296 N.C. App.—No. 5 Pages 557-778

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 23, 2025

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COURT OF APPEALS

CASES REPORTED

FILED 3 DECEMBER 2024

Abitol v. Clark 557
Blastmaster Holdings USA, LLC v. Land Coast Insulation, Inc. 565
Braswell v. Braswell 574
Collins v. Wieland Copper Prods., LLC 584
Durham Green Flea Mkt. v. City of Durham 594
Efstathiadis v. Efstathiadis 605
Fox v. Lenoir-Rhyne Univ. 613
Hill v. Ewing 624
In re T.S. 635
Ledford v. Ledford 648
Lopez v. Arnulfo-Plata 653
N.C. Citizens for Transparent Gov't, Inc. v. Vill. of Pinehurst 658
Proctor v. City of Jacksonville 665
State v. Brown 678
State v. Brown 684
State v. Burnett 698
State v. Chambers 709
State v. Clark 718
State v. Garmon 725
State v. Pettis 739
State v. Plaza 744
State v. Vaughn 752
State v. Wilson 768

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Arrington v. Merck Pharm. Mfg. 775
Bragg Cmtys., LLC v. Johnson Brick Contractors, Inc. 775
Brick Landing Plantation Master Cmty. Ass'n v. Medina 775
Culberson v. Hart 775
Davis v. N.C. Dep't of Transp. 775
Dep't of Transp. v. Wonder Day P'ship 775
Dozier v. Dozier 775
Edmondson v. Edmondson 775
Est. of Graham v. Lambert 775
Hammett v. Hammett 775
In re G.E.A.E. 775
In re J.G.C. 775
In re J.L.S. 775
In re K.B.L. 776
In re M.M.A. 776
In re N.J. 776
In re T.M. 776
Johnson v. Johnson 776
Johnson v. Low 776
Kean v. Kean 776
Mitchell v. Rice 776
N.C. Dep't of State Treasurer v. Perrigo 776
S. Fork Ventures, LLC v. Blackwelder 776
State v. Anthony 776
State v. Ballon 776
State v. Bethea 776
State v. Bishop 776
State v. Brasier 776
State v. Brown 777
State v. Cooper 777
State v. Eskridge 777
State v. Faggart 777
State v. Galarza-Rodriguez 777
State v. Grant 777
State v. Greene 777
State v. Henderson 777
State v. Hoggard 777
State v. Holland 777
State v. Hunt 777
State v. Koagel 777
State v. Mattison 778
State v. Quinlan 778
State v. Yeh 778
Surratt v. Surratt 778
Water Damage Mitigation, Inc. v. Jordan 778
Westmoreland v. Tamari 778

AIDING AND ABETTING

Action against attorney—slander of title—sufficiency of pleading—Plaintiff's claim against defendant attorney, either for aiding and abetting another defendant in an alleged slander of title, or for engaging in slander of title in his own right, was properly dismissed pursuant to Civil Procedure Rule 12(b)(6) because plaintiff failed to allege, as an essential element of slander of title, that she suffered special damages as a result of false statements contained in a deed that was recorded by defendant attorney and that purported to transfer title to plaintiff's property. **Hill v. Ewing, 624.**

Aiding and abetting champerty and maintenance—not recognized as a cause of action—The trial court properly dismissed, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against defendant attorney for aiding and abetting another defendant's conduct engaging in champerty and maintenance with regard to plaintiff's property, since there is no recognized cause of action in this state for aiding and abetting champerty and maintenance. Further, in holding with precedential guidance, there is no civil cause of action for barratry or against an attorney for performing work for a client alleged to have committed champerty and maintenance (based on an attorney-client relationship). Finally, the appellate court noted that the deed prepared by defendant attorney in this case on behalf of the other defendant, which purported to transfer plaintiff's property to third parties, was a non-warranty deed and, as such, stated that there was no express or implied warranty regarding title. **Hill v. Ewing, 624.**

APPEAL AND ERROR

Appellate rules violations—good cause shown—meritorious issue—certiorari granted—Where defendant's appeal contained deficiencies—for failing to designate the court to which appeal was taken and for being untimely filed—but demonstrated probable merit, defendant's intent to appeal to the correct appellate court could be fairly inferred, and the State did not assert that it was prejudiced by the deficiencies, the appellate court granted defendant's petition for writ of certiorari to review the question of whether the trial court erred by denying defendant's motion to dismiss three of four felony larceny charges pursuant to the single-taking rule. **State v. Wilson, 768.**

Jurisdiction—interlocutory order—statement of grounds for appellate review—bare assertions of privilege—In an action filed by a pastor and his wife (plaintiffs) alleging emotional distress and loss of consortium after defendant claimed that the pastor sexually abused her as a child, which resulted in his brief detention before a prosecutor dismissed the charges, plaintiffs' appeal from an interlocutory order compelling discovery was dismissed for lack of jurisdiction where plaintiffs did not show in their statement of the grounds for appellate review that the order affected a substantial right that would be lost absent immediate review. Specifically, plaintiffs' bare assertions that the order compelled them to produce privileged documents (plaintiffs' medical records and the pastor's criminal files) were insufficient, since plaintiffs failed to specify which statutory privileges they were invoking and to explain why the facts of their particular case demonstrated the existence of a substantial right. **Lopez v. Arnulfo-Plata, 653.**

Plain error analysis—readmission of evidence—outside of jury's presence—In an appeal from convictions for first-degree murder and possession of a firearm

by a felon, defendant failed to show that the trial court committed plain error by admitting into evidence the pistol, magazine, and bullets linked to the crimes, where the prosecutor—without any objection from defendant—first introduced the box containing the pistol components as Exhibit 12 and then, outside of the jury's presence, requested that each component be admitted as a separate exhibit. Evidently, the prosecutor made the latter request out of an overabundance of caution, since the court had already listed Exhibit 12's contents out loud when publishing it to the jury. Further, both the State and defendant treated the pistol components as properly-admitted evidence during trial, and therefore defendant could not meet his burden of showing error—much less plain error—on appeal. **State v. Plaza, 744.**

Preservation and waiver—constitutionally protected status as a parent—collateral estoppel—In a neglect proceeding involving two siblings, respondent-mother's challenge—on grounds related to respondent-mother's constitutionally protected status as a parent—to the district court's award of guardianship to the paternal grandmother was preserved for appellate review where no objection on those grounds was raised in the court below because that issue was only determined by the court in an order entered months after a permanency planning hearing, during which respondent-mother had specifically argued that a decision on guardianship was premature in light of her progress on her case plan. Additionally, respondent-mother was not collaterally estopped from advancing her argument in this proceeding despite an earlier award of guardianship for the children to other relatives because the court in the earlier proceeding had not found as fact or concluded as a matter of law that respondent-mother was unfit or had acted inconsistently with her constitutionally protected status as a parent, and even if such determinations had been made, they would not control in a permanency planning proceeding taking place more than two years later. **In re T.S., 635.**

Preservation of issues—constitutional argument—criminal case—no objection raised at trial—In a prosecution for first-degree murder and possession of a firearm by a felon, where the prosecutor introduced into evidence a box containing the pistol, magazine, and bullets linked to the crimes and then, outside of the jury's presence, requested that each component be admitted as a separate exhibit, defendant failed to preserve for appellate review his argument that the admission of the pistol components violated his constitutional due process rights, since he failed to object at trial and, consequently, the trial court never had an opportunity to hear or rule on the issue. **State v. Plaza, 744.**

Rule 2—unpreserved constitutional argument—merit not shown—In an appeal from convictions for first-degree murder and possession of a firearm by a felon, the Court of Appeals declined to exercise its discretion under Appellate Rule 2 to hear defendant's unpreserved argument that the trial court violated his constitutional due process rights by allowing the jury to view improperly admitted evidence. Defendant failed to show that any error occurred at trial, much less that his right to a fair trial free from error was adversely affected, especially where the court, the State, and even defendant all treated the now-challenged evidence as properly admitted throughout the trial. **State v. Plaza, 744.**

ASSAULT

With a deadly weapon inflicting serious injury—jury instruction—deadly weapon—glass beer bottle—In a prosecution for assault with a deadly weapon inflicting serious injury arising from a bar fight, where the victim suffered a deep

facial laceration after defendant struck him with a glass beer bottle, the trial court did not err when it instructed the jury that a glass beer bottle was a "deadly weapon" as a matter of law. The bottle met the legal definition of a deadly weapon—any item likely to cause death or great bodily harm—where defendant hit the victim's face with the bottle, causing it to shatter and cover both the victim and another bar patron with glass; the strike caused a facial laceration requiring thirty-five stitches, as well as many smaller lacerations, which required seven additional stitches and resulted in loss of feeling in the victim's arm; and where a difference of mere inches could have resulted in a fatal cut to the victim's throat or surrounding arteries. **State v. Pettis, 739.**

With a deadly weapon inflicting serious injury—jury instruction—serious injury—facial laceration—plain error analysis—In a prosecution for assault with a deadly weapon inflicting serious injury arising from a bar fight, during which defendant struck the victim's face with a glass beer bottle, the trial court did not commit plain error when it instructed the jury that the victim's injury was "serious" as a matter of law. Even if the court had erred by giving the instruction, defendant failed to meet his burden of showing that, absent the instruction, the jury probably would have found that the victim's painful facial laceration—requiring thirty-five stitches and overnight hospitalization—was not a serious injury. **State v. Pettis, 739.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Guardianship—findings of fact unsupported—conclusions of law unsupported—vacated and remanded—In a neglect proceeding involving two siblings, the district court's permanency planning order awarding guardianship to the children's paternal grandmother and ceasing further hearings was vacated, and the matter was remanded, where many of the court's findings of fact—particularly those concerning respondent-mother's overall progress on her case plan, her ability to care for the children in the near future, and whether she had acted in a manner inconsistent with the health and safety of the children—were not supported by competent evidence, and, in turn, the court's supported findings of fact did not support its conclusions of law that respondent-mother was unfit and had forfeited her constitutionally protected status as a parent. **In re T.S., 635.**

CHILD CUSTODY AND SUPPORT

Custody—standing to intervene—sufficiency of allegations—parental relationship—parents' lack of fitness—In a child custody matter initiated by the child's grandmother, other family members (the child's maternal cousins) had standing to intervene in the matter to seek custody where they sufficiently alleged, pursuant to N.C.G.S. § 50-13.1(a), that they had a parent-child relationship with the minor, whom they had cared and provided for, and that the child's parents had committed acts inconsistent with their constitutionally protected parental status by failing to provide a stable living environment, repeatedly abusing drugs, and placing the child at risk of substantial harm. **Ledford v. Ledford, 648.**

Permanent child custody order—not a request for modification—findings of fact supported by evidence—conclusion of law supported by factual findings—In a permanent custody order arising from the dissolution of the parties' marriage, the trial court did not abuse its discretion by giving primary legal and physical custody of two minor children to plaintiff while giving defendant the right to exercise

secondary physical custody through visitation. First, in the absence of any record evidence of a previous custody order or argument by defendant below, the trial court did not err in failing to consider plaintiff's complaint for custody as a request for modification pursuant to N.C.G.S. § 50-13.7. Second, each of the findings of fact challenged by defendant—concerning abuse defendant directed toward his wife and children, as well as a domestic violence protective order plaintiff obtained after the parties' separation—was supported by competent evidence in the record. Third, the trial court's findings of fact sufficiently addressed defendant's fitness as a parent and supported its determination that it was in the children's best interests for plaintiff to have primary custody, with visitation for defendant. **Efstathiadis v. Efstathiadis, 605.**

CIVIL PROCEDURE

Libel claim—survived Rule 12(b)(6) motion—different standard on summary judgment—not entitled to jury trial—In a lawsuit filed against a university and its president (defendants) by a group of former players on the university's women's basketball team, including a student (plaintiff) who published multiple social media posts accusing defendants of forcing players off the team due to racism and as retaliation for speaking out against racial prejudice, the trial court properly granted summary judgment in favor of defendants on plaintiff's libel claim, which she based on the president's published response letter calling her accusations "simply false." Plaintiff failed to make any argument that the evidence at summary judgment was sufficient for each element of defamation or that a genuine issue of material fact existed, arguing instead that she was entitled to a jury trial because she had successfully overcome defendants' prior motion to dismiss under Civil Procedure Rule 12(b)(6). Plaintiff's reliance on the order denying that motion was misplaced, since the legal standard for a Rule 12(b)(6) motion—which focuses on the allegations within the four corners of the complaint and treats them as true—is different from the standard that must be met on summary judgment—which considers evidence presented during discovery. **Fox v. Lenoir-Rhyne Univ., 613.**

CONSTITUTIONAL LAW

Admission of video evidence—recording of defendant being read Miranda rights—no violation—In a prosecution on charges of speeding and driving while impaired, the trial court did not violate defendant's state or federal constitutional rights against self-incrimination when it admitted video testimony of a Highway Patrol trooper reading defendant his *Miranda* rights (introduced by the State to show the trooper's professionalism during the encounter where defendant had argued that the trooper intentionally administered one part of a roadside sobriety assessment in a location out of sight of the patrol vehicle's camera) where the portion of the video shown to the jury ended before defendant made any response and the State did not make any argument about defendant's reaction or response to being read his *Miranda* rights. **State v. Vaughn, 752.**

Confrontation Clause—basis of expert opinion—report by unavailable forensic analyst—no independent testing done—The judgment entered on defendant's conviction for possession with intent to sell and deliver methamphetamine was vacated where the expert testimony offered by the State regarding a powdered substance—seized from defendant during a warrantless search conducted as a condition of his probation—was given by an analyst who had not independently

tested the substance but gave his opinion based solely on the written report and opinion of the forensic analyst who had performed the chemical analysis (and who was unavailable to testify at trial). The hearsay statements contained in the report were testimonial in nature and, therefore, defendant's right to confront witnesses pursuant to the Confrontation Clause was violated. Further, the erroneous admission of the opinion testimony was prejudicial and required remand for a new trial or other proceedings. **State v. Clark, 718.**

Due process—notice of violation—ordinance requirements—opportunity to be heard—A city-county board of adjustment did not violate the due process rights of a flea market (petitioner) when it issued a notice of violation stating that petitioner was not in compliance with the approved site plan and thus was in violation of the city's Unified Development Ordinance (UDO). The notice met the procedural requirements of the UDO where it sufficiently informed petitioner both of the nature of the violation—based on the description in the notice and pictures that were attached for reference—and of the measures necessary to correct the violation, which included the removal of all alterations that were inconsistent with the approved site plan. The plain language of the UDO allowing for "informal means" prior to issuance of a written notice was permissive and not mandatory. Further, petitioner had multiple opportunities to be heard on the notice of violation, including at a quasi-judicial hearing at which it was represented by counsel. **Durham Green Flea Mkt. v. City of Durham, 594.**

Effective assistance of counsel—statutory rape case—evidence of sexual involvement with victim—failure to object—In a prosecution for statutory rape and other sexual offenses arising from a months-long sexual relationship between a married, fifty-one-year-old man (defendant) and a fifteen-year-old girl, defendant did not receive ineffective assistance of counsel where his counsel did not object to the admission of a photograph showing a home vasectomy test taken by defendant, who allegedly used the test to persuade the girl to have sex with him. The trial court did not abuse its discretion by admitting the photograph, which was admitted for illustrative purposes only and was corroborative of the girl's testimony that defendant had had a vasectomy. Thus, since defendant's objection to the photograph would have been unsuccessful at trial, defendant could not show that his counsel's performance was deficient or prejudicial. **State v. Brown, 684.**

Effective assistance of counsel—statutory rape case—prosecutor's closing argument—inference supported by evidence—In a prosecution for statutory rape and other sexual offenses arising from a months-long sexual relationship between a married, fifty-one-year-old man (defendant) and a fifteen-year-old girl, defendant did not receive ineffective assistance of counsel where his counsel did not object to the prosecutor's closing argument, in which the prosecutor argued that the girl's knowledge of defendant's prior vasectomy supported an inference that the two had been involved in a sexual relationship. The record, which included the girl's trial testimony and a photograph of a vasectomy test strip found on defendant's phone, contained sufficient evidence to support the prosecutor's argument, and therefore it was unlikely that an objection by defense counsel would have materially influenced the verdict or prejudiced defendant. **State v. Brown, 684**.

CONTRACTS

Breach of contract—athletic scholarships and college basketball team membership—summary judgment—In a lawsuit filed against a university and its

president (defendants) by a group of former players on the university's women's basketball team (plaintiffs), the trial court properly granted summary judgment in favor of defendants on plaintiffs' breach of contract claim alleging that defendants violated oral and written contracts related to plaintiffs' athletic scholarships and team membership by removing them from the team and canceling their scholarships. No genuine issue of material fact existed, since the written contracts clearly specified that the scholarships were for one academic year and required yearly renewal, and therefore any oral promises of four-year scholarships and automatic renewals (made by coaches) constituted parol evidence. The evidence did not support a finding that defendants breached the contract terms, showing instead that defendants properly canceled the scholarships after the academic year had ended and that plaintiffs voluntarily entered the transfer portal without appealing their scholarship non-renewals. Further, one of the plaintiffs—a former team manager—admitted to voluntarily quitting her position. **Fox v. Lenoir-Rhyne Univ., 613.**

CRIMINAL LAW

Post-conviction actual innocence investigation—destruction of evidence—violation of due process rights not shown—Where, during an investigation by the North Carolina Center on Actual Innocence of defendant's case following his 2014 conviction of robbery with a firearm, the destruction of biological evidence (latent fingerprints collected at the crime scene) was discovered—depriving defendant of the opportunity to conduct potentially exculpatory DNA testing—the denial of defendant's motion to vacate his conviction and dismiss with prejudice the robbery charge was affirmed. First, the denial order did not prevent meaningful appellate review due to its lack of findings of fact or conclusions of law given that the controlling statute (N.C.G.S. § 15A-268, part of the DNA Database and Databank Act) does not require either written findings or conclusions. Second, in the context of earlier proceedings in the post-conviction matter, the ruling reflected by the very brief denial order could be understood as the superior court's determination, following a hearing, that defendant failed to meet his burden to show that the evidence sought had been destroyed in bad faith and thus to establish that his due process rights were violated. **State v. Brown, 678.**

DECLARATORY JUDGMENTS

Pleading—actual controversy—inheritance rights—after-born child—In an action filed by plaintiff as the executor of his brother's estate, where the brother (decedent) died intestate more than ten months before his wife gave birth to their son, who was decedent's second child, the first being a daughter born from a previous relationship while decedent was alive, the trial court erred in dismissing plaintiff's claim for a declaratory judgment regarding the son's right to inherit as an after-born child. An "actual controversy" existed between the parties (which included the guardian of the daughter's estate), since they disputed the son's inheritance rights under the intestate statutes and the resolution of that dispute would impact the distribution of the decedent's estate, which included assets that were originally set to go solely to the daughter or to the special needs trust set up on her behalf. Further, N.C.G.S. § 29-9 did not bar this matter from being litigated, since it guarantees inheritance rights for children born within ten lunar months of their parent's death but does not exclude other possibilities. **Abitol v. Clark, 557.**

EVIDENCE

Criminal trial—readmission of evidence—outside of jury's presence—no structural error—In an appeal from convictions for first-degree murder and possession of a firearm by a felon, defendant failed to show structural error in the admission into evidence of the pistol, magazine, and bullets linked to the crimes, where the prosecutor—without any objection from defendant—first introduced the box containing the pistol components as Exhibit 12 and then, outside of the jury's presence, requested that each component be admitted as a separate exhibit. Despite defendant's argument that the trial court allowed the jury to view improperly admitted evidence, nothing that occurred at trial aligned with any of the six enumerated instances of structural error that have been formally recognized by the United States Supreme Court and the North Carolina Supreme Court. **State v. Plaza, 744.**

Hearsay—exceptions—medical diagnosis or treatment—statutory rape case—forensic interview of victim—In a prosecution for statutory rape and other sexual offenses arising from a months-long sexual relationship between a married, fifty-one-year-old man (defendant) and a fifteen-year-old girl, the trial court did not err in allowing the jury to watch a video of the girl's forensic interview at a child advocacy center, which was arranged in cooperation with law enforcement's investigation of the case. Although the video contained hearsay, it was still admissible under the exception in Evidence Rule 803(4) for statements "made for purposes of medical diagnosis or treatment," where: the girl's interview occurred immediately before her physical medical examination performed that same day, the interviewer explained to the girl both the medical purpose of the interview and the importance of giving truthful answers, the girl demonstrated an awareness that she would undergo a medical examination after her interview, and the interviewer's questions reflected a primary purpose of attending to the girl's physical and mental health and safety. **State v. Brown, 684.**

FIREARMS AND OTHER WEAPONS

Possession by a felon—motion to suppress—vehicle search incident to traffic stop—In a prosecution for possession of a firearm by a felon, the trial court did not err in denying defendant's motion to suppress evidence seized in the search of his vehicle during a traffic stop where: (1) the eight findings of fact challenged by defendant were each supported by competent evidence, including video evidence obtained from the body-worn cameras of the two law enforcement officers involved in the traffic stop; and (2) the ten challenged conclusions—focused on the existence of reasonable suspicion of criminal activity justifying the traffic stop, the length of the stop, and the alleged prolonging of the traffic stop—were supported by the court's findings of fact. Specifically, the court found that defendant's vehicle had an inoperable tag light and a search of the license plate number revealed that the registered owner had a suspended driver's license, thus permitting a traffic stop to confirm or dispel the reasonable suspicion of those traffic violations; that the stop continued even once the officers determined that defendant was not operating the vehicle because the actual driver admitted that she was driving without a license; and that the 18-minute length of the stop was not unreasonable where the citing officer was still writing a traffic ticket for the unlicensed driver as a K-9 unit (which was already on the scene) performed a "sniff" of the vehicle. **State v. Burnett, 698.**

INDICTMENT AND INFORMATION

Fatal defect—habitual felon status—timing of indictment—predating substantive offenses—In an appeal from convictions on drug-related charges,

INDICTMENT AND INFORMATION—Continued

defendant's guilty plea to attaining habitual felon status was vacated and the matter remanded for resentencing where, because the habitual felon indictment was issued before the underlying felonies that defendant was being tried for had occurred, the indictment was fatally defective and insufficient to confer subject matter jurisdiction on the sentencing court. Under binding legal precedent, a habitual felon indictment must be ancillary to a pending prosecution for the underlying substantive felonies, not issued before the crimes even occurred. **State v. Garmon, 725.**

JURISDICTION

Personal—lack of service—appearance at hearing—waiver—In a child custody matter initiated by the child's grandmother, although there was no evidence that the child's mother (defendant) was served with the summons and complaint, defendant submitted herself to the trial court's jurisdiction over her person by, first, signing a consent order for temporary custody and, second, appearing in court for at least one permanent custody hearing at which she was represented by counsel. Therefore, defendant waived any challenge to personal jurisdiction. **Ledford v. Ledford, 648.**

LARCENY

Multiple counts—single-taking rule—one continuous act—three of four convictions reversed—resentencing required—Where it was unclear during which of two incidents of larceny the victim's firearms were stolen and the State failed to establish that defendant—unlike her cohorts—participated in more than a single incident of larceny, defendant could not be convicted of four separate felony larceny charges (three counts of larceny of a firearm and one count of larceny after breaking and entering). Since defendant participated in only one continuous act of larceny, the single-taking rule required the reversal of the three larceny of firearm charges, and, where all of defendant's convictions had been consolidated into a single judgment for sentencing purposes, her sentence was vacated and the matter was remanded for resentencing. **State v. Wilson, 768.**

LIENS

Claim of lien on real property—second-tier subcontractor—equipment for construction project—"directly utilized"—summary judgment—In a case arising from a contract for construction services between a general contractor and a property owner (together, defendants), where one of the subcontractors involved hired a second-tier subcontractor (plaintiff) to provide rental equipment for the property owner's construction project, and where that subcontractor was eventually fired from the project, the trial court properly granted summary judgment in plaintiff's favor on its subrogation claim of lien on real property. Defendants argued that plaintiff's equipment was not "directly utilized" on the project after the subcontractor's termination, thereby creating a genuine issue of material fact regarding the lien amount plaintiff was entitled to claim. However, the record showed that the invoices plaintiff based its claim upon only covered the period before the subcontractor's termination and that plaintiff's equipment remained available onsite for the project at all times covered by those invoices. Importantly, to raise a proper lien claim under N.C.G.S. § 44A-2, plaintiff only had to prove that its equipment had been "directly utilized" on the project, not that it had been continuously used. **Blastmaster Holdings USA, LLC v. Land Coast Insulation, Inc., 565.**

DUI—breath test results—statutory requirements for admissibility—new trial granted—In a prosecution on charges of speeding and driving while impaired, defendant was entitled to a new trial where the trial court admitted into evidence (over defendant's timely objection) the results of defendant's breath testing even though the State had not established a proper foundation by showing that the Intoxilyzer EC/IR II results complied with the requirements of N.C.G.S. § 20-139.1 or that the testing was performed in accordance with the rules set forth by the North Carolina Department of Health and Human Services—specifically, that if two sequential breath samples differing by less than 0.02 grams of alcohol per 210 liters of breath are not obtained, additional samples must be collected and only the lower of two test results may be used to prove any particular alcohol concentration. **State v. Vaughn, 752.**

DUI—motion to suppress—reasonable suspicion shown—In a prosecution on charges of speeding and driving while impaired, the trial court did not err in denying defendant's motion to suppress evidence discovered following a traffic stop and defendant's subsequent arrest for impaired driving where the court's findings of fact, none of which were challenged and were thus binding on appeal—particularly those regarding evidence of defendant: speeding; having an odor of alcohol and red, glassy eyes after the trooper initiated a traffic stop; admitting to having consumed alcohol before driving; swaying when outside his vehicle; and showing 6 out of 6 possible clues of impairment in his horizontal gaze nystagmus test results—supported the conclusion that the trooper had reasonable suspicion that defendant was driving while impaired. **State v. Vaughn, 752.**

DUI—speeding—radar results—statutory requirements for admissibility—In a prosecution on charges of speeding and driving while impaired, the trial court did not abuse its discretion in admitting the radar reading obtained by a Highway Patrol trooper, which led to a traffic stop and defendant's eventual arrest, to corroborate the trooper's testimony where the trooper—while failing to give the exact name of the agency (the North Carolina Criminal Justice Education and Training Standards Commission) that approved the radar model, issued the operator's certificate, and inspected the device—nonetheless provided sufficiently specific testimony to permit the trial court to conclude compliance with the requirements of N.C.G.S. § 8-50.2(b) (governing the admissibility of results from a speed-measuring instrument). **State v. Vaughn, 752.**

DUI—traffic stop—results of portable breath testing excluded—video showing testing admitted—In a prosecution on charges of speeding and driving while impaired, the trial court did not abuse its discretion by allowing the State to present video evidence to the jury showing that defendant submitted to a portable breath test (PBT), despite the court having excluded the results of the PBT, because the court—aware that the footage could potentially prejudice defendant—instructed the jurors multiple times that they should assess the footage only to determine defendant's "demeanor and behavior" during the traffic stop. **State v. Vaughn, 752.**

Maintaining or keeping vehicle—for keeping or selling controlled substances—motion to dismiss—In a prosecution for multiple drug-related charges arising from the search of a car that defendant was found driving before his arrest, the trial court properly denied defendant's motion to dismiss a charge of maintaining a vehicle for the keeping or selling of controlled substances. To be sure, there was insufficient evidence that defendant "maintained" the car, since there was no proof that he owned or had a property interest in it, paid toward its purchase, or paid

for any repairs or maintenance of the car. However, there was sufficient evidence that defendant "kept" the vehicle where the items found inside—including a hotel receipt from the day before, mail, and a social security card with defendant's name on them—suggested that defendant had control over the vehicle for a longer period of time. Further, other items inside the car—including a handgun and a bookbag containing fentanyl and myriad drug paraphernalia—supported an inference that defendant used the vehicle for keeping or selling controlled substances. **State v. Garmon, 725.**

OPEN MEETINGS

Statute not applicable—email exchanges among village council members—not simultaneous communications—In an action for declaratory and injunctive relief, brought against the Village of Pinehurst, the mayor of Pinehurst, and a member of the Pinehurst Village Council (defendants) by a former member of the council—who had lost a reelection campaign, with his term ending on 31 December 2021—and the entity he incorporated shortly thereafter (plaintiffs), the trial court did not err in allowing defendants' motion for judgment on the pleadings upon a finding that a series of email exchanges—including two email messages generated over the course of five days—among some members of the council (and other parties, such as the mayor, attorney, and manager of the Village of Pinehurst) did not violate N.C.G.S. § 143-318.9 et seq. (the Open Meetings Law) because the exchanges did not constitute "simultaneous communications" among a majority of the council's members. **N.C. Citizens for Transparent Gov't, Inc. v. The Vill. of Pinehurst, 658.**

SEARCH AND SEIZURE

Search of car—drug investigation—reasonable suspicion—specific and articulable facts—In a drug trafficking prosecution arising from the search of a car in which defendant was riding as a passenger, specific and articulable facts, based on competent evidence, supported a reasonable suspicion of criminal activity, including: a known, reliable confidential informant provided information about defendant's drug dealings, residence, and cars that were used to conduct drug transactions; officers began surveilling defendant's residence and cars; drugs and drug paraphernalia were discovered in a trash pull at defendant's home; officers obtained a search warrant to search defendant's person and residence; and, before the warrant was executed, defendant was observed placing a box and bag from his home into one of the identified cars, which led an officer to conduct the car stop. Where the stop was based on reasonable suspicion, the trial court did not err, much less plainly err, by denying defendant's motion to suppress evidence gathered from the car. Further, defense counsel was not ineffective for failing to object to the admission of that evidence. **State v. Chambers, 709.**

SUBROGATION

Claim of lien on real property—second-tier subcontractor—effect of partial lien waivers—statutory interpretation—In a case arising from a contract for construction services between a general contractor and a property owner (together, defendants), where a subcontractor—which had hired a second-tier subcontractor (plaintiff) to provide rental equipment for the construction project—submitted periodic invoices containing partial lien waivers in exchange for progress payments from defendants, the trial court properly granted summary judgment in plaintiff's favor on

its subrogation claim of lien on real property, which plaintiff filed after the subcontractor was terminated from the project. Under the proper interpretation of N.C.G.S. § 44A-23(c), partial lien waivers—unlike final lien waivers—do not fully extinguish a second-tier subcontractor's subrogation rights, but only limit the amount that it can potentially claim as a lien to the outstanding balance on the primary contract. Further, N.C.G.S. § 22B-5—a related statutory provision governing lien waivers—bolsters rather than contradicts this interpretation of section 44A-23(c), since it provides that partial lien waivers are unenforceable unless they are limited to the payment actually received. **Blastmaster Holdings USA, LLC v. Land Coast Insulation, Inc., 565.**

VENUE

Motion to change—non-compulsory counterclaim filed in challenged venue—implied waiver—In an action for child support, post-separation support, and related claims, the trial court properly denied defendant's motion to change venue to an adjacent county because defendant actively participated in the suit by filing non-compulsory counterclaims (including for child custody, which had not been a pending issue before the trial court) in the challenged venue even though his venue motion was still pending and alternative legal options were available. Therefore, defendant waived his challenge to venue. **Braswell v. Braswell, 574.**

WORKERS' COMPENSATION

Separately compensable accident—settlement agreement regarding earlier injury to same body part—not applicable—Where an employee sustained a rotator cuff injury to his right shoulder while at work for his employer in 2020, seven years after the parties—with the approval of the Industrial Commission—entered into a settlement agreement resolving an earlier compensable injury to the rotor cuff of the same shoulder (which the employee sustained at work in 2009) by awarding the employee a lump sum as "the only" compensation for the 2009 injury to be paid "for his entire life," the Industrial Commission did not err in concluding that the 2020 injury was the result of an accident by injury separately compensable from the 2009 injury because the 2020 injury: (1) was a material aggravation of the employee's pre-existing shoulder condition; (2) resulted in new pain; and (3) was the result of a different type of accident. Therefore, the settlement agreement did not bar plaintiff's workers' compensation claim for the 2020 injury. **Collins v. Wieland Copper Prods., LLC, 584.**

ZONING

Unified development ordinance—food trucks—regulations regarding location and operation—In an action brought by two food truck owners and a commercial business owner who sought to host food trucks in her business parking lot (plaintiffs) against the City of Jacksonville and its officials (defendants)—seeking a declaratory judgment, injunctive relief, and nominal damages based on allegations that certain provisions in the city's unified development ordinance (UDO) concerning the location and operation of food trucks violated plaintiffs' state constitutional rights under the freedom of speech, equal protection, fruits of their own labor, and law of the land clauses, and also that the UDO required unreasonably high fees to operate a food truck—the trial court's order dismissing plaintiffs' complaint, pursuant to Civil Procedure Rule 12(b)(6), was reversed and the matter was remanded for

further proceedings. The trial court erred by applying a "blanket legal standard" to all of plaintiffs' claims—specifically, by determining that it could "envision a number of reasonably conceivably rational bases to support the challenged provisions of the [UDO]"—where each of those claims was subject to a distinct applicable legal test. When the allegations in the complaint, taken as true, were considered in light of the legal standard pertinent to each, they sufficiently stated claims upon which relief could be granted. **Proctor v. City of Jacksonville, 665.**

Unified development ordinance—notice of violation—order of compliance with approved site plan—no abuse of discretion—After determining that a flea market (petitioner) was properly issued a notice of violation by a city-county board of adjustment for failure to comply with an approved site plan pursuant to a Unified Development Ordinance, the trial court did not abuse its discretion by ordering petitioner to bring its property into full compliance with a new site plan within thirty-six months, which allowed petitioner an ample amount of time to correct the violation. **Durham Green Flea Mkt. v. City of Durham, 594.**

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

Cases for argument will be calendared during the following weeks:

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

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

ABITOL v. CLARK

[296 N.C. App. 557 (2024)]

MICHAEL JAMES ABITOL IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF DANIEL SOLOMON ABITOL A/K/A DANIEL S. ABITOL A/K/A DAN ABITOL; MICHAEL JAMES ABITOL IN HIS CAPACITY AS TRUSTEE OF THE DANIEL SOLOMON ABITOL REVOCABLE TRUST DATED JANUARY 15, 2018 AND MICHAEL JAMES ABITOL IN HIS CAPACITY AS TRUSTEE OF THE AVA MARIE ABITOL SPECIAL NEEDS TRUST ESTABLISHED JANUARY 15, 2018, PLAINTIFF

v.

DEBORAH R. CLARK, IN HER CAPACITY AS GUARDIAN OF THE ESTATE OF AVA MARIE ABITOL, A MINOR; DEBORAH R. CLARK, IN HER CAPACITY AS TRUSTEE OF THE AVA MARIE ABITOL SPECIAL NEEDS TRUST ESTABLISHED NOVEMBER 10, 2020, AND HASNAA ABITOL, INDIVIDUALLY, AND NOAH DANIEL ABITOL, A MINOR, TO APPEAR THROUGH A GUARDIAN AD LITEM, DEFENDANTS

No. COA24-478

Filed 3 December 2024

Declaratory Judgments—pleading—actual controversy—inheritance rights—after-born child

In an action filed by plaintiff as the executor of his brother's estate, where the brother (decedent) died intestate more than ten months before his wife gave birth to their son, who was decedent's second child, the first being a daughter born from a previous relationship while decedent was alive, the trial court erred in dismissing plaintiff's claim for a declaratory judgment regarding the son's right to inherit as an after-born child. An "actual controversy" existed between the parties (which included the guardian of the daughter's estate), since they disputed the son's inheritance rights under the intestate statutes and the resolution of that dispute would impact the distribution of the decedent's estate, which included assets that were originally set to go solely to the daughter or to the special needs trust set up on her behalf. Further, N.C.G.S. § 29-9 did not bar this matter from being litigated, since it guarantees inheritance rights for children born within ten lunar months of their parent's death but does not exclude other possibilities.

Appeal by plaintiff from order entered 15 January 2024 by Judge Peter Knight in Superior Court, Mecklenburg County. Heard in the Court of Appeals 24 October 2024.

Ellis & Winters, LLP, by Pamela S. Duffy, for plaintiff-appellant Michael Abitol.

Shumaker, Loop & Kendrick, LLP, by Lucas D. Garber & Abigail Y. Bechtol; Kirk Palmer & Thigpen, P.A., by Stephanie C. Daniel, for defendant-appellee Hasnaa Abitol.

Johnston, Allison & Hord, P.A., by Lauren S. Martin & David T. Lewis, for defendant-appellee Deborah Clark.

ARROWOOD, Judge.

Michael Abitol ("plaintiff") appeals from an order entered 15 January 2024 dismissing plaintiff's claim for declaratory relief as to whether Noah Abitol ("Noah"), the son of Daniel Abitol ("decedent"), is a beneficiary of decedent's estate as an after-born child. For the following reasons, we reverse the trial court's dismissal of the claim and remand for further proceedings.

I. Background

Because this appeal arises out of a dismissal pursuant to Rule 12(b)(6), we rely upon the facts as alleged in plaintiff's complaint and defendant's subsequent responses and motions submitted to the Mecklenburg County Superior Court.

Decedent married Hasnaa Abitol ("defendant Hasnaa") in 2018. Decedent had a child from a previous relationship named Ava Abitol. Defendant Deborah Clark ("defendant Clark") was appointed to be the guardian of Ava's estate. Prior to decedent's death, decedent executed a Last Will and Testament ("Will") dated 25 January 2018. Simultaneously with the Will, decedent also executed the 2018 Daniel Solomon Abitol Revocable Trust ("Trust") and the 2018 Ava Marie Abitol Special Needs Trust ("SNT").

On 10 May 2020, decedent died unexpectedly from a heart condition due to a delay in routine surgery during the COVID-19 pandemic. Decedent died testate with the Will, Trust, and SNT having been executed prior to his death. Decedent's brother, plaintiff, submitted decedent's will for probate and qualified as Executor for his estate on 17 June 2020.

On 19 November 2018, decedent had amended the Trust to distribute certain Trust property to defendant Hasnaa at the time of decedent's death. After this amendment, decedent and defendant Hasnaa underwent in vitro fertilization ("IVF") treatments to conceive a child. These efforts were successful and resulted in multiple fertilized embryos. Prior to decedent's death, the couple had selected a specific embryo for implantation. After decedent unexpectedly died, defendant Hasnaa completed the IVF transfer process and gave birth to Noah on 16 March 2021. Noah was born 10 months and 6 days after decedent's death and DNA evidence confirms that Noah is the biological child of the decedent.

Decedent's will devised the residuary of his estate to the Trust. The SNT was established within the Trust for Ava Abitol, who has a disability, and she is the sole beneficiary of the SNT. Plaintiff is the trustee of both the SNT and the Trust. The Trust included provisions regarding the allocation of trust property to various family members, with the remaining balance of the Trust to be distributed to the SNT. The Trust did not define the term "children".

At the time of decedent's death, he had a life insurance policy with a face value of $1,000,000.00 with Ava named as the sole beneficiary. However, due to the failure to name the SNT as a beneficiary on the life insurance policy, in accordance with what decedent intended to do, defendant Clark petitioned the trial court to establish a new Special Needs Trust for Ava which would receive the life insurance proceeds. Neither plaintiff nor decedent's estate were included as parties in that proceeding. Those proceedings resulted in an order to establish a new SNT ("Court Ordered SNT") with defendant Clark appointed as the trustee. Since the Court Ordered SNT was created, Ava Abitol's mother has been receiving payments from this trust for the benefit of Ava.

In the course of administering decedent's estate, plaintiff brought a declaratory judgment action in Mecklenburg County Superior Court seeking to determine four issues: (1) Noah's right to inherit as an after-born child; (2) requesting a modification of the Trust to include Noah as an equal beneficiary with Ava; (3) reconciling the 2018 SNT with the Court Ordered SNT; and (4) requesting a declaratory judgment on the ownership of a Maserati (this issue has been resolved prior to the hearing in this matter). Hasnaa was joined as a defendant individually and in her capacity as the guardian for Noah. Defendant Clark was joined in her capacity as the trustee for the 2018 SNT and as trustee of the Court Ordered SNT.

In response to plaintiff's complaint, defendant Clark moved to dismiss, pursuant to Rule 12(b)(6), all the claims in the complaint with prejudice on 21 November 2022. Specifically, defendant Clark argued the first claim should fail because there was no statutory authority or judicial basis for carving out and distributing an intestate share of a decedent's estate to a child who was born more than ten (10) lunar months after the decedent's death. Defendant Hasnaa, both in her individual capacity and as guardian of Noah, moved for judgment on the pleadings, arguing that DNA evidence can be used to establish that a decedent is the father of a child who is born out of wedlock within one-year of the decedent's death and this evidence may be used to allow that child to inherit intestate.

On 15 February 2024, the trial court denied defendant Hasnaa's motion for judgment on the pleadings, stating that the pleadings in this matter remain open. Furthermore, the trial court partially granted defendant Clark's motion to dismiss by dismissing plaintiff's claim for declaratory judgment on Noah's right to inherit as an after-born child. Specifically, the trial court held that this case did not involve an issue of fact, but rather an issue of law. Accordingly, the trial court found that there was no controversy as to Noah's right to inherit and granted the motion to dismiss for plaintiff's first claim in his complaint. In its dismissal order, the trial court certified the order for immediate appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure in regards to defendant's request for declaratory relief on the issue of Noah's right to inherit.

On 28 February 2024, plaintiff timely filed notice of appeal of the trial court's order dismissing his claim for declaratory judgment as to Noah's status as an after-born child.

II. Discussion

On appeal, plaintiff argues that: (1) the trial court erred in dismissing their claim for declaratory judgment after concluded that there was no genuine controversy concerning Noah's right to inherit; (2) the facts pled in the complaint support a finding that Noah is an "after-born child" under N.C.G.S. § 31-5.5 (2023); and (3) plaintiff is entitled to a declaration as to whether Noah can inherit under N.C.G.S. § 29-19(b)(3) (2023) because he was born after the marriage was terminated. Although defendant Hasnaa is an appellee for this appeal, she also argues that the trial court erred in dismissing the plaintiff's complaint and requests that this court apply equity principles to allow Noah to inherit from his father's estate. We address whether the trial court erred in dismissing plaintiff's request for declaratory judgment.

A. Request for Declaratory Judgment

Both plaintiff and defendant Hasnaa argue on appeal that the trial court erred in dismissing plaintiff's request for declaratory judgment and finding that there was no justiciable controversy. We agree.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400 (2003). Our Supreme Court has held that dismissal of a claim for declaratory judgment "is allowed *only* when the record *clearly shows* that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing

controversy." *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439 (1974) (emphasis added).

In North Carolina, declaratory judgment actions are subject to the Uniform Declaratory Judgment Act ("NCUDJA"). N.C.G.S. § 1-253 to 1-267 (2023). "A jurisdictional prerequisite of a declaratory judgment claim is that a controversy must exist between the interested parties both at the time of filing the complaint and the time of hearing at which the matter comes before the trial court for a hearing." *Chapel H.O.M. Associates, LLC v. RME Management, LLC*, 256 N.C. App. 625, 629–30 (2017) (citing *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584–85 (1986)). A sufficient basis for a declaratory judgment claim exists when:

> (1) . . . a real controversy exists between or among the parties to the action; (2) . . . such controversy arises out of *opposing contentions* of the parties, made in good faith, *as to the validity* or construction of a deed, will or *contract in writing*, or as to the validity or construction of a statute, or municipal ordinance, contract, or franchise; and (3) . . . the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, and may be determined by a judgment or decree in the action . . . .

N.C. Consumers Power, Inc., 285 N.C. at 449. An "actual controversy" has been defined as a controversy that exists "between parties having *adverse interests* in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338 (1984). Accordingly, this standard *only* requires the plaintiff to "allege in his complaint and show at the trial that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities . . . under a statute . . . exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure." *N.C. Consumers Power, Inc.*, 285 N.C. at 449.

Here, it is clear that plaintiff's complaint meets these requirements to show that a proper claim for declaratory relief was asserted. Reviewing the cold record, plaintiff sought a declaratory judgment regarding determination of Noah's rights to inherit intestate as an after-born child of the decedent. Specifically, plaintiff alleges the following in his complaint:

> 45. An actual and justiciable controversy suitable for entry of a declaratory judgment exists regarding a determination of Noah's rights as an afterborn child of the Decedent.

> 46. In accordance with N.C.G.S. § 1-255, Plaintiff Michael James Abitol, as Executor and Trustee, and Noah, by and through his guardian ad litem, are entitled to apply for a declaratory judgment to determine Noah's rights as an afterborn child as a beneficiary of the Decedent's estate and Trust and to the Decedent's life insurance and other assets to the Decedent. . . . .
>
> 50. Pursuant to N.C.G.S. § 31-5.5, as an after-born child, Noah is entitled to share in the Decedent's estate to the same extent that he would have shared had the Decedent died intestate.
>
> 51. Under N.C.G.S. § 29-19(b)(3), Noah is entitled to take under the laws of intestate succession because he was born within one year after his father's death and because his paternity is established by DNA testing.
>
> 52. Upon information and belief, Defendant Clark contends that the provisions of N.C.G.S. § 29-9 bar Noah's inheritance because he was born more than 10 months after the Decedent's death.
>
> 53. While N.C.G.S. § 29-9 creates a presumptive right in the child born within 10 lunar months of the Decedent's death, it is not the exclusive method by which a right to inheritance arises.
>
> 54. There is an actual and justiciable controversy concerning Noah's right to inherit.

In plaintiff's complaint, he clearly alleges how his construction of the after-born child statute contends with defendant's construction of the same and related statutes. Furthermore, in response to plaintiff's complaint, defendant Clark argues that there is no statutory authority or judicial basis for carving out an intestate share for Noah because he was born more than 10 lunar months after decedent's death.

Based on the facts alleged in plaintiff's complaint and defendant Clark's subsequent response, we determine that an actual controversy exists over Noah's right to inherit as an after-born child. A sufficient claim for declaratory relief exists for the following reasons:

First, a real controversy exists between plaintiff and defendant Clark because granting plaintiff's claim for declaratory judgment will adversely impact defendant Clark's interests as guardian of Ava and trustee of the SNT. Plaintiff, as executor of decedent's estate, owes

fiduciary duties to both Ava and Noah, should Noah be considered a beneficiary of decedent's estate. Furthermore, as guardian and trustee of Ava and the SNT, defendant Clark owes a fiduciary duty to Ava to ensure she is advocating and advancing Ava's interests as a minor child with special needs. Accordingly, both parties have vested interests in the outcome of this declaratory judgment as it will impact their fiduciary duties in executing decedent's estate.

Second, the controversy that exists between plaintiff and defendant Clark exists arises from their opposing contentions of certain intestate statutes. Plaintiff's assertion is that Noah should be entitled to inherit under the after-born child statute, which is in direct contention with defendant Clark's assertion that Noah may not inherit due to N.C.G.S. § 29-9. Defendant Clark interprets N.C.G.S. § 29-9 as imposing an absolute bar for after-born children to inherit if they are born more than 10 lunar months after the decedent's death. In the pleadings, plaintiff asserts that N.C.G.S. § 29-9 creates a presumptive right that children born within 10 lunar months of the decedent's death may inherit. Defendant Clark asserts that the same statute creates an absolute bar and any child born after 10 lunar months cannot inherit. Neither of these interpretations can be true at the same time. Furthermore, defendant Clark contends that the presumption established by N.C.G.S. § 29-9 can only be overcome by evidence that the child was *in utero* at the time of decedent's death. Both constructions of this statute cannot be true at the same time and litigation is necessary for a court to resolve this controversy. Accordingly, because both plaintiff and defendant are construing N.C.G.S § 31-5.5 and N.C.G.S. § 29-9 in opposing ways in terms of Noah's right to inherit, an actual controversy between the parties exists.

Finally, the parties in this case have legal rights that would be implicated by a ruling from the trial court and dismissal of the claim could open plaintiff up to further liability due to his role as executor of decedent's estate. First, plaintiff's and defendant Hasnaa's contentions that Noah should inherit under N.C.G.S. § 31-5.5 concern Noah's right to inherit as an after-born child. Second, in her capacity as guardian of the estate for Ava, defendant Clark's contention that Noah may not inherit as an after-born child directly impacts Ava's right to inherit because should Noah be able to inherit under any of the theories stated above, this would impact the distribution of multiple different assets in decedent's estate which are currently set to solely go to Ava or the SNT. Therefore, action on this declaratory judgment claim will necessarily impact if, and how much, of decedent's estate both Noah and Ava will be able to inherit.

Pursuant to N.C.G.S. § 29-9, "[l]ineal descendants and other relatives of the intestate born within 10 lunar months after the death of the intestate shall inherit as if they had been born in the lifetime of the instate and had survived him" N.C.G.S. § 29-9 (2023). Defendant argued, and apparently this trial court agreed, that this statute operates as a bar for any child born more than 10 months from the intestate's death. This argument is incorrect. The statute merely confirms that one born within 10 months SHALL inherit; it does not exclude other possibilities. Thus, the statute does not act as a bar to this claim.

Accordingly, because an actual controversy exists between the parties and Noah and Ava's rights would be impacted through this litigation, and there is no statutory bar to prevent this matter from being litigated, the trial court erred in dismissing plaintiff's request for declaratory relief.

In view of our determination, we decline the parties' invitation to go further in resolving this matter and remand the matter to the trial court to fully determine the facts and issues not only with respect to this issue but the other matters pending in this case.

III. Conclusion

Based upon the foregoing, we reverse the trial court's dismissal of plaintiff's claim for declaratory judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges HAMPSON and WOOD concur.

BLASTMASTER HOLDINGS USA, LLC D/B/A BLASTONE INTERNATIONAL, PLAINTIFF
v.
LAND COAST INSULATION, INC.; MATRIX SERVICE, INC.; PIEDMONT NATURAL GAS COMPANY, INC. A/K/A PIEDMONT NATURAL GAS CO. INC.; AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, DEFENDANTS

No. COA24-347

Filed 3 December 2024

1. Subrogation—claim of lien on real property—second-tier subcontractor—effect of partial lien waivers—statutory interpretation

In a case arising from a contract for construction services between a general contractor and a property owner (together, defendants), where a subcontractor—which had hired a second-tier subcontractor (plaintiff) to provide rental equipment for the construction project—submitted periodic invoices containing partial lien waivers in exchange for progress payments from defendants, the trial court properly granted summary judgment in plaintiff's favor on its subrogation claim of lien on real property, which plaintiff filed after the subcontractor was terminated from the project. Under the proper interpretation of N.C.G.S. § 44A-23(c), partial lien waivers—unlike final lien waivers—do not fully extinguish a second-tier subcontractor's subrogation rights, but only limit the amount that it can potentially claim as a lien to the outstanding balance on the primary contract. Further, N.C.G.S. § 22B-5—a related statutory provision governing lien waivers—bolsters rather than contradicts this interpretation of section 44A-23(c), since it provides that partial lien waivers are unenforceable unless they are limited to the payment actually received.

2. Liens—claim of lien on real property—second-tier subcontractor—equipment for construction project—"directly utilized"—summary judgment

In a case arising from a contract for construction services between a general contractor and a property owner (together, defendants), where one of the subcontractors involved hired a second-tier subcontractor (plaintiff) to provide rental equipment for the property owner's construction project, and where that subcontractor was eventually fired from the project, the trial court properly granted summary judgment in plaintiff's favor on its subrogation claim of lien on real property. Defendants argued that plaintiff's equipment was not "directly utilized" on the project after the subcontractor's termination, thereby creating a genuine issue of material fact regarding

the lien amount plaintiff was entitled to claim. However, the record showed that the invoices plaintiff based its claim upon only covered the period before the subcontractor's termination and that plaintiff's equipment remained available onsite for the project at all times covered by those invoices. Importantly, to raise a proper lien claim under N.C.G.S. § 44A-2, plaintiff only had to prove that its equipment had been "directly utilized" on the project, not that it had been continuously used.

Appeal by Defendants from Order entered 4 January 2024 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 September 2024.

Lewis Brisbois Bisgaard & Smith LLP, by Eric G. Sauls, Jonathan M. Preziosi, pro hac vice, and Brian C. Deeney, pro hac vice, for Defendant-Appellants.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Byron L. Saintsing & Joseph A. Davies, for Plaintiff-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Matrix Service, Inc. (Matrix), Piedmont Natural Gas Company, Inc. (PNG), and Fidelity and Deposit Company of Maryland (Fidelity) (collectively, Defendants) appeal from an Order granting Summary Judgment in favor of Plaintiff-Appellee Blastmaster Holdings USA (Blastmaster) and denying Defendants' Motion for Partial Summary Judgment. The Record before us tends to reflect the following:

On or about 30 April 2019, Matrix entered into a contract with PNG (the Primary Contract) to perform certain engineering, procurement, and construction services for PNG's Robeson County LNG Peak-Shaving Facility (the Project). On 3 July 2019, Matrix filed a Notice of Contract with the Robeson County Clerk of Court. However, Matrix has never provided any evidence a Notice of Contract was posted at the Project site at any time. Matrix entered into a Subcontract Construction Agreement with Land Coast Insulation, Inc. (Land Coast) on 21 January 2021 for Land Coast to provide labor and materials for the Project.

Land Coast then entered into a Credit Application with Blastmaster, pursuant to which Blastmaster provided Land Coast with sandblasting abrasive and equipment, rental of sandblasting equipment, and related

materials and/or labor for use on the Project. Pursuant to the Credit Agreement, between 22 February and 23 August 2021, Land Coast ordered a total of $323,050.47 in sandblasting services and rental equipment from Blastmaster for use on the Project. During the course of Land Coast's work on the Project, it submitted periodic invoices to Matrix for the labor and materials it had furnished in a given period. With each invoice, Land Coast also provided a Subcontractor's Partial Lien Waiver and Release. The partial lien waivers stated:

> [Land Coast], in consideration of payment in the amount of $ [invoice amount] and contingent only upon the receipt of payment, waives and releases any right which it now has [or] may have in the future to claim a mechanics' lien or any other lien rights, and waives and releases all other claims or actions of any kind (whether billed or unbilled) against (a) the real property on which the Project is located; (b) the improvements and other property located thereon; and (c) Contractor and Owner and their partners, parents, members, subsidiaries and affiliates, at all tiers[.]

Under the partial lien waivers, Land Coast certified it had paid all of its subcontractors, suppliers, and employees for the labor and materials connected to the Project. Land Coast submitted the relevant invoices and partial lien waivers on 24 February 2021, 23 March 2021, 25 May 2021, 28 May 2021, 9 July 2021, and 2 August 2021. Matrix terminated Land Coast from the Project for cause on 23 August 2021.

On 14 September 2021, Blastmaster filed and served a Claim of Lien on Real Property and a Notice of Claim of Lien Upon Funds to Matrix and PNG, asserting a lien on real property in the amount of $323,050.47, plus interest and costs. Matrix then executed a Release of Lien Bond with Fidelity. At the time Blastmaster filed its Claim of Lien, Matrix's work on the Project was ongoing. As of 16 September 2021, two days after Blastmaster filed and served a Claim of Lien and Notice of Claim of Lien Upon Funds, Matrix had three outstanding invoices with PNG: one for $2,500,000.00; another for $164,476.81; and a third for $5,511,084.88—totaling $8,175,561.69.

On 28 October 2021, Blastmaster filed a Complaint in Wake County District Court against Land Coast, Matrix, and PNG, alleging breach of contract, claim of lien on real property, wrongful payment by PNG to Matrix, and wrongful payment by Matrix to Land Coast. On 3 December 2021, Blastmaster filed an Amended Complaint adding Fidelity as a defendant and making an additional allegation of claim on corporate surety bond to discharge a statutory lien. Matrix and PNG filed their Answers

on 4 January 2022, and Fidelity filed its Answer on 7 January 2022. In its Answer, Matrix filed a counterclaim against Blastmaster. Blastmaster filed a Motion to Dismiss Matrix's counterclaim on 25 January 2022. Matrix and PNG filed their Answers to the Amended Complaint on 26 January 2022. On 15 February 2022, Blastmaster filed a Renewed Motion to Dismiss Matrix's counterclaim.

This matter was transferred to Wake County Superior Court by consent order on 9 March 2022. On 12 May 2022, the trial court denied Blastmaster's Renewed Motion to Dismiss Matrix's Counterclaim. Blastmaster filed a Motion for Summary Judgment on 20 March 2023. After a continuance, Defendants filed a Motion for Partial Summary Judgment against Blastmaster on 10 October 2023. The summary judgment Motions came on for hearing on 16 November 2023. On 4 January 2024, the trial court entered an Order granting Blastmaster's Motion for Summary Judgment and denying Defendants' Motion for Partial Summary Judgment. The Order awarded Blastmaster a subrogation lien in the principal amount of $323,050.47 with 18% interest per annum from 14 April 2021 until the date of the Order, and an interest rate of 8% per year beginning after entry of the Order until paid in full. Defendants timely filed Notice of Appeal on 11 January 2024.

Issue

The dispositive issue on appeal is whether the trial court erred by granting Summary Judgment for Blastmaster based on: (I) its application of N.C. Gen. Stat. § 44A-23(c); or (II) the existence of genuine issues of material fact.[1]

Analysis

I. Construction Lien Statute

[1] "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted); *see also Rawls & Assocs. v. Hurst*, 144 N.C. App. 286, 289, 550 S.E.2d 219, 222 (2001) ("A summary judgment motion should be granted when, based upon the pleadings and supporting materials, the trial court determines

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

that only questions of law, not fact, are to be decided." (citation omitted)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

This Court has recently addressed subrogation lien rights of second- and third-tier subcontractors arising from the same underlying Project in *Atlantech Distribution, Inc. v. Land Coast Insulation, Inc.*, 294 N.C. App. 629, 905 S.E.2d 224 (2024). There, the Court considered the caselaw around subrogation lien rights and its interaction with the statutes governing subcontractors' lien rights and property owners' liability when a general contractor or subcontractor fails to pay its subcontractor. We recognized the General Assembly's enactment of N.C. Gen. Stat. § 44A-23 as creating statutory mechanisms by which a property owner may protect itself from a risk of double payment to contractors and subcontractors, including the use of lien waivers. Indeed, in that case, the same Defendants raised identical arguments as they do here. This Court rejected those arguments, concluding "partial lien waivers do not extinguish a subcontractor's subrogation rights; however, a partial lien waiver may limit the amount of a subcontractor's claim to the amount remaining on the primary contract following the latest partial lien waiver if that amount is less than the amount owed to the subcontractor." *Id.* at 229 (citing *Vulcan Materials Co. v. Fowler Contracting Corp.*, 111 N.C. App. 919, 922, 433 S.E.2d 462, 464 (1993) and *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 661, 403 S.E.2d 291, 297 (1991)).

Thus, consistent with our recent precedent, we conclude Blastmaster retained its subrogation lien rights to the extent its claim as of the latest partial lien waiver issued was less than the amount remaining on the Primary Contract. Here, Blastmaster filed and served a Claim of Lien and a Notice of Claim of Lien Upon Funds to Matrix and PNG on 14 September 2021 for $323,050.47. Land Coast submitted its last partial lien waiver before its termination on or about 30 July 2021. Although Matrix submitted another partial lien waiver to PNG on 16 September 2021, Blastmaster had already filed and served its Claim of Lien; thus, we consider only the last partial lien waiver preceding Blastmaster's Claim of Lien. It is undisputed that following Land Coast's last partial lien waiver, Matrix had three outstanding invoices totaling $8,175,561.69. Thus, because the amount of Blastmaster's claim was less than the amount outstanding on the Primary Contract when Blastmaster perfected its Subrogation Lien, Blastmaster was entitled to lien rights for the entirety of its claim.

Additionally, Defendants note a different statute—N.C. Gen. Stat. § 22B-5—differentiates partial lien waivers from final lien waivers.[2] They then assert: "Being thoroughly familiar with the construction industry's reliance upon both interim lien waivers and final lien waivers . . . , the Legislature would have used the phrase 'final lien waiver' in N.C. Gen. Stat. § 44A-23(c) if that were the only type of waiver that could affect a lower tier subcontractor's right to assert a subrogated lien against real property." We disagree.

Section 22B-5 provides in full:

> (a) Provisions in lien waivers, releases, construction agreements as defined in G.S. 22B-1(f)(1), or design professional agreements as defined in G.S. 22B-1(f)(5) purporting to require a promisor to submit a waiver or release of liens or claims as a condition of receiving interim or progress payments due from a promisee under a construction agreement or design professional agreement are void and unenforceable unless limited to the specific interim or progress payment actually received by the promisor in exchange for the lien waiver.
>
> (b) This section does not apply to the following:
>
> (1) Lien waivers or releases for final payments.
>
> (2) Agreements to settle and compromise disputed claims after the claim has been identified by the claimant in writing regardless of whether the promisor has initiated a civil action or arbitration proceeding.

N.C. Gen. Stat. § 22B-5 (2023). Under this provision, lien claimants may only waive claims for which they have been paid to date and cannot waive future lien claims for which they have not been paid. *See* "§ 1:31. Public Policy Limitations on Common Construction Contract Provisions—Limits on Lien Waivers," N.C. Constr. L. (Aug. 2024). This is to say partial lien waivers are unenforceable unless they are limited specifically to the payment actually received. This is consistent with this Court's interpretation of N.C. Gen. Stat. § 44A-23: a partial lien waiver reduces the amount of a party's liability by the amount of the payment.

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2. Despite this argument being only briefly raised by Defendants to this Court in *Atlantech*—and then only in a Reply Brief—it, nevertheless, features heavily in their pending Petition for Discretionary Review to the North Carolina Supreme Court. Defendants now raise substantially the same argument here as in their pending Petition for Discretionary Review.

Thus, when a subcontractor issues a partial lien waiver in exchange for a payment, the property owner's liability is reduced by the amount of that payment. However, a second- or third-tier subcontractor retains its lien claim and can enforce that claim to the extent there is an outstanding balance on the primary contract.

Further, although it is true this provision differentiates between partial and final lien waivers, a careful reading of the statute bolsters our interpretation of the statute at issue here. Subsection (b) of § 22B-5 states the above section does not apply to "[l]ien waivers or releases for final payments." N.C. Gen. Stat. § 22B-5(b) (2023) (emphasis added). Merriam-Webster defines "or" as "(1) used as a function word to indicate an alternative, the equivalent or substitutive character of two words or phrases, or approximation or uncertainty." *Or*, The Merriam-Webster Dictionary (11th ed. 2022). Under this definition, we read the term "lien waiver" as "the equivalent or substitutive character" of the term that follows: "releases for final payments." Similarly, Black's Law Dictionary addresses the use of "or" in statutory construction: "in a legal instrument, *and* joins a conjunctive list to combine items, while *or* joins a disjunctive list to create alternatives." *Conjunctive/Disjunctive Canon*, Black's Law Dictionary (12th ed. 2024). Thus, N.C. Gen. Stat. § 22B-5 does not apply to final lien waivers; rather, a final lien waiver can eliminate all liability. This bolsters the above interpretation because a partial lien waiver only releases a property owner from the amount of liability tied to each partial lien waiver. While the General Assembly added language clarifying some lien waivers as partial in § 22B-5, when it referred simply to "lien waivers" it meant releases for final payment—final lien waivers.

Additionally, we note N.C. Gen. Stat. § 22B-5 was enacted in 2022—nine years after N.C. Gen. Stat. § 44A-23(c) was enacted. Thus, although Section 22B-5 differentiates between partial and final lien waivers, it does not necessarily follow that the General Assembly had the same understanding or perception of different types of lien waivers in 2013. Indeed, the General Assembly declined to recognize partial lien waivers in 2012 when it rejected proposed amendments to N.C. Gen. Stat. § 44A-12, which included required forms for partial lien waivers and final lien waivers, as well as language specifying the differing effect of partial versus final lien waivers on the effective date of lien claims. *Compare* H.B. 1052, 2011 Gen. Assemb., 2012 Reg. Sess. (N.C. 2012) (proposed version 22 May 2012) *and* H.B. 1052, 2011 Gen. Assemb., 2012 Reg. Sess. (N.C. 2012) (adopted version 12 July 2012). We are, therefore, not persuaded Section 22B-5 requires a contrary reading of the term "lien waivers" in § 44A-23; rather, we conclude it bolsters this Court's prior interpretation. Thus, based on the pleadings and materials in the

Record, we conclude Blastmaster was entitled to judgment as a matter of law for the full amount of its lien.

II. Issues of Material Fact

[2] Defendants also contend the trial court erred in granting summary judgment for Blastmaster because there were genuine issues of material fact. Defendants specifically argue there was no evidence proving Blastmaster's equipment was directly utilized on the Project after Land Coast abandoned the Project; thus, there is a genuine issue of material fact as to whether all the equipment for which Blastmaster asserted its lien was directly used to improve the Project "for all the time periods covered by its invoices and lien claims." Therefore, Defendants assert, Blastmaster may not be entitled to the amount it sought for the use of its equipment after Land Coast left the Project. We disagree.

As above, "[o]ur standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and quotation marks omitted); *see also Rawls*, 144 N.C. App. at 289, 550 S.E.2d at 222 ("A summary judgment motion should be granted when, based upon the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are to be decided." (citation omitted)).

Blastmaster sought relief under Chapter 44A, Article 2 of our General Statutes. This Article provides for lien rights to a second-tier subcontractor, which it defines as "[a] person who contracts with a first tier subcontractor to improve real property." N.C. Gen. Stat. § 44A-7(8) (2023). The term "improve" under this Section means "[t]o build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, . . . and rental of equipment directly utilized on the real property in making the improvement." N.C. Gen. Stat. § 44A-7(3) (2023). Thus, to make a claim for a lien on real property, Blastmaster must prove its equipment was "directly utilized" on the Project.

According to Defendants, Land Coast abandoned its work under the Painting Subcontract on 23 July 2021, and it did not return to the Project prior to its termination on 23 August 2021. Blastmaster submitted nine invoices totaling $61,293.80 for use of its equipment after Land Coast abandoned the Project. Defendants contend there was no evidence in the Record showing Blastmaster's rental equipment was directly utilized on the Project after Land Coast's abandonment of the Project on 23 July

2021; thus, in Defendants' view, there was a genuine issue of material fact as to whether all of the equipment for which Blastmaster asserted its lien was directly utilized to improve the Project through the dates for which it billed Land Coast.

Defendants point to no caselaw or statute to support their assertion that the requirement equipment be "directly utilized" to improve real property means such equipment must be continuously utilized. It is undisputed that Blastmaster furnished the rental equipment at issue for the Project, the equipment remained onsite at the Project at all times covered by Blastmaster's invoices, and that the equipment was, in fact, directly utilized on the Project. Further, Defendants acknowledge none of the invoices Blastmaster submitted cover a time period after Land Coast was terminated from the Project. Defendants' only contention, then, is that Blastmaster needed to prove the equipment was actively used on the Project after Land Coast's abandonment of the Project. However, such a requirement is not supported by our caselaw or the plain language of the statute. Indeed, we agree with Plaintiff that such a requirement would be untenable in a case such as this, involving rental equipment which is made available on a particular site and therefore cannot be rented by the supplier to a different customer. In the absence of statutory or caselaw support, we decline to read into § 44A-7(8) a requirement that a supplier establish rental equipment was used throughout the entirety of a time period at issue.

Based on the Record and materials before us, Plaintiff established its rental equipment was used on the Project and was onsite at the Project until Land Coast was terminated from the Project. Further, Plaintiff's invoices cover only the period of time prior to Land Coast's termination from the Project. Thus, we conclude Plaintiff established its rental equipment was directly utilized on the Project for purposes of satisfying the definitions of "second-tier subcontractor" and "improve" under N.C. Gen. Stat. § 44A-7(3) and (8). Therefore, there was no genuine issue of material fact before the trial court. Consequently, Plaintiff was entitled to summary judgment.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order granting summary judgment for Plaintiff.

AFFIRMED.

Judges STROUD and ZACHARY concur.

LORETTA BRASWELL, PLAINTIFF
v.
RICHARD D. BRASWELL, DEFENDANT

No. COA24-74

Filed 3 December 2024

Venue—motion to change—non-compulsory counterclaim filed in challenged venue—implied waiver

In an action for child support, post-separation support, and related claims, the trial court properly denied defendant's motion to change venue to an adjacent county because defendant actively participated in the suit by filing non-compulsory counterclaims (including for child custody, which had not been a pending issue before the trial court) in the challenged venue even though his venue motion was still pending and alternative legal options were available. Therefore, defendant waived his challenge to venue.

Chief Judge DILLON dissenting.

Appeal by defendant from order entered 28 August 2023 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 13 August 2024.

Sandlin Family Law Group, by Deborah Sandlin, and Raleigh Divorce Law Firm, by Heather Williams Forshey, Jennifer Sinclair Simpkins, and Katelyn Bailey Hodgins, for plaintiff-appellee.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for defendant-appellant.

THOMPSON, Judge.

Richard D. Braswell ("defendant") appeals an interlocutory order denying his Motion to Transfer Venue (the "Venue Motion"). On appeal, defendant argues that the trial court erred in concluding that he had waived his right to challenge venue. After careful review, we affirm.

I. Factual Background and Procedural History

Loretta Braswell ("plaintiff") and defendant were married in 2013 and separated in 2022. Plaintiff and defendant had one child from their

marriage, born on 13 December 2007. During their marriage, plaintiff and defendant lived in Johnston County with the minor child. On 13 April 2023, plaintiff filed a complaint in Wake County District Court seeking child support, post-separation support, alimony, equitable distribution, and to set aside a premarital agreement. At the time of plaintiff's complaint, plaintiff and the minor child resided in Wayne County, while defendant resided in Johnston County.

On 15 May 2023, defendant timely filed his Venue Motion, requesting that this action be moved to Johnston County. As a basis for transfer, defendant asserted that the parties lived in Johnston County for the duration of their marriage and at the time of their separation, and neither party nor the minor child lived in Wake County at any time in the year preceding the filing of plaintiff's complaint. Plaintiff filed an objection and response to defendant's Venue Motion on 16 May 2023. In plaintiff's objection, she argued that Wake County was an appropriate venue for the following reasons: (1) plaintiff was displaced from her residence due to defendant's actions and had no permanent residence following the separation; (2) defendant held a political position in Johnston County, had influential status within the community, and was associated with members of the community that held positions of power, to such a degree that his position would be a barrier to a fair adjudication; (3) Wake County is in close proximity to Johnston County, defendant's county of residence, and is not an inconvenient forum for him; and (4) defendant actively engaged with plaintiff in a different lawsuit in Wake County. Shortly thereafter, defendant filed a calendar request and notice of hearing, calendaring his Venue Motion to be heard on 12 July 2023.

On 13 June 2023, nearly one month *after* filing his Venue Motion—but a month before the 12 July 2023 hearing on the Venue Motion—defendant filed a motion to dismiss, motion to strike, affirmative defenses, answer, and critically for purposes of this appeal, *counterclaims for equitable distribution and a claim for child custody*. Notably, prior to the filing of defendant's counterclaims for temporary and permanent child custody, child custody was not a pending issue before the trial court. Stated differently, defendant asserted a *new claim* in the present action.

On 12 July 2023, defendant's Venue Motion was heard in Wake County District Court. The trial court considered the parties' arguments, North Carolina case law and persuasive federal case law, and the factors set forth in N.C. Gen. Stat. § 1-83. The trial court found that defendant's custody claim was not one that had to be raised in the present action, as it could have been raised at any time. Defendant could have pursued

other legal options regarding the custody claim that would have avoided the issue of waiver. However, because defendant filed the counterclaim regarding custody, *which was not previously pending before the trial court*, defendant "actively participated" in the litigation. Consequently, because defendant actively participated in the action, he availed himself to the jurisdiction of Wake County and waived his objection to the respective venue.

By written order dated 8 August 2023, the trial court denied defendant's Venue Motion, concluding that defendant had waived his right to challenge venue by filing the counterclaim for child custody in Wake County District Court on 13 June 2023. From this order, defendant filed timely written notice of appeal.

II. Discussion

On appeal, defendant contends that the trial court erred in concluding that defendant had waived his venue defense. We do not agree.

A. Appellate Jurisdiction

As an initial matter, "[a]lthough the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right[,]" and "its grant or denial is immediately appealable." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). N.C. Gen. Stat. § 1-82, which governs venue, provides that an "action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ." N.C. Gen. Stat. § 1-82 (2023). Because defendant's right to venue is established by N.C. Gen. Stat. § 1-82, the trial court's denial of defendant's Venue Motion affects a substantial right and is "immediately appealable." *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471. Consequently, we dismiss defendant's petition for writ of certiorari as moot.

B. Standard of review

"North Carolina precedent has engaged in a fact-based *de novo* inquiry into whether a party waives an improper venue defense as a question of law." *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013). "Under a de novo review, th[is] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 407–08, 747 S.E.2d at 296 (citation omitted).

C. Venue Motion

The dispositive issue before the Court in the present case is whether defendant waived his 15 May 2023 venue objection by filing

a non-compulsory counterclaim in the same venue defendant asserted was improper, prior to the trial court ruling on his Venue Motion. We conclude that defendant did waive his venue defense.

As noted above, N.C. Gen. Stat. § 1-82 requires that "the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ." N.C. Gen. Stat. § 1-82. However, N.C. Gen. Stat. § 1-83 provides that if the county designated in the summons and complaint "is not the proper one, the action may, however, be tried therein [the incorrect venue], unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court." N.C. Gen. Stat. § 1-83.

"Defendants can assert a venue objection in either: (i) a responsive pleading; or (ii) a motion to dismiss under N.C. R. Civ. P. 12(b)(3)." *LendingTree*, 228 N.C. App. at 409, 747 S.E.2d at 297. However, "[e]ven if defendants properly raise a venue objection, they can impliedly waive the defense through their actions or conduct." *Id.* (internal quotation marks and citation omitted). "Factors indicating a waiver include: (i) failure to unambiguously raise and pursue a venue objection; (ii) participation in litigation; and (iii) unnecessary delay." *Id.* None of these factors are dispositive; they are to be considered holistically in determining whether a defendant waived their venue defense. *See generally LendingTree*, 228 N.C. App. at 411, 747 S.E.2d at 297–98 (considering the factors in totality before concluding that defendant had waived his venue defense).

As to the first factor, although defendant raised and pursued his venue objection in a timely manner, defendant subsequently imposed an element of ambiguity into which venue was the correct venue for this action by filing a non-compulsory counterclaim for equitable distribution and child custody *in the same venue he had just asserted was improper.* We recognize the harsh application of *LendingTree*'s factors in the present case, as defendant notes, the "very beginning of the pleading containing [d]efendant's counterclaim *reasserts* [d]efendant's venue objection through his motion to dismiss for improper venue." However, the proper course of action, in the interest of judicial economy, was for defendant to allow the court to rule on his Venue Motion prior to filing non-compulsory counterclaims for equitable distribution and child custody. As the trial court found, defendant had various legal avenues that he could have pursued to appropriately file his counterclaim without interfering with his objection to venue; however, defendant proceeded with the filing of non-compulsory

claims and disregarded alternative options.[1] *See LendingTree*, 228 N.C. App. at 411, 747 S.E.2d at 298–99 (recognizing that the defendant had alternatives, but the failure to seek such alternatives could be considered a failure to press his venue objection.).

Moreover, "a party's failure to unambiguously raise and press a venue objection constitutes a factor indicating waiver." *LendingTree*, 228 N.C. App. at 409, 747 S.E.2d at 297–98. Here, defendant's objection to venue was unambiguously raised by the filing of the Venue Motion on 15 May 2023 and further by the scheduling of a hearing on 12 July 2023. However, this Court not only considers the failure to unambiguously raise a venue objection, but also considers the failure to *press* a venue objection. Defendant asserted a new claim, when that claim could have been filed at any time and when he had numerous legal options by which to pursue such a claim. Although defendant reasserted his objection, he filed a custody claim in the venue he suggested was improper. Defendant's course of action—filing the Venue Motion and subsequently filing a non-compulsory counterclaim in a venue he posed as improper—is not only ambiguous, but also is not a path that could be considered as pressing an objection to venue. Thus, defendant's failure under this factor is considered indicating waiver.

Second, as acknowledged in *LendingTree*, "North Carolina case law generally indicates that participation in litigation can waive a venue objection." *LendingTree*, 228 N.C. App. at 412, 747 S.E.2d at 299. In that case, this Court held that the defendant's "limited discovery participation" was an appropriate consideration indicating waiver. Here, as discussed *supra*, defendant had legal options that would have prevented his engagement in the current action. Instead, defendant chose to participate in the litigation by filing a custody claim and requesting the trial court to "[a]ward temporary and permanent joint physical and legal custody of the parties' minor child to the Defendant." It cannot be concluded that asking the trial court to contemplate custody matters is non-participation in the matter. By contrast, defendant actively participated in the litigation and asserted new allegations that required a response on behalf of plaintiff. Accordingly, defendant's participation of asserting a counterclaim for custody is a factor we consider.

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1. The trial court found that defendant's custody claim could have been raised at any time, including as a later "motion in the cause." Pursuant to N.C. Gen. Stat. § 50-13.5, in a custody action, a motion in the cause may be filed at any time. This alternative was available to defendant and would have allowed his custody claim to be heard after the hearing on his Venue Motion.

As the trial court recognized, there are several federal cases that directly address the issue of a defendant filing a counterclaim after filing an objection to venue. Although not binding on this Court, the cases are instructive in the present action. *See LendingTree*, 228 N.C. App. at 412, 747 S.E.2d at 299 ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive."). In *Beaunit Mills, Inc.*, the plaintiff filed a complaint for breach of contract seeking damages. *Beaunit Mills, Inc. v. Industrias Reunidas F. Matarazzo, S.A.*, 23 F.R.D. 654 (S.D.N.Y. 1959), Fed. R. Serv. 2d 74. The defendant filed responses, including a venue defense and a counterclaim for damages. There, the court considered whether the defendant's venue objection was waived by the filing of a counterclaim, as the counterclaim "affirmatively [sought] the aid of the court." The court held that, because the defendant filed a counterclaim, the defendant "affirmatively invok[ed] the jurisdiction of the court and thus [ ] voluntarily subject[ed] [himself] to that jurisdiction." *Id.* at 657. Similarly, in *Noerr Motor Freight*, the defendant objected to venue and the objection was calendared for hearing. *Noerr Motor Freight, Inc. v. E.R.R. Presidents Conf.*, 155 F. Supp. 768, 838 (E.D. Pa. 1957). Notwithstanding, the defendant filed a counterclaim before the hearing. The court in *Noerr Motor Freight* held that defendant's action of filing a counterclaim "thereby waived any objections which it might have to venue." *Id.* Thus, the defendant filed a counterclaim, despite its venue objection pending before the court, which established the defendant's consent to the venue.

Our case law on what level of participation in litigation constitutes a waiver of the venue defense is undeveloped; however, as applied to the facts of the instant case, we conclude that actively participating in and furthering litigation in Wake County by filing non-compulsory counterclaims—here, for equitable distribution and child custody—constituted a waiver of defendant's Venue Motion.

In conclusion, defendant waived his venue defense by failing to press his objection to venue and by subsequently participating in litigation. Defendant asserted, and reasserted, his objection; however, defendant later filed a custody claim seeking affirmative action on behalf of the trial court in that jurisdiction. Defendant undertook such actions when alternative legal options were available that would not subject him to a waiver of venue. Furthermore, his filing of the counterclaim is considered participation in the litigation. The counterclaim invoked responses on behalf of plaintiff and the trial court, as it was a new matter not previously pending before the court. Accordingly, for these reasons, the trial court's order denying defendant's motion to change venue is affirmed.

III. Conclusion

Because defendant has failed to unambiguously pursue his venue objection, coupled with his active participation in the litigation in Wake County by filing non-compulsory counterclaims, we conclude that defendant waived his venue defense, and the trial court did not err in denying defendant's Venue Motion. For the aforementioned reason, the order of the trial court is affirmed.

AFFIRMED.

Judge WOOD concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

Defendant Richard D. Braswell ("Husband") appeals an interlocutory order denying his Motion to Transfer Venue (the "Venue Motion"). He argues that the trial court erred by concluding that he had waived his right to challenge venue by filing a counterclaim before his Venue Motion was heard. Because I conclude that Husband did not waive his right to challenge venue, I respectfully dissent.

I. Analysis

Our Supreme Court has held that improper venue is not jurisdictional and that a challenge based on improper venue may be waived. *See Stokes v. Stokes*, 371 N.C. 770, 773 (2018). We review *de novo* a trial court's determination that a party has waived his right to challenge venue. *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407 (2013). "When demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal." *Id.* at 409 (citing N.C.G.S § 1-83). Under our Rules of Civil Procedure, a defendant may assert a venue challenge in either (i) a responsive pleading or (ii) a motion to dismiss. *See* N.C. R. Civ. P. 12(b)(3).

Here, Husband clearly timely filed his objection to venue. He filed his objection within a month of the filing of the complaint by Plaintiff Loretta Braswell ("Wife"). He also included his objection to the venue a month later in his answer/counterclaim.

I recognize we have held that even if a defendant properly raises an improper venue defense, he may impliedly waive that defense through

his actions or conduct. *See LendingTree*, 228 N.C. App. at 409 (citing N.C.G.S § 1-83); *see also Miller v. Miller*, 38 N.C. App. 95, 97–98 (1978) (affirming order concluding a party waived her right to change venue by failing to pursue her objection for *well over a year)*.

But based on my *de novo* review, I conclude Husband has not waived his objection to venue through his conduct, namely by merely asserting in his answer a counterclaim for child custody.

In April 2023, Wife filed her complaint in Wake County, though she alleged she resides in Wayne County and Husband resides in Johnston County.

The very next month, in May 2023, before his answer was due, Husband filed his Venue Motion, requesting the matter be transferred to his county of residence—Johnston County, a proper venue. He also immediately caused his Venue Motion to be calendared to be heard two months later, in July 2023.

In June 2023—a month before the July 2023 hearing on that motion—Husband filed his responsive pleading to Wife's complaint. This responsive pleading contained his answer and a counterclaim for child custody. His responsive pleading *also reiterated his challenge to venue being in Wake County*.

In July 2023, Husband's Venue Motion was heard, as originally scheduled, a mere two months after Husband lodged his objection to venue. He never sought any delay in his motion being heard. *See Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495–96 (1975) (holding no waiver where a party delayed "only four months" before pursuing their objection to venue). A month later, the trial court entered its order, concluding Husband had waived his right to challenge venue.

In *LendingTree*, we considered the following factors in determining whether a defendant's actions amount to implied waiver: (i) failure to unambiguously raise and pursue a venue objection; (ii) participation in litigation; and (iii) unnecessary delay. *LendingTree*, 228 N.C. App. at 409. We held that the defendant waived his objection to venue where he noticed two depositions and served interrogatories and document requests on the plaintiff with his venue objection and otherwise did not seek a hearing on his venue objection *for over two years*. *Id*. 406–07.

Here, the majority agrees with Wife's contention that *LendingTree* factors (i) and (ii) apply in this case—that by filing a counterclaim for child custody before his Venue Motion was heard, Husband created ambiguity about his intent to pursue a challenge to venue, and that he also "actively participated" in litigation. I disagree.

As to factor (ii), I do not believe Husband waived his challenge to venue by his participation in this litigation. He merely filed his responsive pleading while waiting for his calendared Venue Motion to be heard. Rule 13 of our Rules of Civil Procedure *allows* for a defendant to include with his answer any counterclaims, including non-compulsory counterclaims, that he may have against the plaintiff. In fact, any failure to assert compulsory counterclaims may warrant waiver of those claims. And Rule 12 allows for a defendant to include an objection to venue in his answer. Clearly, it cannot be said that a defendant waives his objection to venue made in his answer merely by also asserting counterclaims in that answer. In the same way, I do not believe that a defendant who makes a motion which challenges venue prior to filing his answer, as allowed by Rule 12, waives that objection merely by filing his answer which may include counterclaims thereafter while waiting for his motion to be heard. Though Husband's counterclaim may not have technically been compulsory, his child custody claim certainly was related to Wife's domestic claims. In any event, Husband reiterated his venue objection in his responsive pleading. This current case is not a situation where a defendant failed to be vigilant in seeking a hearing on his venue motion.

I am further persuaded by the trend in the federal system not to treat the mere filing of a counterclaim to constitute a waiver of an objection to venue. *See* 5C Charles Wright & A. Miller, *Federal Practice and Procedure* § 1397 (3d ed. 2004) ("The trend in more recent cases is to hold that no Rule 12(b) defense is waived by the assertion of a counterclaim, whether permissive or compulsory. . . . The same result has been reached by several courts with regard to the effect of interposing cross-claims and third-party claims."); 3 James Wm. Moore, *Moore's Federal Practice* § 13.111 (Matthew Bender 3d ed. 2010); and 6 C. Wright, A. Miller, M. Kane & R. Marcus, § 1416. In holding that the mere assertion of a counterclaim does not waive an objection to venue, one federal court has explained:

> We follow this well-traveled path in holding that the mere assertion of a counterclaim will not waive a defense of improper venue that was explicitly asserted in an answer filed contemporaneously with the counterclaim. This conclusion is also consistent with the important and constructive principle of our adversary system that parties may argue alternative positions without waiver. *See* Fed. R. Civ. P. 8(d)(2)-(3) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically. . . . A party may state as many separate claims or defenses as it has, regardless of consistency."); *see also* Wright &

> Miller, *supra*, § 1397 ("Moreover, this practice of allowing a defendant in effect to plead alternatively a counterclaim and one or more threshold defenses conserves judicial resources, for if one of the defenses proves successful, the parties need not litigate a claim that the defendant presumably has no interest in asserting independently."). We endorse the general rule that the assertion of alternative defenses in an answer, or the assertion of claims in a counterclaim or a third-party claim, will not waive a defense that has been asserted previously or contemporaneously in an answer.

Hillis v. Heineman, 626 F.3d 1014, 1018–19 (2010).

As to *LendingTree* factor (i), Husband has been unambiguous about his objection to this matter being heard in Wake County, where neither he nor Wife reside. He raised his objection in the Venue Motion *prior to* filing his answer, he immediately sought and obtained a date for his Motion to be heard—merely two months after he filed his Motion and three months after Wife filed her complaint, his Motion was heard on that date, and he raised his objection to venue again in his answer. *See Shaver v. Huntley*, 107 N.C. 623, 628–29 (1890) (holding that a venue challenge made before an answer is filed is not waived where the answer challenges venue). It is clear from the record that Husband was unambiguous in his objection to the maintenance of Wife's action in Wake County, where neither he nor Wife reside. And it is clear that Defendant did not delay the hearing of his objection or request that the trial court in Wake County consider any other motion.

In sum, based on my *de novo* review, I do not believe that Husband waived his objection to this matter being heard in an improper venue. My vote is to vacate the order of the trial court and remand with instructions to transfer the matter to Husband's home county, as our Supreme Court has held that a plaintiff who files in the wrong county waives her right to have the matter heard in her own home county. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 744 (1952).

DAVID W. COLLINS, EMPLOYEE, PLAINTIFF
v.
WIELAND COPPER PRODUCTS, LLC, EMPLOYER, FARMINGTON CASUALTY COMPANY, CARRIER, (CCMSI, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA24-214

Filed 3 December 2024

Workers' Compensation—separately compensable accident—settlement agreement regarding earlier injury to same body part—not applicable

Where an employee sustained a rotator cuff injury to his right shoulder while at work for his employer in 2020, seven years after the parties—with the approval of the Industrial Commission—entered into a settlement agreement resolving an earlier compensable injury to the rotor cuff of the same shoulder (which the employee sustained at work in 2009) by awarding the employee a lump sum as "the only" compensation for the 2009 injury to be paid "for his entire life," the Industrial Commission did not err in concluding that the 2020 injury was the result of an accident by injury separately compensable from the 2009 injury because the 2020 injury: (1) was a material aggravation of the employee's pre-existing shoulder condition; (2) resulted in new pain; and (3) was the result of a different type of accident. Therefore, the settlement agreement did not bar plaintiff's workers' compensation claim for the 2020 injury.

Appeal by Defendants from Opinion and Award entered 26 September 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2024.

Daggett Shuler, Attorneys at Law, by Michael P. Hummel, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Neil P. Andrews, and Linda Stephens, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

Wieland Copper Products, LLC (Wieland Copper) and Farmington Casualty Company (collectively, Defendants) appeal from an Opinion

and Award entered by the Full Commission of the North Carolina Industrial Commission concluding David Collins (Plaintiff) suffered an injury by accident and granting Plaintiff's claim for compensation under the North Carolina Workers' Compensation Act (the Act). The Record before us tends to reflect the following:

On 15 June 2009, while working for Wieland Copper, Plaintiff tore his right shoulder rotator cuff loading a hopper (2009 Injury). Plaintiff received workers' compensation benefits for the Injury.

Following the 2009 Injury, Plaintiff received medical treatment with Dr. John Ritchie, who performed rotator cuff repair surgery on Plaintiff's right shoulder on 17 February 2010. On 2 August 2010, Plaintiff was deemed to be at maximum medical improvement and assigned permanent physical restrictions, including no lifting over fifty pounds, lifting above table height, or repetitive lifting. On 24 May 2011, Plaintiff returned to Dr. Ritchie with pain in his shoulder; Dr. Ritchie referred Plaintiff to Dr. David Janeway, an orthopedic surgeon, for a second opinion.

Plaintiff saw Dr. Janeway for the first time on 16 June 2011. On 10 August 2011, Dr. Janeway performed a second rotator cuff repair surgery on Plaintiff's right shoulder. On 12 January 2012, Plaintiff was released to regular duties and assigned a twenty percent permanent partial impairment rating. Just over a year later, on 19 March 2013, Plaintiff returned to Dr. Janeway with shoulder pain. On 6 June 2013, Plaintiff underwent an MRI arthrogram, revealing a re-tear of Plaintiff's right rotator cuff; after reviewing the MRI, Dr. Janeway recommended a third rotator cuff surgery, which Plaintiff elected to forgo.

In September 2013, Plaintiff saw Dr. Kevin Supple for an independent medical examination. Dr. Supple concluded Plaintiff had rotator cuff tear arthropathy, meaning Plaintiff had a "significantly retracted" tear in his rotator cuff that could lead to pain, weakness, and functional limitations. He assigned Plaintiff a thirty percent impairment rating. Dr. Supple also concluded overall Plaintiff had excellent motion and strength in his shoulder despite the extent of the tear.

On 17 October 2013, Plaintiff saw Dr. Janeway again, and Dr. Janeway increased Plaintiff's impairment rating for his right arm to a total of thirty five percent. Dr. Janeway also assigned additional permanent work restrictions of no overhead work or work above chest level. Plaintiff returned to work for Wieland Copper without further pain or issue.

A disagreement subsequently arose between Plaintiff and Defendants over the appropriate permanent partial disability rating to

assign and whether additional medical treatment and compensation would be required for the 2009 Injury. On 18 April 2014, Plaintiff and Defendants entered into a Compromise Settlement Agreement, under which Defendants agreed to pay Plaintiff a lump sum of $125,000 in full resolution of the 2009 Injury. The payment was to be "the only" compensation Plaintiff was entitled to "for his entire life" for the 2009 Injury. The Industrial Commission approved the Agreement on 23 May 2014.

On 24 November 2020, Plaintiff was reassigned from his regular job duties that accommodated his permanent work restrictions to work on a "winder" machine. Working on the winder requires the operator to reach forward with both of his arms and "band" spooled copper. Shortly after beginning work on the winder, Plaintiff extended his right arm out, slightly higher than his chest, to band a spool of copper and felt a "pop" in his right shoulder. Plaintiff reported the pain in his shoulder to both his supervisor and the Environmental Health and Safety Director. The Environmental Health and Safety Director sent Plaintiff to a local hospital for medical evaluation on 6 January 2021. The local provider put Plaintiff's arm in a sling and advised that he needed to see a specialist. On 23 February 2021, Plaintiff saw Dr. Janeway for an MRI arthrogram. The MRI showed "severe" thinning of the four tendons of the rotator cuff. On 13 April 2021, Dr. Janeway performed an arthroplasty on Plaintiff's right shoulder.

Plaintiff continued to work until 2 March 2021. On 3 March 2021, Plaintiff filed a Form 18, Notice of Accident to Employer and Claim of Employee, alleging that, on 24 November 2020, he sustained an injury to his right arm, elbow, shoulder, and hand (2020 Injury). Plaintiff's request for workers' compensation benefits was denied on 10 March 2021 on the grounds that Plaintiff's "condition pre-existed the alleged date of injury [and] is therefore not compensable." Plaintiff appealed the denial and requested a hearing before the North Carolina Industrial Commission. The matter was heard before a Deputy Commissioner on 16 November 2021. Defendants maintained that Plaintiff had a pre-existing condition, and his current claim was "barred" by the 2014 Settlement. On 14 July 2022, the Deputy Commissioner entered an Opinion and Award concluding Plaintiff experienced an injury by accident on 24 November 2020 which "materially aggravated Plaintiff's pre-existing right shoulder condition[.]" The Deputy Commissioner also concluded N.C. Gen. Stat. § 97-6, which provides that "[n]o contract or agreement . . . shall in any manner operate to relieve an employer in whole or in part, of any obligation created by [the Act], except as . . . otherwise expressly provided," invalidated any language in the 2014 Settlement that "could be construed as relieving Defendants of any obligation they have under

the Act for any claims filed by Plaintiff for any future alleged injury[.]" Plaintiff was awarded "all medical expenses incurred, or to be incurred" for treatment of his shoulder and temporary total disability benefits at the weekly rate of $783.24 beginning 10 March 2021 and continuing until he returned to work or until further order of the Commission.

Defendants appealed to the Full Commission. The matter was heard before the Full Commission on 8 December 2022. On 26 September 2023, the Full Commission filed an Opinion and Award concluding Plaintiff's 2020 Injury was "separately compensable" from the 2009 Injury by virtue of it being a material aggravation of the 2009 Injury. The Full Commission also concluded, pursuant to N.C. Gen. Stat. § 97-6, "to the extent any language in the April 18, 2014 Agreement can be construed as Plaintiff releasing Defendants from liability for his November 24, 2020 injury . . . such language is unenforceable as a matter of law." The Full Commission entered an award in Plaintiff's favor. On 24 October 2023, Defendants timely filed Notice of Appeal.

Issue

The dispositive issue on appeal is whether the Commission erred in concluding Plaintiff's 24 November 2020 Injury was separately compensable from the 2009 Injury and, thus, not barred by the parties' 18 April 2014 Compromise Settlement Agreement.

Analysis

"Our standard of review for a Commission's opinion and award is limited to whether the Commission's findings of fact support its conclusions of law. Where the competent evidence supports the Commission's findings, those findings are binding on appeal." *Aldridge v. Novant Health, Inc.*, 280 N.C. App. 372, 378-79, 867 S.E.2d 721, 725 (2021) (citation omitted). "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted). "[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus[,] conclusively established on appeal." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (citation and quotation marks omitted). We review the Commission's conclusions of law de novo. *Id.* (citation omitted).

Defendants do not challenge any Finding of Fact regarding the compensability of the 2020 Injury. Instead, Defendants argue any recovery

for the 2020 Injury is foreclosed by the 2014 Settlement Agreement. Defendants contend the following: Plaintiff's 2020 Injury was an aggravation of the 2009 Injury, not a separate injury; the Settlement releases Defendants from any claim relating to the 2009 Injury; thus, because Plaintiff's claim for the 2020 Injury arises out of the 2009 Injury, by nature of it being an aggravation of that Injury, it is foreclosed by the Settlement. The Commission, however, concluded, pursuant to N.C. Gen. Stat. § 97-6, the Settlement is unenforceable to the extent it precludes compensation for the 2020 Injury. Defendants argue the Commission erred by relying on N.C. Gen. Stat. § 97-6 in reaching this conclusion because N.C. Gen. Stat. § 97-17 controls the enforceability of settlement agreements under the Act.

Much of Defendants' argument contests the Commission's determination that the Settlement is unenforceable under N.C. Gen. Stat. § 97-6. Defendants argue N.C. Gen. Stat. § 97-17 is controlling on the enforceability of compromise settlement agreements in North Carolina Workers' Compensation claims and the Commission's reliance on N.C. Gen. Stat. § 97-6 was improper. In support of this position, Defendants cite to *Tellado v. Ti-Caro Corp.*, wherein this Court held N.C. Gen. Stat. § 97-6 did not bar the enforceability of a settlement agreement. 119 N.C. App. 529, 534, 459 S.E.2d 27, 31 (1995). The plaintiff-employee in *Tellado* sought to set aside a settlement that prohibited him from bringing a claim for retaliatory discharge, arguing the agreement was unenforceable under N.C. Gen. Stat. § 97-6. *Id.* at 532-33, 459 S.E.2d at 30. The Court in *Tellado* held N.C. Gen. Stat. § 97-6 does not apply to retaliatory discharge claims because retaliatory discharge is not an "obligation" contemplated by N.C. Gen. Stat. § 97-6. *Id.* at 534, 459 S.E.2d at 31. The Court said nothing about whether N.C. Gen. Stat. § 97-6 might bar a settlement precluding compensation for an injury by accident, as the Commission here determined.

Defendants further cite to a host of cases discussing the enforceability of settlement agreements under N.C. Gen. Stat. § 97-17. Each case cited, however, deals with factual scenarios where one of the parties sought to set aside a settlement agreement, which Plaintiff here does not purport to do, or with a second injury not separately compensable from a first injury, unlike Plaintiff's 2020 Injury, which the Commission found to be separately compensable from the 2009 Injury. For example, in *Caudill v. Manufacturing Co.*, the plaintiff-employee injured his back, requiring surgery, after which he received workers' compensation benefits for temporary total disability. 258 N.C. 99, 100, 128 S.E.2d 128, 129 (1962). The employee and employer entered into a "full, final and complete settlement of any and all claims, past, present and future,

arising out of the accident in question[.]" *Id.* at 100-01, 128 S.E.2d at 129. Several weeks later, an abscess formed at the site of the operation, resulting in the employee having to undergo additional surgery and a three-month hospitalization. *Id.* at 101, 128 S.E.2d at 129. The employee then sought to rescind the compromise agreement in order to obtain additional workers' compensation benefits. *Id*. The Commission agreed to the rescission, and our Supreme Court reversed, holding "the parties were contracting with reference to future uncertainties and were taking their chances as to future developments, relapses and complications, or lack thereof." *Id.* at 106, 128 S.E.2d at 133. Here, unlike in *Caudill*, Plaintiff does not seek to rescind the Settlement. Instead, Plaintiff contends the Settlement is entirely inapplicable to his present claim. Additionally, here the Commission found the 2020 Injury was a separately compensable injury by accident, whereas the employee in *Caudill* was seeking further compensation for complications of one indivisible injury. *Id*. at 100-01, 128 S.E.2d at 129.

Other cases cited by Defendants are distinguishable for similar reasons. In *Holden v. Boone*, the Court held only the Industrial Commission has jurisdiction to set aside an approved settlement agreement and only on the grounds provided by N.C. Gen. Stat. § 97-17. 153 N.C. App. 254, 259, 569 S.E.2d 711, 714 (2002). Similarly, in *Glenn v. McDonald's*, the defendant-employer petitioned the Commission to set aside a settlement agreement for reasons that fell outside those provided in N.C. Gen. Stat. § 97-17. 109 N.C. App. 45, 46-47, 425 S.E.2d 727, 728-29 (1993). The Court held the Commission does not have the authority to do so. *Id*. at 48-49, 425 S.E.2d at 730. We reiterate that, unlike the plaintiffs in *Tellado*, *Caudill*, *Holden*, and *Glenn*, Plaintiff does not seek to set aside the 2014 Settlement. Therefore, these cases are distinguishable from the facts before us.

Indeed, ultimately, our analysis does not hinge on the enforceability of the Settlement Agreement in and of itself. This is so because the Commission ultimately determined the Settlement Agreement simply did not apply to the 2020 Injury. Here, the Commission concluded the 2020 Injury constituted both a compensable injury by accident for the purposes of N.C. Gen. Stat. § 97-2(6) and a material aggravation of Plaintiff's pre-existing shoulder condition:

> (3) The Full Commission concludes that Plaintiff's workplace injury on November 24, 2020 constituted an injury by accident because it resulted from an interruption of his work routine . . .
>
> . . . .

> (5) The Full Commission concludes that the greater weight of the evidence, including the testimony of Dr. Janeway and Dr. Supple, establishes that Plaintiff's workplace injury on November 24, 2020 materially aggravated his pre-existing shoulder condition, and such condition is compensable.
>
> . . . .
>
> (16) The Full Commission concludes, pursuant to N.C. Gen. Stat. § 97-6, that to the extent any language in the April 18, 2014 Agreement can be construed as Plaintiff releasing Defendants from liability for his November 24, 2020 injury, which is an injury separately compensable from the June 15, 2009 injury by virtue of it being a material aggravation of said prior injury, such language is unenforceable as a matter of law. *Id.* Accordingly, the April 18, 2014 Agreement does not bar Plaintiff's current claim. *Id.*

In support of these Conclusions, the Commission made specific Findings, including the following:

> (2) . . . [O]n June 15, 2009, Plaintiff sustained a compensable injury by accident to his right shoulder while working for Defendant-Employer.
>
> (3) Following the June 15, 2009 accident, Plaintiff received medical treatment with Dr. John Ritchie with Orthopaedic Specialists of the Carolinas. On February 17, 2010, Dr. Ritchie performed a right shoulder rotator cuff repair. On August 2, 2010, Plaintiff was deemed to be at maximum medical improvement ("MMI") and assigned permanent restrictions of no lifting over 50 pounds, no lifting above table height, and no repetitive lifting.
>
> . . . .
>
> (11) On April 18, 2014, Plaintiff, Defendant-Employer, and PMA Group entered into an Agreement for Final Compromise Settlement and Release . . . Plaintiff received a payment "in one lump sum, without commutation" of $125,000.00, which would be "the only payment Employee-Plaintiff will be entitled for his entire life" for the June 15, 2009 injury . . .
>
> . . . .

(16) Plaintiff testified that he did not have any issue with his right shoulder from the time he returned to work for Defendant-Employer in 2014 following his prior injury until his November 24, 2020 injury, and Plaintiff's medical records corroborate that testimony.

. . . .

(19) On November 24, 2020, Christy Reyes, a plant supervisor for Defendant-Employer, moved Plaintiff to the Level Winder 4 machine to perform the bander operator position. Plaintiff had never worked on the Level Winder 4 machine and Ms. Reyes told Plaintiff that a co-worker would show him how to perform the bander operator position.

. . . .

(23) On November 24, 2020, while banding a coil of copper at the top-most notch, Plaintiff felt a pop in his right shoulder. Plaintiff was reaching out with his right arm above chest height, holding the bander in his right hand, and tightening the copper strap when he felt the pop.

. . . .

(30) On February 23, 2021, Plaintiff presented to Dr. David Janeway. Plaintiff reported he was using a banding machine at work and felt a pop in the anterior aspect of the shoulder with increased pain in the shoulder. Dr. Janeway ordered an MR arthrogram and assigned Plaintiff to restricted duty.

. . . .

(32) Plaintiff returned to Dr. Janeway on March 31, 2021 for review of the MRI. Dr. Janeway reviewed the MRI films noting evidence of the "previous tendon repair with severe infraspinatus supraspinatus tendon attenuation 4 cm tear humeral head high-riding partial-thickness tear of the mid and superior fibers of the subscapularis with retraction cleft tear anterior labrum." Dr. Janeway noted a "new subscap tear" and "thinning of old revision cuff repair." Dr. Janeway recommended a reverse shoulder arthroplasty and restricted Plaintiff to one-handed work only.

(33) Dr. Janeway performed a right reverse total shoulder arthroplasty on April 13, 2021. Dr. Janeway kept Plaintiff

> out of work after the surgery. Plaintiff continues to treat with Dr. Janeway for his right shoulder condition. As of October 1, 2021, Dr. Janeway continued to restrict Plaintiff from any work.
>
> . . . .
>
> (36) . . . Dr. Supple further testified that Plaintiff's pre-existing shoulder condition made him more likely to reinjure his shoulder or cause further damage to it than someone who did not have a torn rotator cuff. Dr. Supple testified that if Plaintiff were not experiencing problems with his shoulder prior to the incident on November 24, 2020, the incident was an aggravation of his pre-existing right shoulder condition. He opined that if Plaintiff had been constantly reporting shoulder pain prior to November 24, 2020, then the incident caused recurrent symptoms, not an aggravation . . .
>
> . . . .
>
> (40) . . . Dr. Janeway testified that Plaintiff's November 24, 2020 injury aggravated or exacerbated Plaintiff's pre-existing shoulder condition and that Plaintiff remains at out-of-work status as a result of the November 24, 2020 injury.
>
> (41) Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's workplace injury on November 24, 2020 resulted from an interruption of his work routine. In making this finding, the Full Commission considers that Plaintiff performed the duties of a bander operator for the first time on that date, and therefore, the duties of that position were not yet routine to him.
>
> (42) Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's workplace injury on November 24, 2020 materially aggravated his pre-existing shoulder condition . . . .

This Court in *Moore v. Federal Express* considered an appeal by a defendant-employer who argued the plaintiff-employee's injury was not a separate injury by accident but only a change in condition. 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004). In *Moore*, the employee sustained two separate back injuries while working for the same employer. The

first injury was uncontested. *Id.* at 294, 590 S.E.2d at 463. Approximately five years later, the employee sustained a second injury to the same part of his back. *Id.* at 294-95, 590 S.E.2d at 463-64. The Commission found that although the employee had experienced periodic flare-ups of back pain over the last five years, the second back injury constituted an "injury by accident . . . which substantially aggravated [the employee's] pre-existing back condition [created by the first injury]." *Id.* at 296, 590 S.E.2d at 464. The employer appealed, arguing the second injury was only a change of condition stemming from the first back injury. *Id.* at 297, 590 S.E.2d at 465. This Court held the Commission did not err in awarding workers' compensation benefits, citing the Commission's findings that the employee's current back problems "were a result of the [second injury], which substantially aggravated his pre-existing back condition[,]" the pain from the second injury was "different and substantially more severe" than the first injury, and the injury "directly resulted from" a distinctly separate accident. *Id.* at 298, 590 S.E.2d at 465.

Here, the Commission made similar Findings. The Commission found the 2020 Injury was a material aggravation of Plaintiff's pre-existing shoulder condition. The Commission also found the pain from the 2020 Injury was new. Lastly, the Commission found Plaintiff's 2020 Injury was the result of an accident banding copper, whereas the 2009 Injury was the result of an accident loading a hopper. As in *Moore*, these Findings support a conclusion the two injuries arose from distinctly separate accidents. Further, and unlike *Moore*, Defendants do not challenge any Finding that Plaintiff experienced a separately compensable injury by accident.

Defendants challenge only the Commission's Finding of Fact 46, arguing it is more properly characterized as a Conclusion of Law. Finding of Fact 46 addresses the purpose of the $125,000 payment made as part of the Settlement. We do not address this argument because, as we have explained, the Settlement is inapplicable to Plaintiff's 2020 Injury. Defendants have not challenged any Finding relating to the occurrence or compensability of the 2020 Injury, therefore those Findings are binding on appeal. *See Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156. As in *Moore*, the Commission's Findings support its Conclusion that the 2020 Injury is separately compensable from the 2009 Injury. As such, the 2020 Injury falls outside of the terms of the Settlement because it is not a "reopening" of the 2009 claim.

Thus, the Commission's Findings support its Conclusion Plaintiff's 2020 Injury was the result of an injury by accident separately compensable from his 2009 Injury. Therefore, in turn, the Commission did not

err in determining the Settlement Agreement did not bar Plaintiff's claim for the 2020 Injury. Consequently, the Commission did not err in entering its Opinion and Award in favor of Plaintiff.

Conclusion

Accordingly, for the foregoing reasons, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

DURHAM GREEN FLEA MARKET, PETITIONER
v.
CITY OF DURHAM, RESPONDENT

No. COA24-246

Filed 3 December 2024

1. Constitutional Law—due process—notice of violation—ordinance requirements—opportunity to be heard

A city-county board of adjustment did not violate the due process rights of a flea market (petitioner) when it issued a notice of violation stating that petitioner was not in compliance with the approved site plan and thus was in violation of the city's Unified Development Ordinance (UDO). The notice met the procedural requirements of the UDO where it sufficiently informed petitioner both of the nature of the violation—based on the description in the notice and pictures that were attached for reference—and of the measures necessary to correct the violation, which included the removal of all alterations that were inconsistent with the approved site plan. The plain language of the UDO allowing for "informal means" prior to issuance of a written notice was permissive and not mandatory. Further, petitioner had multiple opportunities to be heard on the notice of violation, including at a quasi-judicial hearing at which it was represented by counsel.

2. Zoning—unified development ordinance—notice of violation—order of compliance with approved site plan—no abuse of discretion

After determining that a flea market (petitioner) was properly issued a notice of violation by a city-county board of adjustment for failure to comply with an approved site plan pursuant to a Unified Development Ordinance, the trial court did not abuse its discretion by ordering petitioner to bring its property into full compliance with a new site plan within thirty-six months, which allowed petitioner an ample amount of time to correct the violation.

Judge TYSON dissenting.

Appeal by petitioner from order entered 9 June 2023 by Judge James E. Hardin Jr. in Durham County Superior Court. Heard in the Court of Appeals 9 October 2024.

Perry, Perry, & Perry, PA, by Robert T. Perry, for petitioner-appellant.

Durham City Attorney's Office, by John P. Roseboro and Aarin K. Miles, for respondent-appellee.

GORE, Judge.

Petitioner, Durham Green Flea Market ("DGFM"), appealed the decision of the Board of Adjustment for the City of Durham and Durham County ("BOA") that denied petitioner's appeal of a Notice of Violation ("NOV"). The Superior Court, Durham County, entered an Order on 9 June 2023: (1) affirming the BOA's administrative decision and (2) ordering petitioner to bring the property at issue into full compliance with a new site plan. Petitioner gave timely notice of appeal to this Court from the trial court's final Order. This Court has jurisdiction to hear and decide petitioner's appeal pursuant to N.C.G.S. § 7A-29. Upon review, we affirm.

In this case, respondent, City of Durham, issued a NOV to petitioner. The NOV indicated the violation: "Failure to comply with an approved site plan (D130045)." The NOV further specified, "[t]he above condition constitutes a violation of the Durham Unified Development Ordinance [("UDO")], Section 3.7.2, Applicability, Site Plan and 15.1.2 Violation (see attached). Correction of this violation will require the violator to remove all alterations inconsistent with the approved site plan within thirty (30) days of the receipt of this notice."

Upon receiving the NOV, petitioner filed an application for appeal of the NOV with the respondent's BOA. Petitioner alleged the NOV was

issued in a discriminatory manner and was made contrary to respondent's policy (ordinance) and agreement with petitioner. The BOA held a hearing for this matter virtually on 22 September 2020. This case was continued, however, until the BOA resumed in-person hearings on 22 June 2022.

At the 22 June 2022 hearing, respondent's staff alleged the NOV:

> was [for] improvements to the property without site plan approval. There was a wide variety of things that was done to the property at the time that was without site plan approval, one of which was a permanent structure that covered handicap parking. . . . [S]o, we issued a [NOV] for numerous things. We didn't want to list just one thing because there were several different issues and things that [petitioner] has done to the property without site plan approval.

After a hearing on the NOV, the BOA voted 6 to 1 to uphold respondent's decision to issue a NOV to petitioner. The dissenting voter reasoned, "I cannot support [respondent's] action due to the wording of the NOV . . . . [T]he NOV must list the violations. If there's 20 or 30, it must list 20 or 30. What this Notice is is a boilerplate form that doesn't meet the standards."

Petitioner appealed the BOA's decision to Superior Court, Durham County. The trial court determined that the NOV was properly issued by respondent's staff and that petitioner's due process rights were not violated. The trial court further ordered petitioner "to bring the property . . . into full compliance with a site plan, approved by the Durham City-County Planning Department, within thirty-six (36) months of the filing of the Order."

Petitioner presents two issues for review: (1) whether the trial court erred in concluding that petitioner's due process rights were not violated; and (2) whether the trial court abused its discretion by ordering petitioner to bring the property at issue into full compliance with a new site plan within thirty-six (36) months of the filing of the Order.

> The standard of review depends on the issues presented on appeal. When the issue is (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, if a petitioner contends the board's decision was based on an error of law, de novo review is proper.

Lipinski v. Town of Summerfield, 230 N.C. App. 305, 308 (2013) (cleaned up) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13 (2002)). "In reviewing a superior court order from an appeal of an agency decision, this Court has a two-fold task: (1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly." *Kea v. Dep't of Health & Hum. Servs.*, 153 N.C. App. 595, 602 (2002) (cleaned up).

[1] First, we address petitioner's due process arguments that the NOV "was not implemented in a fair manner" because: (1) respondent's staff failed to adhere to UDO § 15.2.1.A and 15.2.1.C; (2) the NOV was insufficient to inform petitioner in advance of the basis of the proceedings against petitioner; and (3) petitioner was not given notice and opportunity to be heard. In reviewing this claim, the superior court properly employed the de novo standard of review. *See* N.C.G.S. § 150B-51(b)(1)–(4), (c) (2023). We are unpersuaded by petitioner's arguments.

The UDO specifies, in relevant part: "When a violation is discovered, and is not remedied through informal means, written notice of the violation shall be given." UDO § 15.2.1.A. "Where the language of a[n] [ordinance] is clear and unambiguous, there is no room for judicial construction, and the courts must give [the ordinance] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575 (2002) (cleaned up). The plain language of this section does not mandate the use of "informal means" before written NOV is given—it provides that when a violation is discovered, "informal means" are permitted. North Carolina General Statutes § 160D-404(a) ("Notices of Violation") contains no such limitation—it imposes no superseding requirement that informal means be exhausted before written NOV is issued.

Petitioner contends respondent's staff improperly issued the NOV because it failed to adhere to UDO § 15.2.1.C, which requires, in relevant part: "The notice shall include a description of the violation and its location, the measures necessary to correct it[.]" The NOV in question does, however, include these necessary components. The written NOV describes the violation: "Failure to comply with an approved site plan (D130045)[,]" includes attached images with location for reference, and specifies, "correction of this violation will require" removal of "all alterations inconsistent with the approved site plan[.]"

Petitioner generally argues respondent's NOV was "not implemented in a fair manner" because the NOV was insufficient to inform petitioner in advance of the basis of the proceedings against petitioner,

and petitioner was not given sufficient opportunity to be heard. We disagree.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp. Sec. Comm'n of N. Carolina*, 349 N.C. 315, 322 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). "Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The facts before us are like those in *Lipinski*, a case in which we held the "petitioner had adequate notice of the purpose and scope of the hearing" and was "given notice and an opportunity to be heard[ ]" at a subsequent hearing. 230 N.C. App. at 309. Here, the NOV listed the violation and provided contact information with the option to reach respondent's staff directly to inquire about the violation at issue. Petitioner had two opportunities to be heard on the violation. At a quasi-judicial hearing, an attorney appearing on their behalf presented argument and testimony.

Based upon the record, N.C.G.S. § 160D-404(a), and UDO § 15.2.1, the trial court properly concluded that petitioner's due process rights were not violated.

[2] In the second issue presented, petitioner argues the trial court abused its discretion by ordering petitioner to bring the property at issue into full compliance with a new site plan within thirty-six (36) months of the filing of the Order. We disagree.

Here, the trial court affirmed the BOA's order, which states, "[T]he requirements for reversing the [NOV] in [this case] have NOT been met, and that appeal is DENIED." The written NOV required compliance with an approved site plan "within thirty (30) *days* of the receipt of this notice." The Order of the trial court affirmed the BOA's decision and provided petitioner with additional time to bring their property into compliance. Petitioner has not shown an abuse of discretion where the trial court implemented a three (3) *year* window to bring the site into compliance instead.

For the foregoing reasons, the NOV was issued in compliance with N.C.G.S. § 160D-404(a), UDO § 15.2.1.C, UDO § 15.2.1.A, and in a fair manner in compliance with the due process. The trial court applied the appropriate standard of review, properly upheld the BOA's decision, and did not abuse its discretion in expanding the time constraints for petitioner to bring their site into compliance.

AFFIRMED.

Judge FLOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The trial court unlawfully denied Durham Green Flea Market its Due Process rights. The City failed to enforce the statutory and city ordinance requirements for issuing a lawful notice of violation. The city also did not comply with the constitutional requirements to hold an impartial, quasi-judicial hearing. I respectfully dissent.

I. Background

The City of Durham issued a purported Notice of Violation ("NOV") to Durham Green Flea Market ("DGFM") based upon the City of Durham's Unified Development Ordinance ("UDO") § 15.2.1.A, which specifies "[w]hen a violation is discovered, and is not remedied through informal means, *written notice of the violation shall* be given." (emphasis supplied). When such a notice is issued, UDO § 15.2.1.C mandates it "*shall include a description of the violation and its location*, the *measures necessary to correct it*, the possibility of civil penalties and *judicial enforcement* action, and *notice of the right to appeal*." UDO § 15.2.1.C (emphasis supplied).

The NOV issued to DGFM wholly failed to comply with these mandates. The notice identified the sole alleged violation as a "failure to comply with an approved site plan" and stated, "[c]orrection of this violation will require the violator to remove all alterations inconsistent with the approved site plan" as the measures necessary to correct the purported violation.

DGFM timely appealed. At the Board of Adjustment hearing, the dissenter to the board's decision correctly identified the NOV as unlawful and inadequate:

> "I cannot support the City's action due to the wording of the Notice of Violation. . . . [I]n my opinion, the Notice of Violation must list the violations. If there's 20 or 30, it must list 20 or 30. What this Notice of Violation is [ ] a boilerplate form and it doesn't meet the standards. . . . [E]ven

> if there's numerous obvious violations going on, the City must follow the correct procedures."

I agree. The NOV failed to specify how the property owners had purportedly failed to comply with the site plan, which violates the UDO § 15.2.1.C requirement for all notices to contain a "description of the violation[.]" The notice also failed to list the "measures necessary to correct it" or describe any specific measures DGFM could implement to be in full compliance. UDO § 15.2.1.C. These failures clearly conflict with the notice of violation requirements provided in UDO § 15.2.1.C, the mandates established in N.C. Gen. Stat. § 160D-1402(k) (2023), and the statutory rules of construction favoring the free use of property. *See Innovative 55, LLC v. Robeson Cnty.*, 253 N.C. App. 714, 720, 801 S.E.2d 671, 676 (2017). DGFM was denied adequate notice and a fair hearing. The City of Durham violated DGFM's rights to Due Process under the law. U.S. Const., amend. XIV, § 1; N.C. Const. art. I, § 19.

II. Standard of Review

When reviewing a superior court's order regarding a quasi-judicial zoning board of adjustment's decision, this Court is tasked with "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Harding v. Bd. of Adjustment of Davie Cnty.*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005) (citations omitted). When reviewing whether a superior court's order regarding "a zoning board of adjustment's decision [was proper], [t]he scope of our review is the same as that of the trial court." *Id.* (citations and quotations omitted). The proper standard of review "depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

Where the petitioner alleges " 'the Board's decision was based on an error of law, 'de novo' review is proper.' " *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28 (2000) (quoting *JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citation omitted).

III. Plain Language

" '[A] zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property.' "

Innovative 55, LLC, 253 N.C. App. at 720, 801 S.E.2d at 676 (first quoting *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712, 562 S.E.2d 108, 115 (2002) (Tyson, J., dissenting), *rev'd per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003)); and then citing *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983)).

When the language of an ordinance is clear and unambiguous, "the courts must give it its plain and definite meaning." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974). The "words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves." *Grassy Creek Neighborhood All. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations omitted).

The plain language of UDO § 15.2.1 is unambiguous. "When a violation is discovered, *and is not remedied through informal means*, *written notice of the violation shall be given*." UDO § 15.2.1.A (emphasis supplied). "The City must follow the requirements of the statute and charter, and the ordinances and procedures it established." *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353, 361, 831 S.E.2d 605, 611 (2019).

Based upon the plain language and mandate of the ordinance, written notice of specific violation(s) must be issued *after* a violation was not remedied through informal means. *See* UDO § 15.2.1.C. The City immediately issued the purported NOV to DGFM without attempting to resolve the dispute informally or by allowing DGFM an opportunity to abate or cure any purported violation. *See MR Ent., LLC v. City of Asheville*, 295 N.C. App. 136, 142-43, 905 S.E.2d 246, 251 (2024). The City failed to issue a lawful NOV according to the unambiguous language of the ordinance and governing statutes. UDO § 15.2.1.C.

Additional language within the ordinance further supports this conclusion. The NOV must also include "a description of the violation and its location, the measures necessary to correct it, the possibility of civil penalties and judicial enforcement action, and notice of the right to appeal." UDO § 15.2.1.C.

As the dissenting member of the board correctly noted, the notice fails to allege which elements of the approved site plan were non-compliant or "the measures necessary to correct" them. UDO § 15.2.1.C. The City carries the burden of proving the existence of a violation of a local zoning ordinance. *City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980). Because the City further failed to provide DGFM the informal means to cure or

abate and failed to describe the specific measures required to correct the property's unstated inconsistencies with or deviations from the site plan, the NOV fails to satisfy the plain language requirements of the ordinance. *See id.*; UDO § 15.2.1.C.

IV. Judicial Notice and Due Process

"To receive adequate notice, the bases for the sanctions must be alleged. . . . In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." *Dunn v. Canoy*, 180 N.C. App. 30, 40, 636 S.E.2d 243, 250 (2006) (brackets, citation, and quotations omitted). The mandates of Due Process and adequate notice is to inform a party of alleged failure to comply with the law and an opportunity to cure before depriving the owner of their property rights. *McMillan v. Robeson Cnty.*, 262 N.C. 413, 417, 137 S.E.2d 105, 108 (1964).

The UDO mandates the purported non-conforming party must have the opportunity to cure and rectify the violation and the opportunity to be heard. *See* UDO § 15.2.1.C; *City of Randleman v. Hinshaw*, 267 N.C. 136, 139-40, 147 S.E.2d 902, 904-05 (1966). "[T]he opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 309, 750 S.E.2d 46, 49 (2013) (quoting *Peace v. Employment Sec. Com'n of North Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998)).

In *Lipinski*, this Court held the petitioner's procedural Due Process rights were not violated because a meaningful opportunity to be heard was provided. *Id.* The petitioner was sent and received notice of a city ordinance violation, was able to meet with the town attorney to clarify the specific violation, and the parties agreed upon the scope and issues of the hearing beforehand. *Id.* At the hearing, the petitioner testified and was able to present evidence and ask questions. *Id.*

Unlike the petitioner in *Lipinski*, DGFM was unaware of the specific nature of the purported violations, and it was not given the opportunity before the hearing to informally meet with the site compliance officer to clarify, cure, or abate the specific violation(s). DGFM was not afforded a meaningful opportunity to be heard at the hearing. DGFM was barred from presenting evidence at the hearing of the alleged discriminatory and selective enforcement of the ordinance compared to similarly-situated businesses in the area.

According to *Lipinski*, Due Process mandates a party purportedly violating a city ordinance must be notified of and given an opportunity to abate and cure the specific violations, afforded a pre-hearing conference

to determine the scope of the hearing, and given the opportunity to be meaningfully heard. *Id*. The City has the burden and cannot reasonably show DGFM was afforded adequate Due Process under the law. *Id*.; *City of Winston-Salem*, 47 N.C. App. at 414, 267 S.E.2d at 575.

A property owner must be sufficiently informed, not only of the proceedings against him, but also provided a "description of the violation and its location" and the "measures necessary to correct it." UDO § 15.2.1.C. A property owner in violation of a non-specific "failure to comply" cannot be characterized as being "on notice" of the violation itself or of the measures necessary to abate, correct, or cure the violation. Providing the "measures necessary to correct" any purported violation as an inverse statement of the violation itself is insufficient notice of the City's expectations or means to comply. *See id*. Without this specific information, correction of the violation requires the property owner to guess or infer what issue, or possibly several issues, the City is referring to or the "measures necessary" to abate or cure them.

Without evidence of the specific violations and ameliorative measures, DGFM could not rectify the violations it believes the City complains of without being in violation of other unidentified problems. The proposed remedy for DGFM's unspecified "failure to comply with [the] site plan" cannot merely be another unspecified "word salad" of "compliance with the site plan." *Id*.

This lack of specificity allows the City of Durham to "make it up" at the hearing or as the process proceeds and transforms the unlawful Notice of Violation into a prohibited "General Warrant," proscribed by the Due Process clause of the Fifth Amendment and prohibited by the Fourteenth Amendment. *See Andresen v. Maryland*, 427 U.S. 463, 491-92, 49 L. Ed. 2d 627, 649 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) ("An elementary and fundamental requirement of Due Process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); U.S. Const., amends. V, XIV, § 1; N.C. Const. art. I, § 19.

The mandates of Due Process and notice is to specifically inform a party of its failure to comply with the law before depriving him of rights to the property. *McMillan*, 262 N.C. at 417, 137 S.E.2d at 108; *Innovative 55, LLC*, 253 N.C. App. at 720, 801 S.E.2d at 676.

The City failed to provide adequate advance notice of the specified site plan violations and, as such, DGFM did not have the necessary

information to abate, cure, or be adequately heard or present evidence at a fair and impartial hearing, in violation of DGFM's Due Process rights. *Id.*

V. Abuse of Discretion

The superior court is empowered by N.C. Gen. Stat. § 160D-1402(k) to "affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 160D-1402(k) (2023).

The trial court affirmed the Board of Adjustment's denial of appeal and *sua sponte* ordered DGFM to "bring the property . . . into full compliance with a site plan, *approved by the Durham City-County Planning Department*." (emphasis supplied). The order instructed DGFM to comply with filing a new site plan, rather than specifying the requirements for DGFM to achieve full conformity with the existing, approved site plan. The order merely reiterated the directions the court had made to counsel "for petitioner to submit for review and approval a site plan which is compliant with the law, for which the Durham City County Board has authority, or to come into compliance with the current site plan."

The statute does not authorize the superior court under *certiorari* and appellate review to both affirm the Board and further enlarge the burdens on Petitioner in its order. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11-12, 387 S.E.2d 655, 662 (1990) ("In its capacity as an appellate court reviewing the town's quasi-judicial subdivision permit hearing, the superior court could not properly grant summary judgment. . . . The superior court judge may not make additional findings." (citations omitted)). The trial court committed an error of law and abused its discretion by creating and modifying the instructions for how DGFM may come into unspecified compliance with the site plan, including by requiring DGFM to submit a new site plan, when DGFM was provided defective and unspecified notice and no fair opportunity to be heard. N.C. Gen. Stat. § 160D-1402(k).

VI. Conclusion

The trial court failed to correctly interpret and apply the plain meaning of the UDO's mandates. UDO § 15.2.1.C. The City of Durham failed to provide an informal means to correct, cure, or abate, or to issue a specific notice of violation, or to provide a fair hearing. *See id.*; N.C. Gen. Stat. § 160D-1402(k); *Lipinski*, 230 N.C. App. at 309, 750 S.E.2d at 49; *McMillan*, 262 N.C. at 417, 137 S.E.2d at 108; *Innovative 55, LLC*, 253 N.C. App. at 720, 801 S.E.2d at 676; *Mullane*, 339 U.S. at 314, 94 L. Ed.

at 873. The trial court also failed to protect DGFM's Due Process rights under the ordinance and statute. *Id*. In doing so, the trial court and the City denied DGFM of specific notice and an opportunity to abate or cure and its statutory and Due Process rights to present evidence, testimony, or be impartially heard. *See Lipinski*, 230 N.C. App. at 309, 750 S.E.2d at 49; *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873. The order is affected by prejudicial errors mandating reversal and remand for entry of dismissal of the purported violations. *See MR Ent.*, 295 N.C. App. at 143, 905 S.E.2d at 251. I respectfully dissent.

APHRODITE EFSTATHIADIS, PLAINTIFF
v.
EFSTATHIOS EFSTATHIADIS, DEFENDANT

No. COA23-1092

Filed 3 December 2024

Child Custody and Support—permanent child custody order—not a request for modification—findings of fact supported by evidence—conclusion of law supported by factual findings

In a permanent custody order arising from the dissolution of the parties' marriage, the trial court did not abuse its discretion by giving primary legal and physical custody of two minor children to plaintiff while giving defendant the right to exercise secondary physical custody through visitation. First, in the absence of any record evidence of a previous custody order or argument by defendant below, the trial court did not err in failing to consider plaintiff's complaint for custody as a request for modification pursuant to N.C.G.S. § 50-13.7. Second, each of the findings of fact challenged by defendant—concerning abuse defendant directed toward his wife and children, as well as a domestic violence protective order plaintiff obtained after the parties' separation—was supported by competent evidence in the record. Third, the trial court's findings of fact sufficiently addressed defendant's fitness as a parent and supported its determination that it was in the children's best interests for plaintiff to have primary custody, with visitation for defendant.

Appeal by defendant from order entered 7 February 2023 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 12 June 2024.

Ward & Smith, P.A., by Christopher S. Edwards, J. Albert Clyburn, and Hannah M. Daigle, for plaintiff-appellee.

The Lea/Schultz Law Firm, PC, by James W. Lea, III, for defendant-appellant.

GORE, Judge.

Defendant, Efstathios Efstathiadis, appeals the permanent child custody order that granted plaintiff, Aphrodite Efstathiadis, primary legal and physical custody of their two children. Upon review of the record and the briefs, we affirm.

I.

Plaintiff and defendant were married in 2009. The parties had two children together, Vasilios ("Vasili") and Ioanna; both children are still minors. Plaintiff and defendant separated on 8 January 2021, and soon after, entered into a Separation and Property Settlement Agreement ("Settlement Agreement") that included details concerning child custody. The parties originally agreed to share joint legal and physical custody of both children; the trial court defined the child custody agreement as a temporary order. In March 2021, plaintiff sought and obtained an ex parte domestic violence protective order ("DVPO"). Within the DVPO, plaintiff alleged defendant was verbally and physically abusive.

On 9 April 2021, plaintiff filed a summons and complaint against defendant seeking child custody, child support, and temporary custody. The parties entered into a consent order for temporary custody while awaiting the custody hearing, and as part of the consent order, plaintiff agreed to set aside the DVPO and enter into a Rule 65 civil restraining order. Defendant alleges the parties were divorced on 18 March 2022 and incorporated the Separation Agreement, but there is no divorce judgment included in the record.

On 7 November 2022, the permanent child custody hearing took place. The trial court entered an order for permanent child custody giving primary legal and physical custody to plaintiff and giving defendant the right to exercise secondary physical custody through visitation. The trial court included findings of fact and conclusions of law in support of its decision that it was in the best interests of the children. Defendant filed a timely notice of appeal.

II.

Defendant appeals of right pursuant to N.C.G.S. §§ 7B-1001(a)(4) and 7A-27. Defendant seeks review of three issues. Defendant argues the trial court lacked competent evidence to support findings of fact 12–23; that the prior Separation Agreement between the parties meant the trial court must consider the permanent child custody request under the substantial change in circumstances standard prior to modifying the previous custody agreement; and that the trial court lacked findings of fact regarding defendant's fitness and erred by determining it was in the best interests of the children to award plaintiff primary custody. We disagree.

We review challenges to a child custody order for abuse of discretion. *Velasquez v. Ralls*, 192 N.C. App. 505, 506 (2008). The trial court's findings of fact must be "supported by competent evidence" and are considered "conclusive . . . even when the evidence is conflicting." *Dixon v. Dixon*, 67 N.C. App. 73, 76 (1984). The findings of fact may not "consist of mere conclusory statements" to support the custody award and to support the determination that it is in the best interest of the child. *Id.* at 77. With this standard in mind, we consider defendant's arguments.

A.

We first discuss defendant's argument that the trial court should have considered the child custody complaint as a request for modification under section 50-13.7. *See* N.C.G.S. § 50-13.7 (2023). Defendant argues we should review the order to determine whether the trial court properly applied the modification standard (a substantial change in circumstances) prior to allowing a change in the child custody arrangement that was previously decided within the Separation Agreement. Defendant asserts the divorce decree incorporated the Separation Agreement and made the child custody arrangement within the Separation Agreement permanent.

There is no divorce decree in the record, nor did defendant make this argument challenging the permanent versus temporary nature of any prior child custody agreement at the trial court level. Pursuant to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, we may not review unpreserved arguments raised for the first time on appeal. N.C. R. App. P. 10(a)(1). Further, pursuant to Rule 9, the record must contain the documents that "are necessary to an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(1)(j). Beyond defendant's unpreserved argument, we are unable to conduct meaningful review of this issue without the divorce decree in the record. *See Matter of Foreclosure of Deed of Tr. Executed by Moretz*, 287 N.C. App. 117, 124

(2022) (discussing the Rule 9 violations that impaired this Court's ability to conduct meaningful review). Accordingly, we do not consider the permanent child custody order as a modification of a prior permanent order, and therefore, we proceed with review under an abuse of discretion standard.

B.

Defendant broadly challenges findings of fact 13–23 in his issue statements and headings, and specifically challenges findings of fact 12, 13, 14, and 15 within the argument portion of his brief. Defendant's broad challenge to findings 16–23 is therefore, abandoned upon review. *See Gavia v. Gavia*, 289 N.C. App. 491, 497 (2023) (citing N.C. R. App. P. 28(b)(6) (2023)) (stating the mere indication of assigned error to certain findings of fact without arguments within the brief, results in abandonment of the broad assignments of error to those findings). Additionally, findings of fact 16–23 are conclusive on appeal. *See id.*

Defendant specifically challenged the following findings of fact:

> 12. That Defendant was verbally and physically abusive to the Plaintiff and minor children during the marriage.
>
> 13. That Defendant's verbal and physical abuse to Plaintiff and minor children has continued after separation.
>
> 14. That Department of Social Services found it necessary [to] investigate and enter into a safety plan pertaining to the physical abuse perpetrated by Defendant against the minor children. Said safety plan prohibited physical abuse against the minor children.
>
> 15. That the minor child, . . . [Vasili] . . . , admitted to his primary physician, Dr. Harnum, that he was physically assaulted, punched in his stomach, by the Defendant.

Defendant argues these findings are not supported by competent evidence in one part of his argument and later argues the findings must be supported by substantial evidence under a modified custody order standard. Defendant points to evidence in the record in which witnesses testified to a "very good" and "warm" relationship between defendant and the children. Defendant claims the evidence supporting this finding was "anecdotal," but also acknowledges testimony from a cousin stating defendant yelled at his son for spilling ketchup on his shirt and "resorted to name-calling directed at Vasili." This is an argument regarding reliability and credibility, not a lack of evidence. It is within the trial

court's purview to weigh the evidence and consider credibility, including "contrary evidence," not this Court's. *See Woncik v. Woncik*, 82 N.C. App. 244, 248 (1986).

Although defendant argues the evidence lacks reliability and "directness in substantiating the abuse allegations," there is competent evidence in the record upon which the trial court could make findings of fact 12, 13, 14, and 15. As it relates to finding of fact 12, plaintiff testified to defendant hitting her during the marriage. Plaintiff testified defendant cursed at the children and gave specific examples of abuse in the DVPO order, which the trial court found to be credible. Additional witness testimony affirmed that defendant yelled at his children. This evidence supports finding of fact 12.

Finding of fact 13 is also supported by competent evidence in the record. Plaintiff obtained a DVPO order after separation. There is witness testimony in the record that defendant admitted to hitting his son in the face. There is testimony that defendant punched his son in the stomach and a conclusive finding of fact that defendant punched his son in the stomach. Competent evidence exists in the record to support finding of fact 13.

Finding of fact 14 is supported by competent evidence in the record. The safety plan created by the Department of Social Services ("DSS") is in the record. Within the DSS safety agreement, a safety plan was created due to domestic violence concerns that "pose[d] an imminent danger of serious physical harm and/or emotional harm to the child." The safety assessment also stated that defendant punched his son in the stomach. Therefore, competent evidence supports the trial court's finding of fact 14.

Finding of fact 15 is supported by competent evidence in the record. The assessment with Dr. Harnum is in the record and does state that Vasili communicated about being punched in the stomach. Despite the fact the medical assessment does not state Vasili told the doctor defendant punched him, it allows space for inference. When the medical assessment is combined with the other documents in the record, there is competent evidence to support finding of fact 15. Defendant's argument pointing to Vasili's cognitive issues as a means of discrediting the statement in the doctor's report is unpersuasive. As previously stated, it is within the trial court's purview to determine credibility and weigh the evidence.

Having reviewed the specifically challenged findings of fact, we determine the trial court's findings of fact are supported by competent

evidence in the record. Therefore, the findings of fact are conclusive on appeal.

C.

In his final arguments, defendant argues the trial court erred by not making findings of fact related to his fitness as a father and by determining that it was in the best interests of the children to grant primary custody to plaintiff and secondary custody via visitation to defendant. In support of these arguments, defendant first recognizes the discretion given to the trial court to make a determination about the best interests of the child when "it is grounded in competent evidence supporting the judge's findings of fact." Defendant also cites *Dixon* to discuss how a custody order is "defective" when it lacks "detailed findings of fact" in support of the trial court's determination for the best interest of the child. 67 N.C. App. at 76–77. However, in reviewing the permanent child custody order, we disagree with defendant's assertion the findings of fact do not demonstrate defendant's fitness as a father nor the trial court's ultimate discretionary decision.

Defendant's fitness as a father was well developed through the trial court's many findings of fact. Specifically, the following findings of fact provide support for the trial court's determination of defendant's fitness as a father:

> 6. That on or about 31 March 2021, Plaintiff obtained a Domestic Violence Protective Order ("DVPO") against Defendant.
>
> . . .
>
> 11. That the allegations set forth in the DVPO that Plaintiff filed on 31 March 2021 were credible and this [c]ourt finds those allegations still credible.
>
> 12. That Defendant was verbally and physically abusive to the Plaintiff and minor children during the marriage.
>
> 13. That Defendant's verbal and physical abuse to Plaintiff and [the] minor children has continued after separation.
>
> 14. That [DSS] found it necessary [to] investigate and enter into a safety plan pertaining to the physical abuse perpetrated by Defendant against the minor children. Said safety plan prohibited physical abuse against the minor children.

> 15. That the minor child, . . . [Vasili] . . . , admitted to his primary physician, Dr. Harnum, that he was physically assaulted, punched in his stomach, by the Defendant.
>
> . . .
>
> 18. That the conflict amongst the Plaintiff and Defendant has worsened since separation. For example, Defendant contacted law enforcement on Plaintiff for requiring Defendant to meet at Eaton Elementary to exchange the minor children, which is pursuant to the Temporary Order. This incident occurred in the presence of the minor children and caused undue stress[ ] and anxiety.
>
> 19. That Defendant's testimony was not credible. Defendant blamed his counsel of record for not amending his filed Answer, which admitted to selling prescription pain pills out of the marital residence. Defendant's testimony that Plaintiff stole his prescription pain pills out of his safe was not credible. Defendant admitted that he had never made said allegation previously.
>
> 20. That Defendant's testimony was not credible that the minor child, . . . [Vasili] . . . "ran into his elbow" as justification to the minor children openly admitting that Defendant punched him in his stomach.
>
> 21. That Defendant admitted to Debra Bowes that he hit the minor child, . . . [Vasili] . . . , in the face, "but not that hard", and this [c]ourt found her testimony credible.
>
> 22. That Defendant has the capacity to be loving and appropriate but chooses not to.
>
> . . .
>
> 24. That Defendant is fit and proper to exercise secondary physical custody by way of visitation set forth herein.

These findings support the trial court's determination that plaintiff should have primary custody and defendant secondary custody via visitation. Further, these findings sufficiently address defendant's fitness as a father.

The previous stated findings along with the following findings support the trial court's discretionary decision that it is in the children's best interests to award primary legal and physical custody to plaintiff

rather than defendant's desired fifty-fifty custody between himself and plaintiff.

> 8. That on 9 April 2021 an Order was entered captioned CONSENT ORDER ON CUSTODY PENDING HEARING ON TEMPORARY CUSTODY ("Temporary Custody Order").
>
> . . .
>
> 10. That Plaintiff was employed throughout the marriage.
>
> . . .
>
> 16. That since separation, the minor child, . . . [Vasili's] . . . behavior has worsened in school and socially. The minor child's grades have declined, his tics have worsened and [he] is now exhibiting aggressive behaviors.
>
> 17. That both Plaintiff and the minor child's tutor, testified that the minor child, . . . [Vasili's] . . . tics are worse after the custodial exchanges.
>
> . . .
>
> 23. Since the party's separation, the Plaintiff has paid for the majority of the children's medical and extracurricular expenses.
>
> 24. That Plaintiff is fit and proper to have primary legal and physical custody of the minor children. . . .

Because the trial court's findings adequately address the fitness of both parents and support its determination that it is in the best interests of the children to award primary legal and physical custody to plaintiff, we conclude the trial court did not abuse its discretion.

III.

For the foregoing reasons, we affirm the trial court's permanent child custody order.

AFFIRMED.

Chief Judge DILLON and Judge THOMPSON concur.

FOX v. LENOIR-RHYNE UNIV.

[296 N.C. App. 613 (2024)]

LANEY FOX, NAKIA HOOKS, ASHLEY WOODROFFE, MICHAELA DIXON, SYDNEY WILSON, TAMERAH BROWN, KENNEDY WEIGT, KORBIN TIPTON, AND FATOU SALL, PLAINTIFFS
v.
LENOIR-RHYNE UNIVERSITY AND FREDERICK WHITT, DEFENDANTS

No. COA24-16

Filed 3 December 2024

1. Contracts—breach of contract—athletic scholarships and college basketball team membership—summary judgment

In a lawsuit filed against a university and its president (defendants) by a group of former players on the university's women's basketball team (plaintiffs), the trial court properly granted summary judgment in favor of defendants on plaintiffs' breach of contract claim alleging that defendants violated oral and written contracts related to plaintiffs' athletic scholarships and team membership by removing them from the team and canceling their scholarships. No genuine issue of material fact existed, since the written contracts clearly specified that the scholarships were for one academic year and required yearly renewal, and therefore any oral promises of four-year scholarships and automatic renewals (made by coaches) constituted parol evidence. The evidence did not support a finding that defendants breached the contract terms, showing instead that defendants properly canceled the scholarships after the academic year had ended and that plaintiffs voluntarily entered the transfer portal without appealing their scholarship non-renewals. Further, one of the plaintiffs—a former team manager—admitted to voluntarily quitting her position.

2. Civil Procedure—libel claim—survived Rule 12(b)(6) motion—different standard on summary judgment—not entitled to jury trial

In a lawsuit filed against a university and its president (defendants) by a group of former players on the university's women's basketball team, including a student (plaintiff) who published multiple social media posts accusing defendants of forcing players off the team due to racism and as retaliation for speaking out against racial prejudice, the trial court properly granted summary judgment in favor of defendants on plaintiff's libel claim, which she based on the president's published response letter calling her accusations "simply false." Plaintiff failed to make any argument that the evidence at summary judgment was sufficient for each element of defamation

or that a genuine issue of material fact existed, arguing instead that she was entitled to a jury trial because she had successfully overcome defendants' prior motion to dismiss under Civil Procedure Rule 12(b)(6). Plaintiff's reliance on the order denying that motion was misplaced, since the legal standard for a Rule 12(b)(6) motion—which focuses on the allegations within the four corners of the complaint and treats them as true—is different from the standard that must be met on summary judgment—which considers evidence presented during discovery.

Appeal by plaintiffs from summary judgment entered 19 September 2023 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2024.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiffs-appellants.

Robinson Bradshaw & Hinson, P.A., by Charles E. Johnson, David C. Kimball, and Spencer T. Wiles, for defendants-appellees.

GORE, Judge.

Plaintiffs appeal summary judgment in favor of defendants. Plaintiffs argue there were genuine issues of material fact to overcome summary judgment on the claims for breach of contract and plaintiff Fox's libel claim. Upon review of the briefs and the record, we affirm.

I.

Plaintiffs Laney Fox, Nakia Hooks, Ashley Woodroffe, Michaela Dixon, Sydney Wilson, Tamerah Brown, Kennedy Weigt, and Korbin Tipton ("plaintiffs-athletes") were recruited to play women's basketball at Lenoir-Rhyne University ("Lenoir-Rhyne"). Plaintiff Fatou Sall became the women's basketball team manager while attending Lenoir-Rhyne and remained the team manager until November 2020. Plaintiffs Fox, Hooks, Woodroffe, Dixon, Brown, Weigt, and Tipton executed National Letters of Intent ("NLI") to commit to the women's basketball team, and all plaintiffs-athletes executed Grants-in-Aid ("GIA") to receive their athletic scholarships to Lenoir-Rhyne.

Each GIA stated the scholarship was for a one-year period, and acknowledged this one-year limitation was according to the NCAA and Lenoir-Rhyne policies. These scholarships could not be reduced or cancelled during the one-year period apart from four exceptions that

were specified in the GIAs. At the end of the academic year, according to the NCAA student-athlete handbook, the financial aid office was to notify the student-athlete of their award for the coming year. If the financial aid award was reduced or cancelled, the student-athlete would have the right to a hearing before the Athletics Appeal Committee upon a written request for appeal. Lenoir-Rhyne was required to comply with these regulations and policies to remain a member of Division II of the NCAA. Plaintiffs-athletes signed renewal GIAs each academic year when their scholarships were renewed.

Plaintiffs Fox, Hooks, Woodroffe, and Tipton attested they were orally promised a four-year scholarship, automatic renewal of a yearly contract, or to play basketball for four years during their recruitments by Coach Cam Sealy, the previous women's basketball coach, or Coach Grahm Smith, the current women's basketball coach. Plaintiffs-athletes received their scholarships for the 2020-2021 academic year but were given the choice to opt out of the basketball season due to COVID-19 without any change in their scholarship status; only plaintiff-Fox opted out of the 2020-2021 basketball season starting in November 2020. Plaintiffs also assert the Lenoir-Rhyne student-handbook's provision regarding freedom of expression for students was incorporated into the GIA contract.

Plaintiff Sall orally agreed to be the women's basketball team manager after attending a job fair at Lenoir-Rhyne. She did not receive any financial scholarship for her work as the basketball team manager. There was no written contract to be the manager, and each semester the coaches would ask plaintiff Sall if she was available to be the manager that semester. There was no set term agreed upon; it was a season-by-season position.

During the height of COVID-19 in the 2020-2021 basketball season, there were racial tensions within the basketball team that caused the coaches and some administrative personnel to hold a meeting with the team. The team agreed to limit their team communication to only basketball-related and team goal-oriented discussions. Plaintiff Fox organized a "Symposium" for the basketball team and other university administrators to discuss racial prejudice, and later organized a second symposium, "The Talk," open to the entire university, to further discuss racial prejudice. Plaintiff Fox alleges the coaches sought to "retaliate" against her and other African American teammates after these events.

Plaintiffs attested in their affidavits that they were forced off the basketball team at the end of the 2020-2021 basketball season. Plaintiff Fox had a meeting with the coaches in which the coaches told her she did

not fit into the culture of the team and that she would not be welcomed back onto the team for the 2021-2022 basketball season. The coaches offered to still give plaintiff Fox her full scholarship for the 2021-2022 basketball season. Plaintiff Fox ultimately entered the transfer portal to leave Lenoir-Rhyne. Although plaintiffs Dixon, Weigt, Hooks, Wilson, and Brown attested they were forced off the basketball team for the 2021-2022 basketball season, the affidavits of Coach Smith and Kim Pate, the V.P. of Athletics, attested the players planned to and did enter the transfer portal for the 2021-2022 basketball season.

Plaintiff Sall attested in an affidavit that she was "involuntarily separated from the team." During plaintiff Sall's deposition, she admitted she sent Coach Smith a text that stated, "If it isn't already obvious, I will not be working with you guys this semester. Hope you guys have a great season."

Plaintiff Fox later published social media images with statements and an "Open Letter to Lenoir-Rhyne" in which she made claims that she and other teammates were forced off the basketball team due to racism and retaliation. In response, Lenoir-Rhyne's president, Frederick Whitt, published a letter to the entire Lenoir-Rhyne community in which he stated the following:

> Yesterday, a former student-athlete posted a number of false claims on social media, including that she was dismissed from the women's basketball team for speaking out against racism and advocating for social justice. Lenoir-Rhyne flatly disagrees with this student's version of events. Her dismissal from the basketball team was a legitimate coaching decision, and suggestions to the contrary are simply false.

Plaintiff Fox also published a recording to social media of her meeting with the basketball coaches in which they told her she would no longer be on the basketball team.

Plaintiffs filed a lawsuit on 8 July 2021, against Lenoir-Rhyne, Grahm Smith, and Frederick Whitt for the following claims: breach of contract, negligent misrepresentation, tortious interference with contractual rights, tortious interference with prospective economic advantage, and libel per se or alternatively libel subject to two interpretations. Defendants filed a Rule 12(b)(6) motion to dismiss, and the trial court granted the motion to dismiss in part by dismissing all claims against Smith, leaving the following remaining claims against Lenoir-Rhyne and Whitt: the breach of contract claim and the claim for libel subject to two interpretations. The parties conducted extensive discovery,

and defendants filed a motion for summary judgment on the remaining claims against Lenoir-Rhyne and Whitt. After reviewing the parties' affidavits, depositions, interrogatories, financial documents, contractual documents, and all exhibits presented, the trial court ultimately granted summary judgment to defendants. Plaintiffs filed a timely appeal to this Court upon entry of the summary judgment.

II.

Plaintiffs appeal of right pursuant to N.C.G.S. § 7A-27(b). Plaintiffs list three issues on appeal: (1) whether the trial court erred by granting summary judgment in defendants' favor for plaintiffs' breach of contract claim and plaintiff Fox's libel claim; (2) whether plaintiffs are entitled to mental and emotional distress damages under the breach of contract claim; and (3) whether plaintiff Fox presented sufficient evidence for punitive damages on her libel claim. Because we determine the first issue is dispositive, we do not address plaintiff Fox's remaining issues regarding damages.

We review a trial court's summary judgment de novo. *See In re Will of Jones*, 362 N.C. 569, 573 (2008).

> Summary judgment is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law. Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file 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. Research Assocs., Inc., 385 N.C. 250, 267 (2023) (cleaned up). Because defendants moved for summary judgment, we consider the evidence in the light most favorable to plaintiffs.

A.

[1] Plaintiffs argue the trial court erred by granting summary judgment on their breach of contract claims. Specifically, plaintiffs appear to argue there was more than one contract: an oral contract and a written contract. Conversely, defendants argue any oral statements made prior to the written contract constitute parol evidence and argue that the written contracts, the NLI and the GIA, plainly stated that they "nullifi[ed] any agreements, oral or otherwise, which would release [them] from

the conditions stated within th[e] NLI." Although it is difficult to discern in plaintiffs' brief what they claim was contractually breached, after reviewing the record and their complaint, we believe they are arguing the alleged oral and written contracts were breached when the players were allegedly cut from the team and their scholarships allegedly cancelled. Accordingly, we review de novo whether there was any genuine issue of material fact for breach of the written contracts, and whether there was any genuine issue of material fact as to the breach of any oral contracts—if there were oral contracts intact and separate from the written contracts.

As all parties acknowledge, a breach of contract claim requires the "(1) existence of a valid contract, and (2) breach of the terms of [the] contract." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 276 (2019) (citations omitted). "Contract interpretation is a question of law. When interpreting a contract, the Court should presume that the words of the agreement were deliberately selected and be given their plain meaning." *Value Health Sols., Inc.*, 385 N.C. at 267 (cleaned up). Further, evidence of "oral stipulations . . . must not conflict with the written part of the contract. . . . [S]uch evidence will not be received where it contradicts or varies a written contract." *Dr. Shoop Family Med. Co. v. J.A. Mizell & Co.*, 148 N.C. 384, 386 (1908).

Looking to the GIA contracts signed by plaintiffs-athletes, and to the NLI signed by plaintiffs Fox, Hooks, Woodroffe, Dixon, Brown, Weigt, and Tipton, the contractual language is nearly identical in each NLI and GIA (apart from the distinctions of their names, start years, and amount of scholarship granted). All parties agree these written contracts were valid, existing contracts, and only dispute the contractual terms and whether the parties breached these terms. The GIA contracts plainly state the scholarship award is "for one academic year." The record also includes GIA "renewal" contracts, electronically signed by the plaintiffs-athletes, that specify one academic year for the scholarship and include conditions for the renewal of the scholarship. Based upon the evidence in the record, and recognizing any oral promises made in contradiction to the written contracts are not received, there is no genuine issue of material fact that the scholarship was limited to one year and subject to renewal with new contracts each academic year.

Plaintiffs also argue defendants could only cancel the GIA if the listed four conditions in the GIA apply. The original GIA contracts signed by the plaintiffs state the following:

> Upon the recommendation of the Head Coach and approval from the Director of Athletics, an Athletics

> Grant-in-Aid may be reduced or canceled *during the period of the award* by the institutional financial aid authority per NCAA Bylaw 15.6.4.1 if any of the following situations occur: (a) you render yourself ineligible for intercollegiate competition; (b) you fraudulently misrepresent, as defined in the Student-Athlete Handbook, any information on an application, Letter of Intent or financial aid agreement; (c) you engage in serious misconduct warranting substantial disciplinary penalty through the institution's regular student disciplinary authority; or (d) you voluntarily withdraw from the sport at any time for personal reasons.

The plain language within the contract dispels plaintiffs' argument. It plainly states "during the period of the award." Apart from those terms within the GIA, plaintiffs point to no contractual provision that limits defendants' ability to renew or cancel the scholarship after completion of the academic year. Defendants admit they removed plaintiff Fox from the basketball team after the 2020-2021 academic year. But defendants also state, in affidavits and through evidence of a renewal contract, that they awarded a scholarship to plaintiff Fox for the 2021-2022 academic year despite removing her from the basketball team.

Plaintiff Fox admitted during her deposition that she entered the transfer portal to leave Lenoir-Rhyne. The NCAA Division II manual, section 15.5.5.1, and the Student-Athlete handbook, by which parties admit they were contractually bound, state defendants must let the student-athlete know "whether the grant has been renewed or not renewed for the ensuing academic year." Apart from the limitations during the academic period year, plaintiffs point to no requirement for the institutions to automatically renew grants once the academic year completes. The evidence in the record demonstrates the only obligation listed is to notify the student-athlete of the institution's decision, but there is no obligation to renew the grant. Accordingly, based upon the record before us, plaintiffs fail to demonstrate a genuine issue of material fact as to any breach of contract of the GIA terms by defendants.

The remaining plaintiffs-athletes argue in their conclusory affidavits that they were forced off the basketball team. Whereas, defendants argue these plaintiffs-athletes were not removed from the team, but instead chose to enter the "transfer portal" to transfer to different institutions. The evidence in the record, including their own statements within their depositions, demonstrates the plaintiffs-athletes entered the transfer portal at the completion of the 2020-2021 academic year.

Each cancellation of a renewal GIA stated that the student "indicated intent to transfer during the next academic year."

This evidence suggests plaintiffs-athletes' contracts were completed for the 2020-2021 academic year and that each one chose to transfer from Lenoir-Rhyne. These decisions were made during the time frame that Lenoir-Rhyne could determine whether to renew or cancel the GIA. Further the Student-Athlete handbook provided an appeals process for student-athletes who did not receive a renewal of their GIAs. There is no indication in the record that plaintiffs appealed their GIAs. This is likely because the evidence in the record demonstrates plaintiffs entered the transfer portal to transfer to a different institution prior to any non-renewal of their GIAs. Accordingly, plaintiffs-athletes fail to demonstrate a genuine issue of material fact for the breach of contract claim against defendants.

Finally, plaintiff Sall, the former team manager of the women's basketball team, argues she had a contract with defendants and that they breached the contract. Plaintiff Sall testified in her deposition that she had an oral agreement with the basketball coaches to work as the team manager at the beginning of each season, that there was no written contract, and that she did not commit to any length of time to be the team manager. Plaintiff Sall executed an affidavit stating she "tried to contact Grahm Smith to let him know that [she] was ready to return as team manager. [She] sent him several text messages, but he failed to respond. [She] was therefore involuntarily separated from the team."

However, within the record, plaintiff Sall admits texting Coach Smith that she would "not be working with [the team] this semester." Accordingly, there is no genuine issue of material fact of a breach of contract claim against defendants and plaintiff Sall, because plaintiff Sall admittedly quit working as the team manager. Because plaintiff Sall fails to demonstrate defendants breached any alleged contract, we do not consider the validity of the alleged oral contract. Accordingly, having determined there is no breach of contract as to any of the contract claims made by plaintiffs, we do not consider any alleged emotional or mental distress damages as argued by plaintiffs.

B.

[2] Plaintiff Fox also argues the trial court erred by granting summary judgment on her remaining alternative libel claim. Specifically, plaintiff Fox first argues the trial court erred by "overruling" a previous Rule 12(b)(6) order. Plaintiff Fox also argues that she only needs to provide evidence that defendant Whitt's statement "had a defamatory meaning"

and that the defamatory meaning was understood by the third-party recipients. Plaintiff appears to argue that by overcoming a Rule 12(b)(6) motion to dismiss on an alternative theory of libel "susceptible of two reasonable interpretations, one of which is defamatory and the other is not," any granting of summary judgment by the trial court has the effect of "overruling" the prior Rule 12(b)(6) order. *Tyson v. L'Eggs Prods., Inc.*, 84 N.C. App. 1, 11 (1987). Additionally, it appears that plaintiff Fox believes that having successfully overcome a Rule 12(b)(6) dismissal for libel subject to two interpretations that now only a jury can determine whether the statements were defaming or not. We disagree with plaintiff Fox's legal assertions.

Plaintiff Fox relies upon *Robinson v. Duke Univ. Health Systems* in support of her argument that one trial court judge could not overrule the decision of another trial court judge. 229 N.C. App. 215 (2013). In *Robinson*, one judge denied the defendant's motion to dismiss based upon the provisions of Rule 9(j) and the latter judge overruled this determination in a later order granting summary judgment for the defendant. *Id.* at 222. However, having reviewed *Robinson* in context, the legal question was whether the complaint properly complied with the requirements of Rule 9(j). *Id.* That legal question is decided at the Rule 12(b)(6) stage and it cannot be overcome at summary judgment without having the effect of one trial court judge overruling another trial court judge's determination. *Id.*

This legal context is not to be applied to every Rule 12(b)(6) order because the general application is that there are different legal standards by which we consider a Rule 12(b)(6) motion and a Rule 56 motion. A motion to dismiss is decided upon the four corners of the complaint and has a lower threshold that passes muster when the pleading party provides sufficient facts to meet the elements for the legal claim. Under the Rule 12(b)(6) standard, the facts are treated as true and there is no other evidence considered outside the four corners of the complaint. *See State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 572 (2021). But in the context of a Rule 56 motion, the parties have exchanged discovery and submitted affidavits, interrogatories, and additional documents to the court. *See Est. of Graham v. Lambert*, 385 N.C. 644, 656–57 (2024) (cleaned up) ("And while a 12(b)(6) motion is decided on the pleadings alone, summary judgment embraces more than the pleadings, allowing courts to consider affidavits, depositions, and other information."). At this juncture, the trial court now considers all the evidence presented and considers whether there is any genuine issue of material fact such that judgment is or is not proper as a matter of law. *See id.*; N.C. R. Civ. P. 56(c).

In the present case, having considered only the four corners of the complaint, the trial judge determined plaintiff Fox pled her alternative argument for libel sufficiently by treating the alleged facts within the complaint as true to overcome the Rule 12(b)(6) motion. After discovery and upon the motion for summary judgment, the trial court had additional evidence not available at the Rule 12(b)(6) stage such as: the open letter published by plaintiff to social media, the additional social media posts, the published letter by defendant Whitt, multiple affidavits, plaintiffs' depositions, the NLIs, the GIAs, and financial documents. Within this context, the trial court determined there was no genuine issue of material fact as to plaintiff Fox's libel claim subject to two interpretations. Accordingly, the trial court did not overrule the previous denial of the Rule 12(b)(6) order. We now consider under de novo review whether the trial court erred in determining there was no genuine issue of material fact and that defendants were entitled to judgment as a matter of law.

Plaintiff Fox published a letter on social media, entitled "An Open Letter to Lenoir-Rhyne University" along with multiple social media pictures entitled, "The Racist 'Culture' of Lenoir-Rhyne University," "Quotes From Racist Teammates," "The Coaching Staff," "The NCAA & LR," and "Ignorance." Within the letter and social media posts, plaintiff Fox made claims of racism against coaches, basketball teammates, Lenoir-Rhyne, and claimed multiple players were forced to leave the basketball team because of racism. In response to these published images and letter, defendant Whitt published a letter to the Lenoir-Rhyne community. Plaintiff Fox claims the following portion of his letter was defamatory:

> Yesterday, a former student-athlete posted a number of false claims on social media, including that she was dismissed from the women's basketball team for speaking out against racism and advocating for social justice. Lenoir-Rhyne flatly disagrees with this student's version of events. Her dismissal from the basketball team was a legitimate coaching decision, and suggestions to the contrary are simply false.

Plaintiff Fox provided no further argument or legal analysis to demonstrate the evidence at summary judgment was sufficient for each element of defamation and that there is a genuine issue of material fact as to her libel claim. Instead, plaintiff Fox merely cites to multiple cases that state this type of libel claim, "is for the jury to determine under the circumstances whether the publication is defamatory and was so understood by those who saw it." *Renwick v. News & Observer Pub.*

Co., 310 N.C. 312, 316 (1984) (citation omitted). Plaintiff Fox also states, "to survive summary judgment, plaintiff only had to bring forth evidence that Whitt's statement had a defamatory meaning and that was so understood by those to whom the publication was made." This is an incorrect statement of the law.

Considering the evidence presented at summary judgment in the light most favorable to plaintiff Fox, plaintiff has not demonstrated, nor argued for that matter, that there is any genuine issue of material fact to overcome summary judgment. Plaintiff Fox improperly relies upon the Rule 12(b)(6) order as a mechanism to overcome summary judgment and provide automatic access to a jury trial. As previously stated, the parties must demonstrate there is a genuine issue of material fact given the additional evidence presented at summary judgment. Having failed to properly address the summary judgment standard and provide this Court with an argument demonstrating there is a genuine issue of material fact, plaintiff Fox's challenge is overruled. Therefore, we determine the trial court did not err by granting summary judgment to defendants on the remaining claims.

III.

For the foregoing reasons, we affirm the trial court's summary judgment in favor of defendants.

AFFIRMED.

Chief Judge DILLON and Judge STROUD concur.

HILL v. EWING

[296 N.C. App. 624 (2024)]

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

No. COA23-982-2

Filed 3 December 2024

1. Aiding and Abetting—aiding and abetting champerty and maintenance—not recognized as a cause of action

The trial court properly dismissed, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint against defendant attorney for aiding and abetting another defendant's conduct engaging in champerty and maintenance with regard to plaintiff's property, since there is no recognized cause of action in this state for aiding and abetting champerty and maintenance. Further, in holding with precedential guidance, there is no civil cause of action for barratry or against an attorney for performing work for a client alleged to have committed champerty and maintenance (based on an attorney-client relationship). Finally, the appellate court noted that the deed prepared by defendant attorney in this case on behalf of the other defendant, which purported to transfer plaintiff's property to third parties, was a non-warranty deed and, as such, stated that there was no express or implied warranty regarding title.

2. Aiding and Abetting—action against attorney—slander of title—sufficiency of pleading

Plaintiff's claim against defendant attorney, either for aiding and abetting another defendant in an alleged slander of title, or for engaging in slander of title in his own right, was properly dismissed pursuant to Civil Procedure Rule 12(b)(6) because plaintiff failed to allege, as an essential element of slander of title, that she suffered special damages as a result of false statements contained in a deed that was recorded by defendant attorney and that purported to transfer title to plaintiff's property.

Judge TYSON dissenting.

HILL v. EWING

[296 N.C. App. 624 (2024)]

Appeal by plaintiff from order entered 3 April 2023 by Judge David H. Strickland in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2024. Petition for rehearing allowed by our Court 21 October 2024. The following opinion supersedes and replaces the opinion filed 20 August 2024.

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

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

DILLON, Chief Judge.

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

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

On 20 August 2024, we filed an opinion affirming in part, reversing in part, and remanding for further proceedings. On 21 October 2024, we granted Defendant's petition to rehear the matter. After reconsidering the matter, for the reasoning below, we affirm.

I. Background

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

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

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

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

Accordingly, as of 2011, Plaintiff owned a one-half interest in the Property (through her father Herman Washington), subject to Piedmont's easement interest; and the Branham Defendants owned the other one-half interest in the Property.

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

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

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

In any event, in May 2020, the Ewing Defendants and the Branham Defendants executed the deed, and Defendant Attorney recorded the deed.

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

In November 2020, the Ewing Defendants and the Branham Defendants executed a document purportedly granting Piedmont an easement on the Property in exchange for $12,000. This money was split among the Branham Defendants and the Ewing Defendants, with $3,000 going to Defendant Ray as his 25% facilitation fee.[1]

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

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

II. Appellate Jurisdiction

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

III. Analysis

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

A. Aiding and Abetting Champerty and Maintenance

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

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

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

In her complaint, Plaintiff alleges that Defendant Ray notified the Ewing Defendants and the Branham Defendants about potential claims they had against Plaintiff, that he told them he would pay for the prosecution of those claims, that he would receive 25% of any money recovered from the prosecution of those claims, that he engaged Defendant Attorney to pursue those claims, and that Defendant Attorney indeed engaged in legal work in the pursuit of those claims.

Champerty and maintenance are torts recognized in North Carolina. *See*, *e.g.*, *Raymond v. North Carolina Police Benevolent Ass'n*, 365 N.C. 94, 96 (2011). However, neither party has cited a case in which it was held that North Carolina recognizes a cause of action for *aiding and abetting* champerty and maintenance; and we decline to do so. In so holding, we are guided by decisions from our Court and our Business Court. For instance, where a party who was the target of civil suits sued the attorney for barratry, we held that, though "barratry" is a recognized common law crime in North Carolina, our state does not recognize a civil cause of action for barratry. *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 579 (2002). We further held the third party could not maintain a civil claim *against the attorney who performed the work* for his client alleged to have committed champerty and maintenance, based on attorney-client relationship. *Id.* at 580–81 (relying on *Smith v. Hartsell*, 150 N.C. 71, 77 (1908)).

In another case, though we recognized a claim for breach of fiduciary duty, we refused to recognize a cause of action for *aiding and abetting* this breach. *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 302 (2019). And our Business Court, relying on our *BDM* decision, refused to recognize a claim for *aiding and abetting* constructive fraud. *See Brashaw v. Maiden*, 2020 NCBC LEXIS 106, *40 (2020).

Finally, we note that the deed prepared by Defendant Attorney makes no warranty that Plaintiff did not own an interest in the Property. Rather, the deed was a non-warranty deed, specifically stating on its face that "[t]he Grantor makes no warranty, express or implied, as to title to the property hereinabove described."

Accordingly, we conclude the trial court did not err in dismissing Plaintiff's claims against Defendant Attorney for aiding and abetting champerty and maintenance.

B. Slander of Title/Aiding and Abetting Slander of Title

[2] Plaintiff next alleges that Defendant Attorney aided and abetted Defendant Ray in his alleged slander of title. Plaintiff's complaint could be construed as alleging that Defendant Attorney, in his own right, engaged in slander of title. However, for the reasoning below, we conclude that Plaintiff failed to allege a claim for slander of title and, accordingly, that the trial court properly dismissed Plaintiff's claim against Defendant Attorney for slander of title or for aiding and abetting Defendant Ray in his alleged slander of title.

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

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

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

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

> [D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6).
>
> Moreover [Rule] 9(g) requires that when items of special damages are claimed, each shall be averred. Thus, where the special damage is an integral part of the claim for

> relief, its insufficient allegation could provide the basis for dismissal under Rule 12(b)(6).

Stanback v. Stanback, 297 N.C. 181, 204 (1979) (internal marks omitted).

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

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

Accordingly, it is incumbent on a plaintiff seeking damages for slander of title to allege in her complaint how she suffered special damages. That is, it is not enough simply to allege generally that she was damaged because of the false and malicious statements contained in the deed made regarding her interest in the Property or that she hired an attorney to challenge the false statements. For instance, in *Cardon*, our Supreme Court held that the plaintiff suffered special damages for a slander of title where the plaintiff showed that the defendant interfered in the plaintiff's attempt to sell the property, with evidence that the defendant had falsely claimed to a prospective buyer that the plaintiff did not own the property, thereby causing the sale to fail. 120 N.C. at 461.

Here, Plaintiff has not alleged facts showing special damages suffered. She simply alleges that she suffered damages in excess of $25,000

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

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

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

AFFIRMED.

Judge GRIFFIN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion correctly recognizes champerty and maintenance are actionable torts in North Carolina. *See Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 96, 721 S.E.2d 923, 925 (2011); *Wright v. Commercial Union Ins. Co.*, 63 N.C. App. 465, 469, 305 S.E.2d 190, 192 (1983). The majority's opinion now purports to hold no common law tort holds a third party accountable for *aiding and abetting* the admittedly recognized torts of champerty and maintenance and slander of title.

In this panel's prior opinion, we unanimously and correctly reversed the trial court's Rule 12(b)(6) dismissal of Plaintiff's claims against Geoffrey Hemenway, Defendant Attorney, and held he had aided and abetted the other defendants in their torts of champerty and maintenance and slander of title. I respectfully dissent.

I. Standard of Review

This Court's role on review of a Rule 12(b)(6) motion to dismiss is to determine *de novo* "whether the allegations of the complaint, if treated

as true, are sufficient to state a claim upon which *relief can be granted under some legal theory*." *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000) (emphasis supplied); *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 (2003).

II. Aiding and Abetting Champerty and Maintenance

Maintenance is " 'an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.' " *Smith v. Hartsell*, 150 N.C. 71, 76, 63 S.E. 172, 174 (1908). Champerty is a type of maintenance "whereby a stranger makes a 'bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.' " *Id.*

Since its enactment in 1715, N.C. Gen. Stat. § 4-1 has declared all parts of the common law in full force

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C. Gen. Stat. § 4-1 (2023).

Aiding and abetting is a civil common law tort claim to hold a person responsible and liable for the actions of other Defendants when the aider and abettor provided substantial assistance or encouragement to the wrongdoing. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

To show Defendant Attorney aided and abetted the other Defendants to survive a Rule 12 (b)(6) dismissal motion, Plaintiffs must allege facts to support three elements: (1) Defendants breached a duty to Plaintiff; (2) Defendant Attorney knowingly and substantially assisted the other Defendants in breaching the duty; and, (3) Defendant Attorney was aware of his role and actions in promoting the breach of duty at the time he provided assistance. *See id.*

Because Defendant Attorney is a licensed member of the North Carolina State Bar, Plaintiff's allegations assert: (1) Defendant Attorney's

client(s) owed a duty to Plaintiff as a third party; (2) Defendant Attorney was aware of the duty owed by his client(s) to her as a third party; (3) Defendant Attorney's client(s) breached that duty and committed torts against her as that third party; (4) Defendant Attorney was aware of the breach and torts committed by his client(s); (5) Defendant Attorney assisted the client(s) in committing the torts; and, (6) Plaintiff as third party suffered damages.

Plaintiff's allegations in her complaint, which must be taken as true and reviewed in the light most favorable to her as the non-moving party, allege: (1) Defendant Attorney was hired by Defendant Ray to represent the third party Branham Defendants and the Ewing Defendants; (2) Defendant Attorney and Defendant Ray notified the Ewing Defendants and the Branham Defendants about potential claims they may have against Plaintiff; (3) Defendant Ray had told the Ewing Defendants and the Branham Defendants that Defendant Ray or his company would pay for the prosecution of those claims and would receive 25% of any money recovered from the prosecution of those claims; (5) Defendant Ray had hired and paid for Defendant Attorney to pursue those claims; (6) Defendant Attorney had engaged in legal work in the pursuit of those claims; and, (7) Defendants split the entire proceeds from the sale of an easement to Piedmont Natural Gas in 2020.

Defendant Attorney prepared a non-warranty deed, with no title examination, wherein the third party Ewing Defendants and the Branham Defendants granted to themselves and each other "all rights, title, and interest" in the Property, making no mention in the deed of Plaintiff's record interest in the Property. Plaintiff's complaint further alleges Defendant Attorney had prepared the deed conveying all the property, even though he was well aware of Plaintiff's undisputed record ½ interest in the Property. The Ewing Defendants and Branham Defendants executed the deed he had prepared, and Defendant Attorney recorded the deed.

In August 2021, the Branham Defendants further deeded their purported "1/2 interest" in the Property to Defendant Bright & Neal, Defendant Ray's LLC, pursuant to a further non-warranty deed Defendant Attorney had also prepared and recorded. Defendant Bright & Neal now claims to own a one-half undivided interest in the Property as tenant-in-common with Plaintiff. Defendant Ray and/or Defendant Clarissa Verdugo are the sole owners of Bright & Neal.

All of these allegations, taken as true and reviewed in the light most favorable to Plaintiff, compel denial of Defendants' Rule 12(b)(6) as we

had earlier agreed. *Thompson*, 351 N.C. at 463, 526 S.E.2d at 650; *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4. Plaintiff sufficiently alleged claims against Defendant Attorney for aiding and abetting Defendant Ray's alleged conduct involving champerty and maintenance and slander of title to overcome Defendant Attorney's Rule 12(b)(6) motion to dismiss for failure to state a claim. The court erred in dismissing Plaintiff's complaint under Rule 12(b)(6) against Defendant Attorney as to those claims.

III. Aiding and Abetting Slander of Title

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

Plaintiff specifically alleged "Defendants' hostile claims of ownership of the Garrison Road Parcel have caused plaintiff Mary Hill to suffer special damages." Plaintiff also alleged in her Prayer for relief for the court to "5. Award Plaintiff Mary Hill consequential *and special damages* against the defendants, jointly and severally in an amount to be determined at Trial." (emphasis supplied), and "6. Award costs, including reasonable attorney fees be taxed against defendants, jointly and severally."

Plaintiff also alleges she had suffered damages in excess of $25,000, plus interest, by Defendants' actions associated with false and defamatory statements concerning the Property's title.

In *Cardon*, our Supreme Court held a plaintiff had suffered special damages for slander of title, where the plaintiff showed the defendant had interfered in the plaintiff's attempt to sell the property, with evidence tending to show the defendant had falsely claimed to a prospective buyer the plaintiff did not own the property, causing the sale to fail. Our Supreme Court stated, "the gist" of a slander of title claim "is the special damage sustained." *Cardon v. McConnell*, 120 N.C. 461, 462, 27 S.E. 109, 109 (1897).

Plaintiff specifically alleged special damages, an essential element of slander of title, to survive dismissal under Rule 12(b)(6) for failure to state a claim. The trial court erred by dismissing Plaintiff's claims against Defendant Attorney alleging aiding and abetting slander of title. *Id.*

IV. Conclusion

As Officers of the Court, attorneys, who focus only on their client's needs, desires, and expectations, without appreciating the consequences of what is being accomplished, and in particular, how those services and conduct affect third parties, steps into and shares his clients' liability for torts arising from his aiding and abetting their tortious actions. *See* N.C. Gen. Stat. § 4-1; RESTATEMENT (SECOND) OF TORTS § 876; *Cardon*, 120 N.C. at 462, 461, 27 S.E. at 109.

Plaintiff's complaint alleges claims upon which relief can be granted. The trial court erred in dismissing Plaintiff's complaint under Rule 12(b)(6). I respectfully dissent.

IN THE MATTER OF T.S., III & M.S.

No. COA24-47

Filed 3 December 2024

1. Appeal and Error—preservation and waiver—constitutionally protected status as a parent—collateral estoppel

In a neglect proceeding involving two siblings, respondent-mother's challenge—on grounds related to respondent-mother's constitutionally protected status as a parent—to the district court's award of guardianship to the paternal grandmother was preserved for appellate review where no objection on those grounds was raised in the court below because that issue was only determined by the court in an order entered months after a permanency planning hearing, during which respondent-mother had specifically argued that a decision on guardianship was premature in light of her progress on her case plan. Additionally, respondent-mother was not collaterally estopped from advancing her argument in this proceeding despite an earlier award of guardianship for the children to other relatives because the court in the earlier proceeding had not found as fact or concluded as a matter of law that respondent-mother was unfit or had acted inconsistently with her constitutionally protected status as a parent, and even if such determinations had been made, they would not control in a permanency planning proceeding taking place more than two years later.

2. Child Abuse, Dependency, and Neglect—guardianship—findings of fact unsupported—conclusions of law unsupported—vacated and remanded

In a neglect proceeding involving two siblings, the district court's permanency planning order awarding guardianship to the children's paternal grandmother and ceasing further hearings was vacated, and the matter was remanded, where many of the court's findings of fact—particularly those concerning respondent-mother's overall progress on her case plan, her ability to care for the children in the near future, and whether she had acted in a manner inconsistent with the health and safety of the children—were not supported by competent evidence, and, in turn, the court's supported findings of fact did not support its conclusions of law that respondent-mother was unfit and had forfeited her constitutionally protected status as a parent.

Appeal by Respondent-mother from order entered 5 October 2023 by Judge Wendy S. Hazelton in Pitt County District Court. Heard in the Court of Appeals 21 November 2024.

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellee Pitt County Department of Social Services.

GAL Appellate Counsel Matthew D. Wunsche for guardian ad litem.

Anné C. Wright for respondent-appellant mother.

TYSON, Judge.

Respondent-mother appeals from a permanency planning order, which granted guardianship of her minor children T.S., III ("Thomas") and M.S. ("Marcus") to their paternal grandmother ("Grandmother"). *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). We vacate and remand.

I. Background

The Pitt County Department of Social Services (DSS) filed petitions on 26 July 2019 alleging three-year-old Thomas and four-year-old Marcus were neglected juveniles. After noting Respondent-mother's history with DSS dating back to September 2013, DSS alleged it had received two recent reports: a report on 16 April 2019 claiming the children

were left alone in the care of their seven-year-old sibling, A.S., while Respondent-mother picked up her boyfriend from jail, and a report on 4 June 2019 alleging improper care and supervision. Although the underlying juvenile neglect proceeding also involved Thomas and Marcus' siblings A.S. and I.S., the order on appeal only addresses the guardianship disposition of Thomas and Marcus.

After investigation of the April report, Respondent-mother was arrested for four counts of misdemeanor child abuse or neglect. Thomas and Marcus were placed with their maternal aunt in a temporary safety placement. DSS also alleged the children had consistently missed routine health appointments and were not being treated for possible developmental delays.

On 30 December 2019, the trial court entered an order adjudicating Thomas and Marcus as neglected juveniles and placed them with their paternal aunt and uncle. The trial court found Respondent-mother had made progress on her case plan by completing a mental health and substance abuse assessment by "taking online classes[,]" but she had not attended her psychological evaluation appointment, had been arrested for failing to appear for the misdemeanor child abuse charges, was unemployed, had only attended one therapy appointment, and she had not maintained visitation with the boys.

The court ordered Respondent-mother to participate in mental health treatment, complete a parenting program, submit to a substance abuse assessment, receive substance abuse treatment, follow the terms of her parole, and obtain and maintain stable employment. The trial court awarded joint legal custody of Thomas and Marcus to their aunt and uncle and Respondent-mother and further awarded Respondent-mother supervised visitation with her boys for one hour per week.

The trial court entered a three-month review order on 25 March 2020, in which it found Respondent-mother had failed to complete substance abuse treatment, maintain her sobriety, complete a psychological evaluation, and consistently visit with the children. As a result, the court continued Thomas and Marcus' temporary placement with their aunt and uncle.

The trial court entered a permanency planning order on 6 August 2020, maintaining the boys' placement with their aunt and uncle due to Respondent-mother's visitation issues and failure to comply with her case plan. The court set a primary plan of custody with a relative and secondary plan of reunification and again the court ordered Respondent-mother to complete her case plan requirements.

The trial court entered another permanency planning order on 30 March 2021, in which it found Respondent-mother had continued to make progress on elements of her case plan, but she had not completed a mental health assessment or taken a recent drug test, and she was not regularly visiting with the children. The court changed the primary permanent plan to guardianship with a relative with a secondary plan of custody with a relative and awarded guardianship of Thomas and Marcus to their aunt and uncle. The court directed no further review hearings would occur unless sought by the motion of a party and relieved DSS, the guardian *ad litem* (GAL), and Respondent-mother's appointed counsel of further duties

On 22 August 2022, the trial court entered nonsecure custody orders removing the boys from their aunt and uncle's home because "[t]he Juvenile[s were] slapped by the Guardian/Uncle eight times for acting up at the Grandmother's house[,] [and] [t]he Guardian/Aunt does not allow the Juveniles to meet with their (sic) therapist without her present." The court placed the boys with paternal Grandmother. In orders signed on 8 September 2022, but not filed until over four months later on 9 January 2023, the trial court dissolved paternal aunt's and uncle's guardianship.

The trial court conducted a permanency planning hearing on 8 December 2022. In the order from that hearing, the court found Respondent-mother had continued to make progress with her case plan. She had obtained adequate housing and completed a mental health assessment, but she had not secured verified employment, was not consistently attending visitation or family therapy, and had tested positive for cocaine and marijuana. The court set a primary permanent plan of reunification with a secondary plan of guardianship.

The trial court held the next permanency planning hearing on 15 June 2023. In its order from the hearing, the court found Respondent-mother had continued to make progress on her case plan, including obtaining consistent employment, attending college to study business, and completing a comprehensive clinical addendum. However, the court noted Respondent-mother had failed to follow the recommendations of prior assessments and had failed to use additional visitation provided to her. The court changed the primary permanent plan to guardianship with a relative with a secondary plan of reunification.

Another permanency planning hearing was held on 14 September 2023. Prior to the hearing, DSS and the GAL submitted reports requesting that the trial court grant guardianship to Grandmother. During the

hearing, Respondent-mother's counsel specifically argued it was premature to consider guardianship in light of her recent progress.

The trial court entered a permanency planning order on 5 October 2023, in which it found "[b]y clear, cogent, and convincing evidence" Respondent-mother was unfit and was acting inconsistently with her constitutionally-protected status as a parent. The court granted guardianship of Thomas and Marcus to Grandmother based on its conclusion that such placement would be in their best interests. Respondent-mother appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27 and 7B-1001(4) (2023).

III. Standard of Review

Appellate "review of a permanency planning review order 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' " *In re H.A.J.*, 377 N.C. 43, 49, 855 S.E.2d 464, 469 (2021) (citation omitted). At a permanency planning hearing, any evidence may be considered, "including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c) (2023).

"The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re H.A.J.*, 377 N.C. at 49, 855 S.E.2d at 469. Unchallenged findings of fact are "deemed to be supported by the evidence and are binding on appeal." *In re J.C.M.J.C.*, 268 N.C. App. 47, 51, 834 S.E.2d 670, 673-74 (2019) (citation omitted). This Court reviews conclusions of law *de novo*, and freely disregards or replaces erroneous conclusions. *Id.*

IV. Guardianship

Respondent-mother challenges the trial court's award of guardianship to paternal Grandmother. She contends many of the trial court's findings of fact are unsupported by the evidence and the remaining findings do not support the court's conclusion she was unfit and had forfeited her constitutionally-protected status as a parent.

A. Standard of Review

"The trial court's legal conclusion that a parent acted inconsistently with his constitutionally protected status as a parent is reviewed *de novo* to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence." *In re I.K.*, 377 N.C. 417, 421, 858 S.E.2d 607, 611 (2021).

B. Preservation

[1] We address whether Respondent-mother preserved this issue for appellate review. Generally, "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (citation omitted); *see also* N.C. R. App. P. 10(a)(1) ("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.").

"A parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court." *In re J.N.*, 381 N.C. 131, 133, 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).

However, an objection is not possible when the trial court enters written findings of facts and conclusions of law after a hearing is concluded.

> [A] trial court's findings of fact are not evidence, and a parent may not "object" to a trial court's rendition of an order or findings of fact, even if these are announced in open court at the conclusion of a hearing. If a party has presented evidence and arguments in support of her position at trial, has requested that the trial court make a ruling in her favor, and has obtained a ruling from the trial court, she has complied with the requirements of Rule 10 and she may challenge that issue on appeal. An appeal is the procedure for "objecting" to the trial court's findings of fact and conclusions of law.

In re B.R.W., 278 N.C. App. 382, 399, 863 S.E.2d 202, 215 (2021) (overruling contentions a mother had waived challenges to determinations she was unfit and had acted inconsistently with her constitutionally protected status as a parent made in a permanency planning order

entered months after the hearing concluded), *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022).

The court had concluded:

> By clear, cogent, and convincing evidence, the Court finds that the Respondent Parents have waived their paramount Constitutional rights to care, custody, and control of the children, because the Respondent Parents are unfit, have neglected the children's welfare, and have acted inconsistently with their Constitutionally protected status.

In re B.R.W., 381 N.C. at 82, 871 S.E.2d at 775-76.

The trial court had erroneously labeled this determination a finding of fact when "it is, in reality, a conclusion of law[.]"). *Id.*

C. No Waiver

Here, the trial court's determination Respondent-mother had forfeited her constitutionally-protected status as a parent was made in a permanency planning order entered many months after the court had conducted a permanency planning hearing. At that hearing, Respondent-mother had specifically argued against the guardianship plan, requesting that the trial court delay granting guardianship so she could continue to make previously-documented progress on her case plan.

Respondent-mother's counsel argued she was making progress, and while "progress was slow, . . . it's speeding up, and she's been making a lot of progress, great strides in recent months." Counsel further argued it was "premature to consider guardianship" as Respondent-mother was "on the right track to get her kids back. And if the C[ourt] . . . grants guardianship, that's sort of -- that avenue is blocked."

Respondent-mother could not object at the hearing to the trial court's determinations not yet entered in a written order. *See id.* Respondent-mother's counsel specifically argued it was premature to consider guardianship in light of her recent progress. Respondent-mother sufficiently preserved her challenge to the trial court's findings and conclusions she was unfit and had acted inconsistently with her constitutionally-protected status by asserting her opposition to guardianship at the permanency planning hearing. *See id.*

DSS also argues Respondent-mother's argument is waived by the doctrine of collateral estoppel based on the court previously making the same determination when it awarded guardianship of Thomas and Marcus to their paternal aunt and uncle in March 2021.

We categorically reject this argument for several reasons. First, the 30 March 2021 permanency planning order does not include a finding or conclusion Respondent-mother was unfit or had acted inconsistently with her constitutionally-protected status as a parent.

Second, even if the trial court had made such a determination, Respondent-mother's conduct prior to the March 2021 permanency planning hearing was not dispositive or conclusive of whether she was acting inconsistently with her protected status when the trial court granted guardianship to Grandmother in October 2023. *See In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (Whenever custody is granted to a nonparent, "a finding that a parent is unfit or acted inconsistent with his or her constitutionally protected status [at that time] is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent.").

We address the merits of Respondent-mother's challenge to the trial court's determination she had acted inconsistently with her constitutionally-protected status as a parent. *Id.*

D. Findings of Fact

[2] Respondent-mother challenges several findings of fact made by the trial court to support its conclusion are unsupported by the evidence. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding[,]"and "may consist of any evidence, including hearsay evidence[,] or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." *In re J.M.*, 384 N.C. at 591, 887 S.E.2d at 828. (quoting N.C. Gen. Stat. § 7B-906.1(c) (ellipsis omitted)).

1. Finding of Fact 11

Respondent-mother first challenges the portion of finding of fact 11 which states "[a]t the previous court date of June 15 [2023], [Respondent-mother] had a positive result for cocaine from a hair follicle screen. Respondent-mother maintains she has not used cocaine for over a year and does not have an explanation for the positive hair follicle result for cocaine."

Respondent-mother argues this finding was unsupported because during her testimony at the permanency planning hearing, she hypothesized the positive drug test was "the result of her dreadlocks hairstyle." The drug test at issue shows Respondent-mother had tested positive for cocaine and cocaine metabolites in a 12 June 2023 "Hair 5 Drug Panel

Test[.]" At the 14 September 2023 hearing, Respondent-mother testified she had not used cocaine in over a year.

When she was asked to explain the positive test, Respondent-mother stated: "I don't know. Maybe it's because of the hair, . . . I have dreadlocks, so I don't really know how that works." When Respondent-mother was asked "[s]o you're not really sure how you came to test positive for cocaine on that date, but you think it may be an issue with your hair?" she responded, "I guess so, yes." Respondent-mother's testimony to explain why she had tested positive for cocaine was uncertain and conjectural, rather than a definitive explanation.

The challenged portion of finding 11 is supported by competent evidence. To the extent Respondent-mother testified to an explanation for her positive drug test, the trial court found her explanation not credible. As credibility determinations rest within the trial court's purview, we do not disturb its finding Respondent-mother had failed to explain her positive drug test. *See In re J.I.G.*, 380 N.C. 747, 754, 869 S.E.2d 710, 715 (2022) ("The assignment of weight and evaluation of the credibility of the evidence resides solely within the purview of the trial court[.]").

2. Finding of Fact 14

Respondent-mother next challenges finding of fact 14: "Family therapy for the Juveniles and the Respondent Mother is scheduled to begin in September." This statement is anticipatory and is not based on facts admitted into evidence. Respondent-mother argues "[t]o the extent this finding of fact intimates that Mother had not already been participating in family therapy with the juveniles, it should be disregarded."

The DSS social worker testified as follows:

> Q: Okay. When is family therapy for the juveniles and Respondent-Mother scheduled to begin?
>
> A: Okay, family therapy just resumed back because [the therapist], in June, she transitioned to a new agency. So it just resumed back September the 2nd was their — the children's first appointment. She made one for [Respondent-mother] on September the 16th. They go on Saturday. But in between trying to get the therapist set up, [the grandmother] and the children had preplanned vacations, so that's why everything is starting late, because of the transition with the therapist and they had preplanned trips.

Finding 14 concerning family therapy was scheduled to begin in September is not supported as written. The testimony, as opposed to the

question asked, clearly supports Respondent-mother's assertion "family therapy just resumed" and delays were due to "trying to get the therapist set up" and "because of the transition with the therapist and they had preplanned trips." We reject and disregard this "finding" as unsupported.

3. Findings of Fact 22, 24, and 25

Respondent-mother also challenges findings of fact 22, 24, and 25, which address her overall progress and her ability to care for the children in the near future are unsupported. Finding 22 states Respondent-mother "has not made adequate progress within a reasonable period of time under the plan. It is not possible to place the Juveniles with her at this time or within the next six months." Finding 24 states "Mother has acted in a manner inconsistent with the emotional health and safety of the Juveniles." Finally, finding 25 states "[c]ontinued efforts to reunite the Juveniles with the Respondent Mother would clearly be unsuccessful or inconsistent with the children's health, safety, and need for a safe, permanent home within a reasonable period of time."

Respondent-mother asserts these findings are not supported by other findings of fact or evidence at the permanency planning hearing. She argues they disregard the uncontested evidence she had made substantial progress with her case plan, had negative urine drug screens, had attended visitations, was employed, had stable housing, had attended therapy, and had successfully completed a required parenting class and seven of eight other parenting classes.

Respondent-mother's arguments fail to fully address deficiencies in meeting her case plan goals, even though she had been working on the case plan for multiple years. While Respondent-mother did test negative in urine drug screens, she recently had an unexplained positive hair follicle drug screen in June 2023, just a few months before the last permanency planning hearing.

As to visitation, the GAL report, accepted into evidence at the hearing, indicated Respondent-mother had inconsistently attended visitation and had regularly missed birthdays and holidays with her children. The trial court also found when Respondent-mother did attend visitation with her children, she asked Marcus if he wanted to live with her, which "made him uncomfortable[,]" and then she later "denied that this conversation took place." This incident purportedly had upset Marcus and made him "worried that he had been wrong to tell his grandmother" about it. Respondent-mother "admitted that she told [Marcus] that he would be coming home soon." These conversations between a parent and a child to express hope and anticipation to be reunited in the future

does not support a finding of unfitness or conduct inconsistent with her parental rights.

As to her employment, the GAL report indicated Respondent-mother "has a pattern of switching employment on a regular basis[,]" and the trial court found Respondent-mother was only working part-time at the time of the permanency planning hearing. This testimony does not support a finding of unfitness or conduct inconsistent with her parental rights.

Concerning housing, the trial court found "Mother reside[d] in a four-bedroom home managed by the Greenville Housing Authority." Other evidence in the record indicates this subsidized housing *may be* in jeopardy because Respondent-mother did not have custody of her children. DSS does not show Respondent-mother's home is not a safe, permanent home, or is either unsuitable or poses a risk to her children.

Concerning therapy, the trial court found Respondent-mother had "completed three individual therapy appointments, and a medication management appointment." Other evidence reported Respondent-mother had been inconsistent with her therapy in the past. The DSS social worker testified, "But in between trying to get the therapist set up, [the grandmother] and the children had preplanned vacations, so that's why everything is starting late, because of the transition with the therapist and they had preplanned trips."

Concerning parenting classes, uncontested evidence shows Respondent-mother had completed her first set of parenting classes in March 2020. She agreed in late 2022 to take another parenting class, and she had completed seven of eight sessions of that class by the September 2023 permanency planning hearing.

The foregoing and prior permanency planning findings and evidence reflect Respondent-mother had made substantial progress on the requirements of her case plan to address the reasons for her sons' removal. Under these circumstances and properly admitted evidence, the trial court did not credit uncontested evidence or adjudicate the competent conflicting evidence to support a conclusion Respondent-mother had not made adequate progress.

The trial court had concluded Marcus and Thomas could not be returned to her care in the next six months, Respondent-mother had acted in a manner inconsistent with the health and safety of Marcus and Thomas, or future reunification with Respondent-mother would be unsuccessful or inconsistent with Marcus' and Thomas' health, safety, and need for a safe, permanent home within a reasonable period of time. In light of the unsupported findings, we vacate and remand for further

findings or proceedings. *See In re A.J.*, 386 N.C. 409, 417, 904 S.E.2d 707, 715 (2024).

E. Constitutionally-Protected Status

Respondent-mother argues the trial court's findings of fact did not support its conclusion that she had waived her constitutionally protected parental status; and, as a result, the trial court erred in applying the best interest standard when awarding guardianship to Grandmother.

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a natural parent's paramount constitutional right to custody and control of his or her children and ensures that the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status.

In re B.R.W., 381 N.C. at 77, 871 S.E.2d at 775-76 (citation and quotation marks omitted). If the trial court finds by clear and convincing evidence and lawfully concludes the parent has acted inconsistently with her constitutionally-protected status as a parent, the court may proceed to apply the "best interest of the child test" in awarding custody to a nonparent. *In re D.A.*, 258 N.C. App. 247, 250, 811 S.E.2d 729, 732 (2018).

"[T]here is no bright line rule beyond which a parent's conduct meets this standard; instead, we examine each case individually in light of all the relevant facts and circumstances and the applicable legal precedent." *In re B.R.W.*, 381 N.C. at 82, 871 S.E.2d at 779. "In conducting the required analysis, evidence of a parent's conduct should be viewed cumulatively." *Id.* at 83, 871 S.E.2d at 779.

In this case, Thomas and Marcus were removed from Respondent-mother's home in July 2019 and were adjudicated as neglected juveniles in December 2019. In the ensuing years, Respondent-mother made uncontested progress on her case plan. By the time of the permanency planning hearing in June 2023, Respondent-mother had obtained housing, obtained part-time employment, and engaged in some services. Respondent-mother had completed the first parenting class and seven of eight sessions of the second and her agreed-upon most recent parenting classes. Respondent-mother returned a positive drug screen in June of 2023, which she denied but could not offer a credible explanation,

Viewing Respondent-mother's uncontested evidence and behaviors cumulatively, the trial court remaining supported findings do not support

a lawful conclusion she is unfit or forfeited her constitutionally-protected parental status to award guardianship and cease further hearings. We do not disturb the trial court's weighing of conflicting evidence, holding DSS to its burden of proof by clear, cogent, and convincing evidence.

> [W]hen an appellate court determines that the trial court's findings of fact are insufficient, the court must examine whether there is sufficient evidence in the record that could support the necessary findings. If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. This permits the trial court, as finder of fact, to decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings.

In re A.J., 386 N.C. at 417, 904 S.E.2d at 715 (internal citations omitted).

V. Conclusion

"It is not the function of this Court to reweigh the evidence on appeal." *In re J.M.*, 271 N.C. App. 186, 194, 843 S.E.2d 668, 674 (2020). Whenever custody is granted to a nonparent, "a finding that a parent is unfit or acted inconsistent with his or her constitutionally protected status [at that time] is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017).

"The trial court's legal conclusion that a parent acted inconsistently with his constitutionally-protected status as a parent is reviewed *de novo* to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence." *In re I.K.*, 377 N.C. 417, 421, 858 S.E.2d 607, 611 (2021).

The trial court's order awarded guardianship and directed no further review hearings occur. This effectively relieved DSS, the GAL, and Respondent-mother's appointed counsel of further duties to provide services toward reunification. The trial court's order awarding permanent guardianship is vacated and remanded for further findings and proceedings. *Id.*; *In re R.P.*, 252 N.C. App. at 304, 798 S.E.2d at 430. *It is so ordered.*

VACATED AND REMANDED.

Judges WOOD and GORE concur.

LEDFORD v. LEDFORD

[296 N.C. App. 648 (2024)]

JONATHON LEDFORD AND KAYLA LEDFORD, INTERVENOR PLAINTIFFS
v.
MARY LEDFORD, PLAINTIFF
v.
JAMES BURRELL AND VIRGINIA BURRELL, DEFENDANTS

No. COA24-102

Filed 3 December 2024

1. Jurisdiction—personal—lack of service—appearance at hearing—waiver

In a child custody matter initiated by the child's grandmother, although there was no evidence that the child's mother (defendant) was served with the summons and complaint, defendant submitted herself to the trial court's jurisdiction over her person by, first, signing a consent order for temporary custody and, second, appearing in court for at least one permanent custody hearing at which she was represented by counsel. Therefore, defendant waived any challenge to personal jurisdiction.

2. Child Custody and Support—custody—standing to intervene—sufficiency of allegations—parental relationship—parents' lack of fitness

In a child custody matter initiated by the child's grandmother, other family members (the child's maternal cousins) had standing to intervene in the matter to seek custody where they sufficiently alleged, pursuant to N.C.G.S. § 50-13.1(a), that they had a parent-child relationship with the minor, whom they had cared and provided for, and that the child's parents had committed acts inconsistent with their constitutionally protected parental status by failing to provide a stable living environment, repeatedly abusing drugs, and placing the child at risk of substantial harm.

Appeal by defendant Virginia Burrell from order entered 18 September 2023 by Judge Kimberly Gasperson-Justice in Henderson County District Court. Heard in the Court of Appeals 27 August 2024.

BA FOLK, PLLC, by J. Denton Adams, for defendant-appellant Virginia Burrell.

Sheffron, Lee & Associates, by Tamara M. Lee, for intervenor-plaintiffs-appellees. No intervenor-plaintiff-appellee brief.

Ms. Mary Ledford, pro se, no plaintiff-appellee brief.

Mr. James Burrell, pro se, no defendant brief.

GORE, Judge.

Defendant Virginia Burrell ("defendant") appeals the permanent order granting intervenor-plaintiffs sole care, custody, and control of the minor child, L.M. Defendant James Burrell ("James") has not made an appearance nor sought appeal of the permanent order. Defendant argues the trial court lacked personal jurisdiction of her to enter the permanent order, and argues intervenor-plaintiffs lacked standing to seek custody of L.M. Upon review of the record and the sole brief submitted by defendant, we affirm the trial court's order.

I.

Defendant is the daughter of plaintiff Mary Ledford. Defendant and James Burrell had a daughter, L.M., in 2019. Defendant, James, and L.M. lived with plaintiff Ledford from the time of L.M.'s birth. Plaintiff Ledford was the primary caregiver and financial provider for the child since birth. Defendant has a severe drug addiction. She left the home and child in December 2021. Plaintiff Ledford claims James is mentally handicapped, has a bipolar disorder, cannot read, write, or count money, and he lacks the ability to make critical decisions. In February 2022, James gave L.M. into the care and custody of L.M.'s maternal cousins, intervenor-plaintiffs, who reside in South Carolina. Intervenor-plaintiffs claimed James "abdicated" his parental duties to them; they also claimed James was not fit nor a proper person to care for L.M.

Plaintiff Ledford filed an emergency custody complaint in the District Court, Henderson County for the child and was granted an Ex Parte Emergency Custody Order for sole custody of L.M. The Ex Parte Order also denied James and defendant access to L.M. while the order was in effect. Soon after, intervenor-plaintiffs filed a motion to intervene, for child custody, to petition for emergency custody, and to establish jurisdiction. The trial court entered a temporary custody order consented to by James, plaintiff-Ledford, and intervenor-plaintiffs: (1) that allowed intervenor-plaintiffs to intervene, (2) that gave custody of L.M. to intervenor-plaintiffs, (3) that provided supervised visitation and telephone contact for plaintiff Ledford with L.M., and (4) that disallowed any unsupervised contact between L.M. and her parents, defendant and James.

There are no summons or alias and pluries summons in the record that demonstrates defendant was served with the emergency complaint and additional pleadings filed. Yet, on 18 November 2022, a temporary non-prejudicial judgment/order was signed by all parties, including defendant. The temporary order acknowledged intervenor-plaintiffs had primary custody of L.M. and plaintiff Ledford had secondary custody. The temporary order required mediation among the parties and set the case for a hearing for permanent custody.

Defendant included a narrative in the record due to the trial court failing to record the permanent custody hearings that occurred 27 March 2023, 18 April 2023, 21 July 2023, and 18 September 2023. Within the narrative, it plainly states defendant appeared and was represented by attorney Elisa Jarrin on the first day of the hearing for permanent custody. The narrative also references attorney Jarrin examining one of the intervenor-plaintiffs during the hearing. On the final hearing date, 18 September 2023, the narrative states that defendant did not appear, and that her attorney had withdrawn by this time. The trial court determined plaintiff Ledford's house was not safe for L.M. because of certain individuals with violent criminal records related to drugs and domestic violence that plaintiff had previously allowed into her home while L.M. was present. On 18 September 2023, the trial court entered a permanent order granting intervenor-plaintiffs sole legal care, custody, and control of L.M., and granting plaintiff Ledford grandparent visitation rights. The trial court granted defendant and James supervised visitation rights "at the discretion of the intervenor-plaintiffs." On 13 October 2023, defendant filed a timely notice of appeal to specifically appeal the permanent order.

II.

[1] Defendant appeals of right pursuant to N.C.G.S. § 7A-27(b)(2). Defendant argues the trial court's permanent child custody order is void for lack of personal jurisdiction. Specifically, she argues the alias and pluries summons was never properly effectuated upon her. Defendant also argues the trial court erred in entering the permanent custody order because intervenor-plaintiffs lacked standing to seek custody of the child. We disagree.

We review questions regarding matters of law de novo. *Slattery v. Appy City, LLC*, 385 N.C. 726, 729 (2024). As our Supreme Court recently stated, "[W]hen a court lacks subject matter jurisdiction, its actions are void, and objections thereto cannot be waived. When the court lacks personal jurisdiction, however, its actions are merely voidable. The defendant must therefore attack the action's validity at the

first available opportunity; otherwise, the objection is waived." *Id.* at 735. Our Supreme Court also previously discussed the effect of deficiencies in summons and service of process:

> [A] court's jurisdiction over a person is generally achieved through the issuance and service of a summons. Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. . . . Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by . . . appearing at a hearing without objecting to personal jurisdiction.
>
> . . .
>
> Because the summons affects jurisdiction over the person rather than the subject matter, this Court has held that a general appearance by a civil defendant waive[s] any defect in or nonexistence of a summons.

In re K.J.L., 363 N.C. 343, 346–47 (2009) (internal quotation marks and citations omitted).

In the present case, defendant argues she was never served with the summons and complaint. Defendant admits in her brief, and there is evidence in the record, that she signed a consent order for temporary custody with intervenor-plaintiffs on 18 November 2022. Additionally, there is evidence in the record that she made an appearance for at least one of the permanent custody hearings and was represented by counsel at one of the hearings. Her attorney had an opportunity to question at least one of the witnesses during the hearing in which they appeared. At a later hearing, defendant did not appear, and the record indicates her attorney had withdrawn from representing her. This evidence demonstrates defendant submitted herself to the jurisdiction of the court, and there is no indication she challenged personal jurisdiction during these court appearances. Accordingly, defendant waived any challenge to personal jurisdiction. Therefore, the trial court's permanent child custody order is valid.

[2] Next, defendant argues intervenor-plaintiffs lacked standing to seek custody of L.M. The question of standing in a child custody matter is controlled by N.C.G.S. § 50-13.1(a). Section 50-13.1(a) states, "Any parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child

. . . .” When the party seeking custody is not the parent of the child, they must demonstrate “a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, . . . to support a finding of standing.” *Chávez v. Wadlington*, 261 N.C. App. 541, 545 (2018), *aff'd*, 373 N.C. 1 (2019) (citation omitted). When the non-parent is seeking custody against the biological parent, the non-parent “must also allege some act inconsistent with the parent's constitutionally protected status.” *Id.* at 546. There must be a showing that the parents are “unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided by the Constitution” to maintain standing in the action. *Id.*

In the present case, intervenor-plaintiffs are cousins of L.M. who took L.M. into their home and began caring for all her needs starting in February 2022. Intervenor-plaintiffs alleged when they intervened in this cause of action, brought by plaintiff Mary Ledford, that they had a parent-child relationship because they “have cared for, nurtured, and provided for the minor child as a parent would provide for a child.” Intervenor-plaintiffs also alleged: (1) defendant and James[1] acted “inconsistent with their constitutionally protected status as natural parents,” (2) that defendant previously placed L.M. “at risk of substantial harm through her continued and repeated drug abuse,” (3) that she is still “using and abusing illicit substances,” and (4) that defendant placed L.M. “at a risk of substantial harm as a result of her inability to provide a safe and suitable environment.” Further, the trial court concluded that defendant “acted inconsistent with [her] constitutionally protected rights” after finding that defendant had used illicit substances and had used these substances while L.M. was in her care.

Defendant concedes that she has a history with illicit substances and “often wander[s] the streets of Asheville.” There are also references in the record to defendant's substance abuse and the instability of her living situation. Accordingly, despite defendant's challenge, the record indicates that intervenor-plaintiffs have standing to seek and gain custody of L.M. Intervenor-plaintiffs properly alleged and testified to their relationship with L.M. and acknowledged acts that were inconsistent with defendant's and James's “constitutionally protected status.”

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1. Defendant argues that James had the mental capacity of a seven- or eight-year-old and could not make decisions for L.M. Although this is not properly before us, we note that the record demonstrates at least one attorney challenged his mental capacity during trial. The trial court took time to question and examine the mental capacity of James. According to the record, James stated he understood the “nature of the proceedings” during his questioning by the trial court.

Chávez, 261 N.C. App. at 546. Therefore, the trial court did not err in determining intervenor-plaintiffs had standing.

Having considered defendant's challenges to personal jurisdiction and standing, we affirm the trial court's permanent order for custody of L.M.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

ALBERT LOPEZ AND JOY LOPEZ, PLAINTIFFS
v.
ADELA ARNULFO-PLATA, DEFENDANT

No. COA24-103

Filed 3 December 2024

Appeal and Error—jurisdiction—interlocutory order—statement of grounds for appellate review—bare assertions of privilege

In an action filed by a pastor and his wife (plaintiffs) alleging emotional distress and loss of consortium after defendant claimed that the pastor sexually abused her as a child, which resulted in his brief detention before a prosecutor dismissed the charges, plaintiffs' appeal from an interlocutory order compelling discovery was dismissed for lack of jurisdiction where plaintiffs did not show in their statement of the grounds for appellate review that the order affected a substantial right that would be lost absent immediate review. Specifically, plaintiffs' bare assertions that the order compelled them to produce privileged documents (plaintiffs' medical records and the pastor's criminal files) were insufficient, since plaintiffs failed to specify which statutory privileges they were invoking and to explain why the facts of their particular case demonstrated the existence of a substantial right.

Appeal by plaintiffs from order entered 8 November 2023 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 12 June 2024.

McDonald Wright, LLP, by David W. McDonald, and Culbertson & Associates, by K. E. Krispen Culbertson, for plaintiffs-appellants.

A.G. Linett & Associates, PA, by Adam G. Linett, for defendant-appellee.

GORE, Judge.

Plaintiffs Albert Lopez and Joy Lopez appeal from an interlocutory discovery order entered 8 November 2023 (hereinafter, "Order"), which granted defendant Adela Arnulfo-Plata's motion to compel and denied plaintiffs' motion for a protective order. Upon review, we dismiss plaintiffs' interlocutory appeal for lack of jurisdiction.

Plaintiffs initiated this action against defendant seeking damages for both plaintiffs' emotional distress, severe emotional distress, anxiety, depression, sleeplessness, and other symptoms of emotional distress allegedly caused by defendant's claim of sexual abuse made against Mr. Lopez, which resulted in his detention for about one month before the charges were dismissed by a prosecutor in the State of Florida. Mrs. Lopez also included a cause of action in her complaint for loss of consortium—seeking damages for the loss of service, society, companionship, sexual gratification, and affection of her husband.

Defendant alleged in her second amended answer and counterclaims that she was sexually abused by Mr. Lopez (her pastor) when she was twelve years old while entrusted by her parents into plaintiffs' care for a trip to Disney World in Orlando, Florida, in July 2017. Defendant alleged in her counterclaims that plaintiffs knew Mr. Lopez had been accused of child sexual abuse by a different female victim *before* the trip to Florida in July 2017, but that plaintiffs did not warn her or her parents of this before taking her to Florida.

The parties engaged in various motions and discovery in this matter, which led to defendant filing a motion to compel on 18 October 2023. This matter came on for hearing on 28 October 2023, and the trial court entered a written Order dated 8 November 2023 compelling plaintiffs to provide discovery. The trial court ordered, as is relevant here:

1. The plaintiffs' motion for a protective order to limit the plaintiffs' production of medical records to solely records involving emotional distress damages is denied.

2. The defendant's motion to compel the production of five (5) years of the plaintiffs' medical records prior to the date of filing the complaint is hereby allowed.

3. The defendant's motion to compel the production of plaintiff Albert Lopez's criminal files is also hereby allowed.

Plaintiffs timely filed written notice of appeal from the trial court's Order later that same day.

Defendant filed a Motion to Dismiss plaintiffs' appeal as interlocutory pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure. Upon review, we determine that plaintiffs' appeal must be dismissed for lack of interlocutory jurisdiction because plaintiffs have not shown, in their statement of the grounds for appellate review, that the trial court's Order affects a substantial right that will be lost absent immediate review.

As a preliminary matter, defendant asserts plaintiffs' notice of appeal is defective, and thus, fails to vest this Court with appellate jurisdiction. We disagree. Plaintiffs' timely filed notice of appeal meets all the technical requirements of Rule 3(d) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(d) ("Content of Notice of Appeal."). This argument is overruled.

Defendant also argues plaintiffs' failure to seek or obtain Rule 54(b) certification as a basis for their interlocutory appeal is grounds for dismissal. We disagree. "Rule 54(b) certification is effective to certify an otherwise interlocutory appeal only if the trial court has entered a final judgment with regard to a party or a claim in a case which involves multiple parties or multiple claims." *CBP Res., Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 171 (1999). Rule 54(b) does not apply in this case. And in any event, interlocutory orders "may properly be appealed, regardless of lack of certification under Rule 54(b), if they affect a 'substantial right.' " *Estrada v. Jaques*, 70 N.C. App. 627, 639 (1984) (citations omitted). Accordingly, defendant's Rule 54(b) argument lacks merit.

We now resolve defendant's remaining arguments for dismissal by assessing whether plaintiffs, as the parties taking appeal, have demonstrated that the Order appealed affects a substantial right and is subject to immediate appellate review. We determine that plaintiffs have not met their burden.

Plaintiffs acknowledge the interlocutory nature of the discovery order from which they appeal but imply this Court may properly exercise jurisdiction because the trial court's Order affects a substantial right. We disagree.

"[I]n appeals from interlocutory orders, the North Carolina Rules of Appellate Procedure require that the appellant's brief contain a 'statement of the grounds for appellate review,' which must allege 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 219 (2016) (quoting N.C. R. App. P. 28(b)(4)). "Whether a particular ruling affects a substantial right must be determined on a case-by-case basis." *Doe v. City of Charlotte*, 273 N.C. App. 10, 22 (2020) (cleaned up).

> Consequently, outside of a few exceptions such as sovereign immunity, the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right.

Id. (cleaned up). "Importantly, this Court will not construct arguments for or find support for appellant's right to appeal from an interlocutory order on our own initiative[;] [t]hat burden falls solely on the appellant." *Denney v. Wardson Constr., LLC*, 264 N.C. App. 15, 17 (2019) (cleaned up). "[I]f the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Id.*

Here, plaintiffs assert in their "statement of the grounds for review" that the Order appealed compels plaintiffs to produce "two *classes of information* which are *privileged*[:]" (i) "medical records[,]" which they allege are "unrelated to plaintiffs' emotional distress" claims; and (ii) "all documents received" by plaintiff Mr. Lopez's "criminal counsel from the District Attorney in discovery . . . during the pendency of criminal proceedings" against Mr. Lopez. Plaintiffs do not specify which statutory privilege applies, to which records, for what reason—nor do they otherwise offer any "clear and articulable demonstration of the factual basis underlying [their] asserted substantial right . . . ." *Mecklenburg Roofing, Inc. v. Antall*, 895 S.E.2d 877, 880 (N.C. Ct. App. 2023). While physician-patient privilege, attorney-client privilege, and work-product doctrine may be implied here, we emphasize that plaintiffs "ask[ ] us to assume—for the sake of our jurisdiction, no less—that the bare-bones assertions in its statement of the grounds for appellate review are self-evident and supported by the record[.]" *Id.* at 882.

"An order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not

affect a substantial right." *Sessions v. Sloane*, 248 N.C. App. 370, 380 (2016) (citing *Sharpe v. Worland*, 351 N.C. 159, 163 (1999)). When "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, *and the assertion of such privilege is not otherwise frivolous or insubstantial*, the challenged order affects a substantial right . . . ." *Sharpe*, 351 N.C. at 166 (emphasis added). This Court has previously applied "the reasoning of *Sharpe* to include attorney-client privilege, the work product doctrine," *Sessions*, 248 N.C. App. at 380, and physician-patient privilege, *Midkiff v. Compton*, 204 N.C. App. 21, 24 (2010). We do not, however, read *Sharpe* "as opening the door to appellate review of every contested discovery order in which [a statutory] privilege is simply asserted, without more." *Stevenson v. Joyner*, 148 N.C. App. 261, 264 (2002).

"If the assertion of privilege is not 'frivolous or insubstantial' then a substantial right is affected and the order compelling discovery is immediately appealable." *Sessions*, 248 N.C. App. at 381. "Blanket assertions that production is not required due to a privilege or immunity are insufficient to demonstrate the existence of a substantial right." *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 433 (2019) (citation omitted); *see also K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447 (2011). "Although objections made and established on a document-by-document basis are *sufficient* to assert a privilege, they are not the exclusive means of demonstrating the loss of a substantial right and the appealable nature of a discovery order." *Crosmun*, 266 N.C. App. at 433 (cleaned up). Ultimately, "[w]e base our determination on whether [plaintiffs] have *legitimately asserted* the loss of a privilege or immunity absent immediate appeal." *Id.* Plaintiffs "must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78 (2009).

Here, plaintiffs have not *legitimately asserted* the loss of statutory privilege absent immediate appeal. Plaintiffs "[i]mproperly and disproportionately rel[y] upon vague, conclusory statements and prior cases to demonstrate that the challenged order affects a substantial right. Such assertions are ineffective to invoke our appellate jurisdiction, absent the requisite factual or evidentiary support." *Mecklenburg Roofing*, 895 S.E.2d at 880–81. Plaintiffs shift their burden to this Court—a task that we refuse. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]"). Plaintiffs' "misguided fixation on existing caselaw—at the expense of any context that might aid in our consideration

of [their] interlocutory appeal—is compounded by another fatal shortcoming: [plaintiffs'] failure to demonstrate that the [O]rder will work injury to [plaintiffs] if not corrected before appeal from final judgment." *Mecklenburg Roofing*, 895 S.E.2d at 880 (cleaned up).

We dismiss plaintiffs' interlocutory appeal for lack of jurisdiction. Plaintiffs' statement of the grounds for appellate review is insufficient to establish that the challenged order affects a substantial right.

DISMISSED.

Chief Judge DILLON and Judge THOMPSON concur.

N.C. CITIZENS FOR TRANSPARENT GOVERNMENT, INC. AND KEVIN DRUM, PLAINTIFFS
v.
THE VILLAGE OF PINEHURST AND JOHN STRICKLAND IN HIS OFFICIAL CAPACITY AS MAYOR OF THE VILLAGE OF PINEHURST; AND JANE HOGEMAN IN HER OFFICIAL CAPACITY AS A MEMBER OF THE VILLAGE OF PINEHURST COUNCIL, DEFENDANTS

No. COA24-309

Filed 3 December 2024

Open Meetings—statute not applicable—email exchanges among village council members—not simultaneous communications

In an action for declaratory and injunctive relief, brought against the Village of Pinehurst, the mayor of Pinehurst, and a member of the Pinehurst Village Council (defendants) by a former member of the council—who had lost a reelection campaign, with his term ending on 31 December 2021—and the entity he incorporated shortly thereafter (plaintiffs), the trial court did not err in allowing defendants' motion for judgment on the pleadings upon a finding that a series of email exchanges—including two email messages generated over the course of five days—among some members of the council (and other parties, such as the mayor, attorney, and manager of the Village of Pinehurst) did not violate N.C.G.S. § 143-318.9 et seq. (the Open Meetings Law) because the exchanges did not constitute "simultaneous communications" among a majority of the council's members.

Appeal by Plaintiffs from an order entered 12 October 2023 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 11 September 2024.

C. Amanda Martin for Plaintiffs-Appellants.

Hartzog Law Group, LLP by Dan M. Hartzog and Dan M. Hartzog, Jr.; and Van Camp, Meacham & Newman, PLLC, by Michael J. Newman, for Defendants-Appellees.

Reporters Committee for Freedom of the Press, by Elizabeth J. Soja, Katie Townsend, Mara Gassman, and Daniela del Rosario Wertheimer, Amici Curiae.

WOOD, Judge.

N.C. Citizens for Transparent Government, Inc. and Kevin Drum ("Plaintiffs") appeal from an order granting a Motion for Judgment on the Pleadings, arguing the trial court erred in finding the e-mail exchange among members of the Village of Pinehurst Council did not violate N.C. Gen. Stat. § 143-318.9 *et seq*. For the reasons set forth below, we affirm the trial court's order.

I. Factual and Procedural Background

On 20 September 2021 the Pinehurst Village Council ("Council") held a special meeting for a "personnel discussion." The five members of the Council included Mayor John Strickland ("Mayor Strickland"), Mayor Pro Tem Judy Davis ("Davis"), Council member Lydia Boesch ("Boesch"), Council member Jane Hogeman ("Hogeman"), and Council member Kevin Drum ("Plaintiff Drum"). During the closed session, discussions concerned Plaintiff Drum's and Boesch's conversations with the Chief of Police, Moore County legislators, aggressive e-mails to business owners and other behaviors that council members believed violated the Village Ethics Policy.

Between the 20 September 2021 special meeting and a 12 October 2021 Regular Meeting of the Council, various people including Mayor Strickland, Davis, Hogeman, the Village Attorney, and the Village Manager exchanged e-mails concerning Plaintiff Drum's and Boesch's conduct, which Plaintiff Drum had conceded during the special meeting was inconsistent with the Ethics Policy.

At the 12 October 2021 public meeting, Mayor Strickland raised items "that have to do with ethics violations involving Council members." Mayor Strickland addressed letters council members had received from local business owners complaining Plaintiff Drum had sent them "a series of intimidating, some would call threatening, e-mails." Plaintiff

Drum agreed his behavior in sending these e-mails was inconsistent with the Ethics Policy. Council members expressed their disapproval of Plaintiff Drum's behavior during this public meeting and discussed whether Plaintiff Drum should be disciplined for his conduct. Plaintiffs concede no decision was made on 12 October, and the other council members agreed to "defer issues" related to Plaintiff Drum's conduct to the 26 October 2021 public meeting.

Between 12 October and the next public meeting on 26 October, council members, the Village Attorney, and the Village Manager continued to exchange e-mails, which included a draft motion for censure. Boesch, at some point during this time, contacted the UNC School of Government for guidance. On 14 October 2021, Frayda Bluestein ("Bluestein") at the UNC School of Government responded to Boesch's inquiry, advising it would be hard for three members of the council discussing town business via e-mail to be "simultaneous" in their communication and conversations spaced over time are not illegal and do not require the presence of the entire board. Boesch forwarded Bluestein's reply e-mail to Plaintiff Drum.

At the 26 October 2021 public meeting, Mayor Strickland again opened discussion of Plaintiff Drum's ethics issues. Council members never voted on whether to censure Plaintiff Drum, and Plaintiff Drum was never formally censured. Mayor Strickland stated the council members had already expressed their disapproval of Plaintiff Drum's behavior at the 12 October 2021 public meeting, and he believed it was the "consensus" of the Council "that we disapprove" of Plaintiff Drum's conduct.

Plaintiff Drum's re-election campaign was unsuccessful and his term on the Council ended on 31 December 2021. Plaintiff Drum formed N.C. Citizens for Transparent Government, Inc. on 7 February 2022.

On 6 May 2022, Plaintiffs sued Defendants, seeking declaratory and injunctive relief for violations of the Open Meetings Law alleged to have occurred at the 20 September 2021 special called meeting and during the e-mail communications occurring between 20 September and 12 October 2021. Plaintiffs attached as Exhibit H, copies of all the e-mail exchanges and contend these communications constituted an official meeting in violation of the Open Meetings Law.

On 11 September 2023, Defendants filed a Rule 12(c) Motion for Judgment on the Pleadings arguing that Exhibit H demonstrated that no simultaneous communication ever occurred between any council members and the e-mails are not subject to the Open Meetings Law. On 25 September 2023, in open court, Plaintiffs dismissed without prejudice all claims related to the 20 September 2021 special meeting.

On 12 October 2023, the trial court granted Defendants' Rule 12(c) Motion. The trial court also denied Plaintiffs' request for declaratory relief, and dismissed with prejudice all remaining claims, including Plaintiffs' claims for injunctive relief and attorney fees.

On 13 November 2023, Plaintiffs appealed the trial court's order granting Defendants' Motion for Judgment on the Pleadings.

II. Analysis

On appeal, Plaintiffs contend the trial court erred by granting Defendants' Rule 12(c) Motion for Judgment on the Pleadings. Plaintiffs argue the e-mail exchange between members of the Council, discussing the possibility of censuring Plaintiff Drum, constituted a meeting in violation of N.C. Gen. Stat. § 143-318.9 *et seq.* for failure to conduct the public's business in public.

A. Standard of Review

Allegations asserting a party violated the Open Meetings Law are considered by the Superior Court in its role as a trier of fact.

> It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal.

Gannett Pacific Corp. v. City of Asheville, 178 N.C. App. 711, 713, 632 S.E.2d 586, 588 (2006) (internal quotations and citations omitted).

Whether a violation of the Open Meetings Law occurred is a conclusion of law. Therefore, we apply a *de novo* standard of review. *Garlock v. Wake Cnty. Bd. of Education*, 211 N.C. App. 200, 214, 712 S.E.2d. 158, 169 (2011).

B. E-mail exchange

For communications to violate the Open Meetings Law, the communicative exchange must meet the statutory definition of a meeting under N.C. Gen. Stat. § 143-318.10(d), which states in pertinent part:

> "Official meeting" means a meeting, assembly, or gathering together at any time or place or the *simultaneous*

> *communication* by conference telephone or other electronic means of a *majority of the members* of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.

N.C. Gen. Stat. § 143-318.10(d) (2023).(emphasis added).

At issue here is whether the e-mails in question were "simultaneous communication" between a "majority" of the council members. Both parties assert that "simultaneous" is defined as "existing or occurring at the same time." Additionally, the parties agree there are five members of the Council, and that three members constitute a majority of the Council. Thus, three members of the Council must communicate at the same time for the interaction to meet the statutory criteria set forth in N.C. Gen. Stat. § 143-318.10(d).

The question of whether e-mail exchange is a form of communication by which an official meeting can be conducted has not been directly answered by North Carolina courts. Therefore, we look to similar statues regarding communications enacted by our legislature.

The North Carolina legislature considered what forms of technology constitute "simultaneous communication" during North Carolina's response to the COVID pandemic. In N.C. Gen. Stat. § 166A-19.24, addressing remote meetings during an emergency, the legislature stated simultaneous communication is defined as "[a]ny communication by conference telephone, conference video, or other electronic means." N.C. Gen. Stat. § 166A-19.24(i). This definition is very similar to N.C. Gen. Stat. § 143-318.10(d) at issue here. N.C. Gen. Stat. § 166A-19.24(b)(4) further states:

> simultaneous communication *shall* allow for any member of the public body *to do all* of the following: (a) Hear what is said by the other members of the public body, (b) Hear what is said by any individual addressing the public body, (c) To be heard by the other members of the public body when speaking to the public body.

N.C. Gen. Stat. § 166A-19.24(b)(4) (2023) (emphasis added). Additionally, "[a]ll chats, instant messages, texts, or other written communications between members of the public body regarding the transaction of the public business during the remote meeting are deemed a public record." N.C. Gen. Stat. § 166A-19.24(b)(8). In reviewing the legislature's use of simultaneous communication in statute, e-mail is not considered a

simultaneous communication subject to open meetings requirements but rather work product subject to public records requests.

Looking beyond our borders, other state courts have considered whether e-mail communications are subject to their Open Meetings Laws. The rules governing Open Meeting Laws vary from state to state with some, like North Carolina, requiring "simultaneous communication" while others do not. *Compare* N.C. Gen. Stat. § 143-318.10(d) (2023) *with* Mass. Gen. Laws ch. 30A § 18 (2024).

Many states requiring simultaneous communication have found e-mails generally do not meet the requirement of "simultaneity." When considering whether emails exchanged between city council members constituted a meeting under Virigina's Freedom of Information Act the Supreme Court of Virginia stated, "[w]hile such simultaneity may be present when e-mail technology is used in a "chat room" or as "instant messaging," it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail . . . ." *Beck v. Shelton*, 267 Va. 482, 490, 593 S.E.2d 195, 199 (2004). Similarly, the Commonwealth Court of Pennsylvania held that a series of e-mails between board members sent between four hours and over two days apart lacked the "virtually simultaneous interaction" required to constitute a meeting. *M4 Holdings, LLC v. Lake Harmony Estates Prop. Owner's Ass'n.*, 237 A.3d 1208, 1222 (2020). Most recently, the California Fourth District Court of Appeals held, "[e]-mail exchanges among directors on those items that occur before a board meeting and in which no action is taken on the items . . . do not constitute a board meeting within the meaning of [the Common Interest Development Open Meeting Act.]" *LNSU #1, LLC. v. Alta Del Mar Costal Collection Cmty Ass'n.*, 94 Cal. App. 5th 1050, 1080, 312 Cal. Rptr. 3d 707, 729 (2023). While the holdings of these jurisdictions are not binding on this Court, we find their reasoning to be both instructive and persuasive.

Sub judice, the e-mail exchanges began on 8 October 2021 and continued intermittently through 12 October 2021. On 8 October 2021, the Village Attorney sent an e-mail to Mayor Strickland and the Village Manager, copying Davis and Hogeman. The e-mail provided information relevant to the ethics issues that had been raised at the special meeting on 20 September 2021. The information included the Code of Ethics; statements from the police chief, human resources, and the primary business complainants; and proposed Censure Resolutions. Hogeman was the first council member to respond, approximately an hour and a half after the initial e-mail. Her response to the Village Attorney was, "Thank you." Mayor Strickland responded next, approximately two hours after

the initial e-mail was sent. Mayor Strickland, the Village Manger and the Village Attorney exchanged a few e-mails over the course of the afternoon trying to ensure that all relevant rules and policies would be followed as they proceeded with addressing the ethics concerns.

Almost four hours after the initial e-mail was sent Hogeman responded again and indicated that she agreed the issues needed to be addressed but was not sure how to do so. She also sent an e-mail the following morning stating that Mayor Strickland should preside over the upcoming meeting rather than presenting the information from the complainants, noting that the issues were brought to the Council and they sought the advice of the Village Attorney and that the council members should have the opportunity to address the issues.

Approximately twenty-four hours after the initial e-mail was sent from the Village Attorney, Davis responded to the chain. Only two e-mails from Davis were included in Exhibit H. Her first e-mail clarified Hogeman's prior suggestions and requested a few details for clarification. Her second e-mail, sent two days later on 11 October 2021, merely thanked Mayor Strickland and suggested one edit to a previous document.

A council member who generates two e-mails containing seven sentences of less than ninety words over the course of five days is not engaging in "simultaneous communication," "conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business." When limited communication takes place hours or days apart, it does not constitute "simultaneous communication." Additionally, Exhibit H demonstrates that the vast majority of the communication occurred between Mayor Strickland, the Village Attorney and the Village Manager, only one of whom is a council member, and thus, it fails to meet the requirement that a majority of the council members must engage in the communication.

Plaintiffs concede Plaintiff Drum was never formally censured. Further, the Council never voted on whether to censure Plaintiff Drum. Therefore, the council members did not deliberate, vote or otherwise complete business via e-mail as an "end-run" around mandated public deliberation as Plaintiffs suggest. Rather, a few members of the Council, one of whom was also the mayor, consulted with the Village Attorney and the Village Manager to ensure they were prepared for the next open Village Council meeting.

III. Conclusion

In order for an official meeting subject to North Carolina's Open Meeting Law to occur there must be simultaneous communication by

a majority of the members of a public body for the purpose of conducting hearings. We conclude, upon the facts of this case, the e-mail exchanges between 20 September 2021 and 12 October 2021 do not qualify as "simultaneous communication" and are not subject to the North Carolina Open Meetings Law. The trial court properly granted Judgment on the Pleadings in favor of Defendants and properly denied the declaratory judgment sought by Plaintiffs. We affirm the trial court's order.

AFFIRMED.

Chief Judge DILLON and Judge TYSON concur.

ANTHONY L. PROCTOR, SR.; NICOLE GONZALEZ; OCTAVIUS RAYMOND; THE SPOT FLORIDA STYLE SEAFOOD, LLC; THE CHEESESTEAK HUSTLE LLC; and NOAH AND ISIDORE, L.L.C., PLAINTIFFS

v.

CITY OF JACKSONVILLE, ET AL., DEFENDANTS

No. COA24-305

Filed 3 December 2024

Zoning—unified development ordinance—food trucks—regulations regarding location and operation

In an action brought by two food truck owners and a commercial business owner who sought to host food trucks in her business parking lot (plaintiffs) against the City of Jacksonville and its officials (defendants)—seeking a declaratory judgment, injunctive relief, and nominal damages based on allegations that certain provisions in the city's unified development ordinance (UDO) concerning the location and operation of food trucks violated plaintiffs' state constitutional rights under the freedom of speech, equal protection, fruits of their own labor, and law of the land clauses, and also that the UDO required unreasonably high fees to operate a food truck—the trial court's order dismissing plaintiffs' complaint, pursuant to Civil Procedure Rule 12(b)(6), was reversed and the matter was remanded for further proceedings. The trial court erred by applying a "blanket legal standard" to all of plaintiffs' claims—specifically, by determining that it could "envision a number of reasonably conceivably rational bases to support the challenged provisions of the [UDO]"—where each of those claims was subject to a distinct applicable legal test. When the allegations in the complaint, taken as

true, were considered in light of the legal standard pertinent to each, they sufficiently stated claims upon which relief could be granted.

Appeal by Plaintiffs from order entered 2 January 2024 by Judge John E. Nobles, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 24 September 2024.

Cooper & Kirk, PLLC, by Nicole Jo Moss, and Institute for Justice, by Robert Belden and Justin Pearson, pro hac vice, for Plaintiffs-Appellants.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC., by Norwood P. Blanchard, III, for Defendants-Appellees.

GRIFFIN, Judge.

Plaintiffs appeal from the trial court's order granting Defendants' motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6). Plaintiffs argue the trial court erred by granting Defendants' motion because it applied the wrong legal test to their claims and, even assuming the trial court had applied the correct legal tests, their complaint adequately alleged facts sufficient to survive dismissal at the Rule 12(b)(6) stage. We agree with both of Plaintiffs' arguments and reverse the trial court's order dismissing Plaintiffs' claims.

I. Factual and Procedural Background

This case arises out of tension between business owners in Jacksonville and the City of Jacksonville ("the City"). In 2014, the City passed the Unified Development Ordinance of the City of Jacksonville ("the UDO"). The UDO provides numerous zoning maps which dictate the areas where a food truck may operate and numerous regulations which provide the conditions food trucks and private-property owners must meet before operating on private property.

A. The Parties

Plaintiffs are three individual business owners as well as the entities they own and run. Plaintiff Anthony Proctor, a pastor and Marine veteran, and Octavious Raymond, also a Marine veteran, own food trucks which they operate in and around eastern North Carolina. Plaintiff Nicole Gonzalez, a lifelong resident of Jacksonville, owns and operates a general store and small motor repair shop on her commercial property in Jacksonville. Prior to opening the general store and repair

shop, Gonzalez's property was used as a restaurant and includes an oversized parking lot suitable for hosting food trucks. Plaintiffs Proctor and Raymond seek to operate their food trucks in Jacksonville. Plaintiff Gonzalez seeks to host food trucks in the parking lot of her property. Plaintiffs allege the UDO's severe limitations on where food trucks may operate is the embodiment of an unlawful protectionist scheme, through which local officials seek to limit competition against brick-and-mortar restaurants. But for the severe restrictions, Plaintiffs Proctor and Raymond would park their food trucks in Jacksonville and sell their culinary works and wares to Jacksonville's citizens. But for the severe restrictions, Plaintiff Gonzalez would invite food trucks to her private commercial property and allow them to sell food thereon.

B. The UDO

In their complaint, Plaintiffs challenge select provisions of the UDO which require an annual fee from food truck operators, restrict the area where food trucks may operate, and restrict the signage they may use. Food vendors, the term the UDO utilizes to describe food trucks, shall comply with the following challenged standards, and failure to do so can result in the revocation of the Food Vendor Permit:

> (2) Any Food vendor shall be at least 250 feet from any other parcel containing: 1) a food vendor, 2) a low density, medium density, high density residential or downtown residential zoning district, and or 3) a restaurant;
>
> . . .
>
> (11) Food vendors-may only be placed on private property with written approval (notarized) of the property owner. Documentation shall be displayed in plain view at all times;
>
> (12) Food vendor signage is limited to:
>
> i. Up to one 5' x 5' "A" frame sign within 20 feet of the food truck/trailer/cart;
>
> ii. Signage that can be placed on the food vendors truck/trailer/cart including back lit menu boards. No signage may be placed above the height of the food vendors truck/trailer/cart;
>
> iii. Programmable electronic message center signs are prohibited; and

> iv. All other signage is prohibited including LED, rope or strings of lights.
>
> (13) Shall obtain a City of Jacksonville Food Vendor permit (annual) to operate within the City limits and or Extraterritorial Jurisdiction. A copy must be displayed and in plain view at all times. In conjunction with the permit process, the equipment shall be inspected and approved by the Jacksonville Fire Department[.]

Plaintiffs allege the location restrictions prevent food truck operators from conducting business in approximately ninety-six percent of property located in Jacksonville. Because of these restrictions, Plaintiffs contend their rights to engage in safe and lawful occupations are severely infringed.

C. Procedural History

On 7 December 2022, Plaintiffs filed their complaint against the City and its officials in Onslow County Superior Court arguing the UDO unduly restricts their ability to operate their businesses and seeking declaratory judgment, injunctive relief, and nominal damages. Plaintiffs brought their claims under: (1) the Freedom of Speech clause; (2) the Equal Protection clause; (3) the Fruits of Their Own Labor clause; and (4) the Law of the Land clause.

Plaintiffs also allege the UDO requires unreasonably high fees in violation of the North Carolina Supreme Court's holding in *Homebuilders Association of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994). Two months later, Defendants moved to dismiss Plaintiffs' complaint. On 17 July 2023, Defendants amended their motion, arguing the complaint should be dismissed pursuant to Rules 12(b)(1), (2), (4), (5), and (6) of the North Carolina Rules of Civil Procedure. After a hearing held on 23 October 2023, the trial court entered an order on 2 January 2024 granting Defendants' motion to dismiss pursuant to Rule 12(b)(6). Specifically, the court stated it "can envision a number of reasonably conceivably rational bases to support the challenged provisions of the [UDO][.]" Plaintiffs timely appeal.

II. Analysis

Plaintiffs contend the trial court erred by granting Defendants' motion to dismiss. Specifically, Plaintiffs argue their complaint states colorable claims under the North Carolina Constitution and the trial court erred by applying one blanket legal standard for each claim. We agree.

As a threshold matter, we think it beneficial to engage in a brief summary of municipalities' powers. A municipality may enact ordinances, through the authority granted to it by the General Assembly, that "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." *Grace Baptist Church of Oxford v. City of Oxford*, 320 N.C. 439, 442–43, 358 S.E.2d 372, 374 (1987) (citing N.C. Gen. Stat. § 160A-174(a) (1982)); *see also* N.C. Gen. Stat. § 160A-174(a) (2023). This grant of power is "broadly construed to include any additional and supplementary powers that are reasonably necessary to effectuate the grant of power." *Id.* (citing N.C. Gen. Stat. § 160A-4 (1982)); *see also* N.C. Gen. Stat. § 160A-4 (2023) (utilizing the same language).

Furthering this grant, "municipal ordinances are presumed to be valid." *State v. Maynard*, 195 N.C. App. 757, 759, 673 S.E.2d 877, 879 (2009) (citing *McNeill v. Harnett County*, 327 N.C. 552, 565, 398 S.E.2d 475, 482 (1990)). Nonetheless, an ordinance is invalid if it "infringes a liberty guaranteed to the people by the State [] Constitution." N.C. Gen. Stat. § 160A-174(b)(1) (2023). To that end, government action is void "when persons who are engaged in the same business are subject to different restrictions or are treated differently under the same conditions." *Poor Richard's, Inc., v. Stone*, 322 N.C. 61, 67, 366 S.E.2d 697, 700 (1988) (citing *Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968)).

In brief, municipalities have broad powers to enact ordinances regulating the health, safety, and welfare of their constituents; however, that power ends where unlawful differential and preferential treatment of certain citizens and entities at the expense of others begins. *Id.* With this limitation in mind, we now turn to Plaintiffs' claims regarding the City's use of that power to regulate food trucks.

D. Standard of Review

We review a trial court's order granting a motion to dismiss under Rule 12(b)(6) *de novo*. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 798 (2013). On review, "we consider '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.* (quoting *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006)). As a Rule 12(b)(6) motion tests the legal sufficiency of a complaint, *Fuller v. Easley*, 145 N.C. App. 391, 397–98, 553 S.E.2d 43, 48 (2001), "we treat the plaintiffs' factual allegations as true" while ignoring the plaintiffs' legal conclusions. *Skinner v. Reynolds*, 237 N.C. App. 150, 152, 764

S.E.2d 652, 655 (2014) (citations and internal marks omitted). Documents "attached to and incorporated within a complaint" are properly considered when ruling on a 12(b)(6) motion. *Holton v. Holton*, 258 N.C. App. 408, 418–19, 813 S.E.2d 649, 657 (2018).

A 12(b)(6) motion to dismiss should be granted if "one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Bissette v. Harrod*, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations and internal marks omitted). *See also Williams v. Devere Const. Co., Inc.*, 215 N.C. App. 135, 142, 716 S.E.2d 21, 27–28 (2011) (utilizing the same standard of review). However, where the trial court applies an incorrect legal standard it "per se abuses its discretion." *Holmes v. Moore*, 384 N.C. 426, 453, 886 S.E.2d 120, 140 (2023) (citation omitted).

E. Freedom of Speech Claim

Plaintiffs allege the UDO violates their rights to freedom of speech protected by Article I, section 14 of the North Carolina Constitution. Specifically, Plaintiffs allege the UDO signage provisions "impose speaker- or content-based restrictions on truthful and accurate speech by food trucks and the property owners who host them without being directly related to any substantial or important interest, let alone being narrowly tailored to a compelling government interest."

Plaintiffs argue the trial court erred by applying an inapplicable legal standard to their section 14 claim when granting Defendants' motion to dismiss. Specifically, Plaintiffs argue the trial court applied the rational basis test when it should have applied strict or intermediate scrutiny. In support, Plaintiffs point to the order's language, which states that "the [c]ourt can envision a number of reasonably conceivably rational bases to support the challenged provisions of the UDO, so the Defendant City's motion to dismiss the [c]omplaint should also be [allowed]."

Article 1, section 14 of the North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. This provision requires State action regulating commercial speech to satisfy either strict scrutiny or intermediate scrutiny depending on whether the regulation is content-based or content-neutral, respectively. *Hest Tech., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012) (citing *Greater New Orleans Broad. Ass'n v. United State*s, 527 U.S. 173,

183–84 (1999)). Thus, the rational basis test is inapplicable to the issue Plaintiffs alleged.

We hold the trial court erred by applying the wrong legal test to their freedom of speech claim. *Holmes*, 384 N.C. at 453, 886 S.E.2d at 140. Accordingly, we reverse the trial court's order on Plaintiffs' Article I, section 14 claim and remand for analysis under the applicable legal test. *Id.*

F. Equal Protection Claim

Plaintiffs next contend the trial court erred by applying the wrong legal standard when dismissing their Equal Protection claim made under Article I, section 19 of the North Carolina Constitution. Defendants contend Plaintiffs are not similarly situated to their alleged comparators. We agree with Plaintiffs and hold their allegations were sufficient to survive dismissal at the Rule 12(b)(6) stage.

Article I, section 19 of the North Carolina Constitution states, in part, that "[n]o person shall be denied the equal protection of the laws[.]" N.C. Const. art. I, § 19. The equal protection clause " 'requires that all persons similarly situated be treated alike.' " *Holmes*, 384 N.C. at 437, 886 S.E.2d at 130 (quoting *Blankenship v. Bartlett*, 363 N.C. 518, 521, 681 S.E.2d 759, 762 (2009)).

Under the Equal Protection clause of Article I, section 19, when a party challenges a government regulation that classifies businesses and then treats those businesses differently on the basis of said classification, we apply a twofold test, asking: "(1) [is it] based on differences between the business to be regulated and other businesses and (2) [are] these differences [] rationally related to the purpose of the legislation[?]" *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699 (citing *State v. Harris*, 216 N.C. 746, 758–59, 6 S.E.2d 854, 863 (1940)). If the answers to both questions are yes, then the classification is permitted. *Id.*

To be completely clear, the Supreme Court in *Grace Baptist* stated "[a] party seeking to prove that a municipality's *enforcement* of a facially valid ordinance amounted to a denial of equal protection must show that the municipality engaged in conscious and intentional discrimination." 320 N.C. at 376, 358 S.E.2d at 445 (emphasis added). Plaintiffs do not allege selective enforcement. Rather, they allege "the 250-foot proximity bans thus create an arbitrary and irrational distinction between (a) food trucks and the property owners who want to host them, and (b) other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, and property owners who want to host them." As the gravamen of Plaintiffs' claim focuses on the arbitrariness

and irrationality of the distinctions drawn in the UDO, not how the UDO is enforced, we agree with Plaintiffs that the test the Supreme Court applied in *Poor Richard's* governs here.

Turning now to Plaintiffs' complaint, we hold they pled facts sufficient to survive 12(b)(6) for their Equal Protection claim. Specifically, Plaintiffs, as food truck owners, allege "[f]ood trucks are engaged in the same business as, or are similarly situated to, other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, which are not subject to the 250-foot proximity ban." Plaintiff Gonzalez alleges that she and her company "are engaged in the same property use as, or are similarly situated to, property owners who host businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, but are not subject to the 250-foot proximity bans." To exemplify their contention that the UDO provides for different regulations based on arbitrary distinctions and are imposed to further unlawful economic protectionism of restaurants, Plaintiffs also allege "[t]he 250-foot proximity bans do not apply to other businesses offering food and drink for sale to the general public, such as restaurants with indoor and/or outdoor seating, drive-through restaurants, specialty-eating establishments, produce stands, bars, taverns, clubs, convenience or drug stores, gas stations, bed and breakfasts, or museums."

To this point, the regulations do not prevent food trucks from parking or giving food away on eligible property, they only prevent food trucks from "selling food while they are there." Another consequence of the UDO's classifications is that "[a] specialty-eating establishment like a bakery, a coffee shop, or an ice cream shop could open on Eligible Property next door to a restaurant, residential property, or a food truck . . . , but a food truck offering the very same baked goods, coffee, or ice cream could not." Plaintiffs' Complaint contains numerous other factual allegations explaining how the UDO's classifications allow for businesses engaged in substantially the same business as Plaintiffs, namely selling food and drink, to set up shop in areas that food trucks may not.

Despite the alleged similarities between Plaintiffs and other businesses, Plaintiffs' assert that "[t]he 250-foot proximity bans do not draw the classification between food trucks and all other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, based on any legitimate distinguishing feature of food trucks or the property owners who would host them."

These allegations, taken as true, are sufficient to satisfy the first part of the test–the UDO's harsher restrictions on food trucks are not

based on any differences between Plaintiffs' businesses, subject to those restrictions, and other business which are not. *See Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) ("The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." (citation and internal marks omitted)). Moreover, Plaintiffs' two allegations that the regulation (1) is "solely to further the unconstitutional purpose of protecting brick-and-mortar restaurants from competition[,]" and (2) classifies "without substantially or reasonably furthering any constitutionally legitimate, permissible, or substantial government purpose[,]" are sufficient to satisfy the second prong of the test. *See Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (striking down a licensing scheme because, in part, "[t]he [a]ct in question here has as its main and controlling purpose not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business"). Taken as true, Plaintiffs sufficiently allege the UDO's differential classifications are not rationally related to the purpose of the ordinance nor are they based on a permissible purpose.

These allegations essentially allege that, despite being in the same business, Plaintiffs and their respective businesses are "subject to different restrictions [and] are treated differently under the same conditions." *Poor Richard's*, 322 N.C. at 67, 366 S.E.2d at 700 (citing *Cheek*, 273 N.C. at 298, 160 S.E.2d at 23). To Plaintiffs' argument the trial court applied the wrong test, we agree in that the test requires the trial court to engage in a more nuanced analysis than just addressing whether it can envision "reasonably conceivably rational bases." However, the ultimate inquiry does lie in ascertaining whether the government's distinctions are drawn based on actual differences between businesses and whether that distinction is rationally related to the promotion of a permissible government interest. Nonetheless, taking their allegations as true, which we are required to do, Plaintiffs sufficiently alleged facts to survive Defendants' Rule 12(b)(6) motion for their Equal Protection claim. Accordingly, we reverse the trial court's order dismissing this claim.

G. Fruits of Their Own Labor and Law of Land

Plaintiffs argue the trial court erred by dismissing their claims brought under the Fruits of Their Own Labor clause contained in Article I, section 1 and the Law of the Land clause contained in Article I, section 19 of the North Carolina Constitution because it utilized the wrong legal standard when dismissing these claims. We agree.

When a state actor infringes upon a right protected by the North Carolina Constitution, the common law "will furnish the appropriate action for the adequate redress of a violation of that right." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (citation omitted). The Fruits of Their Labor clause provides: "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.

Our Supreme Court has recognized substantive economic protections under the Fruits of Their Labor Clause prevent the State and consequently its political subdivisions from creating and enforcing regulations that impede "legitimate and innocuous vocations by which men earn their daily bread." *State v. Ballance*, 229 N.C. 764, 770–72, 51 S.E.2d 731, 735–36 (1949) (holding a licensing scheme for photographers violated the Fruits of Their Labor Clause); *see also Roller*, 245 N.C. at 525–26, 96 S.E.2d at 859 (holding a licensing scheme for ceramic tile installers violated the Fruits of Their Labor Clause).

The Law of the Land clause, on the other hand, provides: "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." N.C. Const. art. I, § 19. This provision, analogous to the Fourteenth Amendment's Due Process Clause, "serves to limit the [S]tate's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699 (citing *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979)).

Thus, both the Fruits of Their Own Labor clause and the Law of the Land clause protect citizens' constitutional right to earn a living from arbitrary regulations. *See id.* ("These constitutional protections have been consistently interpreted to permit the [S]tate, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose."). When state actors infringe upon these rights, citizens may seek redress through a *Corum* claim. *See Corum*, 330 N.C. at 782, 413 S.E.2d at 289 ("Therefore, in the absence of an adequate state remedy, one whose constitutional rights have been abridged has a direct claim against the State under our Constitution.").

To sufficiently plead a *Corum* claim, a complaint must allege: (1) a state actor violated the plaintiff's state constitutional rights; (2) "the

claim must be colorable, meaning that the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution[;]" and (3) no adequate state remedy exists for the alleged constitutional violation. *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 423, 904 S.E.2d 720, 726 (2024) (cleaned up).

With respect to the second prong, "[a] single standard determines whether [an] ordinance passes constitutional muster imposed by both section 1 and the 'law of the land' clause of section 19: the ordinance must be rationally related to a substantial government purpose." *Treants Enter., Inc. v. Onslow Cnty.*, 320 N.C. 776, 778–79, 360 S.E.2d 783, 785 (1987). "[T]o survive constitutional scrutiny under this provision, the challenged state action 'must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm.' " *Ace Speedway Racing, Ltd.*, 386 N.C. at 424, 904 S.E.2d at 726 (quoting *Ballance*, 229 N.C. at 768, 51 S.E.2d at 731 (1949)). "This test involves a "twofold" inquiry: '(1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?' " *Id.* (quoting *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 697).

As the test for colorability is the same, we analyze the sufficiency of both Plaintiffs' Fruits of Their Labor claim and Law of the Land claim below. Here, Plaintiffs pled the City of Jacksonville, a municipality authorized to act by the General Assembly, and its officials violated their Article I, sections 1 and 19 rights through the enactment and enforcement of the UDO. As municipalities are State actors in that they derive their power from the General Assembly, *see King v. Town of Chapel Hill*, 367 N.C. 400, 406, 758 S.E.2d 364, 370 (2014) ("The General Assembly has delegated a portion of this [police] power to municipalities through N.C. Gen. Stat. § 160A-174."), we hold this allegation sufficient to meet the requirements of the first prong necessary to allege a *Corum* claim. Next, Plaintiffs allege, and we agree, that no administrative remedies were available to them. As Defendants do not contest either of these two prongs, we only address whether Plaintiffs' Complaint alleges facts sufficient to support colorable Article I, section 1 and section 14 claims under the standard set forth in *Poor Richard's*.

Here, Plaintiffs allege the City and its officials enacted the UDO, and the challenged provisions therein, "to protect brick-and-mortar restaurants from competition." In support of this contention, Plaintiffs point to the UDO's enactment history. Plaintiffs allege the UDO initially provided for a less restrictive scheme which would have allowed food trucks to operate within a larger area of Jacksonville. However, the UDO was

redrafted because "in the restaurant owners' view, the original overlay map did not sufficiently insulate them from competition." As a result of this pressure, "the City Council considered allowing food trucks only if they did not operate within 250 feet of, among other things, any other parcel with a restaurant." This consideration ultimately became the codified version of the UDO.

As entities who are engaged in the same business should be subject to the same restrictions, *Poor Richard's*, 322 N.C. at 67, 366 S.E.2d at 700, an allegation that the government enacted a regulation solely to benefit a subset of businesses at the expense of another subset within the same line of business, here food purveyors, is sufficient to meet prong one. Thus, taking Plaintiffs' allegations as true, we hold they sufficiently pled an unlawful and improper governmental purpose for the UDO. Accordingly, as the first prong of *Poor Richard's* test for a colorable constitutional claim under Article I, sections 1 and 19 is met, we do not reach the second question of whether the means chosen to affect that purpose are reasonable. Rather, we reverse the trial court's order dismissing Plaintiffs' claims under the Fruits of Their Own Labor clause and the Law of the Land clause.

H. *Ultra Vires* Claim

Plaintiffs again contend the trial court erred in applying the "reasonably conceivably rational basis test" to their claim that the UDO's permitting fee is unreasonable and *ultra vires*. We agree.

Section 160A-4 of the North Carolina General Statutes provides that "[i]t is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law." N.C. Gen. Stat. § 160A-4 (2023). To that end, "the provisions of [Chapter 160A] and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect[.]" *Id*. However, this grant of power is not without limits. In *Homebuilders Association of Charlotte, Inc. v. City of Charlotte*, our Supreme Court held that when a city has the authority to assess fees for a given purpose, "such fees will not be upheld if they are unreasonable." 336 N.C. at 46, 442 S.E.2d at 51 (citations omitted). There, the Court addressed whether a fee schedule requiring commercial builders in Charlotte to pay for various government services was within the scope of authority granted to municipalities by the General Assembly. *Id*. at 41–42, 442 S.E.2d at 48–49. Concluding Charlotte did have the authority to enforce

the fee schedule, the Supreme Court nonetheless provided a second condition to be met prior to upholding a municipalities enforcement of user fees: namely, that the fees be reasonable. *Id.* at 46, 442 S.E.2d at 51 (citing Lawrence, *Local Government Finance in North Carolina*, § 311, at 68 (2d ed. 1990) ("Because the purpose of such a fee or charge is to place the cost of regulation on those being regulated, a rough limit to 'reasonableness' is the amount necessary to meet the full cost of the particular regulatory program.")). The Court relied on the trial court's findings of fact in holding Charlotte's user fees to be reasonable. *Id.* at 46–47, 442 S.E.2d at 51–52.

Here, Plaintiffs allege the fees were not set based on the City's actual or reasonably anticipated costs nor that the fees "bear any relationship to the City's actual or reasonably anticipated cost to regulate food trucks." Rather, Plaintiffs contend, the fees were set "based on a comparison to the approximate property tax burdens on some properties where brick-and-mortar restaurants are located[,]" which results in the fee amounts exceeding the actual or reasonably anticipated cost for the City to enforce the UDO regulations. In support of their contentions, Plaintiffs point towards other neighboring municipalities which charge smaller user fees for food truck operators. Moreover, in support of their allegation that the fees are not related to the actual cost of regulation, Plaintiffs explain that "[a]lmost all regulatory oversight of food trucks is conducted by other governmental groups." These allegations are sufficient to survive a Rule 12(b)(6) dismissal when making a claim asserting municipalities' user fees are unreasonable and *ultra vire*s.

As the trial court dismissed Plaintiffs' claim on a Rule 12(b)(6) motion, neither party presented evidence as to how the fees were calculated, collected, or used.[1] Without this information, neither we nor the trial court may say whether the fees were rational or reasonable in this instance. This is not to say that a claim challenging a municipality's user fees will never be subject to a Rule 12(b)(6) dismissal. Rather, here, evidence relating to the fees will be necessary to make a determination of whether they are unreasonable and thus *ultra vires*.

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1. We note that the City's Director of Planning and Inspections, Ryan King, submitted an affidavit to the court containing some of this information. The court, however, only considered the affidavit for the sole purpose of determining whether it had jurisdiction to hear Plaintiffs' claims. *See Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 572, 887 S.E.2d 448, 453–54 (2023) ("The trial court 'need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.'" (quoting *Harris v. Pembar*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)).

Accordingly, we hold the trial court erred by dismissing Plaintiffs' claims because it could "envision a number of reasonably conceivably rational bases to support the challenged provisions of the UDO[,]" without analyzing whether Plaintiffs' complaint contained facts sufficient to support their allegation that the user fees were reasonable or related to the City's regulation enforcement cost.

III. Conclusion

While cognizant that the UDO enjoys a presumption of validity, we nonetheless hold the trial court erred by applying an erroneous blanket-test to Plaintiffs' claims. As a result of this error, we reverse the trial court's order granting Defendants' motion for summary judgment. Moreover, as Plaintiffs pled facts sufficient to survive 12(b)(6), we remand for further proceedings.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
ANTHONY TYRONE BROWN

No. COA24-197

Filed 3 December 2024

Criminal Law—post-conviction actual innocence investigation—destruction of evidence—violation of due process rights not shown

Where, during an investigation by the North Carolina Center on Actual Innocence of defendant's case following his 2014 conviction of robbery with a firearm, the destruction of biological evidence (latent fingerprints collected at the crime scene) was discovered—depriving defendant of the opportunity to conduct potentially exculpatory DNA testing—the denial of defendant's motion to vacate his conviction and dismiss with prejudice the robbery charge was affirmed. First, the denial order did not prevent meaningful appellate review due to its lack of findings of fact or conclusions of law given that the controlling statute (N.C.G.S. § 15A-268, part of the DNA Database and Databank Act) does not require either written findings or conclusions. Second, in the context of earlier proceedings

in the post-conviction matter, the ruling reflected by the very brief denial order could be understood as the superior court's determination, following a hearing, that defendant failed to meet his burden to show that the evidence sought had been destroyed in bad faith and thus to establish that his due process rights were violated.

Appeal by defendant from order entered 28 June 2022 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 25 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

N.C. Center on Actual Innocence, by Christine C. Mumma and Michael T. Roberson, for defendant-appellant.

DILLON, Chief Judge.

During a post-conviction investigation, Defendant Anthony Tyrone Brown learned that evidence from his case had been destroyed. Defendant moved to vacate his conviction, contending the destroyed evidence could have been tested with new DNA testing technologies and might have exonerated him. The trial court denied his motion. We affirm.

I. Background

In October 2014, Defendant was convicted of robbery with a firearm and sentenced to 84 to 113 months of imprisonment. Defendant appealed his conviction, and our Court held no error. *See State v. Brown*, 247 N.C. App. 399 (2016) (unpublished).

Following his conviction, the North Carolina Center on Actual Innocence ("NCCAI") investigated Defendant's case and requested an inventory on the evidence held by the Durham Police Department and Durham County Clerk of Superior Court ("Durham Clerk's Office"). The Durham Clerk's Office responded that the evidence entered as exhibits at Defendant's trial had been destroyed.

In January 2021, Defendant filed a Motion for Hearing Regarding Unlawful Destruction of Evidence.

In March 2022, Defendant moved for a hearing on the matter. Defendant alleged that the Durham Clerk's Office violated N.C.G.S. § 15A-268 by destroying biological evidence without proper notice to

him and that the destruction of the evidence (specifically, latent fingerprints collected from the crime scene) prejudiced him by depriving him of the opportunity to conduct exculpatory DNA testing. In his motion, Defendant sought an order to calendar a hearing on the matter without further delay and then, after the hearing, for an order to be entered vacating his conviction and dismissing the robbery charge with prejudice.

Approximately one week later, Judge Orlando Hudson entered an order directing that the matter be calendared for hearing without delay. In his order, Judge Hudson determined, in relevant part, that: (1) the destroyed evidence was "biological evidence" under Section 15A-268(a); (2) the Durham Clerk's Office was required to preserve the destroyed evidence for the duration of Defendant's incarceration, pursuant to Section 15A-268(a6)(3); and (3) the Durham Clerk's Office could only dispose of the destroyed evidence if the requirements of Section 15A-268(b) were met.

In June 2022, another judge, Judge Josephine Kerr Davis, held the hearing ordered by Judge Hudson. Following the hearing, Judge Davis entered an order denying Defendant's motion.[1] Defendant petitioned our Court for a writ of *certiorari* to review Judge Davis's order, which our Court allowed on 9 October 2023.[2]

II. Analysis

Defendant contends the trial court erred in denying his motion to dismiss his conviction. He presents several arguments, which we address in turn.

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1. The June 2022 Order stated, "DEFT MOTION FOR HEARING REGARDING UNLAWFUL DESTRUCTION OF EVIDENCE - PER COURTS IS DENIED." We construe this order in light of the presumption of regularity and that the trial court was denying the relief requested by Defendant (i.e., dismissal of charges), and not that the trial court was denying Defendant's motion for a hearing (which had already been granted in the March 2022 Order).

2. Defendant has also filed with our Court a *Motion for Appropriate Relief*, alleging he received ineffective assistance of counsel in his 2014 trial, and a *Motion to Amend the Record and Consider Materials Pursuant to Rule 2*. In our discretion, we deny Defendant's motion to amend, and we dismiss his MAR without prejudice to file it in the trial court.

The State also filed a *Petition for Writ of Certiorari*, asking our Court to review the March 2022 Order, arguing that the Durham Clerk's Office was not required to preserve the destroyed fingerprints because they were not designated as evidence that "may have biological evidentiary value," pursuant to N.C.G.S. § 15A-268(a3). In our discretion, we deny the State's petition and, therefore, need not determine whether the trial court correctly determined in its March 2022 Order that the Durham Clerk's Office violated the statute by destroying the fingerprint evidence.

A. Meaningful Appellate Review

First, Defendant asserts that our Court is unable to conduct a meaningful review of Judge Davis's order because her order did not include findings of fact or conclusions of law. We disagree.

Judge Davis's order merely states that Defendant's "MOTION FOR HEARING REGARDING UNLAWFUL DESTRUCTION OF EVIDENCE – PER COURTS IS DENIED." Again, in Defendant's Motion, he sought both a hearing and then the vacatur of his conviction/dismissal of the robbery charge. We construe Judge Davis's order as a denial of Defendant's request for the vacatur of his conviction/dismissal of the robbery charge and *not* of his request for a hearing. Judge Hudson already ordered the hearing, and Judge Davis held the hearing.

In any event, we note Section 15A-268, which is part of the DNA Database and Databank Act, does not expressly require that the trial court make specific findings of fact or conclusions of law. *See* N.C.G.S. § 15A-268. And we have held that an order entered pursuant to another part of the Act, Section 15A-269, does not require findings and conclusions. Specifically, in *State v. Gardner*, we declined to impose a requirement that the trial court make specific findings and conclusions for orders denying relief based on Section 15A-269. 227 N.C. App. 364, 370 (2013). Also, in *State v. Shaw*, we explained that a motion pursuant to Section 15A-269 is distinct from a Motion for Appropriate Relief ("MAR") and has "wholly separate" procedures. 259 N.C. App. 703, 706 (2018). Whereas an MAR requires the trial court to make specific findings of fact when it holds an evidentiary hearing, *see* N.C.G.S. § 15A-1420(c)(4), Section 15A-269 contains no such requirement. Similarly, we hold Section 15A-268 does not require the trial court to make specific findings of fact and conclusions of law.

B. Due Process

Defendant argues that the trial court denied him his requested remedy in Judge Davis's order without reaching the due process issue. When the State presented its argument at the June 2022 hearing, the State focused its argument on whether the destroyed fingerprints required preservation under Section 15A-268—an issue already decided by Judge Hudson in the March 2022 Order. Defendant asserts that Judge Davis adopted the State's position and ruled against Defendant because she (presumably) agreed Section 15A-268 did not require preservation of the evidence destroyed by the Durham Clerk's Office. We note it would be inappropriate for Judge Davis to rule based on those grounds, as she would impermissibly be overruling Judge Hudson's earlier order. *See Michigan Nat'l Bank v. Hanner*,

268 N.C. 668, 670 (1966) ("The power of one judge of the superior court is equal to and coordinate with that of another[.]"). *See also Calloway v. Ford Motor Co.*, 281 N.C. 496, 501 (1972) ("[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.").

We, however, do not construe Judge Davis's order as overruling Judge Hudson's earlier order. Specifically, in his order, Judge Hudson determined that the Durham Clerk's Office destroyed evidence that was required to be preserved, and he ordered a hearing, which was in his discretion. *See* N.C.G.S. § 15A-268(g) ("[T]he court *may* conduct a hearing[.]"). Judge Davis then conducted a hearing pursuant to Section 15A-268(g), which does not require a trial court to dismiss charges where evidence is improperly destroyed. Instead, it provides, "If the court finds the destruction violated the defendant's due process rights, the court shall order an appropriate remedy, which may include dismissal of charges." *Id.*

We conclude that, by denying Defendant's motion to vacate his conviction, Judge Davis necessarily found that Defendant's due process rights were not violated by the evidence destruction and, accordingly, that Defendant's requested remedy was not required. *See id.* (instructing the court "shall" grant an appropriate remedy *only if* the court finds that destruction violated the defendant's due process rights).

A defendant has the burden of proving a due process violation at the hearing, in addition to proving a violation of Section 15A-268. And based on Judge Davis's order, we conclude she determined Defendant failed to meet his burden.

Though we have not yet addressed a defendant's burden to show a due process violation specifically under Section 15A-268(g), our Supreme Court has described a defendant's burden to show a due process violation under another statute which also addresses preservation of evidence; namely Section 15-11.1, which states that "[i]f a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial." N.C.G.S. § 15-11.1. Specifically, that Court stated:

> [W]hen the State fails to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant, the unavailability of the evidence does

> not constitute a denial of due process of law unless the defendant shows *bad faith* on the part of the State.

State v. Lewis, 365 N.C. 488, 501 (2012) (cleaned up). *See also Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

Our Supreme Court has held that the bad faith requirement applies to the destruction of evidence *before* trial. Applying the Supreme Court's reasoning, we hold the same burden (i.e., showing bad faith by the State) applies for showing a due process violation based on the destruction of evidence *after* trial or after a defendant's conviction.

In this case, Defendant has failed to show that the Durham Clerk's Office acted in bad faith in destroying the evidence.

In support of his argument that the Durham Clerk's Office acted in bad faith, Defendant notes the following: Before the Durham Clerk's Office destroyed the fingerprints, the State received notice that NCCAI was investigating Defendant's case; NCCAI emailed the Durham Clerk's Office inquiring about the fingerprints before their destruction; and the Durham Clerk's Office preserved the fingerprints for several years before destroying them.

However, it is also possible the Durham Clerk's Office thought it was complying with procedure when it destroyed the evidence. There are conflicts in Section 15A-268 between (a1), which requires a custodial agency to preserve physical evidence that likely contains biological evidence, and (a3) and (a4), which only require evidence preservation when evidence is designated as having biological evidentiary value and the trial court instructs the clerk of superior court to take custody and preserve the evidence. *See* N.C.G.S. §§ 15A-268(a1), (a3), (a4).

Accordingly, Defendant failed to show the Durham Clerk's Office/the State acted in bad faith in destroying the latent fingerprint cards. Thus, the trial court did not violate Section 15A-268 when it denied Defendant his requested remedy.

AFFIRMED.

Judges MURPHY and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
DAVID NEIL BROWN

No. COA24-261

Filed 3 December 2024

1. Evidence—hearsay—exceptions—medical diagnosis or treatment—statutory rape case—forensic interview of victim

In a prosecution for statutory rape and other sexual offenses arising from a months-long sexual relationship between a married, fifty-one-year-old man (defendant) and a fifteen-year-old girl, the trial court did not err in allowing the jury to watch a video of the girl's forensic interview at a child advocacy center, which was arranged in cooperation with law enforcement's investigation of the case. Although the video contained hearsay, it was still admissible under the exception in Evidence Rule 803(4) for statements "made for purposes of medical diagnosis or treatment," where: the girl's interview occurred immediately before her physical medical examination performed that same day, the interviewer explained to the girl both the medical purpose of the interview and the importance of giving truthful answers, the girl demonstrated an awareness that she would undergo a medical examination after her interview, and the interviewer's questions reflected a primary purpose of attending to the girl's physical and mental health and safety.

2. Constitutional Law—effective assistance of counsel—statutory rape case—evidence of sexual involvement with victim—failure to object

In a prosecution for statutory rape and other sexual offenses arising from a months-long sexual relationship between a married, fifty-one-year-old man (defendant) and a fifteen-year-old girl, defendant did not receive ineffective assistance of counsel where his counsel did not object to the admission of a photograph showing a home vasectomy test taken by defendant, who allegedly used the test to persuade the girl to have sex with him. The trial court did not abuse its discretion by admitting the photograph, which was admitted for illustrative purposes only and was corroborative of the girl's testimony that defendant had had a vasectomy. Thus, since defendant's objection to the photograph would have been unsuccessful at trial, defendant could not show that his counsel's performance was deficient or prejudicial.

3. Constitutional Law—effective assistance of counsel—statutory rape case—prosecutor's closing argument—inference supported by evidence

In a prosecution for statutory rape and other sexual offenses arising from a months-long sexual relationship between a married, fifty-one-year-old man (defendant) and a fifteen-year-old girl, defendant did not receive ineffective assistance of counsel where his counsel did not object to the prosecutor's closing argument, in which the prosecutor argued that the girl's knowledge of defendant's prior vasectomy supported an inference that the two had been involved in a sexual relationship. The record, which included the girl's trial testimony and a photograph of a vasectomy test strip found on defendant's phone, contained sufficient evidence to support the prosecutor's argument, and therefore it was unlikely that an objection by defense counsel would have materially influenced the verdict or prejudiced defendant.

Appeal by defendant from judgment entered 10 April 2023 by Judge Patrick Thomas Nadolski in Rowan County Superior Court. Heard in the Court of Appeals 23 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sondra C. Panico, for the State.

Appellate Defender Glenn Gerding by Assistant Appellate Defender, John F. Carella, for the defendant-appellant.

TYSON, Judge.

David Neil Brown ("Defendant"), a fifty-one-year-old man, and Helen, a fifteen-year-old girl, engaged in a sexual relationship spanning several months. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Defendant appeals from judgment entered upon the jury's verdicts of guilty for one count of statutory rape of a child fifteen years old or younger, two counts of statutory sex offense with a child fifteen years old or younger, and three counts of indecent liberties with a child. Our review discerns no error in the jury's verdicts or in the judgments entered thereon.

I. Background

Helen and her family attended the same church as Defendant and his family. At some point, Helen's family stopped attending church services.

When Helen was thirteen or fourteen years old, Helen befriended Defendant's daughter and started riding to church with Defendant's family. In March 2017, Helen started staying over with Defendant's daughter, his wife, and Defendant on Saturday nights at Defendant's house and riding with his family to church on Sunday mornings.

Helen testified she developed a "crush" on Defendant. By the fall of 2017, Helen, Defendant, and Defendant's daughter participated in the church's praise band, which practiced on Tuesday nights. On some Tuesday nights, Defendant would drive Helen back to her home by himself.

During one of those car rides in the fall of 2017, Defendant said he noticed the way Helen had looked at him and asked Helen if she had a crush on him. Defendant also told her to keep her "britches on" and to not have sex because she was "so young." Helen lied and told him she had already had sex because she "did have a crush on him and [she] wanted him to think [she] had had experience." During another one of those car rides in the fall of 2017, Defendant kissed her in his truck when they were parked in front of Helen's house.

A few days before Helen's fifteenth birthday, she attended a wedding along with Defendant and his family. Helen spent that night at Defendant's house. Helen testified Defendant turned her around and started to touch her body over her clothes while they poked each other and played around. Defendant's wife was in the shower, and his daughter, Helen's friend, was asleep. The next morning, Defendant again turned her around and touched her over her clothes, placed her hand over his penis on the outside of his clothes, and said he would "rock her world."

After the wedding weekend, Helen testified "it was almost every Saturday that something had happened between me and him whether it was us making out or him – it eventually progressed to where he was fingering me" and that was "really all that we did" for a while. She testified and reaffirmed the first time Defendant had digitally penetrated her was after the wedding in October 2017, when she was fifteen years old. Although Helen could not remember the specific occasion, Helen testified she performed fellatio on Defendant in November 2017.

In the months preceding April 2018, Helen and Defendant had discussed having sexual intercourse. On 1 April 2018, Easter Sunday, Helen went to church with Defendant's family and then went home with them for dinner. Helen asked to stay the night at Defendant's house because she did not have school the next day.

Defendant and Helen were the only ones awake in Defendant's home that evening. Helen testified she had a conversation with Defendant, during which she expressed her fear of becoming pregnant if they had sexual intercourse. Defendant told her he previously had a vasectomy and was "shooting blanks." She did not testify Defendant showed her a picture or gave her any evidence of the vasectomy. Helen later researched what a vasectomy entails.

Helen testified she had sexual intercourse with Defendant that night in the bathroom, and clarified he had inserted his penis into her vagina. According to Helen, they also had sexual intercourse the next day while Defendant's wife and daughter were not at the house. In total, Helen claimed she and Defendant had sexual intercourse probably five more times in various locations in the house, but she could not remember specific details of those encounters. Helen also testified Defendant performed oral sex on her one time in the bathroom, but she thought this was after they had sexual intercourse in April 2018.

Helen and Defendant's relationship ended on 23 December 2018, which was the last time they engaged in any sexual activity. Helen testified she was angry with Defendant "because he wouldn't do anything with me one day."

Helen confided in her friend, Mallory, about her relationship with Defendant. Helen told Mallory she was angry after Helen had found out Defendant had sexual intercourse with his wife. Helen asked Mallory to pretend to be Defendant's wife, and Helen sent Mallory messages to "try to scare him and think that I'm telling [his wife] what he's been doing with me." Mallory "got in trouble, got her phone taken, and her mom found those messages and told [Helen's] mom."

Law enforcement was notified of Helen's and Defendant's relationship and began to investigate. Helen later sat for a recorded interview at the Terrie Hess Child Advocacy Center ("Terrie Hess") with forensic interviewer Beth McKeithan ("McKeithan").

Defendant was indicted for three counts of indecent liberties with a child, two counts of statutory sex offense with a child fifteen years old or younger, and seven counts of statutory rape of a child fifteen years old or younger.

A. Trial

The State forecasted the evidence they intended to present at trial during opening statements, which included the video recording taken at Terrie Hess "recounting everything that had transpired between her

and [Defendant]." McKeithan testified for the State and recalled interviewing Helen in February 2019. McKeithan testified Helen was referred to Terrie Hess because there was an "active investigation." McKeithan conducted the interview in a small room with "a closed-circuit TV into another small room where law enforcement and Department of Social Services can come and watch while the child[ ] [is] being interviewed."

When the State first attempted to introduce State's Exhibit 2, a DVD of the interview, defense counsel objected based on lack of foundation and to the admissibility of the recording as substantive evidence. The trial court allowed the State to examine McKeithan further, who testified a physical medical examination was conducted after the forensic interview.

McKeithan testified interviews came first "so that any concerns that come up during the interview can be addressed in the medical [exam] afterwards." The State attempted to again introduce the interview as substantive evidence, and defense counsel again objected and requested to *voir dire* the witness.

The trial court allowed defense counsel to *voir dire* McKeithan. Defense counsel renewed and continued to object based on lack of foundation and to its admissibility as substantive evidence. The prosecutor argued the video was admissible under the "statements to medical personnel for medical treatment" exception to hearsay.

In response to questioning from the trial court, McKeithan explained she did not personally explain to Helen the entire process at Terrie Hess, which included a forensic interview and medical examination, because that's "already been covered" prior to the interview. McKeithan testified Terrie Hess's protocol provides the family advocate must inform the child a medical exam follows the forensic interview, and law enforcement should inform the child the contents of the forensic interview and medical exam may be used as evidence in a criminal case. McKeithan said the law enforcement officer who referred the case to Terrie Hess was provided a copy of the DVD of the interview.

The trial court ruled the interview could "come in under the hearsay exception of 803(4)" and its admission was not outweighed by the risk of unfair prejudice. Defense counsel again objected and excepted to the ruling. The interview DVD was admitted into evidence and played in full for the jury.

The video lasted for over an hour. Forty minutes into the interview, McKeithan left the room for over thirteen minutes before returning to

answer further questions. Detective Ryan Barkley, the State's lead investigator, was present for the interview and had watched from another room. During the thirteen minutes McKeithan had stepped outside of the interview room, he had asked McKeithan to clarify several details about Helen's relationship with Defendant.

Detective Barkley testified regarding his search of Defendant's house pursuant to a warrant, his arrest of Defendant, and his search of Defendant's cell phone. Barkley said the cell phone was searched by a forensic analyzer, who used an electronic program to retrieve all the data on Defendant's phone. The program prepares a report Barkley later reviewed.

Barkley testified he saw an image of "a home vasectomy test" while searching through the results of the report. The State introduced the photograph as State's Exhibit 3 without objection. The photograph was admitted solely for illustrative purposes. On cross-examination, Barkley admitted he had no idea when the photograph was made or how it was stored on the device. The State did not introduce text messages or any other information obtained from Defendant's phone explaining why he may have taken an image of the at-home vasectomy test.

During the State's closing argument, the prosecutor said the following regarding State's Exhibit 3, the photograph of the vasectomy test:

> This is also really important. The state introduced a photo of a vasectomy test strip, right, from the defendant's phone. So let's talk about a couple of things. One, why would a 15-year-old know that her best friend's father has had a vasectomy? How does that just come up? Two, if the defendant has had a vasectomy, why is there a test strip on his phone? He's married. Presumably his wife knows he's had a vasectomy. Why is there a photo of a test strip? And the photo of the te[s]t strip is on the phone, again, there's no date stamp, I recognize that, but it's on the phone during the time that Detective Barkley is doing his investigation. He gave you a narrow window of when this was reported, when his investigation started, and when they did the dump on the defendant's cell phone.
>
> Why would that test strip be there if your wife knows you've had a vasectomy? What does your common sense and everyday reasoning tell you? Does it tell you that, if someone's having sex with someone else who's not comfortable with being ejaculate[ed] inside of, does it tell you

> that that person would take a photo to alleviate those concerns? Or would you just have the photo of the test strip just to have it? What does your everyday common sense and reasoning tell you? That is very important. And, again, she is 15 years old and knows her best friend's father has had a vasectomy. How does that happen? These are facts that you put together and you use your everyday common sense and reasoning to arrive at your conclusion.

Defendant failed to object during the State's closing argument. Defendant argued during his closing argument no date was shown on the photograph, the photo had nothing to do with the case, and "the [S]tate would have you supply a reason that fits its side of the story."

B. Verdict and Sentencing

The jury convicted Defendant of all three counts of indecent liberties with a child, both statutory sex offenses, but only one count of statutory rape of a child fifteen years old or younger. Defendant was sentenced to an active term of 192 to 291 months' imprisonment for one of his statutory sex offense with a child fifteen years old or younger convictions and one indecent liberties with a child convictions. He was sentenced to a second, consecutive sentence for 192 to 291 months' imprisonment for his second statutory sex offense with a child fifteen years old or younger conviction. Lastly, he was sentenced for 192 to 291 months' imprisonment for his statutory rape of a child fifteen years older or younger conviction. Judgment was arrested for his two remaining indecent liberties with a child convictions. Defendant entered timely notice of appeal.

II. Jurisdiction

This Court possesses jurisdiction to review a final judgment entered in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by admitting State's Exhibit 2, an hour-long video interview of the alleged victim coordinated with law enforcement, as substantive evidence over Defendant's hearsay objections. Defendant additionally argues he received ineffective assistance of counsel when his attorney failed to object to either the admission of State's Exhibit 3, an undated photograph of a test strip allegedly taken from Defendant's phone, or the State's alleged improper closing argument asking the jury to consider the photograph as substantive evidence.

IV. Hearsay

[1] Defendant argues the trial court erred by admitting State's Exhibit 2, an hour-long video interview of the alleged victim coordinated with law enforcement, as substantive evidence over Defendant's hearsay objections.

A. Standard of Review

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011) (citation omitted).

B. Analysis

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). "Hearsay is not admissible, except as provided by statute[.]" N.C. Gen. Stat. § 8C-1, Rule 802 (2023).

One such exception pertains to "statements for purposes of medical diagnosis or treatment." N.C. Gen. Stat. § 8C-1, Rule 803(4) (2023). This exception applies to "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.*

"Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000) (citations omitted). "Testimony meeting this test 'is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment.' " *State v. Burgess*, 181 N.C. App. 27, 35, 639 S.E.2d 68, 74 (2007) (quoting *Hinnant*, 351 N.C. 277, 286, 523 S.E.2d 663, 669). "In ascertaining the intent of the declarant, 'all objective circumstances of record surrounding declarant's statements' should be considered." *State v. Thornton*, 158 N.C. App. 645, 650, 582 S.E.2d 308, 311 (2003) (quoting *Hinnant*, 351 N.C. 277, 288, 523 S.E.2d 663, 670).

1. State v. McLaughlin

In *State v. McLaughlin* this Court held statements made by a child victim during a videotaped interview to a nurse at a child advocacy

center were admissible hearsay under the medical diagnosis and treatment exception. The "interview reflected the primary purpose of attending to the victim's physical and mental health and his safety[.]" *State v. McLaughlin*, 246 N.C. App. 306, 321, 786 S.E.2d 269, 281 (2016).

This Court reasoned the nurse had "explained to [the victim] that he was there for a checkup[,]" and "she asked [the victim] if he had any health issues[.]" *Id.* The nurse "emphasized to [the victim] the importance of knowing what had happened from beginning to end so they could make sure he did not have any diseases or other issues that could affect him for the rest of his life." *Id.* This Court further stated, "having the victim relate the details from beginning to end helped the medical practitioners [ ] evaluate the extent of the mental and physical trauma to which the victim was exposed, inquire as to whether the victim was out of danger, and discover whether other abusers or victims may have been involved." *Id.*

2. State v. Thornton

Similarly, in *State v. Thornton*, this Court held a child's statements to a social worker before a medical evaluation were admissible hearsay under the medical diagnosis and treatment exception because the child had "made her statements to [the social worker] with the understanding that they would lead to medical diagnosis or treatment and that the statements were reasonably pertinent to diagnosis or treatment." *State v. Thornton*, 158 N.C. App. 645, 651, 582 S.E.2d 308, 311 (2003).

This Court noted the interview with the social worker and the medical evaluation occurred on the same day. *Id.* at 650-51, 582 S.E.2d at 311. The social worker had "asked [the child] very general questions about her home life, and 'very general and nonleading' questions about any touching that may have occurred." *Id.* The social worker testified the child knew she was in a doctor's office and was aware the social worker interviewing her worked with the doctor. *Id.* The child also was told she needed to be truthful. *Id.*

3. State v. Coffey

Likewise, in *State v. Coffey*, this Court held a child sexual assault victim's videotaped interview with a forensic interviewer was admissible hearsay under the medical diagnosis and treatment exception because the sexual assault victim's "statements were made for the purposes of medical diagnosis or treatment, and the statements were reasonably pertinent to diagnosis or treatment." *State v. Coffey*, 275 N.C. App. 199, 205, 853 S.E.2d 469, 475 (2020).

In *Coffey*, the "forensic interviewer testified about the standard procedure at SafeChild, which include[d] conducting a forensic interview and a medical exam for a child-victim's diagnosis." *Id.* at 204, 853 S.E.2d at 475. In addition, "prior to an interview with a child-victim, the child-victim is given a tour, so the child knows '[it] is really important for their health, that we are going to talk about today, we need to kind of know what happened, make sure we are telling the truth, and you are going to see the doctor today for anything that you are worried about with your body.' " *Id.* at 205, 853 S.E.2d at 475. Given the forensic interviewer's testimony, this Court held the videotaped interview was properly admitted under Rule 803(4). *Id.*

4. State v. Hinnant

In contrast, the Supreme Court of North Carolina held in *State v. Hinnant* that a child-victim's statements to a psychologist during an interview were not admissible hearsay under the medical diagnosis and treatment exception because the statements "were not reasonably pertinent to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 290, 523 S.E.2d at 671.

In *Hinnant*, the interview was held "approximately two weeks after [the child-victim] had received her initial medical examination." *Id.* The Court did not find evidence in the record the child-victim was informed of "the medical purpose of the interview or the importance of truthful answers." *Id.* at 289-90, 523 S.E.2d at 671. The Court explained the child-victim could not have understood the interview was for medical purposes because the room the interview was held in was "a 'child-friendly' room" instead of a medical environment. *Id.* at 290, 523 S.E.2d at 671.

5. State v. Waddell

Following *Hinnant*, the Court also held a child sexual abuse victim's statements to a clinical psychologist were not admissible hearsay under the medical diagnosis and treatment exception because "[t]he interview took place after the initial medical examination, in a "child-friendly" room, in a nonmedical environment, and with a series of leading questions." *State v. Waddell*, 351 N.C. 413, 418, 527 S.E.2d 644, 648 (2000). The Court noted "the record also lacks any evidence that there was a medical treatment motivation on the part of the child declarant or that [the clinical psychologist] or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers." *Id.*

6. State v. Watts

Likewise, in *State v. Watts*, this Court held testimony from a child's statements to an emergency room nurse and two doctors were not admissible hearsay under the medical diagnosis and treatment exception because no evidence showed the child "understood she was making the statements to any of the three for medical purposes, or that the medical purpose of the examination and importance of truthful answers were adequately explained to her." *State v. Watts*, 141 N.C. App. 104, 108, 539 S.E.2d 37, 40 (2000). The Court reasoned, based on the emergency room nurse's testimony, the child did not understand why she was at the hospital or what was happening when she made statements to the emergency room nurse. *See id.* The Court also pointed out the doctors examined the child "three months after her initial medical examination . . . ." *Id.*

Here, Helen was aware she would be having a physical medical examination after the interview and made her statements for the purposes of medical diagnosis or treatment. Forensic interviewer McKeithan asked Helen if she was "worried or concerned about anything, [or] scared of anybody?" In response Helen stated, "One thing I'm scared about is like my dad. My dad doesn't know it yet. . . . I'm on his insurance . . . He will get a letter that I've been here." This evidence indicating Helen was worried about the visit being billed to her father's health insurance tends to show Helen was aware she was undergoing a medical examination after the interview.

Helen's forensic interview occurred immediately before her medical examination on the same day. McKeithan asked Helen " 'very general and nonleading' questions" about her relationship with Defendant. *Thornton*, 158 N.C. App. 645, 650-51, 582 S.E.2d 308, 311. McKeithan testified Terrie Hess's protocol requires the family advocate to explain the forensic interview is followed by a medical examination and for law enforcement to inform the victim that any information collected during the forensic interview or medical examination may be used as evidence in a criminal case. McKeithan also testified, when she spoke with Helen, Helen was aware a medical exam would follow her interview.

Helen's statements were reasonably pertinent to her diagnosis and treatment. McKeithan pointed out the camera to Helen and explained, "I can go back and watch all the things we talked about because I talk with a lot of kids. I want to keep everything straight." McKeithan told Helen, "I . . . need . . . as much detail as you can give me, 'cause the whole point of this is so you don't have to keep talking about it over and over."

McKeithan explained to Helen the importance of telling the truth and asked Helen, "is there anything with your body that you're concerned about or anything?" McKeithan also asked Helen if "anything else like this ever happened with anybody else besides [Defendant]?", if she and Defendant had similar relationships with other people, if Defendant ever hurt her body, or if Defendant ever asked for pictures of her body.

All of McKeithan's statements and questions "reflected the primary purpose of attending to [Helen]'s physical and mental health and [her] safety." *McLaughlin*, 246 N.C. App. at 321, 786 S.E.2d at 281. Similarly, "having [Helen] relate the details from beginning to end helped [McKeithan] to evaluate the extent of the mental and physical trauma to which [Helen] was exposed, inquire as to whether [Helen] was out of danger, and discover whether other abusers or victims may have been involved." *Id.*

The trial court did not err by admitting the recording under the statements for purposes of medical diagnosis or treatment exception to hearsay. *Id.* Defendant's argument is without merit.

V. Ineffective Assistance of Counsel

Defendant argues he was provided ineffective assistance of counsel when his attorney failed to object to: (1) the admission of State's Exhibit 3, an undated photograph of a test strip allegedly taken from Defendant's phone; and (2) the State's alleged improper closing argument asking the jury to consider the photograph as substantive evidence.

A. Standard of Review

To demonstrate ineffective assistance of counsel, a defendant must show counsel's performance was deficient and Defendant was prejudiced. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). A deficient performance falls below an objective standard of reasonableness and is so serious it effectively denies the defendant his due process rights. *Id.* "[J]udicial review of counsel's performance must be highly deferential." *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (2002) (citation omitted).

B. Analysis

Counsel's performance prejudices a defendant only when, "looking at the totality of the evidence, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (citation and quotation omitted).

There is "a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance." *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986) (citation omitted). "[W]hen this Court is able to determine that defendant has not been prejudiced by any alleged ineffectiveness of counsel, we need not consider whether counsel's performance was deficient." *State v. Augustine*, 359 N.C. 709, 719, 616 S.E.2d 515, 524 (2005) (citations omitted).

1. Admission of Photograph

[2] Defendant argues that his counsel failed to object to the admission of a photograph of a home vasectomy test, and as a result, he was provided ineffective assistance of counsel. A defendant is not prejudiced by their counsel's failure to raise a claim that would have been unsuccessful. *State v. Waring*, 364 N.C. 443, 513-14, 701 S.E.2d 615, 659 (2010); *State v. Banks*, 367 N.C. 652, 653, 766 S.E.2d 334, 336 (2014).

Here, Defendant's objection to the admission the photograph of a home vasectomy test would have been unsuccessful. Our General Statutes provide:

> Any party may introduce a photograph: video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

N.C. Gen. Stat. § 8-97 (2023).

Rule 403 of the Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023).

"The decision whether to exclude evidence under Rule 403 of the Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citations omitted). "[T]he trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation and quotation marks omitted).

The trial court properly acted within its discretion in admitting the photograph. The photograph was admitted for illustrative purposes only and was corroborative of Helen's testimony that Defendant had a vasectomy. The trial court's decision was not so arbitrary that it could not have been supported by reason.

Additionally, defense counsel extensively cross-examined Detective Barkley about the photograph, highlighting the absence of a date on the photograph and the State's reliance on one photograph out of many on Defendant's phone. There is no reasonable probability in the absence of the defense counsel's alleged error, the result of the proceeding would have been different.

2. Closing Statement

[3] Defense counsel's failure to object to the State's closing argument did not deprive defendant of effective assistance of counsel. To succeed on an ineffective assistance of counsel argument, the defendant must demonstrate counsel's failure to object was both deficient and "infected the trial with unfairness and thus rendered the conviction fundamentally unfair." *State v. Augustine*, 359 N.C. 709, 727, 616 S.E.2d 515, 529 (2005) (quoting *State v. Carroll*, 356 N.C. 526, 537, 573 S.E.2d 899, 907 (2002)).

The argument presented by the State surrounded Helen's knowledge of Defendant's prior vasectomy. The State argued a fifteen-year-old's knowledge of her best friend's dad's vasectomy supports the inference the two were involved in a sexual relationship. The State may, during its closing argument, "create a scenario of the crime committed as long [as] the record contains sufficient evidence from which the scenario is reasonably inferable." *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995).

Both the photograph of the vasectomy test strip found on Defendant's phone and Helen's testimony of her knowledge of the vasectomy were admitted into evidence at the time of the State's closing argument. An adequate evidentiary basis supported the State's argument.

Even excluding the vasectomy test strip, Helen's testimony was properly admitted and supported the State's argument. This supplemental source of evidence indicating Helen was aware of Defendant's purported vasectomy tends to show it was unlikely an objection to the State's arguments would have materially influenced the verdict or prejudiced Defendant. Defendant has failed to show his counsel's performance was deficient or prejudicial. Defendant was not deprived of his right to effective assistance of counsel. *See id.*

VI. Conclusion

The trial court did not err by admitting the Terrie Hess Center's video interview of Helen under the "statements for purposes of medical diagnosis or treatment" exception to hearsay. Defendant was not prejudiced by any purported ineffective assistance of counsel.

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We discern no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge DILLON and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
KEVIN BURNETT, DEFENDANT

No. COA23-944

Filed 3 December 2024

Firearms and Other Weapons—possession by a felon—motion to suppress—vehicle search incident to traffic stop

In a prosecution for possession of a firearm by a felon, the trial court did not err in denying defendant's motion to suppress evidence seized in the search of his vehicle during a traffic stop where: (1) the eight findings of fact challenged by defendant were each supported by competent evidence, including video evidence obtained from the body-worn cameras of the two law enforcement officers involved in the traffic stop; and (2) the ten challenged conclusions—focused on the existence of reasonable suspicion of criminal activity justifying the traffic stop, the length of the stop, and the alleged prolonging of the traffic stop—were supported by the court's findings of fact. Specifically, the court found that defendant's vehicle had an inoperable tag light and a search of the license plate number revealed that the registered owner had a suspended driver's license, thus permitting a traffic stop to confirm or dispel the reasonable suspicion of those traffic violations; that the stop continued even once the officers determined that defendant was not operating the vehicle because the actual driver admitted that she was driving without a license; and that the 18-minute length of the stop was not

unreasonable where the citing officer was still writing a traffic ticket for the unlicensed driver as a K-9 unit (which was already on the scene) performed a "sniff" of the vehicle.

Appeal by defendant from order entered 9 May 2023 by Judge Alyson A. Grine in Orange County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General J. Aldean Webster, III, for the State-appellee.

Mr. Darren Jackson, for defendant-appellant.

GORE, Judge.

Kevin Burnett ("defendant") is appealing his conviction for Possession of a Firearm by a Felon. Defendant argues several of the trial court's findings of fact are not supported by competent evidence. Further, defendant argues that the trial court erred in denying his motion to suppress because the search of the vehicle was unconstitutional. Upon review, we affirm the denial of the motion to suppress.

I. Background

On the evening of 16 October 2020, Orange County Sheriff Deputy R.B. Triplett ("Deputy Triplett") noticed an inoperable tag light above the rear license plate of a vehicle at a gas station. Deputy Triplett ran the license plate number of the vehicle while an occupant of the vehicle was pumping gas. Deputy Triplett learned the vehicle's registered owner, defendant, had a suspended license. It was unclear to Deputy Triplett at the gas station whether defendant was the driver of the vehicle.

Deputy Triplett initiated a traffic stop based on the vehicle's inoperable tag light and because the registered owner had a suspended license. Two additional Orange County deputies, Lieutenant B.M. Lassiter and Deputy Ashley, were present at the traffic stop as cover vehicles. Deputy Ashley's patrol vehicle contained a K-9 unit. All involved deputies were a part of a special Orange County "Strike Team" that investigates narcotics with K-9 units. Each deputy wore a Body Worn Camera ("BWC") that recorded the traffic stop.

When the deputies approached the vehicle at the traffic stop, they learned that defendant's daughter, Shantese Burnett ("Shantese"), was the driver. Deputy Triplett stated the two reasons for the traffic stop and

asked for her license. Shantese admitted to the deputies that she did not have a license. Deputy Triplett returned to his patrol vehicle to write a citation for the unlicensed driver, Shantese. Lieutenant Lassiter and Deputy Ashley remained by defendant's vehicle. Defendant was seated in the front passenger seat and appeared intoxicated.

While Deputy Triplett was writing the citation in his patrol car, Lieutenant Lassiter discussed with Deputy Triplett how they wanted to proceed with the traffic stop. Lieutenant Lassiter stated the occupants "would be a handful" and defendant was "extremely intoxicated." Deputy Triplett radioed for backup officers, who arrived shortly after the radio call. While Deputy Triplett was still in his patrol vehicle preparing the citation, all occupants exited defendant's vehicle at the request of the other officers. At Deputy Triplett's request, Deputy Ashley initiated his K-9 to sniff the vehicle. The K-9 positively alerted for narcotics on the passenger side of the vehicle. Defendant admitted that his friend had marijuana in his car two days prior, but defendant had thrown it out. The deputies searched the vehicle. They did not find drugs in defendant's vehicle, but they found a gun in the passenger-side glove compartment. The deputies arrested defendant for possession of a firearm by a felon. After the vehicle search and defendant's arrest, Shantese was issued a No Operator's License citation by Deputy Triplett. No citation was written for the inoperable tag light.

Defendant was indicted on 22 March 2021 by an Orange County grand jury for Possession of a Firearm by a Felon. On 28 October 2022, defendant filed a motion to suppress evidence seized from the search of defendant's vehicle during the traffic stop. Following a suppression hearing on 8 May 2023, the trial court entered a written order denying the motion. Defendant subsequently entered a guilty plea pursuant to *Alford* and reserved the right to appeal. The court sentenced defendant to 13 to 25 months' imprisonment but suspended the sentence to 24 months of supervised probation. Defendant timely appealed pursuant to N.C.G.S § 15A-979(b) on 9 May 2023.

II. Standard of Review

The standard of review for a motion to suppress consists of two parts. First, this Court must determine whether competent evidence supports the trial court's findings of fact. *State v. Wainwright*, 240 N.C. App. 77, 83–84 (2015). If supported by competent evidence, findings of fact are treated as binding on appeal, even if evidence is conflicting. *State v. Simmons*, 201 N.C. App. 698, 700–01 (2010). Second, this Court reviews whether the findings of fact "support the trial court's conclusions

of law." *State v. Brooks*, 337 N.C. 132, 141 (1994). The conclusions of law are reviewed de novo. *Simmons*, 201 N.C. App. at 701. Under de novo review, this Court considers the "legal conclusion[s] anew and freely substitute[s] [its own] judgment for that of the trial court." *State v. Campola*, 258 N.C. App. 292, 298 (2018) (citation omitted).

III. Discussion

A. Findings of Fact

Defendant contends that eight of the trial court's factual findings are unsupported by competent evidence. Defendant challenges one oral finding of fact made by the court, but "as a general proposition, the written and entered order or judgment controls over an oral rendition of that order or judgment." *In re O.D.S.*, 247 N.C. App. 711, 721 (2016). Additionally, Defendant challenges seven findings of fact ("FOF") in the court's written order:

> 2. Deputy Triplett stopped the vehicle because the registered owner, Kevin Burnett ("the Defendant"), had a suspended driver's license and because the vehicle did not have an operable tag light.
>
> . . .
>
> 6. While in his patrol car, Deputy Triplett performed tasks including the following: checked the status of Ms. Burnett's driver's license in his data base, inspected the vehicle registration card, checked the identifying information provided by all of the occupants of the car to make sure it was valid, and prepared a handwritten traffic citation.
>
> . . .
>
> 9. At approximately 10:53 pm, Deputy Triplett is still seated in his patrol car, looking at court dates. Lieutenant Lassiter approaches and tells him "we're going to probably have our hands full . . . he is drunk, drunk, raising all kinds of . . . ." Deputy Triplett radios for backup[.] The interaction takes less than a minute.
>
> 10. At approximately 10:57 pm, Deputy Triplett was still seated in his patrol car conducting his investigation when Lieutenant Lassiter approached the driver's side of Deputy Triplett's patrol car and provided an update that took approximately 24 seconds.

> 11. The update that Lieutenant Lassiter provided to Deputy Triplett included information that Lieutenant Lassiter was going to have Deputy Ashley "run a dog" or have his canine partner sniff the Silver Infiniti. Lieutenant Lassiter also said that the Defendant appeared "extremely intoxicated" and that the occupants of the Infiniti were "probably going to be a handful" so he wanted more people.
>
> 12. Shortly after the update, backup officers arrived from the Orange County Sheriff's Department.
>
> . . .
>
> 14. A deputy patted down the Defendant.

1. Evidence Competency

"Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625 (2014) (citation omitted). As previously stated, findings of fact are binding on appeal if supported by competent evidence, even if a different outcome could be reached. *Simmons*, 201 N.C. App. at 700–01. "The trial court's findings upon conflicting evidence are accorded great deference upon appellate review." *State v. Ford*, 194 N.C. App. 468, 476 (2008) (citation omitted). The trial court "is in the best position to resolve" evidentiary conflicts. *State v. Williams*, 362 N.C. 628, 632 (2008) (citation omitted).

The inoperable tag light in FOF No. 2 is supported by video of the traffic stop obtained from Deputy Triplett's and Deputy Ashley's BWC. When Deputy Triplett approached the vehicle's driver, he stated the reason for conducting the traffic stop was due to an inoperable tag light. Deputy Triplett also testified that there was an inoperable tag light on defendant's vehicle. Thus, there is competent evidence to support FOF No. 2.

FOF No. 6 states that Deputy Triplett checked the status of licenses in his database, inspected the vehicle registration card, and prepared a handwritten traffic citation while in his patrol vehicle during the traffic stop. This factual finding is supported by Deputy Triplett's BWC exhibit in which he performs the various tasks as stated in FOF No. 6, prior to issuing the written citation. Additionally, Deputy Triplett's testimony in the record states the actions he took while in the patrol vehicle. While Deputy Triplett may have done a few tasks beyond what the court found, they were minimal and did not alter FOF No. 6. There is competent evidence to support FOF No. 6.

The length of the interactions described in FOF No. 9 is supported by the video footage from Deputy Triplett's BWC. In the video, it is shown that Deputy Triplett's and Lieutenant Lassiter's conversation took less than one minute.

Similarly, the length of the interaction in FOF No. 10 is supported by the video footage from Deputy Triplett's BWC. The update with Lieutenant Lassiter of what Deputy Triplett wanted to do with the vehicle occupants took approximately twenty-four seconds in the video footage.

FOF No. 11 and FOF No. 12 are supported by BWC video footage. Within the video footage, the deputies discussed defendant's intoxication level, that defendant and the other vehicle occupants "would be a handful," and their decision to have the K-9 dog "sniff" the vehicle. Even though the court made a clerical error by switching the officers' names, this does not substantively disrupt the finding. *See Bank of Hampton Rds. v. Wilkins*, 266 N.C. App. 404, 407–08 (2019) (a clerical error that occurs from writing or copying the record does not affect the substantial rights of a party and does not invalidate a finding).

Finally, defendant argues that FOF No. 14 is not explained in testimony; however, we determine the finding is supported by competent evidence. The footage from Deputy Triplett's BWC shows defendant raising his arms above his head after exiting the vehicle at the request of the deputies.

The trial court was in the best position to resolve any evidentiary conflict in its factual findings, even if a different conclusion could have been reached. *Williams*, 362 N.C. at 632. The challenged findings of fact made by the trial court are supported by competent evidence, the BWC video footage, and witness testimony. Because the challenged findings are supported by competent evidence, they are binding on appeal.

B. Constitutionality of the Vehicle Seizure

Defendant challenges ten of the trial court's conclusions of law. Even if the findings of fact "are supported by competent evidence" and are binding on appeal, the trial court's conclusions of law are still "fully reviewable" by this Court. *Ford*, 194 N.C. App. at 476.

Defendant argues that the traffic stop was unconstitutional under the United States Constitution and the North Carolina Constitution because (1) the original stop was not supported by reasonable suspicion, (2) the officers lacked reasonable suspicion to extend the traffic stop, and (3) the stop was illegally prolonged. The challenged conclusions of law ("COL") are:

5. The traffic stop was a lawful seizure supported by reasonable suspicion.

. . .

7. The length of time it took Deputy Triplett to complete the investigation and citation following the traffic stop, approximately 18 minutes, was not unreasonable.

8. Deputy Triplett was conducting permissible checks and ordinary inquiries incident to a traffic stop and diligently investigating the traffic stop in his patrol car until approximately 11:03pm.

9. No unlawful extension of the traffic stop took place when Lieutenant Lassiter approached Deputy Triplett and told him the Defendant was impaired and belligerent and backup was needed, and Deputy Triplett radio[e]d for backup, an interaction that lasted less than a minute and took place when Dep[u]ty Triplett was seated in his patrol car investigating the traffic stop.

10. No unlawful extension of the stop took place when Lieutenant Lassiter gave Deputy Triplett an update that lasted approximately 24 seconds while Dep[uty] Triplett was seated in his patrol car investigating the traffic stop.

. . .

13. Law enforcement officers developed reasonable suspicion of drug activity to extend the stop and search the vehicle where the Defendant appeared intoxicated, the canine alerted on the vehicle, and the Defendant told officer that he had a history of drug use and his friend recently had a "blunt" in the car.

. . .

15. Law enforcement officers developed reasonable, articulable suspicion to extend the stop while Deputy Triplett was still addressing the traffic violation that was the original mission of the stop.

. . .

18. The extension of the stop beyond the time required to complete the mission was justified by new reasonable suspicion of criminal conduct and was lawful.

> 19. The State established by a preponderance of the evidence that the challenged evidence was lawfully obtained and admissible.
>
> 20. Defendant's rights under the United States and North Carolina Constitutions and North Carolina statutes were not violated.

The Fourth Amendment of the United States Constitution provides an individual right to be protected from unreasonable searches and seizures by the government and is applied to the states through the Fourteenth Amendment. *State v. Watkins*, 337 N.C. 437, 441 (1994). Similarly, this right is also afforded specifically in Article I, § 20 of the North Carolina Constitution, which states "[g]eneral warrants . . . to search . . . without evidence of the act committed, or to seize any person or persons not named . . . are dangerous to liberty and shall not be granted." "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few . . . established and well-delineated exceptions." *State v. Fizovic*, 240 N.C. App. 448, 452 (2015) (citation omitted).

1. Reasonable Suspicion of Criminal Activity

One of the well-delineated exceptions that allows warrantless searches was established in *Terry v. Ohio*, 392 U.S. 1 (1968). The *Terry* exception allows law enforcement to conduct warrantless investigative searches and seizures by briefly detaining a person. *State v. Tripp*, 381 N.C. 617, 632 (2022). The officer must have a reasonable, articulable suspicion. I*d*. Reasonable suspicion is a low threshold, based upon a totality of the circumstances. *See State v. McClendon*, 350 N.C. 630, 637 (1999). Law enforcement officers need only reasonable suspicion that criminal activity "may be underway" to conduct an investigative seizure. *State v. Barnard*, 184 N.C. App. 25, 29 (2007). If an officer observes a traffic violation, he has reasonable and articulable suspicion to make a traffic stop. *State v. Alvarez*, 385 N.C. 431, 433 (2023). An officer's investigative seizure that is supported by reasonable suspicion is limited to addressing the purpose of the individual's detention to either confirm or dispel the officer's reasonable suspicion. *State v. Wright*, 290 N.C. App. 465, 473–74 (2023).

Defendant challenges COL Nos. 5, 19, and 20 on the basis that the officer lacked reasonable suspicion to stop the vehicle. Here, Deputy Triplett's initial suspicion arose from an inoperable tag light above the license plate of defendant's vehicle. Once Deputy Triplett ran the license

plate, he discovered the registered owner of the vehicle had a suspended license. Under the *Terry* exception, Deputy Triplett established the requisite reasonable suspicion when he observed the traffic violation; thus, he was allowed to conduct an investigatory seizure based on that suspicion. His investigatory seizure was limited to addressing the reasonable suspicion that prompted the traffic stop and to either confirm or dispel that suspicion. *Id.* at 474.

Moreover, an officer who is aware of a vehicle that is registered to an unlicensed owner has reasonable suspicion to conduct a traffic stop. *State v. Hess*, 185 N.C. App. 530, 534 (2007). The officer may only conduct the traffic stop on this basis if they do not know who is driving the vehicle. *Id.* In *Hess*, the deputy was unable to identify who was driving the vehicle that was registered to an unlicensed owner. *Id.* at 530–31. This Court determined it was reasonable for the deputy to infer the unlicensed registered owner was driving the vehicle, "absen[t] . . . evidence to the contrary." *Id.* at 535.

Because Deputy Triplett could not tell who was operating defendant's vehicle at the time he ran the license plate, he had permissible reasonable suspicion pursuant to *Hess* to stop the vehicle. Therefore, Deputy Triplett lawfully conducted a traffic stop based upon reasonable suspicion that defendant was driving with a suspended license. Beyond this, Deputy Triplett also had reasonable suspicion to conduct a traffic stop on the basis that the vehicle had an inoperable tag light.

2. Length of the Traffic Stop

The investigative seizure based on an officer's reasonable suspicion is also limited in its duration. *State v. Bullock*, 370 N.C. 256, 257 (2017). The seizure is limited to the amount of time "necessary to accomplish the mission . . . unless reasonable suspicion of another crime, [or traffic violation,]" arises before the original mission is completed. *Id.* The amount of time necessary in a traffic stop "includes ordinary inquiries incident to the traffic stop." *Id.* (citation omitted). "Once the original purpose of the stop [is] addressed, there must be grounds which provide a reasonable and articulable suspicion . . . to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816 (1998).

Defendant challenges COL Nos. 18, 19, and 20 on the grounds that the officers lacked reasonable suspicion to continue the traffic stop once they determined defendant was not driving the vehicle. As provided in FOF No. 2, the original mission for Deputy Triplett's traffic stop of defendant's vehicle was to address the inoperable tag light and determine whether defendant was operating the vehicle with a suspended

license. However, as stated in FOF No. 3, before the original mission was complete, Shantese admitted to the deputies that she was driving without a license. Her statement provided the deputies with additional "reasonable and articulable suspicion . . . to justify further delay" of the traffic stop. *Id.* Therefore, the Orange County deputies developed additional reasonable suspicion to lawfully extend the traffic stop beyond the original mission, because of this additional traffic violation.

3. Prolonging a Traffic Stop

As stated above, the United States and North Carolina Constitutions protect an individual from unreasonable searches and seizures, apart from a few "well-delineated exceptions" that allow for warrantless searches and seizures. *Fizovic*, 240 N.C. App. at 452. The warrantless seizure is limited in its duration. *Bullock*, 370 N.C. at 257. Defendant challenges COL Nos. 7, 8, 9, 10, 13, 15, 18, 19, and 20, on grounds that the traffic stop was illegally prolonged, making it unconstitutional.

In COL No. 7, the court indicated that the investigatory stop that lasted approximately 18 minutes was not unreasonable. The court also indicated in COL No. 15, that the officers developed reasonable suspicion to extend the stop since Deputy Triplett was still addressing the traffic violation. While Deputy Triplett was writing the citation for driving without a license in his patrol vehicle, the other deputies used the K-9 unit to search the vehicle, as stated in FOF Nos. 15 and 16.

A K-9 unit may be deployed without any level of individualized suspicion but may not prolong a traffic stop. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). "The tolerable duration of . . . the traffic-stop [is] . . . to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). Because Deputy Triplett was still writing the traffic citation while the K-9 sniffed the vehicle, the use of the K-9 unit was within the "tolerable duration" of the stop to address any related safety concerns. *Id.*

Defendant attempts to distinguish the present case from *State v. France*; however, the facts in *France* are analogous to the present case. 279 N.C. App. 436 (2021). In *France*, an officer, who was part of a "street crimes unit," conducted a traffic stop for a broken taillight. *Id.* at 437. After learning the driver did not have a driver's license, the officer requested a K-9 unit come to the traffic stop location. *Id.* While the officer was in her patrol car drafting the driver's citation, the K-9 unit arrived and investigated the vehicle. *Id.* at 438. The K-9 positively alerted for narcotics. *Id.* The unlicensed driver was arrested for various drug offenses based on the evidence obtained from the vehicle search

after the positive alert from the K-9 unit. *Id.* at 438–39. The use of the K-9 unit was permissible because, although the request for a [K-9] sniff was unrelated to the reasons for the traffic stop, the request "did not measurably extend the duration of the stop." *Id.* at 443.

Here, the K-9 unit was at the scene from the start of the traffic stop. While it was unrelated to the purpose of the traffic stop, which was to address the unlicensed driver and inoperable tag light, the K-9 unit was deployed while Deputy Triplett was still addressing the traffic violation. The K-9 unit did not "measurably extend the duration of the [traffic] stop." *Id.* The K-9 unit investigated the vehicle while Deputy Triplett was still in his patrol vehicle writing a citation for the unlicensed driver, like the officer in *France*. While the K-9 unit was not used to accomplish the original mission of the traffic stop, the use of the K-9 did not unconstitutionally prolong the stop. The trial court's conclusions of law are supported by the findings of fact and correctly state that the extension of the traffic stop was constitutional.

The Orange County deputies had lawful reasonable suspicion to conduct a traffic stop of the vehicle based on an inoperable tag light and a registered owner with a suspended license. Shantese's confession to the deputies that she did not have a license provided the officers with further reasonable suspicion to extend the traffic stop. Because Deputy Triplett was still preparing the daughter's citation, the K-9 unit did not measurably prolong the stop. The trial court's findings of fact support its conclusions of law. Therefore, the trial court did not err by denying defendant's motion to suppress the evidence discovered during a lawful search of the vehicle.

IV. Conclusion

For the foregoing reasons, the trial court did not err by denying defendant's motion to suppress.

AFFIRMED.

Chief Judge DILLON and Judge THOMPSON concur.

STATE OF NORTH CAROLINA
v.
PRINCE ALI CHAMBERS

No. COA23-1057

Filed 3 December 2024

Search and Seizure—search of car—drug investigation—reasonable suspicion—specific and articulable facts

In a drug trafficking prosecution arising from the search of a car in which defendant was riding as a passenger, specific and articulable facts, based on competent evidence, supported a reasonable suspicion of criminal activity, including: a known, reliable confidential informant provided information about defendant's drug dealings, residence, and cars that were used to conduct drug transactions; officers began surveilling defendant's residence and cars; drugs and drug paraphernalia were discovered in a trash pull at defendant's home; officers obtained a search warrant to search defendant's person and residence; and, before the warrant was executed, defendant was observed placing a box and bag from his home into one of the identified cars, which led an officer to conduct the car stop. Where the stop was based on reasonable suspicion, the trial court did not err, much less plainly err, by denying defendant's motion to suppress evidence gathered from the car. Further, defense counsel was not ineffective for failing to object to the admission of that evidence.

Appeal by Defendant from judgment entered 17 March 2023 by Judge Louis A. Trosch, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for the State-Appellee.

Mark Hayes for Defendant-Appellant.

COLLINS, Judge.

Defendant Prince Ali Chambers appeals from judgment entered upon a jury's guilty verdicts of two counts of trafficking in cocaine. Defendant argues that he received ineffective assistance of counsel because his attorney did not object to the admission of evidence gathered during a car stop. Alternatively, Defendant argues that the trial court plainly

erred when it denied his motion to suppress and admitted the evidence obtained during the car stop. Because reasonable suspicion existed to support the stop, the trial court did not err, much less plainly err, by denying Defendant's motion to suppress, and Defendant did not receive ineffective assistance of counsel by virtue of the fact that his attorney did not object to the admission of evidence gathered during the stop.

I. Background

Defendant was indicted on 19 November 2018 for two counts of trafficking in drugs by (1) "possess[ing] 400 grams or more of cocaine" and (2) "transport[ing] 400 grams or more of cocaine."

On 10 March 2023, defense counsel filed a motion to suppress evidence seized during a car stop in which Defendant was a passenger and a motion to suppress evidence seized during a search of Defendant's house. The trial court held a hearing on both motions on 13 March 2023. During that hearing, defense counsel elected not to proceed fully with the motion to suppress the evidence seized during the car stop. Defense counsel withdrew his arguments regarding the detention of Defendant and regarding the search of the car, stating, "We're just talking about whether [the officer] had probable cause right now to stop this [car]. That's the end of the inquiry."

The trial court then stated, "That's all – your argument is just that they never should've stopped the vehicle," and defense counsel replied, "Yes." The trial court announced that defense counsel had elected not "to proceed with any arguments that the actual stop of the [car], or the circumstances that led to the [car] being searched, were unconstitutional. Rather, [defense counsel] limited his arguments to the stop of the [car], which was supported by the search warrant." The trial court then denied Defendant's motion to suppress the evidence gathered during the car stop. The case proceeded to trial.

The evidence at trial tended to show that in August 2017, a known, reliable confidential informant identified Defendant to Charlotte Mecklenburg Police Department ("CMPD") detectives as someone "selling heroin . . . on the streets of Charlotte." The confidential informant showed detectives where Defendant lived at 4425 Stonefield Drive and identified three vehicles that Defendant had used to distribute narcotics: a red Ford Explorer, a black Jeep Wrangler, and a black Range Rover. On 4 August 2017, detectives began surveilling Defendant's residence. They saw Defendant and Travis Johnson coming and going from the residence and saw a black Range Rover and a red Ford Explorer parked in the driveway. Detectives then saw Johnson drive the black Range Rover

to a Cookout restaurant and conduct a "suspected narcotic transaction with an individual in the Cookout parking lot." Detectives conducted a traffic stop of the black Range Rover and positively identified Johnson as the driver; Johnson told detectives that Defendant was his brother and that they lived together at the 4425 Stonefield Drive residence.

On 11 August 2017, detectives again surveilled Defendant's residence. Around 10:00 a.m., Detective Stephanie Browder saw Defendant walk out of his residence with a full trash bag and place the bag in the trash can on the curb at the end of Defendant's driveway. Approximately twenty minutes later, Detective Browder saw Johnson drive away from the residence in the black Jeep Wrangler and drive to a "well-known drug transaction location"; detectives saw Johnson meet with several different individuals in the parking lot of a supermarket and loiter in the parking lot, and then witnessed Johnson "rolling [a] marijuana joint in the vehicle." Based on these observations, Detective Todd Hepner stopped the Jeep and conducted a probable cause search based on the odor of marijuana coming from the Jeep. He seized eight grams of suspected heroin, seven grams of marijuana, a set of digital scales, and a .40 caliber firearm from Johnson.

That same day, another detective conducted a trash pull at Defendant's residence. From the trash can the detective pulled a sandwich bag with a white powdery residue in it, corner baggies with white residue in them, and a quart-sized vacuum-sealed bag with marijuana odor and residue inside it. Based on all of the foregoing evidence, on 11 August 2017, detectives obtained a search warrant for Defendant's residence and his person to search for "controlled substances including heroin and evidence of ownership, access, possession, and control" and "other evidence of drug sales or possession."

After the search warrant was issued, but before it was executed on the residence or Defendant's person, Detective Browder saw a black sedan pull into the driveway of Defendant's residence. Detective Browder watched Defendant walk outside the residence with a box, place the box in the backseat of the driver's side of the car, and return into the residence. Defendant reemerged from the residence with a blue bag, placed the bag in the backseat of the driver's side of the car, and got into the front passenger's seat. The car pulled away from the residence with Defendant inside; Detective Browder began following the car.

Detective Browder relayed all of these observations to other surveilling officers via radio, one of whom was Detective Hepner. Detective Hepner—aware that a search warrant had already been issued to search

Defendant's person—located and stopped the car about a half of a mile from Defendant's residence. As soon as the car was stopped, Defendant exited the car and approached Detective Hepner's vehicle. Detective Hepner handcuffed Defendant and waited for backup. Detective Browder arrived on scene, saw the car in which Defendant had been a passenger, "[c]onfirmed that [the car] was the same one that [she] was keeping eyes on," and saw that Defendant had gotten out of the car. She also saw that the box and blue bag that she had witnessed Defendant place in the car were still located in the backseat of the car. She notified Detective Hepner that it "was the correct vehicle, the correct box, and blue bag that [she] observed." Detective Hepner then walked his K-9 around the car, and the K-9 alerted to the odor of narcotics on the driver's side of the car in between the driver's and rear passenger's doors. Detective Hepner searched the car and found 1,613 grams of cocaine in the blue bag and a kilo press in the box in the backseat of the car. He found flip phones on Defendant's person. At trial, defense counsel did not object to the State's evidence obtained from the car stop.

The jury found Defendant guilty of trafficking cocaine by transportation and of trafficking cocaine by possession. The trial court sentenced Defendant to 175 to 222 months' imprisonment. Defendant gave timely written notice of appeal on 20 March 2023.

II. Discussion

Defendant argues that he received ineffective assistance of counsel because his defense counsel did not object to the admission of evidence gathered during the car stop. Alternatively, Defendant argues that the trial court plainly erred when it denied his motion to suppress and admitted the evidence obtained during the car stop.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel, which necessarily includes the right to effective assistance by counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* sets forth a two-part test for ineffective assistance of counsel: (1) the defendant must show that counsel's performance was deficient and (2) "the defendant must show that the deficient performance prejudiced the defense" by showing that " 'counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.' " *State v. Braswell*, 312 N.C. 553, 562 (1985) (quoting *Strickland*, 466 U.S. at 687). The Supreme Court further elaborated on the prejudice prong, explaining that "[t]he 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.

Under North Carolina's plain error standard, we have held:

> 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 jury's 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 (2012) (quotation marks, brackets, and citations omitted). Thus, plain error should only be found where "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 . . . ." *State v. Odom*, 307 N.C. 655, 660 (1983) (quotation marks, brackets, and citation omitted).

Our Court in *State v. Lane* examined and compared "the plain error standard and ineffective assistance of counsel test by this Court [and] our Supreme Court." 271 N.C. App. 307, 313-16 (2020). We explained that "[p]rejudice under plain error requires that the *trial court's* error have had a 'probable impact' on the jury's finding of guilt" such that it " 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." *Id.* at 313 (citations omitted). For plain error to be found, "it must be probable, not just possible, that . . . the jury would have returned a different verdict." *Id.* (citations omitted). "In contrast, prejudice under the ineffective assistance of counsel test requires a showing of 'reasonable probability' that, 'but for *counsel's* unprofessional errors, the result of the proceeding would have been different.' A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations omitted). "Under the reasonable probability standard, a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* (quotation marks and citations omitted). However, the defendant does need to demonstrate that "at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (citation omitted). Under this reasonable probability standard, the "likelihood of a different result must be substantial, not just conceivable" and "it is something less than that required under plain error." *Lane*, 271 N.C. App. at 314 (quotation marks and citations omitted). Despite the differences in prejudice standards

for the ineffective assistance of counsel claim and the plain error claim, both require the defendant to first show error. *See id.* at 313-16.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68 (2011) (citation omitted). "Unchallenged findings of fact are binding on appeal." *State v. Fizovic*, 240 N.C. App. 448, 451 (2015) (citation omitted). "We review the trial court's conclusions of law on a motion to suppress de novo." *State v. Ladd*, 246 N.C. App. 295, 298 (2016) (italics and citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33 (2008) (quotation marks, italics, and citations omitted).

The Fourth Amendment protects individuals "against unreasonable searches and seizures," U.S. Const. amend. IV, and the North Carolina Constitution provides similar protection. *See* N.C. Const. art. I, § 20. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief, . . . [and] [t]raffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1 (1968)." *State v. Styles*, 362 N.C. 412, 414 (2008) (quotation marks and citations omitted). "Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Id.* (quotation marks and citation omitted). "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence' . . . [and] is satisfied by 'some minimal level of objective justification.' " *Id.* (quotation marks and citations omitted). This Court requires that a stop "be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441 (1994) (citation omitted). Moreover, we "must consider 'the totality of the circumstances—the whole picture'—in determining whether a reasonable suspicion . . . exists." *Id.* (citation omitted).

Here, the trial court made the following findings of fact that are supported by competent evidence:

> 5. The defendant withdrew his argument in the motion to suppress regarding the temporary detention of the defendant during the K9 sniff of the vehicle. Therefore, the Court only addressed whether there was probable

cause within the search warrant, and whether there was reasonable suspicion to stop the vehicle pursuant to that search warrant.

6. Within the search warrant, the following information was given:

> a. During the month of August 2017, a confidential reliable informant provided information to Charlotte-Mecklenburg Police Detectives on an individual identified as [Defendant] who was selling heroin on the streets of Charlotte.
>
> b. This confidential informant had a history of providing reliable information to the police department. The confidential informant had been working with the police for over five years.
>
> c. The confidential informant showed the detectives where [Defendant] resides . . . and advised that [Defendant] would operate a red Ford Explorer, a black Jeep Wrangler, or a black Range Rover to distribute narcotics.
>
> d. While conducting surveillance at the given address, detectives observed the black Range Rover and red Ford Explorer in the driveway of the house.
>
> e. Detectives saw both [Defendant] and Travis Johnson walk in and out of the residence.
>
> f. Detectives observed Travis Johnson enter the black Range Rover and conduct a suspected hand-to-hand narcotics transaction with an individual at the Cookout on West Sugar Creek Road in Charlotte.
>
> g. Detectives conducted a traffic stop on this vehicle and identified Travis Johnson as the person driving the black Range Rover. He told officers he lived with his brother on Stonefield Drive.
>
> h. On August 11, 2017, officers observed Travis Johnson and [Defendant] walk in and out of the residence at 4425 Stonefield Drive.
>
> i. On that date, detectives saw Travis Johnson leave in the black Jeep Wrangler and drive to [a supermarket].

> Officers eventually made contact with Johnson. Officers did a probable cause search of the vehicle and found 8 grams of suspected heroin, 7 grams of suspected marijuana, a set of digital scales, and a Smith and Wesson .40 caliber firearm.
>
> j. On that same date, officers conducted a trash pull at [Defendant's] residence. In the trash, detectives located a quart size vacuum sealed bag that had the odor and residue of marijuana on it. Detectives also located a sandwich baggie with white powdery residue in it. Detectives also located corner baggies with a white residue.
>
> . . . .
>
> 10. Detective Hepner with the Charlotte-Mecklenburg Police Department stated that he received information that [Defendant] was leaving [his] residence as the passenger in a black Nissan sedan.
>
> 11. Detective Hepner stated he was nearby and saw the vehicle described.
>
> 12. Detective Hepner stated he confirmed he was behind the correct vehicle and based on the search warrant for [Defendant], he effectuated a traffic stop on the vehicle.
>
> 13. [Defendant] was identified as the passenger in that vehicle.
>
> . . . .

The trial court then concluded as a matter of law that "the search warrant for [Defendant's residence] and [Defendant] that was applied for and executed on August 11, 2017 contains sufficient probable cause, and therefore Detective Hepner had reasonable suspicion to pull over the vehicle containing [Defendant]."

The trial court's supported findings of fact show that: a known, reliable confidential informant provided information to CMPD detectives about Defendant and his history of selling drugs in Charlotte; the confidential informant provided CMPD detectives with reliable information regarding the house where Defendant lived with Johnson and the types of vehicles from which Defendant distributed narcotics; CMPD detectives saw Defendant entering and exiting the house and driving the vehicles identified by the confidential informant; CMPD detectives

saw Johnson conduct narcotics sales from the vehicles identified by the confidential informant; CMPD detectives searched Johnson and discovered marijuana, heroin, digital scales, and a firearm; CMPD detectives conducted a trash pull from Defendant's house, which contained bags with traces of marijuana and a white, powdery substance; and, following the discovery of drugs and drug paraphernalia on Johnson and the trash pull at Defendant's house, Detective Hepner received information that Defendant was leaving the home in a specific car. Detective Hepner was also aware that a search warrant had been issued for Defendant's person and his residence. Moreover, the evidence shows that Detective Browder saw Defendant walk out of his residence while holding a box, place that box in the back seat of the car, walk back into his residence wherein he retrieved a blue bag, walk back to the car and place the blue bag in the back seat of the car, and then get into the front passenger seat of the car before the car left the driveway.

This information amounts to "specific and articulable facts" that support Detective Hepner's stop of the car in which Defendant was traveling. *Watkins*, 337 N.C. at 441. These facts provided Detective Hepner with "reasonable, articulable suspicion that criminal activity [was] afoot," *Styles*, 362 N.C. at 414 (citation omitted), and, when considering "the totality of the circumstances" here, *Watkins*, 337 N.C. at 441, we determine that reasonable suspicion existed to support the stop of the car.

III. Conclusion

The trial court's findings of fact are supported by competent evidence and the findings of fact support the trial court's conclusion of law that there was "reasonable suspicion to pull over the vehicle containing [Defendant]."

NO ERROR.

Judges TYSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
MELVIN HOWARD CLARK, DEFENDANT

No. COA23-1133

Filed 3 December 2024

Constitutional Law—Confrontation Clause—basis of expert opinion—report by unavailable forensic analyst—no independent testing done

The judgment entered on defendant's conviction for possession with intent to sell and deliver methamphetamine was vacated where the expert testimony offered by the State regarding a powdered substance—seized from defendant during a warrantless search conducted as a condition of his probation—was given by an analyst who had not independently tested the substance but gave his opinion based solely on the written report and opinion of the forensic analyst who had performed the chemical analysis (and who was unavailable to testify at trial). The hearsay statements contained in the report were testimonial in nature and, therefore, defendant's right to confront witnesses pursuant to the Confrontation Clause was violated. Further, the erroneous admission of the opinion testimony was prejudicial and required remand for a new trial or other proceedings.

Appeal by defendant from judgment entered 16 February 2023 by Judge R. Gregory Horne in the Superior Court of Avery County. Heard in the Court of Appeals 11 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General William L. Flowers, III, for the State.

Anne Bleyman for defendant-appellant.

DILLON, Chief Judge.

Defendant Melvin Howard Clark appeals from judgment entered upon the jury's verdict of guilty of possession with intent to sell and deliver methamphetamine. We vacate the judgment and remand to the trial court.

I. Background

On 26 August 2020, Defendant was subject to warrantless searches as a condition of his probation. Officers had received tips about Defendant dealing drugs from his residence. Upon searching his residence and person, officers seized containers of a crystalline substance, among other items.

A forensic analyst, Ms. Fox, tested the crystalline substance and created a laboratory report for the State for the evidentiary purpose of identifying the substance. However, when the time came for Defendant's trial, Ms. Fox was unavailable to testify. Therefore, the State called another analyst, Mr. Cruz-Quiñones, as its only expert witness. He offered his expert opinion that the crystalline substance tested by Ms. Fox was, in fact, methamphetamine. He based his opinion upon statements made by Ms. Fox contained in her lab report, as he never performed any testing on the substance himself.

Defendant was convicted of possession with intent to sell and deliver methamphetamine. Defendant timely appealed.

II. Analysis

On appeal, Defendant argues the opinion testimony of Mr. Cruz-Quiñones violated Defendant's rights under the Confrontation Clause of the Sixth Amendment essentially because the basis of Mr. Cruz-Quiñones's opinion was statements made by another analyst, whom Defendant had no opportunity to confront. We review *de novo* alleged constitutional violations objected to at the trial court. *See Smith v. City of Fayetteville*, 227 N.C. App. 563, 565 (2013). *See also State v. Abbitt*, 385 N.C. 28, 40 (2023) ("[A]ny alleged violation of a defendant's constitutional rights are reviewed de novo.").

The Confrontation Clause provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. Amend. VI. *See Crawford v. Washington*, 541 U.S. 36, 38 (2004). "The Clause bars the admission at trial of testimonial hearsay statements of an absent witness unless she is unavailable to testify, and the defendant has had a prior opportunity to cross-examine her." *Smith v. Arizona*, 602 U.S. 779, 783 (2024) (internal citation and quotation marks omitted). *See also Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

In 2009, the Supreme Court of the United States made it clear that the Confrontation Clause applies to forensic reports, meaning a prosecutor "cannot introduce an absent laboratory analyst's *testimonial* out-of-court statements to prove the results of forensic testing." *Smith*, 602 U.S. at 783 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009)) (emphasis added). In other words, based on the Confrontation Clause, a prosecutor may not offer *a lab report* as the sole evidence to prove that a substance is an illegal drug. Our Supreme Court has emphasized, though, that unsworn reports may sometimes be admissible where they are more in the nature of "business records" and not "testimonial evidence" reports. *State v. Forte*, 360 N.C. 427, 435 (2006).

The issue in the present case is slightly different than that in *Melendez-Diaz* and *Forte*. Here, the evidence introduced by the State was *not* Ms. Fox's lab report itself. Rather, the evidence offered by the State was the *expert opinion* of Mr. Cruz-Quiñones, who relied upon Ms. Fox's report as the basis of his expert opinion.

Rule 703 of our Rules of Evidence provides that an expert's opinion is not rendered inadmissible merely because he relies upon facts or data, which *themselves* are not admissible into evidence, as long as said facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions[.]" N.C.G.S. § 8C-1, Rule 703 (2024).

Interpreting Rule 703, in 2013, our Supreme Court held that the opinion of an expert concerning the identity of a particular substance may be admissible even though the testifying expert did not test the substance but rather relied upon testing performed by another analyst. *State v. Ortiz-Zape*, 367 N.C. 1, 9 (2013) (reasoning that the admission of "an expert's independent opinion *based* on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.").

However, just a few months ago, in *Smith v. Arizona*, the Supreme Court of the United States held that the opinion testimony of a surrogate expert who relies upon the "testimonial hearsay" statements contained in a lab report or notes prepared by another analyst who tested the substance in question implicates a defendant's right under the Confrontation Clause. 602 U.S. at 802–03.

The issue before the Court in *Smith* involved the identification at trial of drugs seized from a defendant where a forensic analyst performed laboratory tests on seized items and prepared a signed report along with her notes documenting her lab work. *See id.* at 790. Her

report disclosed, for each item: (1) a description; (2) its weight and the method of weight measurement used; (3) the tests she performed on the item; (4) the results of the tests; and (5) her conclusion on the item's identity. *See id.*

At trial, however, the lab analyst did not testify. Rather, a substitute analyst, who prepared by reviewing the lab analyst's notes and report, testified. *See id.* After "telling the jury what [the lab analyst's] records conveyed about her testing of the items, [the substitute analyst] offered an 'independent opinion' of their identity" and came to the same conclusion as the lab analyst. *Id.* at 791.

The defendant challenged the admissibility of the substitute analyst's opinion as a violation of his rights under the Confrontation Clause.

In its analysis, the Supreme Court reminded that "[t]o implicate the Confrontation Clause, a statement must" meet two criteria; namely, the statement must "[1] be hearsay ('for the truth') *and* [2] it must be testimonial . . . ." *Id.* at 800 (emphasis added). And if a lab analyst's statement meets both criteria, then the "State may not introduce" the statement unless the lab analyst "is unavailable and the defendant has had a prior chance to cross-examine her." *Id.* at 802–03.

Regarding the first prong—whether the lab analyst's statements were hearsay—the state of Arizona argued that said statements contained in the lab report were not being offered for their truth—and therefore are not hearsay—but rather were being offered merely to "show the basis" of the in-court expert's independent opinion. *See id.* at 793. The Supreme Court, however, flatly rejected that and held that the statements contained in the lab report are hearsay:

> But truth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? The whole point of the prosecutor's eliciting such a statement is to establish—*because of the statement's truth*—a basis for the jury to credit the testifying expert's opinion. . . .
>
> Or to see the point another way, consider it from the factfinder's perspective. In the view of the Arizona courts, an expert's conveyance of another analyst's report enables the factfinder to determine whether the [testifying] expert's opinion should be found credible. That is no

> doubt right. The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite. But that very fact is what raises the Confrontation Clause problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.

Id. at 795–96 (internal citations and marks omitted). The Court was not swayed by Arizona's evidentiary rule (similar to our Rule 703) which allows an expert to render "his own independent opinions" based upon inadmissible data, reasoning that:

> [F]ederal constitutional rights are not typically defined— expanded or contracted—by reference to non-constitutional bodies of law like evidence rules. . . . 'Where testimonial statements are involved,' [we have] explained, 'the Framers did not mean to leave the Sixth Amendment's protection to the vagaries of the rules of evidence.'

Id. at 794 (citing *Crawford*, 541 U.S. at 61).

In the present case, Mr. Cruz-Quiñones in the same way relied upon the truth of Ms. Fox's statements in her report, which contained information about the substance Ms. Fox was testing, the methods she followed in testing it, and the purported results of her testing. That is, Ms. Fox's statements are hearsay. Without independent testing on his part, Mr. Cruz-Quiñones's opinion is only persuasive if Ms. Fox's statements were true. As the Supreme Court reasoned in *Smith*:

> If [the lab analyst] had lied about [how she performed her work], the [substitute analyst's] expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and [the defendant] could not ask her any questions.

Id. at 798.

But the fact that Ms. Fox's statements in her lab report are "hearsay" does not necessarily implicate the Confrontation Clause, unless the statements are also be shown to be "testimonial." *Id.* at 800.

The Supreme Court in *Smith* did not reach the question of whether the lab analyst's report and notes in its case were testimonial, stating that the issue was not presented in that appeal:

> What remains is whether the out-of-court statements . . . were testimonial. . . .
>
> But that issue is not now fit for our resolution. The question presented in [the defendant's] petition for certiorari did not ask whether [the lab analyst's] out-of-court statements were testimonial.

Id. Therefore, the Court remanded the matter for the Arizona trial court to consider the issue. *See id*. at 801. The Court did, though, provide guidance for the trial court in making that determination: to first determine *which* statements of the lab analyst were being relied upon by the testifying analyst, and to then determine the "primary purpose" for which those statements were made, "and in particular on how it relates to a future criminal proceeding." *See id*. at 800. In other words, the court should consider "why [the lab analyst] created the report or notes." *Id*. at 802.

Our State Supreme Court, however, has held that lab reports "created *solely* for an evidentiary purpose, made in aid of a police investigation, [ ] rank as testimonial." *See State v. Craven*, 367 N.C. 51, 57 (2013) (internal quotations and marks omitted) (emphasis added) (holding that lab reports of testing whether white powder found on the defendant was cocaine were testimonial).

Based on our Supreme Court's holding in *Craven*, we must conclude Ms. Fox's hearsay statements contained in her report and relied upon by Mr. Cruz-Quiñones, without independent testing, are testimonial as a matter of law. The record before us shows Ms. Fox's report was created *solely* to aid in the police investigation of Defendant as a matter of law. Nothing in the record indicates the report was created to aid in the provision of health care to Defendant or for any other reason, unlike perhaps a hospital's blood toxicology report prepared at least in part to aid in the provision of treatment to a defendant.

Indeed, the lab report here shows on its face that Ms. Fox conducted the testing for the "Avery County Sheriff's Office" in connection with an investigation of Defendant. It states above Ms. Fox's signature that "THIS REPORT IS TO BE ONLY IN CONNECTION WITH AN OFFICIAL CRIMINAL INVESTIGATION" and that it "contains the opinions/interpretations of [Ms. Fox]." The report also identifies itself as "an official file of the North Carolina State Crime Laboratory."

We, therefore, conclude that Mr. Cruz-Quiñones's failure to independently test the substance and his sole reliance upon Ms. Fox's statements contained in her report—being hearsay and testimonial in nature—implicated Defendant's rights under the Confrontation Clause.

III. Conclusion

The State relied upon the opinion of Mr. Cruz-Quiñones to meet its burden of proving that the substance found in Defendant's possession was methamphetamine. In forming his opinion, Mr. Cruz-Quiñones did not independently test the substance and relied upon the lab report prepared by Ms. Fox in stating his opinion.

Based on the Supreme Court of the United States's recent holding in *Smith v. Arizona*, we conclude that Ms. Fox's statements relied upon by Mr. Cruz-Quiñones were hearsay. And based on our Supreme Court's holding in *Craven*, we must conclude that Ms. Fox's statements were "testimonial," as Ms. Fox conducted the testing and prepared her report solely to aid in the criminal investigation and prosecution of Defendant. Accordingly, Defendant's right under the Confrontation Clause was implicated by Mr. Cruz-Quiñones's opinion testimony.

Because nothing in the record suggests that Defendant ever had the opportunity to cross-examine Ms. Fox about her lab report, we must conclude that the trial court erred by allowing Mr. Cruz-Quiñones's opinion testimony. As this opinion testimony was the State's proof regarding the seized substance's identity, we hold that this error was prejudicial to Defendant in his trial.

Accordingly, we vacate the judgment against Defendant and remand for a new trial or other proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
CHARLES LEON GARMON, DEFENDANT

No. COA23-544

Filed 3 December 2024

1. Motor Vehicles—maintaining or keeping vehicle—for keeping or selling controlled substances—motion to dismiss

In a prosecution for multiple drug-related charges arising from the search of a car that defendant was found driving before his arrest, the trial court properly denied defendant's motion to dismiss a charge of maintaining a vehicle for the keeping or selling of controlled substances. To be sure, there was insufficient evidence that defendant "maintained" the car, since there was no proof that he owned or had a property interest in it, paid toward its purchase, or paid for any repairs or maintenance of the car. However, there was sufficient evidence that defendant "kept" the vehicle where the items found inside—including a hotel receipt from the day before, mail, and a social security card with defendant's name on them—suggested that defendant had control over the vehicle for a longer period of time. Further, other items inside the car—including a handgun and a bookbag containing fentanyl and myriad drug paraphernalia—supported an inference that defendant used the vehicle for keeping or selling controlled substances.

2. Indictment and Information—fatal defect—habitual felon status—timing of indictment—predating substantive offenses

In an appeal from convictions on drug-related charges, defendant's guilty plea to attaining habitual felon status was vacated and the matter remanded for resentencing where, because the habitual felon indictment was issued before the underlying felonies that defendant was being tried for had occurred, the indictment was fatally defective and insufficient to confer subject matter jurisdiction on the sentencing court. Under binding legal precedent, a habitual felon indictment must be ancillary to a pending prosecution for the underlying substantive felonies, not issued before the crimes even occurred.

Judge HAMPSON dissenting.

Appeal by Defendant from judgments entered 4 August 2022 by Judge Keith O. Gregory in Union County Superior Court. Heard in the Court of Appeals 5 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STADING, Judge.

Charles L. Garmon ("Defendant") appeals from judgments entered 4 August 2022 after a jury found him guilty of trafficking in opioids by possession, trafficking in opioids by transportation, possession of drug paraphernalia, and maintaining a vehicle for keeping or selling controlled substances—for which Defendant was sentenced following his guilty plea of attaining habitual felon status. On appeal, Defendant argues the trial court committed error by failing to dismiss his charge for maintaining a vehicle for keeping or selling controlled substances. Defendant also filed a motion for appropriate relief challenging his plea to attaining habitual felon status. After careful review, we conclude the trial did not commit error by denying Defendant's motion to dismiss. However, because we are bound by precedent, we must grant his motion for appropriate relief.

I. Factual and Procedural Background

The record tends to reflect that on 12 October 2020, the Union County Sheriff's Office ("UCSO") received information from a confidential informant that led to the planning of a drug interdiction operation that same day. The law enforcement officers involved were informed to look for a small, silver sedan with body damage.

Sergeant Chris Little, as part of the UCSO interdiction team, was sent to a highway intersection to look out for a vehicle matching the description provided by the informant. He spotted the corresponding vehicle—a silver Hyundai with body damage. Sergeant Little recognized the driver and sole occupant as Defendant—who Sergeant Little knew did not possess a valid driver's license. Sergeant Little followed Defendant for a short time and pulled him over.

When asked for his license and registration, Defendant told Sergeant Little that he did not have a license. Sergeant Little placed Defendant under arrest, and additional officers arrived at the scene to conduct a canine search of the car.

Detective Kaitlin Robillard of the UCSO arrived with a canine to assist with the search. The canine alerted to the driver's side door, and Detective Robillard searched the interior of the car. Detective Robillard found a black bookbag on the front passenger floorboard. The bookbag contained a digital scale, a marijuana grinder, plastic bags, a leafy green substance, a bag with a crystallized substance, a bag with white powder, and some pills in a pill bottle. The pills and powder tested positive for fentanyl, with a total tested weight of 4.41 grams. She also found a handgun under the front passenger seat and, in a cupholder, a folded piece of brown paper with a white, powdery substance on it. Among other items also found in the car: social security card, a hotel receipt from the night before, a letter from Bank of America, and a package—all of which had Defendant's name on them. A box of ammunition was also located in the vehicle. Defendant was transported to the Sheriff's Office for arrest processing.

On 14 January 2021, Defendant was indicted for possession of a firearm by a felon, trafficking in opioids by possession, trafficking in opioids by transportation, possession of drug paraphernalia, and keeping or maintaining a vehicle for keeping or selling controlled substances. He was also indicted for the status offense of habitual felon. At Defendant's trial, he moved to dismiss all charges at the close of the State's evidence—which was denied.

The jury found Defendant guilty of both drug trafficking charges, possession of drug paraphernalia, and maintaining a vehicle for keeping or selling controlled substances. But the jury found Defendant not guilty of possession of a firearm by a felon. Defendant pleaded guilty to his habitual felon status.

The trial court entered a consolidated judgment on the two trafficking and drug paraphernalia charges, sentencing Defendant to 73–93 months' imprisonment. In a separate judgment, the trial court sentenced Defendant in accordance with his habitual felon status on the maintaining a vehicle for keeping or selling controlled substances conviction to 44–65 months' imprisonment, to run consecutively with his other sentence. Defendant timely entered a notice of appeal.

II. Analysis

[1] We consider whether the State presented sufficient evidence that Defendant (1) kept or maintained the silver Hyundai and (2) did so for the purpose of keeping or selling controlled substances in order to withstand Defendant's motion to dismiss the charge of keeping or maintaining a vehicle for the keeping or selling of controlled substances. We

further consider whether the Defendant's habitual felon indictment was defective pursuant to his motion for appropriate relief.

A. Standard of Review

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). When conducting de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010).

Defendant argues that the State failed to produce evidence sufficient to support his conviction for keeping a vehicle under N.C. Gen. Stat. § 90-108(a)(7) (2023). When reviewing a motion to dismiss for sufficiency of evidence, we determine whether "there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citation omitted). Substantial evidence is the amount "necessary to persuade a rational juror to accept a conclusion." *Id.* We consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference drawn from that evidence. *Id.* "[W]hen the evidence only raises a suspicion of guilt, a motion to dismiss must be granted." *State v. Foye*, 220 N.C. App. 37, 41, 725 S.E.2d 73, 77 (2012) (citation omitted). However, when there is "more than a scintilla of competent evidence" to support the charge, the case must be submitted to the jury. *Id.* We determine "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998).

To convict a defendant of maintaining a vehicle for the keeping or selling of controlled substances, the State must show that the defendant (1) knowingly (2) kept or maintained (3) a vehicle (4) which was used for keeping or selling (5) of controlled substances. *State v. Rogers*, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018) (citation omitted). At issue in this case is whether substantial evidence was provided of the second and fourth elements: that Defendant "kept or maintained" the vehicle and that he did so for the purpose of "keeping or selling" controlled substances.

B. Keeping or Maintaining a Vehicle

A person "keeps" a vehicle under the meaning of subsection 90-108(a)(7) when he possesses a vehicle "for at least a short period of time" or intends to retain possession of it in the future. *Rogers*, 371 N.C. at 402, 817 S.E.2d at 154. To "maintain" a vehicle is to "bear the expense of; carry on . . . hold or keep in an existing state or condition." *State v. Moore*,

188 N.C. App. 416, 423, 656 S.E.2d 287, 292 (2008) (citation omitted). Whether a vehicle is "kept or maintained" for the keeping or selling of controlled substances is determined by the totality of the circumstances. *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010). Factors that contribute to this totality include occupancy of the vehicle, the extent of the defendant's use of the vehicle, the vehicle's title and ownership, property interest in the vehicle, contribution to vehicle payments, and payment for repairs and maintenance. *State v. Weldy*, 271 N.C. App. 788, 791, 844 S.E.2d 357, 361 (2020). As this determination is made under the totality of the circumstances, no single factor is dispositive. *Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584.

Defendant compares this case to our decision in *State v. Weldy*, where we held there was insufficient evidence that the defendant "kept or maintained" the vehicle. 271 N.C. App. at 797, 844 S.E.2d at 365 (citation omitted). In that case, police observed the defendant driving the vehicle for approximately twenty-five minutes. *Id.* at 792, 844 S.E.2d at 361. He stopped at a hotel, came outside after a few minutes, and was pulled over as he drove away. *Id.* at 792, 844 S.E.2d at 362. "Defendant's possession of the car for approximately 20–25 minutes, standing alone, was insufficient evidence that Defendant 'kept or maintained' the car." *Id.* at 794, 844 S.E.2d at 363.

As in *Weldy*, there is no evidence in this case that Defendant "had title to or owned the vehicle, had a property interest toward the vehicle, paid toward the purchase of the vehicle, or paid for repairs to or maintenance of the vehicle." *Id.* Therefore, there is no evidence that Defendant "maintained" the car, and we must determine if the State provided sufficient evidence that he "kept" it. *Id.*

While the evidence in *Weldy* was of such minimal possession that an inference of "keeping" was not justified, there is no specific period of possession that indicates a car was or was not "kept," as that determination is made by examining the totality of the circumstances. In *State v. Rogers*, for example, the defendant was observed driving a Cadillac for approximately ninety minutes, and the State additionally introduced a service receipt found inside the car, bearing the defendant's name and a date from about two and a half months before his arrest. 371 N.C. at 402, 817 S.E.2d at 154. While this receipt raised a reasonable inference that the defendant had possessed the car for at least that amount of time, our Supreme Court noted that it did not intend to imply that possession for that long was necessary to constitute "keeping," though it declined to take a position on whether keeping a car for "a much shorter period of time" would suffice. *Id.* at 403 n.2, 817 S.E.2d at 154 n.2.

This Court has recognized possession for a significantly shorter period than in *Rogers* as substantial evidence of "keeping" a vehicle. *Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584; *cf. Rogers*, 371 N.C. at 402, 817 S.E.2d at 154. In *State v. Hudson*, the defendant was pulled over while driving a truck pulling a car carrier, and drugs were found in the trunk of one of the cars being transported. 206 N.C. App. at 484, 696 at 580. The bill of lading showed that the defendant picked up the car on 21 October 2008 and "maintained possession as the authorized bailee continuously and without variation for two days before being pulled over . . . ." *Id.* at 492, 696 S.E.2d at 584. We held this was sufficient possession of the car to support the defendant's conviction. *Id.*

This case falls somewhere in between *Weldy* and *Hudson*. While police only observed Defendant driving the vehicle for a short period of time, several items were found inside, tending to show Defendant controlled the vehicle for a longer period. Officers found a hotel receipt from the day before, as well as mail and a social security card with Defendant's name on them. This evidence is sufficient to give rise to a valid inference that Defendant possessed the vehicle to an extent sufficient to satisfy the statute's requirement that he kept the vehicle. N.C. Gen. Stat. § 90-108(a)(7).

C. Keeping or selling controlled substances

When viewing the evidentiary record under a light most favorable to the State, we discern no error from the trial court's denial of Defendant's motion to dismiss because reasonable inferences can be drawn that Defendant also "kept" the vehicle for the purposes of keeping or selling controlled substances. Our Supreme Court in *State v. Rogers* clarified that "[b]y making it a crime to 'keep' a car 'which is used for the keeping' of controlled substances, subsection 90-108(a)(7) uses the word 'keep' and its variant 'keeping' to mean different things." 371 N.C. at 403, 817 S.E.2d at 155. Therefore, we look to, in a light most favorable to the State, whether the State produced substantial evidence under the totality of the circumstances that Defendant stored drugs in his car. *Id.*

Our courts consider factors such as: the amount of controlled substances found in the vehicle; their packaging; whether the controlled substances were hidden in the vehicle; whether there was a large amount of cash; and the presence of weapons and "other implements of the drug trade." *State v. Miller*, 264 N.C. App. 517, 524, 826 S.E.2d 562, 566–67 (2018) (citations omitted). Our inquiry focuses on the vehicle's use rather than its contents. *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (citing *State v. Mitchell*, 336 N.C. 22, 33, 442 S.E.2d 24, 30 (1994)). And "merely possessing or transporting drugs inside a car—because, for

instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the 'keeping' element of subsection 90-108(a)(7)." *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (citing *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30).

Defendant principally relies on whether the controlled substances were hidden in the vehicle to control our analysis. We agree that whether the controlled substances are hidden in the vehicle is a factor to consider; however, such a factor standing alone is not dispositive. In *State v. Rogers*, small bags of cocaine hidden in the gas-cap compartment of the defendant's car, combined with evidence of the same bags and a digital scale in their hotel room, sufficiently raised an inference that the defendant split up portions of cocaine in their room and stored those portions in the vehicle for sale. 371 N.C. at 404, 817 S.E.2d at 155. The *Rogers* opinion cautioned that "merely having drugs in a car (or other place) is not enough to justify a conviction" under subsection 90-108(a)(7). *Id.* at 406, 817 S.E.2d at 157. And "the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place for the keeping of drugs is whether the defendant was using the vehicle, building, or other place for the storing of drugs." *Id.* at 406, 817 S.E.2d at 156 (cleaned up).

We upheld a conviction under subsection 90-108(a)(7) in *State v. Dudley*, whereby the defendant stored trafficking amounts of methamphetamine in a false-bottomed tire sealant can. 270 N.C. App. 775, 783, 842 S.E.2d 615, 621 (2020). Not mentioned in *Dudley* was where within the vehicle officers located the false-bottomed can. *See generally id.* The *Dudley* court looked at the totality of the circumstances to determine whether the defendant attempted to hide the methamphetamine and reiterated " '[a] defendant who wants to store contraband will . . . want to store it in a hidden place, which is exactly what putting the' methamphetamine in the false-bottomed tire-sealant can would accomplish." *Id.* (citing *Rogers*, 371 N.C. at 404, 817 S.E.2d at 155). The false-bottomed can is a "small movable thing[ ]" which a person could easily place within a car and remove it "soon thereafter." *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156. We do not see the hidden factor as one requiring such permanent placement or attachment to the vehicle. Instead, we look at the defendant's effort to hide the controlled substances. *Dudley*, 270 N.C. App. at 782, 842 S.E.2d at 620 ("In this case, as in *Rogers* and *Alvarez*, Defendant attempted to hide the [controlled substance].").

And we reached a similar result in *State v. Alvarez*, whereby the defendant stored cocaine, wrapped in plastic and oil, in a false-bottomed compartment of their truck. 260 N.C. App. 571, 575–76, 818 S.E.2d 178,

182–83 (2018). The question in Alvarez was whether "the State presented [sufficient] evidence that [the defendant] kept or maintained his pickup truck 'over a duration of time' for the purpose of keeping or selling cocaine." *Id.* at 573, 818 S.E.2d at 181. We reasoned that under the totality of the circumstances, viewing the evidence in the light most favorable to the State, the defendant knew of and constructed the false-bottom compartment. The State thus produced sufficient evidence that the defendant kept or maintained the vehicle "over a duration of time" for the purposes of keeping or selling cocaine. *Id.* at 576, 818 S.E.2d at 182–83.

As was done in *Rogers*, *Dudley*, and *Alvarez*, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences from the evidence, a reasonable jury could find that Defendant used the vehicle to keep controlled substances. The evidence here tends to show that law enforcement was deployed as part of a drug interdiction team to look out for a vehicle matching the one driven by Defendant. Upon arresting Defendant for driving without a license, a canine examined the vehicle. After a positive alert, the vehicle was searched. The search revealed both a handgun under the front passenger seat and a black bookbag. Included among the items located within the bookbag were a digital scale, a marijuana grinder, plastic bags—some with removed corners, a leafy green substance, a bag with a crystallized substance, a bag with white powder, and pills in a bottle. In the context of the items found in the bookbag, items scattered about the car included a handgun under the passenger seat and a folded piece of brown paper with a white powdery substance inside. The powder in the cupholder was collected as evidence but not tested in the laboratory since testing was only conducted "to a potential highest charge."[1] The bag with white powder and pills tested positive for fentanyl in the amount of 4.41 grams. The evidence located about the vehicle, including the bookbag and its contents, and all reasonable inferences drawn therefrom, based on the totality of the circumstances, support that Defendant was using the vehicle for keeping or selling drugs. The trial court correctly denied Defendant's motion to dismiss the charge of keeping or maintaining a vehicle for keeping or selling controlled substances.

III. Motion for Appropriate Relief

[2] Last, we consider Defendant's motion requesting resentencing "because the habitual felon indictment pre-dated the offense date of

1. The other tested items established a trafficking weight of fentanyl and testing this additional substance would not have resulted in a higher charge.

all the substantive offenses [he] was tried for." Defendant contends since the habitual felon indictment predates the offense date of the felonies for which he was being tried, the trial court thus lacked subject matter jurisdiction pursuant to a prior panel's decision from this Court. *See State v. Ross*, 221 N.C. App. 185, 727 S.E.2d 370 (2012). Since we are bound by precedent, after careful consideration, we grant his motion.

"On appeal, we review the sufficiency of an indictment de novo." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). "When an indictment is fatally defective, the trial court acquires no subject matter jurisdiction, and if it assumes jurisdiction a trial and conviction are a nullity." *Ross*, 221 N.C. App. at 188, 727 S.E.2d a 372 (quoting *State v. Frink*, 177 N.C. App. 144, 146, 627 S.E.2d 472, 473 (2006)). Pursuant to the Habitual Felons Act, "[t]he indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony." N.C. Gen. Stat. § 14-7.3 (2023). "Properly construed this [A]ct clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon." *State v. Allen*, 292 N.C. 431, 433, 233 S.E.2d 585, 587 (1977). Moreover, "the proceeding by which the [S]tate seeks to establish that [the] defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive, felony." *Id.* at 433–34, 233 S.E.2d 585, 587.

In *State v. Ross*, the defendant "was initially indicted as an habitual felon on 22 September 2008." 221 N.C. App. at 190, 727 S.E.2d at 374. Then a superseding habitual felon indictment correcting a file number was returned on 11 May 2009. *Id.* Thereafter, on 20 July 2009, the defendant was indicted for "bribery of a juror, felony obstruction of justice, and solicitation to commit bribery of a juror." *Id.* at 187, 727 S.E.2d at 372. On appeal, the defendant argued that "the trial court lacked jurisdiction . . . because the habitual felon indictment was returned months before the June 2009 crimes occurred." *Id.* at 188, 727 S.E.2d at 372. And so, a prior panel of this Court determined "[i]t is difficult to see how the habitual felon indictment could attach as ancillary to felonies that had not yet occurred." *Id.* at 190, 727 S.E.2d at 374 (quoting *State v. Flint*, 199 N.C. App. 709, 718, 682 S.E.2d 443, 448 (2009)). Citing *Allen*, the Court reasoned, "[a]t the time the habitual felon indictments were returned, there was no pending prosecution for the June 2009 crimes 'to which the habitual felon proceeding could attach as an ancillary proceeding' because the crimes had not yet happened." *Ross*, 221 N.C. App. at 190, 727 S.E.2d at 374 (citing *Allen*, 292 N.C at 436, 233 S.E.2d at 589).

The Court thus held "under the specific facts of this case, the habitual felon indictment was not ancillary to the substantive felony indictments for the June 2009 crimes." *Ross*, 221 N.C. App. at 190, 727 S.E.2d at 374.

The present case is factually analogous to *Ross*. Here, Defendant was indicted for his habitual felon status on 14 January 2020. However, the principal felony with an enhanced sentence due to Defendant's habitual felon status was committed on 12 October 2020. Defendant was not indicted for this underlying felony until 14 January 2021. Thus, like *Ross*, "[a]t the time the habitual felon indictments were returned, there was no pending prosecution . . . 'to which the habitual felon proceeding could attach as an ancillary proceeding' because the crimes had not yet happened." 221 N.C. App. at 190, 727 S.E.2d at 374 (quoting *Allen*, 292 N.C at 436, 233 S.E.2d at 589). Consequently, on account of the ruling by a prior panel of this Court, we are compelled to hold that the trial court lacked jurisdiction over the habitual felon charge and erred by accepting Defendant's habitual felon guilty plea. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Following the holding of *Ross*, "we vacate Defendant's habitual felon guilty plea and remand to the trial court for resentencing within appropriate sentencing ranges." 221 N.C. App. at 191, 727 S.E.2d at 374.

In so holding, we note that our plain reading of the requirements set forth in N.C. Gen. Stat. § 14-7.3 begs the question of whether the trial court is always divested of subject matter jurisdiction when presented with facts such as those in this case. An indictment for attaining habitual felon status is a sentence enhancement. *See Allen*, 292 N.C. at 435, 233 S.E.2d at 588 ("The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status."). Unless Defendant's record has changed in some manner, *e.g.*, by way of expunction, the date of a habitual felon would not necessarily undermine statutory or constitutional protections. Accordingly, panels of this Court and future litigants could benefit from the guidance of our Supreme Court addressing this concern.

IV. Conclusion

For the reasons discussed above, we hold that the trial court did not commit error by denying Defendant's motion to dismiss. However, we are bound by existing case law to vacate and remand this matter to the trial court for resentencing.

NO ERROR IN PART; VACATED IN PART; REMANDED FOR RESENTENCING.

Judge GRIFFIN concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

The primary issue before this Court is whether evidence of drugs found in a backpack on the front passenger floorboard of a vehicle, standing alone, can support a finding that Defendant kept or maintained the vehicle for the purpose of keeping or selling drugs. Applying our existing precedent, I respectfully disagree with the majority's conclusion and would hold that it cannot. As such, in my view, the trial court erred by not dismissing this charge.

A conviction for Maintaining a Vehicle for the Keeping or Selling of Controlled Substances requires that the State show the defendant (1) knowingly (2) kept or maintained (3) a vehicle (4) which was used for the keeping or selling (5) of controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2023); *State v. Rogers*, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018). Defendant raises only the second and fourth elements as issues on appeal. I agree with the majority that the State provided sufficient evidence that Defendant kept or maintained the vehicle, but I disagree that the State has shown Defendant used the vehicle for the purpose of "keeping or selling" controlled substances.

Defendant was convicted at trial for trafficking in opioids by possession and transportation and does not contest those convictions on appeal. However, our Supreme Court has made clear that Section 90-108(a)(7) does not create a separate offense simply because a controlled substance was located inside a vehicle. *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (citing *State v. Mitchell*, 336 N.C. 22, 33, 442 S.E.2d 24, 30 (1994)). "[M]erely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the 'keeping' element of subsection 90-108(a)(7)." *Id.* Our inquiry focuses on the use of the vehicle rather than its contents. *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30.

As the majority acknowledges, the "keeping" element of the statute is satisfied by evidence showing the vehicle was used for the storage

of drugs. *Rogers* at 403, 817 S.E.2d at 154. The presence of drugs in a car is not sufficient for a conviction: the State must produce "other incriminating evidence" showing that, under the totality of the circumstances, the vehicle was used to store a controlled substance. *State v. Miller*, 264 N.C. App. 517, 524, 826 S.E.2d 562, 566 (2019). In making this determination, our courts have considered factors such as the amount of controlled substances found in the vehicle, their packaging, whether the controlled substances were hidden in the vehicle, and the accompanying presence of drug paraphernalia and large amounts of cash. *State v. Weldy*, 271 N.C. App. 788, 795, 844 S.E.2d 357, 363 (2020). Our task is to determine whether the State has provided substantial evidence that, combined with reasonable inferences, indicates under the totality of the circumstances Defendant used *the vehicle* to store drugs. *Rogers*, 371 N.C. at 406, 817 S.E.2d at 157.

When drugs found in a vehicle were concealed in some way, our courts have tended to hold substantial evidence was presented showing the vehicle was used to store those drugs. The majority relies on *Rogers*, *Alvarez*, and *Dudley*, each of which involved the concealing of drugs in the vehicle in question. In *Rogers* bags of cocaine were hidden in the gas cap, 371 N.C. at 404, 817 S.E.2d at 155; in *Alvarez* the defendant had stored cocaine, wrapped in plastic and oil, in a false compartment in his truck, 260 N.C. App. 571, 575–76, 818 S.E.2d 178, 182–83 (2018); and in *Dudley* methamphetamine was found hidden in a false-bottomed tire sealant can. 270 N.C. App. 775, 783, 842 S.E.2d 615, 621 (2020).

In this case, the drugs found were kept in a backpack rather than concealed in a hidden compartment. Whether or not the controlled substances were hidden is only one factor used in our analysis, but concealment is a strong indicator that the vehicle was used to store drugs. "[A] defendant who wants to store contraband will, all other things equal, want to store it in a hidden place[.]" *Rogers*, 371 N.C. at 404, 817 S.E.2d at 155. Locating drugs in a backpack, which is used to more easily carry items from place to place, does not raise a similar inference. I would hold that this is analogous to cases in which defendants were found with drugs on their person while driving, which our courts have consistently held cannot support a conviction under Section 90-108(a)(7).

When drugs are found on a defendant's person while driving a car, this generally "do[es] not implicate the car" with the sale or keeping of drugs. *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30. In *Weldy*, drugs were found in the defendant's waistband and pants pocket. 271 N.C. App. at 796, 844 S.E.2d at 364. Although the drugs found were in amounts sufficient to support the defendant's trafficking convictions—56.39 grams

of methamphetamine and 6.84 grams of heroin—neither possession of drugs in a car nor using the car to transport drugs is sufficient to show that the vehicle was kept for the purpose of keeping or selling controlled substances. *Id.* Accordingly, we held there was insufficient evidence to support a conviction under subsection 90-108(a)(7). *Id.* at 797, 844 S.E.2d at 365.

Similarly, in *Mitchell*, the defendant was seen with bags of marijuana in his shirt pocket before getting into his car, which led to a reasonable inference that he possessed marijuana while in his vehicle. 336 N.C. at 33, 442 S.E.2d at 30.[1] Even combined with evidence of drug paraphernalia including baggies and a scale found in the defendant's home, the Court held that while the evidence was "consistent with drug use, or with the sale of drugs generally . . . they do not implicate the car with the sale of drugs." *Id.* Nor did finding a loose marijuana cigarette in the car indicate that the defendant was using the car for the storage of drugs. *Id.* "[P]eople often leave cigarettes or other small moveable things in their cars but then take them out soon thereafter." *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156.

Though Defendant in this case did not have the drugs directly on his person, they were not concealed or secreted in the vehicle. Instead, all the drugs and paraphernalia located by law enforcement and relied on by the prosecution were kept in a backpack placed on the front passenger side floor of the car.[2] The presence of this paraphernalia and controlled substances stored in a backpack in amounts that support trafficking convictions are certainly consistent with the general use and sale of drugs. However, "they do not implicate *the car* with the sale of drugs." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 (emphasis added). A backpack, absent other evidence, constitutes a relatively "small moveable thing" a person typically places in a car and removes "soon thereafter."

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1. *Rogers* abrogates *Mitchell* on one part of its interpretation of subsection 90-108(a)(7). The Supreme Court in *Mitchell* defined the keeping of drugs to require "not just possession, but possession that occurs over a duration of time." *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30. In *Rogers* the Court rejected this requirement that drugs be stored for a certain minimum period of time: "[t]he critical question is *whether* a defendant's car is used to store drugs, not *how long* the defendant's car has been used to store drugs for." 371 N.C. at 406, 817 S.E.2d at 156 (emphasis in original). Despite this, the *Rogers* Court recognized that *Mitchell* reached the correct result. *Id.* at 405, 817 S.E.2d at 156.

2. As noted above, there was evidence that a white powdery substance was located in the cupholder of the vehicle. However, the substance was not tested and no evidence introduced showing it to be a controlled substance. The State does not rely on the existence of this substance as a basis for Defendant's conviction.

Rogers, 371 N.C. at 405, 817 S.E.2d at 156. There was no evidence the backpack was concealed in the vehicle. Nor was there evidence linking the car itself to any sale—past or intended—of the drugs. There was no evidence the car itself was being used for the keeping or storing of controlled substances, as all controlled substances and paraphernalia found were in the backpack. There was no evidence that the backpack was left in the car when Defendant was not driving.

The majority emphasizes our decision in *Dudley*, in which the defendant stored methamphetamine in the false bottom of a can of tire sealant. 270 N.C. App. at 783, 842 S.E.2d at 621. It notes that this can "is a 'small movable thing' which a person could easily place within a car and remove it 'soon thereafter,' " as described in *Rogers*, but that we still held that its presence in the vehicle was sufficient to raise an inference that the vehicle was used to store drugs.

Dudley is distinguishable from this case. The can of tire sealant was specifically configured to conceal drugs in its false bottom: we noted it showed "Defendant attempted to hide the methamphetamine," 270 N.C. App. at 782, 842 S.E.2d at 620, whereas there is no indication that the backpack in this case was used to hide anything. Unlike a backpack, a can of tire sealant is not typically used to transport items. Also unlike a backpack, a can of tire sealant is an object which may reasonably be inferred to be intended to be kept in a vehicle—or at least has a circumstantial connection with a motor vehicle.

The majority's opinion in this case threatens to *sub silentio* overrule our Supreme Court's holding that merely possessing or transporting drugs in a car is insufficient to support a conviction under subsection 90-108(a)(7). *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156. Under the majority's analysis, would a defendant who places drugs in a jacket pocket and then takes that jacket off in their vehicle now be guilty of keeping a vehicle for the keeping of drugs? What if that defendant places the drugs in plain sight on the passenger seat? I am unable to distinguish between transporting and keeping drugs given the majority's holding.

Indeed, in *State v. Dickerson*, this Court reasoned "the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance." 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002). *Dickerson*—relying on Supreme Court precedent—teaches that there must be evidence which goes beyond "just possession" in the vehicle. *Id.* (internal quotations and citation omitted). Here, as in *Dickerson*, there is no such evidence.

Thus, on the facts of this case, I would conclude the State failed to provide sufficient evidence that Defendant's vehicle was used for the keeping of drugs. Therefore, the trial court erred in denying Defendant's Motion to Dismiss this charge. Consequently, I would reverse Defendant's conviction for Keeping or Maintaining a Vehicle for Keeping or Selling Controlled Substances in Union County file number 20CRS054203 and, in turn, vacate Defendant's plea to attaining Habitual Felon Status in Union County file number 20CVS000028.[3] Accordingly, I respectfully dissent from the Opinion of the Court.

STATE OF NORTH CAROLINA
v.
CLYDE ANTREA PETTIS, JR., DEFENDANT

No. COA24-358

Filed 3 December 2024

1. Assault—with a deadly weapon inflicting serious injury—jury instruction—serious injury—facial laceration—plain error analysis

In a prosecution for assault with a deadly weapon inflicting serious injury arising from a bar fight, during which defendant struck the victim's face with a glass beer bottle, the trial court did not commit plain error when it instructed the jury that the victim's injury was "serious" as a matter of law. Even if the court had erred by giving the instruction, defendant failed to meet his burden of showing that, absent the instruction, the jury probably would have found that the victim's painful facial laceration—requiring thirty-five stitches and overnight hospitalization—was not a serious injury.

2. Assault—with a deadly weapon inflicting serious injury—jury instruction—deadly weapon—glass beer bottle

In a prosecution for assault with a deadly weapon inflicting serious injury arising from a bar fight, where the victim suffered a deep facial laceration after defendant struck him with a glass beer bottle, the trial court did not err when it instructed the jury that a glass beer bottle was a "deadly weapon" as a matter of law. The bottle met the

3. In light of the result reached by the majority opinion, however, I agree with the majority that Defendant's Motion for Appropriate Relief should be allowed and this matter should be remanded to the trial court for resentencing on his habitual felon conviction.

legal definition of a deadly weapon—any item likely to cause death or great bodily harm—where defendant hit the victim's face with the bottle, causing it to shatter and cover both the victim and another bar patron with glass; the strike caused a facial laceration requiring thirty-five stitches, as well as many smaller lacerations, which required seven additional stitches and resulted in loss of feeling in the victim's arm; and where a difference of mere inches could have resulted in a fatal cut to the victim's throat or surrounding arteries.

Appeal by defendant from judgment entered 22 September 2023 by Judge Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 5 November 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Victor A. Unnone III, for the State.

Michelle Abbott for defendant-appellant.

DILLON, Chief Judge.

Defendant Clyde Antrea Pettis, Jr., appeals from a jury verdict convicting him of assault with a deadly weapon inflicting serious injury. Defendant contends the trial court erred by peremptorily instructing the jury that, as matters of law, a glass bottle is a deadly weapon and the victim's injury was a serious injury. We conclude Defendant received a fair trial, free from reversible error.

I. Background

This case arises from a bar fight in Wilmington. The State's evidence showed that Defendant struck another bar patron with a glass beer bottle which inflicted a laceration on the patron's face requiring thirty-five stitches. Defendant was indicted for assault with a deadly weapon inflicting serious injury. Defendant was tried by a jury.

Following the close of evidence and during the charging conference, the trial court informed counsel that it planned on instructing the jury that the victim's injury was serious *as a matter of law* and that a glass beer bottle is a deadly weapon *as a matter of law*. Defense counsel only objected to the latter, whether a glass beer bottle is a deadly weapon as a matter of law. The trial court ultimately instructed the jury as planned, stating, *inter alia*, that "[a] glass beer bottle is a deadly weapon; and [ ] [D]efendant inflicted serious injury upon the victim. A facial laceration requiring 35 stitches is a serious injury."

During deliberations, jurors submitted a handwritten note to the court asking "[i]s the reference to 'a glass beer bottle,' which is mentioned in the first and second conditions for guilt, an example of a deadly weapon or an absolute requirement? Would a glass highball glass, which could be used to serve a Tequila Sunrise, also a deadly weapon?" The trial court did not provide any further clarification, stating, "You have been instructed on the law to be applied in this case, and you are to rely on these instructions." Following deliberations, the jury returned a verdict finding Defendant guilty. The trial court sentenced Defendant in accordance with the verdict. Defendant timely appeals.

II. Analysis

Defendant makes two arguments, which we address in turn.

A. Facial Laceration: Serious Injury as a Matter of Law?

[1] Defendant argues the trial court committed plain error by instructing the jury that a facial laceration requiring thirty-five stitches is a serious injury as a matter of law. Specifically, Defendant contends the question of whether the victim's injury was serious was a question of fact for the jury to decide.

Defendant did not object to the portion of the jury instructions regarding the serious injury. Thus, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 518 (2012). To meet his burden of showing plain error, Defendant must show that "absent the error, the jury probably would have returned a different verdict." *State v. Reber*, 386 N.C. 153, 158 (2024).

While generally a question for the jury, "a trial court may peremptorily instruct the jury on the serious injury element of N.C.G.S. § 14-32 if the evidence 'is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted.' " *State v. Hedgepeth*, 330 N.C. 38, 54 (1999).

Here, the State's evidence showed that the victim felt a sharp pain when he was hit in the face. Because of this strike, the victim was transported by ambulance to the hospital where he received thirty-five stitches to his face prior to being released in the morning. Further, evidence showed that the victim lost feeling in parts of his arm and has a permanent scar running from the corner of his eye to his chin.

Assuming the trial court erred in not allowing the jury to determine whether a facial wound requiring thirty-five stitches constitutes a serious injury, we conclude that such error does not rise to the level of plain error. That is, we conclude Defendant has failed to meet his burden of

showing that the jury *probably* would have found that the victim's facial laceration requiring thirty-five stitches was not a serious injury, had they been allowed to make that determination.

B. Glass Beer Bottle: Deadly Weapon as a Matter of Law?

[2] Lastly, Defendant argues the trial court erred by instructing the jury that a glass bottle is a deadly weapon as a matter of law. Specifically, Defendant contends the question of whether the glass bottle was a deadly weapon was a question of fact for the jury.

Defendant properly objected to this instruction. Accordingly, Defendant's burden on appeal is to show that the trial court erred in its instruction and that there is a " 'reasonable possibility' that, but for the error, the jury would have reached a different result." *Lawrence*, 365 N.C. at 513.

Our Supreme Court has defined a deadly weapon as "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301 (1981). "[W]here the instrument may or may not be likely to produce such results, according to the manner of its use or the part of the body at which the blow is aimed, its allegedly deadly character is one of fact to be determined by the jury." *State v. Joyner*, 295 N.C. 55, 64–65 (1978). However, "where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the [trial] [c]ourt must take the responsibility of so declaring." *State v. Torain*, 316 N.C. 111, 119 (1986) (cleaned up).

Here, the State presented evidence, and Defendant confirmed, that Defendant was drinking Corona beer from a glass bottle the night of the assault. The State's evidence reflected that Defendant blindsided the victim by hitting him in the face with the bottle. This strike caused the bottle to break over the victim and cover both him and another patron with glass. The strike caused a deep laceration to the victim's face and numerous smaller lacerations which ultimately required seven additional stitches and resulted in loss of feeling in the victim's arm. A difference of mere inches could have resulted in a deadly cut to the victim's throat or other arteries.

Our Supreme Court has held that it was appropriate for the trial court *to submit to the jury* to decide whether a glass bottle was a deadly weapon where the defendant rammed the bottle up the victim's rectum causing bleeding. *Joyner*, 295 N.C. at 65. In that case, the Court noted that the determination of whether an object is a deadly weapon as a

matter of law depends, in part, on "the part of the body at which the blow is aimed[.]" *Id.* at 64.

Since *Joyner* was decided, our Court has held that a trial court did not err by instructing a jury that a glass bottle was a deadly weapon *as a matter of law*, where the defendant blindsided the victim by striking the victim in the head with the bottle, causing cuts on the victim's head and the bottle to break. *State v. Morgan*, 156 N.C. App. 523, 530 (2003)("We hold that the evidence amply supported the trial court's instruction that a broken wine bottle is a dangerous and deadly weapon as a matter of law because, 'in the circumstances of its use by defendant here, it was likely to produce death or great bodily harm' [*State v. Torain*, 316 N.C. 111, at 121-22 (1986)].").

Based on our holding in *Morgan*, we must conclude that the trial court did not err by instructing that the bottle, which was wielded by Defendant at the victim's face with such force as to break the bottle and to cause the injuries described above, is a deadly weapon as a matter of law.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not commit reversible error.

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
MICHAEL GREGORY PLAZA, JR.

No. COA24-311

Filed 3 December 2024

1. Appeal and Error—plain error analysis—readmission of evidence—outside of jury's presence

In an appeal from convictions for first-degree murder and possession of a firearm by a felon, defendant failed to show that the trial court committed plain error by admitting into evidence the pistol, magazine, and bullets linked to the crimes, where the prosecutor—without any objection from defendant—first introduced the box containing the pistol components as Exhibit 12 and then, outside of the jury's presence, requested that each component be admitted as a separate exhibit. Evidently, the prosecutor made the latter request out of an overabundance of caution, since the court had already listed Exhibit 12's contents out loud when publishing it to the jury. Further, both the State and defendant treated the pistol components as properly-admitted evidence during trial, and therefore defendant could not meet his burden of showing error—much less plain error—on appeal.

2. Appeal and Error—preservation of issues—constitutional argument—criminal case—no objection raised at trial

In a prosecution for first-degree murder and possession of a firearm by a felon, where the prosecutor introduced into evidence a box containing the pistol, magazine, and bullets linked to the crimes and then, outside of the jury's presence, requested that each component be admitted as a separate exhibit, defendant failed to preserve for appellate review his argument that the admission of the pistol components violated his constitutional due process rights, since he failed to object at trial and, consequently, the trial court never had an opportunity to hear or rule on the issue.

3. Evidence—criminal trial—readmission of evidence—outside of jury's presence—no structural error

In an appeal from convictions for first-degree murder and possession of a firearm by a felon, defendant failed to show structural error in the admission into evidence of the pistol, magazine, and bullets linked to the crimes, where the prosecutor—without any objection from defendant—first introduced the box containing the pistol

components as Exhibit 12 and then, outside of the jury's presence, requested that each component be admitted as a separate exhibit. Despite defendant's argument that the trial court allowed the jury to view improperly admitted evidence, nothing that occurred at trial aligned with any of the six enumerated instances of structural error that have been formally recognized by the United States Supreme Court and the North Carolina Supreme Court.

4. Appeal and Error—Rule 2—unpreserved constitutional argument—merit not shown

In an appeal from convictions for first-degree murder and possession of a firearm by a felon, the Court of Appeals declined to exercise its discretion under Appellate Rule 2 to hear defendant's unpreserved argument that the trial court violated his constitutional due process rights by allowing the jury to view improperly admitted evidence. Defendant failed to show that any error occurred at trial, much less that his right to a fair trial free from error was adversely affected, especially where the court, the State, and even defendant all treated the now-challenged evidence as properly admitted throughout the trial.

Appeal by Defendant from judgments entered 1 September 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 11 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Drew Nelson for the Defendant.

WOOD, Judge.

Michael Gregory Plaza, Jr. ("Defendant") appeals from convictions finding him guilty of first-degree murder and possession of a firearm by a felon. Defendant was sentenced to life imprisonment without parole for first-degree murder and 21 to 35 months of imprisonment for possession of a firearm by a felon to commence at the expiration of the prior sentence. On appeal, Defendant argues the trial court admitted evidence outside the presence of the jury and allowed the jury to view improperly admitted evidence that had a probable impact on the jury's verdict. For the reasons stated below, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

Andrea Lucas ("Lucas") lived at Mallory Court in Wake County. Lucas was like a grandmother to the kids in the neighborhood, many of whom would hang out in front of her house and play basketball.

In the weeks leading up to 6 January 2021, Defendant stayed with a variety of people, including a family who resided in the Mallory Court neighborhood. During one visit to that family's home, Defendant showed off a small, black pistol. During the week prior to 6 January 2021, Defendant "appeared out of nowhere" at Lucas' home and watched as the kids played basketball. On 3 January 2021, while standing outside Lucas' home, Defendant told Lucas' neighbor that "he was going to get her" because "God sent him . . . to take out the evil people and . . . to protect the kids." He also stated that Lucas was a witch and he "needed to kill [Lucas] in order to save . . . [Lucas'] soul."

On the night of 6 January 2021, Lucas' neighbor went out to his car and noted that Lucas was outside too. The neighbor heard gunshots, hid, but then saw a person dressed in all black or dark clothes flee the scene. Officers responded to a dispatch report of a shooting at Lucas' address where they found Lucas unresponsive, not breathing and with multiple bullet wounds. Seven spent cartridges from a nine-millimeter SIG Luger handgun were recovered at the scene by the crime scene investigator.

On the night of 8 January 2021, Officer Saylor was dispatched to a shopping center in Raleigh where a suspect in a homicide had been located and was reported to be possibly armed. Officer Saylor observed Defendant dressed in dark clothing and conducted a "voluntary encounter." During a weapons frisk, Officer Saylor found Defendant had a loaded, small, black pistol on his person. The pistol was identified as a diamondback nine-millimeter Luger semiautomatic holding seven rounds. Prior to the encounter police were aware that Defendant was a convicted felon and, after recovering a pistol, arrested Defendant for possession of a firearm by a felon.

The State's forensic firearms analyst examined the seven cartridges, and six bullets recovered during the investigation. The analyst conducted a comparative analysis of the microscopic characteristics of bullets recovered during the investigation to those of test bullets fired in the laboratory from the weapon recovered from Defendant. The expert concluded that the bullets recovered from Lucas' body had been fired from Defendant's pistol.

On 28 August 2023, Defendant came on for trial in Wake County Superior Court for first-degree murder and illegal possession of a firearm

by a felon. At trial, Detective Harmon provided testimony and identified items related to the case. The State introduced a box containing a pistol, a magazine, and bullets. Detective Harmon identified the items inside the box as the pistol taken from Defendant's person during the weapons frisk. The prosecutor moved to admit the content of the box into evidence as State's Exhibit 12. The defense was given the opportunity to object but did not. Thereafter, the trial court accepted State's Exhibit 12 into evidence. A few minutes later the prosecutor stated, "Your Honor, at this time I'd just move to publish by reference there's - - there were three items in that box, 12-A, the pistol itself; 12-B, the clip, or the magazine; and 12-C, the container containing the two bullets in this case." The trial court responded, "Mr. DA, if you will label 12-A, I think the clerk - - just for purposes of the record, if you will label 12-A, 12-B and 12-C. While he's doing that, any objection to the publication of those items to the jury?" The defense counsel responded, "no." The record indicates that State's Exhibits 12A – 12C were then marked for identification. The trial court then stated, "All right. The State will be allowed to publish State's Exhibit 12, which consists of 12-A, the weapon; 12-B, I believe the clip; and 12-C, the bullets."

After the testimony of another witness, the trial court called for a brief recess and the jury exited the courtroom. During the break, the prosecutor addressed the Court saying, "[j]ust for the purposes of the record and Madam Clerk, I'd move - - based on previous testimony of Detective Harmon, [I] already had moved State's Exhibit 12 into evidence. I would ask to move State's Exhibit 12-A, the pistol; 12-B, the magazine; and 12-C, the bullets, into evidence as well." The trial court asked the defense if there was any objection and the defense responded, "no." The trial court then accepted into evidence specifically exhibits 12-A, 12-B, and 12-C. Thereafter the jury returned to the courtroom.

On 31 August 2023 the jury found Defendant guilty of possession of a firearm by a felon and on 1 September 2023 guilty of first-degree murder. The verdicts were read in open court on 1 September 2023. The trial court sentenced Defendant to life imprisonment without parole for the first-degree murder conviction and to 21 to 35 months of imprisonment for possession of a firearm by a felon to run at the expiration of the first sentence. Defendant gave notice of appeal in open court during sentencing.

II. Discussion

On appeal, Defendant argues the trial court erred by admitting evidence outside the presence of the jury, and by allowing the jury to view

the improperly admitted evidence, contending it had a probable impact on the jury's verdict. We address each in turn.

A. Admission of Evidence

[1] N.C. R. App. P. 10(a)(1) requires that "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."

At trial, Defendant neither objected to the admission of Exhibit 12, a box containing the pistol components, nor to the State's request to specify the three components of the pistol as 12-A, 12-B and 12-C when given the opportunity and specifically prompted by the Court to state any objections or concerns. Therefore, pursuant to N.C. R. App. P. 10(a)(1), Defendant failed to preserve this issue for appeal. Conceding that no objection was raised at trial, Defendant argues for this Court to apply a plain error standard of review.

N.C. R. App. P. 10(a)(4) allows an issue unpreserved by objection to be raised 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). Our Supreme Court has made it clear plain error must "be applied cautiously and only in the exceptional case, [] is reserved for grave error which amounts to a denial of a fundamental right of the accused and []focuses on error that has resulted in a miscarriage of justice or the denial of a fair trial." *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (internal citations and quotations omitted). In *Reber*, the Court set forth a three-factor test:

> First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. Under the second prong, a defendant must demonstrate that a jury "almost certainly" would have reached a different result had an error not occurred. *Id.* at 159, 900 S.E.2d 787. Defendant has failed to meet this burden.

The trial court properly admitted Exhibit 12 and then clearly listed exhibits 12-A, 12-B and 12-C as the components of Exhibit 12 when publishing them to the jury. The trial court stated, "All right. The State will be allowed to publish State's Exhibit 12, which consists of 12-A, the weapon; 12-B, I believe the clip; and 12-C, the bullets." Both the prosecutor and defense attorney proceeded to treat all three components as properly admitted evidence during their questioning of the witnesses. For reasons unknown, in an apparent overabundance of caution, the prosecutor unnecessarily moved to have the previously admitted components: 12-A, 12-B, 12-C, "readmitted." That this exchange occurred out of the presence of the jury while the court was in recess is irrelevant to our consideration of the merits of this appeal.

In an unpublished but persuasive opinion, this Court previously held "it is apparent from the record before this Court that everyone at the trial considered the handgun to have been admitted into evidence. Given the conduct of all parties at the trial, defendant has failed to meet his burden under our plain error standard of review." *State v. Blount*, 184 N.C. App. 189, 645 S.E.2d 903 (2007)(unpublished). Even if the subcomponents of Exhibit 12 were not properly admitted until later outside the presence of the jury, both the State and Defendant treated it as admitted evidence and as a formal part of the record when it was published to the jury and during questioning of the witness.

Defendant has failed to cite any case law to support a determination of prejudicial error under the facts of this case or how he was prejudiced by the admission of the delineated items constituting Exhibit 12. We hold the trial court did not err, much less prejudicially err, by admitting exhibits 12A – 12C into evidence.

B. Constitutional Right to Due Process

[2] Defendant next argues admittance of the evidence violated his constitutional right to due process. However, to preserve an issue for appellate review, a defendant must object at trial and make a motion and receive a ruling from the court with respect to the constitutionality of the issue. Otherwise, the defendant fails to preserve the issue for appellate review. *State v. Elliott*, 344 N.C. 242, 277, 475 S.E.2d 202, 277 (1996). "[A] purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal." *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002). Further,

> [Rule 10(b)(1)] requires a question to be presented first to the trial court by objection or motion. . . . This Court

> has held that it will not pass upon the constitutionality of a statute where the record does not reveal that the trial court was confronted with the issue and passed upon it.

N.C. R. App. P. 10(b)(1); *In re Crawford*, 134 N.C. App. 137, 142, 517 S.E.2d 161, 164 (1999). Because Defendant failed to object at trial and the trial court had no opportunity to hear or rule on the issue, it cannot now be considered on appeal. Defendant's argument is overruled.

C. Structural Error

[3] Defendant next contends there was a *per se* or structural error. "Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (citations omitted).

Since the United States Supreme Court first identified structural error in 1991,

> [they have] identified only six instances of structural error to date: (1) complete deprivation of right to counsel; (2) a biased trial judge; (3) the unlawful exclusion of grand jurors of the defendant's race; (4) the denial of the right to self-representation at trial; (5) denial of the right to a public trial; and, (6) constitutionally deficient jury instructions on reasonable doubt.

State v. Blake, 275 N.C. App. 699, 704, 853 S.E.2d 838, 842 (2020). The North Carolina Supreme Court "has recently declined to extend structural error analysis beyond the six cases enumerated by the United States Supreme Court." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 (citation omitted).

The facts before us misalign with the six enumerated instances of structural error to date. This Court cannot conclude that mere technical issues rose to a level that Defendant's criminal trial could not have "serve[d] its function as a vehicle for determination of guilt or innocence." *State v. Seelig*, 226 N.C. App. 147, 159, 738 S.E.2d 427, 436 (2013) (cleaned up).

D. Court's Authority Under Rule 2

[4] Finally, Defendant contends this Court should exercise its authority under Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of this unpreserved issue. The exercise of Rule 2 is limited to

"rare occasions." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted). This Court generally invokes Rule 2 in "circumstances in which substantial rights of an appellant are affected." *Id.* (citation omitted). Defendant has failed to demonstrate that his right to a fair trial free from error was adversely affected. In fact, he has failed to demonstrate that any error occurred. Further, the State and Defendant both treated the exhibit components as properly admitted evidence during witness questioning and Defendant raised no objections at trial. *U.S. v. Lopez*, 611 F.2d 44, 47 (4th Cir. 1979). Uncontestably admissible evidence, treated as admitted evidence by both parties and the court, though unnecessarily readmitted into evidence outside the presence of the jury, neither constitutes error nor scales the high bar for prejudicial error. Defendant was not deprived of his right to a fair trial.

III. Conclusion

For the foregoing reasons, we conclude the trial court did not err in the admission of evidence, the trial court reliably served its function as a vehicle for determining guilt or innocence, and none of Defendant's substantial rights were affected. We hold Defendant received a fair trial free from error.

NO ERROR.

Chief Judge DILLON and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
MATTHEW STEPHEN VAUGHN, DEFENDANT

No. COA23-297

Filed 3 December 2024

1. Motor Vehicles—DUI—speeding—radar results—statutory requirements for admissibility

In a prosecution on charges of speeding and driving while impaired, the trial court did not abuse its discretion in admitting the radar reading obtained by a Highway Patrol trooper, which led to a traffic stop and defendant's eventual arrest, to corroborate the trooper's testimony where the trooper—while failing to give the exact name of the agency (the North Carolina Criminal Justice Education and Training Standards Commission) that approved the radar model, issued the operator's certificate, and inspected the device—nonetheless provided sufficiently specific testimony to permit the trial court to conclude compliance with the requirements of N.C.G.S. § 8-50.2(b) (governing the admissibility of results from a speed-measuring instrument).

2. Constitutional Law—admission of video evidence—recording of defendant being read Miranda rights—no violation

In a prosecution on charges of speeding and driving while impaired, the trial court did not violate defendant's state or federal constitutional rights against self-incrimination when it admitted video testimony of a Highway Patrol trooper reading defendant his *Miranda* rights (introduced by the State to show the trooper's professionalism during the encounter where defendant had argued that the trooper intentionally administered one part of a roadside sobriety assessment in a location out of sight of the patrol vehicle's camera) where the portion of the video shown to the jury ended before defendant made any response and the State did not make any argument about defendant's reaction or response to being read his *Miranda* rights.

3. Motor Vehicles—DUI—motion to suppress—reasonable suspicion shown

In a prosecution on charges of speeding and driving while impaired, the trial court did not err in denying defendant's motion to suppress evidence discovered following a traffic stop and

defendant's subsequent arrest for impaired driving where the court's findings of fact, none of which were challenged and were thus binding on appeal—particularly those regarding evidence of defendant: speeding; having an odor of alcohol and red, glassy eyes after the trooper initiated a traffic stop; admitting to having consumed alcohol before driving; swaying when outside his vehicle; and showing 6 out of 6 possible clues of impairment in his horizontal gaze nystagmus test results—supported the conclusion that the trooper had reasonable suspicion that defendant was driving while impaired.

4. Motor Vehicles—DUI—traffic stop—results of portable breath testing excluded—video showing testing admitted

In a prosecution on charges of speeding and driving while impaired, the trial court did not abuse its discretion by allowing the State to present video evidence to the jury showing that defendant submitted to a portable breath test (PBT), despite the court having excluded the results of the PBT, because the court—aware that the footage could potentially prejudice defendant—instructed the jurors multiple times that they should assess the footage only to determine defendant's "demeanor and behavior" during the traffic stop.

5. Motor Vehicles—DUI—breath test results—statutory requirements for admissibility—new trial granted

In a prosecution on charges of speeding and driving while impaired, defendant was entitled to a new trial where the trial court admitted into evidence (over defendant's timely objection) the results of defendant's breath testing even though the State had not established a proper foundation by showing that the Intoxilyzer EC/IR II results complied with the requirements of N.C.G.S. § 20-139.1 or that the testing was performed in accordance with the rules set forth by the North Carolina Department of Health and Human Services—specifically, that if two sequential breath samples differing by less than 0.02 grams of alcohol per 210 liters of breath are not obtained, additional samples must be collected and only the lower of two test results may be used to prove any particular alcohol concentration.

Appeal by Matthew Stephen Vaughn from judgment entered 23 June 2022 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven C. Wilson, Jr., for the State.

The Robinson Law Firm, P.A., by Attorney Leslie S. Robinson, for the defendant-appellant.

STADING, Judge.

I. Background

At 3:30 A.M. on 8 June 2019, North Carolina Highway Patrolman Brandon Cruz ("Trooper Cruz") observed a vehicle operated by Matthew Stephen Vaughn ("Defendant"). He was speeding at an estimated sixty miles per hour in a forty-five mile per hour zone. After confirming the speed at sixty-two miles per hour with his radar, Trooper Cruz initiated a traffic stop and Defendant pulled over to the side of the road. Defendant stated that he did not intend to speed. Trooper Cruz smelled an odor of alcohol coming from Defendant's breath and saw that his eyes were red and glassy. Defendant also told Trooper Cruz that he had consumed an alcoholic drink "about an hour" before the encounter. Trooper Cruz observed a wristband on Defendant and learned he was coming from a "nightclub" located "just a couple of miles" from the stop.

On account of his observations, Trooper Cruz requested that Defendant step out of the vehicle and walk behind his patrol car for the administration of field sobriety tests. When walking, Defendant did not display problems with balance or coordination. The patrol car was equipped with video recording capabilities, but the location to which Defendant was directed for administration of the tests was not captured by the camera. As part of his training, Trooper Cruz had completed a twenty-four-hour course and refresher courses on the administration of standardized field sobriety tests. He had also participated in "hundreds" of driving while impaired investigations. Trooper Cruz began with administration of the Horizontal Gaze Nystagmus ("HGN") test and then the Vertical Gaze Nystagmus ("VGN") test. With respect to the HGN test, Trooper Cruz observed six out of six possible clues present, though VGN was not present. No other field sobriety tests were administered, namely the walk and turn and one-leg stand tests, because Trooper Cruz did not feel "that it [was] safe" to administer those tests in that location.

Next, Trooper Cruz requested that Defendant provide a sample of his breath on a portable breath test ("PBT"). While waiting to obtain a second breath sample, Defendant sat with Trooper Cruz in the patrol car. At this time, Trooper Cruz noted that Defendant had a blank stare on his face and a strong odor of alcohol on his breath. Defendant stated that he was not "supposed to be driving that particular vehicle due to

insurance purposes, especially while drinking and driving." Trooper Cruz then requested a second breath sample from Defendant. Based on the strong odor of alcohol, unfocused eyes, admission to drinking, and field sobriety tests results, Trooper Cruz arrested Defendant for suspected impaired driving. Trooper Cruz then read Defendant his *Miranda* rights. Defendant also received a citation for speeding. Following his arrest, Defendant was transported to the Pitt County Detention Center where he provided a sample of his breath on the Intoxilyzer EC/IR II which showed an alcohol concentration in excess of the legal limit.

The State called Defendant's case for trial in Pitt County Superior Court on 14 June 2022. Pretrial, Defendant moved to suppress evidence of the HGN test and PBT on the grounds that they were improperly administered. Defendant also argued that he exercised his *Miranda* rights, and therefore, video-captured conversation between him and Trooper Cruz occurring after and *contemporaneously* with the invocation of these rights is inadmissible. After seeing the State's video exhibit, the trial court denied the motion to suppress with respect to the HGN test. However, the trial court gave a limiting instruction to the jury for the administration of the first PBT and excluded all evidence of the second PBT.[1]

At trial, the State offered the testimony of Trooper Cruz and admitted a video of the stop; Defendant cross-examined the trooper and offered into evidence the National Highway Traffic and Safety Administration DWI Detection and Standardized Field Sobriety Testing Participant Manual ("NHTSA Manual"). Nat'l Hwy. Traffic Safety Admin., U.S. Dep't of Transp., *DWI Detection and Standardized Field Sobriety Test Participant Manual* (2018). Defendant renewed his motions to suppress at trial, which the trial court denied. The trial court subsequently memorialized its ruling on the motion in a written order. The trial court also permitted the State to introduce evidence of the *Miranda* rights advisement. After the trial court's rulings, among other things, the State introduced evidence before the jury of Defendant's HGN clues and Intoxilyzer EC/IR II reported alcohol concentration results of .10 grams of alcohol per 210 liters of breath. At the close of the State's evidence and close of all the evidence, Defendant moved to dismiss the charges against him for lack of substantial evidence, which the trial court denied. Subsequently, the jury found Defendant guilty of driving while impaired and speeding. Defendant timely entered his notice of appeal.

1. The State did not seek to introduce evidence of the results of either PBT sample.

II. Jurisdiction

This Court has jurisdiction to consider Defendant's appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) (superior court's final judgment) and 15A-1444(a) (2023) (pled not guilty but found guilty).

III. Analysis

Defendant raises five issues on appeal: whether the trial court erred by (1) admitting evidence of the speed results of the radar; (2) admitting video evidence of the advisement of his *Miranda* rights; (3) denying his motion to suppress; (4) admitting evidence of the Intoxilyzer EC/IR II test result; and (5) denying his motion to dismiss. After reviewing the record, we hold that trial court did not commit error in the first three issues raised by Defendant. However, for reasons discussed in-depth below, the trial court prejudicially erred in admitting the breath test result without the proper foundation and a new trial is necessary. Consequently, we do not reach consideration of the trial court's denial of Defendant's motion to dismiss.

A. Radar Foundation

[1] Defendant first argues that the trial court erred in admitting evidence of Trooper Cruz's radar results because the State failed to establish the requisite foundation for admission. More precisely, Defendant posits that the trial court committed error by admitting the radar numerical reading because the State failed to elicit the exact name of the agency that approved the radar model, issued the operator's certificate, and inspected the device. Generally, to preserve an issue for our review, "a party must . . . present[ ] to the trial court a timely objection[ ] or motion [that] stat[es] the specific grounds for the ruling the party desire[s] the court to make . . . ." N.C. R. App. P. 10(a)(1). Here, when the State sought to introduce evidence of the radar reading to the jury, Defendant's trial counsel preserved this issue for our review by objecting to the lack of foundation of testimony regarding the radar results, seemingly challenging the competency of the witness.

Rule of Evidence 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, R. 602 (2023). Moreover, Chapter 8, Article 7 of the North Carolina General Statutes sets out the standards for "Competency of Witnesses" under specific circumstances. Relevant here, radar results "shall be admissible as evidence of . . . speed in any criminal . . . proceeding for the purpose of *corroborating the opinion* of a person as to the speed of an

object. . . ." *Id.* § 8-50.2(a) (2023) (emphasis added). "Corroborating evidence is supplementary to that already given and tending to strengthen or confirm it." *State v. Burns*, 307 N.C. 224, 231, 297 S.E.2d 384, 388 (1982) (citation omitted).

That said, such results are not admissible unless it is found that:

> (1) The operator of the instrument held, at the time the results of the speed-measuring instrument were obtained, a certificate from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as the Commission) authorizing him to operate the speed-measuring instrument from which the results were obtained.
>
> (2) The operator of the instrument operated the speed-measuring instrument in accordance with the procedures established by the Commission for the operation of such instrument.
>
> (3) The instrument employed was approved for use by the Commission and the Secretary of Public Safety pursuant to G.S. 17C-6.
>
> (4) The speed-measuring instrument had been calibrated and tested for accuracy in accordance with the standards established by the Commission for that particular instrument.

N.C. Gen. Stat. § 8-50.2(b).

North Carolina's Administrative Code ("the Code") provides the Commission's standards regarding certification and implementation of standards. *See* 12 N.C. Admin. Code 9C.0300, 9C0600 (2023). Law enforcement officers using a "speed[-]measuring instrument," shall "hold certification from the Commission authorizing the officer to operate the speed[-]measuring instrument." 12 N.C. Admin. Code 9C.0308(a). And "[s]uch certification is for a three[-]year period from the date of issue and re-certifications is for a three[-]year period from the date of issue, unless sooner terminated by the Commission." 12 N.C. Admin. Code 9C.0308(c). The Code specifies that a list of "approved speed-measuring instruments" is contained in a referenced publication by the North Carolina Justice Academy. 12 N.C. Admin. Code 9C.0601(3). Similarly, the Code "establish[es] the minimum requirements and test methods for determining the accuracy of speed-measuring instruments used by law enforcement agencies," including annual and daily test standards and methods

as outlined in a publication by the North Carolina Justice Academy. 12 N.C. Admin. Code 9C.0607. Also, "[t]he operating procedures for each specific [r]adar . . . speed-measuring instrument" is outlined in a publication by the North Carolina Justice Academy and incorporated by reference in the Code. 12 N.C. Admin. Code 9C.0608.

Although our Court has not yet addressed the standard of review for testimony corroborating a radar reading, a review of analogous cases supports application of the abuse of discretion standard. *See State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citation omitted) ("The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroboration."); *see also State v. Gettys*, 243 N.C. App. 590, 594, 777 S.E.2d 351, 355 (2015) (citation omitted) (determining abuse of discretion is the standard of review for assessing an evidentiary ruling admitting a recorded interview for corroboration). Accordingly, we will apply an abuse of discretion standard of review to the trial court's decision to admit the radar results corroborating the trooper's testimony. Under this standard, "a trial judge's discretion may be reversed only if it is manifestly unsupported by reason or so arbitrary that it could not have been a reasoned decision." *State v. Pickens*, 385 N.C. 351, 360, 893 S.E.2d 194, 200 (2023) (citation omitted).

In his testimony about operation of the radar, Trooper Cruz did not specifically note that his certificate was from "the North Carolina Criminal Justice Education and Training Standards Commission" ("the Commission"). Furthermore, he did not testify that this radar was approved by the Commission. Nor did Trooper Cruz use the exact words that this radar was operated or calibrated and tested for accuracy in accordance with the standards of the Commission. Nonetheless, Trooper Cruz testified that he had "a permit to operate" the "approved" radar and referenced the model used. He also stated that he was "certified" from "radar training" and had to "requalify" every three years. Additionally, he explained the steps necessary to operate the radar. Finally, Trooper Cruz testified, "After each traffic enforcement you have to do . . . a tune and fork test. . . . And then once a year we have technicians . . . make sure . . . everything is calibrated correctly. . . ." He followed up by confirming this particular radar had been calibrated.

We are tasked with determining whether the trial court abused its discretion by ruling that the trooper's testimony was sufficient to admit the radar reading under N.C. Gen. Stat. § 8-50.2(b). Defendant urges us to hold that the testimony falls short, and to employ the same logic used by our Court when considering admission of a blood alcohol result as substantive evidence. *See State v. Roach*, 145 N.C. App. 159, 162, 548 S.E.2d

841, 844 (2001) (a proper foundation was not laid to show whether the chemical analyst possessed a current permit issued by the Department of Health and Human Services ("DHHS")); *see also State v. Franks*, 87 N.C. App. 265, 360 S.E.2d 473 (1987) (witness did not state whether he possessed a permit issued by DHHS on the date he administered the breathalyzer test). Contrary to Defendant's contentions, we see no parallel application of this reasoning. The radar reading testimony corroborated a "visual estimation" of Defendant's speed. *See State v. Jenkins*, 80 N.C. App. 491, 495, 342 S.E.2d 550, 552 (1986) ("[T]he speed of a vehicle may not be proved by the results of radar measurement alone and . . . such evidence may be used only to corroborate the opinion of a witness as to speed, which opinion is based upon actual observation.").

By comparison, a chemical analysis result is substantive evidence "deemed sufficient . . . to prove a person's alcohol concentration." N.C. Gen. Stat. § 20-138.1 (2023). When seeking admission of a speed-measuring instrument reading to corroborate the opinion of a witness, evidence of N.C. Gen. Stat. § 8-50.2(b)'s requirements is necessary. However, there is no essential talismanic phrase such as "approved by the North Carolina Criminal Justice Education and Training Standards Commission." As was done here, when the witness provides sufficiently specific testimony permitting the trial court to logically conclude compliance with N.C. Gen. Stat. § 8-50.2(b), the trial court does not abuse its discretion in admitting a radar reading to corroborate speed estimation testimony by a witness.

B. Evidence of *Miranda* Advisement

[2] Defendant next argues that the trial court violated his state Section Twenty-Three and federal Fifth Amendment constitutional rights when it admitted video testimony of Trooper Cruz reading Defendant his *Miranda* rights. The Self-Incrimination Clauses of both our state and federal Constitutions guarantee defendants' rights against self-incrimination. *See* N.C. Const. art. I, § 23, cl. 3; U.S. Const. amend. V, cl. 3. Our state courts generally construe these constitutional protections against self-incrimination via silence under the same *Miranda* rubric. *See*, *e.g.*, *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975) (acknowledging application of *Miranda v. Arizona*, 384 U.S. 436 (1966), to state Self-Incrimination Clause claims). The federal and state constitutions prohibit use of a defendant's post-Miranda exercise of his constitutional right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976); *see also State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012). And although a trial court may not permit a defendant's silence to be used against him, under appropriate circumstances, it may

admit evidence that a defendant was read and understood his *Miranda* rights. *See State v. Carter*, 335 N.C. 422, 432, 440 S.E.2d 268, 273 (1994) (upholding a trial court's decision to allow evidence that a defendant was read his *Miranda* rights according to law because it tends to refute the characterization of the officers' conduct as unprofessional).

Here, the State sought to introduce a video of Trooper Cruz reading Defendant his *Miranda* rights "to show the jury that [he] advised [Defendant of] his rights" as he was "supposed to do." The trial court, prosecutor, and Defendant's counsel engaged a substantive back-and-forth as to whether showing the footage at all would run afoul of the rights *Miranda* is intended to protect. When advocating for admitting the rights advisement in evidence at trial, the prosecutor noted an argument to the trial court by Defendant's counsel that "implied that [Trooper Cruz] deliberately brought [ ] Defendant out of view of the camera when conducting the HGN test" to attack his professionalism and ability to follow proper procedures. In fact, Defendant's counsel pursued this exact line of questioning in front of the jury, asking Trooper Cruz "[w]hy didn't you have [Defendant] do [the HGN test] . . . so that the jury could see that on the video?" He proceeded to question the trooper at length about Defendant's placement off-camera while conducting the HGN test.

Defendant's counsel's assertion supposes some relevant evidentiary purpose beyond a bare use of Defendant's silence against him—which the prosecution refrained from at trial. The prosecution also adhered to the trial court's express condition to strictly cut the video off before Defendant responded to the *Miranda* recitation in any manner. And contrary to Defendant's urging, nothing in our precedents indicates that the admission of the reading of *Miranda* rights, standing alone, constitutes error. To constitute error, the admission of such evidence must either impermissibly use the defendant's silence against him or have no relevancy. *See, e.g.*, *Moore*, 366 N.C. at 104, 726 S.E.2d at 172 (holding "the admission of the [defendant's] post-*Miranda* testimony was error" because it impermissibly used his silence against him); *see also Carter*, 335 N.C. at 432, 440 S.E.2d at 273 (holding the trial court's admission of the reading of the defendant's *Miranda* warnings was permissible because it was relevant to rebut defense counsel's attacks on "the professionalism of the conduct of the law enforcement officers who investigated the case"); *see also* N.C. Gen. Stat. § 8C-1, Rule 401 (2023) (defining relevant evidence). Thus, because the State made "[n]o specific inquiry or argument . . . about defendant's silence" as part of its case and such evidence was relevant to rebut assertions attacking the trooper's conduct, we hold that the trial court did not err in admitting

the camera footage of Defendant being read his *Miranda* rights. *Carter*, 335 N.C. at 432, 440 S.E.2d at 273.

C. Motion to Suppress

[3] Third, Defendant argues that Trooper Cruz lacked the probable cause to arrest him for driving while impaired. In support of his argument, Defendant maintains that the results of an improperly administered HGN test fall short of the necessary threshold to sustain the trial court's finding of probable cause. Moreover, Defendant points to countervailing evidence of his mental acuity and physical dexterity.

A law enforcement officer may arrest a suspect without a warrant only if, as of the arrest, the officer "ha[s] probable cause to suspect him of a crime." *State v. Woolard*, 385 N.C. 560, 570, 894 S.E.2d 717, 725 (2023). Probable cause arises from "a reasonable belief, anchored in specific facts and objectively rational inferences, that a particular person has committed a crime." *Id.* at 570, 894 S.E.2d at 726. "[T]he key question is whether a reasonable officer would find a supported, good faith, and objectively rational basis to suspect a person of a crime." *Id.* at 571, 894 S.E.2d at 726 (citation and internal quotation marks omitted).

1. HGN Test Administration

A variable underlying the trial court's probable cause formulation was Defendant's performance on the HGN test. Defendant asserts that the HGN test results were inadmissible because Trooper Cruz purportedly failed to follow the NHTSA Manual's administration instructions. N.C. R. Evid. 702 governs a trial court's preliminary assessment of an expert's admissible testimony. *See State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 739–40 (2018) (citing N.C. R. Evid. 702). Among other requirements not at issue here, the testimony's proponent must show that the expert has the "specialized . . . knowledge, skill, experience, training, or education" sufficient to testify to his own evidentiary opinion. N.C. R. Evid. 702(a). More specifically, an expert witness may testify "solely on the issue of impairment" resulting from an HGN test "administered in accordance with the person's training by a person who has successfully completed training in HGN." N.C. R. Evid. 702(a1)(1). "We review a trial court's ruling on admissibility of expert testimony pursuant to Rule 702(a) for an abuse of discretion." *State v. Hunt*, 249 N.C. App. 428, 436, 790 S.E.2d 874, 881 (2016) (citing *State v. McGrady*, 368 N.C. 880, 883, 787 S.E.2d 1, 5 (2016)). And reversal for abuse of discretion occurs "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11 (citation omitted).

When addressing the minimum qualifications for Trooper Cruz to offer HGN testimony, Defendant's attorney stated, "I don't contest that he's been trained and meets the qualifications to be an expert." Instead, Defendant suggests that Trooper Cruz did not "appl[y] the principles and methods [of the HGN test] reliably to the facts of [his] case." N.C. R. Evid. 702(a)(3). Defendant's argument rests on his assertion that Trooper Cruz did not comply with an extrapolated minimum time requirement to administer the entire HGN test. However, Defendant's exhibit, the NHTSA Manual, contains no such requirement. Aside from the four-second minimum required for the HGN clue of "distinct and sustained nystagmus at maximum deviation," and the VGN clue of "distinct and sustained" nystagmus at "maximum elevation," the other portions of the test require "approximate" rates of speed for proper administration.[2] The State produced countervailing evidence by extensively questioning Trooper Cruz about the HGN test and following up by confirming that he conducted the test in accordance with his training "in this particular case." In light of the evidence presented to the trial court, we cannot say that its decision to admit the HGN test results "was manifestly unsupported by reason and could not have been the result of a reasoned decision." *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11.

2. Probable Cause to Arrest

The probable cause formula relevant to this case permits an officer to arrest an impaired driving suspect if, "under the totality of the circumstances, he reasonably believes that a motorist consumed alcoholic beverages and drove in a faulty manner or provided other indicia of impairment." *Woolard*, 385 N.C. at 571, 894 S.E.2d at 726 (citation and internal quotation marks omitted). "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citation omitted). "However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Id.* at 168, 712 S.E.2d at 878 (citation omitted). "Conclusions of law are reviewed de novo and are subject to full review." *Id.* (citations omitted). "Under a *de novo* review, the Court considers the matter anew

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2. *See* Nat'l Hwy. Traffic Safety Admin., U.S. Dep't of Transp., *DWI Detection and Standardized Field Sobriety Test Participant Manual* sec. 8, at 19, 23–24, 29–46 (2018) (discussing various steps of HGN test), https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_full_participant_manual_2018.pdf.

and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation and internal quotation marks omitted).

Following a comprehensive examination of Trooper Cruz and arguments of counsel, the trial court found sufficient probable cause underlying Defendant's arrest for driving while impaired and denied his motion to suppress. The trial court's written order documented findings of fact in support its ruling: Trooper Cruz's extensive training and experience investigating the detection of impaired drivers; Trooper Cruz observed a vehicle traveling sixty-two miles per hour in a forty-five mile-per-hour zone; upon Trooper Cruz stopping the vehicle for speeding, Defendant was in the driver's seat; Trooper Cruz noted Defendant had an odor of alcohol coming from his breath and red, glassy eyes when initially speaking with him; Defendant admitted to drinking one hour prior; Trooper Cruz conducted the HGN test on Defendant and observed "all six out of the six possible clues;" Trooper Cruz observed Defendant "swaying slightly" while conducting the HGN test; and later on, Trooper Cruz observed a "blank stare" on Defendant's face and "a very strong odor of alcohol" coming from his breath. Considering its findings, the trial court concluded that "Trooper Cruz possessed sufficient reliable and lawfully-obtained information at the time of [Defendant's] arrest to constitute a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that [Defendant] was guilty of driving while impaired."

Defendant does not challenge any of the findings contained in the trial court's order; accordingly, they are deemed supported by competent evidence. *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878. We therefore review the conclusions of law *de novo*. *See id.* Considering the totality of the circumstances, the trial court's order detailed sufficient findings to support the trooper's reasonable belief that Defendant consumed alcohol, drove in a faulty manner, and displayed other indicia of impairment—including his performance on the HGN test and swaying. *See Woolard*, 385 N.C. at 571, 894 S.E.2d at 726. The trial court's conclusions of law are adequately supported by its findings of fact. *See Biber*, 365 N.C. at 167–68, 712 S.E.2d at 878. Our *de novo* review leads us to hold that the trial court did not commit error by denying Defendant's motion to suppress.

D. PBT Administration

[4] Defendant also argues that the trial court erred in allowing the State to present video evidence to the jury showing he submitted to a PBT since the device's results had been excluded from evidence. As noted,

this Court reviews questions of evidence admission for abuse of discretion by the trial court. *State v. Moultry*, 246 N.C. App. 702, 706, 784 S.E.2d 572, 574 (2016) (citation omitted) ("When a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence."). A trial court may admit otherwise inadmissible hearsay evidence that speaks to a defendant's "then existing state of mind . . . or physical condition[.]" N.C. R. Evid. 803(3). Such evidence is admissible if "the trial court properly instruct[s] the jury as to the limited use of this evidence," and the defendant "fail[s] to show prejudice from the admission of these statements." *State v. Taylor*, 344 N.C. 31, 49, 473 S.E.2d 596, 607 (1996). Absent evidence to the contrary, we presume that a jury "follow[s] a trial court's instructions." *State v. Prevatte*, 356 N.C. 178, 254, 570 S.E.2d 440, 482 (2002) (citation omitted).

Here, Defendant does not raise enough material facts to credibly attack the PBT dashcam's admission as an abuse of discretion. Trooper Cruz's improper administration of the second PBT—which the State conceded—is a separate issue. The footage itself has a "tendency make the existence of" Defendant's impairment "more probable" to the jury's factfinding "than it would be without the evidence." N.C. R. Evid. 401. Aware of the potential prejudice to Defendant, the trial court on multiple occasions instructed the jury to assess the footage only to determine Defendant's "demeanor and behavior." Thus, this Court holds that trial court did not err by admitting the dashcam footage of Defendant's otherwise inadmissible PBT.

E. Intoxilyzer EC/IR II Results

[5] Defendant next argues the trial court erred by permitting the admission of his breath test result in evidence. His argument is premised on the assertion that the State did not show the test was performed in accordance with the rules of DHHS by failing to offer evidence of two sequential breath samples that did not differ by more than .02 grams of alcohol per 210 liters of breath. In further support of his position, Defendant cites the operational procedures prescribed in 10A N.C. Admin. Code 41B.0322 (2023).

The statutory procedures governing chemical analyses permit the admission of breath test results if: (1) the test is performed in accordance with the rules of DHHS; and (2) the operator had a current permit issued by DHHS authorizing the operator to perform a test using the type of instrument used. N.C. Gen. Stat. § 20-139.1(b) (2023). Additionally,

"the testing of at least duplicate sequential breath samples" is required. *Id.* § 20-139.1(b3). Further, "[t]he results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02." *Id.* And "[o]nly the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration." *Id.*

Defendant challenges that the State did not meet its burden with respect to the first subsection of N.C. Gen. Stat. § 20-139.1(b). Compliance with 10A N.C. Admin. Code 41B.0322 fulfills the requirement of N.C. Gen. Stat. § 20-139.1(b)(1). This Code subsection prescribes an eight-step process for operating the Intoxilyzer EC/IR II. 10A N.C. Admin. Code 41B.0322. "If alcohol concentrations differ by more than 0.02," additional breath samples must be collected. *Id.* The breath sample collection process outlined in the Code is reflected in N.C. Gen. Stat. § 20-139.1(b3).

Failure to offer evidence of compliance with the statutorily prescribed methods of administering the test renders the result inadmissible. *See State v. Gray*, 28 N.C. App. 506, 506, 221 S.E.2d 765, 765 (1976) (holding that the defendant was entitled to a new trial when the trial court committed prejudicial error by admitting breath test results over the defendant's objection after the State failed to establish compliance with the procedures outlined in N.C. Gen. Stat. § 20-139.1).[3] The State may "prove compliance with these two requirements in any proper and acceptable manner." *State v. Powell*, 10 N.C. App. 726, 728, 179 S.E.2d 785, 786 (1971).

Trooper Cruz testified that the Intoxilyzer EC/IR II is "the instrument that we use . . . when we arrest somebody for DWI[,] we take them to the . . . Pitt County Detention Center and then we have them provide two [ ] breath samples . . . to give a reading of alcohol concentration." However, noticeably absent from the record is any evidence from which the trial court could have gleaned the foundational requirement that the two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. *See* N.C. Gen. Stat. § 20-139.1(b3); *see also* 10A N.C. Admin. Code 41B.0322. Testimony simply

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3. Each case presents unique facts with some bearing greater evidence of impairment than others, but when considering the particular facts of *State v. Gray,* the Court determined that "the failure of the State to produce evidence of the test operator's compliance with G.S. 20-139.1 (b) must be deemed prejudicial error." 28 N.C. App. at 506, 221 S.E.2d at 765.

noting the test is performed in accordance with the rules of DHHS could have met this requirement; yet the record is completely devoid of such evidence. *See State v. Powell*, 279 N.C. 608, 611, 184 S.E.2d 243, 245 (1971) (holding evidence was sufficient to meet the requirements of G.S. 20-139.1(b) since the officer had a valid permit to conduct the analysis and testified that he made the analysis in this case according to methods approved by the State Board of Health, now identified as DHHS).

Therefore, when the State moved to admit its exhibit displaying Defendant's breath test result, Defendant objected to the foundation. The trial court judge overruled Defendant's objection and accepted the breath test exhibit into evidence. Next, the State asked for the trooper's testimony of the breath result, and Defendant objected a second time to foundation. Again, the trial court judge overruled Defendant's objection, and the result was stated before the jury. In the absence of some form of compliance with both requirements of N.C. Gen. Stat. § 20-139.1(b), we are constrained to hold that these rulings amounted to prejudicial error. *Gray*, 28 N.C. App. at 506, 221 S.E.2d at 765.

Following admission of the breath test result into evidence, the State finished direct examination of the trooper, and the jurors left the courtroom for a break. During this break, the State brought a matter to the attention of the trial court:

> The reason I hesitated about – when I was about to ask the trooper if there's anything that had been altered or changed, that's because we did white-out the second test per request of the Defendant . . . . We had no objection to that, but I just wanted to clarify that for the record.

In light of this conversation, the State argues for the application of invited error on appeal. While a defendant suffers no actual prejudice from an alleged error caused by relief he sought in the first place, we are presented with a wholly separate issue. *See* N.C. Gen. Stat. § 15A-1443(c) (2023); *see also State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 610 (2020). Here, the record does not contain a single piece of evidence from which the trial court could have known whether the two sequential breath samples did not differ by more than 0.02 *at the time* the breath test result was ruled admissible. Furthermore, nothing in the record shows that the trial court ever had any information about the second reading that was redacted, *i.e.*, what was behind the white-out. The State's argument would have merit if the record contained evidence of a colloquy between the parties in the presence of the trial court discussing the redaction of the result *before* the admission of the result, or evidence

of a stipulation to that effect. But that is not the case and the record shows that the State simply did not meet the minimal requirements of N.C. Gen. Stat. § 20-139.1(b).

F. Motion to Dismiss

Since trial court erred in admitting the breath test result without the requisite foundation, at this time we are unable to address Defendant's last argument that trial court also committed error by denying his motion to dismiss his charges for lack of substantial evidence.

IV. Conclusion

For the reasons discussed above, this Court holds that trial court did not commit error by admitting evidence of Trooper Cruz's radar gun results, admitting evidence of Defendant's taped advising of his *Miranda* rights, or denying Defendant's motion to suppress evidence of impairment for lack of probable cause. However, the record leads us to the inescapable conclusion that the State failed to lay the proper foundation permitting admission of Defendant's breath test result from the Intoxilyzer EC/IR II. We are bound by precedent to hold that admission of the breath test result into evidence by the trial court constitutes prejudicial error and entitles Defendant to a new trial.

NEW TRIAL.

Judges ZACHARY and WOOD concur.

STATE OF NORTH CAROLINA
v.
MICHELLE RENEE WILSON

No. COA24-27

Filed 3 December 2024

1. Appeal and Error—appellate rules violations—good cause shown—meritorious issue—certiorari granted

Where defendant's appeal contained deficiencies—for failing to designate the court to which appeal was taken and for being untimely filed—but demonstrated probable merit, defendant's intent to appeal to the correct appellate court could be fairly inferred, and the State did not assert that it was prejudiced by the deficiencies, the appellate court granted defendant's petition for writ of certiorari to review the question of whether the trial court erred by denying defendant's motion to dismiss three of four felony larceny charges pursuant to the single-taking rule.

2. Larceny—multiple counts—single-taking rule—one continuous act—three of four convictions reversed—resentencing required

Where it was unclear during which of two incidents of larceny the victim's firearms were stolen and the State failed to establish that defendant—unlike her cohorts—participated in more than a single incident of larceny, defendant could not be convicted of four separate felony larceny charges (three counts of larceny of a firearm and one count of larceny after breaking and entering). Since defendant participated in only one continuous act of larceny, the single-taking rule required the reversal of the three larceny of firearm charges, and, where all of defendant's convictions had been consolidated into a single judgment for sentencing purposes, her sentence was vacated and the matter was remanded for resentencing.

Appeal by defendant by writ of certiorari from judgment entered 7 December 2022 by Judge Steve R. Warren in Rutherford County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adrina G. Bass, for the State.

John W. Moss for defendant-appellant.

ZACHARY, Judge.

Defendant Michelle Renee Wilson appeals by writ of certiorari from the trial court's judgment entered upon a jury's verdicts finding her guilty of three counts of larceny of a firearm and one count each of possession of a firearm by a felon, misdemeanor possession of stolen goods, possession of burglary tools, breaking or entering, larceny after breaking or entering, possession of a stolen motor vehicle, and attaining habitual-felon status. After careful review, we reverse Defendant's three convictions for larceny of a firearm, vacate Defendant's sentence, and remand for the trial court to resentence Defendant in accordance with this opinion.

BACKGROUND

On 28 January 2019, Detective Atkins of the Rutherford County Sheriff's Office received a report that several items, including three firearms, had been stolen from James Murray's property on Pea Ridge Road in Bostic, North Carolina. Detectives Atkins and Holtzclaw went to Defendant's residence on Lawing Mill Road "[t]o speak with [her] about the . . . break-in from Pea Ridge Road." While the detectives waited for someone to answer the door, they observed—in plain view on the front porch of the residence—several other items that had been reported stolen. Detective Atkins took photographs of the items, which Murray and his grandson later verified as their stolen property.

Detective Millard procured a search warrant for Defendant's residence. When the detectives executed the search warrant, they discovered many of the items that Murray and his grandson had reported stolen.

During the detectives' search of the residence, Defendant arrived in her white, single-cab Chevrolet truck. The detectives searched the truck and found "a set of bolt cutters" and "extra . . . key locks." After agreeing to speak with the detectives and being read her *Miranda* rights,[1] Defendant told them that she, Tim Terry, and Doug Roe met at her residence. They then drove her truck to the Pea Ridge Road property. While at the property, "they wound up taking a lot of smaller [items]"; Defendant, Terry, and Roe then "wound up going back to [Defendant's] property" and "unload[ed] the stuff on the front porch." About an hour

1. In *Miranda v. Arizona*, the United States Supreme Court held that the State "may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless [the State] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966).

and a half later, Terry and Roe returned to the Pea Ridge Road property and stole more items, including a motorcycle.

On 30 January 2019, Sergeant Upton executed a search warrant for Defendant's cell phone and extracted its contents, which Detective Ellenburg reviewed. The cell phone contained several outgoing and incoming text messages from 27–29 January 2019 regarding the stolen property. The stolen firearms were never recovered.

On 7 October 2019, a Rutherford County grand jury indicted Defendant for three counts of larceny of a firearm and one count each of possession of a firearm by a felon, misdemeanor possession of stolen goods, possession of burglary tools, breaking or entering, larceny after breaking or entering, possession of a stolen motor vehicle, and attaining habitual-felon status.

This matter came on for trial on 5 December 2022. Defendant made a motion to dismiss at the close of the State's evidence and renewed the motion at the close of all evidence; the trial court denied both motions. On 7 December 2022, the jury returned verdicts finding Defendant guilty of all charges. The trial court consolidated the convictions into a single judgment and sentenced Defendant to a term of 83 to 112 months in the custody of the North Carolina Division of Adult Correction.

On 4 January 2023, Defendant filed a written notice of appeal.

APPELLATE JURISDICTION

[1] Preliminarily, we note the deficiencies in Defendant's notice of appeal.

The first such deficiency is the lack of designation as to which court she appealed. Rule 4 of the North Carolina Rules of Appellate Procedure provides that an appellant's notice of appeal "shall designate . . . the court to which appeal is taken[.]" N.C. R. App. P. 4(b). Yet, this Court has recognized that such a nonjurisdictional "defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) (cleaned up).

Of more concern, however, is the fact that Defendant's notice of appeal was also untimely. Rule 4 requires that an appellant in a criminal action file notice of appeal and serve copies thereof "upon all adverse parties within fourteen days after entry of the judgment or order[.]" N.C. R. App. P. 4(a)(2). Here, Defendant did not give oral notice of appeal in open court after the trial court entered judgment on 7 December 2022;

rather, she filed an untimely written notice of appeal on 4 January 2023. Because Defendant failed to file her written notice of appeal within the 14-day window allowed by Rule 4(a)(2), we lack jurisdiction over Defendant's appeal. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 ("[C]ompliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by this Court."), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

Acknowledging the deficiencies in her appeal, on 10 April 2023, Defendant petitioned this Court to issue its writ of certiorari to review the judgment entered against her due to the fact that her "right to prosecute [this] appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1).

"Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id*. For the following reasons, we exercise our discretion pursuant to Rule 21 to allow Defendant's petition for writ of certiorari in part and to review one of the two issues that she presents on appeal.[2]

Defendant has shown good cause in that one of the arguments that she raises on appeal has merit. Moreover, the State does not assert that it was prejudiced by the untimeliness of Defendant's notice of appeal. Finally, Defendant's intent to appeal to this Court may be "fairly inferred" from her notice, *Springle*, 244 N.C. App. at 763, 781 S.E.2d at 521 (citation omitted), and the State does not contend that it was misled by the notice's defect.

In our discretion, we allow Defendant's petition for writ of certiorari *solely* to review the question of whether the trial court erred by denying her motion to dismiss three of the four larceny charges. *See State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 43 (2018); *see also State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018). We deny Defendant's petition for writ of certiorari as to the second issue Defendant advances.

DISCUSSION

[2] Defendant contends that the trial court erred by denying her motion to dismiss three of the four larceny charges. Specifically, Defendant

2. Defendant does not challenge "any issues related to her charges for misdemeanor possession of stolen goods or possession of burglary tools."

argues that the State's evidence failed to support four separate larceny offenses under the "single-taking rule," which precludes conviction and sentencing for multiple larceny charges arising out of a single continuous act or transaction.

Standard of Review

This Court reviews de novo a trial court's denial of a motion to dismiss. *State v. Hobson*, 261 N.C. App. 60, 70, 819 S.E.2d 397, 404, *disc. review denied*, 371 N.C. 793, 821 S.E.2d 173 (2018).

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (citation omitted). "Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion." *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (cleaned up).

In evaluating the sufficiency of the evidence upon a defendant's 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) (citation omitted).

Preservation

Our Supreme Court has stated that "under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020); N.C. R. App. P. 10(a)(3). "Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Golder*, 374 N.C. at 245–46, 839 S.E.2d at 788. "[A] defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id.* at 246, 839 S.E.2d at 788.

At trial, Defendant moved to dismiss all charges at the close of the State's evidence and renewed her motion at the close of all the evidence. Accordingly, Defendant properly preserved this issue for appellate review.

Analysis

Defendant argues that under the "single-taking rule," she "may not be . . . convicted . . . and punished for four separate charges of felony larceny arising out of one transaction or occurrence." We are constrained to agree.

"The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Garner*, 252 N.C. App. 393, 396–97, 798 S.E.2d 755, 758 (2017) (citation omitted). Moreover, larceny "[o]f any firearm" is a felony. N.C. Gen. Stat. § 14-72(b)(4) (2023).

The single-taking rule "prevents a defendant from being . . . convicted multiple times for a single continuous act or transaction." *State v. White*, 289 N.C. App. 93, 97, 887 S.E.2d 902, 906 (citation omitted), *disc. review denied*, 385 N.C. 319, 891 S.E.2d 272 (2023). "A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986). It is the State's burden to present evidence that the stolen items were taken as part of multiple acts or transactions in order to support multiple convictions. *Cf. id.* ("The State has not shown a *prima facie* larceny of each of the four [stolen items]."). "Thus, absent evidence that the [items] w[ere] stolen on more than one occasion, [a] defendant could only be convicted of one count of larceny." *Id.*

The underlying facts in this matter parallel those presented in *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992). In *Adams*, the defendant participated in a residential breaking or entering, during which a firearm and other items were stolen. 331 N.C. at 321–22, 416 S.E.2d at 382. The defendant was tried, convicted, and sentenced for a number of offenses, including larceny of a firearm and larceny of property stolen pursuant to a breaking or entering. *Id.* at 333, 416 S.E.2d at 389. Our Supreme Court, however, held that where all of the items were stolen "during the course of a single breaking or entering of the . . . residence[,]" the trial court had improperly convicted and sentenced the defendant "for both larceny of a firearm and felonious larceny of that same firearm pursuant to a breaking or entering." *Id.* Accordingly, the Court reversed the defendant's conviction of felonious larceny pursuant to a breaking or entering and vacated his sentence on the charge. *Id.*

In the case at bar, Defendant was charged, *inter alia*, with larceny after breaking or entering and three counts of larceny of a firearm. While it is unclear when the firearms were taken—during the first larceny or the second, when Defendant's cohorts returned to the property to steal more items—the State's evidence does not establish that Defendant participated in more than a single incident of larceny. Because the evidence presented at trial showed that Defendant participated in "one continuous act or transaction," she could only properly be convicted of and

sentenced for one larceny offense. *Froneberger*, 81 N.C. App. at 401, 344 S.E.2d at 347.

The State failed to meet its burden to present evidence that Defendant stole the items during the course of multiple acts or transactions. "Therefore, we hold that the court erred in not dismissing the three larceny of firearms charges, where [D]efendant was properly" convicted of one count of felonious larceny after breaking or entering. *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 682 (1985); *see Froneberger*, 81 N.C. App. at 401–02, 344 S.E.2d at 346–48. In that the trial court consolidated all of Defendant's convictions into a single judgment for sentencing, we remand for resentencing. *See Froneberger*, 81 N.C. App. at 402, 344 S.E.2d at 347.

CONCLUSION

For the reasons stated above, we reverse Defendant's three convictions for larceny of a firearm, vacate Defendant's sentence, and remand for the trial court to resentence Defendant in accordance with this opinion.

REVERSED IN PART; SENTENCE VACATED; REMANDED FOR RESENTENCING.

Judges STROUD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 DECEMBER 2024)

ARRINGTON v. MERCK PHARM. MFG. No. 24-319	N.C. Industrial Commission (21-015998)	Affirmed
BRAGG CMTYS., LLC v. JOHNSON BRICK CONTRACTORS, INC. No. 24-388	Cumberland (20CVS4465)	Affirmed
BRICK LANDING PLANTATION MASTER CMTY. ASS'N (22CVD698) v. MEDINA No. 23-913	Brunswick	Affirmed
CULBERSON v. HART No. 24-422	Chatham (22CVD944)	Affirmed
DAVIS v. N.C. DEP'T OF TRANSP. No. 23-1008 (TA-26021) (TA-26022)	N.C. Industrial Commission	VACATED and REMANDED WITH INSTRUCTIONS.
DEP'T OF TRANSP. v. WONDER DAY P'SHIP No. 24-525	Wake (20CVS004067)	Dismissed
DOZIER v. DOZIER No. 24-168	Durham (14CVD1272)	Affirmed
EDMONDSON v. EDMONDSON No. 24-239	Onslow (21CVD2404)	Vacated and Remanded
EST. OF GRAHAM v. LAMBERT No. 21-15-2	Cumberland (19CVS3596)	Vacated and Remanded
HAMMETT v. HAMMETT No. 24-184	Polk (19CVD245)	Vacated and Remanded
IN RE G.E.A.E. No. 24-462	Mecklenburg (20JT000330-590)	Affirmed.
IN RE J.G.C. No. 24-73	Wake (17JA10-14)	Affirmed
IN RE J.L.S. No. 24-314	New Hanover (22JT145) (22JT146)	Vacated and Remanded

IN RE K.B.L. No. 24-396	Randolph (23JT55-56)	Affirmed
IN RE M.M.A. No. 24-318	Cabarrus (23JA203) (23JA204) (23JA205) (23JA206)	Affirmed
IN RE N.J. No. 24-312	Pitt (21JA52) (21JA53)	Affirmed
IN RE T.M. No. 24-255	Surry (23JA64)	Affirmed
JOHNSON v. JOHNSON No. 24-304	Harnett (23CV1753-420)	Reversed
JOHNSON v. LOW No. 24-236	Cleveland (21CVS1702)	Affirmed
KEAN v. KEAN No. 24-627	Iredell (19CVS002577)	Vacated and Remanded
MITCHELL v. RICE No. 24-181	Forsyth (22CVS2853)	Vacated and Remanded
N.C. DEP'T OF STATE TREASURER v. PERRIGO No. 23-414	Wake (22CVS9059)	Reversed
S. FORK VENTURES, LLC v. BLACKWELDER No. 24-565	Cabarrus (23CVS002617-590)	Affirmed
STATE v. ANTHONY No. 24-331	Mecklenburg (21CRS210084) (21CRS210086-87) (21CRS210095)	Affirmed
STATE v. BALLON No. 24-31	Guilford (95CRS34636)	Affirmed
STATE v. BETHEA No. 24-135	New Hanover (19CRS57583)	No Error
STATE v. BISHOP No. 24-257	Catawba (22CRS3414-15)	No Error
STATE v. BRASIER No. 24-195	Macon (22CRS263147)	No Error

STATE v. BROWN No. 24-321	Mecklenburg (19CR24446) (19CR24448)	No Error
STATE v. COOPER No. 24-178	Lincoln (22CRS349089)	No Error
STATE v. ESKRIDGE No. 24-4	Cleveland (22CRS30) (22CRS50154)	NO ERROR In Part, NO PLAIN ERROR In Part, and DISMISSED In Part.
STATE v. FAGGART No. 24-89	Stanly (20CRS51000) (21CRS132)	Dismissed
STATE v. GALARZA-RODRIGUEZ No. 23-1036	Surry (21CRS52000)	No Error
STATE v. GRANT No. 24-26	Edgecombe (20CRS51485)	No Error
STATE v. GREENE No. 24-196	Rockingham (21CRS50634)	No Error
STATE v. HENDERSON No. 24-225	Mecklenburg (21CRS203859) (21CRS203861)	No Error
STATE v. HOGGARD No. 24-52	Wayne (22CRS282982) (22CRS632)	No Error
STATE v. HOLLAND No. 24-198	Guilford (20CRS70443-45) (20CRS73673-74)	No Error
STATE v. HUNT No. 23-1066	Robeson (20CRS52764)	NO ERROR AT TRIAL; REMANDED FOR CORRECTION OF ERRORS ON THE JUDGMENT.
STATE v. KOAGEL No. 23-880	Wake (18CR205465-910) (18CR205466-910) (18CR205467-910) (18CR205468-910) (18CR205469-910) (18CR205470-910) (18CR205471-910)	Affirmed

STATE v. MATTISON No. 24-357 and	New Hanover (22CRS53029)	NO ERROR In Part, DISMISSED In Part.
STATE v. QUINLAN No. 24-211	Franklin (19CRS50083)	No Error
STATE v. YEH No. 24-98	Wake (21CR205714-910)	No Error
SURRATT v. SURRATT No. 24-134	Davidson (17CVD1090)	Dismissed
WATER DAMAGE MITIGATION, INC. v. JORDAN No. 24-349	Mecklenburg (22CVS1192)	AFFIRMED IN PART AND DISMISSED IN PART
WESTMORELAND v. TAMARI No. 24-249	Buncombe (22CVS3055)	No Error

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