adoption

Federal and state regulations require the adoption assistance application to be signed and approved "*prior to*" the adoption becoming final. 10A N.C. Admin. Code 70M.0402(b)(4) (2014) (emphasis supplied); *see also* 45 C.F.R. 1356.40(b)(1) (2012) (explaining the "adoption assistance agreement" must "[b]e signed and in effect at the time of or prior to the final decree of adoption").

The whole record shows Petitioners and CHS eventually completed an adoption assistance eligibility checklist. Petitioners submitted an application for adoption assistance on 10 May 2021. DSS received the application and "inquired if there was a date scheduled for finalizing the adoption as 'the adoption agreement will have to be completed and signed prior to finalizing' the adoption."

CHS informed DSS "the adoption was finalized in 2014"; admitted "an adoption assistance application was not completed at that time"; and, that " '[t]his was a private adoption where [CHS] was the legal guardian prior to the adoption being finalized.' "

The superior court properly relied upon the whole record and the existence of these "extenuating circumstances" to conclude "this matter

[needed] to be re-opened and a subsequent determination [made] of C[.]W[.]'s eligibility for adoption assistance." The "extenuating circumstances" cited in addition to the facts stated above were Respondents' "arbitrary and capricious and bad faith" actions.

The presence and use of "extenuating circumstances" has been applied to excuse strict compliance with the "prior to" requirement when interpreting Title IV-E by other jurisdictions relying on federal policy statements from 1992 and 2001. The Supreme Court of Pennsylvania explained, in *Laird v. Department of Public Welfare*, a 1992 federal policy statement formed the basis for the "extenuating circumstances" doctrine. 23 A.3d 1015, 1024 (Pa. 2011). The earlier Federal guidance "stated that adoptive parents would be eligible for a fair hearing if a state agency charged with the administration of adoption subsid[i]es failed to notify adoptive parents of the availability of subsidies[.]" *Id.*

The 2001 Federal Policy Announcement "clarified several outstanding adoption assistance questions, while also revoking fifteen previously issued policy statements and interpretations[,]" including the 1992 policy statement that formed the basis for the extenuating circumstances doctrine. *Id.* at 1025 (citing U.S. Dep't of Health & Hum. Servs., Admin. for Child., Youth & Fams., Pol'y Announcement, Log No. ACYF-CB-PA-01-01 (Jan. 23, 2001) ("2001 Federal Policy Announcement"). The 2001 Federal Policy Announcement "did not abolish the extenuating circumstances doctrine; rather, it detailed various clarifications to it." *Id.*

The superior court correctly relied upon, cited, and summarized the 2001 Federal Policy Announcement as follows:

> c. *Adoption agencies*, *whether public or private*, *have an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of adoption assistance.*
>
> d. *Failure* by the State agency *to advise potential adoptive parents* about the availability of adoption assistance is *an extenuating circumstance*, which justifies a fair hearing and a subsequent grant of adoption assistance if the child meets the eligibility requirements.

(emphasis supplied).

The superior court correctly found and concluded the 2001 Federal Policy Announcement mandates: "the State or local [T]itle IV-E agency is responsible for assuring that prospective adoptive families with whom they place eligible children who are under their responsibility

are apprised of the availability of [T]itle IV-E adoption assistance." 2001 Federal Policy Announcement, ACYF-CB-PA-01-01, at 13.

The superior court properly considered DSS' role and involvement in securing Medicaid coverage for C.W. and CHS' involvement or knowledge of the State or local Title IV-E agency. The 2001 Federal Policy Announcement reiterates: "The right to a fair hearing is a procedural protection that provides due process for individuals who claim that they have been wrongly denied benefits. This procedural protection, however, cannot confer [T]itle IV-E benefits without legal support or basis." *Id.* at 17.

The "legal support or basis" the superior court found upon review of the whole record was, "Respondents were well aware of C[.]W[.]'s special needs prior to adoption, as C[.]W[.] received Medicaid from birth until shortly after the finalization of his adoption." DSS, along with CHS, were privy to all of C.W.'s family and medical history, diagnoses at birth, tests, evaluations, and prognoses from his birth for over six months until the adoption was finalized. Respondents possessed exclusive and specialized knowledge and skills, which they failed to share with Petitioners.

V. Conclusion

Our common sense of transparency and fairness is violated when the "ball is hidden" or by failure to speak when a duty to speak exists. While acts of omission may not be regarded as culpable as affirmative or willful acts of commission, adoption is not like an AS-IS; WHERE-IS, WITH ALL FAULTS commercial transaction.

This duty to disclose is particularly relevant in infants, as here, where critical needs, risks, and prognosis must be shared to allow the adoptive parents to plan to meet both known or likely needs. This "affirmative duty" to disclose is reinforced by Federal and State policies to assist and supplement orphaned or abandoned children with known special needs to promote adoptions and cease or reduce them being public charges.

To fully assess and plan for future needs, prospective adoptive parents must be provided with known medical, mental, physical needs, and prognoses, and of the availability of public assistance to fulfill these special needs. The superior court correctly found and concluded public and private agencies involved in these adoption processes owe an "affirmative duty" to use their knowledge and expertise and to share the information they have gained and the potential availability of means to defray costs and accomplish identified special needs.

The superior court reviewed the whole record and found: "Respondents were well aware of C[.]W[.]'s special needs prior to adoption, as C[.]W[.] received Medicaid from birth until shortly after the finalization of his adoption," and that "C[.]W[.] would have been eligible to receive adoption assistance as of December 2014, and . . . it is clear that C[.]W[.] is still currently eligible to receive adoption assistance."

These properly supported findings from the whole record support the superior court's conclusion that "Petitioners are entitled to receive adoption assistance both from the date of this Order, and retroactive assistance to December 23, 2014[.]" The superior court's order also remanded the matter "to Respondents for a determination of the amount of adoption assistance to which Petitioners are entitled" and for the execution of "all necessary documents in order for Petitioners to receive adoption assistance retroactive to December 23, 2014 and continuing thereafter as long as C[.]W[.] meets eligibility requirements[.]" The court in its discretion also properly found and awarded Petitioners reimbursement of $10,750.00 in attorney's fees as the prevailing party.

CHS and DSS failed to carry their burden to show error and prejudice in the superior court's order. The order is properly affirmed. I respectfully dissent.

WILSON RATLEDGE, PLLC, Plaintiff
v.
JJJ FAMILY, LP, a Nevada Limited Partnership, and LOFTIN ENTERPRISES, LLC, General Partner of JJJ FAMILY, LP, Defendants

No. COA23-959

Filed 7 May 2024

1. Jurisdiction—personal—general—minimum contacts—nonresident business entities—continuous and systematic contacts

In an action for breach of contract and related claims brought by a North Carolina law firm against nonresident business entities (defendants), the trial court did not err in concluding that it had general jurisdiction over defendants where its findings of fact—including that the employee who for years managed defendants' transactions and finances worked remotely from her home in North Carolina and that defendants filed taxes, received mail, and stored business records in North Carolina—demonstrated defendants'

continuous and systematic contacts with this state. Having purposefully availed themselves of the privilege of conducting activities in North Carolina, defendants' constitutional due process rights were not violated by the court's exercise of jurisdiction.

2. Jurisdiction—personal—specific—minimum contacts—nonresident business entities—contract with North Carolina law firm

In an action for breach of contract and related claims brought by a North Carolina law firm against nonresident business entities (defendants), the trial court did not err in concluding that it had specific jurisdiction over defendants where its findings of fact—including that the parties contracted via an engagement letter drafted, accepted, and executed in this state for legal services by a North Carolina law firm, governed by the laws of this state, with substantial legal work performed in this state, and payment made to plaintiff in this state—demonstrated that the action arose out of defendants' contacts with North Carolina. In light of those sufficient minimum contacts with North Carolina, defendants' constitutional due process rights were not violated by the court's exercise of jurisdiction.

Appeal by defendants from order entered 14 July 2023 by Judge John W. Smith in Superior Court, Wake County. Heard in the Court of Appeals 3 April 2024.

Smith, Anderson, Blount, Dorsett, Mitchell, & Jernigan, LLP, by John E. Harris and J. Mitchell Armbruster, for defendant-appellants.

Bailey & Dixon, LLP, by David S. Coats, for plaintiff-appellee.

ARROWOOD, Judge.

JJJ Family, LP ("JJJ Family") and Loftin Enterprises, LLC ("Loftin Enterprises") (together, "defendants") appeal from the trial court's order denying their motion to dismiss for lack of personal jurisdiction. Defendants contend the trial court erred in concluding it had specific and general jurisdiction over them. We affirm the trial court's order.

I. Background

Peter Loftin ("decedent") was from North Carolina and oversaw two businesses, the defendant companies, as part of a larger structure to

manage his business assets and interests. JJJ Family is a Nevada limited partnership, and Loftin Enterprises is a Delaware limited liability company. Loftin Enterprises is the General Partner of JJJ Family, and both defendants maintain offices in Florida. Decedent controlled both defendant companies, and he employed Ms. Amy Usrey ("Usrey") as his assistant. Usrey managed both defendant companies from Johnston County, North Carolina, including the day-to-day management of JJJ Family.

Thomas J. Wilson ("Wilson") is a founding member of the law firm Wilson Ratledge, PLLC ("plaintiff"), and plaintiff and Wilson began representing decedent as legal counsel in the early 2000s. Plaintiff is a North Carolina law firm with its primary office in Raleigh, North Carolina and an office in Florida. Plaintiff and Wilson represented decedent in tax, business, and estate matters. Decedent passed away on 16 November 2019. Decedent's will appointed Wilson as the personal representative of his estate probated in Florida, making him the controlling authority for defendant companies.

On 14 February 2020, Wilson hired plaintiff, his own law firm, to represent defendants. The parties signed an engagement letter providing that plaintiff would represent defendants "as needed and requested and accepted by us from time to time, initially with respect to all business matters relating to the Limited Partnership, its affiliates and Partners . . . ." Wilson signed the engagement letter on behalf of defendants.

A dispute arose between Wilson and decedent's children regarding Wilson's administration as personal representative of the Florida Estate. On 28 January 2022, Wilson and decedent's children entered into an agreement ("the Side Agreement") appointing Jorian Loftin as co-personal representative of the estate. The Side Agreement provided that Wilson and plaintiff "may each seek payment of attorney's fees and costs for its representation of [Wilson] in the Probate Administration and Adversary Case . . . ." The Side Agreement further provided under the "Governing Law" section that the agreement "shall be governed by and construed in accordance with the laws of the State of Florida," and under the "Entire Agreement" provision, that the agreement "supersedes all prior and contemporaneous agreements . . . of the parties." Plaintiff law firm signed the agreement.

On 13 February 2023, plaintiff filed suit against defendants alleging breach of contract, quantum meruit in the alternative, and tortious interference with contract. Plaintiff sought sums owed for legal representation pursuant to the engagement letter. Defendants filed a motion to dismiss for lack of personal jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2).

On 26 June 2023, a hearing on the motion was held in Superior Court, Wake County. The trial court entered an order denying the motion on 14 July 2023. The trial court concluded that

> 3. At the time this action was instituted, Defendants were engaged in substantial activities within North Carolina. . . .
>
> 4. Personal jurisdiction over this action and both of the Defendants is authorized by N.C.G.S. § 1-75.4.
>
> 5. This action arises out of Defendants' contacts with North Carolina and Defendants had fair warning that they may be sued in North Carolina for services performed under the Contract.
>
> 6. Moreover, Defendants both have sufficient contacts with North Carolina.
>
> 7. The Contract also has a substantial connection with North Carolina.
>
> 8. North Carolina properly has specific jurisdiction over both of the Defendants.
>
> 9. North Carolina also properly has general jurisdiction over both of the Defendants.
>
> 10. The exercise of personal jurisdiction over this action and both of these Defendants does not violate the Due Process clause of the United States Constitution.

Defendants filed timely notice of appeal 28 July 2023.

II. Discussion

On appeal, defendants argue that the trial court erred in concluding it had personal jurisdiction over defendants. For the following reasons, we affirm the trial court's order.

As a preliminary matter, we note defendants' appeal from a denial of a motion to dismiss for lack of jurisdiction is interlocutory. However, "[t]he denial of a motion to dismiss for lack of jurisdiction is immediately appealable." *Cambridge Homes of N.C., LP v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 410 (2008) (citations omitted); N.C.G.S. § 1-277(b) (2023).

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Cambridge Homes of N.C., LP*, 194 N.C. App. at 410

(citation omitted). Moreover, "if the trial court's findings of fact resolving the defendant's jurisdictional challenge are not assigned as error, the court's findings are presumed to be correct." *Brown v. Refuel America, Inc.*, 186 N.C. App. 631, 634 (2007) (cleaned up). We review whether the trial court's findings of fact support its conclusions of law de novo. *Nat'l Util. Rev., LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303 (2009) (citation omitted).

Our analysis of personal jurisdiction is two-fold. "First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state's long-arm statute. Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Skinner v. Preferred Credit*, 361 N.C. 114, 119 (2006) (citations omitted). Defendants do not challenge that the long-arm statute authorizes jurisdiction here. Thus, the sole issue is whether the trial court's exercise of jurisdiction violated due process.

"To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 695 (2005) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "The factors used in determining the existence of minimum contacts include (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 145 (1999) (cleaned up).

There are two bases for finding sufficient minimum contacts: specific jurisdiction and general jurisdiction. *Banc of Am. Sec. LLC*, 169 N.C. App. at 696. We discuss each in turn below.

A. General Jurisdiction

[1] Defendants contend that the trial court erred in its determination that it had general jurisdiction over defendants. We disagree.

General jurisdiction over a defendant exists "even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state." *Replacements, Ltd.*, 133 N.C. App. at 145 (citations omitted). Defendants "must engage in acts by which they purposefully avail themselves of the privilege of conducting activities within

the forum State." *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279 (2007) (cleaned up).

In *Schaeffer v. SingleCare Holdings, LLC*, our Supreme Court held that a business with an employee working remotely in North Carolina purposely availed itself in the state. 384 N.C. 102, 112 (2023). The corporate defendant in that case paid state taxes, mailed tax documents to the plaintiff's North Carolina address, and paid him in the state. *Id.* at 111. The company contacted the plaintiff frequently and supported his work in North Carolina, and because of its contacts, the Supreme Court reasoned that the business "voluntarily and knowingly engaged with a North Carolina-based employee" and was thus subject to personal jurisdiction in the state. *Id.* at 112.

Defendants do not challenge any of the facts relevant to the court's determination of general jurisdiction. In its order, the trial court found:

> 6. The Decedent was born and raised in North Carolina and developed a substantial business in North Carolina.
>
> . . . .
>
> 12. Ms. Amy Usrey, who was the Decedent's long-time assistant, is a citizen and resident of Johnston County, North Carolina.
>
> 13. Ms. Usrey managed both Defendants JJJ and Loftin Enterprises from North Carolina.
>
> 14. Ms. Usrey has been a Manager of Defendant Loftin Enterprises since 2012, has controlling signatory authority for Defendant JJJ, and is responsible for the ultimate day-to-day management of JJJ.
>
> 15. The tax returns for both Defendants have been prepared by their accountant in North Carolina and North Carolina has been listed as their address on their tax returns.
>
> 16. Both Defendants maintained post office box mailing addresses in North Carolina.
>
> 17. Defendant Loftin Enterprises maintains a storage unit in North Carolina for their business records.

These findings are presumed to be correct, and the question becomes whether they support the court's conclusion that general jurisdiction can be exercised over defendants.

We hold these findings are sufficient to establish general jurisdiction over defendants. Like the employee in *Schaeffer*, Usrey worked for both defendant companies remotely from her home in North Carolina. Both defendants conducted business in North Carolina through Usrey, who was responsible for daily tasks such as engaging in transactions and managing finances for both defendants. Similar to the company in *Schaeffer*, defendants filed taxes and received returns in North Carolina, received mail in North Carolina, and stored business records in North Carolina. The management of defendants' businesses in North Carolina evidence their "continuous and systematic" contacts with this state, and the trial court did not err in concluding it had general jurisdiction over defendants.

B. Specific Jurisdiction

[2] Defendants next argue that the trial court erred in concluding that it had specific jurisdiction over defendants. We disagree.

Specific jurisdiction over a defendant arises out of the defendant's contacts with the forum state. *Beem USA Limited-Liability Ltd. P'ship v. Grax Consulting, LLC*, 373 N.C. 297, 303 (2020) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). "While a contractual relationship between an out-of-state defendant and a North Carolina resident is not dispositive of whether minimum contacts exists, a single contract may be a sufficient basis for the exercise of specific personal jurisdiction if it has a substantial connection with this State." *Hundley v. AutoMoney, Inc.*, 284 N.C. App. 378, 384 (2022) (citations and internal quotation marks omitted).

The trial court found, and defendants do not contest:

> 7. The Contract pertained to legal services provided by Plaintiff to Defendants for non-probate matters.
>
> 8. Thomas Wilson was authorized by Defendant JJJ to enter into the Contract.
>
> 9. The Contract was drafted in North Carolina, was accepted in North Carolina, was executed in North Carolina, and required the payment of fees to [plaintiff] in North Carolina.
>
> 10. The Contract also specifies that the agreement "shall be governed and construed in accordance with the laws if the State of North Carolina" and in numerous provisions cites to the applicability of certain North Carolina State Bar

> rules and North Carolina Bar Association requirements.
>
> 11. All invoices from [plaintiff] involved substantial legal work performed by [plaintiff] in North Carolina.
>
> . . . .
>
> 19. The invoices under the Contract were generated in and transmitted from North Carolina by [plaintiff] and payment was to be made to [plaintiff] in North Carolina.

The only finding of fact defendants challenge on appeal is that plaintiff was not a party to the Side Agreement. Specifically, defendants challenge the following finding:

> 18. Counsel for Defendants during the hearing handed up a "Side Agreement" dated January 28, 2022, between Thomas Wilson as personal representative of the Decedent's Estate, Jorian Loftin – the Decedent's son, and Kairee Hall as guardian for Decedent's other sons – Jett Loftin and Jagger Loftin. Neither [Wilson Ratledge], JJJ, or Loftin Enterprises are parties to the Side Agreement.

Defendants argue that because plaintiff signed the Side Agreement, they were a party to the agreement and thus were bound by the governing law and entire agreement provisions. This argument is without merit—on the first page of the Side Agreement, the document states that "WILSON, JORIAN, JETT, and JAGGER shall each be referred to hereunder as a 'party' or collectively, the 'parties.' Counsel for the parties are identified at the end of this Agreement." On its face, the Side Agreement identifies the parties to the agreement, and this designation does not include plaintiff or defendants as parties. Therefore, the trial court's finding that plaintiff was not a party to the agreement was correct.

Given that plaintiff and defendants contracted in North Carolina for plaintiff's legal representation, defendants were on notice that they could be sued in North Carolina. The trial court found that the engagement letter was drafted, accepted, and executed in North Carolina and was for legal services provided by a North Carolina law firm. The terms and conditions provided that the engagement letter and terms would be governed by North Carolina law and referred to North Carolina State Bar rules and requirements. The trial court also found that all of plaintiff's invoices "involved substantial legal work performed by [plaintiff] in North Carolina" and required payment to plaintiff in North Carolina. These uncontested findings support the trial court's conclusion that this action arose out of defendants' contacts with North Carolina, and the

trial court did not err in determining it had specific jurisdiction over defendants. *See Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 618–19 (2000) (holding personal jurisdiction existed where defendant owned and leased real property and North Carolina had an interest in adjudicating a case involving a resident arising from a contract for the resident's services); *see also A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 260–61 (2006) ("Here, the only contacts are telephone calls and a few proposed contracts, one sent by Haire. Defendants never entered into a contract with A.R. Haire, Inc. either in or out of the State of North Carolina.").

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges WOOD and FLOOD concur.

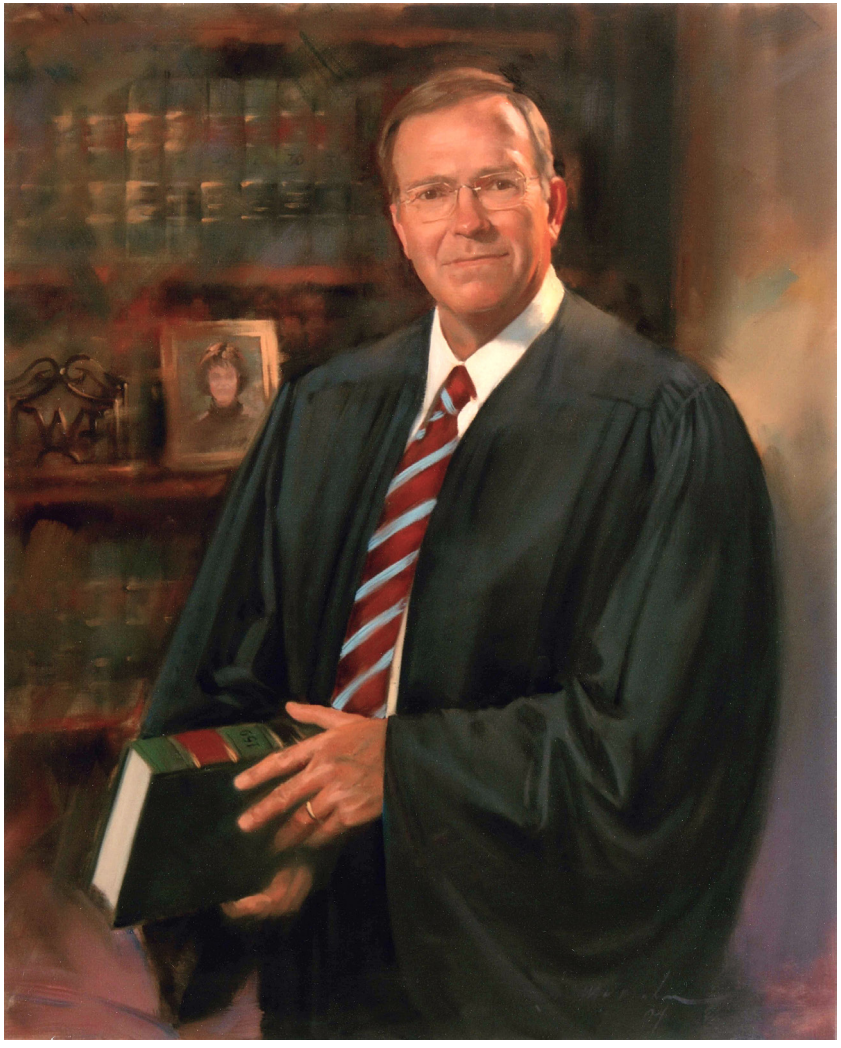
CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 MAY 2024)

ARNOLD v. SWEYER & ASSOCS., INC. No. 23-640	Brunswick (19CVS1911)	Affirmed.
BLACKMON v. BLACKMON No. 23-538	Pitt (20CVD2234)	Vacated and Remanded
DIMUZIO v. DIMUZIO No. 23-494	Columbus (18CVD1519)	Affirmed
HANSON v. MARTEN TRANSP., LTD. No. 23-843	N.C. Industrial Commission (20-747132)	Affirmed.
HURD v. PRIORITY AUTO. HUNTERSVILLE, INC. No. 23-1104	Mecklenburg (19CVD12741)	Reversed and Remanded
IN RE A.F.L. No. 23-1059	Montgomery (21JT11) (21JT12)	DISMISSED in part, and AFFIRMED in part.
IN RE C.D.G. No. 23-894	Wake (15JT120) (15JT122)	Affirmed
IN RE M.K.P-C. No. 23-1075	Lincoln (22JT5)	Reversed
IN RE Z.M. No. 23-829	Alleghany (22JA11) (22JA12) (22JA13)	Affirmed
IN RE Z.S. No. 23-850	Forsyth (22JA84) (22JA86)	Affirmed
JONES v. CORN No. 23-935	Henderson (19CVS1447)	Affirmed
KENT v. JOHNSON No. 22-1060	Guilford (20CVD7835)	Affirmed
KUSTOM U.S., INC. v. BRYANT No. 23-370	Onslow (20CVS2015)	Affirmed
NORMAN v. ALLSTATE INS. CO. No. 23-1111	Davidson (23CVS712)	Affirmed

STATE v. AFZAL No. 23-800	Wake (21CRS210926) (21CRS210927)	Vacated in part and remanded.
STATE v. ALLEN No. 23-831	Edgecombe (21CRS52225)	No Error
STATE v. ANDERSON No. 23-169	Guilford (20CRS26090-92)	No Error
STATE v. AROLD No. 23-1076	Transylvania (22CRS50078)	Dismissed
STATE v. BEST No. 22-856	Sampson (18CRS52520)	No Error
STATE v. BULLOCK No. 23-818	Guilford (21CRS79038-40)	No Error.
STATE v. CARPENTER No. 23-867	Mitchell (21CRS50241)	Remanded.
STATE v. CHINNAS No. 23-706	Guilford (20CRS88040)	No Error.
STATE v. EL No. 23-745	Mecklenburg (19CRS204328) (19CRS24814)	No Error
STATE v. FRANK No. 23-695	Bladen (21CRS272-278)	No Error in Part, Remanded in Part.
STATE v. FRASER No. 23-670	Craven (20CRS51140) (21CRS626)	No Error
STATE v. GLENDENING No. 23-366	Pender (21CRS50088)	No Error
STATE v. GREER No. 23-926	Catawba (22CRS2595) (23CRS242172)	No Error
STATE v. GRICE No. 23-1058	Brunswick (20CRS52906) (20CRS54860) (22CRS918-922)	Remanded
STATE v. HAMMOND No. 23-1118	Onslow (21CRS769) (21CRS776)	NO ERROR in part, and REMANDED in part.

STATE v. HEMINGWAY No. 23-275	Columbus (13CRS50656)	Affirmed
STATE v. HILL No. 23-910	Cabarrus (20CRS53548)	Remanded
STATE v. JACKSON No. 23-1054	Pitt (22CRS265533)	No Error
STATE v. KELLIHER No. 23-691	Cumberland (01CRS59934)	Vacated and Remanded
STATE v. KUERS No. 23-486	Pitt (18CRS54622)	No Error
STATE v. O'BUCKLEY No. 23-1034	McDowell (19CRS51908) (20CRS26) (20CRS28-29)	No Error
STATE v. SAUNDERS No. 23-916	Vance (17CRS53719)	No Error
STATE v. SHEPARD No. 23-824	Martin (19CRS216)	No Plain Error
STATE v. SMITH No. 22-621	Davie (13CRS50876)	Affirmed
STATE v. SPEIGHT No. 23-815	Beaufort (21CRS51209) (21CRS51220)	No Error
STATE v. WHITAKER No. 23-569	Randolph (21CRS50076)	No Plain Error
STATE v. WYNNE No. 23-586	Martin (20CRS50450)	No Error
WILLIAMS v. N.C. DEP'T OF ADULT CORR. No. 23-876	N.C. Industrial Commission (TA-27245)	Affirmed



PRESENTATION OF THE PORTRAIT
of

John C. Martin

Judge
North Carolina Court *of* Appeals
1985-1988, 1992-2004

Chief Judge
North Carolina Court *of* Appeals
2004-2014

11:00 A.M.
FRIDAY, MAY 26, 2023

NORTH CAROLINA COURT OF APPEALS COURTROOM
RALEIGH, NORTH CAROLINA

John C. Martin
Chief Judge
North Carolina Court of Appeals

JOHN CHARLES MARTIN was born in Durham, North Carolina on November 9, 1943. He received his B.A. (1965) and J.D. (1967) from Wake Forest University. He was admitted to the North Carolina State Bar in 1967. From 1967 until 1969, he served in the U.S. Army Military Police Corps as a first lieutenant, and then entered the private practice of law in Durham. He also served as a member of the Durham City Council.

In December 1977, he became a judge of the Superior Court and served until November 1984, when he was elected to the Court of Appeals. He served on the Court until January 1988, when he resigned to re-enter private practice in Durham. He was again elected to the Court of Appeals in November 1992. He was re-elected for a second full term in November 2000. In February 2004, Chief Justice I. Beverly Lake, Jr. appointed him Chief Judge of the Court of Appeals. He was re-elected without opposition to a third term in 2008. He served as Chief Judge for ten years, retiring from the Court in 2014.

During his service on the Court, Chief Judge Martin served as Chairman of the North Carolina Judicial Standards Commission from 2001 to 2013, and as a member of the Chief Justice's Commission on Professionalism from 2004 to 2014. He was elected President of the Council of Chief Judges of the State Courts of Appeal in 2013 and was named to the CCJSCA Hall of Fame in 2021. In 2013, Chief Judge Martin was awarded the John J. Parker Award, the highest honor bestowed by the North Carolina Bar Association, in recognition of his service to the cause of jurisprudence in North Carolina.

Chief Judge Martin is a member of Christ Episcopal Church in Raleigh and has served on multiple committees and as a member of its vestry. Chief Judge Martin is married to Margaret Rand Martin; they are the proud parents of five children and proud grandparents of nine grandchildren.

Sounding of the Gavel

Welcoming Remarks by Chief Judge Donna S. Stroud

Speakers

JOHN H. CONNELL

JOHN R. WESTER

Unveiling of the Portrait

Acceptance of the Portrait by the Court

Adjourn to the Reception

Portrait Artist
Jamie Lee McMahan

Jamie Lee McMahan is a nationally acclaimed portrait artist who lives in Shelby County, TN. He has painted the portraits of a wide range of subjects, including U.S. Senators, governors, judges, university presidents and others, including Alex Haley, the author of Roots. More background on Mr. McMahan and examples of his works can be found at www.jamiemcmahan.com.

OPENING REMARKS

BY

CHIEF JUDGE DONNA STROUD

I am pleased to welcome each of you to this special ceremonial session of the North Carolina Court of Appeals in which we honor the service on this Court of Judge and Chief Judge John Martin. The tradition of the presentation of portraits of former Chief Judges of this Court goes back to the beginning of this Court. The Court was established in 1967, and the first Chief Judge, Raymond Mallard, served until 1973. His portrait was presented to this Court in 1981 – his is behind the bench on my left and your right, and the portraits continue in chronological order around the Courtroom. We are honored to continue this tradition with the addition of the portrait of the Court's 8th Chief Judge, John Martin. This ceremony and presentation allows us to remember an important part of our history and to honor the service of a valued member of our court family.

I extend a special welcome to our former Chief Judge John Martin, his wife, Margaret, and their children and grandchildren, as we accept their gracious donation of the portrait of Chief Judge Martin.

We are also pleased to welcome many current and former justices and judges here with us today, including many who served with Chief Judge Martin here at the Court:

<u>From our Supreme Court:</u>

- Justice Trey Allen, III
- Former Chief Justice Sarah Parker
- Former Justices Patricia Timmons-Goodson, Robin Hudson, and Sam Ervin, IV

<u>From the Court of Appeals:</u>

- Former Chief Judge Linda McGee
- Former Judges of the Court of Appeals —

  John Lewis

  Ralph Walker

  Wanda Bryant

  Richard Elmore

Sanford Steelman

Alan Thornburg

Linda Stephens, and

Robert Hunter

- Former Clerk of the Court of Appeals Dan Horne

And we welcome other judges (who started out their legal careers as research assistants for Judge Martin):

- District Court Judge Christy Wilhelm
- Tamara Ashford, Judge of the U.S. Tax Court

On behalf of the Court and Chief Judge Martin and his family, thank you all for being here to mark this special occasion. We also welcome everyone joining us today virtually on YouTube. It is an honor to have everyone here to celebrate with us today.

Chief Judge Martin has invited two very well-qualified people to speak on his behalf. I will first recognize our former Clerk of the Court of Appeals, John Connell, to speak. Mr. Connell first came to the Court of Appeals as assistant clerk in 1986 and began serving as Clerk in 1993, until his retirement in 2015. With nearly 30 years of service to this Court, including all of Judge Martin's years on the Court, he is well-qualified to speak on this occasion.

REMARKS

BY

JOHN H. CONNELL

Chief Judge Stroud, Associate Judges, Mr. Clerk & Distinguished Guests,

We are gathered to honor one of this state's finest judges.

It is a privilege and an honor to be here today in the Court where I spent my entire professional career on behalf of a man whom I admire as much as anyone I have ever know and am blessed to call my friend.

I am pleased to share the podium with Charlotte's own John R. Wester, a dear friend as well, and one of the finest attorneys this state has ever produced. My one condition for agreeing to do this was that I not have to follow Buddy.

John C. Martin was born and raised in Durham, the fifth of six children born to Chester B. Martin and Mary Blackwell Pridgen Martin. Graduating from Durham High, he entered Wake Forest University where he earned both his B.A. and his J.D. You will never meet someone more proud of and devoted to his alma mater than this Double Deacon.

Armed with his law license, Martin served 2 years as a 1st Lt. in the United States Army with the Military Police Corp. at Fort Riley, Kansas.

In 1969 he returned to his hometown where he joined the firm of Haywood, Denny & Miller. While there he was elected to the Durham City Council in 1975 and was Durham's Outstanding Young Man of the Year in 1976. The following year Governor Hunt appointed him to the Superior Court. Over the next 7 years Judge Martin heard cases in more than 50 counties and became recognized as one of the best judges on the trial bench. More than once Chief Justice Joseph Branch requested that he preside over politically sensitive cases throughout the state. Loving his work as a trial judge, he was torn when approached to run for a seat on this Court, to which he was elected in 1984.

I met Judge Martin when I arrived at the Court as its Assistant Clerk in 1986. He was the third most junior judge, just behind future Chief Judge Sid Eagles and ahead of eventual Chief Justice Sarah Parker. Not long thereafter he made another difficult career choice. As a single father raising 3 daughters, he left the Court in 1988 to return to private practice and its greater earning prospects. However, his devotion to public service and his desire to return to the bench proved irresistible, and in 1992 he was again elected to this Court to succeed Chief Judge

Robert Hedrick, thus becoming the first judge to serve non-consecutive terms on the Court of Appeals.

Judge Martin remained at the Court for the next 21 years until his retirement in 2014. Within these walls he forged a legacy as one of the best and most influential judges ever to sit on this bench, or any in our state's history.

The following words, written by a former colleague of his on the Court, speak to Judge Martin's judicial temperament:

> I appeared a number of times before panels on which Judge Martin sat. Never in my experience did Judge Martin treat the lawyers who argued before him with anything but the utmost respect. Not once did Judge Martin seem impatient or bored or unconcerned. He asked thoughtful questions and let the lawyers fully present their argument. The opinions he authored were always well-reasoned, so that even on the losing side, I knew exactly why, under the law, my arguments failed.

The primary duty of Court of Appeals judges is to decide the cases that come before them. Over the course of his tenure, Judge Martin authored over 2000 opinions and participated in deciding another 4000 cases. The sheer volume tells its own story, but the hallmark of his opinions is their quality and soundness as legal precedent. John Martin's body of work in this regard alone would make for a remarkable, distinguished career. Today, however, I want to speak of his leadership as Chief Judge that will always set him apart.

In February 2004, Chief Justice I. Beverly Lake, Jr. designated John Martin as Chief Judge of the Court of Appeals. It is telling, and merits emphasis, that his first act in his new role was to procure a long overdue pay raise for the deputy clerks in the clerk's office and for the print shop staff.

Chief Judge Martin was fiercely determined that litigants in the court receive prompt, reasoned decisions. He was constant in reminding all court personnel, including his fellow judges, that the cases belong to the parties, not to the court. "It is their case, it is their lives," he said, "and we owe it to them to get it done right and to get it done fast." The Chief led the effort to cut by nearly one-half the time between the docketing of a case and the issuance of an opinion. He mandated a 90-day limit for opinions to be filed from their calendar date, periodically sending to the entire court a list of cases that had missed the deadline. When a fellow judge explained that the reason for his delay in deciding a case was its complexity, Judge Martin told him, "well, it's not going to get any

easier just sitting there." By 2011, the average length of a case's time in the Court dropped from well over a year to under 7 months – the fastest resolution rate in its history.

Impressive under any circumstances, we must remember that the Court achieved its record disposition rate while undergoing a massive renovation. I lived through this combination, I submit this combination is nothing short of amazing. Beginning in 2008, Judge Martin guided the nineteen-month overhaul of its 1914 courthouse building. The courtroom in which we meet today had been restored to its original grandeur in 1997 thanks largely to the efforts and persistence of Chief Judge Arnold. As important as was that restoration, the rest of the building was in severe need of attention. I served on the committee chaired by Judge Martin that was charged with overseeing the project, including the logistical challenge of relocating the Court, its contents and its more than 100 inhabitants. I can tell you that there was no detail – not one – that escaped his attention and no aspect of the finished project that doesn't have his fingerprints on it. At the rededication of the building in 2010 the Chief noted that the goal of the renovation was to, "marry the historical attributes of this beautiful old building with the efficiency and utility of a modern office building." He made it happen.

In 2013 Judge Martin received the Parker Award, the highest honor bestowed by the North Carolina Bar Association – and not bestowed every year – at its annual convention. In his presenting remarks, President Martin Brinkley, now Dean of the UNC School of Law, said that "it would be fitting for the State to erect a bronze entablature outside the courtroom in John's honor. The inscription could be that used for the tomb of Sir Christopher Wren, the architect of St. Paul's Cathedral, in the cathedral crypt: 'If you would see my monument, look around.' "

In a handwritten letter, the architect of the Court's renovation told Judge Martin: "You must know by now that you were the indispensable person on this project. Your character, leadership, candor and good humor kept the design team inspired and motivated to do our best work." The Court's architect speaks for all of us who were privileged to work at the Court of Appeals during the time in which John Martin was its Chief Judge.

Even after becoming Chief Judge he continued to serve as Chairman of the Judicial Standards Commission, remaining to this day the longest to carry that duty. Judge Martin believed this service was the most important work he did. He held that view – holds that view – because preserving our judges' standards lies at the heart of the bench's obligation to regulate itself and to ensure its own integrity.

A writer once said that "private lives are more important than public reputations." John Martin has created a personal life that is even richer and more admirable than what he accomplished in the public realm. Both aspects of his life deserve our attention on this day.

The most personal facet of any life is the family. John Martin's personal life tells the story of a man who has been a role model in every family role he has filled. Let's start with "husband" because it's hard to think about him without thinking of Margaret – his steadfast companion for the past 30 years. I have never seen two people more devoted to each other than the John and Margaret Martins. Margaret Rand Martin is a successful attorney in her own right and as devout a Carolina fan as he is Wake Forest, making William Faulkner's point that we love despite . . . not because. Together they share 5 children and their 4 spouses, one child's fiancé and 9 grandchildren, whom they take individually on a trip to New York City. At their homes in Raleigh and Wrightsville Beach they host reunions and holiday gatherings during which John showcases the cooking prowess that won him the $10 First Prize at the North Carolina State Fair for his blue-ribbon blueberry muffins.

John Martin is as good and true a friend as he is a family man. And not just in good times. He is the first to visit a sick friend and to comfort a troubled one, no matter how hard or inconvenient it is for him personally. I am certain that I am not the only person whom Judge Martin has helped through a dark chapter with comforting words or sage advice. He never forgets a birthday. He practices the lost art of the handwritten letter. He is, in all the best possible ways, old school.

Finally and most importantly, John Martin attends the human family. Grateful for how fortunate he has been, he gives generously of his talent and his treasure to those less so. For years at Christmas I have rung the Salvation Army bell with him on behalf of our Rotary Club, often in the cold and the rain . . . the last several years while he was undergoing treatment for a serious illness. For years he and Margaret tutored underprivileged children at Hope Charter School. He has served his church, Christ Episcopal, in a number of capacities, including 3 years on its vestry. Jim Adams is the rector of Christ Church and someone the Chief greatly admires. I had the occasion recently to talk to him about Judge Martin and I'm going to give Reverend Adams the final word. He said, "I don't know a finer human being than John Martin. He and Margaret are absolute pillars of the church and they are loved beyond words."

Madam Chief Judge and Judges of the Court of Appeals, I will always count as an honor my time in this courtroom today. Deferring for now the bronze entablature that Dean Brinkley imagined, Judge Martin's portrait will remind us of his innumerable contributions and enduring legacy. How grateful we are for him.

RECOGNITION OF
JOHN R. WESTER
BY
CHIEF JUDGE DONNA STROUD

We are also fortunate to have Chief Judge Martin's friend and former president of the North Carolina Bar Association, John Wester, of Robinson, Bradshaw and Hinson, here to make some remarks.

REMARKS
BY
JOHN R. WESTER

A review of the life and career of Chief Judge John Martin, even at the high altitude John Connell shares it this morning, moves me for the depth of his abiding commitment to serving our profession and our state.

As I take in this room, I consider the millions of North Carolina citizens who have never entered this building – and never will, yet they are the direct beneficiaries of John Martin's service to our state – in this building – and beyond.

Today I learned with you that, in his seven years on the trial bench – chosen by the Chief Justice to do so – he travelled to more than half our state's counties – to hold court there. This gives special meaning to the phrase, "he was doing so much, so well – out in the fields."

I was gratified to learn with you that when Judge Martin became chief judge of this court, he *turned first* to securing better wages for the print shop staff, and for the deputy clerks. It is his second nature to recognize those who are essential to assuring the wheels of our judicial system turn on time and to assuring fair treatment to those who turn them.

My first crossing Judge Martin's path – away from arguments in this courtroom – was our service together on the North Carolina Bar Association's committee for judicial independence.

From the beginning of our time together, I took in *his conviction* that our founding fathers put judicial independence in the center of their vision for a new democracy.

Judge Martin holds – and has lived – the conviction that an independent judiciary is not on automatic pilot – especially in a state where we elect judges – and especially when we do so on partisan ballots.

Central to judicial independence is *the command* of constant vigilance to protect it. John Martin has lived that vigilance.

I have heard from more than one judge whom he counseled with this advice: "Yes, you belong to a political party, so do I – but you must leave behind your political ties as you hear every case. We are bound by our oath and our conscience to decide every case – every case – without fear or favor."

Judge Martin put his example of judicial independence behind what he asked of every judge with whom he served.

As I reflect on his service our honoring him today, the sentiment that returns to me most often is one of Thanksgiving.

However fine his portrait – and all of us are grateful for it – when we think of him – however far we are from seeing his face – we can *hold onto* our Thanksgiving for him.

Dean Martin Brinkley, and today John Connell, brought to mind the inscription that Sir Christopher Wren suggested for remembering all he had designed. I presume just enough to call on another Englishman, William Shakespeare, for an adaptation of the address Henry V made to his forces at Agincourt in 1415, before a momentous battle during the 100 Years War.

From this day, to the ending of our days, but we in it shall remember – we few, we happy few, we band of brothers and sisters – for he and she who join with me on John Martin Dedication Day will be my brother and sister.

Be we ne'er so burdened, this day will gentle our condition – and friends and loved ones far away shall think themselves accursed they were not here – and *will count on us* to share with them our memories dear –

Our cherished memories of John Martin Dedication Day.

Madam Chief Judge, associate judges, the Martin family – thank you for this high honor.

May God bless you, and all of us.

ACCEPTANCE OF CHIEF JUDGE MARTIN'S PORTRAIT
BY
CHIEF JUDGE STROUD

Chief Judge Martin, on behalf of the Court and in accord with the Resolution adopted by this Court, we accept your gift with gratitude, and we will be proud to display it in our courtroom. As you can see, we have a blank spot on our wall here in the Courtroom, ready to display this gift.

Before we close, I would like to share a few thoughts regarding Chief Judge Martin also.

In May of 2013, after I had served on this Court for about 6 years with Judge Martin as Chief Judge, I was attending the LLM program for Judicial Studies at Duke Law School, and some of the judges in the program were asked to do articles about judges they admired for a series called "The Storied Third Branch." I did an article about Chief Judge Martin, and I believe it is appropriate for me to share a bit of that article today as we honor him. I will not read the whole thing but I would like to highlight some portions.

I began my article by noting Judge Martin's background and experience and many contributions to judicial education and public service. You have already heard about these today, so I will not repeat that part. I then addressed some of his work in improving this court. I wrote –

> As Chief Judge, Judge Martin has been instrumental in improving the Court in nearly every way. The Court's physical workplace has been improved by his oversight of the complete renovation of the 1913 Court of Appeals Building, coordinating the work of architects, construction experts, and the State Construction Office, a process which took many years and has resulted in a building which retains its historical grandeur but provides a modern and efficient workplace. But the less tangible work, which he has done in the Court of Appeals building, is even more impressive.
>
> . . . .
>
> . . . Judge Martin has indeed earned the respect and admiration of all of us on the Court of Appeals and has, by his leadership, administrative skills, encouragement, and sometimes a bit of nagging, increased both the collegiality and the productivity of this Court to a very high level.

> You need not take just my admittedly biased word as to Judge Martin's accomplishments as Chief Judge. I would offer as evidence an article published in The Journal of Appellate Practice and Process entitled *Seeking Best Practices among Intermediate Courts of Appeal: A Nascent Journey.* [Published in Spring 2007.] This article compares the procedures, efficiency, and productivity of the intermediate appellate courts of 13 states with similar court structures and finds that North Carolina is one of the most efficient and productive intermediate appellate courts in the country [despite ranking close to the bottom in judicial salaries]. The analysis was based on information from 2005, and I believe that our statistics have only improved since then. . . .

I then discussed some of the potential factors which may have contributed to our court's high rankings in efficiency and productivity as compared to other intermediate appellate courts, and then continued with some thoughts on our court's productivity – and I will note that some portions of this are quotes from the article in the Journal of Appellate Practice and Process but I will spare you the citations in these remarks:

> . . . I would argue that the answer to the question of what drives our productivity can be found in the collegiality and professionalism which Judge Martin models and inspires. . . .
>
> > Just how does the stability, civility, and relationships among the judges of a court impact court performance?
> >
> > . . . [A] collegial court [has been defined] as one in which judges have a common interest, as members of the judiciary, in getting the law right, and as a result, they are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.
> >
> > . . . [M]ost fundamentally, work on the appellate bench is a group process. A stable court, with strong leadership and individual judges who subscribe to the institutional mission of the judiciary (getting the law right), can achieve collegiality and high quality productivity.

> . . . .
>
> . . . Thus, a court culture that values productivity and efficiency while giving its members collegiality with each other and active deliberation, might tip the balance in favor of higher court performance.

Id. at 111-14 (ellipses, brackets, and footnotes omitted).

> In my opinion, the answer to the question of how the North Carolina Court of Appeals has achieved such a high level of efficiency, productivity, and collegiality, despite our relatively low salaries and court funding, is the court culture which Chief Judge Martin has in large part created. No statistical analysis is capable of quantifying his influence, but as associate judges on the Court of Appeals we see it every day.
>
> . . . .
>
> . . . Although most of the citizens of North Carolina may not know who Judge Martin is, or even what a Court of Appeals does, all of the citizens who have dealt with our legal system have, in ways large and small, benefited from Judge Martin's many contributions.

Those were my comments in 2013, and they are still true today.

And now, back to the present – I certainly had no idea back in 2013 when I wrote this article that I would have the honor of presiding at the portrait presentation for Judge Martin, but I am so glad we have been able to have this presentation today. I am pleased to have this opportunity to thank Judge Martin for his service to this Court and to the State of North Carolina and on a personal note, for helping me in so many ways in my work as an appellate judge.

We always allow both sides to be heard in this Courtroom, and so Chief Judge Martin, if you have any comments or any rebuttal to our speakers today, I welcome your comments at this time, if you wish.

REMARKS

BY

FORMER CHIEF JUDGE JOHN C. MARTIN

I debated with myself, for a while, about whether I would take up your opportunity for rebuttal. This will not be rebuttal but in my view the two most important words in the English language are, "Thank you."

And I want to thank you, Judge Stroud, and John Connell, and John Wester for your various generous remarks. I want to thank the Court for having this ceremony today. I want to thank Jonathan Harris and Clerk Gene Soar for all of their work in putting this together. It has been a wonderful experience and I appreciate it very much.

I also want to thank my family and my friends for having supported my career. It has been a wonderful career and I am very grateful to have had the opportunity to serve in the ways that I have, in particular as the Chief Judge of this Court.

And finally, I want to thank all of you – former clerks, friends, colleagues – for being here today. I know that it was an effort for many of you to get here today. I can't express enough how grateful I am.

Thank you.

HEADNOTE INDEX

ADMINISTRATIVE LAW

Final agency decision—applicable standards of judicial review exceeded—adoption assistance benefits—In a proceeding regarding eligibility for federally funded adoption assistance benefits provided under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 as administered by the Department of Health and Human Services (DHHS), the superior court exceeded its limited authority upon judicial review in reversing the final agency decision of DHHS to deny benefits to a child's adoptive parents. The superior court's conclusion that the final agency decision was arbitrary, capricious, and an abuse of discretion rested on its reasoning that the adoptive parents' 2021 benefits application was denied only because respondents (DHHS and the child-placement agency) failed to adequately advise the adoptive parents about the availability of, and requirements for, those benefits at the time of the child's adoption in 2014. However, appellate review of the whole record revealed that the child never met the program's eligibility requirements, either at the time of his adoption or when the application was made seven years later, and that ineligibility was unrelated to any failure by respondents to advise the adoptive parents about the adoption assistance program. Accordingly, the superior court's reversal of the final agency decision was reversed. **White v. N.C. Dep't of Health & Hum. Servs., 797.**

Final agency decision—award of information technology contract—arbitrary and capricious—scope of relief—trial court's authority—After determining that the final decision of the State Chief Information Officer confirming the award of an information technology contract to one of two competing bidders was arbitrary and capricious and an error of law, the superior court acted within the authority granted by section 150B-51(c) of the Administrative Procedure Act (APA)—the controlling statutory scheme—when it modified the final agency decision by vacating the contract to the bidder chosen by the agency and awarding the contract to the other bidder, and the court was under no obligation pursuant to the APA to remand for further findings of fact. **eDealer Servs., LLC v. N.C. Dep't of Transp., 27.**

Final agency decision—award of information technology contract—scope of review by superior court—standards of review—The superior court, acting as appellate court, used the correct standards of review to determine whether a final agency decision by the State Chief Information Officer correctly affirmed the award of an information technology contract to one of two competing bidders. The superior court correctly reviewed claims regarding procedural errors under a de novo standard of review, and substantive claims challenging the agency decision as arbitrary, capricious, and an abuse of discretion under whole-record review. Further, the superior court did not impermissibly engage in independent fact-finding when it considered the factual history of the case based on the official record, which included the proposed decision of an administrative law judge and the final agency decision. **eDealer Servs., LLC v. N.C. Dep't of Transp., 27.**

Final agency decision—award of information technology contract—superior court review—procurement process not followed—Upon review of the final decision of the State Chief Information Officer that had confirmed the award of an information technology contract to one of two competing bidders, the superior court, acting as appellate court, correctly applied de novo and whole-record standards of review to alleged procedural and substantive errors, respectively, when it determined that the agency's evaluating committee failed to follow applicable law and the evaluation criteria of the procurement process when assessing the relative merits of the two bidders and, therefore, that the final agency decision should be vacated for being arbitrary and capricious and an error of law. **eDealer Servs., LLC v. N.C. Dep't of Transp., 27.**

APPEAL AND ERROR—Continued

appeals from administrative tribunal decisions "unless the General Statutes provide otherwise"), section 143-293 was controlling. **Jones v. N.C. Dep't of Pub. Safety, 611.**

Petition for writ of certiorari denied—lack of merit on appeal—untimely complaint renewal—dismissal appropriate—After invoking Rule 2 to suspend multiple appellate rules violations in order to consider plaintiff's petition for writ of certiorari, the appellate court determined that, because plaintiff failed to show merit or that error probably occurred in the lower court, further review was not warranted and the appeal should be dismissed. The trial court did not err by dismissing with prejudice plaintiff's wrongful death lawsuit where the trial court properly denied plaintiff's belated motion for extension of time to re-file the lawsuit (more than a year after plaintiff took a voluntary dismissal) as not being allowed by Civil Procedure Rule 6(b), which does not permit a trial court to extend an expired statute of limitations. **Warren v. Snowshoe LTC Grp., LLC, 174.**

Preservation of issues—assault with deadly weapon—failure to move to arrest judgment—Defendant failed to preserve for appellate review his argument that the trial court erred by not arresting judgment on a charge of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI)—because, according to defendant, he could not be convicted of both that offense and felony hit and run with serious injury—where he did not move the court to arrest his AWDWIKISI judgment. **State v. Buck, 671.**

Preservation of issues—equitable distribution order—challenge to findings—specific arguments required—In an appeal from an equitable distribution order, in which the trial court distributed to plaintiff's ex-wife (defendant) a sum of money equal to one half of the value of plaintiff's law firm, plaintiff's generalized assertion that numerous of the court's findings of fact were unsupported by the evidence was insufficient—standing alone and in the absence of specific arguments as to each finding's deficiency—to preserve for appellate review his challenge to those findings. **Sneed v. Johnston, 650.**

Preservation of issues—exclusion of evidence—no offer of proof—In a prosecution for second-degree sexual offense and second-degree rape, defendant failed to preserve for appellate review his argument that the trial court erred by sustaining an objection during the cross-examination of a detective about whether defendant had admitted to the alleged sexual assault where, although defense counsel noted his exception to the exclusion of that testimony, he did not make an offer of proof and the content and significance of the excluded evidence was not apparent from the record. **State v. Ramirez, 757.**

Preservation of issues—failure to raise constitutional issue at trial—Fourth Amendment—blood sample—In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, her appellate argument that her blood sample was taken in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures was not preserved. Defendant did not object to the admission of the resulting blood test results on constitutional grounds at trial, and while defendant filed a pretrial motion to suppress the blood test results on statutory grounds, she did not advance that argument on appeal. **State v. Taylor, 303.**

Preservation of issues—permanency planning order—guardian ad litem duties—automatic preservation—In a grandmother's appeal from a permanency

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

under the statute. The matter fell under the Indian Child Welfare Act (ICWA), but because section 7B-906.1(n) also applied to the case and imposed the same high evidentiary standard for factual findings as ICWA, it was unnecessary to determine whether ICWA also required the court to recite that standard in its order. The matter was remanded for entry of a new order stating the correct standard for the court's findings of fact. **In re J.O., 556.**

Permanency planning—guardian ad litem's duties—sufficiency—In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children—one of whom tested positive for a sexually-transmitted disease that the trial court had previously determined was caused by the father sexually abusing the child, a determination the grandmother refused to accept—there was no merit to the grandmother's contention that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties by not maintaining adequate communication with the grandmother and by not sufficiently investigating the case. The evidence demonstrated that the GAL conducted monthly visits with the children, spoke to their foster parents, asked the children about their wishes, submitted written reports at each hearing, and made a recommendation to the court regarding a permanent plan, all in an effort to determine the best interests of the children. Although the GAL only spoke to the grandmother twice after juvenile petitions were filed and the children were removed from her home, the GAL saw the grandmother interact with the children at several visits and there is no indication that additional communication would have changed the GAL's recommendation, particularly since the grandmother continued to insist that the father had not sexually abused one of the children. **In re M.G.B., 568.**

Permanency planning—refusal to acknowledge sexual abuse—lack of progress on case plan—findings—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court's findings of fact regarding the grandmother's lack of sufficient progress on her case plan—regarding mental health services, disengaging from her relationship with the father, sex abuse education, ability to see reality with regard to the sex abuse, and acting appropriately during visitation with the children—were supported by sufficient evidence. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—burden shifting alleged—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not improperly place the burden of proof on the grandmother to show that she had made sufficient progress to warrant reunification, where its findings of fact reflected the grandmother's failure to obtain educational resources to parent vulnerable children and that the conditions that led to the children's removal had not been alleviated and, as a result of these findings, the court determined that the children would not be safe in the grandmother's home. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—language mirroring ground for termination—no misapprehension of law—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not misapprehend the law or apply an inappropriate standard by including in one of its findings a reference to the definitions of neglect and abuse in N.C.G.S. § 7B-101 and by stating that the children would be at a substantial risk of repetition of that abuse and/or neglect if returned to the grandmother's care. Although the grandmother argued that the court improperly invoked a ground for termination of parental rights before eliminating reunification as a permanent plan, the likelihood of further harm to the children was a relevant consideration to the permanency planning decision. Further, the trial court properly addressed the statutory factors regarding reunification contained in N.C.G.S. § 7B-906.2(d), and its findings were supported by sufficient evidence. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—reasonableness of efforts by social services—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—there was sufficient evidence to support the trial court's determination that the department of social services (DSS) made reasonable efforts toward reunification with the grandmother, including offering assistance to obtain and pay for court-ordered mental health services, which the grandmother rejected. Where the court gave DSS discretion to expand the grandmother's visitation time beyond the minimum amount ordered by the court, the decision of DSS not to expand visitation was not unreasonable based on the grandmother's problematic behavior during existing visitation, including talking about the case in front of the children and asking if they wanted to come home. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—refusal to acknowledge sexual abuse—lack of progress on case plan—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not abuse its discretion by ceasing reunification efforts with the grandmother after determining that she had failed to make sufficient progress on her case plan. Although the grandmother did complete some aspects of her case plan and mostly had positive visits with the children, she failed to complete specific therapy recommendations, to disengage from her relationship with the father, to obtain parenting education to assist her in supporting a child who is the victim of sexual abuse and, most importantly, she continued to insist that the father never sexually abused one of the children despite overwhelming evidence. **In re M.G.B., 568.**

CHILD CUSTODY AND SUPPORT

Change of circumstances—conclusions of law supported by findings of fact—In a proceeding to modify custody, where the district court's findings of fact were that the child was not able to stay with the mother on the joint custody schedule set by consent and experienced adverse personality and demeanor changes as a result of those living arrangements, the court's conclusions of law that there had been a substantial and material change in circumstances affecting the child's welfare warranting a custody modification were supported. **Scott v. Scott, 639.**

CHILD CUSTODY AND SUPPORT—Continued

Child support and arrears—imputation of father's income—improper judicial notice of job market—unsupported finding of bad faith suppression of income—delay in entering child support order—An order determining the permanent child support obligation and amount of arrears owed by a father, who had lost his job at a foreign bank, was reversed and remanded. Firstly, the court abused its discretion in taking judicial notice of the "substantial employment opportunities in banking and finance" in Charlotte, where the father lived, as this fact was not the sort of undisputed adjudicative fact contemplated under Evidence Rule 201(b). Secondly, the court erred by imputing income to the father where none of the evidence supported the court's finding that the father failed to seek new employment in good faith. Finally, by waiting twenty-one months after the child support hearing to enter the order—at which point the children had either reached or were close to reaching the age of majority—the judge failed to diligently discharge their administrative duties pursuant to Canon 3B(1) of the Code of Judicial Conduct and was instructed on remand to enter factual findings explaining the delay. **Sternola v. Aljian, 166.**

Child support—primary liability—same-sex unmarried couple—non-biological parent's obligation—gender neutral interpretation of statute inappropriate—In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, the trial court erred by adopting a gender neutral interpretation of N.C.G.S. § 50-13.4—regarding primary liability for child support to be shared by a child's "mother" and "father"—to deem the child's non-biological parent a "lawful parent" required by statute to pay child support. The clear and unambiguous statutory language did not allow for the extension of primary liability for child support to a non-biological or non-adoptive parent, even one acting in loco parentis and sharing custodial rights. **Green v. Carter, 51.**

Child support—secondary liability—unmarried partner—acting in loco parentis—voluntary assumption of obligation in writing required—In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, although the child's non-biological parent stood in loco parentis to the child and enjoyed custodial rights, she could not be secondarily liable for child support pursuant to N.C.G.S. § 50-13.4 because she had not voluntarily assumed a child support obligation in writing. **Green v. Carter, 51.**

Modification of custody—consent order—statutory authority—child's best interests—A district court had subject matter jurisdiction to modify a consent order as to child custody despite the provision in that order requiring the parties to mediate or arbitrate any disagreement regarding "major decisions" before submitting it to the court because no agreement or contract can deprive the district court of its statutory authority to protect a child's best interests. Moreover, the appellant—here, the mother—did not seek mediation or arbitration in the district court, and thus she waived any appellate review of that issue. **Scott v. Scott, 639.**

Sole custody to mother—finding of adequate child care by all parties—insufficient basis for ruling—An order awarding sole custody of a minor child to her mother was vacated where the only finding of fact upon which the trial court based its decision stated that the child had been well cared for—initially by her mother during her first year of life and then jointly by her mother, her father, and her father's wife during the next six months. Although substantial evidence supported a finding that the mother took good care of the child, the full finding that all of the parties provided adequate care, absent other findings, did not support a conclusion that it

CIVIL PROCEDURE—Continued

Motion to dismiss—converted to motion for summary judgment—matters outside pleadings considered—In a declaratory judgment action filed by an association of private bar owners (plaintiffs), in which plaintiffs raised six claims challenging defendant governor's issuance of executive orders during a pandemic closing bars for public health reasons, where defendant moved to dismiss all claims and plaintiffs moved for partial summary judgment on four of their claims, and where the trial court addressed plaintiffs' constitutional claims together—including plaintiffs' equal protection claim, upon which plaintiffs did not move for summary judgment—the trial court's ruling on the equal protection claim was converted to a summary judgment ruling because the court considered material outside of the pleadings (including news reports and scientific data submitted by defendant). **N.C. Bar & Tavern Ass'n v. Cooper, 402.**

Motion to dismiss—lack of standing—dependent on merits of motion to dismiss for failure to state a claim—In an action for declaratory and injunctive relief filed against a town and its council members (defendants) by two residents (plaintiffs), who alleged that the town had illegally appropriated taxpayer money to fund a council member's legal defense in a quo warranto action, the appellate court declined to address whether plaintiffs sufficiently alleged their standing as taxpayers to bring their claim and to survive defendants' Rule 12(b)(1) motion to dismiss where, in order to determine whether plaintiffs adequately alleged an infringement of a legal right necessary to establish standing, the appellate court needed to address the merits of defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. Thus, the court decided the appeal based on its Rule 12(b)(6) analysis of plaintiffs' substantive claims. **Perryman v. Town of Summerfield, 116.**

Rule 41—relation back—lawsuits challenging rezoning decision—different causes of action asserted—In plaintiff-landowner's third lawsuit challenging a county board's rezoning of land located adjacent to plaintiff's property, the trial court erred in declining to dismiss the lawsuit as untimely where, under Civil Procedure Rule 41(a)(1), the suit did not relate back to plaintiff's previous lawsuit, which he filed within the applicable statute of limitations and then voluntarily dismissed. Although the complaints in both lawsuits requested injunctive relief and contained similar allegations, plaintiff's new complaint requested a declaratory judgment stating that the rezoning was arbitrary and capricious and that it violated his due process rights, whereas his prior complaint challenged the rezoning on completely different grounds (namely, that it violated the local zoning ordinance, the county's "Mission Statement," and the board of county commissioners' "Goal and Priorities"). **Garland v. Orange Cnty., 232.**

Rule 60 motion—mistake and inadvertence—voluntary dismissal—willful act—The trial court did not abuse its discretion in denying plaintiff's motion for relief under Rule of Civil Procedure 60(b)(1) following a voluntary dismissal with prejudice where plaintiff and her counsel did not intend to end the litigation such that res judicata would apply to her claims. The action of voluntary dismissal correctly reflected plaintiff's counsel's procedural intention—to dismiss the matter with prejudice—and any misunderstanding of the consequences of that action—an end of the litigation and the application of res judicata—was immaterial. Thus, the trial court correctly applied the law regarding Rule 60—and properly assessed counsel's credibility—in denying plaintiff's motion. **T.H. v. SHL Health Two, Inc., 462.**

Rule 60 motion—relief "for any other reason"—more properly considered as mistake and inadvertence—Rule of Civil Procedure 60(b)(6) is not a catch-all

CIVIL PROCEDURE—Continued

provision and thus could not provide a basis for plaintiff's motion for relief from her dismissal with prejudice because that motion asserted mistake and inadvertence and thus fell within the scope of Rule 60(b)(1). Even had Rule 60(b)(6) applied, the trial court would not have abused its discretion in denying the motion under that subsection where plaintiff's counsel made material untruthful statements to the court in connection with the motion for relief. **T.H. v. SHL Health Two, Inc., 462.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Child support—prior reference describing parental status—collateral estoppel inapplicable—no adjudication of fact—In a child support matter involving a same-sex unmarried couple who shared joint custody of their child, where the child's non-biological parent argued that the trial court was collaterally estopped from finding that she was a "lawful parent" based on a prior court order that referred to her as a "non-parent" in place of her name, collateral estoppel principles did not apply because the reference was not an adjudication of any fact or issue in that case but was merely a descriptive term used for convenience and clarity. **Green v. Carter, 51.**

CONSTITUTIONAL LAW

Confrontation Clause—blood test report—expert testimony—In a prosecution for second-degree murder based on theories that defendant was driving while impaired and reckless driving, defendant's Confrontation Clause rights were not violated by the trial court's admission of a lab report prepared by a forensic scientist who did not testify. Constitutional limits on the admission of testimonial statements from absent witnesses were inapplicable because another forensic scientist—who had personally participated in the testing and reviewed the raw data generated to form her expert opinion—did testify at trial. Although defendant argued on appeal that the lab report lacked sufficient foundation due to issues with the blood sample's chain of custody, defendant neither cross-examined the testifying forensic scientist regarding the chain of custody nor objected to the lab report or testimony on that basis. **State v. Taylor, 303.**

Double jeopardy—sentencing—first-degree kidnapping—underlying sexual offense—In a prosecution for kidnapping and sex offenses against minors, the trial court violated defendant's right to be free of double jeopardy by subjecting him to multiple punishments for the same offense when it entered judgment upon his convictions for both first-degree kidnapping and the sex offenses that served to elevate the kidnapping charge to one of the first degree; therefore, the sentencing order was vacated and the matter was remanded for resentencing. **State v. Hernandez, 283.**

Effective assistance of counsel—failure to object to admissible evidence—no prejudice—In a prosecution for kidnapping and sex offenses against minors, defense counsel was not ineffective for failing to object to evidence seized pursuant to search warrants, which were properly issued upon probable cause, because any objection would have been overruled and, thus, defendant could not demonstrate that he was prejudiced by his counsel's performance. **State v. Hernandez, 283.**

Executive orders issued during pandemic—business closures—taking alleged—In a declaratory judgment action filed by an association of private bar owners (plaintiffs) challenging the governor's issuance of executive orders during a pandemic closing bars for public health reasons, the trial court properly dismissed plaintitiffs' claim that the governor's action resulted in a taking of their property without just

CONSTITUTIONAL LAW—Continued

pursuant to a monument protection statute (N.C.G.S. § 100-2.1), and therefore the statute was constitutional as applied in the case. First, defendants did not violate the Equal Protection Clause because, regardless of any potential discriminatory intent on their part, defendants could not have relocated the monument anyway because they lacked authority under section 100-2.1 to do so. Second, defendants did not violate N.C. Const. art. V, § 2(7) (permitting counties to appropriate taxpayer money to accomplish "public purposes only") by spending taxpayer funds on law enforcement's response to protests at the monument and on the erection of a fence around the monument, since expenditures for public safety and the protection of county-owned property served public purposes. Finally, defendants did not violate the Open Courts Clause where plaintiffs failed to show that they were deprived of public access to legal proceedings by virtue of the monument's presence, even if offensive to some, in front of the courthouse. **N.C. State Conf. of the NAACP v. Alamance Cnty., 107.**

North Carolina—right to remain silent—evidence of pre-arrest silence—plain error analysis—In a prosecution for statutory sexual offense with a child by an adult and other related crimes, the trial court did not commit plain error in allowing the lead detective in the case to testify that she was unable to get defendant to come in for an interview during her investigation. Even if the court had violated defendant's right to remain silent under the North Carolina Constitution by admitting this evidence of his pre-arrest silence, defendant elicited substantially similar testimony from the detective on cross-examination and therefore could not show that the court's error had a probable impact on the jury's verdict. **State v. McLawhon, 150.**

CONTEMPT

Civil—present ability to pay—findings sufficient—In finding defendant in contempt for failure to comply with a post-separation support order, the trial court's determination that he had the present means and ability to make the required payments was supported by unchallenged findings of fact that defendant was and would continue to be employed as a nurse, had a monthly net income of over $4,000, and had received more than $80,000 in equitable distribution proceeds from the sale of the marital home. **Haythe v. Haythe, 497.**

CONTRACTS

Breach—private school enrollment contract—termination by school—plain language—In an action by parents whose children's enrollment contract was terminated by a private school after plaintiffs challenged the school curriculum (based on their belief that the school had adopted a political agenda), plaintiffs' breach of contract claim was properly dismissed based on the plain and unambiguous language of the enrollment contract, which plaintiffs renewed each year, including the year after the school made the challenged changes. The contract established that the school "reserved the right" to discontinue enrollment if the school determined, in its sole discretion, that one of two conditions had been met: namely, that plaintiffs' actions rendered a positive, working relationship with the school impossible or seriously interfered with the school's mission. **Turpin v. Charlotte Latin Schs., Inc., 330.**

Employment—incorporation of corrective action procedures—alleged breach of procedures—genuine issue of material fact—In an action brought by plaintiff against his former employers after he was fired from his medical residency, the trial court erred by granting summary judgment to defendants on plaintiff's

CRIMINAL LAW

CRIMINAL LAW—Continued

in allowing the jury's request to replay one of the recordings during deliberations, it did not explicitly instruct the jury that it must also consider the rest of the evidence from trial. Even if the court had erred, defendant failed to show that such an error prejudiced him. Further, the court properly instructed the jury during the jury charge to consider all of the evidence, and the court scrupulously followed the requirements of section 15A-1233(a) during the replay of the recording. **State v. Montgomery, 736.**

Motion to sever—no abuse of discretion—transactional connection and fair hearing—The trial court did not abuse its discretion in denying defendant's motion to sever a first-degree murder charge from a charge of possession of a stolen vehicle where there was a transactional connection between the two crimes as reflected by evidence that defendant came into possession of the stolen car about three hours before the murder, was in the stolen vehicle when he fatally shot the victim, and possessed the murder weapon during both crimes. Further, joinder of the offenses did not prevent defendant from receiving a fair trial in light of other substantial evidence demonstrating defendant's premeditation and deliberation in committing the murder charged, including that he possessed the gun immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted another armed robbery just prior to the fatal shooting. **State v. Fernanders, 695.**

Possession—actual and constructive—firearm by a felon—methamphetamine—defendant directing third party to hide the items—The trial court properly denied defendant's motion to dismiss charges for possession of a firearm by a felon and possession of methamphetamine, where the State presented evidence that, on the day of his arrest, defendant made multiple phone calls from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the place where he was arrested. Defendant's phone calls reflected his intent to control the disposition and use of both the gun and the drugs, and therefore the calls constituted sufficient evidence that defendant constructively possessed the items. Additionally, given the location of the items at the scene of defendant's arrest, defendant's awareness of each item's specific location, and his efforts to conceal them, a jury could have also concluded that defendant actually possessed the items prior to his arrest. **State v. Montgomery, 736.**

Possession—firearm by a felon—methamphetamine—jury instructions—attempt—no plain error—In a prosecution for possession of a firearm by a felon and possession of methamphetamine, the trial court did not commit plain error by declining to instruct the jury on theories of attempt with respect to both charges. The State presented sufficient evidence to support convictions for both offenses under theories of actual and constructive possession, including recordings of multiple phone calls that defendant made from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the scene of his arrest. Furthermore, the State's evidence showed that the women had, in fact, moved the items by the time law enforcement approached her, and therefore there was no evidence suggesting that defendant merely attempted to constructively possess the items. **State v. Montgomery, 736.**

Prosecutor's closing argument—defendant's failure to testify—curative instruction sufficient—In a trial on weapon and assault charges, while the prosecutor's two closing-argument references to defendant's failure to testify violated defendant's statutory and constitutional rights against self-incrimination, any prejudice therefrom was cured by the trial court's explanation to the jurors that the

EVIDENCE—Continued

possession of a stolen vehicle, the trial court abused its discretion by allowing defendant's girlfriend to give lay opinion testimony pursuant to Rule of Evidence 701 identifying the gun depicted in video and photographic exhibits as the murder weapon, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the State presented other evidence of premeditation and deliberation, including that defendant possessed the murder weapon immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted an armed robbery just prior to the fatal shooting. **State v. Fernanders, 695.**

Lay witness testimony—rape trial—repressed memories—victim's recall—expert support not required—In a trial for first-degree rape involving an incident that took place years earlier when the victim was a minor, the trial court did not plainly err by allowing the victim to testify regarding her memories of the incident where, despite defendant's characterization of the victim's testimony as involving repressed memories—for which supporting expert testimony would be required—the victim did not testify that she had repressed memories or that she had recovered repressed memories but, instead, recalled certain parts of the incident as "really clear." **State v. Heyne, 724.**

Lay witness testimony—rape trial—repressed memory—admitted for corroborative purposes—In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not plainly err when it admitted testimony, without expert support, of a friend of the victim's family stating that the victim had repressed her memory of the incident, since the family friend's testimony was not admitted for substantive purposes but, rather, as corroboration of the victim's substantive testimony, a distinction that the trial court made clear to the jury during instructions. **State v. Heyne, 724.**

Lay witness testimony—rape trial—victim's advocate—calling memory loss "normal"—based on rational perception—In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not abuse its discretion by allowing the testimony of a domestic violence victim's advocate who described taking the victim to be interviewed by law enforcement and, after relating that the victim did not remember a lot of details, stated that the lack of details was "normal because it happened so long ago." Despite defendant's argument that there was no basis for this opinion, the trial court could have reasoned that the testimony was based on the rational perception that memories fade over time. **State v. Heyne, 724.**

Officer testimony—sexual exploitation of a minor—legally incorrect statement of elements—plain error analysis—There was no plain error in defendant's trial for first-degree sexual exploitation of a minor by the admission of an officer's testimony that the offense did not require a plan to film the sexual activity of a minor, which, although an inaccurate statement of the law, was made on redirect in the broader context of clarifying the officer's responses to defense counsel's cross-examination about the officer's motive for how he questioned defendant after his arrest. Defense counsel had an opportunity to conduct a recross examination, and the trial court properly instructed the jury on the elements of the charged crime. **State v. Walker, 316.**

Other crimes, wrongs, or acts—evidence of previous impaired driving charges and other bad driving—probative value not outweighed by prejudicial effect—

SEARCH AND SEIZURE

Anticipatory search warrant—probable cause—nexus between drug activity and residence—totality of the circumstances—In a drug trafficking case, the trial court properly denied defendant's motion to suppress drugs and drug paraphernalia found at his residence where an investigator's affidavit and application for an anticipatory search warrant contained facts giving rise to a reasonable inference that defendant was involved in criminal activity and establishing a nexus between that activity and the residence, including information law enforcement obtained from a confidential informant, controlled buys, and vehicle surveillance. Based on the totality of the circumstances and giving deference to the magistrate, issuance of the warrant to search defendant's property was supported by probable cause. **State v. Boyd, 665.**

Probable cause—warrantless vehicle search—odor of marijuana—additional circumstances—In a prosecution for drug possession and weapons offenses, where officers had searched a car during a traffic stop after detecting an odor of marijuana and a cover scent, the trial court did not err in denying defendant's motion to suppress evidence seized during the warrantless search. The appellate court did not need to determine whether the odor of marijuana alone provides probable cause for a warrantless search because, here, that odor was accompanied by a cover scent of the sort known by law enforcement officers to be used to mask the odor of marijuana. The totality of these circumstances provided the officers probable cause to search. Moreover, any errors in the suppression order's findings of fact were not dispositive of its conclusions of law or its proper determination of probable cause. **State v. Dobson, 450.**

Search warrant—probable cause—store burglary—video surveillance—unique vehicle characteristics—In a prosecution for multiple charges arising from the theft from a convenience store of cartons of cigarettes, cases of alcohol, twenty-six packs of state lottery tickets, along with the theft of cash from an ATM located there, the trial court properly denied defendant's motion to suppress evidence seized from his vehicle where sufficient other evidence supported issuance of a search warrant based on probable cause. After the burglary was reported to law enforcement, the investigating detective viewed relevant video surveillance footage and, as he was driving in the area, he spotted the same vehicle—based on its make and model, black rims, and missing bumper—that appeared to be associated with the burglary, and discovered that the vehicle displayed a fictitious out-of-state license plate. Despite defendant's argument that law enforcement officers remained in the curtilage of the residence where the vehicle was parked beyond an allowable period of time after an unsuccessful knock and talk, the officers were lawfully securing the vehicle and the scene after probable cause had already been acquired based on the totality of the circumstances, which established a fair probability that contraband related to the burglary would be found in the vehicle. **State v. Norman, 744.**

Search warrants—probable cause—supporting affidavits—nexus between items sought and alleged crimes—In a prosecution for kidnapping and sex offenses against minors, the trial court did not commit plain error in denying defendant's motion to suppress video evidence obtained from media storage devices seized from his home—the site of the alleged crimes—where two separate search warrants were issued upon a proper determination of probable cause. The supporting affidavits attached to the warrant applications were not purely conclusory, but rather contained facts showing a nexus between the list of items to be seized and the alleged offenses sufficient for the magistrate to reasonably infer that the requested searches would reveal incriminating evidence. Further, the description of the

SEXUAL OFFENSES—Continued

by failing to instruct the jury on the offense of second-degree sexual exploitation of a minor because the latter offense—which requires an actual recording or photograph of sexual activity—is not a lesser-included offense of first-degree exploitation—which can be committed by the use or coercion of a minor to engage in sexual activity for the purpose of producing a visual representation of the activity, whether or not an actual recording is made. **State v. Walker, 316.**

Sexual exploitation of a minor—acting in concert—video recording of sexual activity—inference of common plan—In a prosecution for two counts of first-degree sexual exploitation of a minor, the State presented sufficient evidence from which a jury could conclude that defendant acted for the "purpose of producing material" portraying sexual activity with a minor by acting in concert with others, including: testimony relating that, prior to attending a party, a number of defendant's friends discussed a plan to find a girl at the party, have sex with her, and film it; and three cell phone videos recorded later that evening showing defendant and others variously engaging in or watching sexual activity with a minor. Defendant's behavior in the videos, including laughing and looking toward the phone, demonstrates that he was aware the recordings were being made and was actively participating in their production. **State v. Walker, 316.**

Sexual exploitation of a minor—nude photographs—depiction of sexual activity—circumstantial evidence—The trial court properly denied defendant's motion to dismiss a charge of sexual exploitation of a minor where the State presented sufficient evidence that defendant took nude photographs of a minor that depicted "sexual activity" as that term is defined by statute (N.C.G.S. § 14-190.16). Although defendant had deleted the photographs long before trial, a reasonable juror could still determine from the available circumstantial evidence that the photographs exhibited the minor in a lascivious way and that her pubic area was at least partially visible. Any contradictions in the witnesses' testimonies went to the weight and credibility of the evidence—an issue properly submitted to the jury. **State v. Shelton, 154.**

STATUTES OF LIMITATION AND REPOSE

Foreclosure—ten years—from date of acceleration—action barred—The trial court properly concluded that petitioner's non-judicial foreclosure action was barred by the statute of limitations in N.C.G.S. § 1-47(3) where the action was filed more than ten years after the note holder exercised its right of acceleration, as evidenced by the affirmative invocation of the right in a notice to the borrower that stated the full amount of the note was due and payable in full unless the default was cured on or before a date certain. Where the trial court misidentified the year of the payable date in two of its findings (but related the correct year elsewhere in the order), the matter was remanded for correction of the clerical errors. **Real Time Resols., Inc. v. Cole, 632.**

TAXATION

Property tax—exemption—manufactured home community—definition of "providing housing"—The North Carolina Property Tax Commission properly denied a non-profit organization's request for a property tax exemption because the organization's operation of a leased-land housing cooperative—in which the organization owned the land and rented home sites to members who secured their own individually-owned manufactured homes—did not meet the definition of "providing

WORKERS' COMPENSATION—Continued