297 N.C. App.—No. 1 Pages 1-233

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 13, 2025

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

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OF
NORTH CAROLINA

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[1] Sworn in 1 January 2025 [2] Sworn in 1 January 2025. [3] Died 20 January 2025.
[4] Term ended 31 December 2024. [5] Term ended 31 December 2024.

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COURT OF APPEALS

CASES REPORTED

FILED 17 DECEMBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Failure to appeal—issues not raised in prior appeal—waiver—In a child abuse and neglect matter, respondent-father waived his right to appeal the trial court's decision to eliminate reunification from the permanent plan, and the issue of whether respondent received notice of the possibility that reunification efforts could cease, where he had the opportunity to raise those issues in a prior appeal but chose not to. **In re H.G., 41.**

sexual abuse of the child) without holding a new evidentiary hearing and instead relying on the transcript of a prior hearing—a decision which the appellate court had left to the trial court's discretion on remand. **In re H.G., 41.**

CHILD CUSTODY AND SUPPORT

Child support—modification—self-employed parent's income—depreciation expenses—sufficiency of findings—The trial court abused its discretion by modifying defendant father's child support obligation without making sufficient findings regarding depreciation expenses (claimed by defendant as deductions on his personal tax returns), which it excluded when calculating defendant's gross income from self-employment. Since the trial court did not make a finding that it was treating the depreciation as accelerated (versus straight-line), or that the depreciation was inappropriate for income determination pursuant to the North Carolina Child Support Guidelines, the trial court's findings lacked sufficient specificity to support its conclusions. Therefore, the court's modification order was reversed and the matter was remanded for additional findings. **Mecklenburg Cnty. v. Pressley, 82.**

Custody—consideration of statutory factors—sufficiency of findings—In its order granting joint legal and physical custody to a child's mother and father, the trial court entered numerous findings of fact showing that it addressed the factors in N.C.G.S. § 50-13.2, including those that detailed each parent's personal relationship with the child, financial means, housing situation, work schedule, and type of activities engaged in with the child. The trial court's findings supported its conclusions that the child's best interest would be served by having the parents share joint legal and physical custody and for her to attend schools in the school district where her mother lived. **Ludack v. Ludack, 72.**

Custody—conversion of temporary order to permanent by operation of time—delay in seeking permanent custody—remand required—In a child custody proceeding in which the father argued that the court's temporary custody order (granting a mother and father joint legal and physical custody and setting forth a detailed custody schedule) had converted to a permanent order by operation of time, where the trial court's subsequent permanent custody order (entered thirty-eight months after an evidentiary hearing, which kept joint custody but changed the custody schedule) did not indicate the effect that the mother's twenty-five-month delay in seeking permanent custody had on the temporary order, the matter was remanded for the trial court to hold a hearing to determine whether the temporary order had become permanent. **Ludack v. Ludack, 72.**

Custody—delay in entry of permanent order—remedy—petition for writ of mandamus or other action—In a child custody proceeding, although the father argued on appeal that the trial court's lengthy delay before entering a permanent written custody order was prejudicial, the Court of Appeals—following the same rule adopted by the Supreme Court in termination of parental rights cases—held that the proper remedy would have been to request expedited entry at the trial court level, such as by making a motion or petitioning for a writ of mandamus, rather than waiting to raise the issue for the first time on appeal. Here, after the trial court held an evidentiary hearing on child custody, the parties appeared in court multiple times during the thirty-eight months that passed between the hearing and entry of the order, during which either party could have requested entry of a written order. **Ludack v. Ludack, 72.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Res judicata—claim splitting—not applicable—different exclusive jurisdictions for state tort and constitutional claims—In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—plaintiffs were not barred from bringing their claims by the principle of res judicata or the prohibition on claim splitting because the exclusive jurisdiction of the applicable fora (the Industrial Commission for the STCA claims and the superior court for the state constitutional claims) precluded all of the claims from being brought together in a single action. **Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 23.**

CRIMINAL LAW

Defenses—castle doctrine—inapplicable where intruder has ceased efforts to enter a home—plain error and ineffective assistance of counsel not shown—In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not plainly err by failing to instruct the jury on the castle doctrine in the absence of defendant's timely objection to the instruction's omission. The presumptive fear of imminent death or serious bodily harm essential to the defense of habitation, as codified in N.C.G.S. § 14-51.2(b), was unavailable because the victim had discontinued his efforts to forcefully and unlawfully enter—and had clearly exited—defendant's home, as shown by video surveillance footage from the used car lot and testimony from defendant and two eyewitnesses. Accordingly, defendant's related claim for ineffective assistance based on counsel's failure to raise the issue at trial was also unavailing. **State v. Carwile, 145.**

Defenses—self-defense—special instruction not given—jury instructions accurate as given—no error—In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not err by failing to give a special instruction to the jury extending the holding of *State v. McLymore*, 380 N.C. 185 (2022) (which addressed the ability of a criminal defendant to assert self-defense where that defendant had been in the process of committing a felony) to the conduct of the victim, because the victim was not a criminal defendant and was not asserting self-defense. Moreover, the jury instructions as given provided an accurate statement of the law regarding self-defense as it could potentially apply to defendant. **State v. Carwile, 145.**

Prosecutor's closing argument—failure to intervene ex mero motu—no gross impropriety—In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the prosecutor's statement during closing argument—to which defendant did not object—noting that the victim, her child, and her family had no opportunity to realize the finality of their last interactions before the deadly collision occurred, even if improper, did not require the trial court's ex mero motu intervention because it did not rise to the level of gross impropriety. **State v. Moody, 192.**

EVIDENCE

Felony death by vehicle—testimony regarding notification to be on the lookout for an impaired driver—limiting instruction—In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err by admitting testimony from a law enforcement officer that he had been notified to be on the lookout (BOLO) for a "possibly impaired driver" shortly before seeing smoke coming from the scene of the collision. Upon defendant's objection on Evidence Rule 403 grounds, the trial court gave a limiting instruction to the jury that the BOLO testimony was only to be considered to provide context to the officer's investigation, thus ensuring that any prejudice to defendant from the reference to a "possibly impaired driver" did not substantially outweigh the testimony's probative value. Further, even assuming that admission of the BOLO testimony was error on hearsay grounds (a basis not raised by defendant at trial), defendant could not show prejudice in light of the other evidence of defendant's impaired driving and thus could not establish plain error. **State v. Moody, 192.**

FIREARMS AND OTHER WEAPONS

Possession of a stolen firearm—knowledge that firearm was stolen—substantial evidence—In a prosecution on charges including possession of a stolen firearm (discovered in a hidden compartment in defendant's car), the trial court did not err in denying defendant's motion to dismiss the firearms change for insufficiency of the evidence that he knew or had reasonable grounds to believe the firearm was stolen where such knowledge could be reasonably inferred from incriminating circumstances, including defendant's flight from law enforcement officers—first, in a high-speed car chase, and, after defendant crashed his vehicle into trees, on foot—as well as his concealment of the gun in an open space behind a panel near the steering column and his denial of possessing any firearm when apprehended. **State v. Bracey, 136.**

IMMUNITY

Public official—distinguished from public employee—negligence action—In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court erred in granting judgment on the pleadings in favor of the city's Senior Engineer Project Manager and Engineer

Project Manager (defendants), whom plaintiff (the pedestrian's guardian ad litem) alleged had failed to implement safety measures at the intersection. Specifically, the court erred in finding that defendants were entitled to public official immunity when, in fact, they were merely public employees, since neither the state constitution nor any statute (including the City Code of Ordinances) created their positions or delegated statutory authority to them, and therefore they could not exercise a portion of sovereign power. **Orsbon v. Milazzo, 96.**

INSURANCE

Breach of the duty to defend—foreclosed by policy exclusions—Pleasant claim—inapplicable to merely negligent acts—Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had failed to defend plaintiff in the wrongful death suit, the trial court erred in granting partial judgment on the pleadings in favor of plaintiff. A comparison of the allegations in plaintiff's pleading—asserting a claim under *Pleasant v. Johnson*, 312 N.C. 710 (1985)—with the provisions of the insurance policy—which covered as an "insured" "anyone . . . using with [employer's] permission a covered 'auto,' " but excluded coverage for bodily injury to a "fellow employee" of an "insured"—negated any duty by defendant to defend plaintiff against liability arising from the wrongful death of plaintiff's co-worker, his "fellow employee." Moreover, the holding of *Pleasant* (that "the Workers' Compensation Act did not shield a co-employee from common law liability for willful, wanton and reckless acts") was inapplicable in a wrongful death action grounded in negligence. **Ortez v. Penn Nat'l Sec. Ins. Co., 114.**

Claim for breach of duty to settle—Financial Responsibility Act—only a right, not a duty, for an insurance carrier to settle claims—Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding such a breach by defendant because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the estate rejected defendant's offer. **Ortez v. Penn Nat'l Sec. Ins. Co., 114.**

JUDGMENTS

Revocation of probation—clerical error—basis for revocation—incorrect box checked—The judgment revoking defendant's probation was remanded to the trial court for correction of a clerical error where, although the trial court's findings in open court clearly indicated that the basis for revocation was the commission of a new criminal offense (driving while impaired), the court checked an additional box on the judgment and commitment form erroneously linking revocation to defendant's failure to pay court and supervision fees (as alleged in his probation officer's violation report). **State v. McCullough, 183.**

Felony death by vehicle—motion to dismiss—impaired driving—proximate cause of death—substantial evidence—In a prosecution on multiple charges arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err in denying defendant's motion to dismiss the charge of felony death by vehicle where the State produced substantial evidence of the two contested elements of that offense: (1) that defendant was engaged in the offense of impaired driving, as shown by the level of delta-9-tetrahydrocannabinal (THC) in her blood, data from defendant's vehicle showing that she was driving 70 miles per hour (MPH) in a 45 MPH zone and never reduced her speed before the collision, and witness testimony that he saw defendant's vehicle "fly past" him on the wrong side of the road immediately before the crash; and (2) that defendant's impaired driving was the proximate cause of the victim's death, as shown by expert testimony regarding the potential effects of THC on driving—including decreased motor coordination, slowed reaction time, impaired time and distance estimation, and a tendency to weave side to side—along with the above-described vehicle data and witness testimony indicating the defendant's driving was consistent with appreciably impaired driving. **State v. Moody, 192.**

Negligence—jury instruction—last clear chance—no error—In a tort action brought after a truck struck and injured plaintiff as he walked in an empty parking lot—in which the jury found that negligence by defendant (the truck driver) caused plaintiff's injuries, plaintiff was contributorily negligent, and defendant-driver had the last clear chance to avoid the collision—the trial court did not err in submitting the issue of last clear chance to the jury where the evidence, taken in the light most favorable to plaintiff, was sufficient as to each of the two disputed elements of that doctrine. The first disputed element—that a plaintiff's contributory negligence had placed him in a position from which he was powerless to extricate himself—was satisfied by evidence that plaintiff was struck after the truck entered the parking lot, drove safely past him, made a U-turn, and then approached him from behind. The second disputed element—that a driver had the time and means to avoid injury to a plaintiff by the exercise of reasonable care after he discovered, or should have discovered, the plaintiff's perilous position and his incapacity to escape it—was established where defendant-driver turned into an empty parking lot with his headlights on and plaintiff in his plain view, with approximately twelve seconds passing before the truck turned around and struck plaintiff. C**reech v. Town of Cornelius, 31.**

Special jury instruction—workers' compensation award to plaintiff—impact on tort damages award—no abuse of discretion—In a tort action brought after a truck (owned by one defendant) struck and injured plaintiff (a local television news reporter on a work assignment) as he walked in an empty parking lot, in which the jury found that negligence by a second defendant (a truck driver employed by a third defendant) caused plaintiff's injuries—resulting in an award of damages to plaintiff—the trial court did not abuse its discretion in declining to give defendants' requested special instruction pursuant to N.C.G.S. § 97-10.2(j) (which allows a trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases). The court did instruct the jury about the workers' compensation benefits already received by plaintiff for the sole purpose of informing the jury that such amount would be deducted by the court from any amount of damages awarded to plaintiff in the tort action, a correct statement of the law as set forth in section 97-10.2(e). **Creech v. Town of Cornelius, 31.**

NEGLIGENCE

Accident at an intersection—city's actions before the accident—proximate cause of pedestrian's injuries—summary judgment—In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed as to proximate cause. Specifically, the city's actions were not the proximate cause of the pedestrian's injuries where: (1) the injuries were not foreseeable given that, for ten years prior to the accident, there were no pedestrian-related accidents at that intersection and only two left-turn vehicle accidents; (2) the intersection's design complied with North Carolina law, which requires drivers turning left on a circular green light to yield to pedestrians; (3) the city promptly addressed a resident's safety complaint about the intersection by installing a "No Turn on Red" sign within three days; and most importantly, (4) it was the driver's negligence that caused the pedestrian's injuries. **Orsbon v. Milazzo, 96.**

Accident at an intersection—design of intersection, crosswalk, and pedestrian signals—city's duty of care to injured pedestrian—summary judgment—In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed in that the city did not breach its duty of care to the injured pedestrian. Importantly, the intersection design—including the pedestrian signals and crosswalk—complied with state law and specifically with the Manual on Uniform Traffic Control Devices (MUTCD), and the city's decision to install Leading Pedestrian Intervals (LPIs)—timing devices that allow pedestrians to cross before drivers get a green light—in accordance with routine retiming was reasonable, especially where the installation of LPIs was entirely optional under the MUTCD. Further, the city did not delay unreasonably in addressing any safety concerns, as it installed a "No Turn on Red" sign three days after receiving a resident's complaint and later expedited the installation of an LPI following the accident. **Orsbon v. Milazzo, 96.**

Gross negligence—wanton conduct—sufficiency of evidence—summary judgment—In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked following excavation work performed by town employees when installing a sewer line, the trial court properly granted summary judgment to the town on plaintiff's gross negligence claim. A showing of gross negligence requires proof of wanton conduct; here, even assuming that the town had not provided sufficient warnings to cyclists of the backfilled area, plaintiff failed to forecast any evidence indicating that the town had acted with a bad purpose or reckless indifference to plaintiff's rights. **Saad v. Town of Surf City, 127.**

Ordinary—per se—summary judgment—genuine issues of material fact—In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked following excavation work performed by town employees when installing a sewer line, the trial court erred in granting summary judgment in the town's favor

on plaintiff's claims of: (1) ordinary negligence, where there was a genuine issue of material fact regarding whether the town breached its duty of care given that it knew about the backfilled area but still left it unmarked and unlit; and (2) negligence per se, where there was a genuine issue of material fact regarding whether the town violated a public safety ordinance requiring warnings for excavation sites. Further, the town's arguments on appeal—that plaintiff was contributorily negligent, that the trial court lacked jurisdiction over plaintiffs' claims, and that the town was protected by governmental immunity—lacked merit. **Saad v. Town of Surf City, 127.**

PROBATION AND PAROLE

Revocation of probation—new criminal offense—sufficiency of evidence—driving while impaired—The trial court did not abuse its discretion by revoking defendant's probation for committing a new criminal offense while on probation—driving while impaired (DWI)—where the State presented the charging officer's affidavit, defendant's arrest warrant for DWI, an intoxilyzer report showing that defendant had a blood alcohol level of 0.12, and testimony from defendant's probation officer regarding defendant's phone call to her notifying her of his arrest. The affidavit and intoxilyzer report, in particular, were sufficient to allow the trial court to independently determine that it was more probable than not that defendant had violated the terms of his probation. **State v. McCullough, 183.**

Revocation of probation—statutory right to confront adverse witnesses—affidavit in lieu of testimony—other evidence sufficient—The trial court did not commit prejudicial error in defendant's probation revocation hearing—based on defendant's commission of a new criminal offense while on probation (driving while impaired)— by failing to make an explicit finding that good cause existed for denying defendant the right to confront the charging officer, whose affidavit was submitted by the State. Where the State presented sufficient other evidence to support revocation, including an intoxilyzer report and testimony from defendant's probation officer (regarding defendant's phone call to her notifying her about his DWI and admitting that he had been driving), the arresting officer's testimony would have been extraneous. **State v. McCullough, 183.**

SEARCH AND SEIZURE

Motion to suppress—findings of fact—unresolved conflicts in evidence—incorrect legal standard—After defendant pleaded guilty to multiple charges (including possession of methamphetamine and carrying a concealed handgun) arising from a traffic stop, during which police searched defendant's person and vehicle after a K-9 unit performed a drug sniff, both defendant's plea agreement and the trial court's order denying defendant's motion to suppress were vacated and the matter was remanded for new proceedings. The court's findings of fact contained mere recitations of witness testimony that failed to resolve material conflicts in the evidence, including: whether the K-9 actually alerted to the presence of drugs inside the vehicle, especially given the absence of body camera footage of the alert and conflicting testimony among the witnesses regarding the sniff; and whether the officer who frisked defendant did so based on reasonable concerns about officer safety or solely to look for drugs. Further, the trial court applied the wrong legal standard when denying the motion to suppress, concluding that the officers had "reason" to search defendant's person and vehicle rather than determining whether the searches were supported by "probable cause." **State v. Stollings, 220.**

SEARCH AND SEIZURE—Continued

Motion to suppress—knock and talk—warrantless search—probable cause—exigent circumstances—In a prosecution on drug and weapon charges arising from an officer's "knock and talk" at defendant's house, the trial court properly denied defendant's motion to suppress where competent evidence supported the court's factual findings regarding the "knock and talk," which in turn supported the court's conclusions of law. Specifically, the court properly concluded that the "knock and talk" did not rise to the level of a Fourth Amendment search where the officer approached the home in a manner consistent with societal expectations when he followed a visitor to the front door, wearing attire that clearly identified him as a police officer. The fact that he had parked adjacent to the home, entered defendant's property through the side yard, and stood behind the visitor at the front door did not transform the "knock and talk" into a search. Further, the subsequent warrantless search of the house: (1) was supported by probable cause where the officer detected the strong odor of marijuana emanating from the residence; and (2) fell under the exigent circumstances exception to the warrant requirement because the officer believed drugs could be destroyed if he left to obtain a warrant, since defendant tried to prevent the officer from entering after he identified himself. **State v. Reel, 205.**

Warrantless search—curtilage—seizure of neglected animals—exigent circumstances—plain view doctrine—probable cause to search house—In a prosecution for felony cruelty to animals, officers' warrantless search of the curtilage of defendant's home and seizure of twenty-one dogs was not unconstitutional where the officers, in response to a call regarding a strong smell indicating a dead animal, had discovered that defendant was on probation from a prior conviction of animal cruelty and, as they walked up defendant's driveway, they could see and hear multiple animals exhibiting signs of poor health and living conditions and could smell ammonia and feces. The condition of the animals created exigent circumstances justifying their removal for emergency veterinary treatment. Further, based on the plain view discoveries of the animals on the front of the property, there was probable cause to search the backyard and inside the house (for which officers obtained a warrant). The trial court did not err, much less plainly err, by denying defendant's motion to suppress. **State v. Johnson, 160.**

SEXUAL OFFENDERS

Sex offender registration—petition to terminate—tier level—categorical approach—comparability of state and federal offenses—The trial court properly denied defendant's petition to terminate his sex offender registration after determining that he was not a Tier I sex offender, since the state offense he was convicted of—sexual activity by a substitute parent—was comparable to the generic federal offense of abusive sexual contact, thereby placing him in Tier II or III. To be sure, the statute defining the federal offense required that a defendant act "knowingly" while the statute for the state offense lacked any mens rea requirement, thus prohibiting a wider range of conduct than the federal statute. Nevertheless, in affirming the denial of defendant's petition, the Court of Appeals concluded that the two offenses were still a categorical match because there was no realistic probability that the State of North Carolina could or would enforce its statute in a way that would sweep in conduct outside of what the generic federal crime encompassed (specifically, unintentional sexual activity by a substitute parent). **State v. Lingerfelt, 168.**

STATUTES OF LIMITATION AND REPOSE

Constitutional claims—following decision that claims under State Tort Claims Act not permitted—not time-barred—In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—the trial court erred in dismissing the complaint as time-barred where, although the applicable statutes of limitation for both negligence and constitutional claims were three years, they did not begin to run until the Supreme Court issued its decision differentiating general negligence claims as permissible under the STCA from "negligent regulation" claims as not thus permitted. **Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 23.**

TERMINATION OF PARENTAL RIGHTS

Best interest of the child—statutory factors—likelihood of adoption—other parent's rights not terminated—The district court did not abuse its discretion in determining that the termination of respondent-mother's parental rights was in the best interest of her minor son in light of its findings of fact reflecting consideration of each of the statutory factors set forth in N.C.G.S. § 7B-1110(a)—including the likelihood of adoption of the juvenile—despite the court's decision not to terminate the parental rights of the child's father, because termination of respondent-mother's parental rights increased the likelihood that the child would be adopted and thus aided in the achievement of his permanent plan. **In re K.J.D., 49.**

Failure to make reasonable progress—supported by findings of fact—Where a juvenile was initially adjudicated dependent as the result of domestic violence between respondent-mother and the juvenile's father, but his removal from respondent-mother's care and custody was also the result of substance abuse concerns, the district court's adjudication that respondent-mother's willful failure to make reasonable progress in correcting the conditions that led to the child's removal—a ground permitting the termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(2)—was supported by its findings of fact that, over the nearly two-year period the child had been in the custody of the county department of social services, respondent-mother had consistently failed to comply with drug screens or to address her substance abuse issues, and, despite having completed domestic violence classes, continued to be involved in domestic violence situations. **In re K.J.D., 49.**

Notice requirement—notice given less than thirty days before hearing—continuance denied—harmless error analysis—no prejudice—The trial court's order terminating respondent mother's parental rights to her child was affirmed where, although the department of social services (DSS) did not provide the statutorily required notice of thirty days (N.C.G.S. § 7B-1106.1) and the hearing was held before the time to file a written response had expired, there was no evidence that the error caused respondent prejudice. Respondent did not contend that she was not served with or had no actual notice of the motion to terminate her parental rights; DSS provided all the elements of notice required by statute for the initial notice and the notice of hearing, though notice was untimely; there was no proffer by respondent of a responsive pleading or what affirmative defenses respondent would have

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DENNIS DAVID BOSSIAN, PLAINTIFF
v.
ANDREW PAUL CHICA, KIMBERLY ANN BOSSIAN, DEFENDANTS

No. COA24-474

Filed 17 December 2024

1. Torts, Other—interference with parental rights—interference with contract—failure to state a claim

In an action brought by a father (plaintiff) against his former wife (the mother of two children with plaintiff) and the man with whom she lived (together, defendants) after one of plaintiff's children—primary physical custody of whom had been awarded to the mother—moved to Rhode Island to live with plaintiff, but after two years, returned to North Carolina to live with defendants, the trial court did not err in allowing defendants' motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), where plaintiff failed to allege facts supporting his claims for tortious interference with parental rights and tortious interference with contract, in that, although plaintiff and the mother had signed agreements to modify custody before a notary to permit the child to move to Rhode Island and live with plaintiff, no court order modifying custody had been entered, and, thus, even taking as true plaintiff's allegation that defendants had "induced" the child who had been residing with him to live with defendants, such actions were entirely consistent with the controlling custody order, the terms of which could not be altered by contract.

2. Attorneys—Rule 11 sanctions—pro se signature sufficient to certify—other bases not supported by findings of fact —remanded

The trial court's imposition of sanctions against plaintiff under Civil Procedure Rule 11(a) was reversed where one basis for the award was the failure of plaintiff, an attorney licensed in Rhode Island and Massachusetts who represented himself in this tort action, to verify his pleading because he signed the complaint and thus certified the pleading as a party for Rule 11(a) purposes. To the extent defendants' motion for sanctions was allowed because plaintiff's complaint was not well grounded in fact, not warranted by existing law, or filed to harass defendants, the trial court failed to make findings of fact that would support such an award, despite evidence in the record that would permit them; accordingly, the matter was remanded to the trial court to make additional findings.

3. Attorneys—Rule 34 sanctions—gross violation of Appellate Rules—inclusion of collateral matters in reply brief—remand for determination of sanctions

As a result of plaintiff's gross violations of the Appellate Procedure Rules—by including legal arguments and factual assertions entirely outside the issues on appeal and outside of the record (some of which plaintiff acknowledged were "collateral" to the appeal at hand)—the Court of Appeals, on its own initiative, imposed sanctions pursuant to Appellate Rule 34 by remanding the matter to the trial court for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of that rule; specifically, the appellate court directed the award of up to half of the additional attorney fees related to the appeal, with the option to award less left to the sole discretion of the trial court.

Judge MURPHY concurring in part and concurring in result only in part.

Appeal by plaintiff from order entered 17 February 2021 by Judge Ned Mangum in District Court, Wake County. Heard in the Court of Appeals 22 October 2024.

Dennis D. Bossian, pro se, plaintiff-appellant.

Tharrington Smith, LLP, by Jeffrey R. Russell, Alice C. Stubbs, and Casey C. Fidler, for defendants-appellees.

STROUD, Judge.

This is Father Dennis Bossian's second appeal of the trial court's order entered on 17 February 2021; the first appeal was dismissed as interlocutory. *See Bossian v. Chica*, COA21-381, 281 N.C. App. 627, 867 S.E.2d 428, *disc. rev. denied*, 873 S.E.2d 10 (2022) (unpublished) ("*Bossian I*"). Because Father's complaint fails to state a claim upon which relief may be granted, the trial court did not err by granting Defendants' motion to dismiss. The trial court, however, did not make sufficient findings to support its imposition of sanctions under Rule 11 of our North Carolina Rules of Civil Procedure. As such, we vacate the trial court's award of sanctions and remand for entry of a new order with additional findings of fact.

I. Procedural and Factual Background

The relevant background preceding Father's first appeal was summarized in this Court's opinion:

> Dennis David Bossian ("[F]ather") appeals from an order granting Kimberly Ann Bossian ("[M]other") and Andrew Paul Chica ("[D]efendant Chica"; together with [M]other, "[D]efendants") a motion to dismiss, thus dismissing [F]ather's complaint, and allowing [D]efendants' motion for Rule 11 sanctions. On appeal, [F]ather contends the trial court erred in dismissing his complaint and in imposing Rule 11 sanctions.
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> . . . .
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> Father and [M]other were married on 22 August 1998 and had two children, "J.J." and "J.D." "On or about" 1 August 2013, [M]other filed for divorce from [F]ather.
>
> On 12 February 2015, the trial court entered an order granting [M]other primary physical custody of the children, while granting [F]ather, who lived in Rhode Island, visitation during the children's Spring Break holiday and for two weeks during the summer.
>
> On 22 February 2016, [F]ather and [M]other agreed to allow J.D., at J.D.'s request, to move to Rhode Island and live with [F]ather. Accordingly, J.D. moved to Rhode Island in July 2016 and lived there for approximately two years. In June 2018, J.D. flew to North Carolina to stay

with [M]other, who lived with [D]efendant Chica and J.J. Thereafter, J.D. never returned to Rhode Island.

On 11 March 2020, [M]other filed a motion for order to show cause and, in the alternative, a motion for contempt, in which [M]other alleged [F]ather had "willfully refused to make any child support payments since January of 2016," had "willfully refused to pay his half of the children's unreimbursed medical expenses," and had "willfully refused to pay the $1,800 distributive award" resulting from the sale of the former marital residence. On 1 May 2020, the trial court entered an order to appear and show cause against [F]ather.

The matter came on for hearing on 25 August 2020; [F]ather failed to appear. Then, on 18 September 2020, the trial court held [F]ather in contempt "for having willfully violated the trial court's Orders," stating he "may purge his contempt by paying [M]other child support arrears, past due medical expenses," and "the distributive award in the total amount of $1,800"; were he not to comply, [F]ather would face arrest. Additionally, the trial court found that, although its "Order was never modified and no motion to modify custody or child support was filed by either party," both [F]ather and [M]other agreed and confirmed that J.D. "resided with [F]ather from July of 2016 through June 19, 2018" and that, "in June of 2018, J.D. returned to [M]other's physical custody."

On 11 August 2020, [F]ather, acting *pro se*, filed a complaint against [D]efendants for "tortious interference with parental rights," libel per se, and "tortious interference with contract." Specifically, [F]ather alleged [D]efendants "knowingly, willfully, intentionally, and with reckless disregard induced J.D. to leave his home state of Rhode Island and take up residence in North Carolina," resulting in "the loss of the society and companionship" of J.D. for [F]ather. Father also alleged that [M]other published false statements when she "signed a verified complaint" alleging [F]ather had "willfully refused to make any child support payments since January of 2016," which, he argued, "would tend to impeach his reputation and credibility as a licensed attorney." Lastly, [F]ather alleged [D]efendant Chica had "willfully, intentionally, maliciously and without

> a proper societal motive interfered with the contractual 'consent agreement' entered into between" [F]ather and [M]other that allowed J.D.'s return to Rhode Island in 2016.
>
> On 19 November 2020, [D]efendants filed an answer and counterclaims for intentional infliction of emotional distress and "punitive damages related to intentional infliction of emotional distress." Therein, [D]efendants also made three motions: a motion for "gatekeeper order" to "prevent [F]ather's abuse of the judicial process," alleging that [F]ather "has a history of filing frivolous pleadings against" [M]other; a motion for Rule 11 sanctions, alleging that [F]ather had "filed this cause of action for the purpose of harassing the [D]efendants," since, they contend, "there is no binding and enforceable contract in existence" with which [D]efendant Chica could have tortiously interfered; and a motion to dismiss pursuant to North Carolina Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted.
>
> The matter came on for trial on 11 February 2021 in Wake County District Court, Judge Mangum presiding. By order entered 17 February 2021, the trial court granted [D]efendants' motion to dismiss [F]ather's complaint for failure "to allege facts sufficient to state his claims for relief," thus dismissing [F]ather's complaint, and granted [D]efendants' motion for Rule 11 sanctions, finding [F]ather's complaint was "not verified, not well grounded in fact, not warranted by existing law, and is done to harass" [D]efendants. The trial court then reserved "the right to consider [D]efendants' request for a Gate Keeper Order for any new filings of [F]ather against [D]efendants in Wake County Court."
>
> Father, through appellate counsel, gave notice of appeal on 16 March 2021.

Id., slip op. at 1-5 (ellipses, original brackets, and footnotes omitted).

On 1 February 2022, Father's first appeal was dismissed because the 17 February 2021 Order ("2021 Order") was an interlocutory order based upon Defendants' pending counterclaims. *Id.*, slip. op. at 7. Father also "failed to show that the trial court's order deprives him of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Id.* (quotation marks and brackets omitted). On

15 June 2022, the Supreme Court of North Carolina denied Father's petition for discretionary review of this Court's opinion dismissing the first appeal as interlocutory. *See Bossian v. Chica*, 873 S.E.2d 10 (N.C. 2022).

On 26 February 2024, Defendants filed a Notice of Voluntary Dismissal of their counterclaims, and on 15 March 2024, Father filed notice of appeal again from the trial court's 2021 Order. Based upon the dismissal of Defendants' counterclaims, at this point the trial court's 2021 Order became a final order as all claims had been disposed and no further action by the trial court was needed "to settle and determine the entire controversy." *Bossian I*, slip op. at 5 (citations and quotation marks omitted). As this appeal is not interlocutory and Father timely appealed after Defendants' filing of the Notice of Voluntary Dismissal, this Court has jurisdiction to consider Father's appeal. *See Barfield v. Matos*, 215 N.C. App. 24, 35, 714 S.E.2d 812, 820 (2011) ("As all of the pending claims, crossclaims, and counterclaims as to all parties have been disposed of either by order or by voluntary dismissal, the 8 April 2010 summary judgment order is a final and appealable order." (citation omitted)).

II. Motion to Dismiss under Rule 12(b)(6)

[1] Father contends the trial court erred in dismissing his claims against both Mother and Defendant Chica for tortious interference with parental rights and against Defendant Chica for tortious interference with contract.[1]

> The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established. Appellate courts review de novo an order granting a Rule 12(b)(6) motion to dismiss.
>
> The word de novo means fresh or anew; for a second time[.] The appellate court, just like the trial court below, considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory. In other words, under de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of

1. Father's complaint also included a claim for libel *per se* against Mother, but he has not challenged the trial court's dismissal of this claim on appeal. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6).

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

Taylor v. Bank of Am., N.A., 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022) (citations and quotation marks omitted).

A. Tortious Interference with Parental Rights

Father first contends that the trial court erred in dismissing his claims for tortious interference with parental rights. Father alleges many details about the custody dispute between himself and Mother, but in summary, he alleges Mother and Defendant Chica interfered with his parental relationship with J.D. when they "induced" J.D. to move from Father's home in Rhode Island to the home of Defendants in North Carolina. Father's complaint also alleges details regarding the 2015 Order[2] addressing custody of J.D. under North Carolina General Statute Chapter 50. The complaint alleges the trial court entered an order "on or about February 11, 2015," granting "joint legal custody of the minor children" to Mother and Father and granting Mother "primary physical custody of the minor children" with visitation for Father as set out in the 2015 Order. Father alleged the details of various emails between them regarding their agreement for J.D. to move to Rhode Island to live with Father and that ultimately Mother "signed the 'Consent to Modification of Custody' agreement after February 22, 2016 and before July 1, 2016 in the presence of a notary. As such, [Mother] & [Father] mutually agreed that the scheduled adversarial hearing before the Honorable Judge Anna Worley was no longer necessary." However, Father's complaint also reveals that no court order modifying the child custody provisions of the 2015 Order was ever entered.

The portion of the 2021 Order addressing Defendants' motion to dismiss stated as follows:

> Defendants' Motion to Dismiss claims filed by [Father] is GRANTED. [Father] failed to allege facts sufficient

2. In this opinion, we will refer to the 2015 Permanent Child Custody and Child Support Order as the "2015 Order."

> to state his claims for relief, and [Father's] claims for Tortious Interference with Parental Rights (as it relates to both Defendants), Libel Per Se (as it relates to [Mother]), [Father] failed to show that a contract exists, and Tortious Interference with Contract (as it relates to Defendant . . . Chica) are DISMISSED.

Father confidently asserts that the "tort of interference with parental relations" is "well-established in North Carolina, and throughout the entire country." In support of this argument, Father cites to various sources other than North Carolina cases or statutes, relying upon the Restatement (Second) of Torts and cases from various states which may or may not address situations similar to the facts of this case. In any event, this Court is bound by North Carolina law, and even if the tort of interference with parental rights exists, North Carolina law does not support Father's claim based upon the facts as alleged by Father.

Father appears to have a fundamental misunderstanding of the effect of the 2015 Order granting joint custody of the parties' two sons to Father and Mother. He argues at length that the agreement between him and Mother for J.D. to reside with him in Rhode Island – without any court-ordered modification of the 2015 Order – "is sufficient to confer a superior right of custody to one parent." But Father cites no legally relevant authority for this proposition, and it is incorrect. Of course, for purposes of *de novo* review of the 2021 Order allowing the motion to dismiss, we accept as true Father's allegation that he and Mother signed an agreement for J.D. to reside in Rhode Island, despite the absence of any written agreement between him and Mother in our record. In fact, Mother did not dispute that she had agreed for J.D. to reside in Rhode Island in 2016. But we review the trial court's legal conclusion that Father's complaint failed to state a claim for interference with parental rights *de novo*. *Id.* Although the law regarding the effect of a child custody order is well-established, this Court has previously addressed the effect of the very same 2015 Order as well as the informal agreement for J.D. to live in Rhode Island:

> *Both the Custody and Support Order and the Equitable Distribution Order have remained in effect without modification since February 12, 2015, and March 5, 2015, respectively. In January 2016, [Mother] and [Father] mutually agreed their younger son would move to Rhode Island with . . . [F]ather and [Father] would assume primary custody of him. The younger son resided in Rhode Island with [Father] from January 2016 until July 2018,*

> *at which time he returned to North Carolina to live with [Mother]. Neither parent sought permission from the trial court to modify the Custody and Support Order.*

Bossian v. Bossian, 284 N.C. App. 208, 210, 875 S.E.2d 570, 574 (2022), *disc. rev. denied*, 894 S.E.2d 751 (N.C. 2023) (emphasis added) ("*Bossian II*").

Although Mother and Father agreed for J.D. to reside in Rhode Island at all times relevant to Father's alleged claims, *Mother* always had primary physical custody of J.D. under the 2015 Order. The 2015 Order was never modified and it "remained in effect without modification since February 12, 2015." *Id.* Even if Mother "induced" J.D. to return to her home in North Carolina, she had a right to do so as she still had primary physical custody of J.D. under the 2015 Order.[3] And since Defendant Chica and Mother lived together in the same home, even if Defendant Chica joined in Mother's inducements of J.D. to return to North Carolina, his actions were also consistent with the 2015 Order.

The only North Carolina cases cited by Father to support his argument are *Howell v. Howell*, 162 N.C. 231, 78 S.E. 222 (1913), and *LaGrenade v. Gordon*, 46 N.C. App. 329, 264 S.E.2d 757 (1980). In *LaGrenade*, this Court summarized the father's common law "right to control of the child" described in 1913 in *Howell v. Howell*:

> The father of a minor child is its natural guardian, at common law, and his rights of control over the child is superior to that of the mother, in the absence of a court's contrary determination of custody. Thus, a father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or by harboring the child after he has left the house. In *Howell v. Howell*, *supra*, plaintiff husband had entered into a contract with his wife and her father that the parties' minor daughter might remain with the wife until the child was six years old. The husband subsequently obtained a divorce but no mention was made of custody of the child. When the child became six, according to plaintiff's complaint, the mother, with the aid of her father, removed the child

3. Father's complaint also alleged that the 2015 Order provided for J.D. to visit with Father at specific times, but if Father wished to enforce his visitation time with J.D., his remedy would have been by a motion in the cause to enforce the provisions of the 2015 Order at the relevant time, when J.D. was still a minor child.

> from the State. The Supreme Court held that a cause of action existed for abduction.

LaGrenade, 46 N.C. App. at 331, 264 S.E.2d at 758 (citations omitted).

Both *Howell* and *LaGrenade* were based upon ancient common law principles giving a child's father "rights of control over the child . . . superior to that of the mother, in the absence of a court's contrary determination of custody." *Id.* Thus, Father's argument has two fatal flaws. First, here the trial court made a "contrary determination of custody" in the 2015 Order, and the 2015 Order granted Mother primary physical custody of J.D. *Id.* In *Howell* and *LaGrenade*, there was no custody order in effect. *Id.* at 331-32, 264 S.E.2d at 758-59. Second, the common law granting a father rights "superior to that of the mother" as to the custody and control of his children, upon which *Howell*, *LaGrenade*, and Father's argument are based, has been abrogated by legislation, as discussed at length by the Supreme Court of North Carolina in *Rosera v. Blake*:

> In 1967, our General Assembly repealed all prior statutes governing the custody of minor children and enacted N.C.G.S. § 50-13.1 to -13.8, a statutory scheme under which all child custody actions are now to be brought. N.C.G.S. §§ 50-13.1 to -13.8 were enacted to eliminate conflicting and inconsistent custody statutes and to replace them with a comprehensive act governing all custody disputes. When enacted, N.C.G.S. § 50-13.2 directed the trial courts to award custody based upon what will best promote the interest and welfare of the child. Significant to our discussion here, the legislature further amended N.C.G.S. § 50-13.2 in 1977 to provide between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.

Rosero v. Blake, 357 N.C. 193, 199, 581 S.E.2d 41, 45 (2003) (citations and quotation marks omitted).

Father's brief also refers at times to the tort of abduction of a child although his complaint does not mention abduction specifically. Most of the ancient common law cases addressing abduction address it as a criminal offense. *See*, *e.g.*, *State v. Burnett*, 142 N.C. 456, 55 S.E. 72 (1906). As a tort, some of the common law cases address abduction as a claim a father may bring, again based upon a father's superior rights at common law to the custody and control of a child. *See LaGrenade*,

46 N.C. App. at 332, 264 S.E.2d at 759. To the extent we can discern the elements of an ancient common law tort of abduction, it requires the "unlawful taking away or concealment of a minor child[.]" *Howell*, 162 N.C. at 234, 78 S.E. at 224. Father also cites to *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E.2d 521 (1981), and although this case may have involved a claim for abduction[4], the opinion addresses only personal jurisdiction as to one of the defendants under the long arm statute and procedural due process, not the substantive claims alleged in the plaintiff's complaint.

Even assuming North Carolina recognizes a claim for abduction by one parent against the other, Father's complaint has not alleged that J.D. was unlawfully taken away, by either Mother or Defendant Chica, as Mother had primary physical custody of J.D. under the 2015 Order. Certainly Father also had custodial rights under the 2015 Order and he would have had a legal basis to enforce his visitation time while J.D. was still a minor by filing a motion in the Chapter 50 proceeding, but that is not the issue before us. Father has not alleged that Mother or Defendant Chica "spirited the child away beyond the state to some place unknown to the plaintiff." *Howell*, 162 N.C. at 232, 78 S.E. at 223. Instead, he alleged that J.D. returned to North Carolina to reside with Mother, who had primary custody of J.D. Even taking the allegations of Father's complaint as true, he did not state a claim for abduction.

Thus, upon *de novo* review, the trial court did not err by dismissing Father's claim for tortious interference with parental rights under Rule 12(b)(6) because "the complaint on its face reveals that no law supports the plaintiff's claim[.]" *Scheerer v. Fisher*, 202 N.C. App. 99, 102, 688 S.E.2d 472, 474 (2010) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

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4. In *Fungaroli*, the complaint alleged the plaintiff-mother had legal custody of the child and defendant-father

> acting in concert with both the codefendants, who are his parents, secretly left North Carolina with the minor child. They allegedly removed the child from this State for the purpose of defeating plaintiff's right to custody and in violation of G.S. 14-320.1. Thereafter, plaintiff allegedly went to the State of Virginia where defendants were residing with the child and demanded that they release the child to her. Plaintiff charged that the defendants refused to allow her even to see her child.

Fungaroli v. Fungaroli, 51 N.C. App. 363, 364, 276 S.E.2d 521, 522 (1981).

B. Tortious Interference with Contract

Father next contends the trial court erred in dismissing his claim for tortious interference with contract against Defendant Chica. In his complaint, Father alleged Defendant Chica was aware he and Mother had "expressly entered into a written and orally agreed upon contract" or "consent agreement" for J.D. to reside with him in Rhode Island. Defendants argue Father's complaint failed to allege several elements of this claim.

> The elements of a claim for tortious interference with contract are: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 368 N.C. 693, 700, 784 S.E.2d 457, 462 (2016) (citation and quotation marks omitted).

Specifically, Father's complaint alleged as follows:

> 74. On and after January, 2018, [Defendant Chica] knew that [Mother] and [Father] had expressly entered into a written and orally agreed upon contract or "consent agreement," that as the biological parents of J[.]D[.], was in their minor sons "best interest".
>
> 75. On and after January, 2018, in a series of affirmative acts, [Defendant Chica] willfully, intentionally, maliciously and without proper societal motive, interfered with the contractual "consent agreement" entered into between [Mother] and [Father].
>
> 76. At all times material hereto, [Defendant Chica] was an "outsider" to the contractual relationship between [Mother] and [Father] and the paternal relationship between J[.]D[.] and his biological father, [Father].
>
> 77. As a direct and proximate result of the defendants intentional, willful, reckless, malicious and bad faith interference with the verbal and written contractual "consent agreement" between [Mother] and [Father], [Father] has

> suffered and will continue to suffer from extreme mental anguish, loss of sleep, loss of the care, comfort, society and companionship of his youngest son, and has been otherwise injured and damnified.

We first note Father did not attach the alleged written portion of the contract to his complaint nor has it been presented to the Court in this or other proceedings between Father and Mother. *See Bossian II*, 284 N.C. App. at 219, 875 S.E.2d at 579. For purposes of Rule 12(b)(6), we take as true Father's allegation that he and Mother entered into a "verbal and written contractual consent agreement" for J.D. to live with Father. *See Taylor*, 382 N.C. at 679, 878 S.E.2d at 800. But the law is well established, as discussed above, that parents have no authority to modify a child support order or a child custody order by an informal agreement; a custody order must be modified by the trial court upon proper motion. *See Baker v. Showalter*, 151 N.C. App. 546, 551, 566 S.E.2d 172, 175 (2002) ("Individuals may not modify a court order for child support through extrajudicial written or oral agreements." (citation omitted)).

Father's complaint has failed to allege "a valid contract between [himself] and [Mother] which confers upon [himself] a contractual right against [Mother]." *Beverage Sys. of the Carolinas*, 368 N.C. at 700, 784 S.E.2d at 462 (citation and quotation marks omitted). Even if Father and Mother agreed for J.D. to reside in Rhode Island in 2016, this agreement did not confer any *contractual rights* to the physical custody of J.D. to Father. *Children* are not items of property to be possessed or owned based upon the provisions of a contract.

> We reiterate: to modify a child support order or a child custody order, a judicial modification by a court is required and individuals may not modify a court order for child support through extrajudicial written or oral agreements. It is well settled, no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court. Any extrajudicial written agreement between the parties intended to modify the court ordered custody arrangement is invalid and does not implicitly or otherwise modify the parties' court ordered child support obligations. Simply put, the parties do not possess the authority to

> modify a child custody and support order without court intervention.

Bossian II, 284 N.C. App. at 222, 875 S.E.2d at 581 (citations and quotation marks omitted).

Although this Court was addressing Father's child support obligation under the 2015 Order in our 2022 opinion, the same is true of the 2015 Order's provisions regarding child custody. Father has failed to plead the first element of tortious interference with contract, the existence of a valid contract, *Beverage Sys. of the Carolinas*, 368 N.C. at 700, 784 S.E.2d at 462; we need not address the other elements. The trial court properly dismissed this claim under Rule 12(b)(6).

III. Imposition of Sanctions under Rule 11

[2] Father contends the trial court erred in imposing sanctions under North Carolina Rule of Civil Procedure 11(a), "awarding costs and attorney fees in the amount of $9,026.70." The portion of the 2021 Order addressing Defendants' motion for sanctions stated as follows:

> 2. Defendants' Motion for Rule 11 Sanctions is GRANTED in the form of costs and attorneys fees in the amount of $9,026.70. [Father] shall pay said amount directly to Tharrington Smith, LLP, P.O. Box 1151, Raleigh, NC 27602 on or before May 1, 2021.
>
> 3. The Court finds that there are no probable grounds for relief in the Complaint.
>
> 4. [Father's] complaint is in violation of Rule 11 of the NC Rules of Civil Procedure as it is not verified, not well grounded in fact, not warranted by existing Law, and is done to harass the Plaintiff [sic].

Father also contends the 2021 Order "lacks findings to support an award of $9,026.70."

We review the trial court's decision to impose sanctions under Rule 11(a) *de novo* and we review the amount of sanctions for abuse of discretion:

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment

> or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Further, regarding the appropriateness of the amount imposed by the trial court, "an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses concentrates the court's discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Id.* (emphasis in original) (citations, quotation marks, ellipses, and brackets omitted).

Rule 11(a) addresses pleadings, motions, and other papers signed by both attorneys and parties representing themselves, despite the title of the subsection referring only to "signing by attorney":

> (a) Signing by Attorney.— Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. *A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate*

> *sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2023) (emphasis added).

This Court has noted that

> [i]t is well established there are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose . . . . A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.
>
> . . .
>
> This court has held a two-step analysis is required when examining the legal sufficiency of a claim subject to Rule 11 inquiry. Initially, the court must determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, the second issue is whether, based on a reasonable inquiry into the law, the alleged offender formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. Rule 11 sanctions are appropriate where the offending party either failed to conduct reasonable inquiry into the law or did not reasonably believe that the paper was warranted by existing law.

Ward v. Jett Props., LLC, 191 N.C. App. 605, 607-08, 663 S.E.2d 862, 864 (2008) (citations and quotation marks omitted).

Father argues the trial court erred to the extent it ordered sanctions based upon his failure to verify the complaint. Father filed his pleadings in this action *pro se*, and as the trial court noted, he did not verify his complaint in his capacity as plaintiff, but he did sign the complaint indicating he was representing himself. Father is correct that there is no *requirement* for his complaint to be verified; Rule 11(a) itself states "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." N.C. Gen. Stat. § 1A-1, Rule 11(a); *see HBD, Inc. v. Steri-Tex Corp.*, 63 N.C. App. 761, 762, 306 S.E.2d 516, 517 (1983) ("In general, pleadings need not be verified and no lack of credibility will be implied by the absence of a verification of plaintiff's complaint." (citations omitted)). Mother has not

identified any statute or rule requiring that Father's complaint be verified, and we cannot identify any such requirement. Father's failure to verify the complaint is not a basis for sanctions under Rule 11(a). But Father did sign his complaint, and his signature as a party was a certification under Rule 11 that

> he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a). Father's signature on his complaint was the relevant certification under Rule 11(a), even though he did not also verify the complaint, but he would not be subject to sanctions for being "*in violation* of Rule 11 of the NC Rules of Civil Procedure," (emphasis added), because the complaint "[was] not verified."

The trial court also awarded sanctions because the complaint was "not well grounded in fact" and "not warranted by existing Law." Regarding the claims stated in the complaint, Father argues that his claims were "in fact valid claims which should have survived the motion to dismiss." As discussed above, we disagree. Father's claims were not well-grounded in existing law or fact. His asserted legal basis for his claims were bits of the Restatement (Second) of Torts, mostly taken out of context, and cases from other states. Mother correctly notes that even the section of the Restatement relied upon by Father, "Causing Minor Child to Leave or not Return Home," does not support his contention that *North Carolina* recognizes a claim for intentional interference with parental rights as "the Restatement (Second) of Torts § 700 does not cite to any North Carolina cases[.]" The North Carolina cases Father relied upon, *LaGrenade* and *Howell*, entirely fail to support his arguments because there was a court order governing custody in this case. *See LaGrenade*, 46 N.C. App. at 331-32, 264 S.E.2d at 758-59. Father's arguments relied most heavily upon the purported validity of his "contract" with Mother for J.D. to live in Rhode Island, but this contract was not effective to change custody of J.D.[5]

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5. In fact, we note Father has continued to assert the validity and effect of this "contract" in his brief in this appeal, filed after this Court issued its opinion in July 2022, stating:

Father is an attorney licensed in Rhode Island and Massachusetts but represented himself throughout most of this proceeding. However, even if he were not a licensed attorney, we hold all parties representing themselves to the same standard. *See Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999) ("Nevertheless, the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them. Therefore, the rules must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel."). Father should have been well aware of the legal effect of the 2015 Order even before he was held in contempt of that order on 25 August 2021. If he was not already aware the 2015 Order was still in effect, he should have been put on notice of this fact by the trial court's issuance of an Order to Show Cause on 1 May 2020, a few months before he filed the complaint in this case.

We have already determined in our analysis of the trial court's dismissal of the complaint for failure to state a claim upon which relief may be granted that the complaint was not well-grounded in fact or warranted by existing law. However, "[w]e note that the mere fact that a cause of action is dismissed upon a Rule 12(b)(6) motion does not automatically entitle the moving party to have sanctions imposed." *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 561, 638 S.E.2d 260, 268 (2006).

The trial court also determined that the complaint was "done to harass" Defendants.

> Our Courts have held that even if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose. Defined as any purpose other than one to vindicate rights or to put claims to a proper test, an improper purpose may be inferred from the alleged offender's objective behavior. Accordingly, under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. The movant's subjective belief that a

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> Any extrajudicial written agreement between the parties intended to modify the court ordered custody arrangement is invalid and does not implicitly or otherwise modify the parties' court ordered child support obligations. Simply put, the parties do not possess the authority to modify a child custody and support order without court intervention.

Bossian II, 284 N.C. App. at 222, 875 S.E.2d at 581.

> paper has been filed for an improper purpose as well as whether the offending conduct did, in fact, harass movant is immaterial to the issue of whether the alleged offender's conduct is sanctionable. Improper purpose may, however, be inferred from the service or filing of excessive, successive, or repetitive papers or from continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate.

Ward, 191 N.C. App. at 609, 663 S.E.2d at 865 (citations and quotation marks omitted).

Here, the trial court did not make any findings as to the reasons for finding Father's purpose was to harass Defendants. "As a general rule, remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11." *Sholar Bus. Assocs., Inc. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000) (citation omitted). For example, in *Ward*, this Court upheld sanctions under Rule 11 where the trial court had "noted that plaintiff has filed at least forty-two actions in the past six years including a previous action alleging conduct identical to the instant case." *Ward*, 191 N.C. App. at 606, 663 S.E.2d at 864. Here, the trial court did not make findings regarding Father's improper purpose or harassment, although there was information or evidence before the trial court upon which it could make findings of fact. Therefore, we must remand for the trial court to make additional findings.

We also note that Father argues the trial court erred to the extent it relied upon Mother's counsel's argument regarding Father's previous lawsuit "against a different paramour of [Mother], causing [Mother] to spend thousands of dollars in legal fees." Father correctly notes that "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Yet Mother's brief argues "[t]here was evidence presented of [Father's] pattern of filing frivolous actions against" Mother "and now Defendant Chica," based specifically upon her counsel's *argument* to the trial court regarding a "jury trial [Father] initiated against an alleged paramour of [Mother]." If Mother's counsel's argument to the trial court was the only information before the trial court regarding Father's previous lawsuit against a "paramour" of Mother, Father is correct that the trial court could not base its determination of Father's improper purpose on factual information about a separate lawsuit stated only in counsel's argument where no testimony or evidence about the prior lawsuit was presented. Thus, as stated above, we must remand for the trial court to make additional findings.

IV. Sanctions under Rule 34

[3] As to Father's argument addressing Mother's counsel's argument regarding the previous lawsuit, we must also note that Father's reply brief grossly violates our Rules of Appellate Procedure by making arguments entirely outside the issues on appeal and not based upon the record on appeal. Specifically, Father makes factual assertions regarding his own attorney fees in the first interlocutory appeal of this case and argues that Mother and Defendant Chica were in violation of Rule 11 in bringing their counterclaims – dismissed before this appeal – against him. Father also makes additional factual assertions, not based upon the record, to case information "that became available online in Wake County on or about February 13, 2023" and even references to an alleged "domestic assault charge" against Mother.[6] Father claims that he "will decline the opportunity to ask this Honorable Court to consider these collateral matters," yet he still included them in his reply brief. We can discern no legitimate reason for Father to include these "collateral matters" in his reply brief. By addressing these entirely inappropriate matters in his reply brief before this Court, Father continues the same pattern he has pursued in the trial court in the filing of the complaint and discovery in this case.

Father's inclusion of these admittedly "collateral matters" in his reply brief is a gross violation of the Rules of Appellate Procedure. *See Sapia v. Sapia*, 294 N.C. App. 419, 422, 903 S.E.2d 444, 448 (2024) ("In violation of Rule 9(a) of the North Carolina Rules of Appellate Procedure, Wife's brief also refers to at least one document which was not included in our record, a Consent Order for Permanent Child Custody and Attorneys Fees." (citation omitted)). Father's reply Brief is particularly egregious as he seeks to present additional information about the prior lawsuit filed against Mother's "paramour" – going far beyond anything mentioned in Mother's counsel's argument before the trial court – while simultaneously arguing the trial court should not have considered Mother's counsel's arguments regarding the very same lawsuit. On our own initiative, we will impose "sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals." N.C. R. App. P. 25(b). Specifically, the portions of Father's reply brief addressing these "collateral matters" are "grossly lacking in the requirements of propriety,

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6. Father is apparently referring to North Carolina's new electronic filing system, Enterprise Justice (Odyssey). The mere availability of case information in the Enterprise Justice system does not change how appeals are conducted by this Court under the Rules of Appellate Procedure in any way; the information presented by the parties to the Court of Appeals must be provided in accordance with the Rules of Appellate Procedure.

grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court." N.C. R. App. P. 34(a)(3). Pursuant to Rule 34(c), on remand, the trial court shall hold a "hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule." N.C. R. App. P. 34(c). Specifically, the trial court shall award additional reasonable attorney fees related to this appeal. But as Father's appeal is not entirely without merit, the trial court may award no more than one-half of Mother's reasonable attorney fees related to the appeal but may award less, in its sole discretion.

Upon *de novo* review, we conclude the trial court did not err in finding that Father's claims were "not well grounded in fact" and "not warranted by existing Law." However, we must remand for additional findings of fact to address the basis for the trial court's determination that the complaint "[was] done to harass" Defendants. We also remand for the trial court to make additional findings regarding the amount of sanctions, including any sanctions related to violations of the Rules of Appellate Procedure in this appeal based upon Father's reply brief as noted above. Father did not make any specific argument on appeal regarding the amount of sanctions awarded by the trial court but only that the trial court did not make findings of fact as to how the amount was determined. We note that Mother's counsel submitted an affidavit for attorney fees to the trial court and the trial court awarded the amount stated in the affidavit. But we will not further address Father's argument as to the amount of sanctions awarded in the 2021 Order on appeal as we must remand for entry of a new order with additional findings as discussed above. The trial court shall on remand also make appropriate findings regarding the amount of any attorney fees and sanctions granted.

V. Conclusion

The trial court did not err in dismissing Father's claims for tortious interference with parental rights as these claims were not well founded in good, applicable North Carolina law, nor did the trial court err in dismissing Father's claim for tortious interference with contract. We vacate the trial court's award of sanctions in the amount of $9,026.70 and remand for entry of a new order with additional findings of fact supporting the sanctions under Rule 11(a) as noted above and awarding sanctions for Father's violation of the Appellate Rules in his reply brief. The trial court shall hold a hearing on remand as required by North Carolina Rule of Appellate Procedure 34(d) to address the amount of sanctions to be awarded under Rule 34.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge FLOOD concurs.

Judge MURPHY concurs in part and concurs in result only in part by separate opinion.

MURPHY, Judge, concurring in part and concurring in result only in part.

I fully join the Majority in its analysis of the Rule 34 violation in Part IV and tortious interference with contract in Part II-B. However, I cannot join the Majority in its analysis of the alleged torts in Part II-A, as I agree they have not been recognized by our Supreme Court, and concur therein in result only. Further, as discussed in more detail below, I join the Majority fully in Part III but write separately to discuss what Father did not argue on appeal and its impact on our review.

The Majority correctly recognizes that neither tortious interference with parental rights nor abduction have been established as common law tort claims by our Supreme Court. This should be the end of our discussion, and we should not analyze elements of a "claim" that does not exist. "[T]his Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature[.]" *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126, 723 S.E.2d 352, 358 (2012). "This Court is an error-correcting court, not a law-making court." *Id.* at 127, 723 S.E.2d at 358. As a result, I do not join in the analysis of the alleged torts and concur in result only in part.

Finally, the consequences of Rule 11 sanctions in this published opinion, taken in passing, may impose a chilling effect on future litigants. However, it should be noted that Father made no argument on appeal that sanctions were not justified based on the complaint being a "good faith argument for the extension, modification, or reversal of existing law[.]" N.C.G.S. § 1A-1, Rule 11 (2023). He only argued that his claims were "filed based on a good faith interpretation of North Carolina law." If Father had argued that his filing was an attempt to start the process of having the North Carolina Supreme Court recognize his tort claims, I would have considered this portion of his appeal much differently. In our common law system, litigants cannot be afraid to bring good faith arguments at the fringes or beyond the fringes of what has already been recognized based upon the arguments of others in the past. This is how the common law develops and how it must continue to be developed.

CEDARBROOK RESIDENTIAL CENTER, INC. AND FRED LEONARD, PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH & HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, ADULT CARE LICENSURE SECTION, DEFENDANT

No. COA24-523

Filed 17 December 2024

1. **Statutes of Limitation and Repose—constitutional claims—following decision that claims under State Tort Claims Act not permitted—not time-barred**

In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—the trial court erred in dismissing the complaint as time-barred where, although the applicable statutes of limitation for both negligence and constitutional claims were three years, they did not begin to run until the Supreme Court issued its decision differentiating general negligence claims as permissible under the STCA from "negligent regulation" claims as not thus permitted.

2. **Collateral Estoppel and Res Judicata—res judicata—claim splitting—not applicable—different exclusive jurisdictions for state tort and constitutional claims**

In an action asserting state constitutional claims, brought by an adult care home for disabled adults with mental illness and its owner (plaintiffs) against the division of the Department of Health and Human Services that provides regulatory oversight for such facilities (defendant) after the North Carolina Supreme Court issued an opinion in an earlier lawsuit between the parties—holding that plaintiffs' claims for negligent regulatory action could not be brought under the State Tort Claims Act (STCA)—plaintiffs were not barred from bringing their claims by the principle of res judicata or the prohibition on claim splitting because the exclusive jurisdiction of the applicable fora (the Industrial Commission for the STCA claims and the superior court for the state constitutional claims) precluded all of the claims from being brought together in a single action.

Appeal by Plaintiffs from an order entered on 4 October 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 29 October 2024 in session at Duke University School of Law in the City of Durham pursuant to N.C. Gen. Stat. § 7A-19(a).

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi, Howard L. Williams, and Graham F. Whittington, for plaintiffs-appellants.

Robinson, Bradshaw & Hinson, P.A., by Adam K. Doerr and Demi Lorant Bostian, for defendant-appellee.

WOOD, Judge.

Plaintiffs appeal from an order granting a Motion to Dismiss Plaintiffs' complaint with prejudice filed by the Department of Health and Human Services ("DHHS"). Plaintiffs contend the trial court erred by finding that a statute of limitations barred their only remedy for the violation of their rights.

I. Factual and Procedural Background

Plaintiffs' complaint alleges the following: Cedarbrook is an adult care home in Nebo, North Carolina that provides a place of residence for disabled adults with mental illness who are stable in their recovery. Cedarbrook has been licensed to serve this population since 2002. DHHS is the state administrative agency that oversees health and human related services in North Carolina. The Division of Health Services Regulation ("DHRS") is the division of DHHS that provides regulatory oversight for healthcare and adult care facilities. The Adult Care Licensure Section ("ACLS") within DHRS oversees adult care facilities.

The complaint further alleges: ACLS conducts annual inspections of the Cedarbrook facility. In addition, the McDowell County Department of Social Services ("DSS") oversees Cedarbrook and makes site visits multiple times per month. From its founding in 2002 through 2015 Cedarbrook consistently received excellent scores from both agencies and had strong working relationships with each agency. Prior to November 2015, Cedarbrook had never been cited for regulatory violations by either agency.

On 6 November 2015, the United States Department of Justice ("USDOJ") issued an enforcement letter to the State of North Carolina. North Carolina previously had been cited for failure to provide mentally

ill adults with independent housing options, and the USDOJ demanded the State take corrective action. Three days after the USDOJ issued its enforcement letter, the ACLS began its annual inspection of Cedarbrook.

Plaintiffs allege the 2015 inspection differed dramatically from the prior thirteen evaluations. For instance, practices that had been in place for years at Cedarbrook and were previously praised by ACLS were assessed as severe violations. Additionally, ACLS alleged violations that had no basis in the governing administrative rules or statutes.

On 19 November 2015, ACLS issued a summary Suspension of Admissions against Cedarbrook preventing Cedarbrook from admitting new residents. On 17 December 2015, ACLS issued a Notice of Intent to Revoke Cedarbrook's license to operate but withdrew it on 16 May 2016. Notwithstanding ACLS' withdrawal of the Notice of Intent, Plaintiffs allege the Suspension of Admission caused a fifty percent (50%) reduction in the number of residents at Cedarbrook in six months.

Plaintiffs filed *Cedarbrook I* in 2016 with the Office of Administrative Hearings ("OAH"). The OAH issued a stay on 6 July 2016, enjoining the suspension of admission against Cedarbrook. ACLS took more than a month to lift the suspension, waiting until 12 August 2016 to do so. While the suspension was enjoined, ACLS issued penalties in excess of $340,000.00 to Cedarbrook. On the morning of trial at the OAH, ACLS agreed to withdraw all agency actions taken against Cedarbrook and reissue their Four-Star rating. However, Plaintiffs assert the suspension had caused the sale of Cedarbrook to fall through and the appraised value to decrease to the point that Cedarbrook could no longer be sold at the previously secured purchase price. ACLS' actions allegedly cost the facility over $500,000.00 in lost revenue, increased operating expenses and added attorney's fees, as well as costing $790,000.00 in proceeds from the lost sale.

On 25 October 2018 Plaintiffs filed *Cedarbrook II* with the Industrial Commission claiming DHHS engaged in negligent regulation under the State Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* ("STCA"). DHHS moved to dismiss the claim on the basis of sovereign immunity. On 13 March 2019, a Deputy Commissioner denied the motion and on 6 November 2020 the Industrial Commission affirmed the Commissioner's denial of the Motion to Dismiss allowing the suit to continue.

On 4 December 2020, DHHS filed notice of appeal to this Court. In an opinion issued on 21 December 2021, this Court affirmed the decision of the Full Industrial Commission. *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 281 N.C. App. 9, 868 S.E.2d

623 (2021). Based on the dissent in the opinion, DHHS appealed to the Supreme Court of North Carolina. On 16 December 2022, the Supreme Court reversed this Court finding that sovereign immunity applied and holding that "the theory that the agency regulated the entity in question in a negligent manner" is "not generally the type of decisions for which the State is liable to private citizens in tort." *Cedarbrook Residential Ctr., Inc. v. N.C Dep't of Health & Hum. Servs.*, 383 N.C. 31, 47, 50, 881 S.E.2d 558, 571, 573 (2022). The Supreme Court further stated that under the State Tort Claims Act, the State is only liable for negligence in instances where a "private person would be liable under the laws of North Carolina" and private persons do not exercise regulatory power and cannot be held liable for negligent regulation so neither can the State. *Id.* at 50, 881 S.E.2d at 573. On 1 January 2023 Plaintiffs petitioned the Supreme Court to rehear the case, but on 13 February 2023 the Supreme Court denied the petition.

Because the Supreme Court's decision removed the STCA as a remedy to negligent regulatory actions, Plaintiffs turned to assert constitutional claims that had been previously unavailable under the confines of North Carolina's STCA. On 30 March 2023, Plaintiffs filed the present complaint in McDowell County Superior Court.

On 15 June 2023, DHHS moved to dismiss the complaint arguing that the claims asserted are barred by the statute of limitations, the prohibition on claim splitting, and *res judicata*. The matter came on for hearing before Judge J. Thomas Davis on 25 September 2023. On 4 October 2023 the trial court granted DHHS' motion and entered the Dismissal Order. Plaintiffs timely appealed.

II. Analysis

Plaintiffs assert the trial court erred by granting DHHS' Rule 12(b)(6) Motion to Dismiss. We review *de novo* an order granting a Rule 12(b)(6) motion to dismiss. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). "In other words, under de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of whether the allegations of the complaint are sufficient to state a claim for the trial court's assessment." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). The court must address "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.* at 679, 878 S.E.2d at 800 (citing *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796).

Plaintiffs bring forth three separate claims under the North Carolina Constitution: (1) DHHS violated the Plaintiffs' right to the fruits of their

own labor, (2) DHHS interfered with their business which was a regulatory taking under law of the land, and (3) DHHS deprived Plaintiffs of their due process rights.

Defendant's Rule 12(b)(6) motion to dismiss alleged the claims should be dismissed because the claims violate the statute of limitations and are barred by claim splitting or res judicata.

In its ruling, the trial court stated:

> Great arguments, fascinating issue, but it's unfortunately going to be left to three guys in Raleigh to finalize this thing or settle it. I'm going to allow your motion to dismiss based on the statute of limitations on a constitutional claim. . . . [I]t started to run and it's run and I think the case law is not that it had to do with the Industrial Commission case. It's just stating what the law is. It's not any kind of modification or change that would have affected their equitable or legal rights in regard to the statute – or obligations in regard to the statute of limitations.

A. Statute of Limitations

[1] Plaintiffs and Defendant agree that the statute of limitations for both constitutional and negligence claims is three years. N.C. Gen. Stat. § 1-52 (2023); *McFadyen v. New Hanover Cnty.*, 273 N.C. App. 124, 131, 848 S.E.2d 217, 222 (2020). However, Plaintiffs contend that the statute of limitations did not accrue until the Supreme Court issued its decision in *Cedarbrook II*. We agree.

Chapter 1 of the North Carolina Statutes which sets the statute of limitations in N.C. Gen. Stat. § 1-52 clearly states "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*." N.C. Gen. Stat. § 1-15(a) (2023) (emphasis added). Therefore, the statute of limitations begins to run when the cause of action accrues.

> In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. The cause of action does not accrue until the injured party is at liberty to sue. The statute of limitations begins to run only when a party becomes liable to an action.

Raftery v. Wm. C. Vick Const. Co., 291 N.C. 180, 183, 230 S.E.2d 405, 407 (1976).

Here, Plaintiffs were not entitled to institute an action for constitutional claims until the North Carolina Supreme Court determined in *Cedarbrook II* that the State Tort Claims Act ("STCA") was not an adequate – and therefore the exclusive – remedy for the negligent regulatory actions of the DHHS. *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't. Health & Hum. Servs.*, 383 N.C. 31, 881 S.E.2d 558 (2022).

North Carolina law is clear that a litigant who has a remedy under state law cannot bring a constitutional or "*Corum*" claim to redress the same injury and seek the same remedy. *Washington v. Cline*, 385 N.C. 824, 826, 898 S.E.2 667, 669 (2024); *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Under state law, the purpose of the STCA was to "give greater access to the courts to plaintiffs in cases in which they [are] injured by the State's negligence." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 11, 727 S.E.2d 675, 683 (2012). Specifically, the North Carolina Industrial Commission was charged with "hearing and passing upon [such] tort claims against ... agencies of the State." N.C. Gen. Stat. § 143-291(a) (2023).

Prior to *Cedarbrook II* multiple cases from both the Supreme Court and Court of Appeals recognized that claims to recover for state agencies' negligent acts were within the scope of the STCA. *See Multiple Claimants v. N.C. Dep't. of Health & Hum. Servs.*, 361 N.C. 372, 646 S.E.2d 356 (2007) (allowing STCA claims for negligence in inspecting jails); *Ray v. N.C. Dep't. of Transp.*, 366 N.C. 1, 727 S.E.2d 675 (2012) (negligent narrowing of a roadway as an STCA claim); *Russell v. N.C. Dep't. of Env't & Nat. Res.*, 227 N.C. App. 306, 742 S.E.2d 329 (2013) (STCA claims for negligence, negligent misrepresentation and gross negligence); *Patrick v. N.C. Dep't. of Health & Hum. Servs.*, 192 N.C. App. 713, 666 S.E.2d 171 (2008) (STCA claim against DHHS for negligence in investigating reports of abuse); *Batts v. N.C. Dep't. of Transp.*, 160 N.C. App. 554, 586 S.E.2d 550 (2003) (allowing automobile passengers to assert negligence claim against NCDOT). Most significantly, in *Nanny's Korner* when addressing a plaintiff's constitutional claim against DHHS, this Court concluded that the constitutional claim failed because the plaintiff "had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act." *Nanny's Korner Day Care Ctr., v. N.C. Dep't. of Health & Hum. Servs.*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41 (2019) (rev.).

Defendant argues that Plaintiffs cannot rely on *Nanny's Korner* as an example of the existing state law at the time because it was not issued until after *Cedarbrook II* was filed; however, the decision was based on the Court's understanding of North Carolina statute at that

time which established that STCA claims bar constitutional claims on the same issue. *See* N.C. Gen. Stat. § 143.291(a) (2017). Notwithstanding their current argument, DHHS argued in *Nanny's Korner* that the constitutional claims in that case must be dismissed because the STCA provided a "sole and adequate remedy" for negligence claims against a state agency. *Nanny's Korner Day Care Ctr., v. N.C. Dep't of Health & Hum. Servs.*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41 (2019) (rev.) (appellate brief, 2018 WL 4869951) (citing N.C. Gen. Stat. § 143.291(a) (2015); *Taylor v. Wake Cnty.*, 258 N.C. App. 178, 186, 811 S.E.2d 648, 654 (2018); *Est. of Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d, 911, 915 (2000)).

Although the Supreme Court's decision in *Cedarbrook II* does not purport to overrule the previous law, they do state "we do not fault the Court of Appeals for relying upon *Nanny's Korner* as binding precedent," and the Court specifies that they "overrule [*Nanny's Korner*] to the extent it conflicts with this opinion." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't. of Health & Hum. Servs.*, 383 N.C. 31, 57, 881 S.E.2d 558, 577 (2022).

Not until our Supreme Court's decision in *Cedarbrook II* differentiated between the general negligence claims that are permissible under the STCA and "negligent regulation" claims which the Court viewed as discretionary decisions for which the State is not liable in tort negligence did Plaintiffs' constitutional claims accrue. *Id.* at 50, 881 S.E.2d at 573.

Once the Supreme Court removed the opportunity for the Plaintiffs to have their claims heard under the STCA, Plaintiffs were free to bring a constitutional "*Corum*" claim. If the "cause of action does not accrue until the injured party is at liberty to sue," then the cause of action here did not accrue until 16 December 2022, the date *Cedarbrook II* was decided. *Raftery v. Wm. C. Vick Const. Co.*, 291 N.C. 180, 183, 230 S.E.2d 405, 407 (1976).

As discussed supra, our Supreme Court denied Plaintiffs' petition for a rehearing of *Cedarbrook II* on 13 February 2023. The Plaintiffs followed with their *Corum* claims on 30 March 2023 only six weeks after the final denial and less than four months after the decision. Indisputably, Plaintiffs wasted no time in filing their complaint once the cause of action accrued.

B. Res Judicata and Claim Splitting

[2] Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a

> second suit based on the same cause of action between the same parties or their privies. Further, [t]he doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.

Intersal, Inc. v. Hamilton, 373 N.C. 89, 107, 834 S.E.2d 404, 417 (2019) (internal citations and quotations omitted). Although Defendant claimed in their original Motion to Dismiss in Superior Court that "Cedarbrook's new complaint alleges precisely the same facts and seeks the same damages they sought in 2018," in both their written brief and oral argument before this Court, Defendant stated they were not raising *res judicata* and further noted to this Court that the court below did not rely on that theory for its decision.

Defendant did assert the issue of the prohibition on claim splitting to the court below and to this Court. Claim splitting is a common law rule which prohibits plaintiffs from splitting claims based on "the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Reese v. Brooklyn Village, LLC*, 209 N.C. App. 636, 648, 707 S.E.2d 249, 257 (2011).

Neither the claim of *res judicata* nor claim splitting holds merit because Plaintiffs' claims could not have been brought together. When the exclusive jurisdiction of a forum precludes a claim from being brought the plaintiff cannot be barred from bringing it elsewhere based on *res judicata* or claim splitting concerns. *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 54-55, 571 S.E.2d 836, 842-43 (2002).

In the case sub judice, the Industrial Commission was the only competent jurisdiction in which Plaintiffs could bring the STCA claim. However, Plaintiffs were *simultaneously barred* from bringing direct constitutional claims to the Industrial Commission under N.C. Gen. Stat. § 7A-245(a)(4) because it does not have jurisdiction to hear such claims. "[T]he superior court division has original subject matter jurisdiction over constitutional claims[.]" *Gilbert v. N.C. State Bar*, 363 N.C. 70, 86, 678 S.E.2d 602, 612 (2009).

Since the two claims – one tort, the other constitutional – could not have been brought in the same jurisdiction, Defendant's assertion that Plaintiffs' claims were identical or a single wrong to be brought at one time necessarily fails.

III. Conclusion

Because Plaintiffs were not entitled to institute an action for constitutional claims until the North Carolina Supreme Court's decision

determined in *Cedarbrook II* the State Tort Claims Act was not an adequate – and therefore exclusive – remedy for the negligent regulatory actions of the DHHS, the cause of action did not accrue until the Court's ruling. Therefore, Plaintiffs were within the statute of limitations when they filed claims mere months after the *Cedarbrook II* decision.

Additionally, Plaintiffs are not barred from bringing the claim based on *res judicata* or claim splitting since the exclusive jurisdiction of the forum precluded both claims from being brought together.

REVERSED AND REMANDED.

Judges COLLINS and HAMPSON concur.

RICHARD DEVAYNE CREECH, PLAINTIFF
v.
TOWN OF CORNELIUS, ELECTRICITIES OF NORTH CAROLINA, INC., AND IAN CHARLES KENNER, DEFENDANTS

No. COA24-505

Filed 17 December 2024

1. Motor Vehicles—negligence—jury instruction—last clear chance—no error

In a tort action brought after a truck struck and injured plaintiff as he walked in an empty parking lot—in which the jury found that negligence by defendant (the truck driver) caused plaintiff's injuries, plaintiff was contributorily negligent, and defendant-driver had the last clear chance to avoid the collision—the trial court did not err in submitting the issue of last clear chance to the jury where the evidence, taken in the light most favorable to plaintiff, was sufficient as to each of the two disputed elements of that doctrine. The first disputed element—that a plaintiff's contributory negligence had placed him in a position from which he was powerless to extricate himself—was satisfied by evidence that plaintiff was struck after the truck entered the parking lot, drove safely past him, made a U-turn, and then approached him from behind. The second disputed element—that a driver had the time and means to avoid injury to a plaintiff by the exercise of reasonable care after he discovered, or should have discovered, the plaintiff's perilous position and his incapacity to escape it—was established where defendant-driver

turned into an empty parking lot with his headlights on and plaintiff in his plain view, with approximately twelve seconds passing before the truck turned around and struck plaintiff.

2. Motor Vehicles—special jury instruction—workers' compensation award to plaintiff—impact on tort damages award—no abuse of discretion

In a tort action brought after a truck (owned by one defendant) struck and injured plaintiff (a local television news reporter on a work assignment) as he walked in an empty parking lot, in which the jury found that negligence by a second defendant (a truck driver employed by a third defendant) caused plaintiff's injuries—resulting in an award of damages to plaintiff—the trial court did not abuse its discretion in declining to give defendants' requested special instruction pursuant to N.C.G.S. § 97-10.2(j) (which allows a trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases). The court did instruct the jury about the workers' compensation benefits already received by plaintiff for the sole purpose of informing the jury that such amount would be deducted by the court from any amount of damages awarded to plaintiff in the tort action, a correct statement of the law as set forth in section 97-10.2(e).

Appeal by Defendants from judgment entered 19 September 2023 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 November 2024.

Maginnis Howard, by Charles G. Monnett III and Andrew S. O'Hara, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens, and McAngus Goudelock & Courie PLLC, by John P. Barringer and Meredith Cushing, for Defendants-Appellants.

COLLINS, Judge.

This appeal arises from an automobile accident where the driver of a truck hit and injured a pedestrian in a parking lot. The Town of Cornelius, Electricities of North Carolina, Inc., and Ian Charles Kenner (collectively "Defendants") appeal from the trial court's judgment entered upon a jury verdict finding the driver of the truck, Kenner, negligent in causing injury to the pedestrian, Plaintiff Richard Devayne Creech.

Defendants argue that the trial court erred by submitting the issue of last clear chance to the jury and by refusing to give their requested special jury instruction on N.C. Gen. Stat. § 97-10.2(j), which allows the trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases. Because there was sufficient evidence to submit the issue of last clear chance to the jury and the trial court did not err by declining to instruct the jury on the trial court's discretionary authority under N.C. Gen. Stat. § 97-10.2(j), we affirm the trial court's judgment.

I. Background

In the early morning hours of 6 September 2017, Plaintiff was working as a morning news reporter for a local television station in Charlotte, North Carolina. Plaintiff had traveled to Huntersville, North Carolina, to report on a story. Standing in front of the Huntersville town hall building with a cameraman, Plaintiff recorded several "live shots" of the story.

After recording a shot at 6:06 a.m., Plaintiff walked across the street to a convenience store. When he left the convenience store, Plaintiff walked back across the street, past the town hall building, and toward the building's parking lot. The town hall building was to Plaintiff's left, and after passing the building, he turned left into the parking lot. Plaintiff testified that he wanted to walk around the parking lot "to continue to walk, just take steps."

Plaintiff walked into the parking lot at approximately 6:15 a.m. While listening to a news story on his phone, he walked along the white parking lines toward the back of the parking lot. When he reached the back of the parking lot, Plaintiff turned around and started walking back along the same white parking lines toward the entrance. At this point, there were no cars in the parking lot.

As Plaintiff was walking back toward the entrance, Kenner turned right into the town hall parking lot in his truck.[1] The truck's headlights "shined right on [Plaintiff's] face" as it turned into the lot. Plaintiff saw the truck enter the parking lot and thought the truck driver saw him. Kenner drove the truck toward the back of the parking lot, in the opposite direction Plaintiff was walking. When Kenner reached the rear of the parking lot, he made a U-turn and began driving toward Plaintiff. As Kenner prepared to check a mailbox located next to the

1. Kenner was employed by Electricities of North Carolina, Inc., and the Town of Cornelius owned the truck Kenner was driving.

building's entrance, he drove the truck to the far right side of the lot, along the white parking lines closest to the building. Plaintiff recounted the following:

> As I was walking, I remember looking at the truck and seeing it as it -- the bed of the truck go by. And then, out of my peripheral, it felt like something was happening. I really couldn't tell. And then as I looked, it started to turn and my thought was, "It's getting close enough," and before I could get that complete thought out, I was turning and it hit me.

The front of Kenner's truck hit Plaintiff in the legs and knocked him over. Kenner, realizing he had hit something but not knowing what, put the truck in reverse and backed over Plaintiff's leg. Approximately twelve seconds passed from the time Kenner turned into the parking lot to the time he first struck Plaintiff with his truck. Plaintiff was transported by ambulance to the hospital, where he spent several days. Plaintiff sustained a fractured tibia which required surgery and extensive physical rehabilitation.

Plaintiff commenced this action on 17 August 2020 by filing a complaint alleging negligence. The case came for trial on 14 August 2023. The jury found that Kenner's negligence caused Plaintiff's injuries, Plaintiff was contributorily negligent, and Kenner had the last clear chance to avoid the collision. The jury awarded Plaintiff $760,035.44. The trial court entered a judgment upon the jury's verdict. Defendants appeal.

II. Discussion

A. Last Clear Chance Instruction

[1] Defendants first argue that the trial court erred by submitting a last clear chance instruction to the jury.

"The issue of last clear chance must be submitted to the jury if the evidence, viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Bass v. Johnson*, 149 N.C. App. 152, 158 (2002) (citation omitted). Whether the evidence is sufficient to require such an instruction depends upon the facts of each individual case. *Wray v. Hughes*, 44 N.C. App. 678, 682 (1980). We review the sufficiency of the evidence to support the instruction de novo. *See Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 341-42 (2008) (reviewing de novo the sufficiency of the evidence to withstand a motion for a directed verdict); *see also State v. Chevallier*, 264 N.C. App. 204, 214 (2019) (stating in a criminal context that "[w]e review *de*

novo properly preserved sufficiency-of-the-evidence challenges to jury instructions") (citation omitted); *see also Bass*, 149 N.C. App. at 158-59 (reviewing as a matter of law the sufficiency of the evidence to support an instruction on last clear chance).

The last clear chance doctrine "allows a contributorily negligent plaintiff to recover where the defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between the plaintiff's negligence and the injury and becomes the direct and proximate cause of the accident." *Outlaw v. Johnson*, 190 N.C. App. 233, 238 (2008) (quotation marks, brackets, and citation omitted). For cases involving a contributorily negligent pedestrian injured by the driver of a motor vehicle, there must be sufficient evidence of each of the following four elements:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Clodfelter v. Carroll, 261 N.C. 630, 634-35 (1964) (citations omitted).

Defendants concede that sufficient evidence was presented to support the second element—that Kenner knew, or by the exercise of reasonable care could have discovered, Plaintiff's perilous position and his incapacity to escape from it before Plaintiff suffered injury at Kenner's hands. *See id.* Similarly, Defendants make no argument as to the fourth element—that Kenner negligently failed to use the available time and means to avoid injury to Plaintiff, and for that reason struck and injured Plaintiff. *Id.* Accordingly, only the first and third elements are at issue here.

The first element requires sufficient evidence that the plaintiff's "prior contributory negligence had placed him in a position from which he was powerless to extricate himself." *Nealy v. Green*, 139 N.C. App.

500, 505 (2000) (brackets and citation omitted). "The situation is not one of true helplessness, as the injured party is in a position to escape. Rather, the negligence consists of failure to pay attention to one's surroundings and discover his own peril." *Williams v. Odell*, 90 N.C. App. 699, 704 (1988) (citations omitted).

"Cases discussing this first element have consistently distinguished between situations in which the injured pedestrian was facing oncoming traffic and those in which the pedestrian was not." *Nealy*, 139 N.C. App. at 505. Accordingly, our courts have determined that the last clear chance instruction is not warranted when there is evidence showing that an injured pedestrian was facing oncoming traffic and could have extricated himself from his dangerous position. *See Williams*, 90 N.C. App. at 702-04 (the pedestrian was facing oncoming traffic as she was leaning against the rear of her vehicle, parked on the shoulder of highway); *Clodfelter*, 261 N.C. at 635 (the pedestrian was walking on the side of the highway, facing the defendant's approaching automobile). On the other hand, our courts have determined that "evidence tending to show the injured pedestrian either was not facing oncoming traffic or did not see the approaching vehicle" is sufficient to satisfy the first element. *Nealy*, 139 N.C. App. at 505-06 (the pedestrian "was walking with his back to traffic and did not turn when defendant's vehicle approached"); *see also Watson v. White*, 309 N.C. 498, 505 (1983) (the pedestrian was crossing a highway and did not see the defendant's vehicle approach); *Williams v. Spell*, 51 N.C. App. 134, 136 (1981) (the pedestrian, who was walking with his back to traffic when injured, "placed himself in a position of helpless peril"); *Outlaw*, 190 N.C. App. at 240 (the pedestrian did not see the vehicle approaching).

Here, the evidence presented indicates that Plaintiff was put in a perilous position when Kenner made the U-turn and started driving the truck back toward Plaintiff. At that point, Plaintiff was walking with his back to the truck and, "by failing to pay attention to his surroundings and discover his own peril," placed himself in a dangerous position of which he did not realize until it was too late. *Nealy*, 139 N.C. App. at 506 (quotation marks, brackets, and citations omitted).

Defendants contend that Plaintiff, through the exercise of reasonable care, could have escaped from his position of peril by getting out of the parking lot as soon as he saw the truck turn in. At that point, however, Plaintiff did not believe he was in danger because the truck's headlights had shined on him before it began traveling in the direction opposite of Plaintiff. *See id.* at 506 (reasoning that "the pedestrian who did not apprehend imminent danger could not reasonably have been

expected to act to avoid injury") (quotation marks and citations omitted). Plaintiff did not see Kenner turn the truck around and thus did not see the truck approaching him in time to remove himself from the dangerous situation. When viewed in the light most favorable to Plaintiff, the evidence was sufficient to support a reasonable inference that Plaintiff "placed himself in a position of peril from which he could not escape by the exercise of reasonable care[.]" *Clodfelter*, 261 N.C. at 634 (citations omitted).

The third element requires sufficient evidence that "the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it[.]" *Id.* at 635. This element is established where "there was an appreciable interval of time between [the] plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence." *Mathis v. Marlow*, 261 N.C. 636, 639 (1964) (citation omitted). It "must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Id.* (quotation marks and citation omitted). Our courts have emphasized that even in situations where the defendant-motorist never saw the endangered pedestrian, a last clear chance instruction is warranted when there is evidence showing that the defendant-motorist had an unobstructed view of the pedestrian and thus should have observed the pedestrian in time to avoid injury. *See Earle v. Wyrick*, 286 N.C. 175, 178 (1974) (defendant-motorist had a clear and unobstructed view of pedestrian walking in the street at night although the defendant saw pedestrian "only a split second before the impact"); *see also Exum v. Boyles*, 272 N.C. 567, 577 (1968) (although the defendant-motorist did not actually see the pedestrian until it was too late to avoid injury, had he maintained a lookout in the direction of his travel, the defendant could have observed the pedestrian's perilous position in time to avoid striking him).

Here, the evidence indicates that Kenner turned into an empty parking lot with his headlights on, Plaintiff was in his plain view, and approximately twelve seconds elapsed between the time Kenner turned in and the time he first struck Plaintiff. Viewed in the light most favorable to Plaintiff, the evidence indicates that had Kenner maintained a lookout in the direction of his travel, he could have observed Plaintiff's presence in the parking lot and had ample time to avoid striking him.

Kenner also had the means to avoid injury. At the time of the collision, the parking lot was empty. Had Kenner merely swerved to his

left or right, he could have avoided hitting Plaintiff and would not have put anyone else in danger. Accordingly, when viewed in the light most favorable to Plaintiff, the evidence was sufficient to support a reasonable inference that Kenner "had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it[.]" *Clodfelter*, 261 N.C. at 635 (citations omitted).

As Plaintiff presented sufficient evidence supporting a reasonable inference of each element of the last clear chance doctrine, the trial court did not err by submitting the issue to the jury.

B. Special Jury Instruction

[2] Defendants next argue that the trial court erred by refusing to include in its charge to the jury their requested special instruction on N.C. Gen. Stat. § 97-10.2(j), which allows the trial court discretion to determine the amount of an employer's subrogation lien for the payment of compensation in workers' compensation cases.

A trial court has "wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Murrow v. Daniels*, 321 N.C. 494, 499-500 (1988) (quotation marks and citation omitted). A trial court's charge to the jury is to be reviewed "contextually and in its entirety." *Bass*, 149 N.C. App. at 160 (citation omitted). The trial court's refusal to give a requested charge "is not error where the instructions fairly represent the issues" and will not be overturned absent an abuse of discretion. *Osetek v. Jeremiah*, 174 N.C. App. 438, 440 (2005) (citations omitted).

In this case, two specific portions of N.C. Gen. Stat. § 97-10.2 were at issue in the jury instruction on workers' compensation:

> (e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court *shall* instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.
>
> . . . .

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, *in his discretion*, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and the employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(e), (j) (2023) (emphasis added).

Defendants concede that their argument regarding this issue mirrors the argument advanced, and rejected, in *Peay v. S. & D. Coffee, Inc.*, 278 N.C. App. 605 (2021). Although *Peay* is an unpublished opinion and is not controlling legal authority, N.C. R. App. P. 30(e)(3), we find its reasoning persuasive.

Here, the trial court instructed the jury that the amount of workers' compensation benefits already received by Plaintiff was given to the jury "for the sole purpose of informing [them] that such amount will be deducted by the [c]ourt from any amount of damages you award the Plaintiff." The trial court further instructed that "[u]nder North Carolina law, the [c]ourt is required to deduct this amount from any amount of damages" the jury awards. This instruction was a correct statement of the law. *See* N.C. Gen. Stat. § 97-10.2(e) ("In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.")

Defendants requested the trial court also instruct the jury on the language of subsection (j), so that the jury may be informed of the law giving a trial court discretion to alter the workers' compensation award. Denying Defendants' request, the trial court emphasized the discretionary nature of the language of subsection (j). The court reasoned that it "kind of tracks with, if it's something that the judge has discretion on, then . . . I'm not going to allow the attorneys to try to telegraph what that would be, because it's not certain, and it's confusing to the jury." We agree with the trial court's reasoning.

Subsection (j) makes clear that the trial court has discretion in determining whether to alter the workers' compensation award. *Id.* § 97-10.2(j) ("[T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien."). This action does not occur automatically; rather, a party must apply to the resident superior court judge in the appropriate county. *Id.* Accordingly, it was not an incorrect statement of the law for the trial court to omit subsection (j) from its jury instruction. We therefore conclude that the trial court did not err by denying Defendants' requested special instruction.

III. Conclusion

Because Plaintiff presented sufficient evidence supporting a reasonable inference of each element of the last clear chance doctrine, the trial court did not err by submitting the issue to the jury. Furthermore, the trial court did not err by denying Defendants' request for a special instruction on N.C. Gen. Stat. § 97-10.2(j). We affirm the trial court's judgment.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

IN RE H.G.

[297 N.C. App. 41 (2024)]

IN THE MATTER OF H.G., S.G. & E.G.

No. COA24-283

Filed 17 December 2024

1. Appeal and Error—failure to appeal—issues not raised in prior appeal—waiver

In a child abuse and neglect matter, respondent-father waived his right to appeal the trial court's decision to eliminate reunification from the permanent plan, and the issue of whether respondent received notice of the possibility that reunification efforts could cease, where he had the opportunity to raise those issues in a prior appeal but chose not to.

2. Child Abuse, Dependency, and Neglect—disposition order—elimination of reunification—not prohibited by statute—notice to parent not required

In a child abuse and neglect matter, the trial court did not abuse its discretion by eliminating reunification from a child's permanent plan in its disposition order because, contrary to respondent father's contention, N.C.G.S. § 7B-901(d) did not prohibit the court from eliminating reunification even after having previously determined that reunification efforts were not required at the initial disposition hearing. Further, there was no statutory requirement to provide respondent with notice that reunification could be eliminated from the permanent plan.

3. Child Abuse, Dependency, and Neglect—new adjudication and disposition orders—based on prior hearing—within trial court's discretion

In a child abuse and neglect matter that had been remanded back to the trial court for additional findings of fact, the trial court did not abuse its discretion by entering new adjudication and disposition orders (in which it once again eliminated reunification from the permanent plan based on respondent's sexual abuse of the child) without holding a new evidentiary hearing and instead relying on the transcript of a prior hearing—a decision which the appellate court had left to the trial court's discretion on remand.

Appeal by respondent-father from orders entered 27 October 2023 by Judge Angela C. Foster in District Court, Guilford County. Heard in the Court of Appeals 6 November 2024.

Robert W. Ewing, for respondent-appellant father.

Administrative Office of the Courts, Guardian Ad Litem Program Division, by Michelle FormyDuval Lynch, for guardian ad litem.

Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

ARROWOOD, Judge.

Respondent-father appeals from orders on adjudication and disposition filed 27 October 2023 continuing custody of his daughter, H.G.,[1] with the Guilford County Department of Health and Human Services ("DHHS"), suspending visitation between respondent-father and H.G., and relieving DHHS of the obligation to make further reunification efforts between respondent-father and H.G. For the following reasons, we affirm the district court's orders.

I. Factual Background

On 27 March 2019, the trial court filed petitions for nonsecure custody of three adopted children of respondent-father: H.G., then aged 9, S.G., then aged 14, and E.G., then aged 15.[2] In an exhibit attached to the juvenile petition, DHHS noted a report from both S.G. and E.G. stating that they had been verbally and physically abused by their father, all of which respondent-father denied. There was also report of respondent-father's nephew inappropriately touching S.G. and E.G. During a forensic interview, H.G. said that she had witnessed respondent-father's abuse but had not been abused herself. All three children were placed in a children's home and continued to attend school.

The trial court entered an adjudication and disposition order on 26 June 2019 finding that E.G. and S.G. were abused, neglected, and dependent, and that H.G. was neglected and dependent. The trial court ordered custody for the juveniles to remain with DHHS, visitation to remain suspended with "no contact under any circumstances, pending further orders of the Court[,]" and that DHHS "shall cease further reunification efforts with [respondent-father] at this time." Respondent appealed the order on 25 July 2019.

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1. Initials are used for all minors to protect their identities.

2. Respondent-father adopted these children on 26 June 2012 as a single parent adoption, when the children were aged 2, 7, and 8, respectively.

While the appeal was pending, the trial court conducted a permanency planning hearing on 18 September 2019, finding that the primary plan should be reunification with a secondary plan of adoption, and continuing custody with DHHS. The court conducted a visitation review hearing on 13 December 2019; there, the court made findings of fact that included allegations H.G. made concerning respondent-father. H.G. told a social worker that respondent showered with her and touched her "private area." Neither S.G. nor E.G. wished to have visitation with respondent. Custody of the children remained with DHHS and respondent-father was not granted any visitation.

Respondent's appeal was heard by this Court on 10 June 2020. *In re H.A.G.*, 272 N.C. App. 446, 2020 WL 3721834 (unpublished). We found that the trial court erred by admitting testimony from the supervisor of Spencer Brooks, a social worker with DHHS. *Id.* at *1, 4. The supervisor was the only individual who testified at the adjudicatory hearing, and she testified to the out-of-court statements made by the juveniles to Brooks. *Id.* at *4, 5. We determined that the statements did not fall into any exception to the hearsay rule, and prejudiced respondent-father. *Id.* at *5. We accordingly reversed the trial court's adjudication and disposition, *id.*, and the trial court dismissed the juvenile petitions and dissolved the nonsecure custody order as of 27 July 2020.

The next day, 28 July 2020, DHHS took out new juvenile petitions for S.G., E.G., and H.G. alleging they were abused, neglected, and dependent. An attached exhibit described an interview with H.G. conducted 8 July 2020 regarding possible sexual abuse by respondent-father where she stated "she slept in the same [bed] as [respondent-father] . . . with a night gown and no underwear[,]" which "made her feel uncomfortable[,]" but that she did so "because there was no more room for [her] to sleep in." The exhibit also summarized interviews with E.G. and S.G. where they described further abuse by respondent-father, including that respondent-father "slept and showered with [H.G.] from a young age up until they were removed from his care[,]" and "put an ointment on [H.G.]'s vagina until she was at least 9 years old although she was capable of doing this herself[,]" as well as abused by respondent-father's nephew who allegedly touched E.G. and S.G.'s private areas on multiple occasions. The trial court entered orders for nonsecure custody returning custody of the juveniles to DHHS that same day.

At an adjudication hearing on 15 September 2021, all three children were found to be abused, neglected, and dependent. The trial court made findings summarizing the allegations from the new petitions and attached exhibits, including H.G.'s description of sleeping in

respondent-father's bed, showering with him, and respondent's touching of her "private areas[,]" as well as E.G. and S.G.'s statements that respondent-father's nephew sexually assaulted them when they were 14 and 12 years old respectively and respondent-father's nephew was 28 years old.

Following the adjudication, DHHS moved for bifurcation of the disposition hearings. DHHS stated that respondent-father agreed it was in the best interest of S.G. and E.G. to remain in foster care; both children expressed no desire for reunification and stated that they would run away if they were returned to respondent-father, and E.G. would soon reach the age of majority. However, respondent-father sought reunification and to regain custody of H.G., who was 12 years old at the time of the motion and according to DHHS had a "drastically different" proposed plan from the other two juveniles. E.G. reached the age of majority on 5 December 2021, and DHHS was relieved of her custody. The court granted a bifurcation of the trials on 5 January 2022.

Following H.G.'s disposition hearing on 30 March 2022, the trial court entered a disposition order summarizing H.G.'s placement status and CPS history. The trial court found that respondent-father had entered into a case plan with DHHS on 24 March 2022, requiring him to maintain safe and appropriate housing, maintain income to provide for himself and his children, and participate in parenting assessment training and education, a mental health assessment, and a substance abuse evaluation. The trial court further found that "due to the evidence presented of sex abuse, reunification is not a viable plan for this juvenile." Accordingly, the trial court continued custody of H.G. with DHHS, relieved DHHS of the obligation to make further reasonable efforts towards reunification, and found that the plan of reunification was not in the best interest of the juvenile. At this hearing, respondent-father's counsel stated that she disagreed with ceasing reunification efforts, given that she had not had notice that this would be decided at the disposition; she understood "statutorily" DHHS's arguments, but believed "that's something that should have been discussed in advance at a team meeting." Defendant appealed this order 15 July 2022.

Respondent-father's second appeal in this matter was heard by this Court on 28 August 2023; we vacated the district court's order and remanded to allow the district court to make the necessary findings of fact. *In re H.A.G.*, 290 N.C. App. 552, 2023 WL 6119972 at *5. We determined that the findings of fact challenged by respondent-father "merely display[ed] the conflicts of evidence." *Id.* The trial court found that all the witnesses were credible and reliable—including respondent, who

denied the worst allegations—so we were therefore "unable to determine how the trial court came to its ultimate findings of fact regarding abuse." *Id.* However, we determined that reversal was not necessary, and instead remanded for the trial court to make the appropriate findings of fact, permitting the trial court to "hold an additional hearing on evidentiary matters." *Id.*

On 10 and 11 October 2023, the trial court conducted a hearing on remand to discuss the procedural posture of the case. The trial court subsequently entered new adjudication and disposition orders again concluding that H.G. would remain in the custody of DHHS, there would be no visitation between respondent-father and H.G., and that reunification efforts could cease. Respondent-father gave notice of appeal 20 November 2023.

II. Discussion

Respondent-father's sole issue on appeal is whether the trial court abused its discretion at the dispositional phase of the case by eliminating reunification as the permanent plan, arguing the trial court lacked statutory authority and failed to give respondent-father appropriate notice. For the following reasons, we find no abuse of discretion.

A. Failure to Appeal

[1] The events that gave rise to this appeal initially occurred at the 30 March 2022 disposition hearing. In its disposition order, the court found that reunification was not a viable plan for H.G. due to respondent's sexual abuse. The trial court also relieved DHHS of any obligation to make further reunification efforts. Respondent-father's trial counsel noted her disagreement with ceasing reunification efforts, stating, "I don't believe I had notice of that at a prior meeting, so we didn't really discuss that at a meeting." The decision to eliminate reunification at the disposition and the lack of notice serve as the bases for respondent's appeal, which he argues is a violation of N.C.G.S. § 7B-901.

However, we note that respondent had an opportunity to appeal the failure to give notice and elimination of reunification in his 15 July 2022 appeal, but apparently chose not to do so. Rather, he appealed only the "trial court's adjudicatory findings of fact and conclusions." *In re H.G.*, 290 N.C. App. 552, 2023 WL 6119972 at *2. We dismissed a respondent's constitutional challenge of a statute in *In re Estate of Lunsford*, 160 N.C. App. 125 (2003) (*rev'd on other grounds*, 359 N.C. 382 (2005)), where he made that argument for the first time in his second appeal. *Lunsford*, 160 N.C. App. at 129 n.1. Relying on *Lunsford*¸ we later held that "[w]hen a party fails to appeal a ruling on a particular issue, he is then bound by

that failure and may not revisit the issue in subsequent litigation." *Hill v. Hill*, 181 N.C. App. 69, 76–77 (2007).

In the case *sub judice*, respondent-father failed, in his 2022 appeal, to appeal the issues he now challenges. Had he chosen to make a more comprehensive appeal in 2022, this case would have concluded with our ruling in 2023 and provided H.G. a finality in this custody dispute she has not yet been afforded. However, because the issues asserted were unchallenged from the prior order, we find that this constitutes waiver and respondent-father has no right to appeal the lack of notice and elimination of reunification.

B. Disposition Hearing

[2] Assuming, *arguendo*, that respondent's appeal is properly before the court, we address respondent's arguments that elimination of reunification was not authorized by statute, and that respondent failed to receive proper notice.

"The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *In re A.P.W.*, 378 N.C. 405, 410 (2021) (citation omitted). "Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Stephens v. Stephens*, 213 N.C. App. 495, 503 (quotation marks and citation omitted).

We recently addressed the competency of a court to eliminate reunification as a permanent plan in *In re R.G.*, 292 N.C. App. 572 (2024). There, a mother had appealed a permanency planning order ("PPO") on the grounds that this order had eliminated reunification as part of the plan, a decision she was statutorily authorized to appeal. *Id.* at 577. We held to the contrary:

> Mother did not have a right to appeal the Initial PPO pursuant to N.C.G.S. § 7B-1001(a)(5), because N.C.G.S. § 7B-906.2(b) operates to exclude reunification as a permanent plan once the trial court makes findings of aggravated factors under N.C.G.S. § 7B-901(c) at disposition. There is no required delay between the trial court's dispositional order and first permanency planning order for the court to eliminate reunification from the permanent plans for a juvenile after the trial court makes dispositional findings of the specific, statutorily prescribed circumstances under N.C.G.S. § 7B-901(c).

Id.

Here, respondent-father states that § 7B-901(d) "does not permit the trial court to eliminate reunification as a permanent plan for a juvenile when it determines that reunification efforts are not required at the initial disposition hearing." Respondent-father's contention, however, is flatly contradicted by our holding in *In re R.G.* that expressly permits this mechanism.

Our holding also serves to answer respondent-father's contention that he was not given proper notice of the permanency planning hearing that would be occurring as part of the disposition. While we agree that N.C.G.S. § 7B-901(d) requires notice be given before conducting a permanency planning hearing, our holding in *In re R.G.*, as well as the relevant statute, contradict respondent's characterization that H.G.'s disposition hearing was a permanency planning hearing. "The plain language of N.C.G.S. § 7B-906.2(b) now permits trial courts to exclude reunification from the permanent plans for a juvenile at any time, including immediately following disposition, and need not be a permanent plan for a juvenile, at all, if findings were made under N.C.G.S. § 7B-901(c)." *In re R.G.*, 292 N.C. App. at 579. N.C.G.S. § 7B-906.2 provides six permanent plan that the court "shall adopt" at "any permanency planning hearing": reunification, adoption, guardianship, custody, Another Planned Permanent Living Arrangement, or reinstatement of parental rights. N.C.G.S. § 7B-906.2. Thus, while the decision to eliminate reunification will ultimately affect the resultant PPO, that decision does not turn a disposition into a permanency planning hearing, since a hearing requires the establishment of a plan, not merely the elimination of one option, which may be done at any time.

We note that even respondent's counsel at trial admitted there was no statutory basis for requiring notice: "I understand that statutorily they didn't need to. It's just something that we do typically discuss in advance say at a team meeting." Custom is not a substitute for statutory compliance. We find that the court did not abuse its discretion in eliminating reunification and declining to provide notice.

C. Trial Court's Denial of New Hearing

[3] Finally, respondent-father appears to take issue with the trial court's decision to draft an order based on the transcript from the 2022 hearing, rather than conduct a new hearing and receive new evidence. Respondent notes that he "was not given the opportunity to present evidence concerning the permanent plan for Heather based on the current circumstances." In our 2023 opinion remanding this matter to the trial court, we left it to the discretion of the trial court to "hold an additional hearing on evidentiary matters." *In re H.G.*, 290 N.C. App. 552, 2023

WL 6119972 at *5. Further, the evidence that respondent would have brought before the court could not have changed the court's finding that respondent had sexually abused H.G., which was the sole basis for its elimination of reunification.[3] We note that N.C.G.S § 7B-901(c) does not require the trial court to abandon reunification efforts, even after a finding of aggravated circumstances, if the court "concludes that there is compelling evidence warranting continued reunification efforts . . . ." N.C.G.S § 7B-901(c). However, it is clear that the court was satisfied that the evidence presented at the 2022 disposition hearing provided proper grounds for the elimination of reunification efforts, given that it declined the optional, additional hearing, and we do not find the trial court abused its discretion in so deciding.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

3. Respondent's brief lists actions that respondent has taken since the 2020 custody action, including a Parenting Assessment Training and Education pre-test, a Parenting Psycho-Sexual Evaluation, mental health assessment, and participation in shared parenting with H.G.'s placement provider.

IN RE K.J.D.

[297 N.C. App. 49 (2024)]

IN THE MATTER OF K.J.D.

No. COA24-444

Filed 17 December 2024

1. **Termination of Parental Rights—failure to make reasonable progress—supported by findings of fact**

   Where a juvenile was initially adjudicated dependent as the result of domestic violence between respondent-mother and the juvenile's father, but his removal from respondent-mother's care and custody was also the result of substance abuse concerns, the district court's adjudication that respondent-mother's willful failure to make reasonable progress in correcting the conditions that led to the child's removal—a ground permitting the termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(2)—was supported by its findings of fact that, over the nearly two-year period the child had been in the custody of the county department of social services, respondent-mother had consistently failed to comply with drug screens or to address her substance abuse issues, and, despite having completed domestic violence classes, continued to be involved in domestic violence situations.

2. **Termination of Parental Rights—best interest of the child—statutory factors—likelihood of adoption—other parent's rights not terminated**

   The district court did not abuse its discretion in determining that the termination of respondent-mother's parental rights was in the best interest of her minor son in light of its findings of fact reflecting consideration of each of the statutory factors set forth in N.C.G.S. § 7B-1110(a)—including the likelihood of adoption of the juvenile—despite the court's decision not to terminate the parental rights of the child's father, because termination of respondent-mother's parental rights increased the likelihood that the child would be adopted and thus aided in the achievement of his permanent plan.

Appeal by Respondent-Mother from Order entered 2 February 2024 by Judge Kimberly Gasperson-Justice in Polk County District Court. Heard in the Court of Appeals 6 November 2024.

Lisa Noda for Respondent-Appellant Mother.

Hanna Frost for Petitioner-Appellee Polk County Department of Health and Human Services.

Shannon Phillips for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Order terminating her parental rights in her minor child, Kade.[1] The Record before us tends to reflect the following:

On 1 February 2021, Polk County Department of Social Services (DSS) received a report concerning an incident of domestic violence between Respondent-Mother and Father[2] that occurred in the presence of Kade, who was six years old at the time. DSS began providing in-home case management to Respondent-Mother on 18 March 2021. On 31 March 2021, Respondent-Mother signed an In-Home Family Services Agreement whereby she agreed to certain conditions, including obtaining therapy. On 14 April 2021, Respondent-Mother disclosed another incident of domestic violence had occurred in Kade's presence. Two days later, on 16 April 2021, Respondent-Mother signed a Temporary Parental Safety Agreement to address domestic violence concerns. Under this agreement, Respondent-Mother agreed, in part, "Parents will not smoke in the home or around [Kade]. Parents will ensure to have a sober caregiver if they will use."

Additional instances of domestic violence in Kade's presence occurred on 19 May 2021 and 21 June 2021. On 26 May 2021, DSS filed a Petition alleging Kade was a neglected and dependent juvenile. On 28 July 2021, Kade was adjudicated dependent and placed in DSS custody. Under the resulting Order, Kade was physically placed with Respondent-Mother and Father on a fifty-fifty basis. Following the dispositional hearing on 10 August 2021, the trial court ordered Respondent-Mother to: "complete Triple P parenting classes and demonstrate what is learned with Kade"; submit to random drug screens as requested by DSS within 48 hours of request; obtain a substance abuse assessment, follow all recommendations, and successfully complete the program; obtain a mental health assessment, follow all recommendations, and successfully complete the program; attend Kade's medical appointments as often as possible and engage in his medical care; maintain "stable, crime and drug free housing" for Kade; be employed

1. A pseudonym agreed upon by the parties.

2. Father is not a party to this appeal.

full-time and have employment for six months or longer; and obtain a domestic violence assessment and follow all recommendations. In its Order, the trial court noted DSS had terminated Respondent-Mother's unsupervised visits with Kade due to concerns about her boyfriend. On 20 August 2021, DSS placed Kade with a Foster Mother, in whose custody he remained throughout the duration of this case.

At the 22 March 2022 permanency planning review hearing, the trial court observed Respondent-Mother continued to report incidents of domestic violence between herself and Father. These incidents occurred in February 2022 and on 1 March 2022. The trial court noted Sandra Halford, the director of Respondent-Mother's domestic violence intervention program, had reported that although Respondent-Mother had completed some of her domestic violence classes, she "does not follow through with skills learned and does not apply skills to her life."

Respondent-Mother tested positive for methamphetamine and amphetamine on 16 September 2021, positive for codeine on 7 October 2021, and positive for methamphetamine and amphetamine on 8 November 2021. Respondent-Mother did not submit to any drug screens from 8 November 2021 until 1 March 2022 despite multiple requests. On 23 March 2022, Respondent-Mother again tested positive for amphetamine and methamphetamine.

At the 8 November 2022 permanency planning review hearing, the trial court found Respondent-Mother had completed her domestic violence classes; however, the trial court noted the program director, Halford, had observed "she does not follow through with skills learned and does not apply skills to her life." Respondent-Mother's drug screen was negative on 18 July 2022, but she tested positive for methamphetamine on 24 August 2022. The trial court ordered Respondent-Mother to complete a new mental health and substance abuse assessment and comply with all recommendations based on its Finding that DSS had determined her previous assessment "was not accurate or factual. Respondent-Mother lied during her assessment and denied substance abuse issues despite them being prevalent throughout the life of the case." Respondent-Mother had not completed a new mental health and substance abuse assessment as of the hearing on the Motion to terminate her parental rights.

On 13 April 2023, DSS filed a Motion to terminate both parents' parental rights. The adjudication hearing on the Motion occurred on 25 July and 28 November 2023. The evidence presented at the trial included testimony from two DSS employees—Lisa Condrey, a social

worker and Rebecca Warner, a child support case manager—as well as Sandra Halford, the director of the domestic violence intervention program Respondent-Mother had attended. Both parents also testified.

Based on the evidence presented, the trial court found grounds existed to terminate both parents' parental rights in Kade. As to Respondent-Mother, the trial court found grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), and (6). The case proceeded to disposition on 28 November 2023. The trial court found it was in the juvenile's best interest to terminate Respondent-Mother's parental rights, but it determined it was not in the juvenile's best interest to terminate Father's parental rights. The trial court entered an Order terminating Respondent-Mother's parental rights on 2 February 2024. Respondent-Mother timely filed Notice of Appeal on 13 February 2024.

Issues

The issues on appeal are whether the trial court: (I) erred in finding grounds existed to terminate Respondent-Mother's parental rights; and (II) abused its discretion in finding termination of Respondent-Mother's parental rights was in Kade's best interest.

Analysis

I. Termination of Respondent-Mother's Parental Rights

[1] Respondent-Mother contends the trial court erred in determining grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), and (6). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) (citations omitted).

"At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists." *In re O.J.R.*, 239 N.C. App. 329, 332, 769 S.E.2d 631, 634 (2015) (citations omitted); *see also* N.C. Gen. Stat. § 7B-1109(f) (2023). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (citation and quotation marks omitted). On appeal, this Court reviews "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58-59 (2019) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). We review the trial court's

Conclusions of Law *de novo*. *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014).

Respondent-Mother challenges the trial court's adjudication of willful failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). Section 7B-1111(a)(2) authorizes the termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2023).

> To terminate rights on this ground, the court must determine two things: (1) whether the parent willfully left the child in foster care for more than twelve months, and if so, (2) whether the parent has not made reasonable progress in correcting the conditions that led to the removal of the child from the home.

In re C.M.S., 184 N.C. App. 488, 494, 646 S.E.2d 592, 596 (2007).

In the context of Section 7B-1111(a)(2), willfulness means something less than willful abandonment, which involves purpose and deliberation. *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). "Voluntarily leaving a child in foster care for more than twelve months or a failure to be responsive to the efforts of DSS are sufficient grounds to find willfulness." *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596. "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. at 699, 453 S.E.2d at 224. "Similarly, a parent's prolonged inability to improve his or her situation, despite some efforts and good intentions, will support a conclusion of lack of reasonable progress." *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596 (citation omitted). Our Supreme Court has held "that 'parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)' provided that 'the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.' " *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (quoting *In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 313-14 (2019)).

In the present case, the minor child was placed in foster care on 20 August 2021. At the time of the termination hearing on 25 July 2023, Kade had been in foster care for nearly two years. To correct the conditions that led to Kade's removal, the trial court ordered:

> 8. The Respondent Parents shall each cooperate with [DSS] and comply with the following:
>
> a. They will complete Triple P parenting classes and demonstrate what is learned with the juvenile;
>
> b. They will submit to random drug screens at a facility approved by [DSS], including hair, urine and saliva, as requested by [DSS] within forty-eight (48) hours of the request;
>
> c. They will obtain a substance abuse assessment and follow all recommendations and successfully complete the program, sign a release to allow [DSS] access to those records of attendance and attend a program that is certified;
>
> d. They will obtain a mental health assessment and follow all recommendations and successfully complete the program and sign a release to allow [DSS] access to those records of attendance and compliance with the program;
>
> e. They will attend the juvenile's medical appointments as often as possible and engage in the medical care/needs of the juvenile, including any mental health or counseling appointments;
>
> f. They will each maintain stable, crime and drug free housing for the juvenile;
>
> g. They will be employed full-time and have employment for 6 months or longer to show they can provide for themselves and the juvenile.
>
> . . . .
>
> 10. Respondent Mother shall obtain a domestic violence assessment and follow all recommendations.

Respondent-Mother challenges Findings 52 and 56(b), which provide:

> 52. Respondent Mother has acted inconsistently with her parental rights and obligations towards the juvenile. Efforts to reunite the juvenile with Respondent Mother would clearly be unsuccessful and inconsistent with the health and safety of the juvenile.

. . . .

56. Grounds for termination of the parental rights of the Respondent Mother . . . to her minor child exist in that:

. . . .

b. Pursuant to NCGS § 7B-1111(a)(2), Respondent Mother has willfully left the minor child in foster care or placement outside of the home for more than 12 months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the minor child.

Respondent-Mother also contends the trial court overreached its authority by expanding the case plan beyond the conditions that led to Kade's removal by adding substance abuse conditions, and it failed to find a nexus between the substance abuse component and removal.

Our Supreme Court has stated that, when a juvenile is found to have been abused, neglected, or dependent, "the trial judge has the authority to order a parent to take any step needed to remediate the conditions that led to or contributed to either the juvenile's adjudication or the decision to divest the parent of custody." *In re B.O.A.*, 372 N.C. at 381, 831 S.E.2d at 312 (quotation marks omitted). "Put another way, the trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home." *Id.* Here, Respondent-Mother contends the trial court abused its authority by introducing a substance abuse component to her case plan without evidence that she "used substances prior to Kade coming into custody, or that any alleged drug use affected Kade in any way."

This case is similar to *In re B.O.A.*, and we think it instructive. The minor child in *In re B.O.A.* was removed from the parents because she was present during a domestic violence incident between them. 372 N.C. at 373, 831 S.E.2d at 307. The respondent-mother's parental rights were terminated based on N.C. Gen. Stat. § 7B-1111(a)(2), citing her failure to make reasonable progress on parts of her case plan, including addressing substance abuse and mental health issues. *Id.* at 375-76, 831 S.E.2d at 307-08. Our Supreme Court concluded, however, "nothing in the relevant statutory language suggests that the only 'conditions of removal' that are relevant to a determination of whether a particular parent's

parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile." *Id.* at 381, 831 S.E.2d at 311. Indeed, "the relevant statutory provisions appear to contemplate an ongoing examination of the circumstances that surround the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and indirect underlying causes of the juvenile's removal[.]" *Id.* at 381-82, 831 S.E.2d at 312.

Here, although Kade was adjudicated dependent based on instances of domestic violence between Respondent-Mother and Father, he initially remained placed with both parents on a split schedule. At the hearing on DSS's Motion to terminate Respondent-Mother's parental rights, SW Condrey testified "upon further investigation throughout some subsequent domestic violence altercations, it was determined the parents also struggled with substance use issues." On 15 and 16 April 2021, Father and Respondent-Mother, respectively, signed a Temporary Parental Safety Plan with DSS. Under the Agreement, Respondent-Mother agreed to the following as an immediate action step to keep the juvenile safe: "Parents will not smoke in the home or around [Kade]. Parents will ensure to have a sober caregiver if they will use."

While the juvenile was still placed with his parents, DSS attempted to conduct several home visits at Respondent-Mother's residence in response to a report by Father that Kade had told him Respondent-Mother's new boyfriend had stayed the night with them and slept in the same bed. During one attempted home visit on 19 July 2021, Respondent-Mother's boyfriend answered the door, and the DSS social worker—SW Corn—observed he was "slurring his words and speaking in long run-on sentences that were hard to comprehend." SW Corn had observed men's clothing in a laundry basket on a previous attempted home visit, and Respondent-Mother's boyfriend had answered the door and stated Respondent-Mother was at work, while he remained in her residence with his two children. Additionally, on 19 July 2021, SW Corn asked Respondent-Mother to submit to a drug screen by 21 July 2021. On 20 July 2021, Respondent-Mother told SW Corn she had smoked marijuana and would fail a hair follicle drug test. Respondent-Mother did not complete a drug screening until 23 July 2021, and her hair screening "pinged"[3] for "either amphetamine and/or methamphetamine."

3. Although this term is used multiple times in trial court Orders and court reports submitted by DSS, it is not defined at any point in the Record or in briefing to this Court.

Thus, we conclude Kade was removed from Respondent-Mother based on both instances of domestic violence between Respondent-Mother and Father, as well as substance abuse concerns. Therefore, the trial court did not overreach its authority by imposing requirements related to Respondent-Mother's substance abuse in the permanency plan.

DSS asked Respondent-Mother to complete drug screens on numerous occasions. The trial court's unchallenged Findings of Fact establish:

> 30. Both Respondent Parents were requested to pursue mental health assessment and therapy. Neither parent has done so and neither parent has dealt with the major issue of drug dependence which has been at the heart of their failure to effectively pursue reunification with their child.
>
> 31. Respondent Mother did not find an individual therapist. She did find a therapist to do family sessions with but did not reach out to set up times and has not completed her trauma focused therapy.
>
> . . . .
>
> 38. Throughout the course of this matter, DSS has required drug screens from both parents resulting in several positive drug screens for methamphetamine, amphetamine and THC.
>
> 39. When she actually complied with requests for drug screens, Respondent Mother tested positive for methamphetamine, amphetamine or THC at various times from September 16, 2021 until August 24, 2022. After August 2022, Respondent Mother refused drug screens or failed to respond to requests for the same on almost all occasions requested until January 9, 2023 when she tested positive for THC.
>
> 40. Respondent Mother did not submit any drug screens from November 8, 2021, to March 1, 2022, despite being asked a minimum of ten times.
>
> 41. Respondent Parents did submit to drug screens on March 23, 2022, with Respondent Mother being positive for amphetamines and methamphetamine[.]
>
> 42. After March 2022, Respondent Mother continued to fail to comply with drug screen requests except for one negative test on July 18, 2022 and a test that was positive

> on August 24, 2022 for methamphetamine. She has had only one negative drug screen during the full course of this matter, refuses to believe she has a drug problem and has consistently refused to take responsibility for her drug usage.
>
> . . . .
>
> 50. Respondent Mother has acted inconsistently with her parental rights and obligations towards her child and has demonstrated over the course of the twelve months pendency of this case that she is incapable of providing adequate parenting for this child. Respondent Mother has not cooperated with drug screenings requested by [DSS]. She has not completed parenting classes. Respondent Mother has not completed or been actively engaged in substance use services.

These Findings show Respondent-Mother consistently failed to comply with drug screenings or address her substance use issues. The trial court's Findings also establish Respondent-Mother failed to undertake significant steps to address issues around domestic violence, including doing either individual or family therapy. Further, although Respondent-Mother completed domestic violence classes, incidents of domestic violence continued between her and Father, and "[h]er instructor indicated that her continued domestic violence involvement indicated she had not benefitted from the classes." These Findings, which are based on court reports prepared by DSS and the GAL, as well as testimony from DSS social workers at trial, support the trial court's conclusion that Respondent-Mother failed to make reasonable progress in addressing the conditions that led to the juvenile's removal.[4]

II. Best Interests

[2] Respondent-Mother contends the trial court abused its discretion in determining terminating her parental rights was in Kade's best interest. Respondent-Mother argues the trial court failed to consider the effect of its decision not to also terminate Father's parental rights, which she contends effectively negates the likelihood Kade will be adopted.

A finding that termination of parental rights is in the best interest of the minor child is reviewed for abuse of discretion. *In re Shepard*, 162

4. Because we conclude this ground has sufficient support in the trial court's Findings, we need not address Respondent-Mother's arguments as to the remaining termination grounds found by the trial court under N.C. Gen. Stat. § 7B-1111(a)(1), (3), and (6).

N.C. App. 215, 222, 591 S.E.2d 1, 6 (2004). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re C.J.H.*, 240 N.C. App. 489, 492-93, 772 S.E.2d 82, 86 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citations omitted); *see also Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." (quoting *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000)).

Our statutes provide:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). "[T]he language of [N.C. Gen. Stat. § 7B-1110(a)] requires the trial court to 'consider' all six of the listed factors[;]" however, "the court must enter written findings in its order concerning only those factors that are relevant." *In re D.H.*, 232 N.C. App. 217, 220-21, 753 S.E.2d 732, 735 (2014) (citations and quotation marks omitted).

The trial court's Findings of Fact in support of its Conclusion that terminating Respondent-Mother's parental rights was in Kade's best interest are as follows:

59. Testimony was offered by Lisa Condrey, along with the DSS and Guardian ad Litem Court Reports which were received into evidence in support of this disposition.

60. There are no relatives that have been identified as possible kinship or adoptive placement options.

61. The juvenile has been placed with licensed foster parent, [Foster Parent], since August 2021. He has formed a close bond with [Foster Parent] and with the other children living in the home. He is doing well in school and has been to medical and dental appointments. He also attends weekly therapy. [Foster Parent] is willing to provide him a permanent home.

62. [A.B.], the father of the juvenile's half-sister . . .[,] has expressed his interest in being a placement and possible adoptive home for the juvenile, if the juvenile becomes eligible for adoption. The home has been approved for visits by SC DSS and the juvenile has been visiting with [A.B.] every other weekend and has formed a strong bond with [A.B.] and [half-sister].

63. The juvenile reports that he feels comfortable in the home of [A.B.] and enjoys being able to visit his sister.

64. The best interests of the minor child require that an Order of Termination of Parental Rights be entered as to the Respondent Mother[.]

65. Due to her continued refusal to take responsibility for not doing what she should have to pursue reunification, the court does not believe that Respondent Mother will make the effort to conquer her substance abuse and demonstrate she can provide a safe and stable home for the child at any time in the foreseeable future.

66. The Court has considered all of the factors set forth in NCGS § 7B-1110(a) in making its determination of the best interests of the minor child and the Court is keenly aware of the need for permanence for this child after all this time he have [sic] been under DSS protective custody and in foster care.

Respondent-Mother only challenges Findings 64 and 65. In support of these Findings, the trial court had before it significant evidence

regarding Respondent-Mother's continued substance abuse issues and other challenges to achieving reunification. Respondent-Mother acknowledged she had not pursued any substance abuse treatment despite repeated positive drug tests. Indeed, Respondent-Mother testified that, despite testing positive on numerous drug screenings throughout the case, "I don't believe I have a substance abuse issue" and "I don't believe drugs are an issue in my life."

Further, although Respondent-Mother completed the domestic violence classes set out in her case plan, SW Condrey testified that "following her completion of the class, there continued to be domestic violence incidents, so it didn't appear that the skills learned from the group were carried over into life." Respondent-Mother confirmed she had not sought additional resources to address domestic violence, although they were recommended to her. Additionally, DSS determined Respondent-Mother's mental health assessment was not accurate. She was asked to complete another but had not complied at the time of the hearing on the Motion to terminate her parental rights. Respondent-Mother also testified she had not engaged in any mental health services. This evidence is competent to support the trial court's dispositional findings. Based on these Findings, the trial court did not abuse its discretion in determining termination of Respondent-Mother's parental rights was in the juvenile's best interest.

Our Supreme Court addressed a similar set of facts in *In re E.F.*, in which the trial court terminated the respondent-mother's parental rights but did not terminate the juvenile's father's parental rights. 375 N.C. 88, 846 S.E.2d 630 (2020). The trial court's findings of fact as to the juvenile's best interests noted termination of respondent-mother's parental rights would aid in the juvenile's adoption, and the juvenile had a strong bond with proposed adoptive parents. *Id.* at 92, 846 S.E.2d at 633. The respondent-mother argued: "[b]ecause [the father] retained his parental rights in these children, respondent contends the evidence did not show a high likelihood that they would be adopted or that terminating her parental rights would facilitate their adoption." *Id.* Our Supreme Court concluded that the mere fact the juvenile's father's parental rights remained at the time of the termination hearing did not render the trial court's findings as to the juvenile's best interests erroneous. *Id.* at 93, 846 S.E.2d at 633. The Court reasoned: "Subsection (a)(2) refers to the 'likelihood'—not the certainty—of the children's adoption. Similarly, subsection (a)(3) asks whether terminating respondent's parental rights would '*aid in the accomplishment of* the permanent plan for the juvenile[s].' Unquestionably, the termination of respondent's parental rights was a

necessary precondition of the children's adoption." *Id.* (citations omitted) (emphasis in original).

Respondent-Mother raises the same argument here. Consistent with the Supreme Court's reasoning, here, termination of Respondent-Mother's parental rights was a necessary precondition to Kade's adoption and would aid in achieving the permanent plan for Kade regardless of the status of Father's parental rights. Respondent-Mother attempts to distinguish the instant case from *In re E.F.* by pointing to the fact that in *In re E.F.*, DSS decided not to proceed against one of the parents on the day of trial, while here DSS proceeded against both parents but the trial court determined it was not in Kade's best interests to terminate Father's parental rights. We are not persuaded this distinction is material to our analysis.

In both cases, the substantive issue is that one parent retains their parental rights and ability to work toward reunification while the other does not—the difference is only in how that situation arose. Regardless of the way this outcome arises, the factual situation remains the same. The core question for the Supreme Court in *In re E.F.* was whether the trial court abused its discretion in finding terminating one parent's parental rights was in the juvenile's best interest where the other parent retained their parental rights. The question is the same here. Whether Father retains his parental rights, without a doubt terminating Respondent-Mother's parental rights increases the likelihood of Kade's adoption and thus aids in achieving his permanent plan. The core issue Respondent-Mother's arguments in briefing raise speaks more to a sense that it was unfair for the trial court to find it in Kade's best interest to terminate her parental rights but not Father's. We are, however, constrained to consider only Respondent-Mother's case in light of the relevant precedent. Thus, we conclude the trial court did not abuse its discretion in determining terminating Respondent-Mother's parental rights was in Kade's best interest.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order terminating Respondent-Mother's parental rights in Kade.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

IN RE M.R.B.

No. COA24-484

Filed 17 December 2024

Termination of Parental Rights—notice requirement—notice given less than thirty days before hearing—continuance denied—harmless error analysis—no prejudice

The trial court's order terminating respondent mother's parental rights to her child was affirmed where, although the department of social services (DSS) did not provide the statutorily required notice of thirty days (N.C.G.S. § 7B-1106.1) and the hearing was held before the time to file a written response had expired, there was no evidence that the error caused respondent prejudice. Respondent did not contend that she was not served with or had no actual notice of the motion to terminate her parental rights; DSS provided all the elements of notice required by statute for the initial notice and the notice of hearing, though notice was untimely; there was no proffer by respondent of a responsive pleading or what affirmative defenses respondent would have asserted had she been given the full amount of time to file one; and respondent did not object to the lack of notice until the morning of the hearing when she asked for a continuance.

Judge COLLINS dissenting.

Appeal by Respondent-Mother from orders entered 30 January 2024 by Judge Marion M. Boone in Stokes County District Court. Heard in the Court of Appeals 6 November 2024.

Jennifer O. Michaud for Petitioner-Appellee Stokes County Department of Social Services.

James N. Freeman, Jr., for Guardian ad Litem.

Garron T. Michael for Respondent-Appellant Mother.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Adjudication Order in Proceeding to Terminate Parental Rights adjudicating grounds to terminate her

parental rights to her minor child, Megan,[1] and a Disposition Order in Proceeding to Terminate Parental Rights concluding it was in the best interest of the minor child to terminate Respondent-Mother's parental rights in Megan. The Record before us reflects the following:

On 31 May 2022, the Stokes County Department of Social Services (DSS) filed a petition alleging Respondent-Mother and Father[2] were the biological parents of Megan. The petition further alleged Megan—who was approximately five years old—was a neglected juvenile.

On 11 August 2022, the trial court held an adjudication and disposition hearing on the petition alleging Megan's neglect. Respondent-Mother was not present but was represented by counsel. Megan was adjudicated to be a neglected juvenile. At disposition, the trial court established a permanent plan of reunification with the parents.

On 9 September 2022, Respondent-Mother formally entered a case plan with DSS. The trial court held a permanency planning hearing on 27 October 2022; Respondent-Mother was, again, not present but was represented by counsel. During the hearing, the trial court set reunification with a concurrent plan of adoption as the permanent plan for Megan.

The trial court held another permanency planning hearing on 23 February 2023, at which Respondent-Mother was also not present but was represented by appointed counsel. At the hearing, the trial court found Respondent-Mother had not made sufficient progress on her case plan, but the trial court maintained the permanent plan of reunification with a concurrent plan of adoption for Megan. The trial court ordered Respondent-Mother to resume visitation with Megan after she entered into a new visitation agreement with DSS.

On 5 July 2023, Respondent-Mother's appointed counsel moved to withdraw from further representation. The trial court granted the motion on 14 July 2023. The trial court appointed new counsel for Respondent-Mother on 18 July 2023.

On 10 August 2023, the trial court held a permanency planning hearing at which Respondent-Mother was again absent for the hearing but apparently arrived later. Respondent-Mother was, however,

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1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. Father was a named respondent to the juvenile petition filed in this case but is not a party to this appeal.

represented by counsel. The trial court found Respondent-Mother had not made sufficient progress on her case plan and concluded that Megan's primary permanent plan should be changed to adoption with a concurrent plan of reunification. The trial court ordered a Termination of Parental Rights Filing Status Hearing for 12 October 2023.

The trial court held the status hearing on 12 October 2023. Respondent-Mother was present for this hearing. The same day, DSS filed a Motion to Terminate Respondent-Mother's and Father's Parental Rights.

On 2 November 2023 DSS filed a notice of its decision to terminate Respondent-Mother's and Father's parental rights ("TPR Notice"), pursuant to N.C. Gen. Stat. § 7B-1106.1. The TPR Notice stated, "A written response to the Motion must be filed with the clerk within 30 days after service of the Motion and Notice, or the parental rights of the mother and father may be terminated." The TPR Notice also stated, "The date, time, and place of the Pre-trial Hearing and Adjudication Hearing is November 29th, 2023 at 9:00 a.m. in the Courtroom at the Stokes County Government Center in Danbury, North Carolina." (emphasis in original).

At the hearing on 29 November 2023, Respondent-Mother's counsel moved to continue the hearing because the 30-day period to which Respondent-Mother was entitled to file a written response had not yet expired. He also explained that he had been unable to contact Respondent-Mother prior to that day. Father joined in the motion to continue, DSS opposed the motion, and the Guardian ad Litem ("GAL") took no formal position on the motion. After a discussion between counsel and the trial court, the trial court denied Respondent-Mother's motion to continue. The trial court held a pre-trial hearing and then proceeded with the adjudication hearing.

At that hearing, the trial court heard testimony from a DSS social worker, and Respondent-Mother testified in her own defense. At the conclusion of the evidence, the trial court concluded DSS had met its burden in establishing that grounds existed for the termination of Respondent-Mother's and Father's parental rights.

The trial court proceeded to the disposition hearing. At the conclusion of this hearing, the trial court concluded terminating Respondent-Mother's and Father's parental rights was in Megan's best interest. The trial court entered its written orders including orders on the pre-trial, adjudication, and disposition hearings on 30 January 2024. Respondent-Mother timely appealed.

Issue

The sole issue on appeal is whether the trial court prejudicially erred in denying Respondent-Mother's oral motion for continuance and proceeding on the Motion to Terminate Parental Rights prior to the expiration of the 30 days in which Respondent-Mother may have filed a written response following service of the TPR Notice.

Analysis

Respondent-Mother contends the trial court erred in denying her motion to continue the termination proceedings where DSS failed to comply with the notice requirements provided by N.C. Gen. Stat. § 7B-1106.1. Specifically, Respondent-Mother argues DSS' failure to comply with those notice requirements deprived her of the statutorily allowed 30-day timeframe to file a written response to the Motion to Terminate Parental Rights where the TPR Notice issued less than 30 days prior to the hearing. Both DSS and the GAL concede the error but argue it was not prejudicial. Indeed, there was error. However, on the facts of this case, the error was not prejudicial.

When, as here, termination of parental rights proceedings are initiated by motion in a pending abuse, neglect, or dependency case, the movant is required to prepare a notice directed to certain listed individuals or entities, including—relevant to this case—the parents of the juvenile. N.C. Gen. Stat. § 7B-1106.1(a) (2023). The Notice is required to contain the following information:

> (1) The name of the minor juvenile.
>
> (2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
>
> (3) Notice that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
>
> (4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
>
> (5) Notice that the date, time, and place of any pretrial hearing pursuant to G.S. 7B-1108.1 and the hearing on

> the motion will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
>
> (6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

N.C. Gen. Stat. § 7B-1106.1(b) (2023).

Of relevance to this case is section 7B-1106.1(b)(5) requiring: "Notice that the date, time, and place of any pretrial hearing pursuant to G.S. 7B-1108.1 and the hearing on the motion will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed." N.C. Gen. Stat. § 7B-1106.1(b)(5) (2023). The implication of this provision appears to be that the movant would be required to subsequently serve a notice of hearing after the filing of a response to the motion to terminate parental rights or upon the expiration of time to do so.

We have previously held when the movant—here, DSS—fails to provide the statutorily required notice, it is necessarily prejudicial error, and a new hearing is required. *In re Alexander*, 158 N.C. App. 522, 526, 581 S.E.2d 466, 469 (2003). There, the department conceded it had failed to prepare the statutorily required notice compliant with N.C. Gen. Stat. § 7B-1106.1(b) (2023). *Id.* at 524, 581 S.E.2d at 468.

On the other hand, we have also held that the failure to timely serve the subsequent notice of hearing identifying the date, time and place of the hearing upon the filing of a response or expiration of time to do so is error, but subject to a harmless error analysis where notice was, in fact, given. *In re T.D.W.*, 203 N.C. App. 539, 545, 692 S.E.2d 177, 181 (2010). In that case, the department mailed the subsequent notice of hearing to the respondent less than 30 days prior to the hearing and well after the time for responding to the motion had expired. *Id.* at 545-46, 692 S.E.2d at 181. Indeed, the respondent did not appear for the hearing. *Id.* Nevertheless, where the respondent—notwithstanding her non-appearance—failed to demonstrate prejudice from the belated service of the subsequent notice of hearing, we determined the late notice was harmless error. *Id.*

In this case, on 12 October 2023, the trial court held a hearing on the status of the filing of the Motion to Terminate Parental Rights, at which both Respondent-Mother and her trial counsel were present. The Motion was filed the same day. However, the TPR Notice failed to issue. Instead, the TPR Notice did not issue until 2 November 2023. The TPR Notice included the information required by section 7B-1106.1(b) but

also included the specific date, time, and place of the hearing. As such, the TPR Notice effectively collapsed the requirements of both notices into the single notice. However, this TPR Notice was both belatedly issued after the filing of the Motion to Terminate Parental Rights to the extent it was the notice required by section 7B-1106.1 and prematurely issued to the extent it was the notice of hearing contemplated by section 7B-1106.1(b)(5) prior to the expiration of time to respond to the Motion to Terminate Parental Rights. Ultimately, the hearing was noticed for and occurred on 29 November 2023. Respondent-Mother and her counsel were both present and Respondent-Mother testified in support of her case.

While this case does not squarely fall under either *Alexander* or *T.D.W.*, ultimately, here, DSS did provide all the elements of both the notice required by section 7B-1106.1 and the subsequent notice of hearing. Respondent-Mother received all the statutory elements of notice to which she was due. DSS' error was in the timing and way it gave that notice. This is unlike *Alexander* where Respondent did not receive the elements of notice and more akin to *T.D.W.* where notice of hearing was given untimely. As such, to the extent there was any error in denying the Motion to Continue based on the untimely notice(s), this Court must determine whether the error resulted in prejudice to Respondent-Mother.

Respondent-Mother's argument primarily rests on the fact she was not afforded a full 30 days following issuance of the TPR Notice to file a responsive pleading. However, while the motion to continue was initially grounded on the basis additional time was needed so they "could" file a response to the motion, no responsive pleading was proffered. Moreover, while Respondent-Mother also contends she was foreclosed from asserting affirmative defenses, no articulation of those defenses is provided. Respondent-Mother advances no argument as to how the filing of a responsive pleading would have impacted either the process or the outcome of the hearing. Respondent-Mother does not contend the trial court limited her defense of the action or precluded her from offering any evidence in support of her case at the hearing.

Respondent-Mother and her trial counsel were present for the status hearing on 12 October 2023 on the filing of the Motion to Terminate Parental Rights. The Motion was filed the same day. Respondent-Mother does not contend she was not served or did not have actual notice of the filing of the Motion. The hearing occurred on 29 November 2023—48 days after the filing of the Motion. Critically, at no time—either following filing of the Motion or issuance of the later TPR Notice—did Respondent-Mother object to the lack of notice or its contents or move

for a continuance of the hearing to permit time for a responsive pleading. Instead, no motion was raised until the morning of the hearing when everyone was present and prepared to proceed.

Moreover, while trial counsel raised the 30-day time to file a response, the oral motion to continue was primarily premised on counsel's inability to contact Respondent-Mother. Counsel conceded, however, Respondent-Mother could have contacted him. Nevertheless, Respondent-Mother did testify in support of her case. On appeal, Respondent-Mother does not challenge either the adjudication of grounds to terminate her parental rights or the disposition terminating her parental rights.

Thus, Respondent-Mother, on the facts of this case, has failed to demonstrate prejudice from the untimely TPR Notice. *See In re T.D.W.*, 203 N.C. App. at 545-46, 692 S.E.2d at 181. Therefore, any error resulting from the TPR Notice was harmless. Consequently, in turn, the trial court did not commit prejudicial error in denying Respondent-Mother's oral motion to continue.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Adjudication Order in Proceeding to Terminate Parental Rights and Disposition Order in Proceeding to Terminate Parental Rights are properly affirmed.

AFFIRMED.

Judge ARROWOOD concurs.

Judge COLLINS dissents by separate opinion.

COLLINS, Judge, dissenting.

Because DSS failed to provide the statutorily required notice and the trial court violated the statutory mandate when it held the TPR hearing before Mother's 30-day time period in which to file a responsive brief expired, I respectfully dissent.

DSS filed a TPR Notice, pursuant to N.C. Gen. Stat. § 7B-1106.1(b), on 2 November 2023. The TPR Notice stated, "A written response to the Motion must be filed with the clerk within 30 days after service of the Motion and Notice, or the parental rights of the mother and father may

be terminated." The TPR Notice also stated, "The date, time, and place of the Pre-trial Hearing and Adjudication Hearing is November 29th, 2023 at 9:00 a.m. in the Courtroom at the Stokes County Government Center Danbury, North Carolina." The TPR Notice thus allowed Mother only 27 days to file a written response.

DSS erred in three ways: First, DSS conflated the notice and information required in the first notice by N.C. Gen. Stat. § 7B-1106.1(b) with the notice and information in the second notice required by § 7B-1106.1(b)(5). Second, the information included in the first notice about the "the date, time, and place of any pretrial hearing . . . and the [termination] hearing" should have been included in a second notice sent to Mother after her response was filed or 30 days had passed. However, DSS never sent a second notice. Third, the date of the termination hearing set forth in the singular notice sent violated § 7B-1106.1's mandate that Mother have 30 days to respond to the TPR motion.

I disagree with the majority opinion's conclusion that this case is more similar to *In re T.D.W.* than *In re Alexander*. This case is more similar to *Alexander* because there was a "total failure" to provide the second notice *and* "a failure to provide important components" of the second notice–specifically, a hearing date that complied with the mandatory provisions of the statute–in the singular notice that was sent. *In re T.D.W.*, 203 N.C. App. at 544. Thus, the issue here was not merely that DSS's notice was untimely, but also that it failed to include some of the required elements of notice. Accordingly, DSS's failure to comply with N.C. Gen. Stat. § 7B-1106.1 cannot "be excused on the grounds that the parent who did not receive the required notice was not prejudiced." *Id.*

Moreover, even when applying a harmless error analysis in this case, the prejudice to Mother here is self-evident: Mother received *at least* three fewer days to meet with her attorney and prepare her response and defense, time to which she was statutorily entitled. This obvious prejudice can be seen in all types of hypothetical situations. Take, for example, an attorney for an appellant in this Court who shows up to Court three days before their response brief is due for the purpose of moving for an extension of time to file the brief. Not only is the extension denied, but the attorney is required to participate in oral argument on the spot, having not yet met with their client and not filed a brief. I think it would be difficult to find any appellate attorney who would not think this prejudicial on its face.

Here, had DSS sent a proper first notice, Mother would have had 30 days in which to file her response, and DSS would have had to wait

for Mother's response before setting a date, time, and place for the TPR hearing and sending out a second notice containing that information. Furthermore, Mother had to participate in a TPR hearing for which she was not prepared. Mother's attorney made a motion to continue, explaining to the trial court that the time for Mother's response had not yet expired and that they "need[ed] a continuance . . . so that [they] could file a response." Mother's attorney informed the trial court at the hearing on the motion to continue that he had not been in contact with her before that date as her phone had stopped working, he had not "been able to file anything up until this point," and that Mother "hasn't really had a chance to work with me on this . . . ." This evidence amply supports that Mother was prejudiced by DSS's failure to provide the statutorily required notice.

Further, the trial court violated the statutory mandate in N.C. Gen. Stat. § 7B-1106.1(a), (b)(2), and (b)(5) when it held the TPR hearing 27 days after the TPR Notice was filed, depriving Mother of the full 30-day time period in which to file her response. N.C. Gen. Stat. § 7B-1106.1(a) provides that DSS "shall prepare a notice" directed to Mother and that the notice "shall notify the person . . . to whom it is directed to file a written response within 30 days after service of the motion." N.C. Gen. Stat. § 7B-1106.1(a). N.C. Gen. Stat. § 7B-1106.1(b) provides that the notice required by subsection (a) "shall" include, *inter alia*, the following: notice "must be filed with the clerk within 30 days after service of the motion and notice," N.C. Gen. Stat. § 7B-1106.1(b)(2), and notice "will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed." N.C. Gen. Stat. § 7B-1106.1(b)(5). "This Court has held the General Assembly's use of the word 'shall' establishes a mandate, and failure to comply with the statutory mandate is reversible error." *In re Alexander*, 159 N.C. App. at 525. Moreover, "[a] trial court may also abuse its discretion if it . . . fails to comply with a statutory mandate." *In re B.E.*, 375 N.C. 730, 745 (2020) (citations omitted).

DSS argues that Mother and her attorney *could* have prepared in the days leading up to the hearing. The point is, Mother did not have to. Three different subsections of N.C. Gen. Stat. § 7B-1106.1 mandate that a parent be given 30 days to respond to a motion to terminate their parental rights. *See* N.C. Gen. Stat. § 7B-1106.1(a), (b)(2), and (b)(5). Mother was entitled to rely upon the 30 days afforded to her by statute. The trial court thus abused its discretion when it denied Mother's motion to continue and failed to follow the mandate set forth in N.C. Gen. Stat. § 7B-1106.1. It further erred by finding that "all . . . notice requirements

have been met" and that "[t]he time for the mother to file a responsive pleading has not yet expired, however, the mother is present in Court today and is not prejudiced by her failure to file a responsive pleading as of today's hearing." N.C. Gen. Stat. § 7B-1106.1 does not permit the trial court to truncate Mother's 30-day time period in which to file a response.

KURT LUDACK, Plaintiff/Father
v.
CHRISTINA LUDACK, Defendant/Mother

No. COA24-486

Filed 17 December 2024

1. Child Custody and Support—custody—consideration of statutory factors—sufficiency of findings

In its order granting joint legal and physical custody to a child's mother and father, the trial court entered numerous findings of fact showing that it addressed the factors in N.C.G.S. § 50-13.2, including those that detailed each parent's personal relationship with the child, financial means, housing situation, work schedule, and type of activities engaged in with the child. The trial court's findings supported its conclusions that the child's best interest would be served by having the parents share joint legal and physical custody and for her to attend schools in the school district where her mother lived.

2. Child Custody and Support—custody—delay in entry of permanent order—remedy—petition for writ of mandamus or other action

In a child custody proceeding, although the father argued on appeal that the trial court's lengthy delay before entering a permanent written custody order was prejudicial, the Court of Appeals—following the same rule adopted by the Supreme Court in termination of parental rights cases—held that the proper remedy would have been to request expedited entry at the trial court level, such as by making a motion or petitioning for a writ of mandamus, rather than waiting to raise the issue for the first time on appeal. Here, after the trial court held an evidentiary hearing on child custody, the parties appeared in court multiple times during the thirty-eight months that passed between the hearing and entry of the order, during which either party could have requested entry of a written order.

3. Child Custody and Support—custody—conversion of temporary order to permanent by operation of time—delay in seeking permanent custody—remand required

In a child custody proceeding in which the father argued that the court's temporary custody order (granting a mother and father joint legal and physical custody and setting forth a detailed custody schedule) had converted to a permanent order by operation of time, where the trial court's subsequent permanent custody order (entered thirty-eight months after an evidentiary hearing, which kept joint custody but changed the custody schedule) did not indicate the effect that the mother's twenty-five-month delay in seeking permanent custody had on the temporary order, the matter was remanded for the trial court to hold a hearing to determine whether the temporary order had become permanent.

Appeal by Father from order entered 16 November 2023 by Judge K. Dean Black in Lincoln County District Court. Heard in the Court of Appeals 22 October 2024.

The Jonas Law Firm, P.L.L.C., by Rebecca J. Yoder, for Plaintiff-Appellant.

Christina Lee Ludack, pro se Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Kurt Ludack ("Father") appeals from the trial court's order granting Defendant Christina Ludack ("Mother") and Father joint legal and physical custody of their minor child. Father contends the trial court (1) failed to make sufficient, statutorily required findings of fact to support its custody determination; (2) entered its written custody order after a prejudicially long delay; and (3) did not consider whether the temporary custody order became permanent as an operation of time. We remand to the trial court for the sole purpose of considering whether the temporary custody order became permanent.

I. Factual and Procedural Background

Father and Mother were married from 2012 to 2019, and one child was born to the marriage, Arisa.[1] Father and Mother separated in 2017.

1. We use a pseudonym for ease of reading and to protect the identity of the juvenile. *See* N.C. R. App. P. 42(b).

On 6 February 2018, Father filed a complaint for child custody, and later amended it to include a claim for equitable distribution. On 5 March 2018, Father and Mother entered into a Temporary Custody Consent Order (the "Temporary Order"), under which each would have legal and physical custody of Arisa. The Temporary Order established a rotating "2-2-3" equal custody schedule whereby Arisa would stay with parent A for two days, then stay with parent B for two days, then return to parent A for three days, and then restart and continue the pattern.

Father and Mother divorced in September 2019, but did not resolve permanent custody of Arisa at that time.

On 20 August 2020, Mother filed a notice of hearing on permanent child custody. On 3 September 2020, the trial court held a hearing on the permanent custody of Arisa and a pending motion for contempt. Between September 2020 and September 2023, the parties repeatedly returned to court on motions for contempt for a party's failure to adhere to the Temporary Order.

Over three years after the permanent custody hearing, Mother filed a notice of hearing for entry of a written permanent custody order. The trial court held the hearing on 29 September 2023 to discuss entry of the order, but the trial court did not endeavor to collect additional evidence at that time.

On 16 November 2023, the trial court entered a written Permanent Child Custody Order (the "Permanent Order"), granting joint legal and physical custody of Arisa to Father and Mother, but establishing a new custody schedule. The Permanent Order determined Arisa would attend school in the district where Mother lived, that Father would have custody of Arisa every other week from Thursday to Sunday, and Mother would have custody all other times.

Father timely appeals.

II. Analysis

Father contends the trial court erred because the court failed to make statutorily required findings of fact to support its custody determination, and because the Permanent Order was entered after a prejudicially long delay. Father also asserts the Permanent Order did not address whether the Temporary Order became permanent by operation of time.

A. Required Findings of Fact

[1] Father's first argument does not challenge the substance of any of the trial court's findings, but rather contends they are insufficient

to satisfy the court's statutory duty to make sufficient findings of fact. Following a child custody hearing, the trial court is statutorily required to enter a written order determining child custody, including written findings of fact that reflect its consideration of factors relevant to the child's safety and the best interest of the child:

> In making [its child custody] determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.

N.C. Gen. Stat. § 50-13.2(a) (2023). "The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citations and internal marks omitted).

Father contends this case is analogous to, and controlled by, our decisions in *Aguilar v. Mayen*, 293 N.C. App. 474, 901 S.E.2d 662 (2024), and *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977), where this Court vacated custody orders because they failed to make required findings of fact in compliance with section 50-13.2(a). In *Aguilar*, the trial court entered a written order granting sole custody to the mother based upon two findings of fact, total:

> 3. That the minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months.
>
> 4. That it would be in the minor child's best interest that her care, custody and control be placed with the Mother with the Father having substantial visitation.

Aguilar, 293 N.C. App. at 479, 901 S.E.2d at 666. Our Court held, even though the trial court's two findings were supported by the evidence presented and "[t]he transcript [was] replete with evidence from which findings could be made," the two findings were nonetheless insufficient to show the trial court followed section 50-13.2(a)'s mandate to make written findings as to its consideration of all relevant factors. *Id.* at 482,

901 S.E.2d at 668. The Court vacated and remanded the custody order for sufficient findings of fact. *Id.*

In *Montgomery*, the trial court entered a written order granting sole custody to the father following a total of five findings of fact:

> IV. Based upon the greater weight of the evidence, the finding of fact is that at and during the time of separation the wife herein . . . was hospitalized and by necessity the husband . . . had the custody of the two (2) minor children and moved from Stokes County to Forsyth County.
>
> V. That the wife . . . has now recovered from her illness and is fully capable of caring for the children properly and is a fit and proper person to provide to wholesome home life that is conducive to the well-being of the minor children.
>
> VI. The father has cared for the children during his former wife's illness and it is found as a fact that this has been satisfactory for the welfare of the children.
>
> VII. Both children are regular in their attendance of school and the boy has made satisfactory progress in his school work and activities; the girl is an exceptional student and her school work has been highly satisfactory.
>
> VIII. It was admitted by both parents during testimony that each was a fit and proper person to have custody of the children.

Montgomery, 32 N.C. App. at 156, 231 S.E.2d at 28. This Court vacated and remanded the order, explaining only that the order "contain[ed] no findings . . . which support the award of custody . . . to [the father]." *Id.* at 158–59, 231 S.E.2d at 29.

Aguilar and *Montgomery* are distinguishable from the present case. In *Aguilar*, the two findings established a single fact—that all parties adequately cared for the minor child—which was insufficient to support a grant of sole custody to one parent. *Aguilar*, 293 N.C. App. at 482, 901 S.E.2d at 668. In *Montgomery*, the trial court's five findings summarily expressed the same, singular sentiment—that the mother and the father were appropriate and able caregivers for the minor child—and were likewise held insufficient. *Montgomery*, 32 N.C. App. at 157, 231 S.E.2d at 29.

The trial court, here, made a total of nineteen findings of fact in its Permanent Order. The first six findings establish the court's jurisdiction

and the terms of the Temporary Order. The court then laid out thirteen findings regarding Mother and Father's current fitness to have custody of Arisa:

> 7. Father has a loving relationship with [Arisa] and spends time with [Arisa] doing outdoor activities. Father is also involved in [Arisa's] studies and helps her with her homework.
>
> 8. Mother has a loving relationship with the minor child and spends time with the minor child cooking and doing other fun activities. Mother is involved in the minor child's studies and helps her with her homework.
>
> 9. Father has a three-bedroom home he bought in Huntersville through a BA loan, stating he knew someone who knew the owner. He is employed at Sid Harveys in Charlotte, works both at his office and at home, and sometimes takes [Arisa] with him to work. He earns $50,000.00 per year.
>
> 10. Mother is employed with SPC Mechanical as a Property Manager at Charlotte Convention Center where she has a flexible work schedule and is off work every Friday and frequently works from home.
>
> 11. Mother lives in a three-bedroom home with her two children. [Arisa] has her own room and enjoys an excellent relationship with her half-brother who is an honor roll student at Balls Creek Elementary.
>
> 12. [Arisa] has her own room at Father's residence and has age-appropriate toys.
>
> 13. Father and [Arisa] enjoy camping trips in the camper, building "forts" in her bedroom, playing in a pool, and going to birthday parties. [Arisa] enjoys riding her bicycle. She has friends near his home.
>
> 14. [Father] felt it was not in [Arisa's] best interest to go to Balls Creek Elementary due to his online research of school rankings from a website called "schooldigger.com." That website ranked Balls Creek Elementary School in the top 25% of all elementary schools in North Carolina and ranked Grand Oak Elementary in the top 6% of all elementary schools in North Carolina.

> 15. [Father] also looked at Lincoln Center as a possible school because he thought it was a good school and it was halfway between his new home in Huntersville and Mother's home in Sherill's Ford.
>
> 16. [Arisa] is now enrolled at Balls Creek Elementary School. Mother's son, [Arisa's] step-brother, currently attends Balls Creek.
>
> 17. On a typical non-working day, Mother gets up between 5 and 5:30 a.m., does some chores and starts a big breakfast. They live at the lake and do a lot of water activities like fishing, swimming, tubing, boating, and kayaking. [Arisa] likes reading, playing with her Barbies, walking to the community dock, riding her bicycle, and riding her electric scooter. She has friends in her neighborhood that she plays with.
>
> 18. Mother had a good support group. Her parents live five minutes away and help her with her children. They do a lot of activities together.
>
> 19. The parties are fit, proper and suitable persons to have joint physical and legal custody of [Arisa] and it is in [Arisa's] best interest to award joint legal and physical custody of [Arisa] to Mother and Father.

The court then made two substantive conclusions of law: (1) that it is in [Arisa's] best interest for Mother and Father to share joint legal and physical custody; and (2) that it is in [Arisa's] best interest to attend Balls Creek Elementary School, and to thereafter attend schools in the same school district.

The trial court's findings of fact show that it considered factors relevant to Arisa's safety and express substantive considerations beyond whether the parties are simply appropriate and able caregivers, and we can properly review its findings and conclusions on appeal. The findings reflect (1) each parent's personal relationship with Arisa; (2) each parent's ability to financially provide for Arisa; (3) each parent's housing circumstances; (4) the amount of time and kinds of activities each parent usually has with Arisa; and (5) each parent's ability to spend time with Arisa with respect to their work schedule. The record evidence does not show any indication that these parties have a history of domestic violence.

Notably, it is apparent from the record before this court and from the language of the trial court's findings and conclusions of law that a

focally relevant issue to be resolved by the child custody proceedings was which school Arisa would attend. Four of the trial court's findings reference Arisa's school placement and the evidence presented by each party concerning her school's fitness. The court's findings show it considered and weighed Arisa's current placement at Balls Creek Elementary, that her step-brother also attends Balls Creek, and Father's research of school ratings, and determined that it would be in Arisa's best interest to remain in the school district covering Balls Creek. Its conclusion that it is in Arisa's best interest to be in Mother's physical custody during the school-week rationally follows therefrom.

B. Prejudicial Delay in Entry of Order

[2] Father also contends the trial court erred because there was a prejudicial, thirty-eight-month delay between the permanent custody hearing and the entry of its written Permanent Order.

There are no general, statutorily prescribed timeliness requirements for the entry of written orders following civil proceedings. Likewise, neither our legislature nor our Courts have spoken specifically to the timeliness of written orders following child custody proceedings under section 50-13.2. However, our Courts have ruled on this issue in the similar context of written orders on child custody determinations following termination of parental rights hearings. We find these rulings instructive.

In the context of child custody determinations rendered from termination of parental rights proceedings, it is statutorily mandated that the trial court's child custody determination "be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1110 (2023). Our Courts have repeatedly addressed the question of prejudicial delay in the entry of orders pursuant to section 7B-1110. Initially, the Courts developed a rule whereby the length of the delay would be weighed against the practical, prejudicial effects the delay caused on the case, with any delay of six months or more often being held prejudicial. *See In re T.H.T.*, 362 N.C. 446, 451, 665 S.E.2d 54, 57 (2008) (discussing prior appellate prejudicial delay jurisprudence). However, beginning in 2008, our Supreme Court held that vacating or reversing an order solely based upon prejudicial delay, a matter collateral to the substance of the order and its underlying proceedings, is not a proper remedy. *Id.* at 452–53, 665 S.E.2d at 58–59. Our Supreme Court in *T.H.T.* reasoned that "[w]hen the integrity of the trial court's decision is not in question, a new hearing serves no purpose, but only 'compounds the delay[.]' " *Id.* at 453, 665 S.E.2d at 59 (citation omitted).

Rather, the *T.H.T.* Court held, "[m]andamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute" and "is an appropriate and more timely alternative than an appeal." *Id.* at 454, 455, 665 S.E.2d at 59, 60. The Court further explained that "the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not 'sit back' and rely upon an appeal to cure all wrongs." *Id.* at 455, 665 S.E.2d at 60. Our Courts have since declined to reverse or vacate section 7B-1110 orders solely on the grounds of the trial court's prejudicial delay, instead requiring that the party have taken some actions to expedite entry of the order at the trial court level. *See Matter of C.R.L.*, 377 N.C. 24, 28, 855 S.E.2d 495, 498 (2021) (overruling prejudicial delay argument where the father did not move for writ of mandamus during trial court's thirty-three-month delay in entering order pursuant to section 7B-1110).

We hold that the same rule should apply in the present context. If a party would like to hold the court accountable to its statutory duty to enter a written order under section 50-13.2(a), and impose timeliness, the proper remedy is not to argue prejudicial delay for the first time on appeal. Rather, the party should file a writ of mandamus, or employ another method of requesting the court act, in the trial court. Though there is no statutorily mandated deadline for the entry of orders under section 50-13.2(a), the resulting custody determinations have similar effect on the child and the ultimate determination turns on the same cornerstone, qualitative principle: the best interest of the child at the time of the hearing. *See* N.C. Gen. Stat. § 50-13.2(a); N.C. Gen. Stat. § 7B-1110. Further, our legislature chose not to mandate any timeliness requirement for written orders under section 50-13.2; it would be illogical to implement a stricter standard of prejudicial delay in this context.

Here, the trial court conducted an evidentiary hearing on child custody on 3 September 2020. The court then entered its written Permanent Order based on the circumstances existing in 2020 on 16 November 2023. The record is unclear specifically what proceedings and motions may have occurred during the thirty-eight-month delay, but it does show the parties came before the court multiple times. Despite these appearances, neither party addressed the court's delay until Mother finally moved for a hearing to request the trial court enter its written order after approximately thirty-six months. Either party could have made this motion at an earlier time. If either party had desired the court to enter its written order in a timelier manner, it should have moved for a hearing on entry of the order or filed a writ of mandamus at the trial court level.

C. Conversion of Child Custody Orders

[3] Lastly, Father contends the Temporary Order may have become a permanent custody order by operation of time. " 'A temporary custody order may become permanent by operation of time, when neither party sets the matter for a hearing within a reasonable time[.]' " *Lawrence v. Lawrence*, 294 N.C. App. 355, 362, 903 S.E.2d 374, 380 (2024) (quoting *Eddington v. Lamb*, 260 N.C. App. 526, 529, 818 S.E.2d 350, 353 (2018)). What constitutes a reasonable time is a fact-specific question to be assessed on a case-by-case basis. *See LaValley v. LaValley*, 151 N.C. App. 290, 293 n.6, 564 S.E.2d 913, 915 n.6 (2002). While modification of a temporary custody order requires only an assessment of the best interests of the child, modification of a permanent custody order requires the movant to also show a substantial change of circumstances warranting modification. *Id.* at 292, 564 S.E.2d at 914–15.

Here, the Temporary Order was entered in March 2018 and Mother moved to calendar a hearing for permanent custody in August 2020, about twenty-five months later. *See LaValley*, 151 N.C. App. at 293, 564 S.E.2d at 915 (holding that a twenty-three-month delay between entry of the temporary custody order and a party's motion to calendar a permanent custody hearing was not reasonable). The Permanent Order does not include a finding reflecting whether the trial court considered the effect of the parties' delay in moving for entry of a permanent custody order on the status of the Temporary Order. We remand to the trial court for a hearing solely to determine whether the Temporary Order became permanent by operation of time, and, if so, whether Mother presented evidence of a substantial change of circumstances.

III. Conclusion

We hold the trial court's findings of fact were sufficient to comply with N.C. Gen. Stat. § 50-13.2(a), and that its thirty-eight-month delay in entering a written order after the 3 September 2020 hearing was not an unfairly prejudicial delay. We vacate the Permanent Order and remand to the trial court for a hearing on the sole issue of whether the Temporary Order was converted to a permanent order by operation of time.

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

MECKLENBURG COUNTY, O/B/O, SHANNON HERRON, PLAINTIFF
v.
KEDRIC R. PRESSLEY, DEFENDANT

No. COA24-328

Filed 17 December 2024

Child Custody and Support—child support—modification—self-employed parent's income—depreciation expenses—sufficiency of findings

The trial court abused its discretion by modifying defendant father's child support obligation without making sufficient findings regarding depreciation expenses (claimed by defendant as deductions on his personal tax returns), which it excluded when calculating defendant's gross income from self-employment. Since the trial court did not make a finding that it was treating the depreciation as accelerated (versus straight-line), or that the depreciation was inappropriate for income determination pursuant to the North Carolina Child Support Guidelines, the trial court's findings lacked sufficient specificity to support its conclusions. Therefore, the court's modification order was reversed and the matter was remanded for additional findings.

Judge STROUD dissenting.

Appeal by defendant from order entered 14 September 2023 by Judge Dennis J. Redwing in Mecklenburg County District Court. Heard in the Court of Appeals 22 October 2024.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellant.

Cavanaugh Hamrick & McCarthy, PLLC, by Brandon T. McCarthy, for plaintiff-appellee.

FLOOD, Judge.

Defendant Kedric R. Pressley appeals from the trial court's order modifying his child support payment. On appeal, Defendant argues the trial court abused its discretion in modifying the amount of child support without making sufficient findings of fact. Upon review, we agree and conclude the trial court's order is not supported by sufficient findings

of fact regarding depreciation expenses. Accordingly, we reverse and remand for further findings of fact.

I. Factual and Procedural Background

Defendant and Sharon Herron ("Plaintiff") are the parents of two minor children, both born in 2011. Defendant and Plaintiff were never married. Defendant is a self-employed dump truck owner and operator.

In 2019, the trial court entered an order requiring Defendant to pay $50.00 per month in child support. Several years later, in 2022, Plaintiff filed a motion for modification of child support and for attorney's fees.

The trial court heard Plaintiff's motion on 16 August 2023. At the hearing, Plaintiff introduced Defendant's tax returns for 2021 and 2022, wherein Defendant claimed depreciation deductions regarding his business expenses on Schedule C of his personal tax returns. The trial court determined that it would consider Defendant's tax returns for the purposes of establishing income, but it would "not accept[]" the depreciation expenses. The depreciation expenses were thus added back to Defendant's gross receipts, which resulted in Defendant's gross monthly income being set at $4,783.83. The trial court thereafter ordered Defendant to pay $905.35 per month in child support.

Defendant timely appealed to this Court.

II. Jurisdiction

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

III. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (citation omitted). "The standard of review for findings made by a trial court sitting without a jury is whether any competent evidence exists in the record to support said findings." *Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007) (citation and internal quotation marks omitted). The trial court is required to "make findings of those specific facts which support its ultimate disposition of the case . . . to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

Additionally, "the trial court must articulate its rationale with sufficient specificity to facilitate effective appellate review." *Craven Cnty. ex rel. Wooten v. Hageb*, 277 N.C. App. 586, 591, 861 S.E.2d 571, 575 (2021) (citation omitted) (remanding where the trial court's findings on the defendant's income, including the defendant's depreciation expenses, were "more conclusory than explanatory" and "offer[ed] us no basis for review of the trial court's application of the law to the evidence presented").

IV. Analysis

On appeal, Defendant argues Findings of Fact 22, 25, 26, 27, and 29 are not supported by competent evidence, and thus, the trial court abused its discretion in modifying the amount of child support. Specifically, Defendant contends the trial court failed to "make the required distinctions between straight-line and accelerated depreciation deductions as required" when calculating Defendant's income, and therefore the challenged findings are not supported by competent evidence. While we disagree the trial court must make findings as to any required distinctions between straight-line and accelerated depreciation deductions, we agree that the trial court abused its discretion, as its findings are not supported by competent evidence.

"This Court has established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 234 (2005) (citation and internal quotation marks omitted). Under the North Carolina Child Support Guidelines, child support obligations are "based upon net income converted to gross annual income[.]" N.C. Child Support Guidelines, Income (1) (2023). The Guidelines state that income "means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business[.]" N.C. Child Support Guidelines, Income (1). The Guidelines further provide:

> Gross income from self-employment . . . is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Ordinary and necessary business expenses *do not include* amounts allowable by the Internal Revenue Service for the *accelerated component of depreciation expenses*, *investment tax credits*, *or any other business expenses determined by the court to be inappropriate for determining gross income.* In general, income and expenses from self-employment

> or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

N.C. Child Support Guidelines, Income (2) (2023) (emphasis added).

In *Lawrence v. Tise*, we considered whether the trial court properly treated depreciation expenses from the defendant's income per the Guidelines when setting a child support order. 107 N.C. App. 140, 147, 419 S.E.2d 176, 181 (1992). In *Lawrence*, the trial court "did not consider any depreciation in computing [the] defendant's rental property losses"; it did, however, determine "the amount of depreciation claimed by [the] defendant on his income tax returns, but [the record was] not clear whether the [trial] court considered the depreciation in computing defendant's monthly gross income." *Id.* at 148, 419 S.E.2d at 181.

We remanded the matter for a new trial because we were "unable to ascertain how the trial court treated [the defendant's] depreciation[.]" We explained that the "findings . . . [we]re not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing [the defendant]'s gross income," and "to the extent, if any, the trial court considered depreciation, the record d[id] not reveal whether the depreciation claimed by [the] defendant was straight[-]line or accelerated." *Id.* at 148, 419 S.E.2d at 181; *see also Cauble v. Cauble*, 133 N.C. App. 390, 398, 515 S.E.2d 708, 714 (1999) (affirming the trial court's disallowance of depreciation where the findings articulated that the trial court disallowed "in the interest of justice," such that there was no abuse of discretion in applying the Guidelines).

Here, the trial court found that Defendant claimed $41,707.00 as depreciation expenses as part of his business expenses in 2021, and $37,409.00 in 2022. The trial court found and concluded in Finding of Fact 22:

> [Defendant] presented evidence that his 2022 business-related expenses totaled $80,323,13 *exclusive* of depreciation. The [trial c]ourt is using [Defendant]'s tax returns and not accepting the deduction for as [sic] "Depreciation and section 179 expense deduction" and is not considering the actual expenses introduced into evidence.

The trial court then made the following findings of fact:

> 25. [Defendant's] depreciation expense(s) for 2021 and 2022 should be added back in for the purpose of calculating his gross income in those years.
>
> 26. Adding back [Defendant's] claimed depreciation expense in 2021 results in [Defendant] having gross monthly income in 2021 of $4,810.41 per month.
>
> 27. Adding back [Defendant's] claimed depreciation expense in 2022 results in [Defendant] having gross monthly income in 2022 of $4,757.25 per month.
>
> . . . .
>
> 29. [Defendant's] average gross monthly income from 2021 and 2022 is $4,783.83 and that figure is appropriate for the [trial c]ourt to use in determining [Defendant's] prospective child support obligation to [Plaintiff].

As in *Lawrence*, where this Court could not determine how the trial court treated the defendant's depreciation, we are "unable to ascertain how the trial court treated depreciation" and whether the trial court properly treated the depreciation as set by the Guidelines. *See Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181. Although *Lawrence* does not require the trial court to distinguish between types of depreciation, its holding does require the trial court to provide a reviewing court with findings of fact such that the reviewing court has the ability to "ascertain how the trial court treated [the defendant's] depreciation[.]" *See id.* at 148, 419 S.E.2d at 181.

While evidence presented by Defendant may tend to show he was taking accelerated depreciation, which would make the trial court's actions proper, as accelerated depreciation is not allowed to be included per the Guidelines, *see Lawrence*, 107 N.C. App. at 147, 419 S.E.2d at 181, the trial court did not make a finding of fact that it was treating the depreciation as accelerated, and we cannot make that finding for it. *See In re L.C.*, 293 N.C. App. 380, 385, 900 S.E.2d 697, 710 (2024) ("[T]his Court cannot assume findings of fact the trial court did not make, even if there is evidence to support such findings."). When stating it was going to look only at the tax returns, the trial court explained that "[i]f certain things were important, the accountant would've been here. And I am just not going to entertain that, otherwise." The trial court made no finding that the depreciation was inappropriate for income calculation and articulated no rationale as to why it declined to accept the depreciation on the tax returns. *See* N.C. Child Support Guidelines, Income (2);

see also Cauble, 133 N.C. App. at 399, 515 S.E.2d at 714; *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575.

Here, the trial court failed to "articulate its rationale with sufficient specificity to facilitate effective appellate review[,]" such that we cannot conclude there was no abuse of discretion in applying the Guidelines. *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575; *see also Cauble*, 133 N.C. App. at 399, 515 S.E.2d at 714. We therefore hold the trial court failed to make findings of fact to support its ultimate disposition that would "allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *See Coble*, 300 N.C. at 712, 268 S.E.2d at 189; *see also Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575.

While depreciation other than accelerated may be "determined by the [trial] court to be inappropriate for determining . . . income[,]" the trial court here made no findings that Defendant's depreciation was inappropriate for income determination. *See* N.C. Child Support Guidelines, Income (2); *see also Cauble*, 133 N.C. App. at 399, 515 S.E.2d at 714; *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575. Because the findings of fact made by the trial court "are not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing [Defendant's] gross income," remand is necessary. *See Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181; *see also Cauble*, 133 N.C. App. at 399, 515 S.E.2d at 714; *Hageb*, 277 N.C. App. at 591, 861 S.E.2d at 575; *Holland*, 169 N.C. App. at 571, 610 S.E.2d at 236. Thus, we reverse and remand.

V. Conclusion

Upon review, we conclude the trial court abused its discretion in modifying the amount of child support Defendant must pay, where it failed to support its order with sufficient findings of fact as to how it treated the depreciation to support its conclusion for not accepting any of the depreciation. We therefore reverse and remand for further findings of fact, consistent with this opinion.

REVERSED AND REMANDED.

Judge MURPHY concurs.

Judge STROUD dissents in separate opinion.

STROUD, Judge, dissenting.

Because the trial court's findings of fact are supported by the evidence and the calculation of Defendant's gross income was done in accord with the North Carolina Child Support Guidelines, I respectfully dissent.

As the majority opinion notes, Defendant contends the trial court failed to " 'make the required distinctions between straight-line and accelerated depreciation deductions as required' when calculating Defendant's income, and therefore the challenged findings are not supported by competent evidence." In fact, the trial court's failure to distinguish between straight-line and accelerated depreciation was Defendant's primary argument in this appeal. He argued specifically as follows:

> Finding of Fact #22 did not make any distinction between straight-line deductions or accelerated deductions. Findings of Fact #25, #26, #27, and #29 are all based on the trial court's decision to use the tax returns and exclude the depreciation deduction. However, these Findings do not make the required distinctions between straight-line and accelerated depreciation deductions as required by *Holland*. Fu[r]thermore, the trial court did not make any other Findings about the nature of the depreciation listed on [Defendant's] Schedule C. *There was not any evidence presented about what the depreciation was related to, so the trial court could not have made the required Findings.* The trial court also did not make any Findings about how it was exercising its discretion in ruling on the deductibility of the straight-line depreciation as a reasonable and necessary business expense. Since the trial court failed to make the necessary Findings, Findings of Fact #22, #25, #26, #27 and #29 are not supported by competent evidence.

(Emphasis added.)

The majority opinion rejects Defendant's argument, stating that it disagrees that "the trial court must make findings as to any required distinctions between straight-line and accelerated depreciation deductions[.]" But then it holds that the trial court abused its discretion because its findings "are not supported by competent evidence." This statement is mystifying, as the findings are clearly supported by Defendant's income tax returns and the amounts stated in the findings are taken from those income tax returns. Later, despite the majority's disagreement with Defendant's argument that "the trial court must make

findings as to any required distinctions between straight-line and accelerated depreciation deductions," the majority then remands for the trial court to do just that, stating that "the trial court did not make a finding of fact that it was treating the depreciation as accelerated, and we cannot make that finding for them."

The majority is correct that if the evidence was presented to the trial court, "we cannot make that finding" for the trial court. But here, the evidence was not presented to the trial court, nor did Defendant make an argument regarding his depreciation expenses before the trial court. In fact, Defendant argued to this Court that he did not present this evidence: "There was not any evidence presented about what the depreciation was related to, so the trial court could not have made the required Findings." The trial court's findings were supported by the evidence and it made sufficient findings of fact to allow appellate review, and that is all the law requires.

Any failure in the findings of fact to make a distinction between straight-line and accelerated depreciation was not the trial court's failure; instead, Defendant failed to present evidence to support his contention on appeal that the trial court was essentially required to treat his depreciation as straight-line depreciation and to allow him a deduction from his gross income – but that is his argument on appeal. There is no need for remand for additional findings of fact regarding depreciation because the trial court's Order adequately addressed the evidence presented and the arguments Defendant made to the trial court. We should not ask the trial court to make additional findings of fact on remand based upon non-existent evidence or to address arguments a party did not make at the trial.

The majority also noted the trial court's findings of fact regarding depreciation. Findings 22, 25, 26, 27, and 29 noted Defendant presented evidence including his business-related expenses, his income tax returns, and his depreciation expense as shown on the income tax returns for 2021 and 2022. Although the majority states that these "findings *are not supported by competent evidence*" (emphasis added), the only actual problem with the findings the majority identifies is the trial court's failure to make a finding classifying Defendant's depreciation as accelerated or straight-line. The numbers stated in these findings are clearly supported by the evidence and Defendant does not contend on appeal they are not. Defendant just wanted the trial court to use different numbers based upon different evidence – his own copies of receipts and other financial records – instead of his professionally-prepared income tax returns. The trial court's decision to rely upon the tax returns is a

judgment regarding the weight and credibility of the evidence, which is determined solely by the trial court. *See Berry v. Berry*, 257 N.C. App. 408, 417, 809 S.E.2d 908, 914 (2018) ("It is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." (citations, quotation marks, and brackets omitted)).

The majority relies upon *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992), to remand for additional findings regarding depreciation. But the Order on appeal is unlike the order in *Lawrence*. *See id*. In *Lawrence*, the trial court apparently reduced the defendant's gross income based on depreciation and the plaintiff appealed, contending that under the Child Support Guidelines, accelerated depreciation should not be deducted from the defendant's gross income for purposes of child support. *See id*. at 144-45, 419 S.E.2d at 179-80. This Court remanded for additional findings for several reasons. *See id*. at 148, 419 S.E.2d at 181. First, this Court was "unable to ascertain how the trial court treated depreciation." *Id*. Here, we can ascertain how the trial court treated depreciation. Findings 22, 25, 26, and 27 address the gross income amounts, the depreciation amounts, and the fact that the trial court was "not accepting the deduction for as (sic) 'Depreciation and section 179 expense deduction[.]' " The trial court's explanation of its treatment of depreciation was adequate; in fact, it was more detailed than the finding this Court found to be adequate in *Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999), where the trial court simply disallowed the depreciation "in the interest of justice."[1]

In *Cauble*, this Court reversed and remanded for a new calculation of child support based upon the trial court's failure to consider the "defendant's 100% ownership interest in Fun Park" and thus the findings were not specific enough "to indicate to this Court whether the trial court properly applied the Guidelines in computing [the defendant's] gross income." *Id*. at 399-400, 515 S.E.2d at 714. But this Court *rejected* the defendant's contention regarding the trial court's treatment of depreciation expenses related to another business entity the defendant owned, Stanly Farm. *See id*. at 398, 515 S.E.2d at 713. The defendant contended that the trial court erred because it "failed to deduct from the income of Stanly Farm the reasonable and necessary expenses of depreciation and

1. In *Cauble*, the trial court stated more detail about the "bad debt," but the only basis stated for disallowing the depreciation was "in the interest of justice." 133 N.C. App. at 398-99, 515 S.E.2d at 714. So based on *Cauble*, it would appear the trial court could comply with the majority's directions on remand if it simply adds the words "in the interest of justice" to finding of fact 22. *See id*.

bad debt incurred in an accrual accounting tax computation;" this Court found his argument "unpersuasive" and explained:

> Under the Guidelines, the trial court is accorded the discretion to discern those business expenses which are "inappropriate for determining gross income for purposes of calculating child support." In the case *sub judice*, the trial court disallowed "*in the interest of justice*" deductions of $71,886.68 in bad debt and $6,447.53 in depreciation taken by Stanly Farm in 1996. The court stated in its order that the bad debt "did not represent cash dollars flowing out of Stanly Farm during 1996." The court also noted that
>
> > since June 1, 1983, Stanly Farm had taxable income each calendar year, with the exception of 1996, which tax return shows a taxable income loss of $1,498.71.
>
> In light of such findings, as well as those specifying the retained earnings and cash on hand of Stanly Farm, we cannot say the trial court's disallowance of Stanley Farm's claimed bad debt and depreciation expenses in computing [the] defendant's gross income from the corporation was "manifestly unsupported by reason."

Id. at 398-99, 515 S.E.2d at 713-14 (citations, ellipses, and brackets omitted).

Here, the trial court's findings indicate it relied upon Defendant's income tax returns and made findings as to his gross monthly income, based upon his income tax returns, with the exclusion of his depreciation deductions as shown on the income tax returns. The trial court acted fully within its discretion as to the evidence it relied upon and these findings are supported by the evidence.

Another difference between this case and *Lawrence* is that here the trial court's Order is clear that it did not allow the depreciation deduction. In *Lawrence*, this Court stated that "it is not clear whether the court considered the depreciation in computing [the] defendant's monthly gross income."[2] *Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181. The lack of clarity in the findings was also the problem in *Craven Cnty. ex*

2. It appears that the lack of clarity in how the trial court treated depreciation may have been a result of the complexity of the calculation of the defendant's income in *Lawrence*, as there were findings addressing multiple income sources including

rel. Wooten v. Hageb, 277 N.C. App. 586, 861 S.E.2d 571 (2021), also cited by the majority. In *Hageb*, this Court addressed many issues on appeal but the reason for remand was the lack of findings addressing many factors, including depreciation. *See id.* at 590, 861 S.E.2d at 574-75. The only findings in *Hageb* relevant to the child support calculation were:

> 7. Father is self-employed and has a gross income of $19,454.39 per month.
>
> 8. Mother is self-employed and has a gross income of $1,800.00 per month.
>
> Handwritten next to finding of fact #7, the trial court added: "The Court reviewed tax returns provided by Father. Income from Father's business for gaming and lottery was not included."
>
> Following the court's ninth and final typed finding of fact, two additional findings were handwritten:
>
> 10. Father was given credit for one biological child in his home as his name was listed as the father on the birth certificate. The other birth certificate provided did not have Father's name listed as the child's father.
>
> 11. Father shows significant personal expenses as business expenses on his tax returns.
>
> The trial court did not attach a Child Support Guidelines Worksheet to the order.

Id. at 587-88, 861 S.E.2d at 573 (brackets omitted).

This Court stated the findings were "more conclusory than explanatory; they offer us no basis for review of the trial court's application of the law to the evidence presented. *Id.* at 590, 861 S.E.2d at 574. This Court also noted as an "example" that order did not address depreciation at all, and this Court stated that "we are unable to ascertain how the trial court treated depreciation[.] Thus, the findings in this regard are

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> (1) wages and salaries for 1990, 1989, and 1988; (2) losses from real estate investments for 1990, 1989, and 1988; (3) interest income for 1990, 1989, and 1988; (4) dividend income for 1990, 1989, and 1988; (4) non-reimbursed employee expenses for 1990, 1989, and 1988; and (5) 'severance pay' for 1989.

Lawrence, 107 N.C. App. at 146-47, 419 S.E.2d at 180-81.

not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing Father's gross income, and remand is necessary." *Id.* (citation and quotation marks omitted). But in the case before us, it is very clear that the trial court considered the depreciation and did not "accept the deduction" for depreciation as shown on Defendant's income tax returns.

Last, the *Lawrence* Court noted that "[i]n any event, to the extent, if any, the trial court considered depreciation, the record does not reveal whether the depreciation claimed by [the] defendant was straight line or accelerated." *See Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181. The majority focuses on the language from *Lawrence* as to this Court's inability "to ascertain how the trial court treated depreciation" and to determine "whether the trial court properly treated the depreciation as set by the Guidelines." *Id.* But here, the Order states clearly *how* the trial court treated the depreciation – it did not allow this deduction – and the trial court properly considered the depreciation based on the Guidelines, based upon the evidence presented at the trial. Defendant's failure to present any evidence to support a finding that the depreciation was straight-line depreciation and not accelerated depreciation is simply not a reason for remand. Defendant testified, but he did not testify about how the depreciation was calculated. Defendant's income tax returns including Schedule C and Form 4562 "Depreciation and Amortization" were presented as evidence. On the tax returns, Defendant claimed both "special depreciation allowance for qualified property (other than listed property) placed in service during the tax year" and Modified Accelerated Cost Recovery System (MACRS) depreciation. According to the instructions for Form 4562, "The Modified Accelerated Cost Recovery System (MACRS) is the current method of *accelerated asset depreciation* required by the tax code." *Instructions for Form 4562*, Internal Revenue Service (2023) (emphasis added). Thus, Defendant's evidence tends to show he was taking accelerated depreciation. Under the Child Support Guidelines, as noted by *Lawrence*,

> [s]pecifically excluded from ordinary and necessary expenses is the accelerated component of depreciation expenses or any other business expense determined by the Court to be inappropriate for determining gross income for purposes of calculating child support. Thus, accelerated depreciation is expressly not allowed as a deduction from a parent's income.

Lawrence, 107 N.C. App. at 147, 419 S.E.2d at 181 (quotation marks and ellipses omitted).

Defendant's brief states, quite accurately, "[t]here was *no evidence* presented as to what assets were listed as 'depreciation and section 179 expense deduction' on Father's tax returns. There are no Findings of Fact as to what these deductions are related to." (Emphasis added.) But despite his failure to present evidence on this issue, he has presented the issue to this Court on appeal and argues the trial court erred by not making findings on the very thing about which he presented "no evidence." Mother responds, also accurately, that "Defendant had [his] returns professionally prepared and offered *no evidence* as to whether he and his accountant considered calculated (sic) the figures on the tax return as straight-line or accelerated depreciation." Mother also notes that in *Holland*, cited by Defendant, evidence was presented as to straight-line and accelerated depreciation, and on remand to entry of a new order on another basis, this Court directed that the trial court address that evidence. *See Holland v. Holland*, 169 N.C. App. 564, 568-69, 610 S.E.2d 231, 235 (2005) ("Accordingly, we reverse and remand the order for findings concerning [the] plaintiff's 2002 income and for the entry of a child support order on that basis. [The p]laintiff also asserts the trial court erred in its method of computing his income from his 2001 tax return. Since it is likely to recur upon remand, we deem it necessary to address this issue.").

If Defendant wanted the trial court to consider "what assets" were addressed by the depreciation expenses on his own income tax return, Defendant could have presented that evidence. He did not, nor did he make any argument to the trial court on this issue. Defendant did not testify or argue to the trial court that his depreciation expense, or any portion of the expense, should be treated as straight-line depreciation. Instead, before the trial court, Defendant presented voluminous evidence of income and expenses of his business including copies of bank statements, invoices, and receipts and argued that his net income should be calculated based on his exhibits *instead* of relying on his federal income tax returns.[3] The only other argument Defendant made on appeal is that the trial court's Order was "[w]hen the amount of [Defendant's] income and the child support amount are considered in light of *the actual facts*, it is clear that the Order is an abuse of discretion." (Emphasis added.) Defendant then contends the trial court should have based its findings

3. As to these exhibits, Defendant's counsel argued, "These are the actual expenses that he has. *The accountant is not here to explain what goes into accounting and how that works*. So, I think if you want to look at it, the best way is to look, these were his actual expenses. And that comes out again to $1,759, $1,760 per month for 2022." (Emphasis added.)

on "the actual facts" found in his business records instead of using his income tax returns. But again, the trial court is the sole judge of the weight and credibility of the evidence. *See Berry*, 257 N.C. App. at 417, 809 S.E.2d at 914. The trial court did not abuse its discretion by relying upon Defendant's income tax returns. And if there was any question as to the type of depreciation shown by Defendant's evidence, the burden was on him if he wished to show the depreciation shown on his income tax returns should be treated differently. The trial court noted as much after rendering its ruling. In response to Defendant's counsel's question regarding how the trial court was considering "Defendant's Exhibit number 5," which was his listing of his business expenses, the trial court stated:

> I am going to go by what the tax return says, period. And you alluded to that, in passing, about the accountant is not here. If certain things were important, the accountant would've been here. And I am just not going to entertain that, otherwise. Okay? Thank you.

On appeal, Defendant has not directed us to any evidence in the transcript or the 148 pages of exhibits, including financial records and income tax returns, where we might find evidence the trial court could have relied upon to find the depreciation was straight-line depreciation and not accelerated depreciation. Nor has he directed us to any evidence which would support some other finding as to his gross income, other than his financial records he wanted the trial court to use in lieu of his income tax returns—and those records do not mention depreciation.

For all these reasons, this case is quite different from *Lawrence* and *Hageb*. The trial court's findings are supported by the evidence, and it is not the trial court's job to ascertain how Defendant's depreciation on his income tax return was calculated and whether it was actually straight-line deprecation where Father admittedly presented no evidence which would allow the trial court to make this determination. The trial court's findings state how it treated depreciation and based upon the evidence presented, it treated the depreciation properly under the Guidelines. Under *Lawrence*, *Cauble*, *Hageb*, and the Child Support Guidelines, the trial court's Order should be affirmed. I therefore respectfully dissent.

ORSBON v. MILAZZO

[297 N.C. App. 96 (2024)]

R. ANTHONY ORSBON, AS GUARDIAN AD LITEM FOR
PATRICIA BOSWORTH-JONES, PLAINTIFF
v.
MATTHEW TAYLOR MILAZZO AND CITY OF CHARLOTTE, DEFENDANTS

No. COA23-1170

Filed 17 December 2024

1. Immunity—public official—distinguished from public employee —negligence action

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court erred in granting judgment on the pleadings in favor of the city's Senior Engineer Project Manager and Engineer Project Manager (defendants), whom plaintiff (the pedestrian's guardian ad litem) alleged had failed to implement safety measures at the intersection. Specifically, the court erred in finding that defendants were entitled to public official immunity when, in fact, they were merely public employees, since neither the state constitution nor any statute (including the City Code of Ordinances) created their positions or delegated statutory authority to them, and therefore they could not exercise a portion of sovereign power.

2. Negligence—accident at an intersection—design of intersection, crosswalk, and pedestrian signals—city's duty of care to injured pedestrian—summary judgment

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed in that the city did not breach its duty of care to the injured pedestrian. Importantly, the intersection design—including the pedestrian signals and crosswalk—complied with state law and specifically with the Manual on Uniform Traffic Control Devices (MUTCD), and the city's decision to install Leading Pedestrian Intervals (LPIs)—timing devices that allow pedestrians to cross before drivers get a green light—in accordance with routine retiming was reasonable, especially where the installation of LPIs was entirely optional under the MUTCD. Further, the city did not delay

unreasonably in addressing any safety concerns, as it installed a "No Turn on Red" sign three days after receiving a resident's complaint and later expedited the installation of an LPI following the accident.

3. Negligence—accident at an intersection—city's actions before the accident—proximate cause of pedestrian's injuries—summary judgment

In a negligence action arising from a car accident at an intersection with a marked crosswalk, where the traffic light turned green at the same time that the "Walk" signal lit up, at which point the driver turned left into the intersection and struck a pedestrian who was using the crosswalk, the trial court properly granted summary judgment to defendant-city, finding that no genuine issue of material fact existed as to proximate cause. Specifically, the city's actions were not the proximate cause of the pedestrian's injuries where: (1) the injuries were not foreseeable given that, for ten years prior to the accident, there were no pedestrian-related accidents at that intersection and only two left-turn vehicle accidents; (2) the intersection's design complied with North Carolina law, which requires drivers turning left on a circular green light to yield to pedestrians; (3) the city promptly addressed a resident's safety complaint about the intersection by installing a "No Turn on Red" sign within three days; and most importantly, (4) it was the driver's negligence that caused the pedestrian's injuries.

Judge THOMPSON dissenting.

Appeal by plaintiff from order entered 7 June 2023 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 May 2024.

Comerford Chilson & Moser, LLP, by Zachary M. Harris, W. Thompson Comerford, and John A. Chilson, for plaintiff-appellant.

The Law Offices of Lori Keeton, by Lori R. Keeton, for defendants-appellees.

O'Malley Tunstall, PC, by Peter J. Tomasek, Amiee A. Nwabuike, for amicus curiae North Carolina Advocates for Justice.

White & Stradley, PLLC, by J. David Stradley, for amicus curiae North Carolina Advocates for Justice.

Cranfill Sumner LLP, by Steven A. Bader, for amicus curiae North Carolina Association of Defense Attorneys.

FLOOD, Judge.

Plaintiff R. Anthony Orsbon appeals from the trial court's order granting Defendants Geoffrey Sloop and Saleem Barakzai's motion for judgment on the pleadings and Defendant City of Charlotte's motion for summary judgment. After careful review, we conclude the trial court erred in granting Defendants Sloop and Barakzai's motion for judgment on the pleadings because Defendants Sloop and Barakzai are not public officials, and therefore not entitled to public official immunity. The trial court, however, did not err in granting Defendant City's motion for summary judgment, because there is no genuine issue of material fact, and Defendant City is entitled to judgment as a matter of law. We therefore affirm in part, reverse in part, and remand for further proceedings.

I. Factual and Procedural Background

On 9 May 2021, Patricia Bosworth-Jones, a pedestrian, was crossing the intersection of Archdale Drive and Park South Drive in Charlotte, North Carolina (the "Intersection") via a marked crosswalk upon receiving a "Walk" signal. Defendant Matthew Taylor Milazzo, after stopping his vehicle on a red light at the Intersection, received a circular green light, turned left, and struck Bosworth-Jones in the marked crosswalk, causing devastating injuries, including a traumatic brain injury.

Prior to the accident, in July 2020, the Intersection received pedestrian signals and a crosswalk. The Intersection was designed so that the crosswalk "Walk" signal would turn on simultaneously with the circular green light for left turning traffic, a design contemplated by North Carolina law and the Manual on Uniform Traffic Control Devices ("MUTCD").[1] Defendant Milazzo, following the accident, testified he did not understand that a circular green light meant turning vehicles must yield the right of way to oncoming traffic and pedestrians.

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1. North Carolina law specifically requires drivers turning left on circular green lights to yield to pedestrians who lawfully cross the intersection: "When the traffic signal is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law." N.C. Gen. Stat. § 20-158(2a).

Section 4D.04 of the MUTCD states: "Vehicular traffic facing a CIRCULAR GREEN signal indication is permitted to proceed straight through or turn right or left or make a U-turn movement[.] Such vehicular traffic, including vehicles turning . . . left . . . shall yield the right-of-way to (a) Pedestrians lawfully within an associated crosswalk[.]"

Between May 2010 and 2021, there were no pedestrian accidents at the Intersection, and only two left-turn accidents involving motor vehicles. On 30 October 2022, Defendant City received an online complaint about the Intersection, which requested "pedestrian cross walk timing to be adjusted to run when cars are not driving through [the I]ntersection[,]" expressing concern that "[i]ndividuals and families are put in danger when crossing the street while cars are turning into the same lane." In response to the complaint, Defendant Barakzai, Engineer Project Manager for Defendant City, based on his experience, installed a "no Turn on Red" sign at the Intersection, and no further complaints or additional communications following up on the complaint were received by Defendant City.

In 2019, Defendant City adopted its "Vision Zero Action Plan" (the "Action Plan") to address and eliminate serious traffic injuries and fatalities. The Action Plan included a tool, a Leading Pedestrian Interval ("LPI"), to help eliminate serious pedestrian injuries and fatalities. LPIs are timing devices that give pedestrians a "Walk" signal several seconds before a driver gets a green light. Installation of LPIs at intersections is not required under any national standards or under the MUTCD. Defendant City, however, set a goal of installing LPIs at certain intersections during retiming of the intersections, which occurs every two years. Under the goal set by Defendant City, the Intersection was scheduled to have received an LPI at retiming in 2022.

On 28 July 2022, Plaintiff filed suit in Mecklenburg County Superior Court as guardian ad litem of Bosworth-Jones, asserting negligence as to Defendant Milazzo, and "[n]egligence as to [Defendant City], Defendant Sloop[, Senior Engineer Project Manager] (individually and in his official capacity), and Defendant Barakzai (individually and in his official capacity)." Plaintiff's theory of negligence was the failure to include an LPI at the crosswalk. In his complaint, Plaintiff also asserted that Defendant City had waived its governmental immunity. Prior to these events, in October 2009, the city council of Charlotte passed a resolution waiving Defendant City's sovereign immunity from civil liability in tort.

On 27 October 2020, Defendants filed a motion for judgment on the pleadings. On 3 January 2023, the matter came on for hearing in Mecklenburg County Superior Court, and by order entered 24 January 2023, the trial court granted Defendants Sloop and Barakzai's motion for judgment on the pleadings, finding they were public officials rather than public employees, but denied Defendant City's motion for judgment on the pleadings. On 13 April 2023, Defendant City filed a motion for summary judgment, which came on for hearing on 24 May 2023 in

Mecklenburg County Superior Court. By order entered 7 June 2023, the trial court granted Defendant City's motion for summary judgment, concluding that "there is no genuine issue as to any material fact, and Defendant City . . . is entitled to judgment as a matter of law." Plaintiff timely filed written notice of appeal from this order.

II. Jurisdiction

This Court has jurisdiction to review Plaintiff's appeal as an appeal from a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Plaintiff alleges the trial court erred in: (A) granting judgment on the pleadings in favor of Defendants Sloop and Barakzai because Defendants Sloop and Barakzai are not public officials entitled to sovereign immunity, and (B) granting summary judgment in favor of Defendant City because there are genuine issues of material fact from which a jury could reasonably conclude Defendant City violated its duties to Bosworth-Jones. We address each argument, in turn.

A. Motion for Judgment on the Pleadings

[1] Plaintiff first argues that Defendants Sloop and Barakzai are not public officials, and therefore not entitled to public official immunity, because their positions were "neither created by statute nor the constitution, do[] not involve the use of discretionary decision making, and do[] not exercise 'a legally significant portion of sovereign power in the performance of their duties.' " We agree.

"Judgment on the pleadings is appropriate where the pleadings fail to reveal any material issue of fact with only questions of law remaining." *Bauman v. Pasquotank Cnty. ABC Bd.*, 270 N.C. App. 640, 642, 842 S.E.2d 166, 168 (2020) (citation and internal quotation marks omitted). "Granting judgment on the pleadings is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Id.* at 642, 842 S.E.2d at 168 (citation and internal quotation marks omitted).

"This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at 642, 842 S.E.2d at 168 (citation omitted).

It has long been established that "[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts

distinguish between public employees and public officers in determining negligence liability." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993) (citation omitted). "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Isenhour v. Hutto*, 350 N.C. 601, 609, 517 S.E.2d 121, 127 (1999). A public "employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Id.* at 610, 517 S.E.2d at 127 (citation omitted). An individual will not enjoy public official immunity if his or her action "was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Bartley v. City of High Point*, 381 N.C. 287, 294, 873 S.E.2d 525, 533 (2022) (citation omitted).

Our Supreme Court has recognized "several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127. "Discretionary acts are those requiring personal deliberation, decision and judgment"; duties are ministerial when they are "absolute and involve merely the execution of a specific duty arising from fixed and designated facts." *Id.* at 610, 517 S.E.2d at 127 (citations and internal quotation marks omitted) (cleaned up). "Who[]ever is asserting public official immunity must show all three factors of the *Isenhour* test exist." *Baznik v. FCA US, LLC*, 280 N.C. App. 139, 142, 867 S.E.2d 334, 336 (2021).

A person occupies a position created by statute if the position "ha[s] a clear statutory basis." *Id.* at 142, 867 S.E.2d at 337 (citation omitted). If, however, "a statute expressly creates the authority to delegate a duty, [and the] person or organization who is delegated [a duty] . . . performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate[,]" their position is sufficient to meet the first of the three factors for a public official. *Cline v. James Bane Home Bldg., LLC*, 278 N.C. App. 12, 24, 862 S.E.2d 54, 63 (2021). Sovereign power can be exercised only if it is granted by statute or the North Carolina Constitution: "a defendant claiming themself a public official for immunity purposes must show that they have exercised a portion of some power that only the sovereign may exercise, as granted to the sovereign by either the Constitution or a statute." *McCullers v. Lewis*, 265 N.C. App. 216, 224–25, 828 S.E.2d 524, 533 (2019).

In *Cline*, this Court considered on first impression whether an "Environmental Health Administrator" was a position created by statute,

and held the defendant failed to establish the position was created by statute because the statute did not "provide a clear statutory basis for the position . . . nor allow a person or organization created by statute to delegate any statutory duties to [the position]." 278 N.C. App. at 23, 25–26, 862 S.E.2d at 63, 65. In *Baznik*, this Court considered whether a North Carolina Department of Transportation ("NCDOT") "Division Traffic Engineer" and a "Division Sign Supervisor" held positions created by statute, and held that the statutes presented by the defendant did not delegate "statutory authority to employees of NCDOT." 280 N.C. App. at 143, 867 S.E.2d at 337.

Relevant to this matter before us, North Carolina law provides that "[a] city shall have general authority and control over all public streets [and] sidewalks[.]" N.C. Gen. Stat. § 160A-296(a) (2023). The Charlotte City Code of Ordinances authorizes the director to:

> Determine and provide for the installation, removal, relocation and change of official traffic control devices in accordance with accepted traffic engineering principles and standards. All traffic control devices shall conform to the manual and specifications approved by the state board of transportation or a resolution adopted by the city council. All traffic control devices so erected and not inconsistent with the provisions of state law or this chapter shall be official traffic control devices.

Charlotte, N.C., Code of Ordinances § 14-36(1) (2024).

Here, Defendants failed to present a statute that creates the positions held by Defendants Sloop, Senior Engineer Project Manager, or Barakzai, Engineer Project Manager, or one that "delegates such statutory authority to employees," because Ordinance § 14-36 fails to create the positions held by Defendants Sloop and Barakzai or delegate statutory authority to them. *See Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337; *Cline*, 278 N.C. App. at 25, 862 S.E.2d at 65; *cf. Baker v. Smith*, 224 N.C. App. 423, 428–30, 737 S.E.2d 144, 148–49 (2012) (holding that an assistant jailer has a delegated statutory authority where the constitutionally-created Sheriff has the authority to "appoint a deputy or employ others to assist him in performing his official duties" (emphasis omitted)). Further, because Defendants have failed to demonstrate the positions held by Defendants Sloop and Barakzai were created by statute, they cannot have exercised a portion of sovereign power. *See McCullers*, 265 N.C. App. at 224–25, 828 S.E.2d at 533; *Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337. Neither the first nor second factor of the *Isenhour* test was met, and we need not reach the third factor. *See* 350

N.C. at 610, 517 S.E.2d at 127; *see also Cline*, 278 N.C. App. at 26, 862 S.E.2d at 65 ("As the first factor is not met, we need not reach the other two *Isenhour* factors.").

Because Defendants have not shown that "all three factors of the *Isenhour* test" were met, Defendants have failed to demonstrate that Defendants Sloop and Barakzai are public officials subject to public official immunity.[2] *Baznik*, 280 N.C. App. at 142, 867 S.E.2d at 336; *see Isenhour*, 350 N.C. at 609–10, 517 S.E.2d at 127. Accordingly, the trial court erred in holding Defendants Sloop and Barakzai enjoyed public official immunity. *See McCullers*, 265 N.C. App. at 224–25, 828 S.E.2d at 533; *Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337.

B. Summary Judgment

Plaintiff next contends the trial court erred in granting summary judgment in favor of Defendant City because "there are genuine disputes of material fact from which a jury could reasonably conclude that [Defendant City] . . . breached the duty it owed to . . . Bosworth-Jones . . . by instructing her to cross into a dangerous situation." We disagree.

The "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) (internal quotation marks omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* at 573, 669 S.E.2d at 576.

To make out a *prima facie* case of negligence, "a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury." *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729–30 (2015) (citation omitted). Because Defendant City did not breach its duty to Bosworth-Jones nor did it proximately cause her injuries, Plaintiff cannot show that Defendant City was negligent.

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2. Defendants, citing to *Reid*, suggest that even if Defendants Sloop and Barakzai are public employees, they are not liable in their individual capacities because they did not "directly participate in the events that caused [Bosworth-Jones'] injuries[.]" The parties, however, did not argue Defendants Sloop's and Barakzai's liability in their individual capacities before the trial court. *See In re J.B.*, 257 N.C. App. 299, 303, 809 S.E.2d 353, 356 (2018) ("A contention not raised at the trial court may not generally be raised for the first time on appeal.").

1. Breach of Duty of Care

[2] Plaintiff argues Defendant City breached its duty of care to Bosworth-Jones "to reasonably install and maintain the pedestrian signal by instructing her to cross into a dangerous situation."

"Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance." *Wilkerson v. Norfolk S. Ry. Co.*, 151 N.C. App. 332, 340, 566 S.E.2d 104, 110 (2002) (citation omitted) (cleaned up). "If a plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Id.* at 341, 566 S.E.2d at 110 (citation omitted).

A city "shall have general authority and control over all public streets, sidewalks, alleys, bridges[,]" and that authority and control includes "(1) [t]he duty to keep the public streets, sidewalks, alleys, and bridges in proper repair[,]" and "(2) [t]he duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions[.]" N.C. Gen. Stat. § 160A-296(a), (a)(1)-(2) (2023).

"[A] municipality which is under a duty to conform its traffic control devices to the MUTCD and which has also waived immunity for civil liability in tort is subject to possible liability for designing or installing a traffic control device not in substantial conformity with MUTCD specifications." *Lonon v. Talbert*, 103 N.C. App. 686, 692, 407 S.E.2d 276, 281 (1991). Generally, however, "[a]bsent a statute imposing liability, cities acting in the exercise of police power . . . conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit . . . are not liable for the tortious acts of their officers or agents." *Id.* at 691, 407 S.E.2d at 280 (citation and internal quotation marks omitted). The "installation, maintenance and timing of traffic control signals at intersections are *discretionary* governmental functions[,]" and where traffic signals are in compliance with controlling authorities, a city is not under an "obligation" to make discretionary changes to improve safety that were not otherwise required. *Talian v. City of Charlotte*, 98 N.C. App. 281, 286–87, 390 S.E.2d 737, 741 (1990) (emphasis added); *see also Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 173–74, 293 S.E.2d 235, 236–37 (1982) (holding that a municipality is not negligent when, absent an abuse of discretion, it exercises a discretionary power).

In *Talian*, the plaintiffs brought suit against the city of Charlotte for damages arising out of a traffic accident, arguing the city of Charlotte negligently failed "to install a protected left turn signal" at the intersection where the accident occurred. 98 N.C. App. at 283, 390 S.E.2d at 738. This Court found that "[t]he undisputed evidence of record showed that

the traffic signal in place at the time of the collision complied with all requirements of federal, state, and local law and was in proper working order[,]" and that the plaintiffs "failed to offer evidence legally sufficient to support a finding of negligence[.]" *Id.* at 289, 390 S.E.2d at 742. This Court also addressed the plaintiffs' argument that failure to install a new signal within a reasonable time "after the decision to do so was made" constituted negligence, concluding that a "[m]ere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable[.]" *Id.* at 288–89, 390 S.E.2d at 742. This Court concluded that, as a result, the "trial court did not err in granting a directed verdict for [the] defendant." *Id.* at 289, 390 S.E.2d at 742.

Here, Plaintiff correctly alleged that Defendant City "has waived any and all such governmental and/or sovereign immunity . . . by the act of purchasing (or otherwise procuring, obtaining, or having in place) liability insurance[.]" *See Wilkerson*, 151 N.C. App. at 340, 566 S.E.2d at 110. Thus, Defendant City could in theory be held liable for negligence towards Plaintiff. *See id.* at 340, 566 S.E.2d at 110. It is undisputed, however, that LPIs are optional under the MUTCD. Just as the Court in *Talian* found that the traffic signals "were in proper working order and complied in every way with all requirements of the MUTCD," so here has Plaintiff presented no evidence the traffic signals installed at the Intersection were not in compliance with the MUTCD or the North Carolina Traffic Signal Manual at the time of the accident. *See* 98 N.C. App. at 288, 390 S.E.2d at 741. Furthermore, just as the Court in *Talian* held that the plaintiffs "failed to offer evidence legally sufficient to support a finding of negligence," because the evidence demonstrated that the traffic signal "complied with all requirements of federal, state, and local law[,]" so here has Plaintiff failed to offer evidence legally sufficient to support a finding of negligence by Defendant City. *See id.* at 289, 390 S.E.2d at 742.

Additionally, Defendant City did not delay in installing the LPI, much less unreasonably delay in doing so. In *Talian*, the left turn signal was to be installed "in about a year" from December 1982, but its installation was delayed until July 1984, about one month after the accident. *Id.* at 283–84, 288–89, 390 S.E.2d at 739, 742. Here, by contrast, the LPI was scheduled to be installed at retiming in 2022, about one year after the accident, but its installation was in fact *moved up* following the accident.[3] *See id.* at 288–89, 390 S.E.2d at 742. Defendant City's decision to

3. Although Defendant City installed an LPI at the Intersection nine days after the accident, Defendant City should not be penalized for choosing to install an optional traffic

install LPIs at retiming rather than upon initial installation of a new signal, or even following a resident's complaint about an intersection, was reasonable, because the decision ensured the LPI installation projects were completed in an organized fashion and allowed for intersection timing data to be collected concurrent with installation. The decision here to install the LPI at retiming was a component of Defendant City's "exercise of discretion[,]" and even had there been a delay in installing the LPI, such "[m]ere delay [by Defendant City] in meeting a recognized need d[id] not, without more, establish that the delay was unreasonable[.]" *See id.* at 289, 390 S.E.2d at 742.

Plaintiff has not presented evidence "from which the jury could infer that the delay was unreasonable[,]" and so, just as in *Talian*, Plaintiff cannot establish Defendant City's negligence. *See id.* at 289, 390 S.E.2d at 742. Accordingly, because the Intersection was MUTCD compliant at the time of the accident, and Defendant City did not delay in installing the LPI, much less unreasonably delay in doing so, Defendant City did not breach a duty towards Plaintiff. *See id.* at 287, 390 S.E.2d at 741.

2. Proximate Cause

[3] Even if Defendant City owed a duty to Plaintiff, neither the Intersection design, the resident's complaint, nor Defendant City's response to the resident's complaint were the proximate cause of Bosworth-Jones' injuries. To prove proximate cause, a plaintiff must show that the injury would not have occurred but for the defendant's negligence. *Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 624, 507 S.E.2d 602, 606 (1998). "Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence." *Thornton v. F.J. Cherry Hosp.*, 183 N.C. App. 177, 182, 644 S.E.2d 369, 373 (2007) (citation omitted). To prove foreseeability, a plaintiff must show "that consequences of a generally injurious nature might have been expected." *Id.* at 182, 644 S.E.2d at 373 (citation omitted).

Here, for ten years prior to the date of the accident, there had been only two left turn, motor-vehicle related accidents. There were no pedestrian accidents during that time, nor between the time the

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safety device ahead of schedule and in response to an accident. *See, e.g.*, N.C. R. Evid. 407 advisory committee's note (discussing the policy of excluding "evidence of subsequent remedial measures as proof of an admission of fault[,]" explaining that "evidence of . . . installation of safety devices" should be excluded because of the "social policy of encouraging people to take, or at least not to discourage them from taking, steps in furtherance of added safety").

crosswalk was completed in mid-2020 and the accident in this case. Although Defendant City received a complaint about "walk timing" at the Intersection, this single complaint does not reasonably indicate "consequences of a generally injurious nature" were to be expected, meaning that Plaintiff failed to prove Bosworth-Jones' injuries were foreseeable. *See id.* at 182, 644 S.E.2d at 373. Defendant Barakzai nonetheless quickly addressed the complaint by installing a "no Turn on Red" sign within three days of receiving the complaint, and no further complaints or additional communications following up on the resident's complaint were received by Defendant City.[4] Moreover, Bosworth-Jones was injured when Defendant Milazzo failed to yield to the pedestrian in the crosswalk while making a left hand turn on a circular green light; therefore, Defendant Milazzo's negligence—not Defendant City's—was the proximate cause of Bosworth-Jones' injuries. *See Liller*, 131 N.C. App. at 624, 507 S.E.2d at 606.

Defendant City did not create an overly dangerous situation, as the Intersection design was contemplated by both MUTCD and under North Carolina law. *See* N.C. Gen. Stat. § 20-158(b)(2a) (2023). Thus, neither the Intersection design, the resident's complaint, nor Defendant City's response to the complaint was the proximate cause of Bosworth-Jones' injuries. *See Liller*, 131 N.C. App. at 624, 507 S.E.2d at 606.

Viewing the evidence in the light most favorable to Plaintiff, there is no genuine issue of material fact—Defendant City had no legal requirement to exercise a discretionary function in installing an LPI, it did not delay in installing the LPI, Defendant Barakzai did not delay in addressing the resident's complaint, and Bosworth-Jones was injured due to Defendant Milazzo's negligence in failing to yield. *See In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. Defendant City is entitled to judgment as a matter of law because it breached no duty to Bosworth-Jones, and even if it had breached a duty, it did not proximately cause her injuries. *See id.* at 573, 669 S.E.2d at 576. Accordingly, because there is no genuine issue of material fact, and Defendant City is entitled to judgment as a matter of law, the trial court did not err in granting summary judgment in favor of Defendant City. *See id.* at 573, 669 S.E.2d at 576.

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4. Defendant Barakzai's quick response in addressing the resident's complaint by installing a "no Turn on Red" sign, based on Defendant Barakzai's experience that installing the sign would address the resident's complaint, further demonstrates Defendant City did not delay in addressing a danger the Intersection might have posed to pedestrians. *See Talian*, 98 N.C. App. at 289, 390 S.E.2d at 742.

IV. Conclusion

The trial court erred in granting its judgment on the pleadings in favor of Defendants Sloop and Barakzai because Defendants Sloop and Barakzai are not public officials, and therefore not entitled to public official immunity. The trial court did not err, however, in granting summary judgment to Defendant City as, irrespective of its waiver of governmental immunity, there is no genuine issue of material fact, and Defendant City is entitled to a judgment as a matter of law. We therefore remand the trial court's order as to the judgment on the pleadings and affirm the trial court's order as to the granting of the motion for summary judgment.

AFFIRMED In Part; REVERSED AND REMANDED In Part.

Judge GRIFFIN concurs.

Judge THOMPSON dissents in separate opinion.

THOMPSON, Judge, dissenting.

Failure to comply with the Manual on Uniform Traffic Control Devices (MUTCD) is not the *only* way by which a city that has waived its governmental immunity in tort can be liable for negligence. The majority's conclusion that, "because the [i]ntersection was MUTCD compliant at the time of the accident, and [d]efendant [Charlotte] did not delay in installing the LPI, much less unreasonably delay in doing so, [d]efendant [Charlotte] did not breach a duty towards [p]laintiff[,]" is not an appropriate determination for this court at the summary judgment stage.

Because I would conclude that plaintiff has stated facts that, when viewed in the light most favorable to plaintiff, raise genuine issues of material fact—specifically, whether defendant City of Charlotte's (defendant Charlotte) delay in correcting the dangerous conditions posed by the crosswalk timing for approximately seven months *after* defendant Charlotte was notified of the danger the crosswalk posed was *reasonable*—I would conclude that the trial court erred in granting defendant Charlotte's motion for summary judgment, and I respectfully dissent.

In order to bring a prima facie claim for negligence, a plaintiff must show (1) defendant owed a duty to the plaintiff, (2) defendant breached the duty, (3) the breach constituted the actual and proximate cause of plaintiff's injury, and (4) plaintiff suffered damages as a result of the

breach. *Cucina v. Jacksonville*, 138 N.C. App. 99, 102, 530 S.E.2d 353, 355 (2000). Generally, "[a]bsent a statute imposing liability, cities acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit are not liable for the tortious acts of their officers or agents." *Lonon v. Talbert*, 103 N.C. App. 686, 691, 407 S.E.2d 276, 280 (1991) (internal quotation marks, ellipsis, and citation omitted). Simply because "a city has authority to make discretionary decisions does not mean the city is thereby under any obligation[;] [a]uthority or power to control traffic does not create a mandate of action." *Id.*

However, "[a] city may waive its immunity from civil liability in tort by purchasing liability insurance." *Id.* Similarly, "[a]s to traffic control devices, a governmental subdivision [that] has waived immunity from civil liability in tort may be liable for its negligent failure to conform to a published standard such as the Manual on Uniform Traffic Control Devices." *Id.* at 692, 407 S.E.2d at 280. "With respect to state roads within municipal corporate limits, traffic signs, signals, markings, islands, and all other traffic[ ]control devices must be installed or erected in substantial conformance with the specifications of the MUTCD." *Id.* "[A] municipality [that] is under a duty to conform its traffic control devices to the MUTCD and which has also waived immunity for civil liability in tort is subject to possible liability for designing or installing a traffic control device not in substantial conformity with MUTCD specifications." *Id.* at 692, 407 S.E.2d at 281.

Here, defendant Charlotte did not have a mandate or warrant in the MUTCD regarding Leading Pedestrian Intervals (LPIs). As the majority correctly identifies, plaintiff has not pled facts that demonstrate defendant Charlotte was not in "substantial conformity" with the MUTCD. In fact, defendants *were* in "substantial conformity with MUTCD specifications[,]" *id.*, and if non-compliance with the MUTCD was the only means by which defendant Charlotte could be found liable for negligence, our analysis would end here.

However, in *Talian v. City of Charlotte*, our Court's analysis of whether summary judgment was appropriate *did not end* with a determination of whether the defendant, ironically *also* the City of Charlotte, had been in "substantial conformity" with the MUTCD; the defendant was in conformity with the MUTCD. *Talian*, 98 N.C. App. 281, 288, 390 S.E.2d 737, 741 (1990). After determining that the defendant *was* in conformity with the MUTCD, our Court *then* considered whether the defendant was liable—not for their failure to comply with the MUTCD—but

whether their delay was unreasonable, and thereby, *negligent*. *See id.* at 288–89, 390 S.E.2d at 742 (addressing plaintiff's argument that the defendant "was negligent in failing to [fix the dangerous condition] within a reasonable time after the decision to do so was made").

Here, as in *Talian*, our analysis of whether summary judgment was appropriate *should not* end with a determination of whether defendant Charlotte was in conformity with the MUTCD, which it was, but whether defendant Charlotte's delay in installing an LPI—which again, was *not required by the MUTCD*—after being notified of the dangerous conditions that the crosswalk created was *reasonable*.

Again, simply because "a city has authority to make discretionary decisions does not mean the city is thereby under any obligation[;] [a]uthority or power to control traffic does not create a mandate of action." *Lonon*, 103 N.C. App. at 691, 407 S.E.2d at 280. Similarly, in the exercise of discretionary governmental functions, "[m]ere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable or that the municipality abused its discretion." *Talian*, 98 N.C. App. at 289, 390 S.E.2d at 742. However, it is fundamental that, "[u]pon notice of defects and dangers in the streets, the city must remove them in a reasonable time, and *failure to do so is negligence*, and such negligence is the basis of an action by anyone injured by reason thereof." *Jones v. Greensboro*, 124 N.C. 310, 310, 32 S.E. 675, 676 (1899) (emphasis added).

In *Talian*, much like the present case, the majority concluded that, "[t]he undisputed evidence of record showed that the traffic signal in place at the time of the collision complied with all requirements of federal, state, and local law and was in proper working order" and therefore, "the trial court did not err in granting a directed verdict for defendant." *Talian*, 98 N.C. App. at 289, 390 S.E.2d at 742. However, Judge Phillips offered a dissenting opinion, wherein he argued that, "[t]he question properly posed by the record is whether between the determination that additional signals were necessary and the accident[,] *more than a reasonable time went by without the improvement being made*. In my opinion the question is one of fact that should have been submitted to the jury." *Id.* (emphasis added) (Phillips, J., dissenting). I concur with Judge Phillips and apply the same reasoning to the case at bar.

In his complaint, plaintiff alleged that defendant Charlotte, "by and through its agents and employees . . . had a duty to exercise ordinary care for the safety of the general public, including Ms. Bosworth-Jones, in the design of the crosswalk and signal timing . . . and *in its response to the*

resident's complaint that the intersection was unsafe for pedestrians." (Emphasis added). Moreover, the complaint also alleged, *inter alia*, that, "[d]efendants Sloop and Barakzai . . . *in their official capacities*, and as agents and employees of [defendant Charlotte], failed to implement an LPI *after being placed on notice of the danger to pedestrians that the signal timing caused*" and "failed to separate the pedestrian phase from the traffic phase of the signal timing *after being placed on notice that the intersection was dangerous for pedestrians* . . . ." (Emphases added).

Plaintiff alleged that, "[a]s a direct, proximate, and reasonably foreseeable result of the negligence of [defendant Charlotte], by and through its agents and employees . . . [Ms. Bosworth-Jones] suffered severe, lifelong, and debilitating injuries." Finally, in the complaint, plaintiff alleged that defendant Charlotte "has waived any and all such governmental and/or sovereign immunity . . . by the act of purchasing (or otherwise procuring, obtaining, or having in place) liability insurance . . . ."[1]

Indeed, on 31 October 2020, defendant Charlotte was warned by a local resident that "individuals and families are put in danger when crossing the street [at issue in the present case] while cars are turning into the same lane" and requested "the pedestrian [crosswalk] timing to be adjusted to run when cars are not driving through [the] intersection." As plaintiff notes in his appellate brief, defendant Charlotte "chose to leave the crossing unsafe" while "[t]he fix to correct the danger was simple and *could be quickly implemented with little to no cost*." (Emphasis added).

Plaintiff's theory of negligence in the present case was not that defendant Charlotte failed to comply with the MUTCD, but that defendant Charlotte had a duty to exercise ordinary care, and defendant Charlotte breached that duty by "fail[ing] to implement an LPI *after being placed on notice of the danger to pedestrians that the signal timing caused*" and by "fail[ing] to separate the pedestrian phase from the traffic phase of the signal timing *after being placed on notice that the intersection was dangerous for pedestrians* . . . ." (Emphases added).

The majority then asserts that "[e]ven if [d]efendant [Charlotte] owed a duty to [p]laintiff, neither the [i]ntersection design, the resident's complaint, nor [d]efendant [Charlotte]'s response to the resident's complaint were the proximate cause of [Ms. Bosworth-Jones]'s injuries." Moreover, the majority claims that "[a]lthough [d]efendant [Charlotte]

1. I also note that any reference to the MUTCD is entirely absent from plaintiff's complaint.

received a complaint about 'walk timing' at the [i]ntersection, this single complaint does not reasonably indicate 'consequences of a generally injurious nature' were to be expected, meaning that [p]laintiff failed to prove Bosworth-Jones'[s] injur[ies] were foreseeable." Finally, they assert that defendant Charlotte "did not delay in installing the LPI, *much less unreasonably delay in doing so*."

To support their contentions that there was no foreseeability (and in turn, no proximate cause), the majority claims that, "for ten years prior to the date of the accident, there had been only two left turn, motor-vehicle related accidents [at the intersection, and] [t]here were no pedestrian accidents during that time, nor between the time the crosswalk was completed in mid-2020 and the accident in this case." In reality, the crosswalk project did not begin until 2017, and the *design* for the crosswalk at the intersection, which plaintiff contends in his complaint, "created a trap for pedestrians using the crosswalk exactly as they were directed[,]" was not completed until March 2019. The crosswalk itself *was not completed until* "July 2020."

As the majority notes, for ten years prior to the accident "[t]here were no pedestrian accidents [at the intersection,]" and then, *less than a year after* the crosswalk was completed in mid-2020, Ms. Bosworth-Jones was struck by a vehicle while using the crosswalk. The difference between the timeframe where there *were no* pedestrian accidents at the intersection and when there *was* a pedestrian accident at the intersection: *the crosswalk at the intersection*. If anything, the fact that there were no pedestrian accidents at the intersection for *ten years*, and then *seven months* after the crosswalk was completed, Ms. Bosworth-Jones was struck by a vehicle—*is further evidence* of the foreseeability of the harm in this case—that a pedestrian, using the newly created crosswalk *as it was designed*, would be struck and seriously injured by a vehicle entering the intersection due to the crosswalk's timing mechanism.

For *seven* of the *ten* months after the crosswalk was completed, from 31 October 2020 until 9 May 2021 when the accident occurred, defendant Charlotte was on notice that "[i]ndividuals and families are put in danger when crossing the street while cars are turning into the same lane" and that a citizen had requested that the "*crosswalk timing be adjusted* to run when cars are not driving through [the] intersection[,]" (emphasis added). It was at this point, "[u]pon notice of defects and dangers in the streets[,]" *Jones*, 124 N.C. at 676, that defendant Charlotte's duty to correct the dangerous condition arose, but defendant Charlotte failed to correct the dangerous condition by adjusting the

crosswalk timing. Instead, they installed a no right turn on red sign that did not address the "crosswalk timing" noted in the complaint.[2]

Finally, the majority asserts on several occasions that defendant Charlotte's "[m]ere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable[,]" that defendant Charlotte "did not delay in installing an LPI, much less unreasonably delay in doing so[,]" and that plaintiff "has not presented evidence 'from which the jury could infer that the delay was unreasonable.' " However, "[i]n this jurisdiction, questions of proximate cause and insulating negligence *are for the jury except in cases so clear* there can be no two opinions among men of fair minds whether the intervening act and the resultant injury were such that the author of *the original wrong* could reasonably have expected them to occur as a result of his own negligent act." *Lonon*, 103 N.C. App. at 695–96, 407 S.E.2d at 282 (internal quotation marks, ellipsis, and citation omitted) (emphases added).

This is not a case so clear, and determinations about the *reasonableness* of defendant Charlotte's actions are not appropriate for this Court at the *summary judgment stage* of a negligence action.[3] Plaintiff did not just assert that defendant had simply delayed in meeting a recognized need, he also asserted that defendant Charlotte's response to the complaint, by installing a no turn on red signal, did not address the harm identified by the complaint: *crosswalk timing*.

Upon my review, viewing the evidence "in [the] light most favorable to the non-moving party[,]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 575, 576, I would conclude that plaintiff's allegation that defendant Charlotte negligently "failed to separate the pedestrian phase from the traffic phase of the signal timing after being placed on notice that the intersection was dangerous for pedestrians[,]" raised a question of material fact: whether defendant Charlotte was *unreasonable* in its delay in correcting the dangerous conditions in the roadway that were

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2. It should also be noted that "[n]ine days after the collision, [defendant Charlotte] installed a five-second LPI at the intersection."

3. Moreover, this "mere delay" of seven months resulted in "broken bones, fractured ribs, severe lacerations, a dislocated shoulder, and, most significantly, a permanent, traumatic, and debilitating brain injury[,]" to an individual who was utilizing the crosswalk, created just *seven months earlier*, *exactly how she was supposed to*. The delay in correcting the dangerous condition here was not *per se* reasonable simply because of the fact that it constituted less time than the delay in *Talian*. Reasonableness is a question of fact for the jury.

created by the crosswalk, after being notified *seven months earlier* that the crosswalk was dangerous to pedestrians.

"Summary judgment is an extreme remedy and should only be awarded where the truth is quite clear[;] . . . [it] is rarely appropriate in negligence cases[,]" *Nick v. Baker*, 125 N.C. App. 568, 570–71, 481 S.E.2d 412, 414 (1997), and I would posit that the question properly posed by the record is—between the determination that there were dangerous conditions in the roadway created by the crosswalk and the accident—whether more than a reasonable time went by without correcting the dangerous condition. "In my opinion[,] the question is one of fact that should have [survived summary judgment]." *Talian*, 98 N.C App. at 289, 390 S.E.2d at 742 (Phillips, J., dissenting). For these reasons, I would conclude that the trial court erred in granting summary judgment to defendant Charlotte, and I respectfully dissent.

LUIS ORTEZ AND THERESA BEDDARD ESTES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DARREN DRAKE ESTES, PLAINTIFFS
v.
PENN NATIONAL SECURITY INURANCE COMPANY, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY AND PAMELA A. TOKARZ, DEFENDANTS

No. COA24-169

Filed 17 December 2024

1. Insurance—breach of the duty to defend—foreclosed by policy exclusions—Pleasant claim—inapplicable to merely negligent acts

Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had failed to defend plaintiff in the wrongful death suit, the trial court erred in granting partial judgment on the pleadings in favor of plaintiff. A comparison of the allegations in plaintiff's pleading—asserting a claim under *Pleasant v. Johnson*, 312 N.C. 710 (1985)—with the provisions of the insurance policy—which covered as an "insured" "anyone . . . using with [employer's] permission a covered 'auto,' " but excluded

coverage for bodily injury to a "fellow employee" of an "insured"—negated any duty by defendant to defend plaintiff against liability arising from the wrongful death of plaintiff's co-worker, his "fellow employee." Moreover, the holding of *Pleasant* (that "the Workers' Compensation Act did not shield a co-employee from common law liability for willful, wanton and reckless acts") was inapplicable in a wrongful death action grounded in negligence.

2. Insurance—claim for breach of duty to settle—Financial Responsibility Act—only a right, not a duty, for an insurance carrier to settle claims

Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding such a breach by defendant because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the estate rejected defendant's offer.

3. Unfair Trade Practices—insurance—right to seek a settlement—no duty to settle—failure to act in good faith not shown

Where (1) the distracted driving of his employer's commercial vehicle by an employee (plaintiff) caused an accident that killed plaintiff's co-worker (a passenger); (2) the co-worker's widow and estate subsequently obtained an order of summary judgment in the amount of $9,500,000 against plaintiff in a wrongful death action; and (3) plaintiff, along with the co-worker's widow and estate, then filed a complaint alleging that the issuer of employer's commercial auto insurance policy (defendant) had breached its duty by failing to settle an intentional tort claim, the trial court erred in finding that defendant violated the Unfair Trade Practices Act (N.C.G.S. § 75-1.1 et seq.) because the Financial Responsibility Act (N.C.G.S. § 20-279.21) provided an insurance carrier with the right to settle claims, but no duty to do so. Moreover, defendant exercised its right to seek a settlement, but the co-worker's widow and estate rejected defendant's counteroffer requesting a one-day extension for delivery of

payment—a circumstance insufficient to demonstrate a failure to act in good faith on defendant's part.

Judge THOMPSON concurring in result only.

Appeal by defendant from judgment entered 19 July 2019 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 14 August 2024.

White & Stradley, PLLC, by J. David Stradley and Nicole D. McNamara, for the plaintiff-appellee Ortez.

Abrams & Abrams, PA, by Noah B. Abrams, for the plaintiff-appellee Estes.

Kellum Law Firm, by John T. Briggs, for the plaintiff-appellee Estes.

Goldberg Segalla, LLP, by David L. Brown and John I. Malone, Jr., for the defendant-appellant.

TYSON, Judge.

Penn National Security Insurance Company ("Penn National") appeals from the trial court's order granting Luis Ortez's ("Ortez") motion for Rule 12(c) judgment on the pleadings. We reverse.

I. Background

Penn National issued a commercial auto insurance policy ("policy"), No. AX9 0615893 to Kitchen and Lighting Designs Inc. ("employer") on 1 August 2017, for a policy period extending from 1 August 2017 to 1 August 2018. The policy provided, *inter alia*, coverage as an "insured" for "[a]nyone else while using with [employer's] permission a covered 'auto' you own, hire or borrow . . . ." The policy also contained an exclusion as an "insured", stating, "This insurance does not apply to any of the following . . . fellow employee." One week later, on 8 August 2017, Plaintiff Luis Ortez was driving the employer's insured vehicle, when due to Ortez's distracted driving, he was involved in an accident, which resulted in the death of fellow employee, Darren Drake Estes, a passenger in the employer's insured vehicle.

Penn National was notified of the accident by their employer, Kitchen & Lighting Designs, who informed Penn National it employed

both Ortez and Estes. Employer also notified Penn National it had submitted Ortez's and Estes' claims to its workers' compensation carrier.

On 5 March 2018, Estes' wife, Theresa Beddard Estes, individually and as Administratrix of the Estate of Darren Drake Estes, filed a wrongful death suit against Passport Transportations, Inc., their driver, Zemo Fissaha, and Luis Ortez, in Craven County Superior Court ("Wrongful Death Lawsuit"). The Estes and Estes Estate suit asserted five claims: (1) negligent, grossly negligent, willful, wanton and reckless conduct of Fissaha; (2) punitive damages against Fissaha; (3) vicarious liability of Passport Transportation; (4) independent negligent and wanton conduct of Passport Transportation; and (5) reckless, willful, and wanton conduct of Ortez.

The Wrongful Death Lawsuit did not explicitly allege Ortez and Estes were co-employees, but baldly asserted *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) as the basis for the claim. Kitchen and Lighting Designs Inc. was not named as a party defendant. Ortez made no demands on his employer nor Penn National to defend or indemnify him against the Estes Estate's claims asserted against him.

On 4 March 2019, the Craven County Superior Court entered partial summary judgment on liability against Ortez. On 27 March 2019, the Estes Estate served a motion for summary judgment on damages from both Ortez and Penn National, along with a notice of hearing setting the motion hearing for 8 April 2019. The Estes Estate served an amended notice of hearing on 4 April 2019, noting its summary judgment motion would be heard on 9 April 2019 at 9:30 a.m. On 5 April 2019, the Estes Estate transmitted a settlement offer to Penn National, offering to execute a covenant not to enforce judgment in favor of Ortez in exchange for delivery of a check in the amount of $30,000 to the office of counsel for the Estate before 3:00 p.m. on 8 April 2019, the day before the amended summary judgment hearing. Penn National agreed to the settlement but asserted it could not deliver the check by the deadline. Counsel for the Estes Estate withdrew the settlement.

The Estes Estate's summary judgment motion was heard on 9 April 2019. Penn National engaged an attorney to enter a special appearance on behalf of Penn National, seeking to stay the Wrongful Death Lawsuit. The trial court denied the motion to stay. The court heard the motion for summary judgment and entered judgment against Ortez in the amount of $9,500,000 plus interest and costs.

Ortez and the Estes Estate filed a complaint alleging Penn National had breached its duty to defend by failing "to defend a wrongful death

claim against [Ortez], and as a result, a judgment of $9,500,000.00 was entered against [Ortez]." Ortez and the Estes Estate also alleged Penn National had breached its duty to settle, and that they had committed unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 58-63-15(11) and N.C. Gen. Stat. § 75-1.1 *et seq.* ("Unfair and Deceptive Trade Practices Act") (2023).

Ortez filed a motion for judgment on the pleadings as to his claims for breach of the duty to defend, breach of the duty to settle, and violation of the Unfair and Deceptive Trade Practices Act. The trial court granted Ortez's motion for judgment on the pleadings and entered a judgment entitling him "to recover the sum of $9,649,808.27 from [Penn National] as compensatory damages for breach of the duty to defend, breach of the duty to settle, and unfair and deceptive trade practices" by order entered 19 July 2019. The trial court then trebled the damages and entered judgment in the amount of $28,949,424.80 against Penn National for violating the North Carolina Unfair and Deceptive Trade Practices Act. Penn National appeals.

II. Jurisdiction

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

III. Issues

Penn National contends the trial court erred in concluding: (1) it had a duty to defend; (2) it had breached its duty to defend; (3) it had breached its duty to settle; (4) Ortez was entitled to a judgment as a matter of law on his claim for unfair and deceptive trade practices; and (5) erred in entering a $28.9 million judgment against defendant.

IV. Judgment on the Pleadings

A. Standard of Review

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* (citations omitted).

A trial court's grant of a motion for judgment on the pleadings is reviewed *de novo* by this Court. *Toomer v. Branch Banking & Tr. Co.*,

171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

B. Analysis

1. Duty to Defend

[1] Penn National contends the trial court erred in granting Ortez's partial Rule 12(c) motion for judgment on the pleadings and asserts a comparison of the policy language and exclusions with the allegations in the pleading negates any duty to defend. We agree.

"An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings . . . . [w]hen the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Our Supreme Court held long ago an insurer's duty to defend "becomes absolute when the allegations of the complaint bring the claim within the coverage of the policy." *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968).

More recently, our Supreme Court re-affirmed: "In determining whether an insurer has a duty to defend, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). Referred to as the "comparison test," the plain language of the insurance policy is reviewed and compared with the plain language of the facts alleged and the pleadings before the court. *Id.*

The allegations in the complaint, as compared with the exclusions in the policy does not require Penn National to defend Ortez. The Penn National Policy states:

> SECTION II – LIABILITY COVERAGE
>
> A. Coverage We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto". * * * We will have the right and duty to defend any "insured" against a "suit" asking for such damages … *However, we will have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" … to which this*

> *insurance does not apply*. We may investigate and settle any claim or "suit" as we consider appropriate.

(emphasis supplied).

This policy provision clearly provides coverage, to an "insured", but also includes unambiguous exclusions:

> B. Exclusions
>
> This insurance does not apply to any of the following:
>
> . . .
>
> 5. Fellow Employee
>
> "Bodily injury" to:
>
> a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
>
> b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

The complaint alleged "Defendant Luis J. Ortez is liable to the Plaintiff based on the legal precedent of *Pleasant v. Johnson*, and subsequent legal authority in North Carolina recognizing that legal duty and that legal right of recovery." The opinion of *Pleasant v. Johnson* provides, ". . . the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence. An injured worker in such situations may receive benefits under the Act and also maintain a common law action against the co-employee." *Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250.

After our Supreme Court's decision, similar claims asserted between co-workers, not based upon negligence, have been referred to as *Pleasant* claims in this Court's decisions. *See Est. of Baker v. Reinhardt*, 288 N.C. App. 529, 537, 887 S.E.2d 437, 444 (2023); *Blue v. Mountaire Farms, Inc.*, 247 N.C. App. 489, 505, 786 S.E.2d 393, 403 (2016); *Greene v. Barrick*, 198 N.C. App. 647, 650, 680 S.E.2d 727, 730 (2009).

Using the comparison test to compare and assess the plain language of the policy and the allegations in the complaint, it is clear Penn National had no duty to defend Ortez in the Complaint as written. The only claim Estes and the Estes Estate asserted against fellow employee Ortez in the Wrongful Death Lawsuit was the *Pleasant* claim, which

could only be asserted by one employee against another employee for injuries resulting from intentional acts. These acts fall squarely within *Pleasant*'s exception from the worker's compensation exclusivity of negligence claims and the express and unambiguous policy exclusions stated in Penn National's policy. *Id.*

Plaintiffs argue *Pleasant*, like many landmark cases, embodies more than a single legal proposition. However, *Pleasant* has one clear and distinct holding that has become well-recognized in North Carolina law. *Id.* In cases involving actions asserted between fellow or co-employees, "the Workers' Compensation Act does not shield *a co-employee* from common law liability for willful, wanton and reckless negligence." *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249 (emphasis supplied). A "*Pleasant* claim" addresses matters relating to the scope and limits of liability among co-workers, rather than to implicate their employer in the litigation involving international torts or "willful, wanton and reckless" acts. *Pleasant*'s central holding is unambiguous and occupies a limited, unique, and specific claim between fellow employees for alleged intentional torts. *Id.*

Employer's insurance carriers are allowed to exclude fellow or co-employee intentional torts from coverage in their policies. Worker's Compensation insurance generally covers an employer's liability in negligence actions by and/or between co-employees at work. "[T]he plain language of G.S. 20-279.21(e) . . . allows an exemption from policy coverage of an employee only insofar as there are benefits available to that employee pursuant to North Carolina's Workers' Compensation Act." *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 639, 313 S.E.2d 856, 861 (1984). The North Carolina Workers' Compensation Act provides the sole remedy against the employer for an employee who has been injured by the ordinary negligence of a co-employee. *Id.*; *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882-83 (2000) (The Workers' Compensation Act is "the exclusive remedy in the event of [an] employee's injury by accident in connection with [their] employment.").

The Estes Estate's allegations against Ortez allege "reckless, willful, and wanton conduct" between co-workers, not simple negligence. Employer is not a party to this litigation and no allegations implicate or suggest their employer's complicity or directing Ortez's alleged "reckless, willful, and wanton conduct" toward Estes.

Workers' compensation insurance is designed to cover an employer's liability for an employee's accidental or negligent acts arising out of acts in the course and scope of employment occurring in the workplace.

Any conduct outside of that scope—such as intentional or grossly reckless acts—is excluded from coverage under both the Workers' Compensation Act and Penn National's express Fellow Employee exclusion. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250. This statute and policy exclusion excludes coverage for employee behaviors arising outside of ordinary negligence, encompassing alleged intentional, reckless, or willful actions, which are beyond those reasonably covered in a typical workplace negligence incident. *Id.*

Under North Carolina law, particularly as clarified in *Pleasant v. Johnson*, workers' compensation indemnity protections do not extend to cases involving willful, wanton, or reckless conduct by a co-employee. *Id.* at 716, 325 S.E.2d at 249. This precedent leaves room for assertion of personal liability for intentional acts outside of the Workers' Compensation Act's exclusivity. Ortez can be held personally liable for any intentional harm and damage he allegedly caused to Estes and the Estes Estate. *Id.* Fellow or co-employee exclusions allow employer's insurers to exclude covering claims based upon an employee's gross misconduct or intentional harm, which acts are fundamentally different from the unintentional accidents or minor negligence actions workers' compensation policies address. *Id.*; *South Carolina Ins. Co.*, 67 N.C. App. at 639, 313 S.E.2d at 861.

Requiring the insurer to defend Ortez would defeat the purpose of the Fellow Employee exclusion, which exists to shield the employer and insurer from being required to cover claims rooted in extreme recklessness or willful misconduct, conduct which aligns more closely with intentional harm, than with accidental injury. Courts generally interpret these exclusions to protect employers and their carriers from liability for egregious conduct not arising within the scope of employment-related negligence risk coverage. *Id.*

The holding in *Pleasant* and the purpose behind the Fellow Employee policy exclusion together show the insurer has no duty to defend or indemnify Ortez, particularly where Ortez never demanded his employer or Penn National to provide him with defense counsel. This exclusion is intended to limit coverage strictly to accidental or negligent conduct and not to encompass allegations of extreme or intentional wrongdoing between co-employees. As such, the Estes Estate's assertions of Ortez's alleged reckless and willful conduct are plainly and unambiguously excluded from coverage under the Fellow Employee exclusion in Penn National policy and falls outside the insurer's duty to defend. *Id.*

2. Duty to Settle

[2] The Penn National policy and the statutes provides insurance carriers with the right to settle under indemnity coverage, not a duty to settle. This right is conferred by the Financial Responsibility Act in N.C. Gen. Stat. § 20-279.21(f)(3) (2023) ("The insurance carrier shall have the right to settle any claim covered by the policy …").

When exercising its right to settle, the insurer "owes a duty to its insured to act deligently [sic] and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 13 (1958).

When Penn National received an offer to settle from the Estes Estate on Friday afternoon, the terms of the settlement required a check for $30,000 to be delivered to its attorney's offices on the following Monday by 3:00 p.m. Penn National replied by agreeing to the settlement and to deliver full payment the following day on Tuesday, which Plaintiffs denied, and withdrew their offer. Asking for a one-day extension to deliver payment to a demanded less-than-one-business-day turnaround does not support a finding and conclusion Penn National had failed to act in good faith to settle. *Id.* N.C. Gen. Stat. § 20-279.21(f)(3).

The trial court erred in finding Penn National had breached its duty to settle the intentional tort claim Estes and the Estes Estate had asserted against Ortez. Penn National had no duty to settle, only the right to seek settlement, which Penn National chose to exercise when it offered to settle for a $30,000 payment within two business days to the Estes Estate. The trial court's ruling on this issue is erroneous, prejudicial, and reversed.

3. Finding Penn National Violated the Unfair and Deceptive Trade Practices Act

[3] As noted above, the express policy language and the statute allows insurance companies the right to seek a settlement, not a duty to settle. N.C. Gen. Stat. § 20-279.21(f)(3) ("The insurance carrier shall have the right to settle any claim covered by the policy …").

When exercising its right to settle, the insurer "owes a duty to its insured to act deligently [sic] and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 13 (1958). When Penn National received an offer to settle from Estes and the Estes Estate on Friday afternoon, the terms of the settlement

included a check for $30,000 to be delivered to its attorney's offices on the following Monday by 3:00 p.m. Penn National replied asking to deliver on Tuesday, which was denied, and Plaintiffs withdrew their offer. Requesting a one-day extension to a demanded one business day turnaround does not support the finding Penn National had failed to act in good faith to settle to trigger treble damages and attorney fees liability under the Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 75-1.1.

The trial court erred in finding that Penn National had breached its duty to settle the claims. No duty to settle arose, only the right to seek settlement, which Penn National tried to exercise when it offered to settle for $30,000 with payment to be made within two business days thereafter in exchange for a covenant not to enforce judgment against Ortez.

The trial court erred in concluding Penn National had failed to act in good faith or committed unfair or deceptive trade practices to trigger treble damages and attorney fees liability under the Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 75-1.1 *et seq*. The trial court's ruling on this issue is erroneous, prejudicial, and reversed.

V. Conclusion

The trial court erred in granting Ortez's partial motion for a Rule 12(c) judgment on the pleadings. Under the comparison tests of the policy to the allegations and pleadings, Plaintiff failed to allege Penn National had breached its duty to defend or its duty to settle.

Plaintiff also failed to show the employer or Penn National had violated the Unfair and Deceptive Trade Practices Act. *Id*. The trial court erred in trebling the award of damages pursuant to N.C. Gen. Stat. § 75-1.1. The order of the trial court is reversed. *It is so ordered*.

REVERSED.

Judge STADING concurs.

Judge THOMPSON concurs in result only by separate opinion.

THOMPSON, Judge, concurring in result only.

Because I disagree with the majority's determination that "it is clear that [defendant] Penn National had no duty to defend [plaintiff] Ortez in the complaint as written[,]" I concur in result only.

A. Duty to defend

"An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings . . . . [w]hen the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). As our Supreme Court held long ago, an insurer's duty to defend "becomes absolute *when the allegations of the complaint* bring the claim within the coverage of the policy." *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968) (emphasis added).

"In determining whether an insurer has a duty to defend, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). "If the insurance policy provides coverage for the facts *as alleged*, then the insurer has a duty to defend." *Id.* (emphasis added). "An insurer is excused from its duty to defend only if the facts are *not even arguably* covered by the policy." *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 277–78, 708 S.E.2d 138, 144 (2011) (internal quotation marks and citation omitted) (emphasis added).

Defendant argues that the "fellow employee" provision of the policy nullified its duty to defend plaintiff Ortez in the underlying wrongful death action, and the majority contends that

> [t]he only claim Estes and the Estes Estate asserted against fellow employee [plaintiff] Ortez in the Wrongful Death Lawsuit was the *Pleasant* claim, [under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985)] which could only be asserted by one employee against another for employee injuries resulting from intentional acts. These acts fall squarely within Pleasant's exception from the worker's compensation exclusivity of negligence claims and the express and unambiguous policy exclusions stated in [defendant] Penn National's policy.

After my review of the *allegations of the complaint*—the guidepost for determining whether an insurer has a duty to defend, per our Supreme Court's longstanding precedent—I would conclude that the trial court did err in determining that defendant had a duty to defend plaintiff Ortez in the underlying wrongful death action. Although there were no allegations *in the complaint* that plaintiff Ortez was a "fellow employee" of decedent Drake Estes at the time of the accident, as the

majority notes, the initial complaint alleged that plaintiff "Ortez is liable . . . based on the legal precedent of *Pleasant v. Johnson*, and subsequent legal authority in North Carolina recognizing that legal duty and that legal right of recovery." Although "[a]n insurer is excused from its duty to defend only if the facts are *not even arguably* covered by the policy[,]" *Kubit*, 210 N.C. App. at 277–78, 708 S.E.2d at 144 (internal quotation marks and citation omitted) (emphasis added), I would conclude that this reference to *Pleasant v. Johnson*[1] did suffice to bring the allegations of the complaint outside of the coverage of the policy, thereby absolving defendant Penn National of their duty to defend. I do not agree that this lone reference in the complaint, made it "*clear* that [defendant] Penn National had no duty to defend [plaintiff] Ortez in the complaint as written[,]" (emphasis added), and seek further clarity from our Supreme Court on whether this allegation in the complaint sufficed to absolve defendant Penn National of their duty to defend for purposes of the "comparison test" established in *Strickland*.

B. Duty to settle

Finally, the majority contends that "the statutes provide[ ] insurance carriers with the right to settle under indemnity coverage, not a duty to settle." This is not correct, as our courts have *consistently held* that insurance companies owe a duty to their insured to act diligently and in good faith in reaching settlements.

"The law imposes on the insurer the duty of carrying out in good faith its contract of insurance." *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958). "It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims." *Id.* "It is for this reason that courts have *consistently* held that an insurer *owes a duty* to its insured to act diligently and in good faith in *effecting settlements* within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Id.* (emphasis added). "Liability has been repeatedly imposed upon insurance companies because of their failure to act diligently and in good faith in effectuating settlements with claimants." *Id.*

Indeed, our Legislature has enacted N.C. Gen. Stat. § 58-63-15, which defines "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" as a matter of law, and provides, in

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1. In *Pleasant*, our Supreme Court held that "the Worker's Compensation Act does not shield *a co-employee* from common law liability for . . . negligence." *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249 (emphasis added).

pertinent part, that one commits an "Unfair Claim Settlement Practice[ ]" by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear . . . ." N.C. Gen. Stat. § 58-63-15(11)(f) (2023).

I agree with the majority that defendant Penn National did not have a duty to defend, nor a duty to settle, but write separately to note that insurance companies in North Carolina *do* "*owe*[ ] *a duty* to their insured to act diligently and in good faith in *effecting settlements* within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy." *Id.* (emphasis added). For the aforementioned reasons, I concur in result only.

ADAM SAAD, PLAINTIFF
v.
TOWN OF SURF CITY, DEFENDANT

No. COA24-10

Filed 17 December 2024

1. Negligence—gross negligence—wanton conduct—sufficiency of evidence—summary judgment

In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked following excavation work performed by town employees when installing a sewer line, the trial court properly granted summary judgment to the town on plaintiff's gross negligence claim. A showing of gross negligence requires proof of wanton conduct; here, even assuming that the town had not provided sufficient warnings to cyclists of the backfilled area, plaintiff failed to forecast any evidence indicating that the town had acted with a bad purpose or reckless indifference to plaintiff's rights.

2. Negligence—ordinary—per se—summary judgment—genuine issues of material fact

In a negligence action filed against a town after an accident on a public roadway, where plaintiff was launched to the ground from his electric scooter after driving over a depressed, back-filled portion of the bicycle lane, which had been left unpaved and unmarked

following excavation work performed by town employees when installing a sewer line, the trial court erred in granting summary judgment in the town's favor on plaintiff's claims of: (1) ordinary negligence, where there was a genuine issue of material fact regarding whether the town breached its duty of care given that it knew about the backfilled area but still left it unmarked and unlit; and (2) negligence per se, where there was a genuine issue of material fact regarding whether the town violated a public safety ordinance requiring warnings for excavation sites. Further, the town's arguments on appeal—that plaintiff was contributorily negligent, that the trial court lacked jurisdiction over plaintiffs' claims, and that the town was protected by governmental immunity—lacked merit.

Appeal by plaintiff from order entered 3 July 2023 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 25 September 2024.

Everett Gaskins Hancock Tuttle Hash LLP, by Jason N. Tuttle and Michael J. Byrne, for plaintiff-appellant.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Norwood P. Blanchard, III, and Clay A. Collier for defendant-appellee.

DILLON, Chief Judge.

Plaintiff Adam Saad brought this action alleging he suffered damages when he wrecked his electric scooter while traveling over an area of the bicycle lane of a public roadway, said area being temporarily unpaved due to recent work performed by Defendant Town of Surf City. Mr. Saad appeals the trial court's grant of the Town's summary judgment motion on his claims for negligence and gross negligence.

I. Standard of Review

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Cullen v. Logan Devs., Inc.*, 386 N.C. 373, 377 (2024) (quoting N.C.G.S. § 1A-1, Rule 56(c)). We review an appeal from summary judgment *de novo*. *Value Health Sols., Inc., v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 267 (2023). "In review of the motion for summary judgment, [we] must view the evidence in the light most favorable to the non-moving

party." *Id.* Accordingly, we review the forecasted evidence in the light most favorable to Mr. Saad, as the non-moving party.

II. Background

The forecasted evidence in the record at the summary judgment hearing, when viewed in the light most favorable to Mr. Saad, shows as follows:

In July 2019, a utilities company (hired by the Town) excavated a section of pavement, including the bicycle lane, on State Highway 210 to install sewer access for a house under construction in the Town. A few days later, Town employees excavated the same area to install a water line for the house under construction. When they completed their installation, the Town employees backfilled the excavation site with dirt and stone.

At approximately 10:45 pm on 27 July 2019, Mr. Saad was riding an electric scooter in the bicycle lane when his scooter struck the backfilled site, launching him forward into the ground and causing serious injuries. He was riding at "full throttle," where the specifications for that vehicle show a maximum speed of fifteen-and-a-half miles per hour.

It is undisputed that the backfilled site had not yet been repaved at the time of Mr. Saad's accident.

According to Mr. Saad's complaint, the backfilled site was entirely unmarked and uncovered. That is, there were no cones, barricades, signs or lights to warn cyclists of the unpaved backfilled site at the time of Mr. Saad's accident.

The backfilled site was, at most, "a couple of" inches below the surrounding asphalt surface.[1]

Mr. Saad filed his complaint against the Town, alleging (1) negligence *per se* and (2) negligence and gross negligence.[2] The Town moved

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1. We note that, in his verified complaint, Mr. Saad alleged that "upon information and belief" the backfilled area was six to twelve inches below the surrounding asphalt. Our Court, though, has consistently held that it is inappropriate for a trial court at summary judgment to give weight to any allegation made upon information and belief. *See, e.g.*, *Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 345 (2009) (noting that statements made "upon information and belief" in an affidavit or verified complaint "do not comply with the 'personal knowledge' requirement" required for affidavits at summary judgment). Therefore, in recounting the facts, we do not give weight to any allegation in Mr. Saad's complaint made "upon information and belief."

2. Mr. Saad also brought claims against the construction company building the house. However, Mr. Saad has voluntarily dismissed those claims without prejudice.

for summary judgment. Following a hearing, the trial court found there was no genuine issue of material fact and granted summary judgment in favor of the Town. Mr. Saad appeals.

III. Analysis

Mr. Saad has sued the Town for negligence (under theories of ordinary negligence and negligence *per se*) and gross negligence.

[1] We first address Mr. Saad's gross negligence claim. "[O]rdinary negligence involves inadvertence or carelessness," whereas gross negligence involves wanton conduct where a defendant "acted with a bad purpose or with reckless indifference to [a] plaintiff's rights." *Cullen*, 386 N.C. at 382.

Based on our review of the record, we conclude that Mr. Saad has not forecasted evidence to put at issue whether the Town was *grossly* negligent. Assuming the Town failed to provide a warning of a two-inch depression in the bicycle lane caused by the backfilled area, Mr. Saad has not forecasted evidence from which a jury could conclude that the Town acted with a bad purpose or with reckless indifference. We, therefore, affirm the trial court's grant of summary judgment to the Town on Mr. Saad's gross negligence claim.

[2] We now turn to Mr. Saad's claims for negligence.

"The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450 (2022).

We have recognized that municipalities may be subject to negligence claims for defects in a travel way, as follows:

> Municipalities are responsible only for negligent breach of duty, which is made out by showing that (1) a defect existed, (2) an injury was caused thereby, (3) the [municipality] officers knew, or should have known from ordinary supervision, the existence of the defect, and (4) that the character of the defect was such that injury to travelers therefrom might reasonably be anticipated.

Desmond v. City of Charlotte, 142 N.C. App. 590, 592–93 (2001) (citation and internal marks omitted). "It is not every defect in a street or sidewalk which will render a city liable to a person who falls as a result thereof. Trivial defects, which are not naturally dangerous, will not

make the city liable for injuries occasioned thereby." *Mosseller v. City of Asheville*, 267 N.C. 104, 109 (1966).

As pointed out by the Town in its brief, it has been held that a change in sidewalk elevation is a trivial defect if the difference is only a couple of inches. *See*, *e.g.*, *Desmond*, 142 N.C. App. at 593 (at least one-half inch sidewalk depression); *Joyce v. City of High Point*, 30 N.C. App. 346, 348 (1976) (one-to-two-inch sidewalk irregularity); *Bagwell v. Town of Brevard*, 256 N.C. 465, 466 (1962) (approximately one-inch change in sidewalk elevation).

Our Supreme Court has explained that an inconsistency in a walkway may, but does not typically, arise to the level of negligence on the part of the municipality:

> The existence of a hole or depression, or a material inequality or unevenness, or a gap in a sidewalk or crosswalk may constitute such negligence on the part of a municipality as will render it liable to pedestrians for injuries caused thereby.
>
> But a municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to mere convenient travel, and slight inequalities or depressions or differences in grade, or a slight deviation from the original level of a walk due to the action of frost in the winter or spring, and other immaterial obstructions, or trivial defects which are not naturally dangerous, will not make a municipality liable for injuries occasioned thereby.
>
> The fact that the surface of a walk may have become uneven from use, or that bricks therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk.

Houston v. City of Monroe, 213 N.C. 788, 790–91 (1938) (concluding demurrer was proper where crosswalk depression was up to two-and-a-half inches).

However, our Supreme Court has also held that *it was a jury question* whether a city was liable for a pedestrian's injury from falling due to a defect in a sidewalk where the city knew of the defect and the injured pedestrian had no notice of the defect. *Bell v. City of Raleigh*, 212 N.C. 518, 519–20 (1937).

The forecasted evidence here, taken in the light most favorable to Mr. Saad, shows that the Town knew of the "backfilled" condition of the section of the bicycle lane where Mr. Saad had his accident. It is uncontested that the Town's own employees performed the work to backfill that section.

Further, there is forecasted evidence from Mr. Saad's verified complaint that on the night of Mr. Saad's accident there was nothing in front of the section warning oncoming cyclists of the backfilled area. Indeed, the facts here involve a lane of travel for bicyclists, rather than a lane of travel for pedestrians, as was at issue in the cases cited above. Because a cyclist travels faster than a pedestrian, it is reasonable that a cyclist, especially one riding at night, would have less opportunity to discern an inconsistency in the lane of travel than a pedestrian.

Mr. Saad argues the Town was negligent based on a "negligence *per se*" theory, contending the Town violated one of its safety ordinances, specifically Section 16-47, which requires that one who has excavated a lane of travel place sufficient warnings to put travelers on notice, as follows:

> It shall be unlawful for any person to make or cause to be made any excavation of any kind in the town in or along or near any street without placing and maintaining proper guardrails and signal lights or other warnings at, in or around the same, *sufficient to warn the public* of such excavations and to protect all persons using reasonable care from accidents on account of the same.

Surf City, N.C., Code, § 16-47 (2023) (emphasis added).

Our Supreme Court has instructed as follows:

> The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*. A public safety statute is one imposing upon the defendant a specific duty for the protection of others. Significantly, even when a defendant violates a public safety statute, the plaintiff is not entitled to damages unless the plaintiff belongs to the class of persons intended to be protected

> by the statute and the statute violation is a proximate cause of the injury.

Stein v. Asheville City Bd. of Educ., 360 N.C. 321, 326 (2006) (cleaned up).

We conclude that the ordinance is a public safety statute and Mr. Saad belongs to the class of persons intended to be protected by the ordinance. It is undisputed that the Town caused the excavation to take place. And based on Mr. Saad's allegation in his verified complaint, there is an issue of fact whether the Town placed something in front of the backfilled site "sufficient to warn the public" of the danger.

The Town makes several arguments as to why it was entitled to summary judgment, which we address in turn.

First, the Town contends that the forecasted evidence shows that Mr. Saad was contributorily negligent as a matter of law. We disagree.

Our Supreme Court has explained contributory negligence as follows:

> Every person having the capacity to exercise care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant, contributes to the injury complained of, he is guilty of contributory negligence.

Clark v. Roberts, 263 N.C. 336, 343 (1965). Further, it "is not necessary that [a] plaintiff be actually aware of the unreasonable danger of injury to which his conduct exposes him. [A] [p]laintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673 (1980).

Here, the Town contends that Mr. Saad was contributorily negligent by failing to operate his electric scooter with reasonable care while riding in a bicycle lane, at a high speed, at night, and with limited visibility. *See Clark*, 263 N.C. at 343 ("Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."). "Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774 (1997).

There was evidence that the scooter was traveling approximately fifteen miles per hour. We conclude this forecasted evidence is such as

that a jury must determine whether Mr. Saad acted with reasonable care in operating his electric scooter.

The Town also argues that Mr. Saad was contributorily negligent *per se*, contending that Mr. Saad violated both a Surf City town ordinance and a North Carolina statute by operating an electric scooter in a bicycle lane.

A Town ordinance prohibits motorized vehicles on all bikeways. Surf City, N.C., Code, § 17-162 (2023). And the North Carolina statute requires that "[t]he headlamps of motor vehicles shall be so constructed, arranged, and adjusted that . . . they will at all times mentioned in G.S. 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead . . ." N.C.G.S. § 20-131 (2023).

However, for a plaintiff's violation of the law to constitute contributory negligence *per se*, the violation must be a proximate cause of the plaintiff's injuries—akin to how a defendant's violation of law must be a proximate cause of a plaintiff's injuries to constitute negligence *per se*. *See Short v. Chapman*, 261 N.C. 674, 680 (1964) ("It is a fundamental principle that the only contributory negligence of legal importance is contributory negligence which proximately causes or contributes to the injury under judicial investigation."). Here, even if we were to determine that the ordinance and/or statute cited by the Town applied to Mr. Saad and that he violated the ordinance and/or statute, we cannot conclude on this record whether such a violation was a proximate cause of Mr. Saad's injuries as a matter of law. As our Supreme Court has instructed,

> [w]hat is the proximate cause of an injury is ordinarily a question to be determined by the jury as a fact in view of the attendant circumstances. When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case.

Oxendine v. Lowry, 260 N.C. 709, 713 (1963) (citations and quotation marks omitted).

For instance, it may be that a jury would determine that Mr. Saad would have suffered the same fate had he been on a bicycle traveling fifteen miles per hour rather than an electric scooter traveling that same

speed. In sum, viewed in the light most favorable to Mr. Saad, the forecasted evidence fails to show whether Mr. Saad's injury was proximately caused by the scooter's headlamps or by riding an electric scooter in a bicycle lane, rather than a bicycle. *See Nicholson*, 346 N.C. at 774 ("Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment").

Next, the Town argues the trial court lacked subject matter jurisdiction over this matter because the bicycle lane where the injury occurred is owned and controlled by the Department of Transportation (an agency of the State of North Carolina) and that, therefore, a claim should have been brought under the North Carolina Tort Claims Act, N.C.G.S. § 143-291 (2023).

The Town's contention, however, fails because Mr. Saad has sued the Town, a municipality; he has not brought a claim against the State. We conclude that the trial court has jurisdiction over the tort claims brought by Mr. Saad against the Town.

Finally, the Town contends it is protected by governmental immunity as a matter of law. We, however, have stated that

> the doctrine of governmental immunity will not act as a shield to a municipality from liability for torts committed by its agencies and organizations when the activity of the municipality is proprietary in nature. The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines.

Harrison v. City of Sanford, 177 N.C. App. 116, 121 (2006) (citations and quotation marks omitted). Here, the Town has admitted that it sets rates and charges fees for the maintenance of sewer lines. *See Vill. of Pinehurst v. Reg'l Invs. of Moore, Inc.*, 330 N.C. 725, 729 (1992) ("[O]wnership and operation of a water and sewer service is a proprietary function operated for a profit."). And there is forecasted evidence that the Town caused the excavation in the bicycle lane to provide access to its sewer line to a new customer.

IV. Conclusion

The trial court improperly granted summary judgment in favor of the Town on the issue of negligence (under theories of ordinary negligence

and negligence *per se*) but properly granted summary judgment in favor of the Town on the issue of gross negligence.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges MURPHY and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
MACK VERNON BRACEY, DEFENDANT

No. COA23-875

Filed 17 December 2024

Firearms and Other Weapons—possession of a stolen firearm—knowledge that firearm was stolen—substantial evidence

In a prosecution on charges including possession of a stolen firearm (discovered in a hidden compartment in defendant's car), the trial court did not err in denying defendant's motion to dismiss the firearms change for insufficiency of the evidence that he knew or had reasonable grounds to believe the firearm was stolen where such knowledge could be reasonably inferred from incriminating circumstances, including defendant's flight from law enforcement officers—first, in a high-speed car chase, and, after defendant crashed his vehicle into trees, on foot—as well as his concealment of the gun in an open space behind a panel near the steering column and his denial of possessing any firearm when apprehended.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 31 January 2023 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adrina G. Bass, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant.

FLOOD, Judge.

Defendant Mack Vernon Bracey appeals from the trial court's denial of Defendant's motion to dismiss his charge of possession of a stolen firearm for insufficient evidence. On appeal, Defendant argues the State failed to present sufficient evidence that Defendant knew or had reasonable grounds to know the gun he possessed was stolen. Upon review, we conclude the State presented sufficient evidence that Defendant knew or had reasonable grounds to know the gun was stolen property, based on incriminating circumstances, and the trial court did not err in denying Defendant's motion to dismiss this charge for insufficient evidence.

I. Factual and Procedural Background

On 31 January 2022, Officer Hannah Jackson was parked outside the Day's Inn hotel in Shallotte, North Carolina, which is known by law enforcement as a "hub for illegal activity," when an empty stationary vehicle caught her attention as it was parked in front of the hotel. Officer Jackson ran the vehicle's license plate and ascertained the vehicle belonged to Defendant, who had two felony warrants from Columbus County and two felony warrants from Brunswick County.

For the next six hours, Officer Jackson observed the vehicle from her police car until Defendant approached the vehicle and entered it via the driver's side door, leaving the door open. Officer Jackson called her partner[1] to the scene. Once her partner arrived, Officer Jackson then approached Defendant's vehicle from the passenger's side, made contact with Defendant, and ordered Defendant to exit the vehicle. Defendant refused to exit, stating "I'm not getting out of the car"; began "reaching around for some things"; and appeared to be "trying to hide things." As Defendant was reaching around in his vehicle, Officer Jackson's partner walked around to the vehicle's driver's side. Defendant immediately "shut [the driver's side door,] put the car in drive, and took off." Officers quickly began their pursuit of Defendant.

As Defendant fled from the officers' pursuit, he drove at sixty-five miles per hour ("mph") in a thirty-five mph zone, running red lights and driving "into the opposite lane of travel[.]" At some point during the pursuit, Defendant was driving "95 to 100" mph in a sixty mph zone; thereafter, having slowed down at some point, he crashed his vehicle between two trees, exited it, and continued to flee on foot, into a swampy area.

The officers pursued Defendant on foot and eventually apprehended him. Upon apprehension, the officers proclaimed to Defendant that they

1. A review of the Record did not indicate Officer Jackson's partner's name.

had found a gun, after having seen an empty gun holster on the driver's side in Defendant's vehicle when looking in after the crash. Defendant asked, "[w]here?" and the officers replied, "[i]n the woods . . . where you tossed it." Defendant then replied: "Oh. There ain't no gun." From this exchange, Officer Jackson determined "there was a gun somewhere" on the premises. Officer Jackson then asked Defendant why he ran, and Defendant claimed Officer Jackson was interrupting his "hit" of cocaine.

After further questioning Defendant about what may be back at the Day's Inn hotel he had left, Defendant denied having anything in his hotel room, but officers later found .38 caliber ammunition, as well as illegal narcotics, inside the room. Defendant was arrested, and his car was towed to an impound lot.

The next day, Officer Jackson searched Defendant's vehicle and found a loaded .38 caliber revolver in a hidden compartment in the steering wheel area of the vehicle. As to the hidden compartment, Officer Jackson later testified:

> I noticed that on the left side of the steering wheel where you would normally turn your headlights on and off, it was a little loose looking, so I used that pry bar to pop it open. It popped open very easily. And it was a [] natural void is what it's called in your vehicle where there's places that you can hide things. Just open space. So there's an open space behind there. A few wires for the headlights. And I noticed the butt of a revolver.

Further, upon investigation, officers later discovered the gun had been previously reported stolen.

Defendant was indicted on several charges, including (1) fleeing to elude arrest with two aggravating factors, exceeding the speed limit by fifteen mph and driving recklessly; (2) possession of a stolen firearm; and (3) possession of a firearm by felon.

On 30 January 2023, this matter came on for trial. At the close of the State's evidence, Defendant moved to dismiss the charge of possession of a stolen firearm, arguing the State had not met its burden of proving Defendant knew that the gun was in the car, or that he knew the gun was stolen. The trial court denied this motion. At the close of all evidence, Defendant renewed his motion to dismiss, which was also denied. The jury found Defendant guilty of possession of a stolen firearm and guilty as to the other charges not relevant to this appeal, and Defendant was sentenced accordingly.

Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review the appeal of the final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (citation omitted). Under North Carolina law, "[w]hen a trial court is considering a defendant's motion to dismiss based upon an insufficiency of the evidence presented, the trial court 'is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight.' " *State v. Brown*, 182 N.C. App. 277, 281, 641 S.E.2d 850, 853 (2007) (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate or would consider necessary to support a particular conclusion." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (internal citations omitted) (cleaned up). "A substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight." *Id.* at 412, 597 S.E.2d at 746 (citation and internal quotation marks omitted). "It is the function of the jury to determine the facts in the case from the evidence and to determine what the evidence proves or fails to prove." *State v. Taylor*, 64 N.C. App 165, 169, 307 S.E.2d 173, 176, (1983).

Further, "the evidence must be considered in the light most favorable to the State [and] the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citation and internal quotation marks omitted). It is not the job of this Court, nor that of the trial court, to weigh the evidence; we must determine only whether the State presented substantial evidence such that a reasonable juror might accept the evidence as adequate to support a particular conclusion. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790.

IV. Analysis

Defendant argues the trial court erred in denying his motion to dismiss the charge for possession of a stolen firearm for insufficient evidence. Specifically, Defendant contends the State failed to present

sufficient evidence that Defendant "knew or had reasonable grounds to believe the [gun] was stolen." We disagree.

For a defendant to be properly found guilty of possession of a stolen firearm, "the State must present substantial evidence that (1) the defendant was in possession of a firearm; (2) which had been stolen; (3) the defendant knew or had reasonable grounds to believe the property was stolen; and (4) the defendant possessed the pistol with a dishonest purpose." *State v. Brown*, 182 N.C. App. 277, 281, 641 S.E.2d 850, 853 (2007). "Knowledge that property was stolen may be inferred from incriminating circumstances[,]" *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176, and our Supreme Court has provided that "an accused's flight is evidence of consciousness of guilt and therefore of guilt itself." *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986).

This Court has previously considered appeals concerning a defendant's knowledge of property being stolen, and for which we concluded such knowledge may be evinced by incriminating circumstances. For instance, in *Taylor*, where, after being yelled at by a passerby, the "defendant removed the firearm from his coat, stooped near a car and attempted to surreptitiously hide or dispose of it by throwing it into nearby bushes[,]" we concluded this evidence was "sufficiently incriminating to permit a reasonable inference that [the] defendant knew or must have known that the firearm was stolen[.]" *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176.[2] Additionally, in *State v. Wilson*, where the defendant fled by car from police officers and had his companion throw a gun that the defendant and his companion used in a robbery out of the car window, we concluded this evidence was "sufficiently incriminating to permit a reasonable inference that [the] defendant knew the firearm was stolen, and [was] therefore sufficient to go to the jury on that issue." 106 N.C. App. 342, 348, 416 S.E.2d 603, 606 (1992).

Here, like the defendant in *Wilson*, Defendant fled by car from the officers, running red lights and exceeding the speed limit, all while the gun was inside his vehicle. *See* 106 N.C. App. at 348, 416 S.E.2d at 606; *see also Parker*, 316 N.C. at 304, 341 S.E.2d at 560. Further, like the defendant in *Taylor*, who hid the gun in a bush, Defendant "surreptitiously hid[]" the gun in his vehicle behind a loose panel in the steering wheel. *See Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176. Moreover, during his exchange with the officers upon his apprehension, Defendant

2. Black Law's Dictionary defines "surreptitious" as "done by stealth[.]" *Surreptitious*, Black's Law Dictionary (12th ed. 2024).

denied possessing a gun and further denied having anything in his hotel room, but officers later found the gun in the hidden compartment of Defendant's vehicle, and found .38 caliber ammunition inside the room, which is the type of ammunition for which the gun is chambered.

Per our standard of review, when considering the sufficiency of the evidence and viewing the evidence in the light most favorable to the State, these facts indicate the State presented substantial evidence that a reasonable juror may find that Defendant knew or had reasonable grounds to believe that the gun discovered in his vehicle was stolen. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790; *Wilson*, 106 N.C. App. at 348, 416 S.E.2d at 606; *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176.

Defendant further argues, however, that the facts of this case are more akin to those in *State v. Wilson*, which this Court decided in 2010. In *Wilson*, the sole issue on appeal was "whether [the d]efendant's guilty knowledge can be inferred from his *placement* of the stolen property." 203 N.C. App. 547, 555, 691 S.E.2d 734, 740 (2010) (emphasis added). There, the defendant stored a stolen gun in his mother's closet after committing a robbery. *Id.* at 549, 691 S.E.2d at 736–37. At trial, the State presented evidence of those facts, and the defendant moved to dismiss for insufficient evidence that he knew or should have known the gun was stolen. *Id.* at 549–50, 691 S.E.2d at 736–37. On appeal, we agreed and held "the mere fact of depositing [evidence in one's residence] does not by itself constitute incriminating behavior." *Id.* at 555, 691 S.E.2d. at 740.

Here, however, Defendant's gun was not simply placed in his vehicle, as one might simply place a firearm in a closet. *See id.* at 549, 691 S.E.2d at 736–37. Rather, the gun was stealthily hidden in a compartment of the steering wheel of Defendant's vehicle, requiring removal of a loose panel for the gun to be accessed. Further, although a gun holster was found in Defendant's vehicle by the driver's side door, the gun was found not in or with the holster, but rather in this hidden compartment of the steering wheel, indicating that Defendant "surreptitiously" hid the gun. *See Taylor*, 64 N.C. App at 169, 307 S.E.2d at 176. Finally, unlike *Wilson*, and as discussed above, there is other incriminating evidence, such as Defendant's flight from the officers and the .38 caliber ammunition found in his hotel room, from which a reasonable juror may conclude that Defendant knew or had reasonable grounds to believe that the gun discovered in his vehicle was stolen. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249, 839 S.E.2d at 790.

As the State presented evidence from which a reasonable juror may find Defendant guilty, we conclude the State met its evidentiary

burden of presenting substantial evidence. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746; *see also Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790. Accordingly, it was not error for the trial court to deny Defendant's motion to dismiss for insufficient evidence, and we affirm the trial court's denial.

V. Conclusion

Upon review, viewing the evidence in the light most favorable to the State, we conclude the State presented substantial evidence based on incriminating circumstances that Defendant knew or had reasonable grounds to believe the gun was stolen. We therefore affirm the trial court's denial of Defendant's motion to dismiss his charge of possession of a stolen firearm for insufficient evidence.

AFFIRMED.

Judge STROUD concurs.

Judge MURPHY dissents in separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority's holding that the State presented substantial evidence that Defendant knew or had reasonable grounds to believe that the .38 revolver discovered in his vehicle was stolen. I would hold that the State did not present sufficient evidence to persuade a rational juror of Defendant's guilty knowledge as, even in the light most favorable to the State, no evidence or reasonable intendment drawn therefrom indicates a connection between Defendant's actions and knowledge or reasonable grounds to believe that the firearm was stolen. Instead, I find the factual circumstances to be similar to those in *State v. Wilson*, 203 N.C. App. 547 (2010), wherein we held that, "[w]hile it is certainly possible to hide stolen property in one's residence, the mere fact of depositing it there does not by itself constitute incriminating behavior." *Id.* at 555 (citation omitted).

In *Wilson* (2010), the State's evidence tended to show that the defendant and his accomplice robbed a convenience store using a firearm that had been stolen from its owner's home around or about one month earlier. *Id.* at 548-550. After the robbery, the defendant and his accomplice visited the accomplice's mother's home and deposited the firearm in her

bedroom closet. *Id.* at 549. The defendant was charged, *inter alia*, with possession of a stolen firearm and moved at trial to dismiss the charge for lack of sufficient evidence that he knew or had reasonable grounds to believe that the firearm was stolen. *Id.* at 550. The trial court denied the defendant's motion to dismiss, reasoning that the defendant's behavior in bringing the firearm to his accomplice's mother's home "for the purpose of hiding it[] . . . in and of itself would raise an inference that [he] knew the weapon was [']hot['] and didn't want to be seen with it out in public." *Id.* We reversed, holding that, unlike in *Taylor*, *Parker*, and *Wilson* (1992), we could not infer the defendant's "guilty knowledge" that the firearm had been stolen from his mere storage of that firearm in his accomplice's mother's home. *Id.* at 555.

Here, the State's evidence tended to show that, on 31 January 2022, Defendant—who was already a convicted felon and had four active felony warrants for his arrest—was confronted in a hotel parking lot by law enforcement officers while inside of his vehicle as he was "trying to get a hit in[]" of the cocaine in his possession. Defendant fled from the officers in a high-speed motor vehicle pursuit until he crashed into a wooded, swampy area. Defendant exited the vehicle and fled from the officers in a foot chase until he was apprehended and questioned. In a preliminary search of Defendant's vehicle, law enforcement officers located an empty gun holster but were unable to locate any firearm on the scene. When questioned about a firearm found outside the vehicle, Defendant denied its existence. The next day, Officer Jackson located a firearm tucked into a natural void of Defendant's vehicle during a search at the impound lot and determined from its serial number that it had been reported stolen. Defendant argues, and I agree, that the factual circumstances underlying the revolver here more closely align with those in *Wilson* (2010), where mere storage of a stolen firearm in the accomplice's mother's residence was not substantial evidence of guilty knowledge of the gun's stolen status.

In *Taylor*, the State presented evidence that, after the defendant was confronted by a passerby, he was witnessed pulling the stolen firearm from his jacket and disposing of it in the bushes. *State v. Taylor*, 64 N.C. App. 165, 169 (1983). In *Parker*, the State presented evidence of circumstances surrounding the defendant's acquisition of the stolen vehicle—the defendant's role as a go-between for two individuals located a short distance from one another, the purchase price of $800.00 for a vehicle worth substantially more, and the lack of vehicle title—*and* of the defendant's flight. *State v. Parker*, 316 N.C. 295, 304 (1986). In *Wilson* (1992), the State presented evidence that the defendant disposed of the

stolen firearm during the police pursuit. *State v. Wilson*, 106 N.C. App. 342, 347-48 (1992).

Here, unlike in the aforementioned cases, the State presented no evidence of the circumstances surrounding Defendant's acquisition of the firearm; no evidence of when the firearm was stored in the natural void of Defendant's vehicle, including whether this storage took place during the flight; and no evidence tending to relate Defendant's flight to the stolen firearm as opposed to his outstanding warrants, his possession of any firearm itself being a felony, and additional flight after committing felony fleeing/eluding arrest.

While "an accused's flight is evidence of consciousness of guilt and therefore of guilt itself[,]" *id.* at 348, substantial evidence that Defendant is guilty of *some* crime is *not* substantial evidence that he committed this particular crime, no more specifically that he knew or had reasonable grounds to believe that the firearm in his possession was stolen. In the light most favorable to the State, substantial evidence of Defendant's flight on 31 January 2022 is not, by inference and without more, substantial evidence of every knowing element of every crime which he could plausibly be charged with committing that day. The facts and circumstances warranted by the State's evidence here do no more than raise a suspicion or conjecture as to Defendant's guilty knowledge of the gun's stolen status, "since there would still remain a reasonable doubt as to [D]efendant's guilt." *State v. Turnage*, 362 N.C. 491, 494 (2008). I would hold that the trial court erred in denying Defendant's motion to dismiss the charge of possession of a stolen firearm because the State failed to present substantial evidence that Defendant knew or had reasonable grounds to believe that the .38 revolver discovered in his vehicle was stolen. I respectfully dissent.

STATE v. CARWILE

[297 N.C. App. 145 (2024)]

STATE OF NORTH CAROLINA
v.
JASON JOHN CARWILE

No. COA23-885

Filed 17 December 2024

1. Criminal Law—defenses—castle doctrine—inapplicable where intruder has ceased efforts to enter a home—plain error and ineffective assistance of counsel not shown

In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not plainly err by failing to instruct the jury on the castle doctrine in the absence of defendant's timely objection to the instruction's omission. The presumptive fear of imminent death or serious bodily harm essential to the defense of habitation, as codified in N.C.G.S. § 14-51.2(b), was unavailable because the victim had discontinued his efforts to forcefully and unlawfully enter—and had clearly exited—defendant's home, as shown by video surveillance footage from the used car lot and testimony from defendant and two eyewitnesses. Accordingly, defendant's related claim for ineffective assistance based on counsel's failure to raise the issue at trial was also unavailing.

2. Criminal Law—defenses—self-defense—special instruction not given—jury instructions accurate as given—no error

In a prosecution that resulted in a conviction for second-degree murder—arising from an incident where the (masked) victim entered defendant's residence in the early morning hours and struck defendant with multiple objects before defendant pushed him out of the house; the two continued to fight away from the house and into a used car lot; after the victim raised his hands, defendant and two other occupants of the home each kicked and beat the victim even after he became motionless—the trial court did not err by failing to give a special instruction to the jury extending the holding of *State v. McLymore*, 380 N.C. 185 (2022) (which addressed the ability of a criminal defendant to assert self-defense where that defendant had

been in the process of committing a felony) to the conduct of the victim, because the victim was not a criminal defendant and was not asserting self-defense. Moreover, the jury instructions as given provided an accurate statement of the law regarding self-defense as it could potentially apply to defendant.

Appeal by Defendant from Judgments entered 22 February 2023 by Judge Todd W. Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 27 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Christopher J. Heaney for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jason John Carwile (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Second-Degree Murder, Misdemeanor Assault with a Deadly Weapon, and Misdemeanor Communicating Threats. The Record before us, including evidence presented at trial, tends to reflect the following:

Around 5:00 a.m. on 4 September 2018, the decedent in this case—Christopher Easter—approached Defendant's residence wearing a mask. Defendant, his wife, and Joshua Chinault were all present at the house. Easter grabbed a chainsaw that was on the porch, entered the house, and struck Defendant with the chainsaw. Easter also hit Defendant in the head with a rock-stuffed sock. Defendant pushed Easter out of the house through the front door, and an altercation between the two ensued. Defendant and Easter continued to fight while moving away from the house and towards a used car dealership lot approximately five hundred yards away. As they entered the neighbor's yard, Easter slipped and dropped the chainsaw. Defendant also fell around this point, but Easter continued "backing" away from the house.

Surveillance footage from the auto dealership—admitted into evidence—showed Easter, with his hands raised, backing into the car lot. Approximately five seconds later, Defendant approached Easter as he backed into one of the cars and yelled, " 'Where are you going, boy?' and 'I'm going to kill you[.]' " Easter was still backing away when Defendant's wife entered the scene carrying a white trash can. Defendant's wife hit

Easter with the trash can as Easter kept backing up. Defendant and his wife continued to approach Easter until he backed into another car. Defendant and his wife both hit Easter, causing him to fall to the ground. As Easter tried to get back up, Defendant began to repeatedly hit him in the head with a rock-filled sock. During the beating, a wrench fell from Easter's clothes; Defendant picked up the wrench and hit Easter in the head with it. Easter wrapped around Defendant's knees, causing him to fall to the ground.

Around this time, Chinault arrived. Defendant continued to strike Easter with the wrench while both were on the ground. While Defendant was hitting Easter with the wrench, Defendant's wife and Chinault started kicking and striking Easter as well. Defendant also began slamming Easter's head into the concrete. All three kept attacking Easter while he lay on the ground unmoving for over a minute. Defendant, while slamming Easter's head into the ground, dragged and pulled him over to a parked car. While Easter lay motionless in the road, Defendant continued to beat him. At this point, both Defendant's wife and Chinault attempted to "get [Defendant] to stop." But he did not. Defendant's wife pulled Easter's shoes and pants off of him and left them in the road. Eventually, Defendant's wife pulled him off of Easter. Defendant, his wife, and Chinault then went back to the house, leaving Easter on the ground. Easter died as a result of his injuries.

On 5 November 2018, Defendant was indicted for First-Degree Murder. On 13 July 2020, the State obtained a superseding indictment for First-Degree Murder. On 10 August 2020, Defendant was additionally indicted for Felony Assault with a Deadly Weapon and Felony Communicating Threats. This case came on for trial on 13 February 2023. In his defense, Defendant asserted self-defense and defense of others. During the preliminary charge conference, the trial court expressly asked Defendant's counsel about the self-defense issue in the following exchange:

> [Trial Court]: [A]re you looking at self-defense and then the motive, the stand your ground, like defense of habitation or . . .
>
> [Defense Counsel]: No, because that clearly says it does not apply.
>
> [Trial Court]: Right.
>
> [Defense Counsel]: This is more of a — It's a hybrid, but I think it's accurate under the law, Your Honor. This is one

> [of] those strange cases where I think it's pretty clear, just like [the prosecutor] said, that if he'd shot him dead in the house, everything would have been fine.
>
> [Trial Court]: Right.
>
> [Defense Counsel]: Unfortunately, he managed to run away. But that's the reason you don't get to use physical force while doing that. There is no home base here.

After the defense rested, Defendant proposed a special instruction stating that "the State must prove that but for the alleged victim escaping after the commission of the felony of felonious breaking or entering, the confrontation resulting in the death of the victim would not have occurred." The trial court rejected this instruction.

On 22 February 2023, the jury returned verdicts finding Defendant guilty of Second-Degree Murder, Misdemeanor Assault with a Deadly Weapon, and Misdemeanor Communicating Threats. The trial court sentenced Defendant to 300 to 372 months of imprisonment for Second-Degree Murder. The trial court consolidated the convictions for Assault with a Deadly Weapon and Communicating Threats, and sentenced Defendant to 30 days of imprisonment to run concurrently with the sentence for Second-Degree Murder. Defendant orally gave Notice of Appeal on 22 February 2023.

Issues

The dispositive issues on appeal are whether the trial court: (I) plainly erred in failing to give the jury an instruction on the defense of habitation—known as the Castle Doctrine—where Defendant used deadly force against Easter in a parking lot after Easter retreated from Defendant's residence; and (II) erred by refusing to give Defendant's requested special jury instruction.

Analysis

I. Applicability of the Castle Doctrine

[1] On appeal, Defendant contends the trial court plainly erred by failing to instruct the jury on the Castle Doctrine. Specifically, Defendant argues the trial court should have instructed the jury: (a) his fear for his life was presumptively reasonable; (b) an aggressor instruction clarifying that a person is "not the aggressor while defending their home"; and (c) he was allowed to threaten Easter with lawful force. He also argues his trial counsel's failure to request these instructions constituted ineffective assistance of counsel.

For each of the jury instructions at issue here, Defendant failed to object at trial to their omission. He is, therefore, limited to arguing their omission constituted plain error. N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original). In other words, plain error requires a defendant to meet 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.

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citations and quotation marks omitted).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Kuhns*, 260 N.C. App. 281, 284, 817 S.E.2d 828, 830 (2018) (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973)). "Accordingly, 'it is the duty of the trial court to instruct the jury on all substantial features of a

case raised by the evidence.' " *Kuhns*, 260 N.C. App. at 284, 817 S.E.2d at 830 (quoting *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988)). Conversely, a trial court does not err by omitting an instruction where there is not substantial evidence presented at trial that the defendant is entitled to such an instruction. *See, e.g.*, *State v. Dilworth*, 274 N.C. App. 57, 64, 851 S.E.2d 406, 411 (2020) (trial court did not err in omitting defense of habitation instruction where there was no evidence victim was attempting to unlawfully enter home); *State v. Copley*, 386 N.C. 111, 125, 900 S.E.2d 904, 915 (2024) (no prejudicial error in jury instructions where "jurors concluded that the castle doctrine did not shield" the defendant from criminal liability).

A. *Castle Doctrine and Presumption of Reasonable Fear*

"North Carolina has long recognized that '[a] man's house, however humble, is his castle, and his castle he is entitled to protect against invasion.' " *Kuhns*, 260 N.C. App. at 284, 817 S.E.2d at 830 (quoting *State v. Gray*, 162 N.C. 608, 613, 77 S.E. 833, 835 (1913)). As our Supreme Court has recently affirmed, "an attack on the house or its inmates may be resisted by taking life." *State v. Phillips*, 386 N.C. 513, 517, 905 S.E.2d 23, 27 (2024) (quoting *Gray*, 162 N.C. at 613, 77 S.E. at 834). "This fundamental principle of defense of habitation is known as the castle doctrine." *Id.* The defense of habitation is codified in our statutes as follows:

> The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> > (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
> >
> > (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2023).

Here, Defendant contends the trial court plainly erred by failing to instruct the jury that Defendant's fear for his life was presumptively

reasonable under the circumstances. When the Castle Doctrine applies, a person has a presumptively reasonable fear of imminent death or serious bodily harm when another seeks to unlawfully and forcefully enter that person's home while he is present. This presumption, however, does not apply in any of the statutory conditions listed in subsection (c) of N.C. Gen. Stat. § 14-51.2. *Phillips*, 386 N.C. at 524, 905 S.E.2d at 31. Relevant to the present case, our statutes provide the Castle Doctrine presumption does not apply where "[t]he person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace, and (ii) has exited the home, motor vehicle, or workplace." N.C. Gen. Stat. § 14-51.2(c)(5) (2023). In determining whether a defendant is entitled to an instruction on the Castle Doctrine, a court must view the evidence "in the light most favorable to the defendant, and the determination shall be based on evidence offered by the defendant and the State." *State v. Cook*, 254 N.C. App. 150, 152, 802 S.E.2d 575, 577 (2017) (citations omitted).

There is no dispute that at the time Defendant used deadly force against Easter, Easter had exited Defendant's home. Video surveillance footage shows Defendant used deadly force against Easter in a used car parking lot five hundred yards away from Defendant's home. The question, then, is whether Easter had "discontinued all efforts to unlawfully and forcefully enter the home[.]" N.C. Gen. Stat. § 14-51.2(c)(5) (2023). Viewing the evidence in the light most favorable to Defendant, we conclude that he had and, consequently, that the Castle Doctrine does not apply to the present case.

While much of the caselaw addressing whether an intruder had discontinued their efforts to forcefully enter a home is unpublished and, thus, not controlling legal authority,[1] we find *State v. Willoughby* persuasive in our assessment of the facts at bar. In *State v. Willoughby*, the defendant was convicted of second-degree murder after shooting a woman standing in his yard who was in the midst of a dispute with another occupant through a window. 292 N.C. App. 220, 896 S.E.2d 317 (2024) (unpublished). There, viewing the evidence in the light most favorable to the defendant, this Court concluded the Castle Doctrine did not apply and thus, the trial court did not err by declining to instruct the jury on the Castle Doctrine. *Id.* at *2. In support of its conclusion,

1. Our Rules of Appellate Procedure provide: "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]" N.C. R. App. P. 30(e)(3) (2024).

this Court noted several facts. First, an eyewitness to the shooting testified at trial that the victim "was standing in the front yard and was not coming toward [d]efendant before [d]efendant shot at her from his front porch." *Id.* Further, the defendant acknowledged to law enforcement officers that the victim "was not acting in a threatening manner." *Id.* Indeed, "the evidence showed that [the victim] stood approximately 38 feet away and exclaimed, 'Oh, well, you're going to . . . shoot me,' a sentiment she reiterated, in shock, after [d]efendant then shot her." *Id.* Additionally, the Court pointed to evidence the defendant was calm when officers arrived at the scene and that the defendant repeatedly told law enforcement he had not intended to shoot the victim, but rather he was aiming at a brick pile in the front yard. *Id.*

Viewing the evidence in the light most favorable to Defendant in the present case, like the victim in *Willoughby*, Easter was not moving toward Defendant or Defendant's home at the time Defendant used deadly force. Indeed, eyewitnesses—notably Defendant's wife and his friend Chinault—testified Easter was moving away from Defendant's home and was backed up against a car in a used car dealership lot hundreds of yards away. Further, the video surveillance footage shows a period of time when there was distance between Easter and Defendant. Similarly to the victim in Willoughby, in that time, Easter did not move toward Defendant or Defendant's home; rather, he stood still, backed against a car some five hundred yards from Defendant's home.

Although Defendant testified that the altercation with Easter "continued from [his] residence" to the auto dealership lot and claimed Easter did not "turn and run away," Defendant also testified that he fell just before reaching the parking lot and thus may not have seen Easter run. Further, Defendant conceded on cross-examination that Easter "back[ed] away" at various points, consistent with Defendant's wife's and neighbor's testimony. Indeed, Chinault testified that as Easter backed against one of the cars, Defendant yelled "Where are you going, boy?" and "I'm going to kill you[.]" Additionally, the video surveillance footage clearly shows at least a full minute where Easter lay motionless on the ground while Defendant repeatedly slams his head against the concrete and Defendant's wife and Chinault kick and strike him. Based on this evidence, even viewed in the light most favorable to Defendant, we conclude Easter had "discontinued all efforts to unlawfully and forcefully enter the home" and thus, the Castle Doctrine did not apply. N.C. Gen. Stat. § 14-51.2(c)(5) (2023). Therefore, Defendant was not entitled to a jury instruction that his fear was presumptively reasonable.

B. *Aggressor Instruction*

Defendant next contends the trial court plainly erred in failing to provide a jury instruction clarifying that a person is "not the aggressor while defending their home." Because Defendant was not entitled to an instruction on the Castle Doctrine, we conclude he was therefore not entitled to this aggressor instruction.

The defenses available to defendants pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3 "[are] not available to" someone who "[i]nitially provokes the use of force against himself or herself." N.C. Gen. Stat. § 14-51.4(2) (2023). This is commonly known as the aggressor doctrine. "Someone may be considered the aggressor if they 'aggressively and willingly enter into a fight without legal excuse or provocation.' " *State v. Hicks*, 385 N.C. 52, 60, 891 S.E.2d 235, 241 (2023) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). "Additionally, someone who did not instigate a fight may still be the aggressor if they continue to pursue a fight that the other person is trying to leave." *Id.* (citation omitted). "When the evidence is conflicting, it is for the jury to determine whether the defendant was the aggressor." *Id.* (citations omitted).

Here, the evidence shows Defendant became the aggressor when Defendant continued to pursue Easter after Easter discontinued his efforts to unlawfully and forcefully enter the home and tried to leave. Indeed, Chinault testified Defendant followed Easter yelling, "Where are you going, boy? I'm going to kill you[.]" Easter was also moving away from Defendant's home while Defendant, Defendant's wife, and Chinault followed. When Defendant reached Easter, he beat Easter with a sock filled with rocks and a wrench, taking turns with his wife and Chinault in delivering the blows. Defendant did not stop beating Easter when he was lying motionless on the ground; the assault continued well after Easter ceased resistance. Thus, we conclude Defendant "continue[d] to pursue a fight" that Easter was "trying to leave." *Hicks*, 385 N.C. at 60, 891 S.E.2d at 241. Therefore, Defendant was not entitled to a clarification regarding when he could not be deemed the aggressor. Consequently, we conclude the trial court did not plainly err in omitting this instruction.

C. *Communicating Threats*

Defendant additionally contends the trial court plainly erred in failing to instruct the jury that Defendant had lawful authority to communicate threats to an intruder while he was defending his home. Again, Defendant did not request any such instruction at trial.

The offense of communicating threats is defined as follows:

> A person is guilty of a Class 1 misdemeanor if without lawful authority:
>
> > (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
> >
> > (2) The threat is communicated to the other person, orally, in writing, or by any other means;
> >
> > (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
> >
> > (4) The person threatened believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1(a) (2023). Defendant concedes the four enumerated elements for communicating threats are met. However, Defendant argues that when he communicated threats to Easter, he had the lawful authority to do so because he was acting in self-defense or defense of habitation pursuant to the Castle Doctrine. In other words, Defendant contends "[t]he trial court should have told the jurors that if [Defendant] was threatening to use lawful force, then he could not communicate threats." We disagree.

As discussed above, Defendant was not entitled to use deadly force pursuant to the Castle Doctrine because Easter had exited Defendant's home and "discontinued all efforts to unlawfully and forcefully enter the home." N.C. Gen. Stat. § 14-51.2(c)(5) (2023). Thus, Defendant's contention that if deadly force is justified, so too is communicating threats fails because Defendant's use of deadly force was *not* justified.

Further, even if the Castle Doctrine applied, the trial court substantively provided the instruction Defendant now argues for at trial. "The trial court is not required to follow any strict format when instructing the jury 'as long as the instruction adequately explains each essential element of the offense.' " *State v. Guice*, 286 N.C. App. 106, 113, 879 S.E.2d 350, 355 (2022) (citing *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014)). Where a defendant requests additional language be added to a jury instruction that is redundant, the trial court does not err in failing to add the requested language, even if it is a correct statement of law. *See id.* (where a trial court instructed the jury the

phrase "willfully threaten" means "intentionally or knowingly expressing an intent or a determination to physically injure another person," a requested instruction as to the subjective intent of the defendant was redundant and thus it was not error for the trial court to refuse to give the instruction).

Regarding the charge of Communicating Threats, the jury was instructed as follows:

> For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt: First, that the defendant willfully threatened to physically injure the victim. A threat is any expression of an intent or determination to physically injure another. A threat is made willfully if it is made intentionally or knowingly. Second, that the threat was communicated to the victim orally. Third, that the threat was made in a manner and under circumstances which would cause a reasonable person to believe that it was likely to be carried out. Fourth, that the victim believed the threat would be carried out. *Fifth, that the threat was made without lawful authority*. Sixth, that the offense was committed because of the victim's race or color. . . . If you do not so find or have a reasonable doubt as to one or more of these things, you would then determine if the defendant is guilty of misdemeanor communicating threats. Misdemeanor communicating threats differs in that the offense need not be committed because of the victim's race or color.

(Emphasis added). Thus, the jury was in fact instructed that the State had to prove Defendant had communicated threats without lawful authority. We, therefore, conclude there was no error in the trial court's instruction on communicating threats.

D. *Ineffective Assistance of Counsel*

Defendant also argues his trial counsel's failure to request the above jury instructions constituted ineffective assistance of counsel (IAC). Because the Castle Doctrine does not apply in this case, we conclude Defendant's counsel was not ineffective in failing to request said instructions.

Defendant raises his IAC claim for the first time on appeal. "In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Warren*,

244 N.C. App. 134, 144, 780 S.E.2d 835, 841 (2015) (citation and quotation marks omitted). IAC claims brought on direct review will be decided on the merits, however, "when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). On direct appeal, this Court "ordinarily limits its review to material included in the record on appeal and the verbatim transcript of the proceedings[.]" *Id.* at 166, 557 S.E.2d at 525 (citation omitted).

Under *Strickland v. Washington*, a defendant must satisfy a two-part test to show ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To demonstrate prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. "A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge." *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003) (citing *State v. Swann*, 322 N.C. 666, 688, 370 S.E.2d 533, 545 (1988)).

The evidence presented at trial shows the Castle Doctrine does not apply in this case because Easter had exited Defendant's home and discontinued his efforts to enter the home. Thus, the trial court did not err in failing to give jury instructions on the Castle Doctrine. As such, defense counsel's failure to request these jury instructions does not amount to error. Therefore, Defendant's claim of ineffective assistance of counsel fails. *Pratt*, 161 N.C. App. at 165, 587 S.E.2d at 440.

II. Defendant's Special Instruction

[2] Defendant contends the trial court's refusal to give a special instruction was in error. At trial, Defendant requested the following instruction:

> The alleged victim would not be justified, and is therefore not entitled to the benefit of using defensive force, if he was escaping after the commission of the felony of felonious breaking or entering, and that felony offense was immediately causally connected to the circumstances giving rise to the defensive force used by the alleged victim. As such, for the alleged victim to be allowed the benefit of using defensive force, the State must prove beyond a reasonable doubt, among other things, that the alleged victim, while using defensive force, was not escaping after the commission of the felony of felonious breaking or entering, and there was not an immediate causal connection between the alleged victim's use of such defensive force and his felonious conduct. In other words, the State must prove that but for the alleged victim escaping after the commission of the felony of felonious breaking or entering, the confrontation resulting in . . . the death of the victim would not have occurred.

The trial court declined to give this instruction, finding it unsupported by legal authority. We agree.

"It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citation omitted). "A specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation and quotations marks omitted). Additionally, "[i]t is well established in this jurisdiction that the trial court is not required to give a requested instruction in the exact language of the request." *State v. Green*, 305 N.C. 463, 476-77, 290 S.E.2d 625, 633 (1982). A trial court need not give an instruction verbatim so long as it gives the instruction in substance. *State v. Godwin*, 369 N.C. 604, 613, 800 S.E.2d 47, 53 (2017).

"A request for a special instruction which deviates from the pattern jury instruction qualifies as a special instruction." *State v. Young*, 294 N.C. App. 518, 524, 903 S.E.2d 460, 465 (2024) (citing *State v. Brichikov*, 281 N.C. App. 408, 414, 869 S.E.2d 339, 344 (2022)). "[I]f a request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance."

State v. Lamb, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988) (quoting *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)). "A trial court's erroneous refusal to instruct the jury in accordance with a criminal defendant's request will not result in a reversal of the trial court's judgment unless the error in question has prejudiced the defendant," such that "there is a 'reasonable possibility that, had the trial court given the [requested instruction], a different result would have been reached at trial." *State v. Benner*, 380 N.C. 621, 628-29, 869 S.E.2d 199, 204-05 (2022) (quoting *State v. Lee*, 370 N.C. 671, 672, 811 S.E.2d 563, 564 (2018)).

Defendant contends *State v. McLymore* provides the legal basis for his requested special instruction. 380 N.C. 185, 868 S.E.2d 67 (2022). In *McLymore*, the defendant was charged with first-degree murder, among other charges, after he got into an altercation with the decedent and shot him. *Id.* at 187-88, 868 S.E.2d at 70-71. At the time of the shooting, the defendant was a felon in possession of a firearm. *Id.* at 188, 868 S.E.2d at 71. At trial, the defendant sought to assert the affirmative defense of self-defense. *Id.* In its review, our Supreme Court considered N.C. Gen. Stat. § 14-51.4(1), which provides that self-defense is not available to a person who used defensive force and who was attempting to commit, committing, or escaping after the commission of a felony. *Id.* at 186-87, 868 S.E.2d at 70. The Court concluded that because the defendant was committing the felony of being a felon in possession of a firearm at the time he shot the decedent, and the two activities shared a "causal nexus," he could not assert the defense of self-defense under N.C. Gen. Stat. § 14-51.4(1). *Id.* at 200, 868 S.E.2d at 78.

McLymore's holding is narrower than Defendant contends. *McLymore* addressed whether a criminal defendant could assert the defense of self-defense where the defendant had been in the process of committing a felony. Defendant wishes to extend this principle to the conduct of Easter, arguing that Easter used impermissible force against Defendant because he was in the process of fleeing a felony when he fled Defendant's home. Easter, however, is not a criminal defendant and is not asserting self-defense as an affirmative defense for his conduct. Thus, *McLymore* does not apply to Easter's conduct. Because the Defendant's requested instruction, as written, is not supported by legal authority, the trial court did not err in declining to provide it to the jury.

Moreover, to the extent the requested jury instruction pertains to Defendant, the instruction was substantively given. Defendant's requested instruction informs the jury that Easter's use of force was unlawful, thus entitling Defendant to defend himself. The requested instruction, in substance, thus asks the jury to be instructed on

self-defense. The jury received such an instruction. Indeed, at trial, the following instruction was provided to the jury regarding Defendant's right to defend himself:

> If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm and the circumstances did create sufficient belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense. You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at that time.

The provided instruction is an accurate statement of the law regarding self-defense. Thus, even were Defendant entitled to the requested instruction, it was substantively given. Therefore, the trial court did not err in declining to give Defendant's requested instruction. Consequently, the trial court did not err in its jury instructions. In turn, the trial court did not err in entering judgment upon the jury verdicts.

Conclusion

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

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JEFFREY LEE JOHNSON

No. COA24-336

Filed 17 December 2024

Search and Seizure—warrantless search—curtilage—seizure of neglected animals—exigent circumstances—plain view doctrine—probable cause to search house

In a prosecution for felony cruelty to animals, officers' warrantless search of the curtilage of defendant's home and seizure of twenty-one dogs was not unconstitutional where the officers, in response to a call regarding a strong smell indicating a dead animal, had discovered that defendant was on probation from a prior conviction of animal cruelty and, as they walked up defendant's driveway, they could see and hear multiple animals exhibiting signs of poor health and living conditions and could smell ammonia and feces. The condition of the animals created exigent circumstances justifying their removal for emergency veterinary treatment. Further, based on the plain view discoveries of the animals on the front of the property, there was probable cause to search the backyard and inside the house (for which officers obtained a warrant). The trial court did not err, much less plainly err, by denying defendant's motion to suppress.

Appeal by Defendant from judgments entered 12 October 2023 by Judge Phyllis M. Gorham in Carteret County Superior Court. Heard in the Court of Appeals 9 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State-Appellee.

W. Michael Spivey for Defendant-Appellant.

COLLINS, Judge.

Defendant Jeffrey Lee Johnson appeals from judgments entered upon guilty verdicts of one count of felony cruelty to animals and two counts of misdemeanor cruelty to animals. Defendant argues that the trial court plainly erred by concluding that a warrantless search of his home's curtilage was reasonable due to exigent circumstances and by

denying his motion to suppress the evidence seized as a result of that search and the search of his home. We find no error, much less plain error.

I. Background

Defendant was indicted for two counts of felony animal cruelty and three counts of misdemeanor animal cruelty. Defendant moved to suppress all evidence seized during the search of his property. The evidence presented at the suppression hearing tended to show the following:

Carteret County Animal Control Officer Tyler Harvill received a phone call reporting a strong smell coming from Defendant's property and concern that there might be a deceased dog on the property. Harvill discovered that Defendant was on probation as a result of being found guilty of cruelty to animals. As conditions of Defendant's probation, he was required to allow reasonable searches of his home and yard concerning animals on his property and was prohibited from abusing animals by withholding food or water.

Harvill immediately attempted to reach Defendant by phone but received no response; he left a voicemail. Harvill contacted Carteret County Deputy Sheriff Jessica Newman and requested her assistance with checking on several dogs at Defendant's property. He told Newman of Defendant's conviction for animal cruelty and his probation conditions.

Harvill and Newman drove to Defendant's home. Harvill parked his car just past Defendant's driveway. "[E]ven from next to the road" he could smell ammonia and feces coming from Defendant's property. Newman drove separately to Defendant's property. She testified, "As soon as I got out of my patrol car, I could smell a very, very strong odor of ammonia and feces and what I associate with, my experience being, just the smell of rot." The property had overgrown brush and "a lot of trash and building construction materials piled up." Newman could see animals throughout the front of the property and was concerned about them being dirty.

Because Harvill and Newman had been unable to reach Defendant and were concerned about a potentially dead animal on the property, the officers walked up the driveway toward Defendant's home to attempt to make contact with Defendant. When they reached the end of the driveway, they encountered Chubby, a Pitbull attached to a heavy chain that was driven into the ground.

Chubby's neck was "very irritated"; he had "a lot of missing fur"; his teeth "were worn down to the gumline"; he had overgrown toenails, one of which was "enlarged, red, and appeared to be infected"; and "[h]e had

scabs on his body [in] various stages of healing." Chubby did not have any food or water nearby.

The officers could see other dogs on the property. "[T]hey all had similar . . . hair loss and overgrown nails, and their teeth were worn down severely. They all pretty much had the same setup." The officers could also hear dogs barking from various points on the property. Newman walked toward the sound of barking puppies. She found puppies in a box filled with fresh and dried feces. The water buckets inside the box were too tall for the puppies to reach over.

One of the officers knocked on Defendant's front door but got no response. They could hear a dog barking inside. Newman stood on a pile of trash and a freezer next to the door to look inside Defendant's window for the dog. As she did this, "the smell of ammonia and feces increased significantly to the point [she] felt physically sick." "[T]he residence was very dirty. The floor was coated in dirt. There were piles of feces. It was just very dirty, and there was a lot of trash." The barking dog was positioned to the side of the window.

The officers headed into the backyard to check on the other dogs, because they were concerned for the dogs' safety. The dogs in the backyard "did not appear to be in good condition." One of the dogs had a large tumor above its tail. Several dogs had "their teeth worn down to the gumline, some of them, including their canine teeth; missing fur on the majority of the dogs; scabs on the majority of the dogs; overgrown toenails on the majority of the dogs." Some of the dogs had water, others did not, and others had dirty water. Some of the water bowls were placed on top of the dogs' shelters and the dogs were not in good enough condition to get on top of the shelters to reach the bowls.

As she was looking around, Newman noticed a chain leading into a dog shelter created out of a barrel. She walked over to it and saw a dog inside. She initially thought the dog was deceased. She called out to it, but there was no reaction. Newman testified:

> I got closer to the dog. Her name is Emmie. I bent down and I watched. I could see her breathing very shallow. Continued trying to get her attention. She didn't react. I ended up putting my hand on the chain and kind of rustling the chain, and she slowly started to react.
>
> . . . .
>
> She picked her head up, looked at me. She began to try to get up to step out of the crate, the barrel. She was very

> uneasy on her feet. She actually stumbled and fell a couple of times as she was walking out.
>
> . . . .
>
> She looked terrible. Again, her teeth were very worn down to the gums. Her ears had both been -- they're very short-cropped ears. The ears were both bleeding. Both ears had open wounds that were bleeding. She had the most missing fur. You could see her skin and several patches throughout her entire body. She had a large mass on her left thigh that was oozing blood and -- and fluid, and her toenails were so overgrown that it actually changed -- it contorted her toes. Her paw didn't just sit flat on the ground.

Newman called the magistrate and sent over some photographs of the dogs. The magistrate found probable cause to charge Defendant with animal cruelty and probable cause to take the dogs at that time for their safety. Newman also spoke with Animal Control and explained her intention to get the animals to the Humane Society for safekeeping and veterinary care.

At that point, Defendant arrived home. He was "not receptive to having a conversation," and Newman placed him under arrest. After taking Defendant to the Carteret County Detention Center, Newman applied for, and received, a warrant to search Defendant's home. Inside the home, Newman found two dogs, Weezy and Peezy, both of whom were in horrible physical condition. No food or water was available to the dogs.

Ultimately, twenty-one dogs were seized from Defendant's property. The vast majority of the dogs needed immediate veterinary assistance. Emmie was immediately euthanized based on veterinary recommendation. Weezy was also euthanized after the removal of her bladder stones did not sufficiently treat her poor health.

The trial court denied Defendant's motion to suppress, finding facts consistent with those recited above and concluding that the search was not unreasonable based on exigent circumstances. The case proceeded to trial. The jury found Defendant guilty as charged. Defendant was sentenced to 8-to-19 months of imprisonment for the felony cruelty to animals conviction and to two 120-day sentences for the two misdemeanor cruelty to animals convictions, all to run consecutively. The trial court suspended the sentences with an active sentence of 90 days, and Defendant was placed on special supervised probation for 48 months. Defendant appealed in open court.

II. Discussion

Defendant contends that the trial court plainly erred by denying his motion to suppress evidence seized as a result of the warrantless search of the curtilage of his home and of his home. Defendant's arguments are wholly meritless.

A. Standard of Review

When a defendant fails to preserve an issue relating to a motion to suppress but "specifically and distinctly" contends plain error, this Court reviews the issue for plain error. *State v. Powell*, 253 N.C. App. 590, 594 (2017); N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted).

"In reviewing a motion to suppress evidence, this Court examines whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law." *State v. Alvarez*, 385 N.C. 431, 433 (2023) (citation omitted). "Conclusions of law are reviewed de novo." *Id.*

B. Applicable Search and Seizure Law

The Fourth Amendment protects individuals "against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. No unreasonable search occurs when "an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well-established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper." *State v. Lupek*, 214 N.C. App. 146, 151 (2011) (quotation marks, brackets, and citation omitted). "When law enforcement observes contraband in plain view, no reasonable expectation of privacy exists, and thus, the Fourth Amendment's prohibition against unreasonable warrantless searches is not violated." *State v. Grice*, 367 N.C. 753, 756 (2015) (citation omitted). Moreover, an officer may seize evidence under the plain view doctrine when "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed; . . . the evidence's incriminating character . . . was immediately apparent; . . . the officer had a lawful right of access to the object itself; . . . [and] the discovery of evidence in plain view [was] inadvertent." *Id.* at 756-57 (quotation marks and citations omitted).

When an officer is not in a place where the public is allowed to be, "[t]he governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135 (1982) (citations omitted). "Exigent circumstances exist when there is a situation that demands unusual or immediate action and that may allow people to circumvent usual procedures." *State v. Nance*, 149 N.C. App. 734, 743 (2002) (quotation marks, brackets, and citations omitted). "If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible . . . ." *State v. Allison*, 298 N.C. 135, 141 (1979) (citations omitted). Exigent circumstances exist where an officer reasonably believes that an animal on the property needs immediate aid. *Cf. Nance*, 149 N.C. App. at 743-44 (analyzing whether exigent circumstances existed for animal control officers to enter defendant's property and seize horses located thereon and ultimately concluding they did not because the "animal control officers had ample time during the three days after [first] viewing the horses in which to secure a warrant, but neglected to do so because they mistakenly believed it to be unnecessary"). *See Morgan v. State*, 645 S.E.2d 745, 749 (Ga. Ct. App. 2007) (holding that the Fourth Amendment does not bar a police officer from making a warrantless entry and search when they reasonably believe an animal on the property needs immediate aid).

1. Search of Defendant's Curtilage

Here, Harvill received a phone call reporting a strong smell and the potential for a dead animal on Defendant's property. He discovered that Defendant had been convicted of cruelty to animals and was on probation. Harvill called Defendant but Defendant did not answer. Harvill called Newman, and upon their arrival at Defendant's property, they immediately smelled ammonia and feces; Newman smelled rot. The property was overgrown with brush, and a lot of trash and building construction materials were piled up. They could see animals "throughout the front of the property."

The officers walked up Defendant's driveway toward his home. At the end of the driveway, they encountered Chubby, who was chained up and in poor physical condition with no food or water. They could see other dogs on the property in similar condition with "pretty much . . . the same setup." They could hear puppies barking in a nearby box, dogs barking from various points on the property, and a dog barking

inside the home. When the officers knocked on the door, they got no response. Next to the door, "the smell of ammonia and feces increased significantly to the point [Newman] felt physically sick."

At this point, no unreasonable search had occurred as Newman was "in a place where the public is allowed to be" when she walked up Defendant's driveway and onto the porch. *Lupek*, 214 N.C. App. at 151. Furthermore, the seizure of Chubby and the other dogs visible on the property was justified under the plain view doctrine: Newman did not violate the Fourth Amendment in arriving where Chubby was chained to the ground and the other dogs were visible; it was immediately apparent from Chubby's and the other dogs' conditions that Chubby and the other dogs were evidence of animal cruelty; Newman had a lawful right of access to Chubby and the other dogs; and the discovery of Chubby and the other dogs in plain view was inadvertent. *See Grice*, 367 N.C. at 756-57. Additionally, the circumstances abundantly supported a reasonable belief that the dogs on the property needed immediate aid to prevent further serious injury or death such that exigent circumstances justified Newman's warrantless entry into the areas of Defendant's property where the dogs were located.

Likewise, once Newman observed the seriously deprived condition of the dogs, she was entitled to respond to the dire emergency situation by having the dogs immediately seized so that they could be transported for emergency medical treatment. Accordingly, under these circumstances, the prevention of the continued needless suffering and death of the dogs on Defendant's property created exigent circumstances justifying the warrantless search and seizure of the dogs. *See*, *e.g.*, *Morgan v. State*, 656 S.E.2d 857, 860 (Ga. Ct. App. 2008) (affirming exigent circumstances existed where malnourished and mistreated animals were observed on the property, a neighbor had reported mistreated animals on the property, and harsh weather conditions existed, giving the deputy "a reasonable belief that the dogs heard barking in the backyard were in need of immediate aid to prevent their serious injury or death").

We further note that, given the plain view discoveries of Chubby and the other dogs on the front of the property, there was a substantial basis for probable cause to search the backyard and inside the house. Indeed, Newman applied for and received a search warrant to search the residence, storage units, barns, sheds, outbuildings, and person(s) at Defendant's property. Thus, even if exigent circumstances had not justified the search of the backyard and seizure of the dogs therein, the dogs would have been seized inevitably upon Newman securing and executing the search warrant for the premises; the inevitable discovery rule

therefore applies. *See State v. Wells*, 225 N.C. App. 487, 490 (2013) ("Under the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when the [evidence] ultimately or inevitably would have been discovered by lawful means." (quotation marks and citations omitted)).

For these reasons, the trial court did not err, much less plainly err, by denying Defendant's motion to suppress evidence seized as a result of the warrantless search of the curtilage of Defendant's home.

2. Search of Defendant's Home

Defendant also asserts that the trial court plainly erred by denying his motion to suppress evidence seized as a result of the search of his home because the warrant was based on evidence seized from an unconstitutional search of the curtilage of his home. However, because the search of Defendant's curtilage was not unconstitutional, the warrant obtained to search Defendant's home was not based on evidence obtained by an unconstitutional search. Accordingly, the trial court did not err, much less plainly err, by denying his motion to suppress.

III. Conclusion

No unreasonable search occurred when Newman walked up Defendant's driveway and onto the porch, and the seizure of Chubby and the other dogs visible on the front property was justified under the plain view doctrine. Furthermore, exigent circumstances justified the warrantless search of Defendant's backyard and the seizure of the dogs found there. Finally, given the plain view discoveries of Chubby and the other dogs on the front property, even if exigent circumstances had not justified the backyard search and seizure of the dogs therein, the inevitable discovery rule applies. Accordingly, the trial court did not err, much less plainly err, by denying Defendant's motion to suppress.

NO ERROR.

Chief Judge DILLON and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
WILLIAM DAVID LINGERFELT, DEFENDANT

No. COA23-1158

Filed 17 December 2024

Sexual Offenders—sex offender registration—petition to terminate—tier level—categorical approach—comparability of state and federal offenses

The trial court properly denied defendant's petition to terminate his sex offender registration after determining that he was not a Tier I sex offender, since the state offense he was convicted of—sexual activity by a substitute parent—was comparable to the generic federal offense of abusive sexual contact, thereby placing him in Tier II or III. To be sure, the statute defining the federal offense required that a defendant act "knowingly" while the statute for the state offense lacked any mens rea requirement, thus prohibiting a wider range of conduct than the federal statute. Nevertheless, in affirming the denial of defendant's petition, the Court of Appeals concluded that the two offenses were still a categorical match because there was no realistic probability that the State of North Carolina could or would enforce its statute in a way that would sweep in conduct outside of what the generic federal crime encompassed (specifically, unintentional sexual activity by a substitute parent).

Judge MURPHY dissenting.

Appeal by defendant from order entered 22 May 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 8 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

THOMPSON, Judge.

When determining whether a defendant may be afforded relief pursuant to a petition for termination of sex offender registration, a trial court must first determine, by comparison between the defendant's state offense and federal law, where the severity of Defendant's conduct falls within a three-tier system. Defendants whose offenses under state law do not meet any of the enumerated bases for categorization under Tier II or Tier III of this federal system automatically default to Tier I. After careful review, we affirm the order of the trial court denying defendant's petition for termination of sex offender registration.

I. Factual Background and Procedural History

On 4 February 2003, defendant was convicted of two counts of sexual activity by a substitute parent under the then-applicable provisions of N.C. Gen. Stat. § 14-27.7. Pursuant to these convictions, defendant was placed on probation and first registered as a sex offender on 14 February 2004; however, after a violation of conditions of his probation, defendant had his probation revoked and his sentence activated on 19 May 2004.

On 26 June 2019, defendant filed a petition for termination of his sex offender registration, and the petition was denied. Defendant filed another petition for termination of his sex offender registration on 1 March 2023—the petition at issue in this case—and the trial court again denied the petition. In denying the 2023 petition, the trial court made the following findings of fact from a form checklist on the order:

> 1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above. [Defendant's February 2003 convictions were identified above on the form.]
>
> 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above. [14 February 2003 was the registration date identified.]
>
> 3. Since the Date Of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
>
> 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.

> 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.
>
> 6. The petitioner is not a current or potential threat to public safety.

However, the trial court left blank the box indicating that

> [t]he relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State[,]

leaving a note beside the unchecked box that read "Tier II or Tier III[.]"[1]

The trial court concluded the petition should be denied, and from this order, defendant filed timely written notice of appeal.

II. Discussion

A. Standard of review

While the determination of whether to terminate a defendant's registration requirement is technically discretionary and subject to review for abuse of that discretion, in cases where, as here, the classification of the offense is the sole issue on appeal, we review the matter de novo as an alleged error of law and not as a discretionary determination by the trial court. *State v. Moir*, 369 N.C. 370, 374, 389 (2016); *In re Hamilton*, 220 N.C. App. 350, 359 (2012).

B. Defendant's tier status

Defendant argues that the underlying offense for which he had to register—sexual activity by a substitute parent—was a Tier I offense for purposes of comparison with federal statutes, specifically in that his offense was not comparable to the allegedly analogous federal Tier II crime. We do not agree.

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1. The trial court also left unchecked a box indicating that, "[i]f the petitioner filed a previous petition for termination under N.C. Gen. Stat. § 14-208.12A that was denied, one year or more has passed since the date of the denial." However, as noted above, it had been more than one year since the denial of defendant's next-most-recent petition for termination, and no other information on the record indicates that defendant had had a petition for termination denied within one year of the 2023 petition.

Under N.C. Gen. Stat. § 14-208.12A, "[t]en years from the date of initial county registration, a person required to register [as a sex offender] may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article." N.C. Gen. Stat. § 14-208.12A(a) (2023). A trial court may terminate the defendant's registration requirement if the defendant shows the following in the petition:

> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a1).

For purposes of N.C. Gen. Stat. § 14-208.12A(a)(2), although the form language on the trial court's order indicates that any termination of defendant's registration requirement must comply with the Jacob Wetterling Act, the current legislation setting minimum standards for the state receipt of federal funds with respect to release from sex offender registries is the Sex Offender Registration and Notification Act (SORNA). *See Moir*, 369 N.C. at 375, 794 S.E.2d at 690 (holding that "the currently effective federal statutory provisions governing the extent to which an individual is required to register as a sex offender is . . . found in the Sex Offender Registration and Notification Act (SORNA)"). Under SORNA, "sex offenders subject to a registration requirement are classified on the basis of three tier levels . . . with sex offenders being treated differently based upon the exact tier to which they are assigned . . . ." *Moir*, 369 N.C. at 376, 794 S.E.2d at 690. The three tiers are statutorily defined by analogy to federal offenses.

First, "[t]he term '[T]ier I sex offender' means a sex offender other than a [T]ier II or [T]ier III sex offender." 34 U.S.C.A. § 20911(2) (2023). Second, "[t]he term '[T]ier II sex offender' means a sex offender other than a [T]ier III sex offender whose offense is punishable by imprisonment for more than 1 year" and

> (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
>
> (i) sex trafficking (as described in section 1591 of Title 18);
>
> (ii) coercion and enticement (as described in section 2422(b) of Title 18);
>
> (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;
>
> (iv) abusive sexual contact (as described in section 2244 of Title 18);
>
> (B) involves--
>
> (i) use of a minor in a sexual performance;
>
> (ii) solicitation of a minor to practice prostitution; or
>
> (iii) production or distribution of child pornography; or
>
> (C) occurs after the offender becomes a [T]ier I sex offender.

34 U.S.C. § 20911(3).

Finally, "[t]he term '[T]ier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year" and

> (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
>
> (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
>
> (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;
>
> (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
>
> (C) occurs after the offender becomes a tier II sex offender.

34 U.S.C.A. § 20911(4).

In *State v. Moir*, our Supreme Court observed that "[t]he federal courts have described three approaches for making determinations like

ascertaining the tier to which a defendant should be assigned for the purpose of determining whether he is eligible to have his sex offender registration obligation reduced[,]" including, "(1) the 'categorical approach,' (2) the 'circumstance-specific approach,' and (3) 'the modified categorical approach.' " *Moir*, 369 N.C. at 379, 794 S.E.2d at 692. "The applicability of each approach depends upon whether the statute under which a defendant was convicted refers to a 'generic crime' or to a 'defendant's specific conduct.' " *Id.* at 379–80, 794 S.E.2d at 692.

However, "[i]n the event that the court is required to address issues arising under a divisible [state] statute, which exists when the relevant provision sets out multiple offenses rather than a single offense, a pure categorical approach cannot be utilized in any meaningful way." *Id.* at 381, 794 S.E.2d at 693. "In order to resolve cases involving divisible statutes, courts have developed the 'modified categorical approach.' " *Id.* The modified categorical approach "only permits a finding of comparability in the event that the elements of at least one of the alternative offenses set out in the statute defining the offense of which the defendant was previously convicted categorically match the generic federal offense." *Id.*

"In using the 'modified categorical approach,' the court is permitted to examine a limited number of contemporaneously generated documents . . . such as the indictment, the plea agreement, and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* (internal quotation marks and citation omitted). "[T]he only reason that a court is allowed to consider certain extra-statutory information in the 'modified categorical approach' is to assess whether the plea was to the version of the crime' in the state statute 'that correspond[s] to the generic [federal] offense.' " *Id.* at 382, 794 S.E.2d at 693 (internal quotation marks, brackets, and citation omitted).

N.C. Gen. Stat. § 14-27.7(a) provides that

> [i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a) (2002).

Here, applying the framework set forth by our Supreme Court in *Moir*, we observe that N.C. Gen. Stat. § 14-27.7(a) is a divisible statute in that it "sets out multiple offenses rather than a single offense[,]" *Id.* at 381, 794 S.E.2d at 693, with the elements being either:

- (1) Defendant assumes the position of a parent in the home of a minor and (2) Defendant engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home; or
- (2) Defendant has custody of a victim of any age or a person who is an agent or employee of any person or institution and (2) Defendant engages in vaginal intercourse or a sexual act with the victim while the victim is in Defendant's custody.

N.C. Gen. Stat. § 14-27.7(a).[2]

Furthermore, when making limited judicial observance of the indictment, *Moir*, 369 N.C. at 381, it appears that both of defendant's counts were of the first formulation, with the indictment specifically referring to intercourse with a victim residing in his home.[3] Accordingly, our comparison will inquire as to whether the federal statute, abusive sexual contact, is *a categorical* match with the state offense of sexual activity by a substitute parent.

C. Categorical approach

This case ultimately turns on, as noted above, whether defendant's "state conviction is comparable to the relevant federal offense for purposes of the 'categorical approach[,]' " that is, whether "the elements

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2. The current codification of sexual activity by a substitute parent substantially reflects this division, with the offense currently being formulated as follows:

> (a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, the defendant is guilty of a Class E felony.
>
> (b) If a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony.
>
> (c) Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.31.

3. The second count, for which the indictment is absent, is stipulated by the parties to have occurred in a substitute parental, rather than custodial, arrangement.

composing the statute of conviction are the same as, or narrower than, those of the generic offense." *Moir*, 369 N.C. at 380, 794 S.E.2d at 692 (internal quotation marks and citation omitted).

As the dissent correctly notes, "if a state statute 'sweeps more broadly than the generic crime,' there is no categorical match." *Id.* "In other words, if there is a *realistic probability* that the State would apply its statute [sexual activity by a substitute parent pursuant to N.C. Gen. Stat. § 14-27.2] to conduct that falls outside the generic definition of a crime [abusive sexual contact pursuant to 18 U.S.C. § 2244(a)(3)] there is no categorical match . . . ." *Id.* (internal quotation marks, ellipsis, and citation omitted) (emphases added). Therefore, in applying the categorical approach—we consider the elements of the state offense: sexual activity by a substitute parent; with the elements of the generic federal offense: abusive sexual contact—to determine whether there is a categorical match between the two offenses.

18 U.S.C. § 2244(a)(3) defines abusive sexual contact as

> [w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate- -
>
> . . . .
>
> (3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both . . . .

18 U.S.C. § 2244(a)(3) (2023).

In turn, 18 U.S.C. § 2243(a) defines sexual abuse *of a minor*:

> [w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and

> (2) is at least four years younger than the person so engaging[.]

18 U.S.C.A. § 2243(a).

On the other hand, the offense for which defendant was convicted was sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7, which provided:

> [i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a).

Applying the categorical approach to the two offenses at issue in the present case, we observe that the state offense is not *fully* coterminous with the pertinent federal state offense. While the federal prohibition on abusive sexual contact in 18 U.S.C. § 2244(a)(3) includes the requirement that the defendant act "knowingly[,]" N.C. Gen. Stat. § 14-27.7(a) contains no such mens rea requirement.[4] Therefore, the range of conduct prohibited by N.C. Gen. Stat. § 14-27.7(a) is wider than the range prohibited by 18 U.S.C. § 2244(a)(3), because it does not require a mental state.

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4. For comparison, the first prong of North Carolina's currently effective statute prohibiting indecent liberties with children includes both a purpose requirement and a mens rea requirement:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . *[w]illfully* takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years *for the purpose of arousing or gratifying sexual desire*[.]

N.C. Gen. Stat. § 14-202.1(a)(1) (emphases added). From this, we can infer that, had our General Assembly intended to include such mens rea requirements in N.C. Gen. Stat. § 14-27.7(a), it could have done so, making their omission intentional.

I agree with the dissent that "the North Carolina formulation [of the elements of sexual activity by a substitute parent] prescribes no intent requirement, [while] the federal formulation [of the offense] does." However, the dissent argues that a "mismatch between the mens rea of the federal generic crime" and the North Carolina statute "leads inevitably to the conclusion that they are not a categorical match." *See Cabeda v. Attorney General of United States*, 971 F.3d 165, 176 (3d Cir. 2020) (holding that "the mismatch between the mens rea of the federal generic crime and the [state crime] leads inevitably to the conclusion that they are not a categorical match").

In *Cabeda v. Attorney General of United States*, the Third Circuit Court of Appeals acknowledged the oddity of the ensuing result due to the categorical mismatch between the mens rea of the state and federal offenses at issue in that case, observing that:

> one might be forgiven for thinking that, as a matter of common sense, it is scarcely conceivable that one could, as a factual matter, recklessly commit the crime that Pennsylvania calls involuntary deviate sexual intercourse. That improbability, one might further think, should mean that the Pennsylvania statute is a categorical match for the generic crime of sexual abuse of a minor, *because there is no realistic probability* that Pennsylvania could or would enforce its statute in a way that would sweep in reckless conduct. *Following that reasoning would allow for a more sensible result here*, the semantic strictures of the categorical approach notwithstanding. Unfortunately, that analytical route is also barred by binding precedent.

971 F.3d 165, 175 (3d Cir. 2020) (emphases added).

Ultimately, the Third Circuit observed that the Third Circuit's "precedent, however, takes an alternative approach[,]" and "where the elements of the crime of conviction are not the same as the elements of the generic federal offense[,] the realistic probability inquiry *is simply not meant to apply*." *Id.* at 176 (ellipses omitted) (emphasis added). Again, in reaching this result, the majority acknowledged that, "the mismatch between the mens rea of the federal generic crime and the Pennsylvania involuntary deviate sexual intercourse statute leads inevitably to the conclusion that they are not a categorical match." *Id.* "We are left with no option, then, but to conclude that Cabeda's multiple statutory rapes of a 15-year-old boy do not qualify as sexual abuse of a minor within the meaning of the [federal statute]. *What a world*." *Id.* (emphasis added).

We propose reaching the "more sensible result[,]" *id.* at 175, lamented by the majority in *Cabeda*, that—despite the mens rea mismatch between the statutes at issue, there is no *realistic probability* that North Carolina could or would enforce its statute in a way that would sweep in *unintentional* sexual activity by a substitute parent—therefore, there *is* a categorical match between the North Carolina offense, sexual activity by a substitute parent, and the generic federal offense, abusive sexual contact.[5]

Because we conclude there is a categorical match between the two offenses, we conclude that the trial court did not err in denying defendant's petition for termination of his sex offender registration. Consequently, we conclude that the trial court did not abuse its discretion in denying defendant's petition for termination of his sex offender status.

III. Conclusion

Because there is not a realistic possibility that the State of North Carolina would apply its statute to conduct that falls outside of the generic definition of the crime, there is a categorical match between the two offenses. Therefore, we conclude that the trial court did not err in denying defendant's petition for termination of his sex offender registration.

AFFIRMED.

Judge GRIFFIN concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

The Majority's holding, even if framed as the "more sensible result," *Majority* at 14, is an incorrect application of the framework mandated by our Supreme Court in *Moir*, 369 N.C. at 380, as—by the Majority's own

5. I take judicial notice of the reality that the Third Circuit Court of Appeals of the United States has explicitly (but reluctantly) rejected my proffered approach, holding that, "where the elements of the crime of conviction are not the same as the elements of the generic federal offense . . . the realistic probability inquiry . . . is simply not meant to apply." *Cabeda*, 971 F.3d at 176. However, our Supreme Court *has not offered further guidance* on what constitutes a "realistic probability" under *Moir*, and whether that inquiry is an appropriate one to undertake in light of the mens rea mismatch between the two offenses in the present case.

admission—"the range of conduct prohibited by [N.C.G.S.] § 14-27.7(a) is *wider* than the range prohibited by 18 U.S.C. § 2244(a)(3), because it does not require a mental state." *Majority* at 12-13 (emphasis added). For the reasons explained below, I would hold that the offense of sexual activity by a substitute parent for which Defendant was convicted includes a broader range of conduct than the allegedly analogous federal offense, such that Defendant was not a Tier II offender, but a Tier I offender, and therefore entitled as a matter of law to a new determination as a Tier I offender.

Under *Moir*, once the modified categorical approach resolves into the categorical approach, we must examine the elements of the divided state offense to see if they refer to a range of conduct narrower than that described by the comparable federal offense for tiering purposes:

> A defendant's state conviction is comparable to the relevant federal offense for purposes of the "categorical approach" when the elements composing the statute of conviction are the same as, or narrower than, those of the generic offense. Accordingly, if a state statute "sweeps more broadly than the generic crime," there is no categorical match. *Descamps* [*v. United States*, 570 U.S. 254, 261 (2013)] (stating that "[t]he key, we emphasize[], is elements, not facts.") In other words, if there is a realistic probability that the State would apply its statute to conduct that falls outside the generic definition of a crime, there is no categorical match and the prior conviction cannot be for an offense under the federal statute.

Moir, 369 N.C. at 380.

Here, the allegedly analogous federal statute is abusive sexual contact under 18 U.S.C. § 2244(a)(3):

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—
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> . . . .
>
> (3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both[.]

18 U.S.C. § 2244(a)(3) (2023). In turn, 18 U.S.C. § 2244(a)(3) provides that

> [w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and
>
> (2) is at least four years younger than the person so engaging[.]

18 U.S.C. § 2243(a) (2023). A "sexual act," under these statutes, is

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

18 U.S.C. § 2246(2) (2023). Overall, then, abusive sexual contact occurs when a person "knowingly engages in or causes" "a sexual act with another person who[] (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging[,]" with "sexual act" being defined in 18 U.S.C. § 2246(2). *See* 18 U.S.C. § 2243(a) (2023).

The offense for which Defendant was convicted was sexual activity by a substitute parent under N.C.G.S. § 14-27.7 (2002). The language of the statute is as follows:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C.G.S. § 14-27.7(a) (2002). A "sexual act," for purposes of N.C.G.S. § 14-27.7(a) (2002), "means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." N.C.G.S. § 14-27.1(4) (2002).

Here, where it is undisputed that Defendant was at least four years older than the victim and the victim was between 12 and 16 at the time of the offense, the question becomes whether, when a defendant assumes the position of a parent in the home of the minor and engages in vaginal intercourse or a sexual act with her, he necessarily *knowingly* engages in or causes a sexual act with the victim. *See* 18 U.S.C. § 2244(a)(3) (2023); 18 U.S.C. § 2243(a) (2023); *Moir*, 369 N.C. at 384 n.9 (determining that issues of age are resolved by the facts of the offense, not the elements in the statutes); *see also State v. Williams*, 226 N.C. App. 393, 406 (2013) (cleaned up) ("The word 'knowingly' means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged.").

For purposes of detailing the comparison, both vaginal intercourse and the N.C.G.S. § 14-27.7(a) (2002) definition of "sexual act" are *almost* completely subsumed by the federal statute. Vaginal intercourse necessarily includes "contact between the penis and the vulva"; "cunnilingus" entails "contact between . . . the mouth and the vulva"; "fellatio" entails "contact between the mouth and the penis"; "analingus" entails "contact between . . . the mouth and the anus"; and "anal intercourse" entails "contact between . . . the penis and the anus[.]" *Compare* N.C.G.S. § 14-27.1(4) (2002) *with* 18 U.S.C. § 2246(2) (2023). However, "the penetration, however slight, by any object into the genital or anal opening of another person's body" is not *fully* coterminous with "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, *with an intent to abuse*, *humiliate*,

harass, degrade, or arouse or gratify the sexual desire of any person[.]" *Compare* N.C.G.S. § 14-27.1(4) (2002) *with* 18 U.S.C. § 2246(2)(C) (2023). While the North Carolina formulation prescribes no intent requirement, the federal formulation does. The same could also be said of the offenses more broadly: while the federal prohibition on abusive sexual contact in 18 U.S.C. § 2244(a)(3) includes the requirement that the defendant act "knowingly[,]" the relevant portion of N.C.G.S. § 14-27.7(a) (2002) contains no such mens rea requirement. Therefore, the range of conduct prohibited by N.C.G.S. § 14-27.7(a) (2002) is wider than the range prohibited by 18 U.S.C. § 2244(a)(3).

Based on this mismatched mens rea element, I would hold that Defendant was not a Tier II offender by comparison with abusive sexual contact, as N.C.G.S. § 14-27.7(a) (2002) prohibited a wider range of conduct. Moreover, there is no serious contention on appeal that Defendant was a Tier III offender; that his offense was comparable to sex trafficking, coercion and enticement, or transportation with intent to engage in criminal sexual activity; that his offense involved a minor in sexual performance, the practice of prostitution, or child pornography; or that his offense occurred after he had already previously become a Tier I offender. *See* 34 U.S.C. §20911(3)(A)(i)-(iii), (B), (C) (2023). This necessarily leads to the conclusion that Defendant was a Tier I offender. *See* 34 U.S.C. § 20911(2) (2023) ("The term 'tier I sex offender' means a sex offender other than a tier II or tier III sex offender."); *see also Cabeda*, 971 F.3d at 176 ("[T]he mismatch between the mens rea of the federal generic crime and the [state crime] leads inevitably to the conclusion that they are not a categorical match . . . ."). Given that the trial court's order denying Defendant's petition for termination of sex offender registration was predicated solely on the belief that Defendant was a Tier II or Tier III offender, this misapprehension of law suffices to show abuse of discretion. *See Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104 (2022) (marks omitted) ("[W]hatever the standard of review, an error of law is an abuse of discretion.").

In light of this abuse of discretion, I would vacate the order of the trial court denying Defendant's petition for termination of sex offender registration and remand to the trial court. On remand, Defendant would be entitled to a new determination as a Tier I offender; however, "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion." *In re Hamilton*, 220 N.C. App. 350, 359 (2012). "Thus, after making findings of fact supported by competent evidence on each issue raised in the petition, the trial court [would be] then free to employ its discretion in reaching its conclusion of law whether Petitioner is entitled to the relief he requests." *Id.*

STATE OF NORTH CAROLINA
v.
FERNANDO RODRIQUEZ McCULLOUGH

No. COA24-361

Filed 17 December 2024

1. Probation and Parole—revocation of probation—new criminal offense—sufficiency of evidence—driving while impaired

The trial court did not abuse its discretion by revoking defendant's probation for committing a new criminal offense while on probation—driving while impaired (DWI)—where the State presented the charging officer's affidavit, defendant's arrest warrant for DWI, an intoxilyzer report showing that defendant had a blood alcohol level of 0.12, and testimony from defendant's probation officer regarding defendant's phone call to her notifying her of his arrest. The affidavit and intoxilyzer report, in particular, were sufficient to allow the trial court to independently determine that it was more probable than not that defendant had violated the terms of his probation.

2. Probation and Parole—revocation of probation—statutory right to confront adverse witnesses—affidavit in lieu of testimony—other evidence sufficient

The trial court did not commit prejudicial error in defendant's probation revocation hearing—based on defendant's commission of a new criminal offense while on probation (driving while impaired)— by failing to make an explicit finding that good cause existed for denying defendant the right to confront the charging officer, whose affidavit was submitted by the State. Where the State presented sufficient other evidence to support revocation, including an intoxilyzer report and testimony from defendant's probation officer (regarding defendant's phone call to her notifying her about his DWI and admitting that he had been driving), the arresting officer's testimony would have been extraneous.

3. Judgments—revocation of probation—clerical error—basis for revocation—incorrect box checked

The judgment revoking defendant's probation was remanded to the trial court for correction of a clerical error where, although the trial court's findings in open court clearly indicated that the basis for revocation was the commission of a new criminal offense (driving while impaired), the court checked an additional box on the

judgment and commitment form erroneously linking revocation to defendant's failure to pay court and supervision fees (as alleged in his probation officer's violation report).

4. Attorney Fees—criminal case—attorney appointment fee—duplicate fees erroneously assessed

Where the trial court erroneously assessed defendant two appointment fees for court-appointed counsel in a criminal matter—once after defendant's sentencing when he pleaded guilty and a second time after his probation was revoked—in violation of N.C.G.S. § 7A-455.1, the duplicate appointment fee was vacated and the matter was remanded to the trial court for recalculation of the judgment.

Appeal by Defendant from an order entered 16 November 2023 by Judge Lori I. Hamilton in Cabarrus County Superior Court. Heard in the Court of Appeals 8 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Helms, for the State.

Jason Christopher Yoder for Defendant-appellant.

WOOD, Judge.

Fernando Rodriquez McCullough ("Defendant") appeals from a final judgment following the revocation of his probation.

I. Factual and Procedural Background

On 18 May 2022, Defendant pleaded guilty to assault by strangulation, assault on a female, and injury to real property. He was sentenced to 11 to 23 months of imprisonment, suspended for 18 months of supervised probation, and was ordered to pay court appointed attorney fees plus a $75.00 attorney appointment fee.

On 7 May 2023, Defendant was charged for the criminal offenses of DWI and driving while license revoked for an impaired revocation in Cabarrus County. On 17 May 2023, Defendant's probation officer filed a violation report in Cabarrus County Superior Court alleging Defendant had violated the conditions of his probation by failing to pay court and supervision fees as ordered by the court and for committing the new criminal offenses of DWI and driving while license revoked for an impaired revocation.

Defendant's probation expired on 14 November 2023, and his violation hearing was held on 16 November 2023. The trial court found good cause to retain jurisdiction because the hearing was conducted during the same session of court in which Defendant's probation expired. Defendant admitted the violations related to owing money but denied committing a new criminal offense.

At the hearing, Defendant's probation officer testified she filed a violation report alleging new criminal offenses after a magistrate issued a warrant charging Defendant with five offenses: driving while impaired, driving while license revoked for an impaired revocation, no liability insurance, "giving, lending, or borrowing a license plate" and "expired/no inspection." The State introduced the warrant into evidence as State's Exhibit 1. The State also introduced an officer's affidavit, consent form, and intoxilyzer result form from the 7 May 2023 arrest. Defense counsel objected to the probation officer testifying to the content of those items rather than the arresting officer. The trial court noted Defendant had the right to confront witnesses at the hearing but overruled the objection concluding that the officer's testimony would be extraneous under this Court's decision in *Singletary. State v. Singletary*, 290 N.C. App. 540, 893 S.E.2d 215 (2023). The probation officer also testified that Defendant had called her to report his arrest for the new offenses.

The trial court found the evidence sufficient to support revocation of Defendant's probation for committing a new criminal offense based on the officer's affidavit, the consent form, the test results, and the Defendant's admission to his probation officer. After revoking Defendant's probation, the trial court ordered the clerk to enter a civil judgment for $325.00 in attorney fees, as well as another $75.00 attorney appointment fee.

II. Analysis

Defendant argues the trial court erred in finding Defendant had committed a new criminal offense based on the magistrate's warrant and violated Defendant's due process and statutory right to confrontation by failing to make a finding of good cause for denying his right to confront and cross-examine the arresting officer. Additionally, Defendant argues the trial court erred in ordering Defendant to pay a second $75.00 appointment of counsel fee and erred in finding that "[e]ach violation is, in and of itself a sufficient basis upon which this Court should revoke probation and activate the suspended sentence."

A. Jurisdiction

On 16 November 2023, after the trial court revoked Defendant's probation, Defendant gave oral notice of appeal in open court. Because it is

a final judgment from the superior court, jurisdiction lies in this Court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

The North Carolina Rules of Appellate Procedure permit appeals from a criminal action to be made in two ways: entering oral notice at trial or filing written notice with the clerk of superior court within fourteen days. N.C. R. App. P. 4(a). This Court has held attorney fees are civil penalties subject to the rules of civil procedure governing appeals. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008). Therefore, defendants are required to follow the civil rules of procedure when appealing attorney fees. A party must file and serve written notice of appeal with the clerk of superior court within thirty days after entry of judgment. N.C. R. App. P. 3(a),(c)(1). Defendant gave oral notice of appeal after entry of the judgment but failed to enter written notice of appeal within the time proscribed.

On 25 June 2024, Defendant filed a Petition for Writ of Certiorari pursuant to N.C. Gen. Stat. § 7A-32(c), Rule 21 of the North Carolina Rules of Appellate Procedure, and S*tate v. Ledbetter*, 371 N.C. 192, 194, 814 S.E.2d 39, 41 (2018) requesting this Court cure the defective notice of appeal. Under Appellate Rule 21(a)(1), this Court may issue a writ of certiorari to permit review "when the right to prosecute an appeal has been lost by the failure to take timely action[.]" N.C. R. App. P. 21(a)(1)(2023). Our Supreme Court has stated the writ of certiorari should issue upon "a reasonable show of merits and that the ends of justice will be thereby promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924).

The State concedes the trial court erred by duplicating the attorney appointment fee. Under N.C. Gen. Stat. § 7A-455, a trial court may impose attorney's fees against a convicted, indigent defendant for the cost incurred by a defendant's appointed counsel. *State v. Webb*, 358 N.C. 92, 100, 591 S.E.2d 505, 512 (2004). The statute permits a $75.00 fee for the appointment of a court-appointed attorney in every criminal case. The fee applies once, "regardless of the number of cases which the attorney was assigned. An additional appointment fee shall not be assessed if the charges for which an attorney was appointed were reassigned to a different attorney." N.C. Gen. Stat. § 7A-455.1(e) (2023).

As this issue clearly has merit, we grant certiorari to reach the merits of Defendant's appeal.

B. Standard of Review

A trial court's decision to revoke probation is reviewed for "manifest abuse of discretion." *Singletary* at 545, 893 S.E.2d at 220.

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

When the trial court's revocation of probation relies on statutory interpretation, it is a question of law and is reviewed *de novo*. *State v. Krider*, 258 N.C. App. 111, 113, 810 S.E.2d 828, 829 (2018), *aff'd but criticized*, 371 N.C. 466, 818 S.E.2d 102 (2018). Claims alleging violations of statutory guidelines and constitutional rights are also reviewed *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation omitted).

C. New Criminal Offense

[1] The trial court may revoke probation when a defendant commits a criminal offense while on probation. N.C. Gen. Stat. §§ 15A-1343(b)(1) (2022), 15A-1344(a) (2022). That a defendant is charged with a criminal offense is "insufficient to support a finding that he committed them." *Singletary* at 546, 893 S.E.2d at 220 (quoting *State v. Hancock*, 248 N.C. App. 744, 749, 789 S.E.2d 522, 526 (2016)). To revoke probation for committing a criminal offense, there must be "some form of evidence that a crime was committed." *State v. Graham*, 282 N.C. App. 158, 160, 869 S.E.2d 776, 778 (2022). However, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 159, 869 S.E.2d at 778. The trial court only need find that a defendant "willfully violated a valid condition of probation" to revoke probation. *Singletary* at 545, 893 S.E.2d at 220 (quoting *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008)). The evidence must "reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation . . . ." *Id.*

The evidence is sufficient when "the trial court can independently find that the defendant committed a new offense." *Id.* at 546, 893 S.E.2d at 221 (quoting *Hancock*, 248 N.C. App. at 749, 789 S.E.2d at 526).

At the hearing, the trial court cited *Singletary* to support its decision. In *Singletary*, the trial court relied upon the violation report, arrest warrants, the defendant's admission to her probation officer of the crimes, and images of the defendant committing the alleged crimes to make an independent determination that it was "more probable than not Defendant committed the new criminal offense." *Id.* at 547, 893 S.E.2d at 221.

Defendant contends the trial court erred in its comparison to *Singletary* as there was no independent evidence to establish that he committed a new crime. We disagree.

The trial court was presented with the driving while impaired arrest warrant containing Defendant's photograph, the charging officer's affidavit, the intoxilyzer report showing a blood alcohol level of 0.12, and the probation officer's testimony regarding the telephone conversation she had with Defendant shortly after the incident. Although the arrest warrant is not sufficient to allow the trial court to independently determine Defendant probably committed a new offense, the charging officer's affidavit and the intoxilyzer report were sufficient to allow the trial court to independently determine Defendant probably had committed the offenses of driving while impaired. Thus, the evidence allowed the trial court to independently determine that it was "more probable than not Defendant committed the new criminal offense" and thereby violated the terms of his probation. *Id.*

D. Due Process and Right to Confrontation

[2] A probation revocation hearing is not a criminal proceeding and therefore the "Sixth Amendment right to confrontation in a probation revocation hearing does not exist." *Singletary* at 548, 893 S.E.2d at 222 (quoting *State v. Hemingway*, 278 N.C. App. 538, 548, 863 S.E.2d 279, 286 (2021)). N.C. Gen. Stat. § 15A-1345(e) "controls the probationer's right to confrontation" during a hearing. *Id.* Therefore, no constitutional argument exists; there is only a statutory argument for Defendant's violation of due process. *Id.*

Under N.C. Gen. Stat. § 15A-1345(e), during a revocation hearing, the probationer "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2022). The court may use its discretion to determine if good cause exists for denying confrontation. *Singletary*, 290 N.C. App.

at 548, 893 S.E.2d at 222 (citing *State v. Jones*, 269 N.C. App. 440, 444, 838 S.E.2d at 686, 689 (2020)). Accordingly, the issue is whether the trial court made a prejudicial error by not making a finding of good cause for denying Defendant the ability to confront the arresting officer.

While enumerating its findings in open court, the trial court cited *Singletary* explaining "failure to require an adverse witness to testify is not error if the adverse witness' testimony would have been merely extraneous evidence in light of other competent evidence presented . . . ." *Singletary* at 548, 893 S.E.2d at 222.

In *Singletary*, this Court found that when the trial court had arrest warrants, video footage, and the parole officer's testimony about the defendant's admissions, there was sufficient evidence to support the trial court's finding that the defendant had committed new crimes without any testimony from the witness at issue. *Id.* at 549, 893 S.E.2d at 223.

As in *Singletary*, here, the trial court received into evidence documents filed with the court, specifically the arrest warrant containing Defendant's picture and the intoxilyzer results indicating a breath alcohol level above the legal limit. In addition, Defendant's probation officer testified that Defendant contacted her about his arrest and admitted he had been driving. Even without the arresting officer's affidavit or testimony, the trial court had sufficient evidence to independently determine a new offense of driving while impaired had been committed. Because the arresting officer's testimony would have been merely extraneous when sufficient evidence had been admitted, the trial court did not err by omitting a finding of good cause for denying the confrontation of the arresting officer.

E. Clerical Errors

[3] Defendant's probation officer filed a violation report alleging Defendant was in violation of his probation for failing to pay court and supervision fees and committing new criminal offenses. When completing the Judgment and Commitment Upon Revocation of Probation form, the trial court checked both box four, indicating "each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence," as well as box five (a) which acknowledged Defendant's probation could only be revoked "for the willful violation of the condition(s) that he/she not commit any criminal offense . . . ." Probation can only be revoked if the probationer:

> (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3)

> violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] under N.C. Gen. Stat. § 15A-1344(d2).

N.C. Gen. Stat. § 15A-1344(a)(2023); *State v. Krider*, 258 N.C. App. 111, 113, affirmed in part, 371 N.C. 466 (2018). Thus, Defendant's failure to pay the fees alleged in the violation report is not a sufficient basis for revoking probation and the trial court's selection of box four indicating that each violation was a sufficient basis upon which the court could revoke probation was error.

Thorough review of the trial court's findings made in open court clearly indicate Defendant's probation was revoked on the basis of new criminal conduct. The trial court stated,

> The State has presented sufficient evidence to indicate that the defendant has committed new criminal conduct while he was on probation. That is [a] revocable offense. The recommendation from the probation officer is that his probation be revoked. I am going to accept the recommendation. I'm going to revoke his probation . . . .

Notwithstanding the trial court's statements, the trial court checked the wrong box. "When the trial court incorrectly checks a box on a judgment form that contradicts its findings and the mistake is supported by the evidence in the record, we may remand for correction of this clerical error in the judgment." *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019). Accordingly, we remand to the trial court for correction of the clerical error.

F. Appointment Fee for Court-Appointed Attorney

[4] Defendant next argues the trial court incorrectly assessed two appointment fees for his court-appointed attorney, and the State concedes the error. Pursuant to N.C. Gen. Stat. § 7A-455.1, a trial court may impose attorney's fees against a convicted, indigent defendant for the cost incurred by a defendant's appointed counsel. *Webb* at 100, 591 S.E.2d at 512. The statute allows for a $75.00 appointment fee for court-appointed attorney fees in every criminal case provided the fee shall be applied "only once, regardless of the number of cases to which the attorney was assigned. An additional appointment fee shall not be assessed if the charges for which an attorney was appointed were reassigned to a different attorney." N.C. Gen. Stat. § 7A-455.1(e) (2023). The plain reading of this statute shows the attorney appointment fee should only be charged once for each case and our Supreme Court has stated that "[c]osts are imposed only at sentencing . . . . " *State v. Webb* at 101,

591 S.E.2d at 513. However, here it was charged both during sentencing after Defendant pleaded guilty and at the probation revocation hearing.

Further, the attorney appointment fee statute specifically states it can only be assessed if the "person is convicted." N.C. Gen. Stat. § 7A-455.1(a) (2023). Here, Defendant had already been assessed a $75.00 fee during sentencing when he pleaded guilty in this case. Probation violation proceedings occur in the same case for which a defendant is placed on probation following a conviction but are not in themselves new convictions. Our Supreme Court has clarified, "[w]hen a defendant's probation is revoked, the sentence the defendant may be required to serve is the punishment for the crime of which he had *previously* been found guilty." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (cleaned up) (emphasis added).

Therefore, the second $75.00 appointment fee charged after Defendant's probation revocation must be removed from the calculation of civil penalties charged to Defendant. We vacate the duplicate attorney fee and remand to correct the judgment amount.

III. Conclusion

For the foregoing reasons, the trial court did not err in its determination Defendant had committed a new criminal offense warranting, in its discretion, revocation of Defendant's probation, nor did the trial court err in denying Defendant's confrontation of the arresting officer. However, the trial court erred when it charged Defendant the $75.00 attorney appointment fee twice. We vacate the duplicate attorney appointment fee and remand to the trial court for recalculation of the judgment.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
CINQUANA LAZIAH DAYREIONA MOODY, DEFENDANT

No. COA23-1020

Filed 17 December 2024

1. Motor Vehicles—felony death by vehicle—motion to dismiss—impaired driving—proximate cause of death—substantial evidence

In a prosecution on multiple charges arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err in denying defendant's motion to dismiss the charge of felony death by vehicle where the State produced substantial evidence of the two contested elements of that offense: (1) that defendant was engaged in the offense of impaired driving, as shown by the level of delta-9-tetrahydrocannabinal (THC) in her blood, data from defendant's vehicle showing that she was driving 70 miles per hour (MPH) in a 45 MPH zone and never reduced her speed before the collision, and witness testimony that he saw defendant's vehicle "fly past" him on the wrong side of the road immediately before the crash; and (2) that defendant's impaired driving was the proximate cause of the victim's death, as shown by expert testimony regarding the potential effects of THC on driving—including decreased motor coordination, slowed reaction time, impaired time and distance estimation, and a tendency to weave side to side—along with the above-described vehicle data and witness testimony indicating the defendant's driving was consistent with appreciably impaired driving.

2. Evidence—felony death by vehicle—testimony regarding notification to be on the lookout for an impaired driver—limiting instruction

In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the trial court did not err by admitting testimony from a law enforcement officer that he had been notified to be on the lookout (BOLO) for a "possibly impaired driver" shortly before seeing smoke coming from the scene of the collision. Upon defendant's objection on Evidence Rule

403 grounds, the trial court gave a limiting instruction to the jury that the BOLO testimony was only to be considered to provide context to the officer's investigation, thus ensuring that any prejudice to defendant from the reference to a "possibly impaired driver" did not substantially outweigh the testimony's probative value. Further, even assuming that admission of the BOLO testimony was error on hearsay grounds (a basis not raised by defendant at trial), defendant could not show prejudice in light of the other evidence of defendant's impaired driving and thus could not establish plain error.

3. Criminal Law—prosecutor's closing argument—failure to intervene ex mero motu—no gross impropriety

In a prosecution on charges including felony death by vehicle arising from the head-on collision of a vehicle driven by defendant with another vehicle—killing the other driver—after defendant, while speeding, crossed into oncoming traffic, the prosecutor's statement during closing argument—to which defendant did not object—noting that the victim, her child, and her family had no opportunity to realize the finality of their last interactions before the deadly collision occurred, even if improper, did not require the trial court's ex mero motu intervention because it did not rise to the level of gross impropriety.

Appeal by Defendant from judgment entered 23 January 2023 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

William D. Spence, for the defendant-appellant.

STADING, Judge.

Cinquana Laziah Dayreiona Moody ("Defendant") appeals the trial court's judgment after a jury found her guilty of felony death by vehicle, among other charges not at issue. For the reasons below, we hold that the trial court did not err in denying Defendant's motion to dismiss the felony death by vehicle charge, did not plainly err or abuse its discretion in admitting Officer Jacob Huneycutt's testimony, and did not abuse its discretion by not intervening *ex mero motu* in the State's closing argument.

I. Background

On the morning of 10 September 2020, Defendant crashed her vehicle head-on into another vehicle driven by Ms. Brianna Simpson. The collision occurred when Defendant crossed from her lane into the oncoming lane occupied by Ms. Simpson. Defendant survived but Ms. Simpson was pronounced dead at the hospital afterward. The first witness on the scene of the accident, Joshua Whitley, saw Defendant's black SUV "flying" past him at over seventy miles per hour immediately prior to the collision. The posted speed limit was forty-five miles per hour. Mr. Whitley also observed that Defendant had crossed into the furthest lane of oncoming traffic.

Around the same time, Officer Huneycutt of the Kannapolis Police Department, received a "be on the lookout" ("BOLO") notification from police dispatch about a "possibly [ ] impaired driver." Shortly after receiving the notification, Officer Huneycutt "saw smoke up in the distance." Upon approaching the smoke's location, he observed two totaled vehicles—a white sport utility vehicle ("SUV") and a black SUV. Sergeant Matthew Hoehman of the Kannapolis Police Department also arrived at the scene to secure it for further investigation. Sergeant Hoehman obtained a search warrant to draw Defendant's blood for testing and to recover the SUVs' respective event data recorders ("EDR"). Defendant's EDR confirmed that, immediately prior to impact, she failed to remove her foot from the gas pedal or press the brake, and thus failed to decelerate below seventy miles per hour. Ms. Simpson's EDR, on the other hand, confirmed that she sharply decelerated to forty-one miles per hour and attempted to swerve away from Defendant.

Defendant's blood test showed the presence of delta-9-tetrahydro cannabinal ("THC"), the primary psychoactive substance in marijuana. More precisely, the results confirmed a THC concentration of 1.4 nanograms per milliliter of blood ("ng/ml") with a margin-of-error of ± 0.3 ng/ml. One of the State's expert witnesses testified that the test registers any THC amount above 1.0 ng/ml but cannot "connect a particular concentration of THC to a level of impairment." The witness also testified:

> THC can cause euphoria, reduced inhabitations, drowsiness, sedation, disorientation and confusion. And specifically with respect to driving, it can cause . . . decreased motor coordination, subjective sleepiness. It can cause lateral travel, meaning you're weaving from left to right. It can cause slowed reaction time, and it can cause impaired time and distance estimation, meaning it can cause you to

> misjudge how close you are to another vehicle. It can also cause reduced ability to maintain headway, meaning keeping track of your surroundings and . . . what all is around you as you're driving down a roadway.

Another expert witness testified "a potentially impairing side effect of marijuana" is "a lack of awareness of where you are as far as lane position, whose lane you're in, and lack of awareness of the vehicle you're headed toward."

Both in pretrial proceedings and at trial, the court denied Defendant's motion to dismiss the felony death by vehicle charge for lack of substantial evidence. Additionally, during the trial, the court admitted, over Defendant's objection, Officer Huneycutt's testimony about the BOLO. Furthermore, during closing arguments, a portion of the prosecutor's closing referenced Ms. Simpson's family. After the trial court entered judgment, Defendant entered her notice of appeal.

II. Jurisdiction

Under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023), this Court has jurisdiction to consider Defendant's appeal of the trial court's judgment.

III. Analysis

Defendant raises three issues on appeal: Whether the trial court (1) erred in denying Defendant's motions to dismiss her felony death by vehicle charge and instead allow the State's case to go to the jury; (2) plainly erred or abused its discretion in admitting Officer Huneycutt's testimony concerning a BOLO for a "possibly [ ] impaired driver;" and (3) abused its discretion by not intervening *ex mero motu* during the State's closing arguments.

A. Motion to Dismiss

[1] First, Defendant argues that the trial court erred by denying her motion to dismiss her felony death by vehicle charges in favor of allowing the State's case to go to the jury.

We review this question of law *de novo*. *See State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). When considering a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299

N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Evidence is judicially substantive if it would "persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citation omitted). A trial court must consider all evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom [.] . . ." *Powell*, 299 N.C. at 99, 261 S.E.2d at 118.

In relevant part, a person commits felony death by vehicle if they: (1) unintentionally cause the death of another person (2) were engaged in the offense of impaired driving, and (3) the commission of the offense of impaired driving is the proximate cause of the death. N.C. Gen. Stat. § 20-141.4(a1)(1)–(3) (2023). Since Defendant stipulated to unintentionally causing the victim's death in the crash, we address only the latter two felony death by vehicle elements. *Id.* § 20-141.4(a1)(2)–(3). For the reasons below, this Court holds that the State produced substantial evidence of these two elements necessary to survive Defendant's motion to dismiss.

1. Impaired Driving

Defendant asserts that the State did not provide substantial evidence of her impairment because it could not pinpoint when or how much THC she consumed before the collision. More specifically, Defendant argues that there was insufficient evidence that she had consumed a sufficient quantity of marijuana as to cause her to lose control of her bodily or mental faculties to any extent. After reviewing the record, we disagree.

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance." *Id.* § 20-138.1(a)(1) (2023). Under our statutory scheme, an "Impairing Substance" is defined as: "Alcohol, *controlled substance under Chapter 90 of the General Statutes*, *any drug or psychoactive substance capable of impairing a person's physical or mental faculties*, or any combination of these substances." *Id.* § 20-4.01(14a) (emphasis added). "Under the Influence of an Impairing Substance" is statutorily defined as "[t]he state of a person having his physical or mental faculties, or both, *appreciably impaired by an impairing substance*." *Id.* § 20-4.01(48b) (emphasis added).

Both statutory and case law contemplate legal impairment arising under the influence of substances other than alcohol. *E.g.*, *id.* § 20-138.1(a)(1) ("while under the influence of an impairing substance"); *State v. Norton*, 213 N.C. App. 75, 81–82, 712 S.E.2d 387, 392 (2011)

(upholding an impaired driving conviction based in part on cocaine metabolites found in a post-hospitalization blood test). The mere consumption or use of an impairing substance does not necessarily render someone impaired. *See State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) ("An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired."). Indeed, "[t]he effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *Id.* However, "evidence that a defendant consumed an impairing substance and then drove in a faulty manner is sufficient *prima facie* to show appreciable impairment." *Norton*, 213 N.C. App. at 80, 712 S.E.2d at 391.

When addressing impaired driving in the context of alcohol, our Supreme Court held that evidence of consumption of that impairing substance, "*standing alone*, is no evidence that [a driver] is under the influence of an intoxicant." *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000) (quoting *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970) (brackets in original). However, "the fact that a motorist has been drinking, when considered in *connection with faulty driving* . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [the impaired driving statute]." *Rich*, 351 N.C. at 398, 527 S.E.2d at 306 (citations and internal quotation marks omitted, emphasis added). Although the present matter does not involve alcohol, the text of our impaired driving statute applies to "impairing substance[s]," thereby logically extending the holding of *State v. Rich* to marijuana consumption. *See id.*; *see also Norton*, 213 N.C. App. 75, 712 S.E.2d 387.

With respect to the impaired driving element, Defendant argues that the amount of THC shown in her system, without more evidence, is insufficient to survive a motion to dismiss. However, this view disregards that the State offered additional circumstantial evidence to meet its burden. The State did not only offer direct evidence of THC in Defendant's blood at the time of the crash. It also provided evidence of "faulty driving . . . indicating an impairment of physical or mental faculties." *Id.* (citation omitted). For example, the EDR from Defendant's SUV showed that she did not decelerate below seventy miles per hour at any point before impact in the far-left opposite lane, while the victim's own recorder showed both a sharp deceleration and an attempt to swerve at the same time. Also, Mr. Whitley witnessed Defendant's SUV "fly past" him "completely on the wrong side" of the road immediately before the crash. Based on the results of Defendant's blood test and the additional supporting circumstantial evidence, we hold that the

State adduced substantial evidence of impaired driving to withstand Defendant's motion to dismiss.

2. Proximate Cause

Defendant also asserts that the State did not provide substantial evidence that her impaired driving proximately caused Ms. Simpson's death. After careful consideration, we disagree.

A proximate cause is one:

> (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

State v. Smith, 289 N.C. App. 707, 716, 891 S.E.2d 459, 465 (2023) (quoting *State v. Hall*, 60 N.C. App. 450, 454–55, 299 S.E.2d 680, 683 (1983)). To establish proximate cause, "the act of the accused need not be the immediate cause of the death[;] [the accused] is legally accountable if the direct cause is the natural result of his criminal act." *Id.* at 716, 891 S.E.2d at 466 (citation omitted and brackets in original). If a person "of ordinary prudence could have foreseen an accident resulting from [impaired] driving," then there is substantial evidence to support a finding that the defendant's impaired state was a proximate cause of the victim's death. *State v. Leonard*, 213 N.C. App. 526, 530-31, 711 S.E.2d 867, 871 (2011). The evidence is considered "in the light most favorable to the State, with all reasonable inferences drawn in the State's favor[.]" *Id.* at 530, 711 S.E.2d at 871 (citation omitted).

Proximate cause is also satisfied if there is more than one cause of the victim's death or injury and the defendant's impaired driving is *one of those causes*. *See id.* ("Defendant's violation [of the impaired driving statute] . . . need not be the *only* proximate cause of a victim's injury in order for defendant to be found criminally liable; a showing that defendant's action of driving while under the influence was *one* of the proximate causes is sufficient."); *see also State v. Cummings*, 301 N.C. 374, 377, 271 S.E.2d 277, 279 (1980) ("There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death."); *see also State v. Bethea*, 167 N.C. App. 215, 221, 605 S.E.2d 173, 178–79 (2004) ("The defendant's acts need not have been the last or nearest cause. It is sufficient if they concurred

with some other cause, acting at the same time, which in combination with it proximately caused the victim's death.").

Again, addressing proximate cause, the State met its burden of production to survive Defendant's motion to dismiss. The crucial question here is whether, pursuant to the evidence, a reasonable juror could be persuaded to accept the conclusion that—under the unbroken, natural, and continuous sequence—Defendant's impaired driving was the proximate cause of Ms. Simpson's death. *See* N.C. Gen. Stat. § 20-141.4(a1)(2)–(3); *see also Smith*, 289 N.C. App. at 716, 891 S.E.2d at 466; *see also Leonard*, 213 N.C. App. at 531, 711 S.E.2d at 871 (holding that a reasonably prudent person could foresee that driving under the influence of an impairing substance could lead to the injury of another.). At trial, expert testimony provided THC is an impairing substance that "can cause . . . decreased motor coordination, . . . lateral travel, meaning you're weaving from left to right[,] . . . slowed reaction time, . . . [and] impaired time and distance estimation, meaning it can cause you to misjudge how close you are to another vehicle." All of these factors are present: The evidence from the EDRs and testimony of other witnesses showed that Defendant's driving was consistent with such impairment—she left her lane of travel crossing "completely on the wrong side" of the road, was "flying" seventy-three miles per hour in a forty-five mile-per-hour zone, failed to decelerate, failed to initiate her SUV's brakes, and collided head-on with Ms. Simpson's SUV, which in turn caused Ms. Simpson's death. Considering the evidence in the light most favorable to the State, we hold that the State presented substantial evidence of proximate causation to withstand Defendant's motion to dismiss. *Leonard*, 213 N.C. App. at 531, 711 S.E.2d at 871.

B. BOLO Testimony

[2] Second, Defendant argues that the trial court abused its discretion or plainly erred by admitting Officer Huneycutt's testimony concerning the BOLO notification. Defendant first asserts that the probative value of the testimony is substantially outweighed by the danger of unfair prejudice under N.C. Gen. Stat. § 8C-1, R. 403 (2023). Defendant further argues that this evidence amounted to inadmissible hearsay. *Id.* § 8C-1, R. 801–02. For the reasons below, we are unable to discern reversible error by the trial court's admission of the testimony.

1. Rule 403 Balancing

Defendant asserts that Officer Huneycutt's BOLO testimony prejudiced her to the extent that it violated Rule 403. After careful consideration, we disagree.

During Defendant's pretrial motion, she argued that the admission of the BOLO testimony into evidence would violate Rule 403's balancing test—challenging the introduction of Officer Huneycutt's testimony on this topic. The trial court heard arguments and subsequently denied Defendant's motion. Thereafter, at trial, Officer Huneycutt testified that he received a BOLO for a "possibly [ ] impaired driver." Defendant's counsel objected but failed to state the specific grounds; however, the grounds are apparent upon review of the record. *State v. McLymore*, 380 N.C. 185, 192, 868 S.E.2d 67, 73 (2022) (quoting 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."). The following colloquy took place during Officer Huneycutt's testimony:

> [STATE'S ATTORNEY]: How do you remember that day?
>
> [OFFICER HUNEYCUTT]: It was one of the worst days I've had, quite honestly, in law enforcement. I was traveling on the way home. And as I was travelling down Lane Street, we got a BOLO over the radio just saying that there was possibly an impaired driver on 85.
>
> [DEFENDANT'S ATTORNEY]: Objection, Alford.
>
> THE COURT: Overruled. Thank you.

Although Defendant did not clearly state the basis for her objection, we gather from the context of the record that the objection was rooted in Rule 403. *See* N.C. R. App. P. 10(a)(1). Accordingly, we review the trial court's ruling for an abuse of discretion. *See State v. Lail*, 294 N.C. App. 206, 903 S.E.2d 204, 208 (2024) ("We review Rule 403 rulings for abuse of discretion, which 'results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' ") (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Under Rule 403, a trial court may exclude otherwise relevant evidence "if its probative value is *substantially* outweighed by the danger of unfair prejudice . . . ." *Id.* § 8C-1, R. 403 (emphasis added). "Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. France*, 94 N.C. App. 72, 76, 379 S.E.2d 701, 703 (1989) (citations and internal quotation marks omitted). "Rule 403 calls for a balancing of the proffered evidence's probative value against its

prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer*, 317 N.C. 87, 93–94, 343 S.E.2d 885, 889 (1986). The rule does not forbid a trial court from admitting relevant evidence even if "it may tend to prejudice the accused or . . . excite sympathy for the cause of the party who offers it." *State v. Mayhand*, 298 N.C. 418, 422, 259 S.E.2d 231, 235 (1979).

Here, Defendant maintains that the admission of the BOLO testimony prejudiced her because it impermissibly could persuade the jury to infer that she was driving impaired prior to the crash. However, the record demonstrates that the trial court adequately considered the possibility of prejudice, limited the scope in which the State could offer the evidence, and additionally offered to give a limiting instruction to that effect upon request:

> THE COURT: All right. We are out of the presence of the jury and the jury pool. From yesterday, we had, I believe, one outstanding issue left for me to address. And that is an objection to the information about the 911 call with regard to a possible impaired driver. After considering all of the arguments, in my discretion I'm going to overrule the objection with a limitation. I will allow the information be presented for the matter . . . other than for the truth of the matter asserted, I will allow it to provide context to . . . the officer's investigation. I will, however, consider offering a limiting instruction if you all think that would be helpful. And I'll allow you all to consider that in responding at a later time if you all would like for me to give a limiting instruction to the jury that it's not being offered for the truth of the matter asserted but for the purpose of the investigation, what the officer did next.

Thus, the record clarifies that the trial court recognized the possibility of prejudice and limited the purpose for which the State could offer it "to provide context to . . . the officer's investigation."

Turning next to Officer Huneycutt's testimony, the record supports the purported use of this testimony—that it demonstrated "what he did next." Indeed, after he testified to receiving the BOLO, Officer Huneycutt stated: "I heard it. Just a few moments later I was travelling down the road, and I saw smoke up in the distance. As I approached the smoke, it was apparent there had been a motor vehicle crash." After providing this testimony, Officer Huneycutt did not mention the BOLO again. We

discern no merit to Defendant's contention that the prejudicial value of the BOLO testimony outweighed its probative value.

2. Hearsay

Defendant next asserts that the trial court committed plain error because Officer Huneycutt's BOLO testimony was inadmissible hearsay. We disagree.

" '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, R. 801(c) (emphasis added). "However, out of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Thomas*, 350 N.C. 315, 339, 514 S.E.2d 486, 501 (1999).

Since Defendant did not raise any hearsay arguments or objections at the trial, we review this issue for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error."). To demonstrate plain error, a defendant must show "that a fundamental error occurred at trial. A fundamental error requires a defendant to establish prejudice, *i.e.*, that the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Carter*, 255 N.C. App. 104, 106, 803 S.E.2d 464, 466 (2017) (internal citations and quotations omitted).

Assuming, for purposes of our analysis, that it was error to admit the testimony because it was hearsay, Defendant, still, is unable to establish prejudice. *Id.* As discussed at-length above, other pieces of evidence sufficiently support that Defendant was driving while impaired. Thus, this BOLO statement of "possibly [ ] impaired driver" did not amount to such a fundamental error as to have a probable impact on the jury's verdict. *Id.*

C. Intervention *Ex Mero Motu*

[3] Third, Defendant argues that the trial court abused its discretion by not intervening *ex mero motu* in the State's closing argument to correct its allegedly emotional and improper appeals to the jurors' passions. In making this challenge, Defendant points to the State's references at closing "to the victim, her child, and her family were clearly improper appeals to sympathy and pity, and clearly calculated to prejudice the jury."

During a closing argument, an attorney "may not become abusive, inject her personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of

the defendant, or make arguments on the basis of matters outside the record . . . ." N.C. Gen. Stat. § 15A-1230(a) (2023). This Court subjects a trial court's supervision of closing arguments to an abuse of discretion standard. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). Our courts analyze the contextual discretion here through a two-step inquiry: (1) whether the prosecutor made an improper argument in fact and, if so, (2) whether the impropriety so grossly prejudiced the jury as to deny the defendant due process. *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 468 (2017). We reverse a conviction on the basis of a prosecutor's closing argument only if a defendant can show "both an improper argument and [resulting] prejudice . . . ." *Id.*

The following portion of the State's closing argument is challenged:

> We've heard a lot of science and a lot of numbers. You've heard a lot of People testify about a lot of things, and most of it has been about the Defendant. But what you don't hear about nearly enough and really what this case comes down to is that empty sear. It comes down to [Ms. Simpson].
>
> On September 10, 2020, [Ms. Simpson] didn't know it was the last time that her brother and sister would try to wake her up in the morning. [S]he didn't know it was the last time she would hug her daughter [ ] goodbye. She didn't know it was the last time she'd kiss her mother before she left or that she wouldn't see her dad when he got home from work.
>
> . . . .
>
> On that day, [Ms. Simpson's] final moments were spent on the side of Lane Street in a mass of mangled metal and smoke. [Defendant] had a choice and she chose marijuana. [Defendant] had a choice and she cho[se] to drive. [Ms. Simpson] had no choices. But you do. You really have the last choice and the only one that matters.
>
> You have the choice to find [Defendant] responsible and guilty of exactly what she did. [Ms. Simpson] deserves it, and that's what justice requires. And that's what I'm asking you to do. Find [Defendant] guilty of felony death by motor vehicle."

After reviewing the record, for the reasons below, we hold that trial court did not abuse its discretion in failing to intervene *ex mero motu* in the State's closing arguments.

1. Gross Impropriety

Within the bounds of Section 15A-1230, "prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all *reasonable* inferences drawn therefrom." *Huey*, 370 N.C. at 180, 804 S.E.2d at 469 (emphasis added) (internal quotation marks and citation omitted). A prosecutor's argument is proper when "it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987).

In this case, even if we assume that the prosecutor's inferential comments are improper statements by the State in service of its closing argument—mere impropriety is not enough; the comments must be so grossly improper and prejudicial as to deny the defendant due process protections. *Huey*, 370 N.C. at 180, 804 S.E.2d at 469 (citations omitted). To determine gross impropriety, we consider the prosecutor's statements "in context and in light of the overall factual circumstances to which they refer." *Id.* at 180, 804 S.E.2d at 470 (citations omitted). "When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470 (citations omitted). The inquiry must ultimately focus on "whether the jury relied on the evidence or on prejudice enflamed by the prosecutor's statements." *Id.* at 185, 804 S.E.2d at 473.

Here, the prosecutor's closing argument "did not manipulate or misstate the evidence[;]" rather, it focused on a walkthrough of Section 20-138.1(a)'s elements that the State had to prove to the jury beyond a reasonable doubt. *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993). Regularly infusing her argument with references to "reason and common sense," the prosecutor explained appreciable impairment, the multiple ways Defendant's actions met the proximate cause requirement, and THC as falling within the definition of "an impairing substance." These strategic choices by the prosecutor sufficiently reduced the likelihood that any potentially inflammatory statements influenced the jury's ultimate verdict. Moreover, we consider the substantial weight of the evidence against Defendant as a factor. *Id.* We therefore hold that the prosecutor's comments about the victim's family, even if improper, did not amount to a denial of Defendant's due process right to a fair trial. *See Huey*, 370 N.C. at 180, 804 S.E.2d at 470; *see also McCollum*, 334 N.C. at 224–25, 433 S.E.2d at 152–53.

IV. Conclusion

For the reasons discussed above, we hold that the trial court did not err in denying Defendant's motion to dismiss the felony death by vehicle charge, neither plainly erred nor abused its discretion in admitting Officer Huneycutt's BOLO testimony, and did not abuse its discretion in not intervening *ex mero motu* in the State's closing argument.

NO ERROR.

Chief Judge DILLON and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
QUASHAUN MELSUN REEL, DEFENDANT

No. COA23-711

Filed 17 December 2024

Search and Seizure—motion to suppress—knock and talk—warrantless search—probable cause—exigent circumstances

In a prosecution on drug and weapon charges arising from an officer's "knock and talk" at defendant's house, the trial court properly denied defendant's motion to suppress where competent evidence supported the court's factual findings regarding the "knock and talk," which in turn supported the court's conclusions of law. Specifically, the court properly concluded that the "knock and talk" did not rise to the level of a Fourth Amendment search where the officer approached the home in a manner consistent with societal expectations when he followed a visitor to the front door, wearing attire that clearly identified him as a police officer. The fact that he had parked adjacent to the home, entered defendant's property through the side yard, and stood behind the visitor at the front door did not transform the "knock and talk" into a search. Further, the subsequent warrantless search of the house: (1) was supported by probable cause where the officer detected the strong odor of marijuana emanating from the residence; and (2) fell under the exigent circumstances exception to the warrant requirement because the officer believed drugs could be destroyed if he left to obtain a warrant, since defendant tried to prevent the officer from entering after he identified himself.

Judge THOMPSON dissenting.

Appeal by defendant from judgment entered 3 February 2023 by Judge William A. Wood II in Superior Court, Guilford County. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant-appellant.

STROUD, Judge.

This appeal arises from the trial court's denial of a motion filed by Defendant in which he sought to suppress evidence underlying several drug and weapon charges brought against him. Based on the applicable standard of review, we must overrule Defendant's arguments and affirm the trial court's order.

I. Factual Background and Procedural History

On 14 September 2020, Defendant was indicted for the following drug related charges at issue in this appeal: in case file 20 CRS 79581: trafficking a schedule I controlled substance (heroin), possession with intent to sell or deliver a schedule I controlled substance (heroin), possession with intent to sell or deliver a schedule I controlled substance (MDMA); in case file 20 CRS 79582: possession with intent to sell or deliver a schedule VI controlled substance (marijuana), possession of a schedule VI controlled substance (marijuana), and possession of drug paraphernalia; and in case file 20 CRS 79583: possession with intent to sell and deliver a schedule I controlled substance (heroin) within 1000 feet of a school.

On 10 May 2021, Defendant was indicted on several more charges: in case file 21 CRS 70148, possession of a firearm by a felon; in 21 CRS 70149, possession with intent to sell or deliver a schedule VI controlled substance (marijuana) and carrying a concealed firearm; and in case file 21 CRS 70150, maintaining a dwelling to keep and sell a controlled substance (heroin).[1]

1. On 10 October 2022, superseding indictments were filed in 20 CRS 79581, 20 CRS 79583, and 21 CRS 70150, changing the controlled substance from heroin to fentanyl. Also on 10 October 2022, an additional indictment was filed in 22 CRS 26050, charging Defendant with two counts of trafficking between four and thirteen grams of fentanyl.

On 14 September 2022, Defendant filed a motion to suppress statements he made and contraband discovered during a search of Defendant's residence on 6 August 2020. That motion and other pretrial matters came on for hearing on 6 December 2022 in Superior Court, Guilford County. On 12 December 2022, the trial court entered an order denying the motion to suppress; the order contained three dozen findings of fact.

The unchallenged portions of the trial court's findings indicate that on 24 July 2020, the High Point Police Department ("HPPD") received a complaint regarding "drugs[and]narcotics" at 1506-A Leonard Avenue. On 4 August 2020, an anonymous tip received through Crime Stoppers alleged that illegal drugs were being sold by an unnamed male at the same residence, with "people . . . in and out of the residence constantly, day and night." Both reports were passed along to HPPD Officer Brian Hilliard[2] with a directive to "check the address[.]"

Hilliard learned that Defendant was listed on the utility accounts for the address and decided to conduct a "knock and talk" at the residence on 6 August 2020. On that date, when Hilliard and two other officers arrived at Defendant's home in an unmarked police car, they saw no cars in the driveway and no apparent activity. The officers decided to drive around the block, eventually arriving on a road that runs along the side of the home, where they parked. When a grey Acura pulled into the driveway of the home, Hilliard got out of his car and walked toward the female visitor who got out of the car. Hilliard spoke to the visitor, although she did not respond to him. Hilliard then followed the visitor to the front door of the home.

Defendant answered the door after the visitor opened the storm door and knocked. Hilliard, who was standing "just behind" the visitor, two feet from the doorway, "detected the strong odor of marijuana emanating from the residence[.]" The visitor entered the home, and the door was closed. Hilliard perceived that the door was being braced to prevent entry, and the combination of these circumstances caused Hilliard to believe that "drugs could be destroyed if he did not immediately gain entry."

Hilliard then verbally identified himself as a law enforcement officer and gave a command for the door to be opened. When that command was not heeded, he attempted but failed to "shoulder" the door open.

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2. The order indicates that at the time the suppression hearing, Hilliard held the rank of lieutenant. At the time of his encounter with Defendant, however, Hilliard was an officer with the HPPD street crimes unit.

Another officer was able to kick the door open, and officers entered the home. Defendant and the visitor were handcuffed and detained, and officers discovered "[a] bag of marijuana, a bag of pills[,] and a digital scale were in plain view inside the residence directly beside the front door."

Based on its factual findings, the trial court made twenty-three conclusions of law, including that the "knock and talk" by Hilliard did not rise to the level of a Fourth Amendment search and that probable cause and exigent circumstances justified the warrantless search of Defendant's home. Accordingly, the trial court held that Defendant's constitutional rights were not violated and denied his motion to suppress.

Defendant reserved his right to appeal the denial of his motion to suppress. On 26 January 2023, he pled guilty, under an agreement with the State, to five charges: two counts of trafficking fentanyl and one count each of possession with the intent to sell or deliver fentanyl, possession with intent to sell or deliver MDMA, and possession of a firearm by a felon. The remaining charges were dismissed, and the trial court consolidated the convictions for sentencing, imposing an active term of 225-282 months and a fine of $500,000.

II. Analysis

Defendant argues that the trial erred by denying his motion to suppress under the "knock and talk" exception to the Fourth Amendment and by concluding that the officers' warrantless entry into Defendant's home was justified by probable cause and exigent circumstances.

A. Standard of Review

"In reviewing a motion to suppress evidence, [the Court of Appeals] examines whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law. Conclusions of law are reviewed de novo." *State v. Alvarez*, 385 N.C. 431, 433, 894 S.E.2d 737, 738 (2023) (citations omitted). In conducting this review, "we examine the evidence introduced at trial in the light most favorable to the State." *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citations omitted).

A reviewing court is "bound by the trial court's findings of fact if such findings are supported by competent evidence in the record," *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997), and "[c]onclusions of law that are correct in light of the findings are also binding on appeal[,]" *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996) (citation omitted). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard

all of the testimony and observed the demeanor of the witness." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

B. Challenged Findings of Fact

Defendant contends that all or portions of four findings of fact in the suppression order are not supported by competent evidence.

Finding of fact 11- Defendant first maintains no competent evidence indicated that Hilliard parked "in the same area" as the Acura, which he maintains had parked in the driveway of his home. Defendant notes that Hilliard's testimony and a surveillance video admitted at the suppression hearing indicate that Hilliard approached the home from the side. We note that the preceding finding, finding of fact 10, identifies Defendant's home as a duplex and states that the Acura "pulled into the driveway or adjacent parking area[.]" Hilliard testified that he had parked in a "driveway, slash, cut-through that cuts through a cemetery that runs directly beside" Defendant's home. This description is consistent with a photo of Defendant's home included in Defendant's brief, which shows the "cut-through" as running roughly as close to the left side of the duplex as the driveway does on the right side of the building. For purposes of our resolution of Defendant's appeal, we will presume the trial court's reference to "the same area" referred to the area "directly beside" Defendant's home where the parties agree Hilliard was in fact parked and from which it is undisputed he saw the Acura pull into Defendant's driveway/parking area.

Similarly, Defendant takes issue with the court's finding that Hilliard "approached the Acura," emphasizing that "[t]his is not seen on the surveillance video, which shows Hilliard walking up from a different direction (the left side of the house) and walking straight to the front door." Hilliard testified that he "approached the Acura," which he described as being parked "approximately . . . ten feet from" Defendant's front door. Based on the testimony, the video showing the layout of the area, and the photo in Defendant's brief, for purposes of resolving this appeal, we read this finding of fact as indicating that Hilliard walked toward the Acura and then—as stated in unchallenged findings of fact 13, 14, and 17—followed closely behind the Acura's driver as she approached Defendant's front door.

Findings of fact 12 and 25- Defendant contends that although the trial court found that during the encounter with Defendant, Hilliard was wearing police attire that said "POLICE" across the chest, the surveillance video shows that Hilliard was wearing a plain black police uniform. The transcript from the suppression hearing reveals that

Hilliard testified that he and the other officers in the street crimes unit of the HPPD wear "not a typical police uniform. It is a blue or black shirt with a police vest, a black vest that says 'police' across the chest, and BDU-style pants." Nonetheless, the State concedes that the word "POLICE" appeared on the back rather than the front of the officers' uniforms as depicted in the surveillance video.

However, the surveillance video also reveals that the officers were in police uniforms with badges on the front and insignia on the sleeves. We further note that Defendant, Hilliard, and the trial court agree on the point critical to our analysis below—that Hilliard was wearing clothing which clearly identified him from the front as a law enforcement officer.

Finding of fact 21- The court found that "the door was immediately slammed shut" after the female visitor entered Defendant's home. Defendant contends that "[t]he surveillance video shows that [Defendant] attempted to close the door but it was stopped by Hilliard at first. [Defendant] then successfully closed it." Hilliard testified that Defendant "immediately slammed the door" after the visitor entered—and after Hilliard had already detected "a strong odor of marijuana" "waft[ing]. . . from. . . the inside of the house[.]" But the trial court's finding of fact is supported by the evidence, whether Defendant "immediately slammed the door" completely shut or immediately tried to close the door, was briefly stopped by Hilliard, and then succeeded in closing the door completely.

C. Challenged Conclusions of Law

Defendant next identifies six conclusions of law which he contends are erroneous:

> 6. Officer Hilliard's approach to the front entrance of 1506-A Leonard Ave., was legal in every way.
>
> . . . .
>
> 17. Officer Hilliard was in police attire with the word "POLICE" emblazoned on his chest and positioned approximately two feet from the doorway when it was opened by [Defendant]. Upon his slamming the door shut immediately when the female entered the residence, it was objectively reasonable of the officers to believe that the possessors of the contraband were aware of the close presence of law enforcement and were intent on moving or destroying that contraband.

> 18. Given the totality of the circumstances, sufficient exigent circumstances existed for the officers to force entry into the residence located at 1506-A Leonard Ave. without a search warrant.
>
> 19. The officers had both probable cause and exigent circumstances to force entry into 1506-A Leonard Ave. on August 6, 2020, without a search warrant.
>
> 20. Defendant's rights guaranteed by the Fourth Amendment to the United States Constitution were not violated.
>
> 21. None of Defendant's constitutional rights were violated.

Defendant argues these conclusions are not supported in that "the trial court erred by denying [Defendant's] motion to suppress under the 'knock and talk' exception where no implied license existed to cut through [Defendant's] side yard and attempt to follow an invited guest into his home" and "by holding that the officers' warrantless entry into [Defendant's] home was supported by probable cause and justified by exigent circumstances." As explained below, we find these contentions without merit.

1. Knock and Talk Exception to the Fourth Amendment

As the United States Supreme Court has stated, "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 185 L. Ed. 2d 495, 501 (2013) (citation and quotation marks omitted). This constitutional protection includes "the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes." *Id.* (citation and quotation marks omitted).

"A 'knock and talk' is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Marrero*, 248 N.C. App. 787, 790, 789 S.E.2d 560, 564 (2016) (citation omitted). This procedure is constitutionally permissible because "no search of the curtilage [of a home] occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). "Put another way, law enforcement may do what

occupants of a home implicitly permit anyone to do, which is approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *State v. Huddy*, 253 N.C. App. 148, 151-52, 799 S.E.2d 650, 654 (2017) (citation and quotation marks omitted).

This Court has emphasized, however, that "law enforcement may not use a knock and talk as a pretext to search the home's curtilage. . . . [and] the knock and talk doctrine does not permit law enforcement to approach *any* exterior door to a home." *Id.* at 152, 799 S.E.2d at 654 (emphasis in original) (citations omitted). In *Huddy*, for example, an officer was held to have exceeded the scope of a knock and talk where he "ran a license plate on a car whose license plate was not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to 'clear' the sides of the home before approaching the back door." *Id.* at 153, 799 S.E.2d at 655.

This Court also found that officers exceeded the scope of a constitutional knock and talk where they "cut across a person's front yard, swiftly passing a no trespassing sign, and emerge from trees they were using for cover and concealment in order to illuminate, surround, and stop [the resident's] departing car" on a dark winter evening. *State v. Falls*, 275 N.C. App. 239, 240, 853 S.E.2d 227, 229 (2020). One of the officers testified about their route of approach:

> The sidewalk would be what anybody that was going door-to-door selling anything would take, they would go down --up the little sidewalk that jets off the driveway.
>
> There was not a worn path in the grass where we walked, or anything like that. I would think anybody, especially if you parked your vehicle on the roadway, you would go down the driveway. We did -- just because of the freedom of movement, and stuff, we're not going to block the driveway. We don't like parking our patrol cars on the road. So that's why we took the path we did. If you were in a mail truck you would probably stop at the driveway and go down the sidewalk to the door. But that's not the path that we took.

Id. at 242, 853 S.E.2d at 230-31 (brackets and ellipses omitted).

This Court emphasized that "[t]he scope of the implied license to conduct a knock and talk is governed by societal expectations, and when law enforcement approach a home in a manner that is not customary, usual, reasonable, respectful, ordinary, typical, nonalarming,

they are trespassing, and the Fourth Amendment is implicated." *Id.* at 248, 853 S.E.2d at 234 (citation and quotation marks omitted). The Court then noted three pertinent circumstances in that case "[r]elevant to distinguishing between a knock and talk and a search[:] . . . how law enforcement approach the home, the hour at which they did so, and whether there were any indications that the occupant of the home welcomed uninvited guests on his or her property." *Id.* In *Falls*, because the officers had approached the residence in dark, unmarked clothing, after darkness had fallen, through the side yard and past a "no trespassing" sign rather than by the driveway or walkway to the front door, this Court held that "[t]he officers . . . strayed beyond the bounds of a knock and talk[.]" *Id.* at 254, 853 S.E.2d at 238.

We agree with Defendant that the analysis in *Falls* is helpful, but we find the facts of that case easily distinguishable from the matter before us. Defendant emphasizes that Hilliard parked his car "on an adjacent street to the left of his house, out of view," walked through Defendant's side yard, and then "once at the door, . . . stood less than two feet away from [Defendant's] invited guest." Defendant maintains these acts "flouted 'background social norms' and exceeded what a 'reasonably respectful citizen' would do[.]" We disagree.

The street or "cut-through" where the officers parked was directly adjacent to Defendant's home, and nothing suggested that parking on that street as opposed to the street in front of the home or in its driveway was unusual, much less unreasonable or not respectful. Additionally, although Hilliard cut across the side yard of the building to reach the path to the front door, this Court in *Falls* noted that "there may be circumstances where cutting across a person's yard does not exceed the scope of the implied license[.]" *Id.* at 253, 853 S.E.2d at 237 (citation omitted). Hilliard testified that he approached the visitor as she made her way to Defendant's front door, speaking to her, did not stop or cut in front of her, and then followed her to the front door. Hilliard's testimony that he stood about two feet behind the visitor suggests that Hilliard may have been holding open a storm door which the visitor had opened as she knocked on Defendant's door.

In any event, other than his walking through Defendant's side yard, nothing about Hilliard's approach is like that of the officers in *Falls*. *See id.* at 242, 853 S.E.2d at 230-31. The visit was made during the day, Hilliard's attire indicated that he was a law enforcement officer, and he followed the visitor to the front door. Considering "societal expectations," *id.* at 248, 853 S.E.2d at 234, Hilliard approached Defendant's house in a way that was "customary, usual, reasonable, respectful,

ordinary, typical, [and] nonalarming," *Id.* (citation and quotation marks omitted). Thus, Hilliard did not exceed the scope of a knock and talk and transform his presence at Defendant's front door into a search for Fourth Amendment purposes.

Accordingly, we turn to whether, during the knock and talk, circumstances arose which justified and made constitutionally permissible Hilliard's subsequent warrantless entry into Defendant's home.

2. Probable Cause and Exigent Circumstances

> The Fourth Amendment dictates that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement. The existence of probable cause and exigent circumstances is one such exception.

Marrero, 248 N.C. App. at 794, 789 S.E.2d at 566 (citations, quotations marks, and ellipsis omitted).

"Probable cause refers to those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted). As the State notes, this Court has held that the "plain smell" of marijuana emanating from a location alone "provide[s] sufficient probable cause to support a search[.]" *State v. Corpening*, 200 N.C. App. 311, 315, 683 S.E.2d 457, 460 (2009).

Here, unchallenged findings of fact 18 and 19 state that Hilliard, an experienced law enforcement officer who had worked on "several hundred drug investigations" and was "familiar with the smell of marijuana[,]" "detected the strong odor of marijuana emanating from the residence in a 'waft' of air that left the residence upon the main door being opened." Thus, the plain smell of marijuana wafting from the front door constituted probable cause.

"An exigent circumstance is found to exist in the presence of an emergency or dangerous situation. The State has the burden of proving that exigent circumstances necessitated the warrantless entry. Determining whether exigent circumstances exist depends on the totality of the circumstances." *Marrero*, 248 N.C. App. at 794, 789 S.E.2d at 566 (citations, quotations marks, and brackets omitted). Moreover, we

consider "objective factors, rather than subjective intent" in making this determination. *Id.* at 795, 789 S.E.2d at 566 (citation omitted). Among the factors to be considered are

> (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

Id. (citation and quotation marks omitted).

Here, the trial court found that Hilliard: was following up two reports of drugs sales by a male at the home via the knock and talk and smelled marijuana emanating from the front door; was wearing his police uniform and standing only two feet behind the visitor when Defendant answered the door, admitted the visitor, and then closed the door, leaving Hilliard outside; perceived someone inside the residence was "placing a brace on the door to prevent others from entering"; identified himself as a law enforcement officer; and commanded the door be opened, but it was not. "Given these findings, it is objectively reasonable to conclude that an officer in [Hilliard's] position would have worried that [D]efendant would destroy evidence when he . . . left the scene to obtain a search warrant, especially given the ready destructibility of marijuana." *Id.* at 796, 789 S.E.2d at 567.

We also reject Defendant's proposal that after detecting the smell of marijuana wafting from the door, "Hilliard merely had probable cause for possession of marijuana, a misdemeanor" and "could have attempted to detain [Defendant] and his invited guest outside." First, since Hilliard was conducting the knock and talk to investigate multiple complaints of drug sales from the residence, the odor of marijuana wafting out when Defendant opened the front door suggested possible drug trafficking by sale rather than simple possession. After Defendant closed the door to Hilliard after admitting the visitor, appeared to be bracing the door, and did not respond to Hilliard's command that the door be opened, it is unclear how Hilliard could have detained Defendant outside the home.

III. Conclusion

The evidence at the suppression hearing supported the trial court's pertinent findings of fact, which in turn supported its conclusions of law. Further, the trial court did not err in concluding that the knock

and talk here did not rise to the level of a Fourth Amendment search or that probable cause and exigent circumstances justified the warrantless entry into Defendant's home. Accordingly, the trial court's order denying Defendant's motion to suppress is affirmed.

AFFIRMED.

Judge GRIFFIN concurs.

Judge THOMPSON dissents by separate opinion.

THOMPSON, Judge, dissenting.

I respectfully dissent from the majority opinion and agree with defendant's contentions regarding the following findings of fact and conclusions of law:

A. Challenged Findings of Fact

On appeal, defendant contends that the trial court erred in denying his motion to suppress and challenged four findings of fact in the trial court's order denying his motion to suppress.

Defendant first challenged Finding of Fact 11, which says, "Officer Hilliard parked his patrol car in the same area. He exited his vehicle and approached the Acura." After reviewing the record, I would conclude that this finding of fact is not supported by competent evidence. Officer Hilliard's testimony indicates that Ms. Hemsley, who was driving the gray Acura, parked in defendant's driveway, while Officer Hilliard parked his car on the side street to the right of defendant's residence—between defendant's residence and the cemetery. Therefore, Officer Hilliard was not parked in the same area. Furthermore, the video footage shows that Officer Hilliard walked straight from the side street onto defendant's front porch, and he never approached the gray Acura. Thus, I would conclude that this finding of fact is not supported by competent evidence.

Defendant next challenged Finding of Fact 12, which says, "Officer Hilliard was in police attire with the word 'POLICE' emblazoned across the chest of his uniform." After reviewing the video footage from defendant's front porch, I would conclude that this finding of fact is not entirely supported by competent evidence. As seen in the video footage, there are no words "emblazoned" across Officer Hilliard's chest. Instead,

there is a badge on the left side of Officer Hilliard's chest, a radio clipped to his shirt in the middle of his chest, and on the right side of his chest is what appears to be his last name. With that being said, I do believe there is competent evidence to support a finding of fact that "Officer Hilliard was in police attire[.]"

Defendant's third challenged finding, Finding of Fact 21, says, "The door was immediately slammed shut." After reviewing the evidence, I would conclude that this is not supported by competent evidence. The video footage shows that as defendant attempted to shut his front door, his attempt was thwarted by Officer Hilliard stopping the door with his foot.

Defendant's final challenged finding of fact is Finding of Fact 25, which says,

> Officer Hilliard, who was still wearing his uniform with the word 'POLICE' emblazoned across the front, identified himself verbally as a High Point Police Officer and began to give commands for the door to be opened. Several commands were given. The door was not opened. Officer Hilliard attempted unsuccessfully, to shoulder the door open.

After reviewing the evidence, I would conclude that this finding of fact is only partially supported. The only portion of this finding of fact that is supported by competent evidence is that Officer Hilliard gave several commands for the door to be opened. However, the rest of this finding of fact is not supported by competent evidence. As mentioned above, the word "POLICE" was not "emblazoned" across Officer Hilliard's chest. Secondly, Officer Hilliard unsuccessfully attempted to kick defendant's door, not shoulder it. And most importantly, at no point before Officer Hilliard and Officer Finn forcefully gained entry into defendant's residence did either officer, Hilliard or Finn, identify themselves as law enforcement officers with HPPD.

Although the majority of the above-mentioned findings of fact are unsupported by competent evidence, the crux of this dissent is in the following discussion.

B. Conclusions of Law

Defendant challenged several of the trial court's conclusions of law, but because "[c]onclusions of law are reviewed de novo and are subject to full review[,]" *State v. Huddy*, 253 N.C. App. 148, 151, 799 S.E.2d 650, 654 (2017) (citation omitted), the focus of my dissent is on Conclusion of Law 2. Conclusion of Law 2 says, "Officer Hilliard and the

other officers were not using the 'knock and talk' as a pretext to search the home or the curtilage to the home." However, after reviewing the record de novo, I would conclude that Officer Hilliard and the other officers did precisely that.

Under the knock and talk doctrine, "law enforcement may do what occupants of a home implicitly permit anyone to do, which is approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 151–52, 799 S.E.2d at 654 (citation omitted). "Importantly, law enforcement may not use a knock and talk as a pretext to search the home's curtilage." *Id.* "No one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Id.* (internal quotation marks and citation omitted).

After reviewing the evidence, I would conclude that Officer Hilliard, and the other HPPD officers, used the alleged "knock and talk" as a pretext to search defendant's curtilage. The HPPD Chief of Police, Travis Stroud (Stroud), instructed the "Patrol Commanders" to "coordinate amongst [themselves] and conduct a [k]nock and [t]alk" or utilize "some sort of enforcement action" at defendant's residence because the "complaints [we]re probably valid."[1] However, the video footage from defendant's front porch makes it evidently clear that neither Officer Hilliard nor Officer Finn ever knocked on defendant's door, nor did they, at any point, announce their presence on defendant's front porch or announce themselves as law enforcement officers with the HPPD. Instead, the evidence tends to show that Officer Hilliard and Officer Finn in fact utilized a different "sort of enforcement action." The video footage from defendant's front porch shows that Officer Hilliard lingered behind Ms. Hemsley after *she* knocked on defendant's storm door and waited to be invited in. In the video footage, Officer Hilliard is seen standing behind Ms. Hemsley and as she opened the storm door to go inside defendant's residence, Officer Hilliard quickly stepped forward, grabbed the storm door and continued in Ms. Hemsley's footsteps until he was standing in the doorway of defendant's home—an area that defendant did not invite Officer Hilliard to be in. Furthermore, Officer Hilliard testified that he believed that defendant was unaware of police presence on his front porch, and this is corroborated by defendant's testimony that he was unaware of police presence on his front porch.

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1. HPPD received two complaints (one from City Hall on 24 July 2020 and one from Crime Stoppers on 4 August 2020) regarding potential drugs/narcotics being sold from defendant's residence.

By not conducting the "knock and talk" and attempting to piggyback off of Ms. Hemsley's invitation into defendant's home, the HPPD officers usurped defendant's opportunity to decline to receive the officers. *See Huddy*, at 151–52, 799 S.E.2d at 654 (explaining that the proper execution of a "knock and talk" consists of law enforcement approaching the front door of a home, knocking, waiting briefly to be received, and potentially (if invited to linger longer) engage in *consensual* conversation with the occupant(s)). Indeed, the HPPD officers were not "invited to enter the protected premises" of defendant's home, *id.* at 152, 799 S.E.2d at 654, and a "consensual conversation with" defendant never occurred. *Id.* Instead, when defendant shut the door on Officer Hilliard—an uninvited visitor—Officer Hilliard's initial response was an unsuccessful attempt to kick in defendant's door. Following Officer Hilliard's unsuccessful attempt to kick defendant's door in, he gave defendant several commands to open the door, and when defendant did not comply, Officer Finn kicked the door in. During this time, as Officer Hilliard's testimony indicates, he saw defendant and Ms. Hemsley were standing just on the other side of the door, and defendant can be heard repeatedly asking the officers what they were doing. Therefore, the evidence shows that Officer Hilliard never attempted to "remedy the situation before going any further," which he testified was the purpose of a "knock and talk." Instead, Officer Hilliard used the alleged "knock and talk" as a pretext to search the curtilage of defendant's home, which is precisely what our case precedent says law enforcement cannot do. *See Huddy*, *id.* at 152, 799 S.E.2d at 654.

"When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5, 133 S. Ct. 1409, 1414 (2013) (internal quotation marks and citation omitted). And "when it comes to the Fourth Amendment, the home is first among equals." *Id.* at 6, 133 S. Ct. at 1414. "At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* (internal quotation marks and citation omitted). "This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front [door]." *Id.* "We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes." *Id.* (internal quotation marks and citation omitted). The curtilage of "the home is intimately

linked to the home, both physically and psychologically, and is where privacy expectations are most heightened." *Id.* at 7, 133 S. Ct. at 1415 (internal quotation marks and citation omitted). And, "[t]he front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends." *Id.* (internal quotation marks and citation omitted). "As a result, law enforcement ordinarily cannot enter the curtilage of one's home without either a warrant or probable cause and the presence of exigent circumstances that justify the warrantless intrusion." *Huddy*, 253 N.C. App. at 151, 799 S.E.2d at 654.

Yet here, without a warrant or probable cause, the HPPD law enforcement officers physically intruded on defendant's front porch to obtain information. The HPPD officers trawled for evidence *and* observed defendant from just outside his front door (eventually observing him from inside defendant's front doorway), without ever knocking or announcing their presence. For the foregoing reasons, I would conclude that the trial court erred by denying defendant's motion to suppress because the "knock and talk" exception to the Fourth Amendment warrant requirement is inapplicable, and defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CURTIS LEE STOLLINGS

No. COA24-138

Filed 17 December 2024

Search and Seizure—motion to suppress—findings of fact—unresolved conflicts in evidence—incorrect legal standard

After defendant pleaded guilty to multiple charges (including possession of methamphetamine and carrying a concealed handgun) arising from a traffic stop, during which police searched defendant's person and vehicle after a K-9 unit performed a drug sniff, both defendant's plea agreement and the trial court's order denying defendant's motion to suppress were vacated and the matter was remanded for new proceedings. The court's findings of fact contained mere recitations of witness testimony that failed to resolve material conflicts in the evidence, including: whether the K-9 actually alerted to the presence of drugs inside the vehicle, especially

given the absence of body camera footage of the alert and conflicting testimony among the witnesses regarding the sniff; and whether the officer who frisked defendant did so based on reasonable concerns about officer safety or solely to look for drugs. Further, the trial court applied the wrong legal standard when denying the motion to suppress, concluding that the officers had "reason" to search defendant's person and vehicle rather than determining whether the searches were supported by "probable cause."

Appeal by Defendant from Judgment entered 12 July 2023 by Judge Joseph N. Crosswhite in Rowan County Superior Court. Heard in the Court of Appeals 10 September 2024.

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

Cynthia Everson for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Curtis Lee Stollings (Defendant) appeals from the trial court's Order denying his Motion to Suppress and from a Judgment entered 12 July 2023 after Defendant pleaded guilty to Possession of Drug Paraphernalia, Possession of Methamphetamine, and Carrying a Concealed Handgun. The Record before us tends to reflect the following:

On the evening of 7 March 2020, the Rowan County Sheriff's Office (RCSO) was conducting a "special project" around a "fish game arcade" in Salisbury, North Carolina. During the investigation, RCSO Detectives Gerald Gordy and Kelvin Peoples ran the license plate on a parked black SUV and discovered it was registered to a woman whom the Detectives believed to be Defendant's spouse or girlfriend. Detective Gordy later testified he was familiar with Defendant because he had received information in the past that Defendant sold drugs, although he could not recall how recent that information was or from whom he had received it.

Based on this limited information alone, the Detectives decided to follow the vehicle. The SUV left the fish arcade and briefly entered a gas station parking lot, where a small pick-up truck was also parked. Shortly thereafter, the SUV left the gas station, followed by the pick-up truck, and both vehicles pulled into the parking lot of an Applebee's approximately a half mile away. Both vehicles remained a "very short period of

time" before leaving the parking lot and driving in different directions. At no point did anyone in either vehicle exit their respective vehicle, nor was any illegal activity observed.

After leaving the Applebee's parking lot, the SUV traveled up I-85 toward Davidson County. At the Davidson County line, the Detectives stopped the vehicle; the basis for the stop was Defendant's speeding five miles over the speed limit. Defendant was driving the SUV, with a woman in the passenger seat and a child in the back seat. During the stop, K-9 Sergeant William Basinger arrived with his K-9, Kantor; Kantor is trained to sniff for the presence of various illegal drugs, including methamphetamine. Sergeant Basinger conducted a sniff for drugs with the K-9 around the SUV. Detectives Gordy and Peoples were informed the K-9 "alerted" for the presence of drugs near the gas lid on the rear driver's side of the vehicle. Neither Detective Gordy nor Detective Peoples personally observed Kantor alert. Sergeant Basinger's body camera did not capture footage of the sniff.

After being informed the K-9 alerted, Detective Peoples searched Defendant. Detective Peoples reached into Defendant's pants pocket and discovered methamphetamine. At the suppression hearing, Detective Peoples could not recall whether he first frisked Defendant before reaching into Defendant's pocket. While Detective Peoples searched Defendant, Detective Gordy searched the vehicle and discovered a black handgun between the driver's seat and the middle console. Upon discovery of the handgun, since Detective Gordy was not wearing a body camera, he asked Detective Peoples to continue the search of the vehicle. Detective Peoples then completed the search of the vehicle, seizing the handgun and a set of scales. No drugs were found in the vehicle.

On 6 December 2021, Defendant was indicted for Possession of Drug Paraphernalia, Possession with Intent to Sell or Deliver Methamphetamine, and Carrying a Concealed Handgun. Prior to trial, Defendant moved to suppress "all of the evidence in this case" as the product of an unlawful search and seizure. The trial court denied the Motion, concluding that "based on the positive alert by K-9 Kantor, the officers had reason to search both the person and the vehicle of the defendant." Following the denial of his Motion to Suppress, Defendant entered into a plea agreement, reserving his right to appeal the denial of the Motion. In exchange for Defendant's plea, the State agreed to a "consolidated . . . judgment for the drug charges and to leave sentencing for the gun charge in the Court's discretion." On 12 July 2023, the trial court, pursuant to the plea agreement, entered a Judgment for the charge of Carrying a Concealed Handgun and a Conditional Discharge

for the consolidated drug charges. The trial court's written Order denying the Motion to Suppress was filed on 23 August 2023. Defendant timely filed written Notice of Appeal on the same day.

Issue

The dispositive issue on appeal is whether the trial court's written Findings of Fact and Conclusions of Law support its denial of Defendant's Motion to Suppress.

Analysis

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). Whether the trial court describes its conclusions as findings of fact or conclusions of law makes no difference to our review: "[w]e will review conclusions of law de novo regardless of the label applied by the trial court." *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012) (citation and quotation marks omitted).

A. *Findings of Fact*

The trial court's Order denying the Motion to Suppress contains thirty-eight Findings of Fact. Our review of the Order is frustrated because the trial court failed to resolve conflicts in the evidence with its Findings, instead reciting the testimony of the investigating officers. "Although . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983). Here, material conflicts remain in the evidence as to whether the officers observed Defendant engage in suspicious activity, the basis for the search of Defendant's person, and whether the K-9 positively alerted on Defendant's vehicle for the presence of drugs. Of the Findings Defendant challenges, Findings 19, 26, 27, 33, and 36 are most relevant to our discussion. We take each of these Findings in turn.

1. *Finding of Fact 19*

Finding of Fact 19 is a summary of Detective Gordy's testimony from the suppression hearing stating he considered the activity of the SUV to be suspicious:

> (19) That Detective Gordy further testified that he saw nothing illegal but did see suspicious activity that he associated with drug activity based on his training and experience such as the activity in the parking lots, the time of day, traveling to the same places as the other vehicle for a short period of time and the vehicles following each other to a separate location, that from Detective Gordy's training and experience he testified that from this activity he was able to form probable cause of drug activity;

Defendant contends Finding of Fact 19 is more properly characterized as a Conclusion of Law since it refers to a determination of probable cause and alternatively argues it is unsupported by competent evidence. Defendant argues the activity the Finding describes—traveling in a parking lot with another vehicle at night—is innocent and cannot support a probable cause determination.

We cannot impart meaningful appellate review of factual findings that "merely recite or summarize witness testimony, but do not state what the [trial court] finds the facts to be." *See Huffman v. Moore Cty.*, 194 N.C. App. 352, 359, 669 S.E.2d 788, 792-93 (2008). "[Material conflicts in the evidence] must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations omitted). It is unclear whether, by including this recitation of Detective Gordy's testimony in Finding 19, the trial court is concluding Detective Gordy's observations gave him probable cause, so that we should review this Conclusion de novo, or is merely finding Detective Gordy personally believed he had probable cause. Alternatively, Finding 19 might be a Finding that the alleged suspicious activity was in fact observed by Detective Gordy, or that the alleged suspicious activity was in fact indicative of drug activity. We cannot choose between these competing inferences. "[O]nly the trial court, as fact-finder, can determine which inferences shall be drawn and which shall be rejected." *State v. Jordan*, 385 N.C. 753, 759, 898 S.E.2d 279, 284 (2024) (citation and quotation marks omitted).

Our Supreme Court has articulated the problem in the context of orally-made findings:

> "[W]hen announcing an oral ruling, trial courts often will describe the testimony and evidence received at the hearing. The court might say, 'The officer testified that the door was open.' Is this a finding that the officer's testimony is

> credible and, thus, a finding that the door was indeed open? On a cold appellate record, it can be hard to tell."

Id. at 757, 898 S.E.2d at 283.

The same issue arises when the written order only "describe[s] the testimony and evidence received at the hearing." *Id.* Both Detectives Gordy and Peoples testified the observations described in Finding 19 informed their belief Defendant was engaged in a drug transaction. Detective Peoples testified this same belief informed his reasons for searching Defendant's person. Finding of Fact 19 is a recitation of Detective Gordy's testimony that he believed the activity to be suspicious, but fails to resolve whether his observations were accurate, indicative of drug activity, or actually and properly served as the basis of a probable cause determination.

2. *Findings of Fact 26 and 27*

Findings 26 and 27 fail to resolve another material conflict: whether the officers searched Defendant's person based on reasonable concerns about officer safety or in order to find drugs. Finding 26 recites Detective Peoples' testimony that he searched Defendant for weapons, while Finding 27 recites Detective Peoples' testimony that he couldn't remember whether he frisked Defendant before reaching into his pockets and finding methamphetamine:

> (26) . . . Detective Peoples indicated that he first searched the defendant due to activity and to ensure that the defendant did not have any weapons on his person;
>
> (27) Detective Peoples testified that he couldn't recall specifically if he felt something in the pocket before he reached in or not but that the pat down was due to the nature of the stop, the hour of the night, the fact that these are trained crime-reduction unit officers, narcotics officers, FBI task force officers, and that that is the reason for the search. During the search of the defendant, Detective Peoples located methamphetamine in the defendant's pants pocket . . .

Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334, 343-44 (1993) (citations and quotation marks omitted).

> One such exception was recognized in Terry v. Ohio, which held that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot[,] the officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or dispelling his suspicions.

Id. at 372-73, 113 S. Ct. at 2135, 124 L. Ed. 2d at 344 (alteration, citations, and quotation marks omitted). The standard in *Terry* applies to traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 3149, 82 L. Ed. 2d 317, 334 (1984); *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012).

"[W]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a patdown search to determine whether the person is in fact carrying a weapon." *Dickerson*, 508 U.S. at 373, 113 S. Ct. at 2136, 124 L. Ed. 2d at 344 (citations and quotation marks omitted). "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence[.]" *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 617 (1972). The relevant inquiry is whether the officer had a reasonable belief that the individual was armed and dangerous. *See id*. at 146, 92 S. Ct. at 1923, 32 L. Ed. 2d at 617; *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 908 (1968). Our courts follow these same principles. *See, e.g.*, *State v. Harris*, 95 N.C. App. 691, 697, 384 S.E.2d 50, 53 (1989) (citation omitted) ("[I]t is well within the law to conduct a frisk of a defendant for weapons when it is strictly limited to determination of whether that defendant was armed.").

Defendant argues the search was conducted not to locate weapons, but because it was Detective Peoples' routine practice; Defendant further argues there is no evidence that Detective Peoples frisked Defendant before reaching into his pockets, and even if he had, there was no basis to justify a *Terry* frisk because the officers could not have justifiably believed Defendant was armed.

Findings 26 and 27 recite testimony that might support a finding that the search of Defendant's person was based on Detective Peoples' reasonable belief Defendant was armed and dangerous. Other testimony at the suppression hearing, however, showed Defendant was searched immediately and only after the K-9 alerted. Thus, a material conflict in

the evidence remains as to whether the basis of the search was a *Terry* frisk for weapons or a response to the alleged K-9 alert on the vehicle. Testimony cannot substitute for a finding in this instance. *See Lang*, 309 N.C. at 520-21, 308 S.E.2d at 321; *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. *See also Jordan*, 385 N.C. at 757-58, 898 S.E.2d at 283 ("[W]e cannot infer the necessary findings under *Bartlett* because there is a material conflict in the evidence that the trial court must resolve.").

3. *Findings of Fact 33 and 36*

Another conflict in the evidence exists regarding whether the K-9 alerted for the presence of narcotics. Finding 33 describes Detective Peoples' testimony that he was informed the K-9 alerted and Finding 36 recites Sergeant Basinger's testimony about how the K-9 sniff took place:

> (33) That at the 9-minute-and-14-second mark Detective Peoples could clearly be heard on his bodycam footage saying, "positive". When asked what this meant, he said that it was a question to the K-9 officer to see why he was being summoned to the vehicle. It was at that point that he was informed that the K-9 had alerted on to the possibility of illegal substances in the defendant's vehicle;
>
> (36) That Detective Basinger testified Kantor did not receive any command to sniff . . . He said that the K-9 circled the vehicle and first alerted to suspected illegal substances between the front and rear door seam on the driver's side of the vehicle . . . He indicated that he considered it an alert because Kantor had a change of demeanor. They continued the search and K-9 Kantor had a complete alert on the gas lid at the back left side of the defendant's vehicle . . .

Defendant argues there is no competent evidence showing the K-9 alerted, and as such there was no probable cause to search Defendant's vehicle; nor were there grounds to search Defendant, even if the K-9 had alerted, because probable cause to search a vehicle does not create probable cause to search its occupants.

Whether the K-9 alerted for drugs on the vehicle is critical to the inquiry of whether the officers had probable cause to search the vehicle. *See State v. Degraphenreed*, 261 N.C. App. 235, 246, 820 S.E.2d 331, 338 (2018) ("A positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts.")

(citation omitted). Testimony and body camera footage introduced at the suppression hearing showed Detective Peoples bending over and waving something near the rear tire by the gas lid where the K-9 is subsequently alleged to have detected drugs. Detective Peoples testified there was "absolutely no[]" reason for him to have been waving or rubbing anything against the tire, and despite seeing himself do so on the footage, could not recall why he had bent over or what he was doing at the time. We note that no illegal substances were found at or near the source of the K-9's alleged alert. Furthermore, the body camera footage introduced at the suppression hearing was absent of any footage of the K-9 performing its trained alert.

Ultimately, there is no finding in the Record resolving the conflict surrounding the alleged K-9 alert. Finding 33 provides Detective Peoples' testimony that he was informed of an alert, and Finding 36 provides Sergeant Basinger's testimony describing the K-9 sniff and alert. This witness testimony cannot substitute for a finding by the trial court that the K-9 alerted. *See Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674; *Huffman*, 194 N.C. App. at 359, 669 S.E.2d at 793.

B. *Conclusions of Law*

Defendant also challenges the trial court's Conclusion of Law 2 as applying the wrong legal standard and unsupported by the Findings. We review conclusions of law de novo. *See Fernandez*, 346 N.C. at 11, 484 S.E.2d at 357. Conclusion of Law 2 concerns the basis for both the search of Defendant's person and the vehicle:

> (2) That based on the positive alert by K-9 Kantor, the officers had reason to search both the person and the vehicle of the defendant.

The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. "Generally, warrantless searches are not allowed absent probable cause and exigent circumstances," *State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67, *disc. review denied*, 357 N.C. 509, 509, 588 S.E.2d 372, 373 (2003), and a warrant may not be issued without probable cause. U.S. Const. amend. IV. Our state constitution likewise has adopted this same standard. *See* N.C. Const. art. I § 20.

The warrantless search of a vehicle is permissible if based on probable cause. *State v. Guerrero*, 292 N.C. App. 337, 341, 897 S.E.2d 534, 537 (2024) ("It is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a

public roadway . . . may take place.") (alteration in original) (citation and quotation marks omitted). Thus, the standard for assessing the legality of the search of Defendant's vehicle is whether the officers had probable cause. The trial court, however, concluded only that the officers had "reason" to conduct the search. We note that, in its Conclusion of Law 1, the trial court properly concluded the officers had "probable cause" to stop the vehicle for speeding, but Conclusion of Law 2 does not use the same "probable cause" language; Conclusion of Law 2 only concludes the officers had "reason" to conduct both searches.

Furthermore, even if the trial court properly concluded the K-9 sniff gave probable cause to search the vehicle, it could not have given probable cause to search Defendant's person.

> "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."

Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 342 (1979). *See also State v. Malunda*, 230 N.C. App. 355, 360, 749 S.E.2d 280, 284 (2013) (probable cause to search vehicle when officers smelled marijuana did not amount to probable cause to search passenger in that vehicle) and *Degraphenreed*, 261 N.C. App. at 246, 820 S.E.2d at 338 (positive K-9 sniff gives probable cause to search only the area or item where the K-9 alerts).

Remand is appropriate where the trial court has applied the wrong legal standard. *See State v. Williams*, 195 N.C. App. 554, 561, 673 S.E.2d 394, 398-99 (2009) ("Where . . . the trial court mistakenly applies an incorrect legal standard in determining whether a defendant's constitutional rights have been violated for purposes of a motion to suppress, the appellate court must remand the matter to the trial court for a 'redetermination' under the proper standard."). We note also that, the Findings, as they currently exist in the Order, cannot support the trial court's ultimate Conclusion there was "reason" or probable cause to conduct either search based on the alleged K-9 alert because, as discussed above, there was no finding that the K-9 alerted.

Thus, where the trial court did not apply the probable cause standard for either search, the trial court's denial of the Motion to Suppress was entered upon an improper legal standard. Therefore, the trial court's

Order is not supported by its Findings of Fact or Conclusions of Law. Consequently, we vacate the trial court's Order denying the Motion to Suppress and the Judgment subsequently entered and remand this matter to the trial court for new findings and application of the correct legal standard to the evidence. *See State v. McKinney*, 361 N.C. 53, 65, 637 S.E.2d 868, 876 (2006) (remanding to "afford the trial court an opportunity to evaluate" a motion to suppress "using the appropriate legal standard."). We express no opinion on the ultimate merits. *See id.*

Furthermore, because the Judgment was imposed as part of a plea agreement, the plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments. S*ee*, *e.g.*, *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding judgment should be vacated, guilty plea set aside, and the case remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on the defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 327, 734 S.E.2d 571, 571 (2012).

Conclusion

Accordingly, for the foregoing reasons, we vacate the Judgment against Defendant and set aside the plea agreement in its entirety. We remand to the trial court for new proceedings on Defendant's Motion to Suppress, including for findings of fact resolving disputes in the evidence and conclusions of law and, if necessary, to proceed to trial. We further note: "if the judge who conducted the hearing is not available to enter a new order on remand, a new evidentiary hearing on the motion to suppress is required[.]" *State v. Swain*, 276 N.C. App. 394, 399, 857 S.E.2d 724, 727 (2021).

VACATED AND REMANDED.

Judge STROUD concurs. Judge GORE concurs in the result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 17 December 2024)

BAREFOOT v. LAFAYETTE CEMETERY PARK CORP. No. 24-282	Cumberland (21CVS7251)	Affirmed
CLARK v. BALDWIN No. 24-547	Wake (20CVS007603-910)	No Error
GEICO INDEM. CO. v. POWELL No. 24-209	Nash (22CVS1318)	Affirmed
GRONLUND v. HAWK No. 24-614	Harnett (23CV003394)	Affirmed in Part, Reversed in Part, and Remanded
HILL v. HILL No. 24-329	Mecklenburg (23CVS5788)	Affirmed in Part, Vacated in Part, and Remanded
IN RE C.K.R. No. 24-122	Burke (21JT120) (21JT121)	Affirmed
IN RE M.C. No. 24-448	Onslow (19JA144)	AFFIRMED In Part, and DISMISSED In Part.
KOTSIAS v. FLA. HEALTH CARE PROPS. No. 23-1029-2	N.C. Industrial Commission (X59853)	AFFIRMED IN PART AND REMANDED. ALL COSTS TAXED TO APPELLANT.
MIDLAND CREDIT MGMT., INC. v. MITCHELL No. 24-123	Forsyth (23CVD1164)	Dismissed
MILLER v. UNITED PROP. & CAS. INS. CO. No. 22-734	New Hanover (19CVS2293)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. BARNHARDT No. 24-404	Cabarrus (22CVS568)	Reversed
SOSNA v. CAUSEY No. 24-338	Wake (23CVS4186-910)	Affirmed

STATE v. DAVIS No. 24-144	Lenoir (21CRS50323)	No Error
STATE v. FORD No. 24-130	Rowan (21CRS53404)	No Error
STATE v. GREENE No. 24-345	Rowan (20CRS50270)	No Error
STATE v. HAYES No. 23-1142	Bertie (20CRS50132) (20CRS50202)	Vacated and Remanded
STATE v. HINES No. 24-171	Columbus (18CRS493-94)	No Error
STATE v. JENKINS No. 24-427	Randolph (22CRS51164) (23CRS189)	No Error
STATE v. JONES No. 24-384	Forsyth (22CRS223) (22CRS54824)	No Error
STATE v. MARTINEZ No. 23-905	Brunswick (18CRS55383)	No Plain Error
STATE v. MERRELL No. 24-292	McDowell (22CRS50092) (22CRS50094-95)	No Error
STATE v. PHILLIPS No. 24-273	Cabarrus (21CRS53444-45)	No Error
STATE v. QUICK No. 23-503	Johnston (21CRS259-60) (21CRS50524-25)	No Error
STATE v. RAMEY No. 24-395	Haywood (23CRS34)	Dismissed
STATE v. RUTHERFORD No. 24-96	Cabarrus (19CRS53171)	No Error.
STATE v. SMITH No. 24-226	Union (22CRS298072) (22CRS392)	Vacated in Part and Remanded
STATE v. TAYLOR No. 24-363	McDowell (20CRS50516)	No Plain Error in part, and Vacated and Remanded in part.

STATE v. WILLIAMS No. 24-465	Gaston (20CRS055958)	No Error
STATE v. WILSON No. 24-342	Caswell (21CRS50133)	No Error
THOMAS v. E&J AUTO., INC. No. 24-365	Craven (23CVD961)	Affirmed as Modified and Remanded
VALDOVINOS v. DUKE UNIV. No. 24-84	N.C. Industrial Commission (18-054517)	Affirmed
WYNNEFIELD PROPS., INC. v. EMERGENCY RESTORATION EXPERTS, LLC No. 24-240	Guilford (19CVS7928)	NO ERROR IN PART, VACATED IN PART, AND REMANDED.
YOW v. DISPATCH & SERVS., INC. No. 24-405	Mecklenburg (23CVS6406)	AFFIRMED In Part, and DISMISSED In Part.

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