299 N.C. App.—No. 3 Pages 304-559

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 19, 2026

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

DONNA S. STROUD
JOHN M. TYSON
VALERIE J. ZACHARY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
JULEE T. FLOOD
MICHAEL J. STADING
THOMAS O. MURRY
CHRISTOPHER A. FREEMAN

Former Chief Judges

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

Former Judges

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

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

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

COURT OF APPEALS

CASES REPORTED

FILED 18 JUNE 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appellate jurisdiction—order from State Bar Disciplinary Hearing Commission—timely notice of appeal—The Court of Appeals had jurisdiction to review an attorney's appeal from an order of discipline entered against him by the State Bar Disciplinary Commission, where the attorney timely filed his notice of appeal within thirty days of the order's entry in compliance with N.C.G.S. § 7A-29(a) (allowing appeals from any final order of the State Bar) and Rule 18(b)(2) of the Rules of Appellate Procedure (governing the timing for appeals from administrative tribunal decisions). **N.C. State Bar v. Musinguzi, 410.**

Mootness—intervention in contested case—settlement of controversy—Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental

Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions to intervene by the administrative law judge. Even if appellants arguably should have been permitted to intervene in the contested case, appellants' claims were moot by the time of the superior court's order because the relief appellants sought was no longer available. By settling the dispute with respondent and voluntarily issuing the requested permit, NCDEQ ended the controversy from which appellants would have appealed to the superior court (had they been allowed to intervene in the matter). **N.C. Dep't of Env't Quality v. Wake Stone Corp., 403.**

Preservation of issues—affidavit treated as a pretrial order—failure to object at hearing—In a proceeding for equitable distribution, alimony, and child support, plaintiff's appellate argument—that the trial court erred in ordering that defendant's equitable distribution affidavit be treated as a pretrial order—was not preserved for appellate review where plaintiff did not raise a timely objection to the trial court's decision (because plaintiff, while duly noticed, did not attend the hearing or timely submit his own equitable distribution affidavit). **Theuerkorn v. Heller, 534.**

ASSAULT

Assault with deadly weapon with intent to kill inflicting serious injury—intent element—sufficiency of evidence—In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally (for which defendant was found guilty of second-degree murder), the State presented substantial evidence to support the charge of assault with a deadly weapon with intent to kill inflicting serious injury; specifically, the evidence supported an inference of defendant's intent to kill, including that defendant raised her loaded and cocked gun and shot at the second victim, who was running toward defendant immediately after the first victim was shot. **State v. Swinson, 496.**

ATTORNEY FEES

Subject matter jurisdiction—delay after entry of domestic violence protective order—pending custody proceedings—award vacated—Where plaintiff was granted an ex parte domestic violence protection order (DVPO) (pursuant to Chapter 50B of the General Statutes) against defendant in March 2021 and defendant later filed a separate action for child custody (pursuant to Chapters 50 and 50A), but the parties agreed to numerous continuances and no further action was taken until January 2023, when plaintiff was allowed to amend her DVPO complaint—followed by the trial court's dismissal of her complaint and defendant's filing of a motion for attorney fees—the trial court's award of attorney fees to defendant was vacated. The trial court lacked subject matter jurisdiction for any award of attorney fees under Chapters 50 or 50A because causes of action under those statutes remained pending; as to Chapter 50B, jurisdiction to award relief expired 18 months after entry of the DVPO. As to an award of attorney fees pursuant to N.C.G.S. § 6-21.5, the trial court did not make findings regarding whether there was a complete absence of a justiciable issue or if either party prevailed; accordingly, the matter was remanded for further proceedings. Finally, plaintiff's arguments regarding the denial of her Civil Procedure Rule 59 and 60 motions were moot. **Cauley v. Cauley, 315.**

it was not testimonial because it was not generated solely to aid a police investigation. Finally, even assuming any error in the admission of the DNA results, any error was harmless in light of the other evidence of defendant's guilt. **State v. Tate, 507.**

CONTEMPT

Civil—failure to pay attorney fees—amount owed increased under the contempt order—improper modification—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it improperly increased the amounts in attorney fees and past-prospective child support that plaintiff was required to pay. The trial court erred in using the contempt order to modify its prior order, as well as to punish plaintiff for noncompliance, since the purpose of civil contempt is to coerce compliance with an underlying order. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—automatic incarceration in case of missed payment—improper—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it required that plaintiff be automatically incarcerated if she failed to make any of her court-ordered payments as scheduled. Under settled law, plaintiff could only be incarcerated after a determination that she was capable of complying with the underlying court order; however, the trial court had no way of projecting out and assuming what income, expenses, or assets plaintiff would have in the future. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—findings unsupported by evidence—improper modification of attorney fee order—In plaintiff mother's appeal from an order in a child custody case, in which the trial court found her in civil contempt for failing to pay attorney fees pursuant to a prior order, the Court of Appeals disregarded three findings of fact in the contempt order that were unsupported by competent evidence: that all of plaintiff's child support payments had been late; that plaintiff had the ability to comply with the terms of the order for attorney fees and child support; and that defendant father had insufficient means to defray his attorney fees. Additionally, the Court of Appeals rejected a conclusion of law (labeled as a finding of fact in the contempt order) that grounds existed to modify the prior order by increasing the amount of attorney fees and child support that plaintiff would have to pay; civil contempt is not a proper mechanism for modifying an underlying order, but rather is an enforcement mechanism used to compel obedience to that order. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—purge conditions—increase in amount owed—improper—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where its purge conditions required plaintiff to pay even greater amounts in attorney fees and past-prospective child support than what the prior order originally required. The evidence at trial indicated that plaintiff lacked the present ability to comply with the purge conditions, since she already made insufficient income to cover both her monthly expenses and the court-ordered payments (in the original amounts, let alone in the new increased amounts). Further, the increase in those court-ordered payment obligations was an improper use of civil

contempt to punish plaintiff rather than to coerce compliance with the underlying order. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—willfulness—insufficiency of factual findings—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, the contempt order was reversed because the court's factual findings failed to support the conclusion that plaintiff willfully violated the prior order. To the contrary, the evidence showed that plaintiff's income was insufficient to cover both her regularly recurring expenses and her court-ordered payments; since she lacked the ability to comply with the order for attorney fees, her noncompliance could not be deemed willful. Additionally, the contempt order lacked certain statutorily required findings: that the attorney fee order remained in force and that the purpose of that order might still be served by compliance with it. **Collins v. Holley, 323.**

CONTRACTS

Breach—town's nonpayment under road improvement contract—unresolved utility conflicts—impossibility of performance—In a breach of contract action brought against a town by plaintiff, a company that had been awarded a contract to install a storm water drainage system underneath roads as part of a broader roadway improvement plan, the trial court's judgment awarding plaintiff $132,657.40 was affirmed where the court's unchallenged findings of fact amply supported its conclusions, including that: the town had breached the contract by failing to identify and arrange for the resolution of potential utility impacts—including underground gas lines—prior to the start of plaintiff's work and by failing to pay plaintiff for work satisfactorily completed under the contract; the town's refusal to terminate the contract as requested by plaintiff was unreasonable; the town's breach excused further performance by plaintiff; and the town was not justified in defaulting plaintiff. Further, the trial court's decision did not overlook the contract's Authority of Engineer term, since the project engineer's limited authority under the contract did not extend to determining whether the town had met its contractual obligations or owed damages. **N. State Env't, Inc. v. Town of Mooresville, 387.**

Third-party-beneficiary breach of contract—commercial lease—services agreement—lack of direct benefit to general public—The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's third-party-beneficiary breach of contract claim, in which she asserted that her husband's death in a car accident (that, although it occurred two miles away, was caused by a teen driver who had attended car meets in the parking lot of the shopping center, which sometimes entailed car racing) constituted a breach of defendants' contracts—a commercial lease agreement between the owner and its tenants and the services agreement between defendants—that set forth certain responsibilities for providing security and traffic control. Plaintiff could not show that she and her husband were intended third-party beneficiaries of the contracts despite language in the lease requiring tenants to carry liability insurance "for the protection of the general public," a term which was intended to set forth the rights and responsibilities between the landlord and its tenants. **Ghassemi v. Centrex Props., Inc., 338.**

Equitable distribution—distributive award—no explicit finding of fact—ability to pay ascertainable from the record—In a proceeding for equitable distribution, alimony, and child support, the trial court did not abuse its discretion in ordering plaintiff to pay defendant a distributive award, rather than making an in-kind distribution, as provided for in N.C.G.S. § 50-20(e), where, although the court did not make an explicit finding of fact regarding plaintiff's ability to pay the award with liquid assets, plaintiff's ability to do so was ascertainable from unchallenged findings of fact, including that plaintiff was awarded portions of two retirement accounts, as well as a home with significant equity. **Theuerkorn v. Heller, 534.**

Equitable distribution—military pension—calculation and award—statutory default equation properly applied—In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court's award of 24.7720% of defendant's military pension to plaintiff and its order requiring defendant to remit $50,111.73 of back payments to plaintiff were supported by its findings of fact, which in turn were supported by competent evidence. The parties' prior consent judgment had reserved the pension issue for further consideration without specifying an equal division; therefore, the statutory default method applied and, here, the trial court properly applied the statutory default coverture fraction in its calculation and award. **Holland v. Holland, 362**.

Subject matter jurisdiction—military pension division—dismissal of procedural motion—no effect—In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied defendant's motion to dismiss for lack of subject matter jurisdiction. At the time plaintiff filed her motion, her sole remaining claim was for equitable distribution (ED). Contrary to defendant's assertion, plaintiff's voluntary dismissal of her initial motion—she refiled a new one several months later—did not effectuate a dismissal of the ED claim in its entirety, but was instead a procedural withdrawal of her motion (done erroneously with a pre-printed AOC form for voluntary dismissals) that did not cause prejudice to defendant. **Holland v. Holland, 362.**

EVIDENCE

Hearsay— exceptions—excited utterance—startling event—bank statement showing large sum of money missing—In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her mother-in-law, an elderly woman who later discovered upon reading a bank statement that a significant amount of money was missing from her bank account, the trial court properly admitted hearsay statements that the mother-in-law made immediately after reading the bank statement (including "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account,") as substantive evidence that defendant withdrew the money for her personal use without her mother-in-law's knowledge or permission. Given the mother-in-law's circumstances—as an eighty-four-year-old widow who suffered from dementia and had no control over her finances—and visible emotion immediately after her discovery, the act of opening a bank statement and noticing a large sum missing from her life savings qualified as a sufficiently startling event such that the excited utterance exception to the rule against hearsay applied to her statements. **State v. Fraley, 463.**

Prior crime—murder trial—Rule 404(b)—identity of defendant as shooter—prejudice analysis—In a first-degree murder prosecution arising from the fatal

reasonableness of the cost, design, and means of construction) where, although its proposed development of a new hospital was on a designated EPA Brownfield Site, there was no evidence of a legal or practical bar to the site being developed, and the ALJ's further determination that the property could be safely remediated was not contradicted by any evidence that remediation would exceed projected development costs. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

Certificate of need—conformance with statutory criteria—need determination—"surgical services"—The administrative law judge properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 1 (requiring a proposed project to be consistent with applicable policies and need determinations in the SMFP) where, although its project did not include a general purpose operating room (OR) (contained in both of the other applicants' plans), the plain and unambiguous language of the SMFP did not require a general purpose OR; moreover, the selected plan included a new c-section operating room, which qualified under the broad category of "medical or surgical services" contained in the SMFP. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

Certificate of need—public hearing—limits placed on applicant employees from speaking—no substantial prejudice—In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, the administrative law judge properly determined that the decision of the Department of Health and Human Services to prohibit eight employees of one of the applicants from speaking during a portion of the agency's public hearing—a part of the hearing process distinct from the Proponent Time Period, during which applicants' employees were allowed to speak—did not constitute prejudicial error. Even if the restriction placed on the employees was in error or not in keeping with the agency's past practice, there was no substantial prejudice as a matter of law, since the limitation was in accord with a permissible interpretation of the public hearing statute. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

IMMUNITY

Public official immunity—police officer—summary judgment—genuine issue as to gross negligence—immunity pierced—In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, the trial court did not err at the summary judgment phase in finding that the officer was not immune from suit through public official immunity, since the court also found that a genuine issue of material fact existed as to whether the officer's conduct during the incident rose to the level of gross negligence, which in turn pierced the shield of absolute immunity the officer would have enjoyed under the public official immunity doctrine. **Hatcher v. Rodriguez, 351.**

INDICTMENT AND INFORMATION

Continuing criminal enterprise—non-jurisdictional, non-statutory defect—prejudice not established—On remand from the North Carolina Supreme Court

for reconsideration in light of *State v. Singleton*, 386 N.C. 183 (2024) (holding that the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule), the Court of Appeals held that, although defendant's indictment on a charge of continuing criminal enterprise (CCE)—related to his alleged involvement with a cocaine trafficking ring—was defective, defendant was not entitled to relief. While the indictment failed to enumerate the alleged underlying offenses comprising CCE, that defect was non-jurisdictional in nature, and defendant did not establish that the indictment failed to satisfy constitutional purposes. Further, defendant failed to establish that the flawed indictment was prejudicial in light of the overwhelming evidence of his guilt. **State v. Cornwell, 453.**

JURISDICTION

Disciplinary—attorney licensed out of state—Rule 8.5 of the Rules of Professional Conduct—In an action before the North Carolina State Bar Disciplinary Hearing Commission (DHC) involving an attorney (defendant) who lived in North Carolina and maintained an office there but was licensed in New York and limited his practice to federal immigration court, a disciplinary order disbarring defendant was reversed where the DHC lacked subject matter jurisdiction over defendant under Rule 8.5 of the Rules of Professional Conduct, which authorized the State Bar to discipline attorneys not licensed in North Carolina but who "render any legal services in North Carolina." Rule 8.5 could not confer jurisdiction over defendant beyond the jurisdiction granted under N.C.G.S. § 84-28, which limited the DHC's disciplinary jurisdiction to attorneys "admitted to practice law in [North Carolina]." Furthermore, Chapter 84 defined the "practice [of] law" in terms of the specific legal services performed, not the physical location where an attorney works or meets with clients. **N.C. State Bar v. Musinguzi, 410.**

Disciplinary—attorney licensed out of state—statutory basis for jurisdiction—limited to attorneys admitted to practice in North Carolina—An order of discipline from the North Carolina State Bar Disciplinary Hearing Commission (DHC) was reversed where the DHC lacked subject matter jurisdiction over defendant, since N.C.G.S. § 84-28 limits the DHC's disciplinary jurisdiction to any attorney "admitted to practice law in [North Carolina]," and defendant—though he lived in North Carolina and maintained a law office there—was licensed in New York and limited his practice to federal immigration court. Importantly, the more specific language in section 84-28 controlled over the more general language in section 84-23 granting the State Bar disciplinary authority over any "licensed lawyer," which, when read in conjunction with section 84-28, necessarily referred to any lawyer licensed to practice in North Carolina. **N.C. State Bar v. Musinguzi, 410.**

JURY

Due process right to a unanimous jury—jury instructions and verdict sheets—no error—In a prosecution that resulted in defendant being found guilty of second-degree rape—where the indictment alleged that defendant "knew" the victim was mentally incapacitated and was physically helpless (due to having consumed alcohol), while the jury was instructed that, to convict defendant, it must find beyond a reasonable doubt that he "knew or should reasonably have known" of the victim's condition—defendant's due process rights to a unanimous jury verdict and to be convicted only of an offense for which he was charged were not violated. First, N.C.G.S. § 15-144.1(c) provides that short-form indictments for second-degree rape

(based on victim incapacity) need not allege the element of actual or constructive knowledge of the victim's condition. Second, the disjunctive instruction on knowledge did not deny defendant a unanimous jury verdict because defendant's actual versus constructive knowledge of the victim's incapacity did not implicate separate criminal acts, but, instead, constituted alternative factual avenues to prove the same element. **State v. Tate, 507.**

LACHES

Equitable distribution—motion for division of military pension—delay not unreasonable—pension issue reserved until vesting—In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied and dismissed defendant's laches defense—whereby defendant asserted that plaintiff's fifteen-year delay in seeking to resolve her equitable distribution claim was unreasonable and should be barred. First, the parties' prior consent judgment explicitly reserved the pension issue for further consideration; therefore, defendant was on notice of the grounds for the issue he sought to bar. Second, since defendant was not vested in his military pension until his retirement, it was not unreasonable for plaintiff to wait until then to file her motion, which she did within two months of defendant's retirement. Finally, defendant's assertion that he would have sought other employment had he known that his military pension would be divided did not serve to support his laches defense. **Holland v. Holland, 362.**

NEGLIGENCE

Gross negligence—car accident—officer speeding in response to nonemergency—reckless disregard for safety of others—In a tort action arising from a car crash involving plaintiff and a police officer, the trial court did not err by denying summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, where the evidence showed that the officer: responded to a shoplifting incident despite no request for assistance from the officer at the scene; initiated an emergency response, which was against department policy for a property crime; turned on his lights but failed to activate his siren; by his own admission, did not know how to operate the siren following recent repairs to his vehicle; drove at 52 mph in a 35-mph speed zone; and looked away from the road to adjust the siren controls, all while driving into an oncoming traffic lane on a two-lane road with double lines, after which he crashed into plaintiff's vehicle. Based on these facts, a jury could find that the officer's actions showed a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits, thereby creating a genuine issue of material fact on the issue of gross negligence. **Hatcher v. Rodriguez, 351.**

Gross negligence—respondeat superior—applicability conceded by defendants—claims of inadequate training and negligent supervision still allowed to proceed—In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, where the trial court denied summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, the trial court did not err by declining to dismiss plaintiff's additional claims of inadequate training and negligent supervision where, although the city conceded that the officer acted within the course and scope of employment at the time of the collision, thereby enabling plaintiff to argue the city's liability under

the doctrine of respondeat superior, plaintiff also sought punitive damages, which could only be pursued through the inadequate training and negligent supervision claims. **Hatcher v. Rodriguez, 351.**

Off-property car accident—legal duty by property owner—harm not foreseeable—The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's negligence claim alleging that her husband's death in a car accident was the result of defendants' failure to prevent car meets in the shopping center's parking lot, which sometimes entailed car racing. Defendants could not be held liable for negligence where the accident and resulting harm were not reasonably foreseeable; the accident occurred two miles from the shopping center and the relationship between the teen driver's actions—deciding, after he left a car meet at the shopping center, to test his car's limits by accelerating to nearly ninety miles per hour and failing to stop at a stop sign before entering the intersection where he hit decedent's car—and the car meets were attenuated. **Ghassemi v. Centrex Props., Inc., 338.**

NUISANCE

Private and public—car meets in parking lot—single instance of injury—The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's nuisance claims (both public and private) alleging that her husband's death from a car accident resulted from defendants' failure to prevent car meets in the parking lot of the shopping center, which sometimes entailed car racing. Plaintiff failed to allege facts to support each essential element of a nuisance claim since, although she asserted that the car meets repeatedly occurred, there was no continuous injury but, rather, a single physical injury—her husband's death. Notably, plaintiff sought damages as a result of the accident but did not seek abatement of the alleged nuisance. **Ghassemi v. Centrex Props., Inc., 338.**

PARTIES

Challenge to mining permit—intervention of right—permissive intervention—conditions not met—Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions by the administrative law judge (ALJ). The individual appellants failed to show a direct and immediate interest in the matter—as required to intervene of right pursuant to Civil Procedure Rule 24(a)(2)—because their basis for challenging the mining permit (a direct and substantial physical hazard to their home) differed from that of NCDEQ (significant adverse effects on the Park); further, they were not entitled to permissive intervention pursuant to Rule 24(b)(2) because there was no common question of law or fact between their asserted interest and the contested case. In addition, the interests of the nonprofit, which sought only permissive intervention, were adequately represented by NCDEQ such that the superior court was correct to determine that the ALJ did not abuse his discretion in denying the nonprofit's motion to intervene. **N.C. Dep't of Env't Quality v. Wake Stone Corp., 403.**

PROBATION AND PAROLE

Revocation of probation—alleged violation—insufficiency of evidence—The trial court's judgment revoking defendant's probation was reversed where the State presented insufficient evidence to support the allegations in its probation violation report—that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was "a violation of [defendant's] probation." First, although the report alleged that defendant violated a condition of his probation by committing a crime on "18 January 2023," all of the evidence offered at the revocation hearing referenced events that occurred on a later date (in March 2023). Second, although the evidence established that defendant had accounts on certain social media platforms, there was no evidence showing that he failed to register these accounts within the ten-day window prescribed under N.C.G.S. §§ 14-208.11(a)(10) and 14-208.9(e) (requiring registered sex offenders to report any "online identifier" to the registering sheriff), thus committing a crime. **State v. Gault, 471.**

Subject matter jurisdiction—to revoke probation—probation violation report—adequate notice of alleged violation—The trial court had jurisdiction to revoke defendant's probation where the State's probation violation report alleged that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was "a violation of [defendant's] probation." The violation report gave defendant sufficient notice of the alleged probation violation such that he could prepare his defense, where: it stated the condition of probation he allegedly violated—that he commit no criminal offense; mentioned the specific acts that the State contended constituted the violation; and indicated which criminal offense he allegedly committed, referring to his failure to report an online identifier pursuant to N.C.G.S. § 14-208.11(a)(10), which is a Class F felony. **State v. Gault, 471.**

SENTENCING

Classification—second-degree murder—malice theory—unambiguous verdict—The trial court properly sentenced defendant as a Class B1 felon after she was convicted of second-degree murder where there was no evidence that defendant was merely reckless in her handling of the gun used in the incident—which would support depraved-heart malice, the only malice theory that would require classifying second-degree murder as a B2 offense—and, therefore, the jury's general verdict of guilty was not ambiguous. Further, where the evidence showed that defendant acted intentionally when she shot the victim, the trial court did not err, much less plainly err, by failing to instruct the jury on depraved-heart malice. **State v. Swinson, 496.**

SEXUAL OFFENSES

Inability of the victim to consent—defendant's knowledge of the victim's condition—evidence sufficient—In a prosecution that resulted in defendant being found guilty of second-degree rape (of a woman who had become incapacitated due to alcohol consumption), the trial court properly denied defendant's motion to dismiss for insufficient evidence of two elements: the victim's incapacity and defendant's knowledge of her condition. The evidence of the victim's incapacity included records of the victim's blood and urine alcohol levels, statements and testimony from the victim, and comments made by defendant to investigators about the victim's intoxication level; the evidence of defendant's knowledge of the victim's condition included defendant's comments to investigators that the victim was "wasted" and "a drunk bitch" at the time he had sex with her. **State v. Tate, 507.**

WORKERS' COMPENSATION

Disability determination—lower back injury—unreasonable job search—wage-loss compensation denied—The Full Commission properly determined that defendant was not entitled to wage-loss compensation for a specified two-year period based on competent evidence and sufficient findings of fact where plaintiff, who had filed a claim for benefits after injuring his lower back while working as a molding production supervisor, failed to apply for any job for a year and a half after his injury, even though he had been laid off from his job (unrelated to his injury) and had not been assigned any written work restrictions. Further, plaintiff voluntarily removed himself from the job market in order to pursue an associate degree in business. Given that plaintiff was capable of work, a job search would not have been futile and, therefore, plaintiff failed to make an initial showing of disability for the relevant time period. Finally, the Full Commission did not err by relying on an unpublished appellate opinion to reach its conclusion because the case was factually similar (regarding a claimant pursuing education rather than employment) and no published opinion of stronger persuasive value had been identified. **Cable v. Consol. Metco, Inc., 304.**

Exclusivity provision—Woodson claim—forecast of evidence insufficient—denial of summary judgment reversed—In a tort action brought on behalf of the estate of an employee who was killed by an explosive fire while operating a zirconium crusher at a metal recycling plant owned and operated by defendants (a parent company and its subsidiaries), the trial court erred in denying defendants' motion for summary judgment where plaintiff failed to forecast evidence that would establish a *Woodson* claim—an exception to the exclusivity provision of the Workers' Compensation Act permitting civil tort claims arising from work-related injuries resulting from conduct tantamount to an intentional tort. The exacting standard and high bar for a *Woodson* claim was not satisfied where no evidence showed that defendants—despite having knowledge of some possibility (or even probability) of injury or death—recognized the immediacy of the hazard facing the employee, and, thus, no evidence indicated defendants intended, or were manifestly indifferent to, the employee's injury and death. Accordingly, the trial court's denial of defendants' motion for summary judgment was reversed. **Tyson v. ELG Utica Alloys, Inc., 550.**

N.C. COURT OF APPEALS
2026 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	12 and 26
February	9 and 23
March	9 and 23
April	20
May	4 and 18
June	1
August	10 and 24
September	14 and 28
October	12 and 26
November	16
December	1

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

CHRISTOPHER G. CABLE, EMPLOYEE, PLAINTIFF
v.
CONSOLIDATED METCO, INC., EMPLOYER, ACE, USA, CARRIER,
(ESIS, INC., THIRD PARTY ADMINISTRATOR), DEFENDANTS

No. COA24-413

Filed 18 June 2025

Workers' Compensation—disability determination—lower back injury—unreasonable job search—wage-loss compensation denied

The Full Commission properly determined that defendant was not entitled to wage-loss compensation for a specified two-year period based on competent evidence and sufficient findings of fact where plaintiff, who had filed a claim for benefits after injuring his lower back while working as a molding production supervisor, failed to apply for any job for a year and a half after his injury, even though he had been laid off from his job (unrelated to his injury) and had not been assigned any written work restrictions. Further, plaintiff voluntarily removed himself from the job market in order to pursue an associate degree in business. Given that plaintiff was capable of work, a job search would not have been futile and, therefore, plaintiff failed to make an initial showing of disability for the relevant time period. Finally, the Full Commission did not err by relying on an unpublished appellate opinion to reach its conclusion because the case was factually similar (regarding a claimant pursuing education rather than employment) and no published opinion of stronger persuasive value had been identified.

Appeal by Plaintiff from opinion and award entered 5 February 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2024.

The Harper Law Firm, PLLC, by Joshua O. Harper and Richard B. Harper, for Plaintiff-Appellant.

Roberts & Stevens, P.A., by Charles E. McGee, for Defendants-Appellees.

CARPENTER, Judge.

Christopher G. Cable ("Plaintiff") appeals from an "Opinion and Award" entered 5 February 2024 by the North Carolina Industrial Commission (the "Full Commission"). On appeal, Plaintiff argues the Full Commission erred by not awarding him wage-loss compensation from 3 April 2020 to 20 April 2022. After careful review, we affirm.

I. Factual & Procedural Background

On 21 January 2020, Plaintiff injured his low back while working as a molding production supervisor for Consolidated Metco, Inc. ("Defendant-Employer") at their facility in Bryson City, North Carolina. Plaintiff was lifting a wooden pallet when he "felt and heard a pop in [his] back as [he] was twisting and lifting." The following day, Plaintiff reported his injury to his supervisor, Chris Burch, and took a vacation day due to his back pain. At the time, Defendant-Employer was in the process of "shutting down their Bryson City facility in favor of the Canton plant and other facilities."

On 23 January 2020, Plaintiff saw Nicole Foxworth, a physician assistant at Everside Health, for an annual appointment and complained about back pain stemming from the 21 January 2020 work injury. Foxworth diagnosed Plaintiff with a lumbar strain and recommended Plaintiff continue taking ibuprofen, advised Plaintiff that he could continue his regular work duties, and ordered an x-ray which Plaintiff completed the same day at Smoky Mountain Urgent Care. The radiologist who interpreted the x-ray film included in the "impression" section of her report that Plaintiff had "mild degenerative disc disease."

On 24 January 2020, Plaintiff texted Burch asking if he could take another vacation day. Burch responded, "Sure. That's fine. I'll see you on Monday." According to Burch, when Plaintiff returned to work he did "a little bit of everything," including running presses, setting tools, and working as a material handler and process tech—a job that involved lifting, bending, twisting, and stooping. According to Plaintiff, however, when he returned to work he only performed computer tasks and did not engage in any heavy lifting due to his back pain.

On 28 January 2020, on behalf of Defendant-Employer, Ace USA, and ESIS, Inc. (collectively, "Defendants"), Burch completed a Form 19 Employer's Report of Employee's Injury or Occupational Disease for the Industrial Commission, which indicated that Plaintiff's specific injury was "sprain trunk – spinal cord." On 11 February 2020, Plaintiff visited his family physician, Dr. David Johnston, for a neurology referral because Plaintiff "want[ed] to go to flight school and need[ed] [an]

ok to go." Plaintiff did not mention his work injury or back pain to Dr. Johnston during the visit.

In March 2020, when Burch asked Plaintiff to "pull the tools out of the press [to] send back over to Canton," Plaintiff informed Burch that his back was bothering him again. According to Burch, Plaintiff did not take the news that tools were being moved to Canton very well.

On 3 April 2020, Plaintiff was laid off by Defendant-Employer. Plaintiff's layoff was unrelated to his 21 January 2020 work injury. On 20 April 2020, Plaintiff signed a document entitled "Separation and General Release of all Claims," in which he agreed to no longer render services to Defendant-Employer and acknowledged that he may be denied further employment with Defendant-Employer should he later re-apply. When Plaintiff returned to collect his personal belongings after being laid off, he told Burch he was still experiencing back pain.

On 15 April 2020, Plaintiff texted Everett Lynch, Defendant-Employer's Human Resources Director, saying he would "be willing to go back to hourly to keep [his] job" at either the Bryson City or Canton facility. Lynch responded: "Okay. I will keep you posted. It's just unclear right now."

That same day, Plaintiff saw Dr. David R. Castor at Smoky Mountain Urgent Care. Plaintiff complained of low back pain and was diagnosed with "Lumbago with sciatica, right side" and "chronic pain." Defendant-Employer requested an MRI, which Plaintiff underwent on 26 June 2020. On 20 July 2020, Plaintiff reviewed the results of the MRI with Dr. Castor, who reported that Plaintiff had "Lumbar degenerative disc disease" and "Foraminal stenosis of lumbar region." At that time, Plaintiff was advised to "avoid heavy lifting or repetitive motion of the affected area."

On 22 July 2020, Plaintiff completed an application for the Trade Adjustment Assistance program ("TAA") to obtain tuition assistance so he could enroll in the two-year Business Administration program at Southwestern Community College. In the application, Plaintiff checked "yes" when asked if he could return to his former occupation and former industry. In the section "Barriers to employment (if any)," Plaintiff simply noted that he was seeking a degree to obtain employment to support his family.

Plaintiff's application was endorsed by Sheila Traub, a local TAA representative. Traub determined Plaintiff was eligible for the program because: (1) "[s]uitable employment [was] not available;" (2) he would "benefit from appropriate training;" (3) "a reasonable expectation for

employment following training exists;" (4) "training is reasonably available;" (5) he was "qualified to undertake and complete his training;" and (6) the "training [was] suitable and available at a reasonable cost." Plaintiff was admitted to Southwestern Community College on 24 July 2020 and began classes on 17 August 2020.

On 19 August 2020, Smoky Mountain Sports Medicine & Physical Therapy recommended that Plaintiff participate in six weeks of physical therapy, one to two times per week. Plaintiff attended one physical therapy appointment, but did not return because he was "in so much pain" after the appointment that he "didn't go back."

On 25 September 2020, Plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee, Representative, or Dependent. On 27 October 2020, Defendants filed a Form 63 Notice to Employee of Payment of Compensation [or Payment of Medical Benefits Only] Without Prejudice. On 5 May 2021, Plaintiff filed a Form 33 Request That Claim be Assigned for Hearing, and Defendants filed a Form 33R Response to Request That Claim be Assigned for Hearing on 21 June 2021. On 3 August 2021, Plaintiff filed a corrected Form 33 and Form 18.

On 14 September 2021, Plaintiff applied to work for Defendant-Employer as a Process Engineer. According to Plaintiff's job-search log, he applied for twenty-four jobs between 14 September 2021 and 18 October 2021.

On 21 March 2022, Plaintiff's workers' compensation claim came before Deputy Commissioner Jesse M. Tillman, III. On 19 December 2022, Deputy Commissioner Tillman entered an opinion and award concluding Plaintiff was "entitled to have Defendants provide medical compensation" and "vocational rehabilitation" because Plaintiff "sustained a compensable injury by accident (specific trauma incident) to his low back on January 21, 2020." Deputy Commissioner Tillman found that Plaintiff was "totally, and after an eventually successful reasonable effort to return to work, partially disabled." Deputy Commissioner Tillman further found that "Plaintiff's total disability . . . began on April 3, 2020 and continued until the Plaintiff successfully returned to work on June 6, 2022."

Defendants appealed to the Full Commission, and the matter was heard on 11 May 2023. On 5 February 2024, the Full Commission issued its Opinion and Award, concluding, in relevant part, that Plaintiff was not entitled to any wage-loss compensation from 3 April 2020 to 20 April 2022. On 20 February 2024, Plaintiff filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 97-86 (2023).

III. Issues

The issues are whether the Full Commission erred by: (1) determining that Plaintiff was not disabled from 3 April 2020 to 20 April 2022; and (2) relying on an unpublished opinion and "deficient" findings of fact to support conclusion of law 7.

IV. Standard of Review

Our review of an opinion and award of the Full Commission is "limited to reviewing whether *any* competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (emphasis added). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Church v. Bemis Mfg. Co.*, 228 N.C. App. 23, 26, 743 S.E.2d 680, 682 (2013). The Full Commission "is the sole judge of the weight and credibility of the evidence[,]" *Deese*, 228 N.C. App. at 116, 530 S.E.2d at 553, and its findings of fact "are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding," *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995).

In making its determinations, the Full Commission cannot "wholly disregard or ignore the competent evidence before it." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 601, 532 S.E.2d 207, 212 (2000). It is "not required, however, to find facts as to all credible evidence," as such a mandate "would place an unreasonable burden on the Commission." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000). Instead, the Full Commission must make findings regarding "those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award." *Johnson v. Southern Tire Sales & Service*, 358 N.C. 701, 705, 599 S.E.2d 508, 511 (2004).

V. Analysis

Plaintiff's primary argument is that the Full Commission erred by failing to award him wage-loss compensation from 2 April 2020 to 20 April 2022. Specifically, Plaintiff challenges the Full Commission's disability determination and its conclusion of law 7. Although Plaintiff

advances four theories in support of his contention that the Full Commission erred by determining he was not disabled from 2 April 2020 to 20 April 2022, all of Plaintiff's challenges pertain to one overarching issue: whether the Full Commission erred by determining Plaintiff's job search during this time period was unreasonable. Accordingly, we address Plaintiff's contentions below.

A. Disability Determination

First, Plaintiff argues the Full Commission erred by determining his job search was unreasonable. Specifically, Plaintiff asserts that when making this determination, the Full Commission failed to consider his pain, disregarded the jobs he applied to while he was not under any formal work restrictions, and failed to shift the burden to Defendants to show that suitable jobs were available to Plaintiff. We disagree.

To receive compensation under the Workers Compensation Act, " 'the claimant has the burden of proving the existence of his disability and its extent.' " *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002) (quoting *Saums v. Raleigh Cnty. Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (citation omitted)). "[O]nce the claimant meets this initial burden, the defendant who claims that the plaintiff *is* capable of earning wages must come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis in original).

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2023). "Although the pain caused by an injury is not compensable . . . , the degree of pain experienced must be considered by the Commission in determining the extent of the employee's incapacity to work and earn wages." *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992).

"A determination of disability is a conclusion of law that must be supported by specific findings which show: (1) plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment; (2) plaintiff was incapable after his injury of earning the same wages he had earned before his injury at any other employment; and (3) the incapacity to earn was caused by plaintiff's injury." *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 199,

837 S.E.2d 420, 425 (2020). A claimant can offer proof to support the first two findings in several ways, including by producing:

> (1) medical evidence that the employee is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; or
>
> (2) evidence that the employee is capable of some work, but after reasonable effort on the part of the employee has been unsuccessful in efforts to obtain employment; or
>
> (3) evidence that the employee is capable of some work but that it would be futile because of preexisting conditions, i.e. age, inexperience, lack of education, to seek other employment; or
>
> (4) evidence that the employee has obtained other employment at a wage less than that earned prior to the injury.

Id. at 199–200, 837 S.E.2d at 425.

Although the Commission is required to "explain its basis" for its determination that a claimant's job search was unreasonable, *see Patillo v. Goodyear Tire & Rubber Co.*, 251 N.C. App. 228, 240, 749 S.E.2d 906, 914 (2016), "no general rule exists for determining the reasonableness of an injured employee's job search," *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 480, 768 S.E.2d 886, 894 (2015). Instead, the Commission is "free to decide whether an employee made a reasonable effort to obtain employment[,]" provided, of course, that such determination is supported by competent evidence. *Id.* at 480, 768 S.E.2d at 894 (*purgandum*); *see also Patillo*, 251 N.C. App. at 240, 794 S.E.2d at 914 (explaining conclusory findings that the "[p]laintiff's search for employment was unreasonable" are insufficient).

Here, the Full Commission concluded Plaintiff was not disabled from 2 April 2020 until 20 April 2022 because Plaintiff's job search during this time period was unreasonable. Specifically, the Full Commission found, based on the preponderance of evidence on the record, that:

> 41. Plaintiff's job search log documents that he applied for twenty-four jobs between 14 September 2021 and 18 October 2021. The Full Commission finds . . . that Plaintiff's failure to apply for any job until September of 2021, having been laid off in April 2020 and not assigned any written work restrictions, was not reasonable. The Full Commission further finds that Plaintiff's post-layoff

> text communications with Defendant-Employer during 2020, while an effort to obtain reemployment, is not sufficient to constitute a reasonable job search.
>
> . . .
>
> 85. . . . Plaintiff's 3 April layoff from Defendant-Employer was unrelated to his 21 January 2020 injury.
>
> 86. . . . [S]tarting at the beginning of Southwestern Community College's fall semester of 2020, Plaintiff voluntarily removed himself from the labor market to pursue an associate degree in business.
>
> 87. . . . [P]rior to voluntarily removing himself from the labor market to pursue an associate degree . . . Plaintiff had not conducted a reasonable job search.
>
> 88. . . . [G]iven Plaintiff's lack of formal work restrictions and work history, that it would not have been futile for Plaintiff to seek employment subsequent to being laid off by Defendant-Employer prior to enrolling at Southwestern Community College. The Full Commission finds that, to the extent the 20 July 2020 Smoky Mountain Urgent Care medical note imposed physical restrictions, those restrictions were not sufficient to render a job search futile or render Plaintiff's subsequent search reasonable.
>
> 89. . . . Plaintiff was assigned no formal work restrictions consequent of the 21 January 2020 specific traumatic incident until March 2022, approximately two months prior to his graduation from Southwestern Community College.

The Full Commission's findings were supported by competent evidence and supported its determination that Plaintiff's job search was unreasonable. According to Plaintiff's job-search log, Plaintiff did not apply to any jobs prior to enrolling in community college in August 2020 and submitted his first job application to his former employer, Defendant-Employer, on 14 September 2021. Although Plaintiff applied to twenty-four jobs between 14 September 2021 and 18 October 2021, Plaintiff did not apply for any jobs from 18 October 2021 until 20 April 2022, at which time Plaintiff was nearing the end of his community college program. Moreover, Plaintiff testified that he "could do" a process engineer job following his 21 January 2020 work injury and was not prevented from working "all jobs."

Therefore, the Full Commission was free to find that Plaintiff's job search was unreasonable based on Plaintiff's job-search history, his decision to enroll in community college full-time rather than remain in the workforce, and his testimony indicating he was able to work during this time frame. Because competent evidence supports the Full Commission's determination that Plaintiff did not conduct a reasonable job search, and the findings sufficiently explain how Plaintiff failed to conduct a reasonable job search, we conclude the Full Commission did not err by concluding Plaintiff was not disabled from 2 April 2020 to 20 April 2022. *See Patillo*, 251 N.C. App. at 240, 794 S.E.2d at 914. Accordingly, the Full Commission did not err by concluding Plaintiff was not entitled to wage-loss compensation for this time period.

Our conclusion regarding the Full Commission's disability determination forecloses Plaintiff's remaining arguments pertinent to this issue. Plaintiff cannot demonstrate the Full Commission failed to consider or weigh the evidence regarding his pain when determining Plaintiff's disability. Indeed, although it was not required to make specific findings regarding Plaintiff's pain, the Full Commission made several findings of fact considering Plaintiff's pain. For example, the Full Commission found that Dr. Albright determined Plaintiff's back pain was causally-related to his work injury and that the work restrictions Dr. Albright imposed "reflect[ed] his opinions regarding Plaintiff's physical restrictions as of 9 March 2022, consequent of [Plaintiff's] back pain." In other words, the Full Commission did not disregard Plaintiff's pain when determining that his job search was unreasonable and did not err by failing to make more specific findings regarding Plaintiff's pain. *See Garrett v. Goodyear Tire & Rubber Co.*, 260 N.C. App. 155, 174, 817 S.E.2d 842, 856 (2018); *Matthews*, 108 N.C. App. at 265, 423 S.E.2d at 535. Finally, because Plaintiff did not make an initial showing of disability for the relevant time period, the Full Commission did not err by failing to shift the burden to Defendants to show suitable jobs were available to Plaintiff. *See Kennedy*, 101 N.C. at 33, 398 S.E.2d at 682. Accordingly, the Full Commission did not err in its disability determination.

B. Conclusion of Law 7

Next, Plaintiff challenges conclusion of law 7. Specifically, Plaintiff argues the Full Commission's findings in support of this conclusion are "deficient" because they do not explain how Plaintiff failed to conduct a reasonable job search. Plaintiff further asserts that the Full Commission improperly relied on *Ward v. Floors Perfect*, 151 N.C. App 752, 567 S.E.2d 465 (2002) (unpublished) because the facts of *Ward* are "extremely different from this case."

Having determined Plaintiff's findings of fact 41, 85, 86, 87, 88, and 89 are supported by competent evidence and sufficiently explain how Plaintiff failed to conduct a reasonable job search, we next examine Plaintiff's remaining argument: that the Full Commission's reliance on *Ward* was improper.

"An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority[,]" and citation to an unpublished opinion is "disfavored . . . ." N.C. R. App. P. 30(e)(3). Nevertheless, an exception exists and citation to an unpublished opinion is generally permissible "where the persuasive value of a case is manifestly superior to any published opinion." *State ex rel. Moore County Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005). This principle applies at both the appellate and trial court level. *See Zurosky v. Shaffer*, 236 N.C. App. 219, 233–34, 763 S.E.2d 755, 764 (2014) (explaining that the trial court may rely on persuasive authority in the same way as an appellate court "if the case is properly submitted and discussed and there is no published case on point"). Consistent with *Zurosky*, we conclude the Industrial Commission may rely on persuasive authority in the same manner as a trial or appellate court. *See id.* at 233–34, 763 S.E.2d at 764.

Here, the Full Commission concluded that from 3 April 2020 until 20 April 2022, "Plaintiff was capable of work [and] did not put forth reasonable effort to obtain employment [when] . . . it would not have been futile for him to seek employment." In conclusion of law 7, the Full Commission cited to *Ward* stating: "In *Ward v. Floors Perfect*, the Court of Appeals of North Carolina held that an injured worker who had not conducted a reasonable job search prior to attending community college full-time voluntarily removed himself from the job market and was not entitled to temporary total disability compensation." Analogizing to *Ward*, the Full Commission stated, "[s]imilarly, in the case at bar, Plaintiff enrolled in a full-time community college curriculum in the fall semester of 2020, not having conducted a reasonable job search before beginning classes."

Plaintiff asserts that, unlike the claimant in *Ward*, he did not voluntarily stop working at a company he owned, but was instead laid off by Defendant-Employer and was under more limiting work restrictions. Plaintiff also highlights the fact that he presented testimony from a vocational professional indicating Plaintiff needed re-training. He further notes that from 14 September 2021 until 15 May 2022, he unsuccessfully sought employment. These factual distinctions, however, do not undermine the "persuasive value" of *Ward*. *See Moore Cnty. Bd. of*

Educ., 168 N.C. App. at 222, 606 S.E.2d at 909. Indeed, *Ward* specifically analyzes how a claimant's decision to voluntarily exit the workforce in pursuit of an education impacts the reasonableness of his job search. Further, Plaintiff has not directed our attention to a published opinion with stronger persuasive value than *Ward*.

In *Ward*, this Court held the Commission's determination that the claimant "voluntarily removed himself from the job market and chose to enter community college" was supported by the evidence. *Ward*, at *14. This Court noted that "none of [claimant's] doctors opined that [he] could not work, and [he] presented no medical evidence that he was unable to work." *Ward*, at *14.

Similarly here, Plaintiff did not re-enter the job market, but instead chose to attend community college at a time when he was not unable, due to his injury, to work. Although Plaintiff was advised by Dr. Castor in July 2020 to "avoid heavy lifting," he was not under any formal work restrictions for the relevant time period. Because *Ward* is factually similar and there appears to be no other case equally as persuasive, we conclude it was not improper for the Full Commission to rely on *Ward* in conclusion of law 7. *See Moore County Bd. of Educ.*, 168 N.C. App. at 222, 606 S.E.2d at 909.

VI. Conclusion

The Full Commission's conclusion that Plaintiff was not entitled to wage-loss compensation from 2 April 2020 until 20 April 2022 is supported by the findings which are supported by competent evidence. Accordingly, we affirm the Opinion and Award.

AFFIRMED.

Chief Judge DILLON and Judge COLLINS concur.

CAULEY v. CAULEY

[299 N.C. App. 315 (2025)]

JULIANA CAULEY, PLAINTIFF
v.
MICHAEL CAULEY, DEFENDANT

No. COA24-200

Filed 18 June 2025

Attorney Fees—subject matter jurisdiction—delay after entry of domestic violence protective order—pending custody proceedings—award vacated

Where plaintiff was granted an ex parte domestic violence protection order (DVPO) (pursuant to Chapter 50B of the General Statutes) against defendant in March 2021 and defendant later filed a separate action for child custody (pursuant to Chapters 50 and 50A), but the parties agreed to numerous continuances and no further action was taken until January 2023, when plaintiff was allowed to amend her DVPO complaint—followed by the trial court's dismissal of her complaint and defendant's filing of a motion for attorney fees—the trial court's award of attorney fees to defendant was vacated. The trial court lacked subject matter jurisdiction for any award of attorney fees under Chapters 50 or 50A because causes of action under those statutes remained pending; as to Chapter 50B, jurisdiction to award relief expired 18 months after entry of the DVPO. As to an award of attorney fees pursuant to N.C.G.S. § 6-21.5, the trial court did not make findings regarding whether there was a complete absence of a justiciable issue or if either party prevailed; accordingly, the matter was remanded for further proceedings. Finally, plaintiff's arguments regarding the denial of her Civil Procedure Rule 59 and 60 motions were moot.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiff from orders entered 7 August 2023 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 8 October 2024.

King Law Offices, by Krista S. Peace and Patrick K. Bryan, for plaintiff-appellant.

Andrew C. Brooks, for defendant-appellee.

STADING, Judge.

Juliana Cauley ("Plaintiff") appeals from orders granting Michael Cauley ("Defendant") attorney's fees and denying her Rule 59 and 60 motions. For the following reasons, we vacate the attorney's fees order and remand for further proceedings. We also vacate the trial court's order denying Plaintiff's Rule 59 and 60 motions.

I. Background

This case has a complex procedural history. The action commenced when Plaintiff filed a complaint under Chapter 50B for a domestic violence protective order ("DVPO") against Defendant on 29 March 2021. Defendant filed an answer and counterclaims, but later voluntarily dismissed all counterclaims. Defendant later filed a separate action for child custody under Chapters 50 and 50A of the General Statutes.

With respect to the Chapter 50B action, on 29 March 2021, the trial court entered an order granting Plaintiff an *ex parte* DVPO. The trial court set the return hearing for 21 April 2021. Thereafter, the parties mutually agreed to continue the matter several times and leave the *ex parte* order in effect. On 27 October 2021, the trial court granted an additional continuance and scheduled a new court date of 3 December 2021. The record contains no indication that any action was taken on the new court date.

Nothing happened with Plaintiff's Chapter 50B action until she sought to revive the matter under N.C. Gen. Stat. § 1A-1, Rule 15 (2023) by requesting leave to amend her complaint on 5 January 2023, over a year after the last scheduled court date. In response, Defendant moved for attorney's fees and sanctions under N.C. Gen. Stat. §§ 1A-1, Rule 11, 50B-3(a)(10), and 6-21.5 (2023). The trial court granted Plaintiff's request for leave to amend her complaint but denied Defendant's requests for attorney's fees and sanctions on this occasion. Plaintiff filed her amended complaint on 23 January 2023, and on 15 March 2023, Defendant filed an answer to the amended complaint, a motion to dismiss and again moved for sanctions as well as reasonable expenses and attorney's fees under N.C. Gen. Stat. §§ 1A-1, Rule 11, 50B-3(a)(10), and 6-21.5. On 23 May 2023, the trial court conducted a hearing and dismissed Plaintiff's complaint, having determined she "failed to prove grounds for issuance of a domestic violence protective order."

On 26 May 2023, Defendant moved for return of his weapons surrendered under the *ex parte* DVPO. The trial court conducted a hearing and ordered Defendant's weapons returned to him on 31 May 2023. On

20 July 2023, Plaintiff was served with Defendant's motion for attorney's fees and a notice of hearing, but "forgot to mark the hearing on her calendar." On 7 August 2023, the hearing for attorney's fees was scheduled but Plaintiff did not appear. The trial court awarded Defendant $21,105.00 in expenses and $75,258.00 in attorney's fees in an order citing N.C. Gen. Stat. §§ 50B-3(a)(10), 50A-312, and 50-13.6 (2023).

On 17 August 2023, Plaintiff moved the trial court, under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, for a new trial, or alternatively, for the attorney's fees order to be set aside or amended. *See* N.C. Gen. Stat. § 1A-1, Rules 59, 60. The trial court denied Plaintiff's Rule 59 and 60 motions in an order dated 21 September 2023. Plaintiff entered her written notice of appeal on 18 October 2023.

II. Subject Matter Jurisdiction

Plaintiff maintains the trial court lacked subject-matter jurisdiction to award attorneys' fees under N.C. Gen. Stat. §§ 50B-3(a)(10), 50A-312, and 50-13.6.

A. Chapters 50 and 50A

The trial court ordered attorney's fees under N.C. Gen. Stat. § 50-13.6:

> In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

It also ordered attorney's fees under N.C. Gen. Stat. § 50A-312, relevant here:

> (a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the

> course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

As acknowledged by the trial court in its denial of Plaintiff's DVPO on 23 May 2023, determinations of custody "remain[ed] with the Watauga County Department of Social Services pending further orders in that case." To the extent the awards included fees incurred from the actions under Chapters 50 and 50A, the trial court could not award attorney's fees since those causes of action were stayed by statute. *See* N.C. Gen. Stat. § 7B-200(c)(1) (2023) ("When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent . . . [a]ny other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue . . . ."); *see also McMillan v. McMillan*, 267 N.C. App. 537, 542, 833 S.E.2d 692, 696 (2019). Accordingly, we vacate the trial court's award of attorney's fees attributed to the actions under Chapters 50 and 50A.

B. Chapter 50-B

The trial court cited N.C. Gen. Stat. § 50B-3—the statute enumerating relief available for a protective order—as an additional basis to award attorney's fees. In relevant part, that provision states, "[a] protective order may include [an] . . . [a]ward [of] attorney's fees to either party." N.C. Gen. Stat. § 50B-3(a)(10).

In *Rudder v. Rudder*, a prior panel from our Court considered the validity of a one-year DVPO entered by the trial court after the associated *ex parte* DVPO had expired by more than one-year. 234 N.C. App. 173, 175, 759 S.E.2d 321, 324 (2014). With respect to the trial court's *ex parte* order, the *Rudder* Court initially concluded, "[b]ased upon the orders entered continuing the *ex parte* DVPO and setting this matter for hearing, upon expiration of the ex parte order after more than a year, the trial court no longer had jurisdiction under the original complaint to enter an order further extending the DVPO." *Id.* at 184, 759 S.E.2d at 329. Then, the Court extended its reasoning to the associated one-year DVPO: "Because the trial court, in this case, lacked authority to enter the [one-year] order after the ex parte DVPO expired more than 18 months after its original entry, we vacate the [one-year] DVPO and remand for a hearing on defendant's motion for return of firearms." *Id.* at 186, 759 S.E.2d at 330.[1]

---

1. The *Rudder* Court reached this determination after acknowledging a plaintiff could seek a one-year DVPO even without requesting an *ex parte* DVPO: "This case also

N.C. Gen. Stat. § 50B-3(a)(10) characterizes attorney's fees as "relief" available in the order resulting from a request for a DVPO. An application of the *Rudder* ruling results in the trial court losing jurisdiction to enter the order and therefore any relief available under the statute. *Rudder*, 234 N.C. App. at 175, 759 S.E.2d at 324. The *Rudder* decision produces an unintended consequence when considering this particular set of facts. Regardless, we are bound by precedent. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). We vacate the trial court's award of attorney's fees attributed to N.C. Gen. Stat. § 50B-3(a)(10).

C. N.C. Gen. Stat. § 6-21.5

In his "Motion to Dismiss; Answer to Amended Complaint," Defendant requested the trial court award reasonable expenses and attorney's fees, citing N.C. Gen. Stat. §§ 1A-1, Rule 11, 50B-3(a)(10), and 6-21.5. Defendant's request for attorney's fees did not cite any provisions from Chapters 50 or 50A. Yet, as noted above, in its order awarding attorney's fees, the trial court's order referenced N.C. Gen. Stat. §§ 50B-3(a)(10), 50A-312, and 50-13.6. The trial court's order does not cite N.C. Gen. Stat. §§ 1A-1, Rule 11, and 6-21.5 in awarding reasonable expenses and attorney's fees, nor does the record reveal whether the trial court considered these statutes. Plaintiff argues on appeal, "the only statutory authority arguably authorizing entry of any attorney's fees award . . . would be N.C. Gen. Stat. §6-21.5," but the trial court's order did not contain "the requisite findings of fact." Neither party argues on appeal for or against remedial measures available under Rule 11.

The relevant portions of N.C. Gen. Stat. § 6-21.5 provide:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading . . . . The court shall

---

does not present the issue whether a hearing upon a domestic violence complaint or motion, when no ex parte order was entered, could be continued repeatedly, even for more than a year, and we do not address that situation." *Id.* at 185, 759 S.E.2d at 330.

> make findings of fact and conclusions of law to support its award of attorney's fees under this section.

"The purpose behind N.C. Gen. Stat. § 6-21.5 is to 'discourage frivolous legal action.' " *McLennan v. Josey*, 247 N.C. App. 95, 98, 785 S.E.2d 144, 148 (2016) (citation omitted). To support an award of attorney's fees under section 6-21.5, "a plaintiff must either":

> (1) 'reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue'; or (2) be found to have 'persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.' "

Id. at 99, 785 S.E.2d at 148 (citations omitted). "[A] 'prevailing party,' as used in Section 6-21.5, is a party who prevails on a claim or issue in an action, not a party who prevails *in the action*." *Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 66, 671 S.E.2d 23, 30 (2009) (citation omitted). A prevailing party is one who succeeded "on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 196, 412 S.E.2d 893, 896 (1992) (citation omitted). Although section 6-21.5 is outside of Chapter 50B, a party is permitted to pursue other remedies under N.C. Gen. Stat. § 50B-7(a)(1): "The remedies provided by this Chapter are not exclusive but are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes."

Here, the trial court could have assessed attorney's fees under other statutes which Defendant included in his motion before the trial court. *See id.* Although there is no precedent directly addressing the exact issue before us, our Court has previously determined a trial court possessed jurisdiction to award attorney's fees under section 6-21.5 even though "the motion seeking such payment was filed more than a year after summary judgment was entered for the defendants and more than a month after the judgment was affirmed on appeal." *Brooks v. Giesey*, 106 N.C. App. 586, 590, 418 S.E.2d 236, 238 (1992). An analogous application of *Brooks* to the present matter would be neither inconsistent with *Rudder* nor contradictory to the general statutes. The *Rudder* Court limited its analysis to the trial court's jurisdiction in entering a permanent protective order under section 50B-3 after the relevant *ex parte* DVPO expired. 234 N.C. App. at 182, 759 S.E.2d at 328. Unlike *Rudder*, the issuance of a DVPO by the trial court is not in question here. Rather, the material issue in this case is whether the trial court's jurisdiction persists to award attorney's fees after Plaintiff's *ex parte* DVPO expired. The

plain language of section 50B-7(a) incorporates the "remedies provided under Chapter 50 and elsewhere in the General Statutes." N.C. Gen. Stat. § 50B-7. Not only law, but logic also supports the conclusion that the trial court retained its ability to consider attorney's fees under N.C. Gen. Stat. § 6-21.5. Under a scenario whereby a party wrongfully brings an action, and a trial court lacks jurisdiction to consider the claim, depriving a blameless party's request of attorney's fees for want of jurisdiction in the underly claim creates a perplexing result.

When awarding attorney's fees in the instant case, the trial court did not make findings of whether there was a complete absence of a justiciable issue; nor did it make findings of whether either party prevailed. *See id.* § 6-21.5. We therefore vacate and remand the trial court's underlying order for further proceedings consistent with this opinion.

III. Post-Trial Motions

Plaintiff argues the trial court's denial of her Rule 59 and 60 motions "are devoid of reason and amount to a substantial miscarriage of justice." Since we vacate a portion of the trial court's order and remand it for further findings of fact and conclusions of law, the trial court's Rule 59 and 60 order should be vacated as moot. *See Geoghagan v. Geoghagan*, 254 N.C. App. 247, 251–52, 803 S.E.2d 172, 176 (2017) (holding review of the defendant's Rule 60 issue as moot since "the order from which movant sought relief through the Rule 60 motion had been" vacated); *see also Khwaja v. Khan*, 239 N.C. App. 87, 92, 767 S.E.2d 901, 904 (2015) ("Based on the foregoing, we reverse the orders of the trial court entered 29 October 2013 granting Plaintiff summary judgment and costs; we vacate the 25 April 2014 order denying Defendants' Rule 60(b) motion as moot . . . ."). We thus decline to address Plaintiff's arguments with respect to the trial court's Rule 59 and 60 order.

IV. Conclusion

For the reasons above, we vacate and remand the trial court's order for attorney's fees, but hold the trial court could award attorney's fees if supported by appropriate statutory authority and a sufficient order. On remand, if the trial court deems appropriate, it may hold an evidentiary hearing and consider additional evidence on the issue of attorney's fees. *See Shropshire v. Shropshire*, 284 N.C. App. 92, 103–04, 875 S.E.2d 11, 20 (2022). Consequently, we vacate the trial court's subsequent order denying Plaintiff's Rule 59 and 60 motions. Since we vacate the orders and remand this matter to the trial court, consideration of Plaintiff's arguments about the trial court's findings of fact and conclusions of law are unnecessary at this time.

VACATED AND REMANDED.

Judge WOOD concurs.

Judge ARROWOOD concurs in part and dissents in part by separate opinion.

ARROWOOD, Judge, concurring in part and dissenting in part.

I concur with the decision to vacate the order on attorney fees in accordance with the statutes and *Rudder v. Rudder*. The trial court lacked jurisdiction to enter the DVPO after the *ex parte* order expired without proper renewal. However, I dissent from the majority's analysis with respect to N.C.G.S. § 6-21.5, as I believe remanding with instructions on these grounds is unnecessary.

It is well-settled that "the Court of Appeals may not address an issue not raised or argued by [the appellant] for it is not the role of the appellate courts to create an appeal for an appellant." *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 386 N.C. 359, 362, 905 S.E.2d 14, 16–17 (2024) (quoting *In re R.A.F.*, 384 N.C. 505, 512, 886 S.E.2d 159 (2023)).

In the order on attorney's fees, the trial court concluded defendant was entitled to be reimbursed pursuant to N.C.G.S. §§ 50B-3(a)(1), 50A-312, and 50-13.6. The trial court did not make any findings of fact or conclusions of law with respect to N.C.G.S. § 6-21.5, nor did it find that there was a complete absence of a justiciable issue. Although plaintiff states in her brief that § 6-21.5 may be "the only statutory authority arguably authorizing entry of any attorney's fees award," plaintiff contends that "[w]ithout any of the requisite findings in the Fees Order, the trial court could not" award attorney's fees to defendant under § 6-21.5.

The majority cites § 50B-7 which allows for parties to pursue other remedies outside Chapter 50B. Although this may be true, the parties here did not pursue remedies under § 6-21.5, at trial or on appeal. I believe we should not address the same, and that the appropriate action in this case is to vacate the orders without reaching beyond the proceedings before the trial court and the parties' arguments on appeal.

COLLINS v. HOLLEY

[299 N.C. App. 323 (2025)]

LISA M. COLLINS, PLAINTIFF
v.
COREY T. HOLLEY, DEFENDANT

No. COA24-516

Filed 18 June 2025

1. Contempt—civil—failure to pay attorney fees—findings unsupported by evidence—improper modification of attorney fee order

In plaintiff mother's appeal from an order in a child custody case, in which the trial court found her in civil contempt for failing to pay attorney fees pursuant to a prior order, the Court of Appeals disregarded three findings of fact in the contempt order that were unsupported by competent evidence: that all of plaintiff's child support payments had been late; that plaintiff had the ability to comply with the terms of the order for attorney fees and child support; and that defendant father had insufficient means to defray his attorney fees. Additionally, the Court of Appeals rejected a conclusion of law (labeled as a finding of fact in the contempt order) that grounds existed to modify the prior order by increasing the amount of attorney fees and child support that plaintiff would have to pay; civil contempt is not a proper mechanism for modifying an underlying order, but rather is an enforcement mechanism used to compel obedience to that order.

2. Contempt—civil—failure to pay attorney fees—willfulness—insufficiency of factual findings

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, the contempt order was reversed because the court's factual findings failed to support the conclusion that plaintiff willfully violated the prior order. To the contrary, the evidence showed that plaintiff's income was insufficient to cover both her regularly recurring expenses and her court-ordered payments; since she lacked the ability to comply with the order for attorney fees, her noncompliance could not be deemed willful. Additionally, the contempt order lacked certain statutorily required findings: that the attorney fee order remained in force and that the purpose of that order might still be served by compliance with it.

3. Contempt—civil—failure to pay attorney fees—amount owed increased under the contempt order—improper modification

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it improperly increased the amounts in attorney fees and past-prospective child support that plaintiff was required to pay. The trial court erred in using the contempt order to modify its prior order, as well as to punish plaintiff for noncompliance, since the purpose of civil contempt is to coerce compliance with an underlying order.

4. Contempt—civil—failure to pay attorney fees—purge conditions—increase in amount owed—improper

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where its purge conditions required plaintiff to pay even greater amounts in attorney fees and past-prospective child support than what the prior order originally required. The evidence at trial indicated that plaintiff lacked the present ability to comply with the purge conditions, since she already made insufficient income to cover both her monthly expenses and the court-ordered payments (in the original amounts, let alone in the new increased amounts). Further, the increase in those court-ordered payment obligations was an improper use of civil contempt to punish plaintiff rather than to coerce compliance with the underlying order.

5. Contempt—civil—failure to pay attorney fees—automatic incarceration in case of missed payment—improper

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it required that plaintiff be automatically incarcerated if she failed to make any of her court-ordered payments as scheduled. Under settled law, plaintiff could only be incarcerated after a determination that she was capable of complying with the underlying court order; however, the trial court had no way of projecting out and assuming what income, expenses, or assets plaintiff would have in the future.

Judge STADING concurring in result only.

Appeal by Plaintiff from Order entered 29 August 2023 by Judge W. David McFadyen, III, in Carteret County District Court. Heard in the Court of Appeals 30 January 2025.

Miller & Audino, LLP, by Jay Anthony Audino, for Plaintiff-Appellant.

Schulz Stephenson Law, by Sundee G. Stephenson and Bradley N. Schulz, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Lisa M. Collins (Plaintiff) appeals from an Order finding her in contempt and granting Corey T. Holley's (Defendant) Motion to Increase Attorney's Fees, Motion to Increase Arrears, and Motion to Order Plaintiff Incarcerated. The Record before us tends to reflect the following:

The parties are parents of one minor child. On 16 February 2021, Plaintiff initiated this proceeding by filing a Complaint for child custody and child support in Carteret County District Court. A Temporary Child Custody Order was entered with the consent of the parties on or about 9 March 2021. That Order granted the parties joint legal custody and awarded Plaintiff primary physical custody, while Defendant had visitation. The trial court entered a permanent Custody Order on 5 April 2022, which maintained the parties' joint legal custody but awarded Defendant primary physical custody of the minor child and granted Plaintiff visitation.

Defendant filed a Motion seeking attorney fees on 22 September 2022. The trial court heard arguments on Defendant's Motion, temporary child support, and "arrears"[1] on 22 May 2023. At that hearing,

1. The trial court repeatedly identifies certain amount as "arrears." However, this award is properly considered past-prospective child support. Arrears are past-due child support payments that have already been ordered and are vested as they accrue. *See* N.C. Gen. Stat. § 50-13.10 (2023). In contrast, past-prospective child support is child support that is ordered for the time period between the filing of a claim for child support and entry of an order for child support. *Miller v. Miller*, 153 N.C. App. 40, 48, 568 S.E.2d 914, 919 (2002) ("[O]ur court has previously held that child support which is awarded from the time a party files a complaint for child support to the date of trial is not retroactive child support, but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial." (citation and quotation marks omitted)). Here, the "arrears" identified by the trial court had not previously been

Defendant requested $48,866.92 in attorney fees. The trial court entered an Attorney Fees Order on 19 July 2023 determining the appropriate amount of attorney fees was $30,000.00. The trial court ordered Plaintiff to pay $2,500.00 per month toward the total award amount on the first day of each month beginning 1 August 2023 until the award was paid in full.

The same day, 19 July 2023, the trial court entered an Order on Temporary Child Support; Arrears (Child Support Order). In the Child Support Order, the trial court determined the parties' respective monthly gross incomes and health insurance expenses for the minor child. Specifically, the trial court found Plaintiff's monthly gross income was $5,739.07. The trial court calculated Plaintiff's child support obligation using our Child Support Guidelines, which set a monthly child support payment of $795.00. The trial court also determined Plaintiff owed Defendant $6,447.34 in past-prospective child support based on a monthly payment of $882.34 for November 2022 through May 2023. However, the trial court ordered Plaintiff pay only $3,500.00 in past-prospective child support according to the following schedule: $1,000.00 on 1 July 2023, 1 October 2023, and 1 January 2024; and $500.00 on 1 April 2024.

Defendant filed his first Contempt Motion on 25 July 2023. Defendant alleged Plaintiff had paid a total of $1,800.00 in child support in June and July 2023 but owed $790.00 for that time period. Defendant filed a second Contempt Motion on 8 August 2023, alleging Plaintiff had failed to pay the first attorney fee payment of $2,500.00. The trial court held a hearing on Defendant's Contempt Motions on 24 August 2023. At the time of the hearing, Plaintiff had paid her outstanding child support and was current on her child support obligations; however, she had not paid any of the attorney fee payment.

At the hearing, Defendant's case-in-chief was exclusively Plaintiff's testimony. Defendant did not testify nor offer other evidence. Plaintiff testified she earned approximately $1,800.00 every two weeks and had less than $100.00 per month remaining for her own expenses after fulfilling her court-ordered child support payments. Plaintiff stated she lived with her grandmother and did not have a mortgage nor any kind of rental agreement. When asked about her credit score, Plaintiff responded, "I am not sure." She further testified she had not applied for any loan to pay the

---

ordered and were unpaid; rather, they were newly established child support obligations for the time period prior to the child support hearing through entry of the Child Support Order. Accordingly, what the trial court refers to as "arrears" we refer to as past-prospective child support in this opinion.

attorney fee award because she "would have to get a co-signer" to obtain a loan for the full amount of $30,000.00. Plaintiff testified her current, recurring monthly expenses included: $150.00 for electricity, $40.00 for water, $180.00 for Spectrum services, $600.00 for a personal loan payment, $105.00 for car insurance, $68.00 for cell phone service, $442.00 for credit card payments, and $120.00 for therapy. Plaintiff declined to present evidence.

The day of the hearing, Defendant filed a Motion to Increase Attorney Fees Award and a Motion seeking to have Plaintiff incarcerated. Defendant requested the trial court increase the attorney fee award from $30,000.00 to $50,163.06 and to increase the past-prospective child support award from $3,500.00 to $6,447.34.

The trial court entered its Contempt Order on 29 August 2023. In that Order, the trial court found Plaintiff in contempt of the Attorney Fees Order for her failure to satisfy the $2,500.00 payment. The trial court further found "Plaintiff's actions were willful and intentional. The Plaintiff has an ability to comply with the terms of the July 19, 2023 Order, and she has willfully disobeyed the Orders of this Court." In the Contempt Order, the trial court granted Defendant's Motion to Increase Attorney Fees Award, Motion to Increase the Arrears (Past-Prospective Child Support), and Motion to Order Plaintiff Incarcerated. To purge her contempt, the trial court ordered Plaintiff pay $51,600.00 in three installments of $17,200.00 each on 15 October, 15 November, and 15 December 2023, and to pay $6,000.00 in past-prospective child support in six installments of $1,000.00 per month beginning 1 September 2023. The trial court also provided, "If Plaintiff fails to make any payment as scheduled, on the date so scheduled, Plaintiff shall be arrested and held in the Carteret County Jail until payment in full is made." Plaintiff timely filed Notice of Appeal on 26 September 2023.

Issues

The issues on appeal are whether the trial court erred by: (I) making Findings of Fact unsupported by competent evidence; (II) concluding Plaintiff was in contempt of the Attorney Fee Order; (III) ordering Plaintiff to pay additional attorney fees and past-prospective child support; (IV) entering its purge conditions; and (V) ordering Plaintiff's automatic incarceration if she failed to comply with future payments.

Analysis

I. Findings of Fact

[1] "We review a trial court's determination of civil contempt to determine 'whether there is competent evidence to support the findings of

fact and whether the findings support the conclusions of law.' " *Deanes v. Deanes*, 269 N.C. App. 151, 162, 837 S.E.2d 404, 412 (2020) (quoting *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted)). "When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper." *Thompson v. Thompson*, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012) (citation omitted). Here, Plaintiff challenges the trial court's Findings 5, 12, 14, and 15 as not supported by competent evidence presented at trial.

Plaintiff contends the following portion of Finding 5 is not supported by competent evidence: "Defendant detailed that Plaintiff had not made a single child support payment or arrears payment on time. All payments had been late." The only evidence elicited during the contempt hearing regarding Plaintiff's child support payments was the following exchange with Plaintiff:

> [Attorney]: Are you current on your child support?
>
> [Plaintiff]: Yes.

Although Defendant alleged Plaintiff's child support payments were late in his first Contempt Motion, that Motion was not introduced into evidence nor did Defendant request the trial court take judicial notice of that Motion. In the absence of additional evidence beyond Plaintiff's statement above, the challenged portion of Finding of Fact 5 was not supported by the evidence.

Plaintiff challenges Finding 12, which states: "The Plaintiff's actions were willful and intentional. The Plaintiff has an ability to comply with the terms of the July 19, 2023 Order, and she has willfully disobeyed the Orders of this Court. The Plaintiff's actions have defeated, impaired, impeded, and prejudiced the rights and remedies of the Defendant." Our caselaw consistently defines "willfulness" as "(1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002) (citation omitted). Thus, to establish willfulness, Defendant had to show Plaintiff had the ability to comply with Attorney Fees Order.

At the contempt hearing, Plaintiff testified she earned approximately $3,600.00 per month. She also testified her regular recurring monthly expenses were $1,705.00 and she also paid monthly prospective child support of $795.00 and needed $250.00 per month to go toward past-prospective child support payments of $1,000.00 due every four months. Those expenses alone leave Plaintiff with approximately $850.00—significantly less than the monthly attorney fee payment she

owed of $2,500. Thus, the evidence showed Plaintiff did not have the ability to pay the monthly attorney fee award.

Although perhaps Plaintiff could have obtained a loan to satisfy the attorney fee award, *see Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 ("Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply." (citation omitted)), there was not sufficient evidence adduced at trial to show this is the case. The only evidence presented on this issue showed Plaintiff did not know what her credit score was, and she had not applied for a loan because she believed she would need a co-signer given the amount needed. In *Henderson v. Henderson*, our Supreme Court affirmed this Court's vacatur of a civil contempt order where "[n]o evidence was adduced at the hearing with respect to any assets or liabilities of the defendant, any inventory of his property, his present ability to work, nor even his present salary." 307 N.C. 401, 409, 298 S.E.2d 345, 351 (1983). Similarly, in the present case, there was no evidence produced at the hearing regarding Plaintiff's assets. Indeed, even more compellingly, the evidence revealed only liabilities and a present salary that is not sufficient to cover all of her expenses and court-ordered payments. Thus, Finding 12 is unsupported by the evidence.

Plaintiff challenges Finding 14, which states: "Defendant is an interested party acting in good faith who has insufficient means to defray the expense of this action, including but not limited to his reasonable attorney fees. Defendant is in need of an award of reasonable attorney's fees. Plaintiff has the ability to pay these attorney fees." At the contempt hearing, Defendant presented no evidence whatsoever as to his own financial status. In the absence of any evidence as to Defendant's finances, the trial court erred in finding he has insufficient means to defray his attorney fees. Further, as we discussed in addressing Finding 12, there was insufficient evidence to show Plaintiff had the ability to satisfy all of her current financial obligations at the time of the hearing; thus, the trial court had no basis on which to find Plaintiff had the ability to pay even more attorney fees. Accordingly, Finding 14 is erroneous.

Finally, Plaintiff challenges Finding 15: "Grounds also exist to warrant modification of the Court's prior Orders as more specifically detailed below." Although labeled a finding of fact, whether grounds exist to warrant modification requires the trial court to weigh and judge the evidence. Thus, it is properly considered a conclusion of law. *See In re K.J.M.*, 288 N.C. App. 332, 339, 886 S.E.2d 589, 595 (2023) ("Any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law." (quoting

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)) (internal citations omitted)); *see also In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("The labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review. If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." (internal citation omitted)). We review it as such below.

But in any event, this statement reflects a fundamental misunderstanding and misuse of contempt. Civil contempt is an enforcement mechanism used to "compel obedience" to court orders. *Hardy v. Hardy*, 270 N.C. App. 687, 690, 842 S.E.2d 148, 151 (2020) (citation omitted). It is not a substitute for procedures to modify an underlying court order. *See generally Jackson v. Jackson*, 192 N.C. App. 455, 459, 665 S.E.2d 545, 548 (2008) (discussing confusion between contempt and modification of an order in the context of child custody).

Reviewing the Record and transcripts, the challenged Findings of Fact are unsupported by the evidence. "[W]hen an appellate court determines that a finding of fact is not supported by sufficient evidence, the court must disregard that finding and examine whether the remaining findings support the trial court's conclusions of law." *In re A.J.*, 386 N.C. 409, 410, 904 S.E.2d 707, 710 (2024) (citing *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 693 (2023)). Accordingly, we disregard the above Findings and consider whether the remaining Findings support the trial court's Conclusions.

II. Contempt and Willfulness

[2] Plaintiff contends the trial court erred in concluding she was in willful violation and contempt of the Attorney Fee Order. Specifically, she argues the Findings of Fact do not support the Conclusion she "has willfully and intentionally violated the Orders of the Court issued on July 19, 2023."

In civil contempt proceedings, our review is limited to "determining whether competent evidence supports the findings of fact and whether those findings support the conclusions of law." *Blanchard v. Blanchard*, 279 N.C. App. 280, 284, 865 S.E.2d 693, 697 (2021) (citing *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). If the findings are supported by competent evidence, they are conclusive on appeal. *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (citing *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 394 (1966)).

Under our statutes, failure to comply with a court order is continuing civil contempt so long as

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a)(1)-(3) (2023).

"Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power." *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Henderson*, 307 N.C. at 408, 298 S.E.2d at 350). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596 (citation omitted). Ability to comply may mean the present means to comply or the ability to take reasonable measures to comply. *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980)).

Here, Plaintiff testified about her finances at the contempt hearing. Plaintiff reported earning approximately $3,600.00 per month, and she testified to her recurring personal expenses, prospective child support, and past-prospective child support, which totaled $2,750.00. Her remaining attorney fee obligation under the Attorney Fee Order is $2,500.00. She also explained she resided with her grandmother and was not listed on any lease or rental agreement. There was no other evidence presented at the hearing as to Plaintiff's finances. Based on this evidence, the trial court concluded Plaintiff was in willful violation of the Attorney Fee Order.

At the conclusion of a contempt hearing, the trial court "must enter a finding for or against the alleged contemnor on *each of the elements* set out in G.S. 5A-21(a)." N.C. Gen. Stat. § 5A-23(e) (2023) (emphasis added). The Contempt Order in this case does not contain any Finding that the Attorney Fee Order remains in force, nor does it contain a Finding stating the purpose of the Attorney Fee Order may still be served by compliance with that Order. Thus, as to the Attorney Fee Order, the

trial court's Findings of Fact do not support its Conclusion that Plaintiff was in contempt of the Order.

Further, as we have explained, the Findings regarding Plaintiff's ability to pay were not supported by the evidence presented. The only evidence presented at trial showed Plaintiff had $100.00 per month left over after expenses and she did not believe she could obtain a loan without a co-signer. There was no basis upon which to conclude Plaintiff had the ability to pay $2,500.00 in attorney fees to comply with the Attorney Fee Order. Without the ability to comply with an order, a party cannot be held in contempt of that order. *See Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596 (citation omitted). Thus, the trial court's Findings of Fact are insufficient to support its Conclusion Plaintiff was in contempt of the Attorney Fee Order. Therefore, the trial court erred in holding Plaintiff in contempt.

III. Attorney Fees and Past-Prospective Child Support

[3] Plaintiff argues the trial court erred in ordering her to pay additional attorney fees for which the court previously found her not responsible and ordering her to pay increased past-prospective child support. We agree.

"Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties." *Hardy*, 270 N.C. App. at 690, 842 S.E.2d at 151 (quoting *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985)). "A major factor in determining whether contempt is civil or criminal is *the purpose for which the power is exercised*. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." *O'Briant*, 313 N.C. at 434, 329 S.E.2d at 372 (emphasis added).

This Court has previously concluded a trial court acted erroneously by using a civil contempt order to punish or amend a prior court order. *See Jackson*, 192 N.C. App. at 464, 665 S.E.2d at 551 (concluding provisions in contempt order impermissibly modified a prior child custody order); *Parker v. McCoy*, 291 N.C. App. 693, 895 S.E.2d 481, 2023 WL 8746469 (2023) (unpublished) (trial court erred in suspending existing permanent custody order and entering new custodial provisions within a contempt order).

In *Jackson*, although neither party had a pending motion to modify the underlying custody order, the trial court entered a contempt order which modified a provision of the existing custody order and imposed several new custody provisions. 192 N.C. App. at 460, 665 S.E.2d at 549. The trial court later amended the contempt order to make several additional findings and conclusions regarding child custody and recaptioned it "Order Modifying Custody Order and for Contempt, and for the Appointment of a Parenting Coordinator." *Id.* at 462, 665 S.E.2d at 550. Although in the child custody context, this Court noted the distinction between "the purposes of modification and contempt" and concluded the trial court abused its discretion by modifying the prior custody order via contempt. *Id.* at 463-64, 665 S.E.2d at 551. In *Parker*, this Court looked to *Jackson* and concluded the trial court had erred by suspending the underlying permanent custody order and entering a temporary order with new custodial provisions within its contempt order. 291 N.C. App. at *3.

The consistent teaching of these cases is that civil contempt may not be used to modify a prior court order. This is precisely what occurred in the case *sub judice*. Here, the Attorney Fee Order mandated Plaintiff pay $30,000.00 in attorney fees. However, the trial court later increased this amount to $51,600.00 in the Contempt Order. In doing so, the trial court impermissibly modified its prior Order. *See Jackson*, 192 N.C. App. at 464, 665 S.E.2d at 551. Moreover, increasing the amount of attorney fees Plaintiff is required to pay is clearly unrelated to coercing her to pay the attorney fees previously awarded and, thus, is impermissible. *See Hardy*, 270 N.C. App. at 690, 842 S.E.2d at 151 (civil contempt is a mechanism "to compel obedience to orders and decrees made for the benefit of such parties").

Likewise, the trial court's use of contempt to grant Defendant's Motion to Increase Arrears is erroneous. In the Child Support Order, the trial court "adjudicate[d] the arrears at $3,500.00[.]" Thus, the trial court had already determined the amount of past-prospective child support. As with the attorney fees, contempt is not a proper mechanism to modify an award of past-prospective child support. *See Jackson*, 192 N.C. App. at 464, 665 S.E.2d at 551. Nor is increasing the amount of past-prospective child support Plaintiff owes related to coercing her to pay the ordered amount. *See Hardy*, 270 N.C. App. at 690, 842 S.E.2d at 151.[2] Thus, the

2. Even if we were to accept Defendant's characterization of the underlying amount as "arrears," this modification would be erroneous. Under our statutes, "Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, *or otherwise modified in any way* for any reason . . . except that a child support obligation may be modified as otherwise provided by law" subject to the requirements

trial court lacked authority to modify the past-prospective child support award and the attorney fee award.

IV. Purge Conditions

[4] Plaintiff contends the purge conditions set out in the Contempt Order were improper. We agree.

The trial court set out the conditions Plaintiff must satisfy to purge herself of the contempt as follows:

> a. Plaintiff shall pay attorney's fees to Defendant in the amount of $51,600.00, payable under the following schedule:
>
> i. $17,200.00 payable on or before October 15, 2023.
>
> ii. $17,200.00 payable on or before November 15, 2023.
>
> iii. $17,200.00 payable on or before December 15, 2023.
>
> b. Plaintiff shall pay child support arrears in the amount of $6,000.00, payable at $1,000.00/month until satisfied. This is in addition to what Plaintiff has paid in arrears to date. The first arrears payment of $1,000.00 shall be paid on or before September 1, 2023.

Plaintiff specifically argues the trial court failed to determine whether she had the ability to satisfy the purge conditions and the purge conditions impermissibly escalated her financial obligations beyond what was previously ordered. We address each argument in turn.

A. *Ability to Satisfy Purge Conditions*

"[T]he trial court must find that [the obligor] has the ability to *fully comply* with any purge conditions imposed upon him." *Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016) (emphasis added). Indeed, "a person in civil contempt holds the key to his own jail by virtue of his ability to comply [with the court order]." *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980), *overruled on other grounds by*

---

set out in that statute. N.C. Gen. Stat. § 50-13.10(a) (2023) (emphasis added). Indeed, this Court has recognized "[c]hild support cannot generally be retroactively increased back to date before the filing of a motion to increase child support." *Crenshaw v. Crenshaw*, 296 N.C. App. 1, 18, 907 S.E.2d 743, 753 (2024). Here, Defendant made no argument, either before the trial court or in briefing to this Court, that modification of the "arrears" was warranted under N.C. Gen. Stat. § 50-13.10(a) or that Defendant had satisfied the statutory requirements under that Section. Thus, Defendant has not established this modification was warranted under any view of the amount.

McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993). This Court has previously vacated a contempt order where the findings of fact "[did] not support the conclusion of law that defendant has the *present ability* to purge himself of the contempt[.]" *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985) (citation omitted) (emphasis added). "Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply." *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Teachey*, 46 N.C. App. at 334, 264 S.E.2d at 787). "A general finding of present ability to comply is sufficient when there is evidence in the record regarding [the contemnor]'s assets." *Id.* (citing *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986)).

Here, the evidence before the trial court showed Plaintiff lacked sufficient income to cover her expenses and court-ordered payments. Again, Plaintiff testified her net income was approximately $3,600.00 per month, while she owed $3,545.00 total in prospective and past-prospective child support and attorney fees. Additionally, Plaintiff testified her recurring monthly personal expenses totaled $1,705.00. Thus, Plaintiff could not pay both her expenses and court-ordered payments. Further, the only evidence as to Plaintiff's assets was her testimony that she lives in her grandmother's house and thus does not own a home.

It would be illogical to conclude, based on this evidence, Plaintiff had the present ability to pay even greater attorney fees and past-prospective child support than already ordered or that Plaintiff could have taken reasonable measures to comply. Thus, the evidence is insufficient to support the trial court's Finding that Plaintiff had the ability to comply with the purge conditions. Therefore, the trial court erred in finding Plaintiff had the ability to comply with the purge conditions.

B. *Escalation of Financial Obligations*

"The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2023). Again, our Courts have consistently affirmed the "statutory definition of civil contempt makes clear that civil contempt is not a form of punishment; rather, it is a civil remedy to be utilized *exclusively to enforce compliance* with court orders." *Atassi v. Atassi*, 122 N.C. App. 356, 360, 470 S.E.2d 59, 61 (1996) (quoting *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142) (emphasis added). As a result, purge conditions must be used to coerce compliance with an underlying court order, not to modify such an order. *See Robinson v. Robinson*, 273 N.C. App. 407, 846 S.E.2d 595, 2020 WL 5154040, *3 (2020) (unpublished) (concluding

civil contempt purge conditions modifying parties' prior equitable distribution consent order were improper).

Here, as a purge condition, the trial court ordered Plaintiff to pay $21,600.00 in attorney fees beyond what it had previously ordered. Although we have already concluded the trial court's award of increased attorney fees and past-prospective child support were impermissible as a modification of a prior order, they are likewise impermissible as purge conditions. Given that the purpose of a purge condition is to compel compliance, it is illogical to conclude ordering Plaintiff to pay more money could coerce her to pay the amounts already ordered where she does not have the ability to pay the original amounts. Thus, under our caselaw, the trial court did not have the authority to modify the past-prospective child support or attorney fees through purge conditions or modification order.

Even if these escalations were viewed as fines rather than modifications of prior orders, they would still be inappropriate here. Although a fine may be an appropriate sanction for civil contempt, this is so only "when the [contemnor] can avoid paying the fine simply by performing the affirmative act required by the court's order." *Bishop v. Bishop*, 90 N.C. App. 499, 504, 369 S.E.2d 106, 109 (1988) (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632, 108 S. Ct. 1423, 1429, 99 L. Ed. 2d 721 (1988)). Here, the Record reflects Plaintiff *cannot* comply with the underlying order. Thus, she has no way to avoid such a sanction. Therefore, viewed in any light, the trial court's purge conditions here exceeded the scope of its authority. Consequently, the purge conditions are impermissible.

V. Automatic Incarceration

[5] "A trial court may not hold a person in civil contempt indefinitely." *Spears*, 245 N.C. App. at 282, 784 S.E.2d at 499 (citing *Wellons v. White*, 229 N.C. App. 164, 181-83, 748 S.E.2d 709, 722-23 (2013)). Moreover, it is well-established that a "defendant in a civil contempt action will be fined or incarcerated *only after* a determination is made that defendant is capable of complying with the order of the court." *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142 (emphasis added).

Here, the trial court ordered: "If Plaintiff fails to make any payment as scheduled, on the date so scheduled, Plaintiff shall be arrested and held in the Carteret County Jail until payment in full is made." This too is error.

Our caselaw makes clear an alleged contemnor may only be incarcerated *after* a trial court determines he is capable of complying with

the underlying court order. *E.g.*, *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142; *Hodges v. Hodges*, 64 N.C. App. 550, 552, 307 S.E.2d 575, 577 (1983) (citation omitted); *Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 574 (citations omitted); *Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222. And this makes absolute sense given how our courts define "willfulness": a present ability to comply and deliberate decision not to do so. *Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596 (citation omitted); *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Teachey*, 46 N.C. App. at 334, 264 S.E.2d at 787). Thus, for each alleged violation, a trial court must consider whether the contemnor indeed can comply with the order. Here, although Plaintiff testified to her income and some of her regular expenses, there is simply no way the trial court can project out and assume her income, expenses, or assets in the future; and our law requires a fact-specific inquiry for each alleged violation. Therefore, the trial court erred in ordering Plaintiff be automatically incarcerated if she fails to make any scheduled payment.[3]

Thus, for all the reasons set forth herein, the trial court erred both in holding Plaintiff in civil contempt and by impermissibly modifying its prior orders. Consequently, the trial court's Contempt Order was entered erroneously.

Conclusion

Accordingly, for the foregoing reasons, we reverse the Contempt Order.

REVERSED.

Judge FLOOD concurs.

Judge STADING concurs in result only.

---

3. We note Defendant additionally argues Plaintiff failed to preserve most of these issues for appellate review because she did not object during the contempt hearing. This argument lacks merit. Our Rules of Appellate Procedure provide: "Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings . . . *or taken without any such action*, including, but not limited to, *whether the judgment is supported by the verdict or by the findings of fact and conclusions of law* . . . may be made the basis of an issue presented on appeal." N.C. R. App. P. 10(a)(1) (2024) (emphasis added). Further, "an order is not final until 'it is reduced to writing, signed by the judge, and filed with the clerk of court[.]' " *In re L.G.A.*, 277 N.C. App. 46, 54, 857 S.E.2d 761, 767 (2021) (quoting N.C. Gen. Stat. § 1A-1, Rule 58). Thus, "[a] party would have no way of 'objecting' to a provision of the order until after the order is written, signed, and filed; that is the purpose of an appeal." *Id.* at 54, 857 S.E.2d at 768.

SHAYA GHASSEMI AS THE ADMINISTRATOR OF THE ESTATE OF ARMIN ROSHDI, AND SHAYA GHASSEMI, INDIVIDUALLY, PLAINTIFFS
v.
CENTREX PROPERTIES, INC., HAMED A. ALAWDI, JEHAN A. ALI AHMED, ALI ZAID, AND WESTWOOD PROPERTY GROUP, LLC, DEFENDANTS

No. COA24-717

Filed 18 June 2025

1. Negligence—off-property car accident—legal duty by property owner—harm not foreseeable

The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's negligence claim alleging that her husband's death in a car accident was the result of defendants' failure to prevent car meets in the shopping center's parking lot, which sometimes entailed car racing. Defendants could not be held liable for negligence where the accident and resulting harm were not reasonably foreseeable; the accident occurred two miles from the shopping center and the relationship between the teen driver's actions—deciding, after he left a car meet at the shopping center, to test his car's limits by accelerating to nearly ninety miles per hour and failing to stop at a stop sign before entering the intersection where he hit decedent's car—and the car meets were attenuated.

2. Nuisance—private and public—car meets in parking lot—single instance of injury

The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's nuisance claims (both public and private) alleging that her husband's death from a car accident resulted from defendants' failure to prevent car meets in the parking lot of the shopping center, which sometimes entailed car racing. Plaintiff failed to allege facts to support each essential element of a nuisance claim since, although she asserted that the car meets repeatedly occurred, there was no continuous injury but, rather, a single physical injury—her husband's death. Notably, plaintiff sought damages as a result of the accident but did not seek abatement of the alleged nuisance.

3. Contracts—third-party-beneficiary breach of contract—commercial lease—services agreement—lack of direct benefit to general public

The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's third-party-beneficiary breach of contract claim, in which she asserted that her husband's death in a car accident (that, although it occurred two miles away, was caused by a teen driver who had attended car meets in the parking lot of the shopping center, which sometimes entailed car racing) constituted a breach of defendants' contracts—a commercial lease agreement between the owner and its tenants and the services agreement between defendants—that set forth certain responsibilities for providing security and traffic control. Plaintiff could not show that she and her husband were intended third-party beneficiaries of the contracts despite language in the lease requiring tenants to carry liability insurance "for the protection of the general public," a term which was intended to set forth the rights and responsibilities between the landlord and its tenants.

Appeal by Plaintiff from orders and judgments entered 28 March 2024 and 1 April 2024 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Law Offices of James Scott Farrin, by Coleman M. Cowan, Kaitlyn E. Fudge, and Hannah L. Lavender, for the Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader, for Defendants-Appellees Centrex Properties, Inc., and Westwood Property Group, LLC.

GRIFFIN, Judge.

Plaintiff Shaya Ghassemi, in her capacity as administrator of her husband's estate and in her individual capacity, appeals from the trial court's orders granting summary judgment in favor of Defendants Centrex Properties, Inc, and Westwood Property Group, LLC. Plaintiff contends the trial court erred in summarily dismissing each of her claims for negligence, private and public nuisance, and third-party-beneficiary breach of contract. We affirm.

I. Factual and Procedural Background

Armin Roshdi, Plaintiff's husband, passed away following a motor vehicle accident between his vehicle and another vehicle driven by Defendant Hamed A. Alawdi, after Alawdi left the Cornerstone Village shopping center in Cary.

A. Motor Vehicle Accident

Alawdi, then sixteen years old, attended a car meet with his cousins in a parking lot at Cornerstone Village on 30 June 2021. On Wednesday nights, large numbers of car enthusiasts would meet in the Cornerstone Village parking lot to show off their customized vehicles, hang out, and sometimes compare their vehicles by street racing.

That evening, other attendees began to compare Alawdi's new sports car with another teen's car. They insisted Alawdi and the other teen should street race to prove whose car was better. Though Alawdi had previously agreed to the race, he made excuses that night to avoid racing. Alawdi left the car meet after fifteen to thirty minutes when his aunt called for him and his cousin to return home.

Alawdi's cousins were driving another vehicle, so he followed them to his aunt's house because he did not know the way there. On the way to his aunt's house, Alawdi pulled over and waited because he got separated from his cousins. Forensic evidence showed that, while he waited for his cousins, Alawdi was in communication with a friend who insisted he should have raced at the car meet. Alawdi then resumed traveling to his aunt's house, following his cousins. Alawdi was upset that he "couldn't prove [his] point to the people" at the car meet, and "wanted to test the limits of [his] car [himself] in what [he] thought was a safe area[.]" Alawdi sped up, passed his cousins' vehicle, and accelerated to a speed of nearly ninety miles per hour as he entered the intersection of Creek Park Drive and Morrisville Parkway in Morrisville. Roshdi was entering the intersection from Alawdi's right at that time, and Alawdi did not stop at the stop sign before entering the intersection. Alawdi crashed into the driver's side of Roshdi's vehicle. Roshdi succumbed to injuries sustained in the motor vehicle collision later that night.

B. Centrex and Westwood Own Cornerstone Village

At all times relevant to this appeal, Westwood owned and operated Cornerstone Village, and hired Centrex as the property manager of Cornerstone Village. In January 2021, Cary police notified Centrex it had received multiple reports over the preceding six months that car meets were occurring in the Cornerstone Village parking lot on Wednesday nights. Centrex consulted with Cary police, then responded to the reports by posting "no trespassing" and "no loitering or soliciting" signs in the parking lot and had their employees visit the Cornerstone Village parking lot on Wednesday evenings to monitor activity. The employees did not report any car meets during January and February of 2021, and stopped monitoring the lot on Wednesdays thereafter.

In March 2021, Charles Butler, a Cary resident who lived near Cornerstone Village, called Centrex's property manager and informed him that the car meets were still occurring in the parking lot. Butler told Centrex that drivers often sped recklessly down nearby roads when leaving the car meets. Butler also contacted Cary police, who informed him that they had already spoken with Centrex but could not otherwise intervene with car meets occurring on private property without Centrex's approval. David Dilts, another Cary resident, also contacted both Centrex and Cary police to complain about the Cornerstone Village car meets in June 2021. Centrex told Dilts that it had given Cary police permission to intervene in the car meets, but Cary police told Dilts that they did not have the property manager's permission to intervene.

On 1 July 2021, Richard Kim, an attorney for H Mart Companies, Inc., contacted Centrex to complain about the car meets. H Mart was an "anchor tenant" in Cornerstone Village, and, on behalf of H Mart, Kim expressed a desire for the car meets to be stopped. Centrex then met with Cary police to give them explicit authority to intervene in their parking lot, and began to dispatch private security to the parking lot on Wednesday nights.

C. Procedural Timeline

On 18 November 2021, Plaintiff filed a complaint commencing this action against Alawdi,[1] the owners of Alawdi's vehicle, and Centrex. Plaintiff later amended her complaint to add Westwood as a defendant. Relevant to this appeal, the amended complaint alleged negligence claims—negligence, premises liability, and loss of consortium—against Centrex and Westwood. On 29 June 2023, Plaintiff filed a motion for leave to amend her complaint to add claims for nuisance and third-party breach of contract against Centrex and Westwood.

On 21 August 2023, Centrex and Westwood filed a motion for summary judgment on Plaintiff's negligence claims. The trial court held a hearing on 4 October 2023 to hear Plaintiff's motion for leave to amend and Centrex and Westwood's motion for summary judgment. On 11 October 2023, the trial court entered a written order allowing Plaintiff to amend her complaint and deeming the second amended complaint formally filed as of June 29. The following day, the trial court entered

1. Plaintiff also named the owners of the sports car Alawdi was driving, Jehan A. Ali Ahmed and Ali Zaid, as defendants. Zaid has been dismissed from this case. Alawdi and Ahmed are not parties to this appeal.

a written order granting Centrex and Westwood's motion for summary judgment against Plaintiff's negligence claims.

On 25 October 2023, Centrex and Westwood filed an answer to Plaintiff's second amended complaint. On 31 October 2023, Centrex and Westwood filed a motion for summary judgment against the claims for nuisance and breach of contract added against them.

On 16 January 2024, Plaintiff filed a motion for reconsideration of the trial court's 12 October 2024 order granting Centrex and Westwood's motions for summary judgment against her negligence claims. On 25 March 2024, the trial court held a hearing on Plaintiff's motion for reconsideration and on Centrex and Westwood's second motion for summary judgment. On 1 April 2024, the trial court entered written orders granting Centrex and Westwood summary judgment against Plaintiff's added claims for nuisance and breach of contract, and denying Plaintiff's motion for reconsideration. The trial court certified each of its orders for immediate appellate review under Rule 54(b) of the North Carolina Rules of Civil Procedure.[2]

Plaintiff timely appeals.

II. Analysis

Plaintiff appeals from the trial court's orders granting Centrex and Westwood's motions for summary judgment against each of her claims for negligence, private and public nuisance, and breach of contract. We address the trial court's ruling as to each claim below.

A. Interlocutory Review

Plaintiff appeals from the trial court's orders fully resolving each of her claims against Centrex and Westwood, but her claims against Alawdi and Ahmed are still unresolved. Plaintiff's appeal is therefore interlocutory, *see Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted), and ordinarily not ripe for immediate appeal, *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citation omitted). However, the trial court

2. On 28 March 2024, the trial court filed an amended order granting summary judgment against Plaintiff's claims for negligence against Centrex and Westwood, amending the prior 12 October 2023 order on the same to include a Rule 54(b) certification that there is no just reason to delay immediate appeal. Plaintiff timely appeals from the amended order. *See Doe v. City of Charlotte*, 273 N.C. App. 10, 20, 848 S.E.2d 1, 9 (2020) (discussing interlocutory appealability of retroactive Rule 54(b) certification through newly filed amended orders).

certified each of the orders from which Plaintiff appeals for immediate appellate review under Rule 54(b) of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 54(b) (2023); *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) ("Rule 54(b) provides that in an action with multiple parties . . . , if the trial court enters a final judgment as to a party . . . and certifies there is no just reason for delay, the judgment is immediately appealable."). Plaintiff's appeal is properly before this Court.

B. Summary Judgment

"This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684 (2021) (citation omitted). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2023). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006) (citation omitted). "When evaluating a trial court's decision to grant or deny a summary judgment motion in a particular case, we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *Beavers v. McMican*, 385 N.C. 629, 633, 898 S.E.2d 690, 694 (2024) (citations and internal quotation marks omitted).

1. Negligence

[1] Plaintiff contends the trial court erred by summarily dismissing her negligence claims against Centrex and Westwood. A claim for negligence has three essential 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, 873 S.E.2d 567, 574 (2022) (citations omitted). These elements share a recursive relationship; "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care[,]"

and foreseeability "depends on the facts of the particular case." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (citations omitted). "[I]t is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted).

To establish a legal duty owed by Centrex and Westwood in this case, Plaintiff directs us to the standard adopted by our Supreme Court in *Benton v. Montague*, 253 N.C. 695, 117 S.E.2d 771 (1961). In *Benton*, a pre-school-aged child was injured when the defendant allowed a licensee to clear property adjacent to the child's family's property, and the licensee chose to set a fire which spread into an area where the child was playing. *Id.* at 699–700, 117 S.E.2d at 774. The plaintiff, the injured child's family, argued the defendant was negligent in allowing the licensee's actions on their property. *Id.*

Our Supreme Court began its analysis by concluding with certainty that the licensee acted negligently, and acknowledged well-established precedent that, " '[a]s a general rule, the owner of land is not liable for injury caused by the acts of a licensee unless such acts constitute a nuisance which the owner knowingly suffers to remain.' " *Id.* at 702, 117 S.E.2d at 776 (citation omitted). With that in mind, the Supreme Court in *Benson* established a two-part analysis whereby a landowner could be held liable for the torts of his licensee which cause injury off his property:

> With reference to negligence of a landowner in controlling the activities of third persons on the land, where there is injury to persons outside the premises and where there is no vicarious liability . . . [,] [i]t is not enough . . . to show that the [licensee's] conduct foreseeably and unreasonably jeopardized [the] plaintiff. [The p]laintiff must also show that the [landowner]
>
> (a) had knowledge or reason to anticipate that the [licensee] would engage in such conduct upon the [landowner]'s land, and
>
> (b) thereafter had a reasonable opportunity to prevent or control such conduct.

Id. at 703, 117 S.E.2d at 777 (citations and internal marks omitted).

Plaintiff's allegations ultimately contend that the *Benton* analysis applies here because Centrex and Westwood were aware that licensees of their parking lot were holding recurring car meets there, knew or should have known that allowing the car meets to occur would cause motor vehicle accidents two or more miles away from their property, and had a duty to stop the car meets to prevent those remote accidents. Plaintiff also advances two additional avenues through which Centrex and Westwood had a duty to prevent the car meets: expert opinion testimony introducing a duty in Centrex and Westwood's area of work, and a factor-balancing test for the imposition of a duty.

Nonetheless, even if we were to hold that the *Benton* analysis, or one of Plaintiff's other theories, created a duty of care for Centrex and Westwood under these circumstances, Centrex and Westwood are not liable in negligence because Alawdi's conduct and the resulting injury to Roshdi were not reasonably foreseeable. The facts of this case, in the light most favorable to Plaintiff, present a tenuous relationship between the events occurring at Cornerstone Village and the motor vehicle accident between Alawdi and Roshdi, and we are unwilling to create a duty where the resulting harm was not a foreseeable result of the duty's alleged breach. *See Stein*, 360 N.C. at 328, 626 S.E.2d at 267 ("No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." (citation omitted)).

To succeed on a negligence claim, the plaintiff must show the injury complained was proximately caused by the defendant's breach of duty. *Keith*, 381 N.C. at 450, 873 S.E.2d at 574. A proximate cause is one " 'that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' " *Ward v. Carmona*, 368 N.C. 35, 37, 770 S.E.2d 70, 72 (2015) (quoting *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961)). "It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected." *Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965) (citations omitted). Though, "[a] defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984) (citation omitted).

"Whether the harm was foreseeable depends on the particular facts." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010) (citation omitted). "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." *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1944) (citations omitted).

Plaintiff contends that her negligence claim was erroneously dismissed because the evidence showed a genuine issue of material fact exists regarding whether the motor vehicle accident and Roshdi's death were foreseeable results of a "series of events which began on [Centrex and Westwood's] property as a result of the dangerous condition they allowed to persist." We disagree.

Contrary to Plaintiff's assertion, the evidence shows the motor vehicle accident did not occur in continuous sequence from an event that began at Cornerstone Village or that was otherwise inexorably connected to the car meet at Cornerstone Village. Alawdi chose to "test the limits of [his] car [himself] in what [he] thought was a safe area," after continued instigation that he should race another teen. His act of reckless driving began and ended approximately two miles away from Cornerstone Village. Further, the record reflects Alawdi received text messages from other teens before and after his attendance at the car meet, all of which factored into his desire to test the limits of his vehicle. Plaintiff does not contend that a race began at Cornerstone Village, or that Alawdi was racing against the teen he was dared to race while attending the car meet. Based on the undisputed facts of this case, Alawdi could have elected to test his sports car without attending the car meet.

We hold Alawdi's reckless conduct two miles away from Cornerstone Village was not a reasonably foreseeable result proximately caused by Centrex and Westwood's decisions. Our holding is based on the specific facts of the case before us. The attenuated relationship between Alawdi's actions and the car meets and the distance between the intersection where the motor vehicle accident occurred and Cornerstone Village both weigh against the foreseeability of the accident. Under the facts of this case, we cannot hold that Centrex and Westwood had a duty to prevent a frustrated driver from causing a motor vehicle accident two miles away.

2. Nuisance

[2] Plaintiff next contends "[t]he trial court erred in summarily dismissing Plaintiff's nuisance claim against [] Centrex and Westwood[,]" arguing Centrex and Westwood committed both private nuisance *per accidens* and public nuisance.

" 'The term nuisance means literally annoyance; anything which works hurt, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property.' " *Holton v. Nw. Oil Co.*, 201 N.C. 744, 747, 161 S.E. 391, 393 (1931) (citation omitted). "A nuisance may be both public and private." *Swinson v. Cutter Realty Co.*, 200 N.C. 276, 279, 156 S.E. 545, 547 (1931) (citation omitted). Private nuisance *per accidens* occurs when an act, omission, or thing is not a nuisance at all times, "but may become so by reason of its locality and surroundings." *Id.* at 279, 156 S.E. at 547. " 'A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights.' " *Twitty v. State*, 85 N.C. App. 42, 49, 354 S.E.2d 296, 301 (1987) (quoting *State v. Everhardt*, 203 N.C. 610, 617, 166 S.E. 738, 741–42 (1932)). In either case, liability turns on whether the defendant's conduct was a reasonable use of his property when weighed against the resulting harms. *See Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) (citations omitted); *Swinson*, 200 N.C. at 279, 156 S.E. at 547.

Our Courts have frequently held, "where the damage the plaintiffs complained of arose out of single physical injury, instead of an on-going injury, the action sounds in negligence and not nuisance." *Wagner v. City of Charlotte*, 269 N.C. App. 656, 671, 840 S.E.2d 799, 809 (2020) (citation modified); *see Boldridge v. Crowder Const. Co.*, 250 N.C. 199, 202, 203, 108 S.E.2d 215, 217, 218 (1959) (holding "the evidence in this case was insufficient to establish [the] plaintiff's right to recover on the basis of nuisance, either public or private[,]" where the evidence disclosed "a single physical injury of the type sustained by the plaintiff" (citations omitted)). "[T]aking the evidence according to its reasonable inferences, the nuisance, if it may be called such, was negligence-born, and must, in the legal sense, make obeisance to its parentage." *Butler v. Carolina Power & Light Co.*, 218 N.C. 116, 121, 10 S.E.2d 603, 606 (1940) (holding "no transmutation of negligence to nuisance" in wrongful death action where the defendant's improperly maintained electrical wires electrocuted the plaintiff's husband).

The trial court did not err in summarily dismissing Plaintiff's claim for nuisance, both private and public, because Plaintiff does not attest to facts which could support each essential element of a nuisance claim. Plaintiff contends that Centrex and Westwood have allowed the car meets to repeatedly occur, interfering with the enjoyment of their property and unreasonably endangering the public. However, Plaintiff does not assert that she, or Roshdi, suffered continuous injury from the car meets occurring at Cornerstone Village. Rather, her nuisance claim

submits a single physical injury, Roshdi's death, resulting from a single occurrence, Alawdi's conduct on 30 June 2021, and requests only compensation for expenses and suffering incurred because of Roshdi's death. Notably, Plaintiff does not request abatement of the alleged nuisance.[3] It is conceivable that a plaintiff living near Cornerstone Village could complain of on-going injuries stemming from the weekly car meets, but Plaintiff has not presented those circumstances in the present case.

3. Breach of Contract

[3] Plaintiff's final argument asserts "[t]he trial court erred in summarily dismissing Plaintiff's third-party beneficiary breach of contract claim against [] Centrex and Westwood."

This Court has often affirmed that, to assert their rights as third-party beneficiary of a contract, a plaintiff must show: "(1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the third party." *Town of Belhaven, NC v. Pantego Creek, LLC*, 250 N.C. App. 459, 471, 793 S.E.2d 711, 719 (2016) (citations and internal marks omitted). "Ordinarily the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (citations and internal quotations marks omitted). The mere fact that a contract refers to a third-party does not inherently show the parties' intent to make the third-party a direct beneficiary of the contract. *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336–37, 641 S.E.2d 721, 724 (2007). The pinnacle question is " 'whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts.' " *Raritan River Steel Co.*, 329 N.C. at 651, 407 S.E.2d at 181 (citation omitted). "It is not sufficient that the contract does benefit [the third party] if in fact it was not intended for his direct benefit." *Vogel v. Reed Supply Co.*, 277 N.C. 119, 128–29, 177 S.E.2d 273, 279 (1970) (citation omitted).

Plaintiff argues the existence of two contracts to which they were third-party beneficiaries. First, Westwood is party to lease agreements

---

3. Plaintiff presents a claim for common law nuisance. We are cognizant of North Carolina's statute granting a statutory private right of action for public nuisance. Section 19-2.1 of the North Carolina General Statutes creates a right of action to sue for abatement of the nuisance. *See* N.C. Gen. Stat. § 19-2.1 (2023) (allowing "any private citizen of the county [to] maintain a civil action in the name of the State of North Carolina to abate a [public] nuisance . . . , perpetually to enjoin all persons from maintaining the same").

with the commercial tenants in Cornerstone Village, which bestow on Westwood the responsibility for "providing security and on-and-off site traffic control" on the premises. Second, the services agreement between Centrex and Westwood states that Centrex would "perform and observe [Westwood's] obligations under the lease agreements." Neither party disputes the existence and validity of these agreements.

Plaintiff argues each of these contracts "explicitly contemplate[s] the existence of Plaintiff as a member of the general public and contain[s] provisions which are intended for the public's direct, and not merely incidental, benefit." In support, Plaintiff points to language in Westwood's lease agreements which require its commercial tenants to "provide and keep in force, *for the protection of the general public* and [Westwood], liability insurance against all claims, for bodily injuries or death upon or near" Cornerstone Village. (Emphasis added). Plaintiff interprets this provision to mean that "members of the general public, including individuals located not directly on but near the premises, were specifically considered within and intended to benefit from the parties' agreement."

We disagree with Plaintiff's interpretation. Beyond recitations of black-letter law setting out North Carolina's observation of breach of contract claims by third-party beneficiaries, Plaintiff presents no law which specifically bolsters her interpretation of the contracts. Likewise, this Court can ascertain no North Carolina precedent which supports the notion that the terms within a lease agreement between two private entities specifically intended to bestow rights upon third-parties the lessee may serve.[4] Lease agreements, by their nature, are ordinarily drafted to make explicit the rights and duties of the parties in the lessor-lessee relationship, and are not created for the benefit of a third-party.

In this case, the language "for the protection of the general public and [Westwood]" describes the liability insurance that Westwood's commercial tenants must provide as a duty of its relationship with

4. Other jurisdictions have, however, held that a lease agreement naturally intends to benefit only the parties to the lease and serves to establish their contractual duties to one another. *See Brunsell v. City of Zeeland*, 651 N.W.2d 388, 391 (Mich. 2002) (holding the plaintiff was not an intended third-party beneficiary of a lease agreement which required maintenance "as may be necessary for the public safety," because the "public as a whole is too expansive a group to be considered 'directly' benefitted by a contractual promise"); *Wood v. Centermark Props., Inc.*, 984 S.W.2d 517, 527 (Mo. Ct. App. 1998) (holding that term in lease agreement between a commercial tenant and a landlord which required the landlord to provide security services did not intend to benefit the tenant's employee).

Westwood, to safeguard Westwood against liabilities that may arise throughout the commercial tenant's use of the leased property. This term intended to set out only Westwood and the commercial tenant's duties and rights with respect to each other. *See Town of Belhaven, N.C. v. Pantego Creek, LLC*, 250 N.C. App. 459, 472, 793 S.E.2d 711, 720 (2016) (holding that a contract giving the defendant the right to manage and operate a hospital was for the exclusive benefit of the parties to the contract); *Brunsell*, 651 N.W.2d at 391 ("[A]n objective analysis of the contract at issue indicates that the contractual provision at issue was intended to delineate the obligations of the [contractual parties] with regard to the premises, not to directly benefit third parties."). The trial court did not err in dismissing Plaintiff's claim because neither Plaintiff nor her husband were intended third-party beneficiaries of the contracts existing between Centrex and Westwood.

III. Conclusion

The trial court did not err by granting summary judgment in favor of Defendants Centrex and Westwood, and dismissing each of Plaintiff's claims against them, because Plaintiff failed to forecast genuine issues of fact regarding each claim.

AFFIRMED.

Judges TYSON and HAMPSON concur.

HATCHER v. RODRIGUEZ

[299 N.C. App. 351 (2025)]

JAMES HATCHER, PLAINTIFF
v.
JEREMY R. RODRIGUEZ, INDIVIDUALLY, AND JEREMY R. RODRIGUEZ, IN HIS CAPACITY AS A MEMBER OF LAURINBURG POLICE DEPARTMENT, AND CITY OF LAURINBURG, DEFENDANTS

No. COA23-1108

Filed 18 June 2025

1. Negligence—gross negligence—car accident—officer speeding in response to nonemergency—reckless disregard for safety of others

In a tort action arising from a car crash involving plaintiff and a police officer, the trial court did not err by denying summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, where the evidence showed that the officer: responded to a shoplifting incident despite no request for assistance from the officer at the scene; initiated an emergency response, which was against department policy for a property crime; turned on his lights but failed to activate his siren; by his own admission, did not know how to operate the siren following recent repairs to his vehicle; drove at 52 mph in a 35-mph speed zone; and looked away from the road to adjust the siren controls, all while driving into an oncoming traffic lane on a two-lane road with double lines, after which he crashed into plaintiff's vehicle. Based on these facts, a jury could find that the officer's actions showed a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits, thereby creating a genuine issue of material fact on the issue of gross negligence.

2. Immunity—public official immunity—police officer—summary judgment—genuine issue as to gross negligence—immunity pierced

In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, the trial court did not err at the summary judgment phase in finding that the officer was not immune from suit through public official immunity, since the court also found that a genuine issue of material fact existed as to whether the officer's conduct during the incident rose to the level of gross negligence, which in turn pierced the shield of absolute immunity the officer would have enjoyed under the public official immunity doctrine.

3. Negligence—gross negligence—respondeat superior—applicability conceded by defendants—claims of inadequate training and negligent supervision still allowed to proceed

In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, where the trial court denied summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, the trial court did not err by declining to dismiss plaintiff's additional claims of inadequate training and negligent supervision where, although the city conceded that the officer acted within the course and scope of employment at the time of the collision, thereby enabling plaintiff to argue the city's liability under the doctrine of respondeat superior, plaintiff also sought punitive damages, which could only be pursued through the inadequate training and negligent supervision claims.

Appeal by defendants from interlocutory order entered 5 September 2023 by Judge Dawn M. Layton in Scotland County Superior Court. Heard in the Court of Appeals 17 April 2024.

Law Offices of James Scott Farrin, by Coleman M. Cowan, Donald C. Clack, and Hannah L. Lavender, for plaintiff-appellee.

Hall Booth Smith, P.C., by Christian J. Ferlan and Scott D. MacLatchie, for defendants-appellants.

GORE, Judge.

Defendants, Jeremy Rodriguez ("defendant Rodriguez") and the City of Laurinburg (the "City"), appeal the order denying their motion for summary judgment ("MSJ"). The MSJ order is interlocutory but includes a denial of defendant Rodriguez's public official immunity claim. Defendants properly demonstrate that the interlocutory order affects a substantial right, therefore, we have jurisdiction to consider this appeal. *See Bartley v. City of High Point*, 381 N.C. 287, 293 (2022). Having reviewed the briefs, the record, and recent precedent, we affirm.

I.

On 19 November 2021, Defendant Rodriguez was in his patrol vehicle at a church parking lot on Old Lumberton Road while on duty for the Laurinburg Police Department ("LPD"). Defendant Rodriguez began working with LPD in 2017 and was assigned a marked patrol vehicle. The interior of the vehicle included a switch that would activate both

the siren and the lights when slid to a certain position. A couple months before the incident in November, defendant's vehicle went to the shop for repairs after his "light bar" sustained considerable wiring damage. After the repairs to the vehicle, the mechanic explained a separate siren knob must be turned on to activate both the siren and the lights when he moved the normal switch. Defendant Rodriguez testified he did not attempt to activate his siren and lights between the repair and the November incident, and that he did not know how to activate the siren the day of the incident.

Around 3:50 p.m. on 19 November 2021, defendant Rodriguez heard Corporal Teasley over the radio stating he was at the nearby Walmart to respond to a reported shoplifting incident. Corporal Teasley did not request backup and he did not communicate any concerns with the shoplifter other than to state the female shoplifter might attempt to run on foot. Although Corporal Teasley did not request assistance, defendant Rodriguez decided to respond and assist Corporal Teasley in case the shoplifter was dangerous, based upon his previous experiences. A sergeant and lieutenant who were near the Walmart, communicated over the radio that they would respond as backup and to follow "routine traffic"; however, defendant Rodriguez stated he did not hear the others' responses at the time. When the sergeant and lieutenant arrived at the Walmart, Corporal Teasley had already apprehended and released the shoplifter with a citation.

Defendant Rodriguez pulled out onto Old Lumberton Road, a two-lane road in a residential area with a school bus route and many side roads, and drove westbound. There were three vehicles driving in front of defendant Rodriguez and double lines on the road such that he could not pass the vehicles. Defendant Rodriguez decided to initiate an emergency response; he drove into the oncoming traffic lane and moved the switch to initiate both the lights and siren, while the lights turned on the siren did not, because the separate siren knob was turned off. Defendant Rodriguez looked down at the controls as he continued in the oncoming traffic lane, driving about 52-mph in the 35-mph speed limit zone. When defendant Rodriguez looked up, he saw that the vehicle two cars in front of him was turning onto a side street. Although he stated he hit his brakes, the crash was instantaneous. Plaintiff was driving the vehicle and sustained serious life-altering injuries.

The LPD assigned an officer to investigate the collision; at the conclusion of the investigation, the officer submitted a report that stated defendant Rodriguez violated multiple standard procedures. The report included a recommendation to issue a reprimand and suspend defendant

Rodriguez from police duty. Defendant Rodriguez resigned from the LPD prior to the issuance and suspension.

Plaintiff filed a complaint and an amended complaint against defendant Rodriguez in his individual and official capacities, and against the City of Laurinburg. Plaintiff brought claims for negligence, gross negligence, and wanton negligence; imputed liability of the City for negligence, gross negligence, recklessness, and willful and wanton conduct by its police officer; negligent supervision and inadequate training by the City; a claim for section 20-145 against defendant Rodriguez; and sought punitive damages against both defendants in addition to the compensatory damages. Plaintiff specified, and the City conceded, that the City waived its governmental immunity through its liability insurance under the doctrine of *respondeat superior*.

Defendants filed a motion for summary judgment after discovery. Defendants asserted defendant Rodriguez was entitled to public official immunity and that both the City and defendant Rodriguez were "entitled to judgment as a matter of law." Plaintiff filed multiple affidavits, photographs, a police report, the LPD internal investigation report, the LPD Standard Operation Procedures, defendant Rodriguez's responses to the interrogatories, transcripts of multiple depositions, the radio call, and other forms of exhibits in support of his motion in opposition to summary judgment. On 14 August 2023, the trial court heard arguments from both parties on the motion for summary judgment. After reviewing the submitted materials and hearing arguments, the trial court determined there were genuine issues of material fact on plaintiff's claims against defendants and entered an order on 5 September 2023 denying defendants' motion for summary judgment. Defendants filed an interlocutory notice of appeal seeking review of the order denying the motion for summary judgment. Defendants seek interlocutory appeal by arguing that public official immunity affects a substantial right.

II.

Both parties agree that an interlocutory order denying summary judgment is immediately appealable when governmental immunity and public official immunity are involved. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 653 (2001) ("Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable.").

Defendants seek de novo review of the order denying their motion for summary judgment. Defendants seek review of the following three issues: (1) whether the trial court erred by determining the claim for

gross negligence against Officer Rodriguez involved a genuine dispute of material facts; (2) whether the trial court erred by denying Officer Rodriguez's claim for public official immunity; and (3) whether the trial court erred by not dismissing the claims against the City of imputed liability for inadequate training and supervision. We review a denial of a motion for summary judgment de novo. *Bartley*, 381 N.C. at 293.

> Summary 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573–74 (2008) (cleaned up). Accordingly, we consider defendants' arguments through this standard of review.

A.

[1] Defendants argue the trial court erred by denying summary judgment because defendant Rodriguez's conduct "did not rise to the level of gross negligence." Plaintiff seeks damages pursuant to section 20-145, which establishes the standard of care for officers and exempts them from speeding laws when engaged in high-speed chases or emergency responses but does not exempt officers who display a "reckless disregard [for] the safety of others." N.C.G.S. § 20-145 (2023). Our Supreme Court previously established that civil suits against law enforcement for injuries resulting during emergency responses and high-speed chases are based upon a gross negligence standard of care. *Parish v. Hill*, 350 N.C. 231, 238 (1999). Gross negligence is "defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Id.* at 239.

As plaintiff states, "issues of negligence are generally not appropriately decided by way of summary judgment," because the question of whether Officer Rodriguez's conduct "was grossly negligent or showed reckless disregard for the safety of others are legal conclusions to be drawn from the evidence." *Norris v. Zambito*, 135 N.C. App. 288, 292–93 (1999) (cleaned up). Negligence is only properly decided through

summary judgment when "there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established." *Id.* at 293. Our Supreme Court explained that when deciding whether a police officer's actions were grossly negligent, we should consider that:

> an officer must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury. Gross negligence occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.

Jones v. City of Durham, 168 N.C. App. 433, 444 (2005) (Levinson, J., dissenting in part and concurring in part), *aff'd*, 360 N.C. 81 (2005), *opinion withdrawn and superseded on reh'g*, 361 N.C. 144 (2006) (Supreme Court reversing for the reasons stated in the dissent of Judge Levinson).

Defendants direct us to consider twelve cases with similar outcomes that each determined the officers in high-speed chases or emergency response calls did not act grossly negligent. *See Parish*, 350 N.C. at 246; *Young v. Woodall*, 343 N.C. 459 (1996); *Estate of Graham v. Lambert*, 282 N.C. App. 269 (2022), *rev'd and remanded by* 898 S.E.2d 888 (N.C. 2024); *Greene v. City of Greenville*, 225 N.C. App. 24 (2013); *Lunsford v. Renn*, 207 N.C. App. 298 (2010); *Holloway v. N.C. Dep't of Crime Control & Pub. Safety*, 197 N.C. App. 165 (2009); *Villepigue v. City of Danville, Va.*, 190 N.C. App. 359 (2008); *Bray v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 281 (2002); *Norris*, 135 N.C. App. at 295; and *Fowler v. N.C. Dep't of Crime Control & Pub. Safety*, 92 N.C. App. 733 (1989). Having considered each case, the similar features throughout are the direct pursuit or emergency response by each officer and the primary role each officer had during the emergency responses. As defendants accurately state, the appellate Courts ultimately determined in each case a lack of gross negligence on the officer's part. But the present case does not involve the necessity of a direct pursuit or an emergency response with defendant Rodriguez taking the primary response role.

Plaintiff relies upon *Jones v. City of Durham* and *Truhan v. Walston* as analogous cases to the present case. In *Jones*, our Supreme Court ultimately reversed this Court's determination because the officer was acting in a backup response role, and the facts in totality were more appropriate for jury determination rather than summary judgment adjudication. 361 N.C. 144, 146 (2006) (adopting dissent of Judge Levison).

Similarly in *Truhan*, the officer was responding in a backup role to provide traffic control assistance for a minor accident. 235 N.C. App. 406, 413 (2014). The officer testified a concern that there was a "violent situation" having believed he heard radio communications state, "a woman was arguing with a man and had pushed him." *Id.* at 413–14. However, the audio recording lacked proof of the evidence, and this Court additionally added that even if the officer "was aware of the disturbance, there [was] no evidence that the disturbance was serious." *Id.* at 414. Further, the officer was acting against department policy by "initiating emergency response driving without any justifiable reason, and without notifying his department." *Id.* at 420. This Court listed additional evidence viewed in the light most favorable to the nonmoving party and held that the facts were similarly persuasive to *Jones*. *Id.* at 420–21. The *Truhan* Court reversed the trial court's summary judgment and remanded for further proceedings on the claims against the officer. *Id.* at 421.

Every case involving section 20-145 and the gross negligence of a police officer considers and applies three components to determine whether their actions "constituted gross negligence." *Greene*, 225 N.C. App. at 27. These components are: "(1) the reason for the pursuit; (2) the probability of injury to the public due to the officer's decision to begin and maintain pursuit, and (3) the officer's conduct during the pursuit." *Id.*

When reviewing the reason of the pursuit under the first component, we consider: "whether the officer was attempting to apprehend someone suspected of violating the law and whether the suspect could be apprehended by means other than [a] high-speed chase." *Id.* In the present case, viewing the facts in the light most favorable to plaintiff, defendant Rodriguez heard an officer's communication over the radio for a shoplifter at a Walmart and responded, although the officer did not request assistance. The officer who was at the Walmart did not suggest an emergency response was necessary to apprehend the suspect and was able to apprehend the suspect without an emergency response.

We consider these additional factors under our review of the second component: "(1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit." *Id.* Viewing the evidence in the light most favorable to plaintiff, defendant Rodriguez initiated an emergency response on a road that is a mix between residential and commercial/urban, and along a school bus route between 3:50 p.m. and 4:00 p.m. in the afternoon; defendant Rodriguez admitted he saw school buses driving along

this road prior to his emergency response. There were three vehicles in the lane in front of defendant Rodriguez when he decided to initiate an emergency response, the road was a two lane road with two lines in the center indicating a no pass zone; the speed limit was 35-mph; the weather conditions were uneventful and the road was relatively flat; Officer Rodriguez's emergency response lasted only seconds after driving into the oncoming traffic lane and looking away from the road to initiate his siren before a vehicle (not directly) ahead of him turned left.

Under the third component, we consider the following: "(1) whether an officer made use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit." *Id.* at 27–28. Viewing the evidence in the light most favorable to plaintiff, defendant Rodriguez turned on his lights but not his siren; the siren knob was turned off in defendant Rodriguez's vehicle, despite his informed knowledge that the knob be turned on for siren activation; within seconds of initiating an emergency response and driving into the oncoming traffic lane, defendant Rodriguez collided with plaintiff as plaintiff made a left-hand turn onto an adjoining road; defendant Rodriguez lost control of his cruiser; the affidavits, interviews, and policy handbook entered into evidence prove defendant Rodriguez did not follow department policies for pursuits; and the evidence reveals defendant Rodriguez drove up to 52-mph within the 35-mph speed zone.

Viewing the evidence produced at summary judgment in the light most favorable to plaintiff a jury could find: defendant Rodriguez responded to a Walmart shoplifting incident although there was no request for assistance; defendant Rodriguez drove on a school bus route around 3:50 p.m. that was partially residential and partially commercial; defendant Rodriguez initiated an emergency response although this was against the department's policy for a property crime; defendant Rodriguez initiated his lights but failed to initiate his siren, and this was also against the department policy; defendant Rodriguez did not know how to operate his siren, despite the informed knowledge, and had not attempted to operate it after repairs were made to the vehicle; defendant Rodriguez drove into the oncoming traffic lane and was going up to 52-mph; defendant Rodriguez looked away from the road and down at his controls when the siren did not turn on; defendant Rodriguez collided with plaintiff's vehicle at about 52-mph as plaintiff turned left onto an adjoining street; the speed limit was 35-mph; defendant Rodriguez accelerated until he saw and collided with plaintiff; this collision occurred because defendant Rodriguez initiated an emergency response when only a "traffic control" response was proper, which requires officers to

follow traffic regulations and drive on a direct route at a normal speed; other officers had responded on the radio that they would back up the officer at the Walmart; and defendant Rodriguez was familiar with the road and had seen school buses driving on that route.

This evidence is analogous to both *Jones* and *Truhan*. Given the affidavits, depositions, interrogatories, and cumulative evidence, a jury could find that defendant Rodriguez's actions "tended to show a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits, and thus raises a genuine issue of material fact on the question of gross negligence." *Truhan*, 235 N.C. App. at 420 (citation omitted). Therefore, the trial court did not err by denying defendants' motion for summary judgment on the gross negligence claim under section 20-145.

B.

[2] Defendants argue the trial court erred by determining defendant Rodriguez was not immune from suit through public official immunity. We disagree.

We first address the confusion surrounding governmental immunity for officers in their official capacity as opposed to immunity for officers in their individual capacity. Both parties refer to the protection of governmental immunity under section 20-145, however, our Supreme Court just recently opined that there is no waiver of governmental immunity under section 20-145. *Estate of Graham*, 898 S.E.2d at 900 (internal quotation marks and citation omitted) ("Because section 20-145 is not a direct, positive, or clear waiver by the lawmaking body, it does not expose municipalities to liability when their agents breach its terms.").[1] However, "[s]ection 20-145 fastens responsibility to individual drivers for their individual acts and therefore applies to individual capacity suits. For those claims, gross negligence is the standard." *Id.*

While plaintiff may not seek liability against the City through the vehicle of section 20-145, it may seek liability through waiver of governmental liability "by the purchase of liability insurance," under section 160A-485. *Id.* at 898, 900; *see* N.C.G.S. § 160-485 (2023) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). Further, our Supreme Court clarified that a suit against an officer "in his official capacity" is "merely another

1. We recognize the parties did not have access to this recent opinion by our Supreme Court at the time of filing.

way of bringing suit against the City, both claims entail the same analysis and the same result." *Estate of Graham*, 898 S.E.2d at 900 (citation omitted).[2] Plaintiff specified a waiver of governmental immunity by the City through liability insurance, and plaintiff sought relief through the doctrine of *respondeat superior*. Defendants do not appear to challenge the waiver of governmental immunity, but instead argue the trial court erred by not granting the motion for summary judgment because of defendant Rodriguez's public official immunity defense.

Public official immunity is a complete defense for "discretionary acts" public officials commit, in their individual capacity, while in the course and scope of government employment. *Schlossberg v. Goins*, 141 N.C. App. 436, 445 (2000) ("[P]olice officers enjoy absolute immunity from personal liability for their discretionary acts done without corruption or malice."). This complete defense is not a "shield[ ] from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties." *Id.* "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Bartley*, 381 N.C. at 296 (citation omitted). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52 (2001), *superseded on other grounds by* N.C. R. Civ. P. 51. "Gross violations of generally accepted police practice and custom contributes to the finding that officers acted contrary to their duty." *Bartley*, 381 N.C. at 296 (internal quotation marks and citation omitted). Therefore, our determination there is a genuine issue of material fact as to the gross negligence of defendant Rodriguez pierces defendant Rodriguez's shield of absolute immunity under the public official immunity doctrine. The trial court did not err by denying the motion for summary judgment despite the defense of public official immunity.

C.

[3] Defendants also argue the trial court erred by not dismissing plaintiff's additional claims of inadequate training and negligent supervision because of the concession of defendant Rodriguez's employment status at the time of the incident. In support of this argument, defendants cite

---

2. We take time to clarify this area of law because both parties although including the necessary claims to preserve both individual capacity and official capacity claims, make statements that have the appearance of conflating these important distinctions. Such conflation of these claims could have legal consequences for the parties as it did for the plaintiff in the *Estate of Graham*.

to a case from the United States District Court for the Eastern District of North Carolina and one case from our Supreme Court. *See Johnson v. Lamb*, 273 N.C. 701, 706–07 (1968); *Justice v. Greyhound Lines, Inc.*, 2019 WL 267910 *1, *2 (E.D.N.C. 2019).

Having reviewed these cases, we determine the trial court did not err by allowing these claims to proceed, because although the City concedes defendant Rodriguez was within the course and scope of employment, thus triggering the doctrine of *respondeat superior*, plaintiff also seeks punitive damages. Based upon the case law defendants cite to in support of this argument, punitive damages are not available through the doctrine of *respondeat superior*, but rather through these additional claims. *See Plummer v. Henry*, 7 N.C. App. 84, 90–91 (1969). Because defendants limit their argument to whether these claims should have been dismissed pursuant to the City's concession under the doctrine of *respondeat superior*, we do not consider the additional question of whether denial of summary judgment was proper for these claims.

III.

For the foregoing reasons, we determine the trial court did not err by denying defendants' motion for summary judgment.

AFFIRMED.

Judges CARPENTER and WOOD concur.

HOLLAND v. HOLLAND

[299 N.C. App. 362 (2025)]

JULIA A. HOLLAND, PLAINTIFF
v.
JONATHAN R. HOLLAND, DEFENDANT

No. COA24-791

Filed 18 June 2025

1. Divorce—subject matter jurisdiction—military pension division—dismissal of procedural motion—no effect

In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied defendant's motion to dismiss for lack of subject matter jurisdiction. At the time plaintiff filed her motion, her sole remaining claim was for equitable distribution (ED). Contrary to defendant's assertion, plaintiff's voluntary dismissal of her initial motion—she refiled a new one several months later—did not effectuate a dismissal of the ED claim in its entirety, but was instead a procedural withdrawal of her motion (done erroneously with a pre-printed AOC form for voluntary dismissals) that did not cause prejudice to defendant.

2. Laches—equitable distribution—motion for division of military pension—delay not unreasonable—pension issue reserved until vesting

In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied and dismissed defendant's laches defense—whereby defendant asserted that plaintiff's fifteen-year delay in seeking to resolve her equitable distribution claim was unreasonable and should be barred. First, the parties' prior consent judgment explicitly reserved the pension issue for further consideration; therefore, defendant was on notice of the grounds for the issue he sought to bar. Second, since defendant was not vested in his military pension until his retirement, it was not unreasonable for plaintiff to wait until then to file her motion, which she did within two months of defendant's retirement. Finally, defendant's assertion that he would have sought other employment had he known that his military pension would be divided did not serve to support his laches defense.

3. Divorce—equitable distribution—military pension—calculation and award—statutory default equation properly applied

In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court's award of 24.7720% of defendant's military pension to plaintiff and its order requiring defendant to remit $50,111.73 of back payments to plaintiff were supported by its findings of fact, which in turn were supported by competent evidence. The parties' prior consent judgment had reserved the pension issue for further consideration without specifying an equal division; therefore, the statutory default method applied and, here, the trial court properly applied the statutory default coverture fraction in its calculation and award.

Appeal by defendant from judgment entered 18 January 2024 by Judge Bryan A. Corbett in Iredell County District Court. Heard in the Court of Appeals 10 April 2025.

Poyner & Spruill, LLP, by Steven B. Epstein, for the plaintiff-appellee.

Sullivan & Hilscher Family Law, by Kristopher J. Hilscher, for the plaintiff-appellee.

Pope McMillan, P.A., by Clark D. Tew, and Christian Kiechel, for the defendant-appellant.

TYSON, Judge.

Jonathan R. Holland ("Defendant") appeals from the trial court's denial of his motion to dismiss for lack of subject matter jurisdiction, disposal of his laches defense, and entry of a military pension division order awarding 24.7720% of his military pension and $50,111.73 in back payments to his ex-wife, Julia Holland ("Plaintiff"). We affirm.

I. Background

Plaintiff and Defendant were married 31 March 1991 and separated 5 October 2004. Plaintiff and Defendant had two children during the marriage. An absolute divorce judgment was entered 24 September 2007. Plaintiff filed a complaint for child custody, equitable distribution, post-separation support, and alimony on 7 June 2005. She subsequently filed a supplemental pleading for absolute divorce on 24 October 2005. Defendant filed a counterclaim for child custody, child support, and raised the affirmative defense of laches.

The parties entered into a consent judgment on 9 November 2005. Section 4(d) of the parties' judgment stated, "The nonvested military retirement account is reserved for further consideration." The judgment also provided all other issues remain open for further consideration, including alimony, child support, and post-separation support. Plaintiff voluntarily dismissed her claims for alimony, post-separation support, and attorney's fees on 4 January 2006.

The absolute divorce judgment expressly provided and reserved all pending claims between the parties would survive entry of judgment. The parties' youngest child turned eighteen on 26 February 2019 and child support was terminated. Defendant's pension vested upon his retirement from the United States Army and achieving the rank of Lieutenant Colonel (O-5) on 30 June 2021.

Plaintiff filed a motion for entry of the military pension division order on 25 August 2021. She voluntarily dismissed the motion, without prejudice, on 25 February 2022. She re-filed the motion on 20 December 2022. The trial court denied Defendant's motion to dismiss Plaintiff's motion pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and (6). The trial court ordered division of Defendant's military pension, awarding Plaintiff 24.7720% of the pension and for him to remit $50,111.73 in back payments. Defendant appeals.

II. Jurisdiction

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

III. Issues

Defendant argues the district court lacked subject matter jurisdiction to consider Plaintiff's motion for entry of a military pension division order, erred by rejecting his laches defense, and erred by entering a military pension division order.

IV. Subject Matter Jurisdiction

A. Standard of Review

[1] This Court "reviews Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings." *Nation Ford Baptist Church Incorporated v. Davis*, 382 N.C. 115, 121, 876 S.E.2d 742, 750 (2022) (citation omitted). On *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576, S.E.2d 316, 319 (2003).

B. Analysis

North Carolina Rule of Civil Procedure 41(a)(1) states, in relevant part:

> Subject to the provisions of Rule 23(c) and of any statute of this State, *an action or any claim therein* may be dismissed by the plaintiff without order of court [] by filing a notice of dismissal at any time before the plaintiff rests his case[.] Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]

N.C. Gen. Stat. § 1A-1, Rule 41(a) (2023) (emphasis supplied).

"An 'action' is defined as 'a formal complaint within the jurisdiction of a court of law.' A 'claim' is a 'demand for money or property' or a 'cause of action.' " *Bradford v. Bradford*, 279 N.C. App. 109, 114, 864 S.E.2d 783, 788 (2021) (quoting *Massey v. Massey*, 121 N.C. App. 263, 267, 465 S.E.2d 313, 315 (1996) (citation omitted)).

A motion is "a written or oral application requesting a court to make a specified ruling or order." *Motion*, Black's Law Dictionary (12th ed. 2024). A claim asserts a party's substantive right to relief, while a motion seeks procedural action in relation to that right. A motion exists to facilitate how and when a claim is addressed. *Id.*

"Generally, trial court judges enjoy broad discretion in the efficient administration of justice and in the application of procedural rules toward that goal." *M.E. v. T.J.*, 380 N.C. 539, 555, 869 S.E.2d 624, 634 (2022). "[R]ather than erecting hurdles to the administration of justice, '[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings.' " *Id.* at 556, 869 S.E.2d at 635 (citation omitted). "Equity regards substance, not form," and it "will not allow technicalities of procedure [to] defeat that which is eminently right and just." *Lankford v. Wright*, 347 N.C. 115, 118, 489 S.E.2d 604, 606 (1997) (citation omitted).

Plaintiff initiated this action asserting claims for equitable distribution, child support, child custody, alimony, post-separation support, and attorney's fees on 7 June 2005. The parties' entered into a consent judgment expressly preserving all claims for future consideration on 9 November 2005. Plaintiff voluntarily dismissed the latter three claims on 4 January 2006. The parties' youngest child reached the age of majority in 2017, and child support terminated in 2019. As of 2021, Plaintiff's sole remaining and pending claim was for equitable distribution.

Plaintiff filed a motion for entry of the military pension division order on 25 August 2021, voluntarily dismissed that motion on 25 February 2022, then refiled it 20 December 2022. Defendant argues the voluntary dismissal of the motion should be construed as dismissal of Plaintiff's sole pending claim, terminating the civil action and requiring her to commence a new action by filing a summons and complaint. *Bradford*, 279 N.C. App. at 116, 864 S.E.2d at 789.

The record shows Plaintiff intended only to withdraw her motion, not her underlying equitable distribution claim. She used a pre-printed AOC form specific to voluntary dismissal of actions and claims under Rule 41(a). Rather than checking the box to dismiss her complaint or a counterclaim, she marked the "other" box and specified "Motion (See Below)," attaching only her military pension motion. Plaintiff did not reference the greater equitable distribution claim within which the motion was asserted. If she had intended to dismiss the claim in its entirety, she would have identified it explicitly.

This filing error does not cause prejudice to the opposing party. A party cannot unilaterally alter a court-ordered and entered consent judgment by withdrawing a motion. As a result, Plaintiff's equitable distribution claim remained pending despite her voluntary dismissal of the motion, which amounted to a harmless procedural error. She refiled the motion within one year of dismissal, and Defendant has not shown he suffered prejudice from her action.

The civil action remained pending despite dismissal of Plaintiff's procedural motion. The court retained subject matter jurisdiction to resolve the equitable distribution claim. We affirm the trial court's order denying Defendant's motion to dismiss for lack of subject matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2023).

V. Laches Defense

[2] Defendant argues the district court's Military Pension Division Order is barred under the doctrine of laches. The trial court found Plaintiff did not unreasonably delay filing this suit to foreclose Defendant's laches

defense. Defendant challenges this finding and conclusion and argues Plaintiff's fifteen-year delay in seeking to resolve her equitable distribution claim was barred by laches.

A. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). "If supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Gannett Pac. Corp. v. City of Asheville*, 178 N.C. App. 711, 713, 632 S.E.2d 586, 588 (2006) (quoting *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003)). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Gannett*, at 713, 632 S.E.2d at 588 (quoting *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980)).

B. Analysis

Defendant appeals the trial court's denial and dismissal of his laches defense at the hearing. He challenges the court's finding Plaintiff did not act in a manner which unreasonably delayed this suit.

> A party seeking to invoke the affirmative defense of laches must show: (1) a delay of time resulting in some change in the condition of the property or in the relations of the parties; (2) the delay was unreasonable and worked to the disadvantage, injury, or prejudice of the party seeking to invoke the doctrine of laches; and, (3) the party against whom laches is sought to be invoked knew of the existence of the grounds for the claim sought to be barred.

U.S. Bank Nat'l Ass'n v. Estate of Wood, 268 N.C. App. 311, 320, 836 S.E.2d 270, 276 (2019) (citing *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001)).

The assertion of laches is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88-89, 712 S.E.2d 221, 230 (2011) (citation omitted). Laches does not arise from the mere passage of time; it must be demonstrated the delay was unreasonable under the circumstances. *Myers v. Myers*, 213 N.C. App. 171, 179, 714 S.E.2d 194, 200 (2011).

The trial court's 29 March 2023 Order Denying Defendant's Motion to Dismiss included the following finding:

> 17. The Court does not find that Plaintiff acted in a manner which deliberately or unreasonably delayed the matter. Furthermore, the Uniform Services Former Spouse Protection Act contains no deadline for the entry of a Military Pension Division Order. Although [Plaintiff] filed her motion nearly sixteen (16) years after the entry of the divorce judgment, [Defendant's] pension did not vest until he retired on July 1, 2021. Even if the Court had determined the percentage of the pension that Plaintiff would be entitled to in 2007, the actual amount that [Plaintiff] is to receive cannot be determined until now.

Defendant sufficiently challenged this finding and preserved this issue for our review. We review whether competent evidence supports the findings and whether the court's conclusion to deny Defendant's motion to dismiss was proper. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

Defendant asserted prejudice and testified he would have pursued alternate employment had he known his pension would be divided. This Court has found prejudice to exist where a defendant entered into real estate contracts and incurred financial obligations while a plaintiff, having knowledge of these facts, delayed filing suit. *Save our Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ.*, 140 N.C. App. 233, 237, 535 S.E.2d 906, 909-10 (2000).

Defendant undertook no such action or change of position. He did not incur legal or financial obligations, nor did he change his position in reliance upon Plaintiff's delay during the period between the time of 2005 consent judgment and Plaintiff's motion for division of the pension. His asserting he may have sought other financially-fulfilling employment is too speculative to support a laches defense.

In *Seifert v. Seifert*, the Supreme Court of North Carolina calculated the percentage of Defendant's pension the plaintiff was entitled to and ordered a deferred award of such benefits "payable when defendant-husband actually begins to receive them." This holding tends to show the trial court's ruling is not unreasonable. *Seifert v. Seifert*, 319 N.C. 367, 372, 354 S.E.2d 506, 510 (1987). "[A]bsent agreement, a court cannot order the immediate or periodic payment of a distributive award of vested pension . . . prior to the employee-spouse's actual receipt thereof." *Id.* at 369, 354 S.E.2d at 508; N.C. Gen. Stat. § 50-20.1(b).

"Under 10 U.S.C. § 3914 (1983), an enlisted member of the United States Army's right to retirement benefits vests when he/she has completed twenty years of service." *George v. George*, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994); 10 U.S.C. § 3914 (1983). Here, Defendant's military pension vested 30 June 2021. Plaintiff filed her motion to divide the pension on 25 August 2021, less than two months after it vested. Until vesting, Defendant remained at risk of ineligibility. *Id.* As the pension's value and status could not be ascertained before mid-2021, Plaintiff's timing in filing less than two months after the pension vested was reasonable. *Seifert*, 319 N.C. at 372, 354 S.E.2d at 510.

The consent judgment and record shows Defendant was aware of the grounds for the claim he sought to bar. He agreed and had received clear notice the issue of the military pension remained unresolved, because the 2005 Consent Judgment explicitly reserved the matter for further consideration. Plaintiff also filed an equitable distribution status report in 2007 confirming her claim remained pending.

Competent evidence supports the trial court's finding and conclusion Plaintiff did not act in a manner to unreasonably delay asserting her claim. We affirm the district court's denial and dismissal of Defendant's laches defense. *Id.*

VI. Award of Military Pension

[3] Defendant contends the district court failed to make sufficient findings to support its award of 24.7720% of his pension and to remit $50,111.73 of back payments to Plaintiff.

A. Standard of Review

Our Supreme Court has held:

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). The trial court's findings of fact are conclusive on appeal, if they are supported by competent evidence. *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984).

B. Analysis

The trial court's Military Pension Order distributed Defendant's pension in accordance with § 50-20.1(a)(3)(ii), which states, *inter alia*:

> (a) The distribution of vested marital pension, retirement, or deferred compensation benefits may be made payable by any of the following means:
>
> …
>
> (3) As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund . . . (ii) at the time the participant-spouse actually began to receive the benefits[.]

N.C. Gen. Stat. § 50-20.1(a) (2023).

The court found Plaintiff was eligible to receive a portion of Defendant's retirement under the Uniform Services Former Spouses' Protection Act, which permits classification of military retirement pay as either marital or separate property and authorizes direct payments to a former spouse, when the marriage overlapped with at least ten years of the service member's military service. 10 U.S.C. § 1408(c)(1) (2018). Defendant contends such marital property must be equally divided under N.C. Gen. Stat. § 50-20(c) (2023).

This argument overlooks the parties' 2005 consent judgment which reserved the military pension "for further consideration," without prescribing an equal division method. Such judgments are governed by § 50-20(d), which states parties may "in a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property. . . in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties." N.C. Gen. Stat. § 50-20(d) (2023).

Where a consent judgment reserves a pension determination for future consideration but provides no specific terms, the default method in § 50-20.1(d) applies. N.C. Gen. Stat. § 50-20.1(d)(2023); *Gilmore v. Garner*, 157 N.C. App. 664, 670, 580 S.E.2d 15, 20 (2003). Section 50-20.1(d) prescribes a valuation method that:

> [C]an be expressed as a fraction, the numerator of which "is the total period of time the marriage existed (up to the date of separation) simultaneously with the employment which earned the vested pension or retirement rights[,]" with the denominator being "the total amount of time the

> employee spouse is employed in the job which earned the vested pension or retirement rights."

Gagnon v. Gagnon, 149 N.C. App. 194, 198, 560 S.E.2d 229, 231 (2022) (quoting *Lewis v. Lewis*, 83 N.C. App. 438, 442-43, 350 S.E.2d 587, 589 (1986); *see also Seifert*, 82 N.C. App. at 337, 346 S.E.2d at 508 (approving use of § 50-20(d) for distribution of military retirement benefits).

The court determined and awarded Plaintiff's share of the pension in accordance with the statutory default equation by concluding: "Plaintiff is entitled to receive one-half of the marital share of the divisible retirement benefits, computed as follows: 163 months of marital pension service, divided by 329 of total pension service which is equal to Plaintiff receiving 24.7720% of Defendant's military retired pay." *Id.*

Competent evidence exists to support the trial court's calculation and award of 24.7720% of Defendant's pension to Plaintiff. We affirm the trial court's order dividing Defendant's military pension and the award of back pay as shown above.

VII. Conclusion

The trial court properly denied Defendant's motion to dismiss for lack of subject matter jurisdiction to consider Plaintiff's motion for military pension division order. Plaintiff's voluntary dismissal of her motion did not extinguish her equitable distribution claim, which remained pending under the parties' prior 2005 consent judgment.

The court's award of 24.7220% of Defendant's military pension was supported by competent evidence. In the absence of an agreement to the contrary, the trial court correctly applied the statutory default coverture fraction, where the consent judgment failed to specify a different division method of the pension. The trial court's disposal of Defendant's laches defense was proper because competent evidence supports the court's finding and conclusion Plaintiff did not unreasonably delay asserting her preserved claim. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

MH MISSION HOSPITAL, LLLP, PETITIONER
v.
NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT

No. COA24-726

Filed 18 June 2025

1. Hospitals and Other Medical Facilities—certificate of need—conformance with statutory criteria—need determination—"surgical services"

The administrative law judge properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 1 (requiring a proposed project to be consistent with applicable policies and need determinations in the SMFP) where, although its project did not include a general purpose operating room (OR) (contained in both of the other applicants' plans), the plain and unambiguous language of the SMFP did not require a general purpose OR; moreover, the selected plan included a new c-section operating room, which qualified under the broad category of "medical or surgical services" contained in the SMFP.

2. Hospitals and Other Medical Facilities—certificate of need—conformance with statutory criteria—cost, design, and means of construction—designated Brownfield site

The administrative law judge (ALJ) properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 12 (regarding the reasonableness of the cost, design, and means of construction) where, although its proposed development of a new hospital was on a designated EPA Brownfield Site, there was no evidence of a legal or practical bar to the site being developed, and the ALJ's further determination that the property could be safely remediated was not contradicted by any evidence that remediation would exceed projected development costs.

3. Hospitals and Other Medical Facilities—certificate of need—public hearing—limits placed on applicant employees from speaking—no substantial prejudice

In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, the administrative law judge properly determined that the decision of the Department of Health and Human Services to prohibit eight employees of one of the applicants from speaking during a portion of the agency's public hearing—a part of the hearing process distinct from the Proponent Time Period, during which applicants' employees were allowed to speak—did not constitute prejudicial error. Even if the restriction placed on the employees was in error or not in keeping with the agency's past practice, there was no substantial prejudice as a matter of law, since the limitation was in accord with a permissible interpretation of the public hearing statute.

4. Hospitals and Other Medical Facilities—certificate of need—competing applications—award to one applicant insufficient to show prejudice to another

In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, where the administrative law judge properly upheld the decision of the Department of Health and Human Services to award the CON to one applicant, since the agency did not commit any error in making its determination, the mere denial of another applicant's submission did not automatically establish substantial prejudice to that unsuccessful applicant.

Appeal by Petitioner and cross-appeal by Respondent from a final decision entered 10 May 2024 by Administrative Law Judge Michael C. Byrne in Office of Administrative Hearings. Heard in the Court of Appeals 25 February 2025.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by William F. Maddrey, Kenneth L. Burgess, Matthew A. Fisher, and Iain M. Stauffer, for the petitioner-appellant.

Attorney General Jeff Jackson, by Assistant Attorney General, Derek L. Hunter, for the respondent-appellee.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum, Charles George, and Trevor P. Presler, for the respondent-intervenor-appellant.

TYSON, Judge.

MH Mission Memorial Hospital, LLLP ("Petitioner" or "Mission Memorial") appeals from a Final Decision by an Administrative Law Judge ("ALJ") affirming the decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section ("DHHS"). DHHS approved AdventHealth Asheville, Inc.'s and Adventist Health System Sunbelt Healthcare Corporation's (collectively "Respondent-Intervenor" or "Advent") application for a certificate of need ("CON") for a new hospital with sixty-seven acute beds, one obstetrical c-section delivery operating room, and five procedure rooms.

Petitioner appealed DHHS' decision to the Office of Administrative Hearings ("OAH"). The ALJ affirmed DHHS' decision and entered a Final Decision for Advent on 10 May 2024. Mission Memorial appeals. Advent cross-appeals.

I. Background

The 2022 State Medical Facilities Plan ("2022 SMFP") identified a need for an additional sixty-seven acute care beds in the service area of Buncombe, Graham, Madison, and Yancey counties. Advent is a not-for-profit acute healthcare system operating in Western North Carolina. Mission Memorial operates an 815 bed, tertiary-quaternary acute care hospital facility located in Asheville. Mission Memorial is a subsidiary of HCA Healthcare, Inc.

Mission Memorial submitted a CON application to develop sixty-seven additional acute care beds at its existing hospital in Buncombe County on 15 June 2022. Advent filed a CON application to develop a new hospital with sixty-seven acute care beds, one obstetrical c-section operating delivery room, and five procedure rooms at a new location in Buncombe County the same day.

Novant Health Asheville Medical Center ("Novant") also filed a CON application to develop a new hospital with sixty-seven acute care beds, one relocated operating room from the Outpatient Surgery Center of Asheville, one obstetrical c-section operating delivery room, and three procedure rooms at a new location in Buncombe County.

DHHS determined the three applications were submitted by qualified applicants and complete and began its review on 1 July 2022. DHHS determined the approval of one application under the 2022 SMFP would result in the denial of the other applications. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2023) ("The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.").

Mission Memorial submitted written comments addressing both Advent's and Novant's applications. Advent submitted written comments to DHHS addressing the proposals included in both Mission Memorial's and Novant's applications. Novant also submitted written comments to DHHS addressing the proposals included in both Advent's and Mission Memorial's applications.

DHHS conducted a public hearing in Buncombe County on 12 August 2022. DHHS did not allow eight attendees to speak at a certain time at the public hearing because they were purported employees of Mission Memorial or employees of one its affiliated hospitals or entities. DHHS hearing administrators decided these speakers should have presented during the "Proponent Time Period" of the hearing, rather than during the "Public Time Period."

DHHS issued its decision approving Advent's application and disapproving Mission Memorial's and Novant's application on 22 November 2022. Mission Memorial filed a Petition for Contested Case Hearing in the OAH to seek administrative review of the 22 November 2022 decision on 21 December 2022. Novant also filed a Petition for Contested Case Hearing in the OAH on the same day.

By order entered 20 January 2023, the OAH consolidated the cases and allowed Mission Memorial and Novant to intervene in both parties' actions. Novant voluntarily dismissed its petition for a contested case hearing with prejudice on 21 March 2023. Mission Memorial voluntarily dismissed its petition for a contested case on 14 August 2023, but it refiled a Petition for Contested Case Hearing the same day.

The ALJ entered a Final Decision to uphold DHHS' decision to award Advent the CON to develop its proposed project. Mission Memorial appeals. Advent cross-appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-29(a) (2023).

III. Standard of Review

This Court applies a *de novo* standard of review if a party argues DHHS' "findings, inferences, conclusions, or decisions are: (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) made upon unlawful procedure; [or] (4) affected by other error of law[.]" N.C. Gen. Stat. § 150B-51(b)(1)-(4) and 51(c) (2023).

If the appealing party argues DHHS' decision was "(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion [,]" this Court must apply the "whole record" test. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c) (2023). A petitioner's status as a denied applicant does not alone constitute substantial prejudice. *CaroMont Health, Inc. v. N.C. HHS Div. of Health Serv. Regulation*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (citation omitted); *Parkway Urology, P.A. v. N.C. HHS*, 205 N.C. App. 529, 536-37, 696 S.E.2d 187, 193 (2010).

A non-applicant's witness's attempt to quantify the projected harm that will allegedly result from grant of the application is insufficient. *Id.* The evidence must be persuasive and demonstrate the harm caused by the CON approval to successfully challenge DHHS' grant of a CON application. *Id.* at 17, 751 S.E.2d at 255.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (citations omitted).

A statute "should always be interpreted in a way which avoids an absurd consequence." *Wake Med v. N.C. Dep't of Health and Human Servs.*, 225 N.C. App. 253, 258, 737 S.E.2d 754, 757 (2013) (quoting *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 423, 276 S.E.2d 422, 435 (1981)). "Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Wake Med*, 225 N.C. at 258, 737 S.E.2d at 757-58 (quoting *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999)).

Our Supreme Court has held:

> When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (citations omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)).

IV. Issues

Mission Memorial contends the ALJ erred in finding and concluding Advent's CON application met the "qualified applicant" standard and complied with Criteria 1 and 12 of N.C. Gen. Stat. § 131E-183(a)(1), (12) (2023) to meet the need outlined in the 2022 SMFP. Mission Memorial further asserts DHHS violated N.C. Gen. Stat. § 131E-185 (2023) by refusing to allow eight individuals to speak at the public hearing, resulting in substantial prejudice to Mission Memorial from the approval of Advent's application.

Advent argues Mission Memorial's application failed to comply with Criteria 1, 4, and 18a, under N.C. Gen. Stat. § 131E-183(a)(1), (4), (18a) (2023), and was not eligible for CON approval.

V. Advent's CON Application Compliance with Criterion 1 and 12 of N.C. Gen. Stat. § 131E-183 (2023)

DHHS determined and concluded Advent was a qualified CON applicant in compliance with § 131E-183(a) criteria. N.C. Gen. Stat. § 131E-183(a) (2023). Mission Memorial argues the ALJ erroneously found Advent to be a qualified applicant because it had failed to comply with Criteria 1 and 12. *Id.* We disagree.

A. Analysis

The 2022 SMFP defines a "qualified applicant" applying "for a CON to acquire the needed acute care beds" as a person or entity "who proposes

to operate the additional acute care beds in a hospital," to provide: (1) "a 24-hour emergency services department;" (2) "inpatient medical services to both surgical and non-surgical patients; and" (3) "if proposing a new licensed hospital, medical and surgical services on a daily basis within at least five of the following major diagnostic categories (MDC) recognized by the Centers for Medicare & Medicaid Services (CMS)." N.C. Dep't Health & Hum. Servs. ("NC DHHS"), State Medical Facilities Plan 37 (2022).

1. General OR Requirement (Criterion 1)

[1] Statutory Review Criterion 1 of N.C. Gen. Stat. § 131E-183(a)(1) ("Criterion 1") requires proposed projects to be consistent with needs of qualified applicants as set forth by the SMFP. N.C. Gen. Stat. § 131E-183(a)(1) (2023) (providing the applicant's proposal must be "consistent with applicable policies and need determinations in the State Medical Facilities Plan"). The 2022 SMFP provided an applicant proposing to develop and construct a new hospital must also provide medical and surgical services on a daily basis within at least five of the twenty-five MDCs listed in the 2022 SMFP and recognized by CMS. NC DHHS, State Medical Facilities Plan 37.

Mission Memorial argues, while Advent's application includes a proposal to develop a new c-section operating room ("OR"), the application did not propose to develop a new general purpose OR to be used for any type of surgical procedure, which would not support the conclusion Advent would be providing surgeries on a daily basis.

No statute or regulation requires a new hospital to include a general-purpose OR to qualify for the CON under the SMFP, as Mission Memorial suggests. The purported requirement to provide a general purpose OR is not mentioned in the SMFP definition of a "qualified applicant." The SMFP simply requires the applicant to offer "medical and surgical services" within the five of the twenty-five MDCs. NC DHHS, State Medical Facilities Plan 37. The language of the SMFP is unambiguous and incorporated into a statute. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2023). The language should be interpreted using the plain meaning of its words, applying "surgical services" broadly rather than to limit the terms of the 2022 SMFP to mandate a general purpose OR. *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.").

Additionally, Advent's application proposed to develop five procedure rooms and one c-section OR, which is recognized as an OR by DHHS. *See* 10A N.C. Admin. Code 14C.2101 (2021); NC DHHS, State Medical Facilities Plan 49, 54. The ALJ found Advent would provide "medical and surgical services on a daily basis within eight (8) MDCs in Project Year 1, ten (10) MDCs in Project Year 2, and twelve (12) MDCs in Project Year 3." DHHS concluded Advent was a Qualified Applicant, and the "surgical services" required by the 2022 SMFP could be provided in either a procedure room or in a c-section OR.

Although DHHS may have initially advised Advent a CON application for a new hospital had to include at least one general OR, the statement was without legal justification, and the plain statutory interpretation rule from *Lemons* governs. *Id.* 322 N.C.at 276, 367 S.E.2d at 688. While no other approved applicant proposed to develop a new hospital without at least one general OR, DHHS found and concluded a general OR is not a qualification for the CON award. The ALJ concluded the absence of something does not mean it is either required or prohibited.

Mission Memorial's own witness testified no current law specifies what specific types of procedures can be performed in a procedure room. One of Mission Memorial's witnesses testified surgeries may be performed in a procedure room, provided the licensed clinicians and governing body of the specific facility agree the space is safe and equipped to perform such procedure. The ALJ's Final Decision acknowledges this fact and used this as part of his conclusion Advent was a qualified applicant and DHHS' grant of the CON to Advent should be affirmed.

Mission Memorial also argues the Facility Guidelines Institute ("FGI") guidelines state specific differences between procedure rooms and operating rooms and invasive procedures should not be performed in procedure rooms. At the hearing, it was acknowledged this notion is contained in an FGI Guidelines appendix item, which is not an enforceable part of the guidelines. *See* 10A N.C. Admin. Code 13B.6105(b) (2019).

Mission Memorial's arguments challenging Advent's omission of a general operating room fails to recognize the General Assembly is presumed to be aware of the CON application statutes and decided to maintain *status quo*. Hospitals in North Carolina are required to report each year the numbers and types of procedures performed in general ORs. The General Assembly has not found this as a concern by specifying procedural practices by statute. The ALJ's decision complies with the current statutory scheme.

2. Brownfield Site (Criterion 12)

[2] Statutory Review Criterion 12 ("Criterion 12") requires an applicant to "demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction of the project will not unduly increase the cost of health services." N.C. Gen. Stat. § 131E-183(a)(12) (2023). DHHS and the ALJ's Final Decision determined Advent's proposed development of a hospital on an EPA Brownfield Site was not strictly barred by a Brownfield Site agreement, and the ALJ concluded the site could be safely remediated for construction if needed. *See* N.C. Gen. Stat. § 130A-310.31 (2023) (explaining a "brownfields site" is "abandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of environmental contamination and that is or may be subject to remediation").

Mission Memorial argues it was error for the ALJ to conclude Advent complied with Criterion 12 because Respondent's CON application for the proposed hospital site was a designated Brownfield site. Advent was not aware the location was designated a Brownfield at the time Advent filed its application. Mission Memorial asserts Advent failed to include reasonable and adequate information demonstrating the proposed project is cost-effective and would not incur unreasonable costs in developing its proposed project and to include reasonable and adequate information to demonstrate the project can be developed at its proposed site. Mission Memorial argues the cost of the Advent project failed to factor in the potential remedial costs of the site, considering its Brownfield site designation, and these costs may affect consumers pursuant to N.C. Gen. Stat. § 131E-181(b) (2023).

While Advent did not initially disclose the site's Brownfield designation in its application, DHHS found and the ALJ concluded no legal or practical bar exists to the hospital's development on that site. *Britthaven v. North Carolina Dept. of Human Resources, Div. of Facility Services*, 118 N.C. App. 379, 389, 455 S.E.2d 455, 463 (1995) asserts an ALJ reviewing a CON case is limited to evidence, which either was or could have been before the Agency at the time of its original decision.

In *Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs.*, 295 N.C. App. 25, 905 S.E.2d 729 (2024) ("*Duke I*"), DHHS found the applications of both UNC and Duke to develop forty acute care beds and four operating rooms in the Durham/Caswell County service area to be conforming with all statutory criteria under N.C. Gen. Stat. § 131E-183(a). *Id.* at 77, 905 S.E.2d. at 761. DHHS conditionally approved the UNC application, and the ALJ affirmed DHHS' decision after being

presented with a "proposed alternative location" after learning "the primary location is currently subject to zoning requirements and restrictive covenants that would, as they stand currently, prevent the construction of the proposed facility." *Id.* This Court remanded the matter "given the possibility that the ALJ would not have awarded UNC the CON without the additional consideration of the proposed alternative site and a future material compliance request, we have no way of knowing whether the ALJ's conclusion would have followed from only the allowable considerations." *Id.* Duke had argued UNC's proposal was nonconforming with Criterion 12 because the hospital's primary proposed location in Research Triangle Park was subject to restrictive covenants not accounted for in the application, which purportedly prohibited the development of a hospital, while the alternate proposed site posed hazards that would require extra costs to remediate. *Id.* at 295 N.C. App. 58, 905 S.E.2d 751. This Court overturned the ALJ's determination on this basis.

In contrast to the facts in *Duke I*, no definitive evidence was offered tending to show a hospital could not be built on Advent's proposed site. The ALJ found "as of the time of the hearing, it has not been established that [Advent] cannot use the . . . site to construct a hospital," and "[t]here is no evidence before the Agency or this Tribunal that the site selected by [Advent] could not be used by [Advent] for its proposed project . . . ."

No evidence before DHHS showed the Brownfield site was not suitable for development as a hospital, and nothing in the Brownfield agreement strictly prohibited the construction of the hospital. The ALJ further concluded the Brownfield site had potential for remediation, and no evidence was offered such remediation would exceed projected project costs.

Unlike in *Duke I*, where this Court questioned whether the ALJ would have reached the same decision if an alternate site was not considered and the ability to use a different site pursuant to a material compliance request, here, the availability of the material compliance request was, at most, an alternate basis for his finding of conformity with Criterion 12. *Id.* at 77, 905 S.E.2d. at 761. There is no doubt whether the ALJ would have found conformity with Criterion 12 even without considering the availability of a material compliance request. *Id.*

The DHHS project analyst testified "[n]othing about [the Brownfield designation] automatically makes it a site that cannot be developed." She added: "[i]n situations where I have found that there are land restrictions that would prevent . . . a CON facility from being developed, I have denied an applicant because of that, but nothing in the

Brownfield's agreement by itself said it couldn't be developed." While the EPA Brownfield designation clearly prohibits numerous activities, as was found by the ALJ, none prohibits building a hospital on the site.

The ALJ correctly found:

> It is simply not the Tribunal's function under the CON law to supersede the Agency's judgement and declare that a given site is "inappropriate" for the proposed new hospital. Either the proposed hospital site property is legally barred from use as a hospital, or it is not. It is not, and accordingly, the Tribunal will not replace the Agency's judgment on this issue with its own.

As the ALJ properly noted, it is not the function on appellate review under the CON law to supersede DHHS' judgment and to declare a site is "inappropriate" for a proposed project. "Either the proposed hospital site is legally barred from use as a hospital, or it is not." The Final Decision also evidences how the ALJ would have decided on Criterion 12 if he had not considered the possibility of Adent later filing a material compliance request for a different property be used. No evidence tends to show required remediation would cause undue cost increases.

The ALJ found and concluded no evidence showed the hospital could not be safely built on the property selected. *Id.* Because no evidence tends to show Advent was not compliant with Criteria 1 or 12 of the relevant statute, the ALJ's decision on this issue is affirmed.

VI. Public Hearing

[3] DHHS prohibited eight Mission Memorial employees from speaking during a portion of the public hearing. DHHS determined whether the individual worked for Mission Memorial by examining their email addresses. Mission Memorial argues its employees should have been allowed to speak as members of the public pursuant to N.C. Gen. Stat. § 131E-185 (2023), as long as the employee was not a "proponent" of the CON being awarded to them. We disagree.

A. Analysis

DHHS is required to conduct a public hearing if: (1) "the review to be conducted is competitive;" (2) "the proponent proposes to spend five million dollars ($5,000,000) or more;" (3) "a written request for a public hearing is received before the end of the written comment period from an affected party as defined in G.S. 131E-188(c);" or, (4) "the agency determines that a hearing is in the public interest." N.C. Gen. Stat. § 131E-185(2) (2023).

If a public hearing is held, the public hearing "shall" include:

> a. An opportunity for the proponent of each application under review to respond to the written comments submitted to the Department about its application.
>
> b. An opportunity for any person, except one of the proponents, to comment on the applications under review.
>
> c. An opportunity for a representative of the Department, or such other person or persons who are designated by the Department to conduct the hearing, to question each proponent of applications under review with regard to the contents of the application.

N.C. Gen. Stat. § 131E-185(2)(a)-(c)(2023).

In *Fletcher I*, this Court held the failure to hold a public hearing was error under N.C. Gen. Stat. § 131E-185. *Fletcher Hosp. Inc. v. N. Carolina Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Health Care Plan. & Certificate of Need Section*, 293 N.C. App. 41, 47, 902 S.E.2d 1, 5 (2024) ("*Fletcher I*"). The Court in *Fletcher I* held the requirements in N.C. Gen. Stat. § 131E-185(2) are clear, and "this Court has 'no power to add to or subtract from the language of the statute.' " *Id.* (quoting *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525 (1950)).

Here, and unlike in *Fletcher I*, DHHS conducted a hearing as required by statute. Mission Memorial asserts the project exceeded the five-million-dollar cap, and a public hearing was required. N.C. Gen. Stat. § 131E-185(2) (2023). Mission Memorial's argument relies upon cases where no public hearing occurred at all, despite also acknowledging a public hearing was held in this case. Our General Statutes delineate the time during which the general public is scheduled to speak, the "Public Time Period," from the time during which a proponent of the application is permitted to speak, the "Proponent Time Period." *Compare* N.C. Gen. Stat. § 131E-185(a1)(2)(a.) and (b.) (2023). DHHS' hearing included both a Proponent Time Period and a Public Time Period.

Mission Memorial contends the DHHS Coordinator wrongfully restricted certain people from speaking during the Public Time Period based upon her classification of them as employees of Mission Memorial or its affiliates and as proponents. She made this decision by reviewing the email addresses these individuals used to sign in at the hearing, and she barred all individuals with a Mission Memorial email address from speaking as a member of the public. All of those prohibited from speaking during the Public Time Period were either employees of Mission

Memorial or one of its affiliate organizations, and they were presumed to be speaking in favor of Mission Memorial's application and against Advent's and Novant's applications. Mission Memorial argues this restriction of an applicant's employees from speaking during the Public Time Period violated the statute requiring a public hearing.

Mission Memorial contends DHHS' action undermined the clear intent of the statute. By its terms, during the Proponent Time Period, the application proponents are limited to "respond[ing] to the written comments submitted to the Department about its application," and under subsection (a1)(2)(a.), cannot attack another applicant. N.C. Gen. Stat. § 131E-185(a1)(2)(a.) (2023). No such limitation exists with respect to the Public Time Period, where the opportunity existed to "comment on the applications under review," which allow a member of the public, but not proponents, to make positive or negative comments on any of the applications at issue. N.C. Gen. Stat. § 131E-185(a1)(2)(b.) (2023).

Reviewing N.C. Gen. Stat. § 131E-185(a1)(2) and the facts of this case, the record shows DHHS' project analyst's decision to limit an applicant's employees to speaking only during the Proponent Time Period was consistent with the statutes. The DHHS' project analyst determined to allow applicant employees to speak as public commenters would collapse this distinction between the Proponent Time Period and the Public Time Period outlined in the statute. *Id.* The ALJ found DHHS' interoperation of the statute was reasonable and consistent.

Even if this Court determined a reasonable interpretation of the public hearing statute allowed an applicant to self-select who among its officers were to speak as a proponent and who was to speak as a member of the public, the DHHS Project Analyst's decision to prevent Mission Memorial's employees from doing so was reasonable and based on a permissible construction of the statute. *Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), *disc. rev. improvidently allowed*, 333 N.C. 533, 427 S.E.2d 874 (1993) (explaining "the court should defer to the agency's interpretation of the statute . . . so long as the agency's interpretation is reasonable and based on a permissible construction of the statute"). While Mission Memorial relies on communications from the day of the hearing and past practices to argue a different historical interpretation by DHHS, which may have allowed Mission Memorial/HCA employees to speak as members of the public, the agency's interpretation is reasonable and a permissible construction of the statute. *Id. See* N.C. Gen. Stat. § 131E-185(a1)(2) (2023).

Even if the decision to limit those individuals to speak only during the Proponent Time Period was erroneous, there is no prejudice shown for

overturning the ALJ's decision. A decision limiting when persons were allowed to speak during certain times during an actual public hearing does not establish substantial prejudice as a matter of law. *See Fletcher I*, 293 N.C. App. at 47-50, 902 S.E.2d at 5-7 (determining "the Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error" and remanding the case to the trial court for petitioner to establish substantial prejudice); *Fletcher Hospital Inc. v. N.C. Dep't of Health & Human Servs.*, 295 N.C. App. 82, 90, 906 S.E.2d 19, 26 (2024) ("*Fletcher II*") (remanding "to the ALJ for further consideration of whether substantial prejudice existed on a basis other than per se substantial prejudice due to the hearing's absence"); *Duke Univ. Health Sys., Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Healthcare Plan. & Certificate of Need Section*, 295 N.C. App. 589, 593, 906 S.E.2d 535, 537-38 (2024) ("*Duke II*") ("Failure to conduct a public hearing as required by N.C.G.S. § 131E-185(a1)(2), despite constituting improper procedure for purposes of N.C.G.S. § 150B-23(a)(3), does not automatically result in substantial prejudice to a petitioner before the Office of Administrative Hearings.").

The ALJ properly concluded DHHS' reasonable interpretation of an applicant's employees being proponents is not shown to be prejudicial error. *Id.* Substantial prejudice against Mission Memorial was not established in the limitation of its employees or affiliated employees being permitted to speak during the Public Time Period, because the limitation was in accord with the public hearing statute. The ALJ's finding of no prejudice is affirmed.

VII. Mission Memorial's Rights Substantially Prejudiced by the Approval of the Advent CON Application

[4] Mission Memorial argues their rights were substantially prejudiced by the approval of Advent's CON Application because, absent the ALJ's approval of the Advent Application and the award of the CON to Advent, Mission Memorial would have been awarded the CON.

A. Analysis

Mission Memorial made several arguments at the hearing it failed to advance in its brief regarding why its rights had been substantially prejudiced by DHHS' decision. Any arguments not advanced on appeal are deemed abandoned. N.C. R. App. P. 28(a) provides, "Issues not presented and discussed in a party's brief are deemed abandoned." Any other evidence or contention not brought forward from Mission Memorial purporting to show it was substantially prejudiced by DHHS' Decision or the ALJ's Final Decision is deemed abandoned. *Id.*

Mission Memorial argues it was substantially prejudiced due to the alleged error with respect to Criterion 1 because: it was an approvable applicant and Advent was not. It asserts DHHS interpreted the definition of "qualified applicant" differently from how Mission Memorial contends it had been interpreted previously. This Court has affirmed Advent complied with DHHS' interpretation of a "qualified applicant." In *Fletcher I*, DHHS interpreted a CON statute in a manner differently than previously, but to prove this action warranted reversal, the Court required a separate and distinct showing of substantial prejudice separate from DHHS' purported error. *Fletcher I*, 293 N.C. App. at 45-50, 902 S.E.2d at 4-7. Because both of Mission Memorial's prejudice arguments hinge upon this Court holding DHHS erred, which we have held otherwise, Mission Memorial's arguments fail. Mere denial of Mission Memorial's application alone cannot *ipso facto* support substantial prejudice.

Mission Memorial's reliance on *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, 240 N.C. App. 92, 109, 771 S.E.2d 537, 547 (2015) requires the court to find DHHS erred in granting Advent's application by finding them compliant with all criterions of N.C. Gen. Stat. § 131E-185.

In *AH N.C. Owner LLC*, this Court directly linked the determination of agency error in the application of the statutory review criterion with the substantial prejudice to the petitioner. *Id.* Without that initial showing and conclusion of error by DHHS, this Court cannot find Mission Memorial was substantially prejudiced. The ALJ's final decision on this issue is affirmed.

VIII. Advent's Cross Appeal

Advent cross appeals and argues Mission Memorial's application was not in compliance with Criterion 18a of N.C. Gen. Stat. § 131E-183 (2023) because Mission Memorial did not prove their services were ones for which competition would not have a favorable impact, or does enhance competition, because it enhances competition "in the proposed service area." *Id.* Advent also argues Mission Memorial's application was not compliant with Criteria 1 and 4. In light of our holding above to affirm the final decision of the ALJ, we need not reach Advent's cross appeal. We dismiss Advent's cross appeal as moot.

IX. Conclusion

The ALJ reviewed DHHS' evidence and findings and heard arguments from Advent, Mission Memorial, and DHHS. Substantial evidence supported DHHS' finding Advent had complied with Criterion 1 and

Criterion 12. Mission Memorial has not demonstrated reversible error in the public hearing.

Mission Memorial has not demonstrated the ALJ's decision is affected by error or how it was substantially prejudiced. The ALJ's final decision to affirm DHHS' decision to award the CON to Respondent is affirmed. Advent's cross appeal is dismissed as moot. *It is so ordered.*

AFFIRMED.

Judges WOOD and MURRY concur.

NORTH STATE ENVIRONMENTAL, INC., PLAINTIFF
v.
TOWN OF MOORESVILLE, DEFENDANT

No. COA24-765

Filed 18 June 2025

Contracts—breach—town's nonpayment under road improvement contract—unresolved utility conflicts—impossibility of performance

In a breach of contract action brought against a town by plaintiff, a company that had been awarded a contract to install a storm water drainage system underneath roads as part of a broader roadway improvement plan, the trial court's judgment awarding plaintiff $132,657.40 was affirmed where the court's unchallenged findings of fact amply supported its conclusions, including that: the town had breached the contract by failing to identify and arrange for the resolution of potential utility impacts—including underground gas lines—prior to the start of plaintiff's work and by failing to pay plaintiff for work satisfactorily completed under the contract; the town's refusal to terminate the contract as requested by plaintiff was unreasonable; the town's breach excused further performance by plaintiff; and the town was not justified in defaulting plaintiff. Further, the trial court's decision did not overlook the contract's Authority of Engineer term, since the project engineer's limited authority under the contract did not extend to determining whether the town had met its contractual obligations or owed damages.

Appeal by defendant from judgment entered 10 July 2023 by Judge William Long in Iredell County Superior Court. Heard in the Court of Appeals 8 April 2025.

Craige Jenkins Liipfert & Walker LLP, by William W. Walker and Lori B. Edwards, for plaintiff-appellee.

Cranfill Sumner LLP, by Steven A. Bader and Mica N. Worthy, for defendant-appellant.

ZACHARY, Judge.

Defendant Town of Mooresville ("the Town") appeals from the trial court's judgment awarding Plaintiff North State Environmental, Inc., ("North State") the sum of $132,657.40 plus interest on its claim for breach of contract. After careful review, we affirm.

I. Background

We recite only the facts necessary for our analysis. These include the relevant findings of fact made by the trial court, none of which are disputed on appeal.

In 2013, the Town contracted with the North Carolina Department of Transportation ("NCDOT") to administer a roadway improvement project ("the Project") at an intersection on State Highway 115. "The Project had two principal goals: to realign the intersection; and to install a storm water drainage system under the roads. Installation of the drainage system was the Project's 'controlling operation.' " The contract between the Town and NCDOT provided, *inter alia*, that the Town "and/or its agent, at no liability to [NCDOT], shall relocate, adjust, relay, change or repair all utilities in conflict with the Project, regardless of ownership."

The Town hired the engineering firm Ramey Kemp ("Kemp") to design plans for the Project in 2015. In its contract with the Town, Kemp agreed to "[c]oordinate existing private utility conflicts and relocations required for the proposed improvements with the appropriate utility company" and to "[i]dentify all potential utility impacts caused by the [P]roject and show [the potential utility impacts] on plans prepared for coordination with utility owners."

As the trial court described in its findings of fact, Kemp failed to identify several potential utility impacts:

> 7. Kemp's scope of work included a requirement that it produce information and diagrams in "Utilities By Others Plans" (UBO Plans).
>
> 8. In 2016, Public Service Company of North Carolina/ Dominion Energy (Dominion) gave Kemp drawings of its underground gas lines and other facilities in the Project area.
>
> 9. Kemp's "Utility Analysis and Routing Report" dated June 6, 2016, said Dominion's underground gas lines would not conflict with the Project's drainage system.
>
> 10. Kemp failed to identify several Dominion gas lines in conflict with the planned drainage system. In turn, Kemp failed to show all of the Dominion gas lines on the Project plans. And Kemp never produced UBO Plans.
>
> 11. Kemp finalized the Project plans on March 12, 2018.

(Internal citations omitted).

On 5 February 2019, the Town awarded the contract for the Project ("the Contract") to North State. The Town subcontracted the construction engineering and inspection work to Stewart Engineering ("Stewart"), which subsequently subcontracted these portions of the Project to A. Morton Thomas and Associates, Inc. ("AMT"). AMT, in turn, named Brenna Stephenson the Project Engineer under the Contract. The Contract included a term ("the Authority of Engineer Term") giving Stephenson, as Project Engineer, the final authority to resolve certain disputes.

The Contract also incorporated, *inter alia*, NCDOT Standard Specification § 105-8, which provided that before beginning construction, the Town was required to "notify all utility owners known to have facilities affected by the construction of the [P]roject and . . . make arrangements for the necessary adjustments of all affected public or private utility facilities." This Standard Specification further provided that "[t]he utility adjustments may be made either before or after the beginning of construction of the [P]roject. The adjustments will be made by the utility owner or his representative or by [North State] when such adjustments are part of the work covered by [the C]ontract."

Additionally, the Contract incorporated NCDOT Standard Specification § 108-13, which, in pertinent part, authorized the Town to terminate the Contract if it was impossible for North State to complete its contracted work:

> The [Town] may terminate the [C]ontract in accordance with the following provisions:
>
> (A) The [Town] will consider termination of the [C]ontract upon written notification by [North State] that any of the following circumstances exist. [North State] shall include adequate documentation of these circumstances along with such notification:
>
> . . . .
>
> (2) If it is impossible for [North State] to complete the work in accordance with the [C]ontract by reason of unanticipated conditions at the site, including slides and unstable subsoil, without a major change in the design of the [P]roject and [North State] will be unduly delayed in completing the [P]roject by reason of such unanticipated conditions and changes in design . . . .

Before North State began work on the Project, it was informed that there were no anticipated utility conflicts. However, as North State commenced its work, the first utility conflicts were discovered and the first conflicts regarding payment for work on the Project arose between North State and the Town:

> 19. In June 2019, North State's surveyor discovered a sewer line manhole in conflict with the Project fill elevation in the southeast quadrant. The Town installed the new sewer line in the Project area unbeknownst to North State and after North State was awarded the Contract.
>
> 20. The first progress meeting was held on site on June 25, 2019. The AMT and North State representatives discussed the poor condition of the road pavement in the Project area, and North State's representative asked for a GIS layout (i.e., a map) of the utilities in the Project area. AMT never supplied North State with a GIS layout of the utilities.
>
> 21. In June and July 2019, utility poles prevented North State from bringing fill to the southeast quadrant of the Project. Duke was in the process of moving the poles at that time.
>
> 22. North State sent AMT an updated progress narrative on October 3, 2019, and started work on the Project on October 25, 2019.

23. North State installed a construction entrance and temporary traffic control, cleared part of the Project area, and brought in fill materials for the southeast quadrant of the Project.

24. In early December 2019, North State began a planned "jack-and-bore" across and under NC 115. (Jack-and-bore is a procedure used to install pipe under a road without cutting open the road surface.) The plans called for the drainage pipe to run 80 feet and to end in Box 403 at the west side of NC 115 in the Project's southwest quadrant. (A box is a concrete structure, about five feet tall, laid underground to serve as a connection and pivot point for the pipes. The Project plans had four boxes in the drainage system.)

25. The jack and bore could not be completed. AMT realized that the plans showed a gas line running through the 80-foot point – the area in which Box 403 was to be installed – and told North State to stop the bore tunnel at 75 feet. But Box 403 could not [be] installed at the 75-foot point because it would have conflicted with a second gas line – an 8-inch high pressure line that fed Dominion's regulator station in the northwest quadrant.

26. North State submitted its first two pay applications on January 23, 2020. The Town paid North State $74,254.70 for pay application one and $49,577.50 for pay application two.

27. On January 27, 2020, North State asked AMT to hold bi-weekly meetings with all utility owners to review potential utility conflicts.

28. On February 4, 2020, North State and AMT representatives met on site to discuss the utility conflicts on the Project, which included gas lines, signal poles, power poles, and phone lines that prevented installation of the planned drainage system.

29. On February 17, 2020, North State submitted a third pay application for $61,801.40. The Town did not pay the third pay application.

(Internal citations omitted).

As a result of the utility conflicts, work on the Project was paused, while the impasse between North State and the Town and its subcontractors continued:

> 30. At a March 3, 2020, progress meeting, North State and AMT agreed that, because of the underground gas line conflicts, North State would demobilize and leave the site and return when the conflicts were resolved. (A supplemental agreement for demobilization and remobilization was discussed but never implemented.)
>
> 31. After ensuring erosion control measures were in place, North State demobilized and left the site on March 6, 2020.
>
> 32. On March 9, 2020, Kemp sent AMT a revised plan that purported to resolve the Project's gas line conflicts by adding a curb and gutter in the northwest quadrant. North State's supervisor told the [Project E]ngineer the revised plan would not resolve the conflicts. He pointed out that the gas lines in the northwest quadrant still blocked the Project's drainage system — the controlling operation.
>
> 33. On March 20, 2020, North State submitted its fourth pay application, requesting $70,856.00.
>
> 34. The Town did not pay the fourth pay application.
>
> 35. AMT relayed North State's concerns and a drawing to Kemp on April 24, 2020. Kemp's engineer/designer acknowledged that the proposed field adjustment moved boxes in the northwest quadrant to a point where drainage had to flow uphill, but he did not address North State's concerns about the gas line conflicts.
>
> 36. The [Project E]ngineer sent North State a concern for progress letter on May 22, 2020, which said in pertinent part "We are currently not aware of any conflicts or issues delaying your work."
>
> 37. None of the utility conflicts known to the Town in February 2020 had been resolved by May 22, 2020.
>
> 38. The North State supervisor repeatedly expressed concerns to the [Project E]ngineer that Kemp's redesign did not correct the utility conflicts. He repeatedly asked that Kemp and the Town's engineer meet with North State,

> AMT, and the utility companies to discuss the redesign of the Project and the utility conflicts.

(Internal citations omitted).

The parties reconciled their concerns enough to recommence work on the Project in August 2020, whereupon the utility conflicts immediately resumed:

> 41. Assured by the [Project E]ngineer that Kemp's redesign would avoid the gas line conflicts, North State remobilized and returned to the Project site on August 20, 2020.
>
> 42. As a first step, North State "potholed" in the northwest quadrant, looking for potential gas line conflicts. North State sent photos to AMT along with gas line locations and depths.
>
> 43. On August 24, 2020, the [Project E]ngineer told the North State supervisor that North State could file a claim for more time because of the utility conflicts.
>
> 44. On August 28, 2020, North State began trying to implement Kemp's redesign by making an open cut on Campus Lane to install part of the drainage system.
>
> 45. The AMT inspector on site stopped the operation when he determined that the Dominion 8" high pressure gas main was still in direct conflict with the projected location of Box 403 in the southwest quadrant.

(Internal citations omitted).

The resurfaced utility dispute brought the Project to another standstill, and the parties' conflict escalated to the point that North State once again demobilized, and the Town considered default:

> 46. On September 1, 2020, representatives of North State, AMT, Dominion, and NCDOT met on site to discuss the gas line conflicts. Everyone agreed the Dominion gas lines were in conflict with the planned drainage system in the northwest and southwest quadrants of the intersection. Some of the gas lines blocked the drainage system as designed; and, if the intersection was realigned as designed, some of the gas lines would lie dangerously close to the road surface.

> 47. The Dominion representative told the Town it had two options if it wanted to continue the Project: completely redesign the plans or have Dominion relocate the gas lines in conflict with the planned drainage system. (The Dominion representative said there had been a meeting between the Town and Dominion on site two years earlier, and the Town's representative had told Dominion there were no conflicts between Dominion's lines and the planned drainage system.)
>
> 48. North State cleaned up the erosion control on site, demobilized, and left the site on September 4, 2020.
>
> 49. On September 11, 2020, the North State supervisor sent the [Project E]ngineer a lengthy and detailed email explaining why North State was prevented from progressing on the Project and requesting a suspension of the Project retroactive to February 2020.
>
> 50. The [Project E]ngineer replied "Thanks Chris. Yes this is what I was looking for- laying everything out from the contractor's perspective so we can address each issue point by point and figure out together how to go about getting the work completed."
>
> 51. On September 11, 2020, the Town sent North State a letter stating the Town was contemplating default.

(Internal citations omitted).

By this point, as the trial court adroitly summarized, there were utility conflicts preventing North State from working in all four quadrants of the Project work site:

> 52. North State could not work in the *northeast quadrant* of the Project because an underground AT&T line conflicted with driveway pipes in the plans. Any other work in that quadrant would have been out of the plans' sequence and would have sent storm water toward the basement of a nearby residence.
>
> 53. North State was prevented from performing the planned work in the *northwest quadrant* because multiple gas lines blocked installation of the pipes and boxes in the drainage system as designed.

> 54. North State could not work in the *southeast quadrant* because the existing drainage system sent storm water through the quadrant, and, if North State brought in more fill as suggested by AMT, it would cause the intersection to flood.
>
> 55. North State could not work in the *southwest quadrant* because gas lines and signal poles blocked installation of the pipes and boxes of the planned drainage system.

(Emphases added) (internal citations omitted).

Nevertheless, the Town proposed additional work for the Project that North State could perform, although beyond the scope of the Contract:

> 56. The Town and AMT believed in September 2020 that Kemp could re-design its plans to avoid the gas line conflicts. To that end, they suggested North State do exploratory digging in the intersection.
>
> 57. Exploratory digging was outside North State's scope of work in the Contract. And North State had already potholed in the areas where AMT and the Town wanted the exploratory digging to be done.

(Internal citations omitted).

The parties were at a deadlock, with the Town ultimately refusing to terminate the Contract and defaulting North State:

> 60. The Town's principal engineer never went to the site while North State was working on the Project.
>
> 61. North State's attorney asked the Town to meet on site with AMT, Kemp, and the utility companies to find solutions to the utility conflicts. Alternatively, the attorney asked that the Contract be terminated pursuant to Standard Specification § 108-13.
>
> 62. The Town refused to meet and rejected North State's request to terminate the Contract.
>
> 63. On October 5, 2020, North State's supervisor sent the [Project E]ngineer an email requesting updates on the relocation of the gas line, AT&T line, and overhead utility lines. [The Project E]ngineer never responded.

64. The Town defaulted North State on October 21, 2020.

(Internal citations omitted).

North State filed a complaint against the Town on 27 April 2021, which it amended on 3 November 2021. North State alleged that the Town breached the Contract and sought damages as well as a declaration that the Contract had been terminated. Meanwhile, the Town maintained its interest in completing the Project; yet, it was ultimately forced to ask Dominion to relocate its gas lines:

> 66. After it had defaulted North State, and North State had left the site, the Town, including its principal engineer, met with AMT, NCDOT, Dominion, and other utilities and discussed how to complete the Project.
>
> 67. After it defaulted North State, the Town did not immediately attempt to relet the Project.
>
> 68. The Town did not order further surveying of the Project area until March 3, 2021.
>
> 69. Ultimately, NCDOT rejected the Town's new plan to work around the gas line conflicts in the intersection. For instance, the planned drainage pipe under Campus Lane still could not be installed due to a gas line conflict that prevented the pipe from being placed in that location.
>
> 70. In 2022, the Town asked Dominion to relocate its gas lines.
>
> 71. In May 2022, Dominion relocated the gas lines in the intersection. The gas lines and new regulator station were moved completely out of the Project area.
>
> 72. Kemp completed its new plans in March 2022.
>
> 73. The new drainage summary (used to order precast pipes and boxes) in Kemp's plans was materially different from the drainage summary in the original plans dated March 12, 2018.
>
> 74. The new plans incorporated the work completed by North State.

(Internal citations omitted).

On 13 December 2021, the Town filed its answer and counterclaims, in which it alleged that North State breached the Contract and sought

damages as well as liquidated damages. Both parties moved for summary judgment on 5 May 2023; the trial court denied the parties' motions on 30 May 2023.

This matter came on for bench trial in Iredell County Superior Court on 13 June 2023. On 10 July 2023, the trial court entered its judgment, which included the above-quoted findings of fact and the following conclusions of law:

> 2. The Town materially breached the parties' contract.
>
> a. The Town failed to identify and "make arrangements for the necessary adjustments of all affected public or private utility facilities," as required by . . . Standard Specification §[ ]105-8.
>
> b. The Dominion gas lines in conflict with the planned drainage system were affected public utilities.
>
> c. The Town is responsible for the mistakes and omissions of Kemp, Stewart, and AMT, each of which was an agent of the Town, acting in the normal course of its employment.
>
> d. The Town consciously and repeatedly refused to acknowledge and deal with the substantial conflicts posed by the Dominion gas lines. NCDOT rejected the Town's redesigned plans because they would not resolve the gas line conflicts. In essence, NCDOT had to force the Town to ask Dominion to relocate its gas lines.
>
> e. The Town failed to pay North State sums owed under the Contract for work satisfactorily completed.
>
> 3. The Town's breach of contract caused North State to suffer actual damages totaling $132,657.40.
>
> a. North State is entitled to be paid for the work it satisfactorily completed on the Project.
>
> b. The Town breached the Contract by not paying North State for pay applications 3 and 4.
>
> 4. The Town should have terminated the Contract pursuant to Standard Specification §[ ]108-13(A)(2) . . . .
>
> b. North State could not complete the work in accord with the Contract because of unanticipated conditions at the site.

c. The Project could not be completed without a major relocation of the Dominion gas lines.

d. North State would have been unduly delayed in completing the [P]roject by reason of the unanticipated conditions and the necessary changes in the plans' design.

e. The Town's refusal to terminate the Contract was unreasonable and amounts to an abuse of its discretion.

5. North State did not breach the parties' contract.

a. The Town's failure to meet the requirements of §[ ]105-8 was a material breach of the parties' contract. The Town's breach excused further performance by North State and prevented North State from performing its obligations under the Contract.

b. The Town was not justified in defaulting North State.

6. The Town is not entitled to recover compensatory damages from North State.

7. The Town is not entitled to recover liquidated damages from North State. The Town and its agents caused the delays in the completion of the Project by their actions, omissions, negligence, and delays. Standard Specification §[ ]108-11.

The court entered judgment against the Town "in the principal amount of $132,657.40 plus interest at the judicial rate from October 21st, 2020." As of the entry of the judgment, the Project was "not yet completed."

The Town timely filed notice of appeal.

II. Discussion

The Town primarily argues on appeal that the trial court "erred when it declined to give effect to the Authority of Engineer term" in the Contract. (Internal quotation marks omitted). It further argues that the court erred by finding that the Town breached the Contract and that North State did not. We disagree.

A. Standard of Review

"When reviewing a judgment from a bench trial, our standard of review is whether there is competent evidence to support the trial

court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Carolina Marlin Club Marina Ass'n v. Preddy*, 238 N.C. App. 215, 220, 767 S.E.2d 604, 608 (2014) (cleaned up), *disc. review denied*, 368 N.C. 279, 776 S.E.2d 193 (2015). "The trial court's findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Id.* (cleaned up). Unchallenged findings of fact are binding on appeal. *Id.* at 221, 767 S.E.2d at 608.

"An issue of contract interpretation is a question of law" that this Court reviews de novo. *D.W.H. Painting Co. v. D.W. Ward Constr. Co.*, 174 N.C. App. 327, 330, 620 S.E.2d 887, 890 (2005).

B. Analysis

The Town argues that the trial court erred "because its contract interpretation overlooked the Authority of Engineer term altogether. The court made no findings about the term, nor did it make any findings about Stephenson's vital role as the project engineer." (Internal quotation marks omitted).

As our Supreme Court has explained, disputes in construction cases—such as the case at bar—may initially be referred to a project architect or engineer:

> In building and construction contracts the parties frequently provide that the completion, sufficiency, classification, or amount of the work done by the contractor shall be determined by a third person, usually an architect or engineer. Such stipulations which, in their origin, were designed to avoid harassing litigation over questions that can be determined honestly only by those possessed of scientific knowledge, have generally been held valid. This is true even though the architect or engineer is employed by the owner . . . .

Welborn Plumbing & Heating Co. v. Randolph Cty. Bd. of Educ., 268 N.C. 85, 89–90, 150 S.E.2d 65, 68 (1966) (citation omitted). "[W]here the parties stipulate . . . that the determination of the architect or engineer shall be final and conclusive," it is well settled that "both parties are bound by his determination of those matters which he is authorized to determine, except in case of fraud or . . . gross mistake." *Id.* at 90, 150 S.E.2d at 68 (citation omitted).

Here, the Authority of Engineer Term vested the Project Engineer with the final authority to resolve certain disputes:

> The [Project] Engineer will decide all questions which may arise as to the quality and acceptability of work performed and as to the rate of progress of the work; all questions which may arise as to the interpretation of the contract; and all questions as to the acceptable fulfillment of the contract on the part of [North State]. H[er] decision shall be final and [s]he shall have executive authority to enforce and make effective such decisions and orders as [North State] fails to carry out promptly.

But rather than overlooking the Authority of Engineer Term, as the Town asserts, the trial court properly recognized that the term is inapplicable to the dispositive issues in this case: whether the Town breached the Contract, and if so, whether such breach excused any responsive breach by North State. *See McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 198, 585 S.E.2d 234, 239 (2003) ("As a general rule, if either party to a bilateral contract commits a material breach of the contract, the non-breaching party is excused from the obligation to perform further.").

Recognizing this flaw in its argument, the Town argues in its reply brief that it did not breach Standard Specification § 105-8's "plain terms," which it maintains did "not impose a non-delegable duty on [the Town] to locate every utility or forbid assignment." The Town asserts that it did " 'notify' known affected utilities and adjust[ed] work as needed before or during construction"—an assertion flatly contradicted by the trial court's unchallenged findings (1) that "[n]one of the utility conflicts known to the Town in February 2020 had been resolved by May 22, 2020," and (2) that the Town consistently ignored or rejected North State's concerns about the numerous utility conflicts until—and even after—North State requested that the Contract be terminated for impossibility and the Town defaulted North State.

The Town further contends that the Project Engineer told North State that she interpreted Standard Specification § 105-8 as requiring "North State to perform certain exploratory digging" and that "[s]he also told North State, on multiple occasions, that it could work in the area while the engineers resolved the utility conflicts." However, this appeal to the Project Engineer's opinions is unavailing.

First, as quoted above, the Authority of Engineer Term covers a limited set of issues. North State aptly notes that the Project Engineer "is not given authority to determine whether the Town, as opposed to North State, has fulfilled its obligations under the Contract." That determination is therefore within the ambit of the trial court, not the Project

Engineer—and the Town's breach "relieved [North State] from the obligation to perform." *Ball v. Maynard*, 184 N.C. App. 99, 108, 645 S.E.2d 890, 897, *disc. review denied*, 362 N.C. 86, 656 S.E.2d 591 (2007).

Moreover, the Project Engineer's own testimony belies the Town's confidence that her opinion favors it. At trial, the Project Engineer testified that she was "not sure whether or not it was impossible" for North State "to work around" the utility conflicts; that "North State complied with [§] 105-8 as far as potholing the utilities"; that the exploratory digging that the Town suggested North State perform was "outside of the scope of" the Contract and would have required a supplemental agreement; and that it was not "possible" for her to judge whether either party had breached the Contract and owed damages to the other. Thus, insofar as the Town leans on the Project Engineer's favorable opinion for support in this matter, such reliance is misplaced.

Notably, the Town has not challenged any of the trial court's thorough and detailed findings of fact, many of which are quoted above, which are thus binding on appeal. *See Carolina Marlin Club*, 238 N.C. App. at 221, 767 S.E.2d at 608. Instead, the Town challenges the trial court's conclusions that the Town (1) "consciously and repeatedly refused to acknowledge and deal with the substantial conflicts posed by the Dominion gas lines," and (2) "should have terminated the Contract pursuant to Standard Specification §[ ]108-13(A)(2)." However, as these arguments are also based on the trial court's supposed overlooking of the Authority of Engineer Term, they lack merit for the reasons explained above.

The Town also challenges the trial court's conclusion that the Town was "responsible for the mistakes and omissions of Kemp, Stewart, and AMT, each of which was an agent of the Town, acting in the normal course of its employment." The Town undergirds this challenge with the assertion that "[i]n general, a municipality is not liable for actions taken by its independent contractors." To support this proposition, the Town cites a series of cases. *See Drake v. City of Asheville*, 194 N.C. 6, 138 S.E. 343 (1927) (personal injury); *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986) (inverse condemnation); *Horne v. City of Charlotte*, 41 N.C. App. 491, 255 S.E.2d 290 (1979) (property damage). In so doing, the Town misapprehends the import of the challenged conclusion. The Town was not being held liable under any of these theories for the actions taken by its independent contractors; rather, this conclusion—and the unchallenged findings of fact upon which it is based—supports the trial court's determination that the Town breached the Contract.

"Municipal contracts are measured by the same tests and are subject to the same rights and liabilities as are other contracts. It follows that a city may be sued on its valid contracts . . . ." 10A Eugene McQuillin, *The Law of Municipal Corporations* § 29:134 (3d ed., rev. vol. 2018) (footnote omitted). "Thus, it is established that, if a contract has been violated by the municipality, the other party may at once sue to recover damages for its breach . . . in the same manner as though the contract had been made with an individual, firm or private corporation." *Id.* (footnote omitted); *see also Knotville Vol. Fire Dep't v. Wilkes County*, 94 N.C. App. 377, 379, 380 S.E.2d 422, 423 (recognizing that local governments, "no less than others, are legally bound by their valid contracts"), *disc. review denied*, 325 N.C. 432, 384 S.E.2d 538 (1989).

In that a municipality's alleged breach of a valid contract may be determined using ordinary contract principles, North State directs us to *Brown v. Bowers Construction Co.*, in which our Supreme Court recognized that a contractor could not "escape by assignment" of its contractually obligated duties to a subcontractor. 236 N.C. 462, 469, 73 S.E.2d 147, 152 (1952). "The assumption of the assignor's duty by the assignee merely gives to the other party a new and added security." *Id.* at 470, 73 S.E.2d at 152. We agree with North State that the Town can no more "escape by assignment" its contractually obligated duties than can any other contracting party. *Id.* at 469, 73 S.E.2d at 152. The Town's argument concerning purported liability for its agents accordingly misses the mark.

Further, even if we assume, *arguendo*, that the trial court erred by concluding that the Town was "responsible for the mistakes and omissions of Kemp, Stewart, and AMT," the court's remaining conclusions of law amply support its determination that the Town breached the Contract, thereby excusing North State from its contractual obligations. Ultimately, "there is competent evidence to support the trial court's findings of fact and . . . the findings support the conclusions of law and ensuing judgment." *Carolina Marlin Club*, 238 N.C. App. at 220, 767 S.E.2d at 608 (citation omitted). The Town's various arguments to the contrary are meritless.

III. Conclusion

For the foregoing reasons, the trial court's judgment is affirmed.

AFFIRMED.

Judges GRIFFIN and FLOOD concur.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENERGY, MINERAL, AND LAND RESOURCES, PETITIONER
v.
WAKE STONE CORPORATION, RESPONDENT

No. COA24-914

Filed 18 June 2025

1. Parties—challenge to mining permit—intervention of right—permissive intervention—conditions not met

Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions by the administrative law judge (ALJ). The individual appellants failed to show a direct and immediate interest in the matter—as required to intervene of right pursuant to Civil Procedure Rule 24(a)(2)—because their basis for challenging the mining permit (a direct and substantial physical hazard to their home) differed from that of NCDEQ (significant adverse effects on the Park); further, they were not entitled to permissive intervention pursuant to Rule 24(b)(2) because there was no common question of law or fact between their asserted interest and the contested case. In addition, the interests of the nonprofit, which sought only permissive intervention, were adequately represented by NCDEQ such that the superior court was correct to determine that the ALJ did not abuse his discretion in denying the nonprofit's motion to intervene.

2. Appeal and Error—mootness—intervention in contested case—settlement of controversy

Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions to intervene by the administrative law judge. Even if appellants arguably should have been permitted to intervene in

the contested case, appellants' claims were moot by the time of the superior court's order because the relief appellants sought was no longer available. By settling the dispute with respondent and voluntarily issuing the requested permit, NCDEQ ended the controversy from which appellants would have appealed to the superior court (had they been allowed to intervene in the matter).

Appeal by third-party petitioners from order entered 19 February 2024 by Judge Gale M. Adams in Wake County Superior Court. Heard in the Court of Appeals 18 March 2025.

Calhoun, Bhella & Sechrest, LLP, by James L. Conner, II and Shannon M. Arata, for petitioners-appellants The Umstead Coalition, Randal Dunn, and Tamara Dunn.

Ward & Smith, P.A., by A. Charles Ellis and Hayley R. Wells, for respondent-appellee Wake Stone Corporation.

Attorney General Jeff Jackson, by Assistant Attorney General Carolyn McLain and Assistant Attorney General Kyle Peterson, for petitioner-appellee North Carolina Department of Environmental Quality.

DILLON, Chief Judge.

Appellants The Umstead Coalition and Randal and Tamara Dunn wish to challenge the issuance of a mining permit to Wake Stone Corporation ("Wake Stone"). To accomplish this, they moved to intervene in a contested case hearing between Wake Stone and the North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (the "Division"). Appellants' motions were denied in the administrative proceeding, and their appeal of that denial was affirmed by the Wake County Superior Court.

Appellants appeal the superior court's order in its entirety, arguing that they should have been allowed to intervene, that the case is not moot, and that the Administrative Law Judge ("ALJ") erred in reversing the Division's denial of the permit. For the reasoning below, we affirm the order of the superior court.

I. Background

Wake Stone operates Triangle Quarry, a mining operation located adjacent to William B. Umstead State Park and the Raleigh-Durham

Airport in Wake County. In April 2020, Wake Stone applied to the Division to modify its mining permit under The Mining Act of 1971, N.C.G.S. § 74-46 *et seq.*, to expand its operations onto a parcel of land called the Odd Fellows Tract.

In February 2022, the Division issued its decision denying Wake Stone's application.

In March 2022, Wake Stone timely petitioned for a contested case hearing before an ALJ pursuant to N.C.G.S. § 150B-23(a) (2023). At this stage, The Umstead Coalition (a nonprofit organization dedicated to preserving Umstead Park) and the Dunns (Coalition members who own a home adjacent to the Odd Fellows Tract) (collectively, "Appellants") filed motions to intervene as parties pursuant to Rule 24 of our Rules of Civil Procedure. The ALJ denied each motion, but did allow The Umstead Coalition to file an *amicus curiae* brief before the hearing.

In August 2023, the ALJ issued his decision, reversing the Division's denial of the permit on four independent grounds. The next month, in September 2023, the Division filed a petition for judicial review of the ALJ's decision but subsequently settled with Wake Stone and withdrew its petition with prejudice in November 2023.

In the meantime, on 11 September 2023, Appellants filed petitions for judicial review contesting both the ALJ's denial of their motions to intervene and the ALJ's reversal of the Division's denial of the permit application. In February 2024, in a forty-six-page order, the trial court determined Appellants' petitions were mooted in their entirety by the settlement of the underlying controversy between Wake Stone and the Division and the issuance of Wake Stone's permit. The trial court further reasoned in its order that, even if Appellants' petitions were not moot, the ALJ did not err either in denying the motions to intervene or in reversing the Division's denial of the permit. Appellants appealed.

II. Analysis

On appeal, Appellants argue they should have been allowed to intervene as parties, that their petitions for judicial review were not moot, and that the ALJ's reversal of the Division's denial of Wake Stone's permit application was erroneous. We address each argument in turn.

A. Intervention of Right and Permissive Intervention

[1] Rule 24 of our Rules of Civil Procedure governs intervention of parties. N.C.G.S. § 1A-1, Rule 24 (2023). Rule 24(a)(2) provides that an applicant shall be permitted to intervene if he

> claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id. § 1A-1, Rule 24(a)(2).

Our Supreme Court interprets Rule 24 to require a putative intervenor to "show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health*, 350 N.C. 449, 459 (1999). To show a "direct and immediate interest," the putative intervenor must prove "he will either gain or lose by the direct operation and effect of the judgment[.]" *Strickland v. Hughes*, 273 N.C. 481, 485 (1968). "[A]n indirect, inconsequential, or a contingent" interest is not sufficient. *Id.*

Rule 24(b)(2) provides for permissive intervention "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." N.C.G.S. § 1A-1, Rule 24(b)(2). Permissive intervention is a matter of the court's discretion, considering "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* A discretionary ruling under Rule 24(b)(2) "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985).

1. The Dunns

The Dunns moved to intervene under both Rules 24(a)(2) and 24(b)(2). As to Rule 24(a)(2), the superior court found that the Dunns failed to show a "direct and immediate interest" because the Dunns' basis for challenging the mining permit was not the same as that of the Division. The Division denied Wake Stone's permit application under N.C.G.S. § 74-51(d)(5), which allows denial based on "a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area." As this was the sole basis for the Division's denial, Wake Stone's effect on the purposes of Umstead Park—namely, conservation, recreation, and education—was the only interest at issue in the contested case hearing. The Dunns, however, applied to intervene to challenge the permit application pursuant to N.C.G.S. § 74-51(d)(4), which allows denial based on "a direct and substantial physical hazard to . . . a neighboring dwelling

house." Therefore, the ALJ found, and the superior court affirmed, that the Dunns were not entitled to intervene because they did not allege a direct and immediate interest.

We conclude the trial court did not err. While Appellants are correct that intervenors are free to introduce new issues beyond the scope of the original case once they become a party, *see Leonard E. Warner, Inc. v. Nissan Motor Corporation in U.S.A.*, 66 N.C. App. 73, 79 (1984), this rule does not extend to *putative* intervenors. As the Dunns were not yet parties to the contested case hearing, any interest warranting intervention under Rule 24(a)(2) must have been at issue at the time of their motion to intervene. The Dunns' interest in the case—the potential physical hazard posed to their home—was properly identified as an indirect interest in the dispute between Wake Stone and the Division because it did not relate to the mining operation's effect on Umstead Park. *See Holly Ridge Assocs. v. N.C. Dep't of Env't & Nat. Res.*, 361 N.C. 531, 538 (2007) (finding that a direct interest must be one that relates to the matter at issue in the contested case and not merely an "underlying issue" affected by the ruling).

As to Rule 24(b)(2), the ALJ determined, and the superior court affirmed, the Dunns were not entitled to permissive intervention because there was no common question of law or fact between the contested case and the Dunns' asserted interest. We agree. The denial criteria raised by the Division and the Dunns—adverse effect on the purposes of Umstead Park and physical hazard to the Dunns' house—are distinct legal questions involving substantially different factual inquiries. The Dunns' characterization of the question of law here as "whether the denial of [Wake Stone]'s application was proper pursuant to the provisions of [N.C.G.S. § 74-51]" erroneously conflates the two distinct legal and factual inquiries raised. We conclude that there is no basis for finding that the ALJ reached his decision arbitrarily.

2. The Umstead Coalition

As an initial matter, we agree with the superior court that The Umstead Coalition moved to intervene solely pursuant to Rule 24(b) (permissive intervention). As such, The Umstead Coalition cannot now raise Rule 24(a) as a ground for intervention. *See Plemmer v. Matthewson*, 281 N.C. 722, 725 (1972). Regardless, there was certainly sufficient evidence to find that The Umstead Coalition's interest was adequately represented by the Division. The Umstead Coalition asserts that the Division is "not well-equipped to assess the specific impact of proposed mining operations on the Park and its environs." However, the

Division is explicitly tasked by statute to do just that. *See* N.C.G.S. §§ 74-48, -50, -51(d)(5) (2023). And in doing so, the Division consulted the North Carolina Division of Parks and Recreation—the agency that has the primary responsibility of preserving and protecting Umstead Park—extensively. Therefore, the evidence shows that the Division adequately represented the interest of protecting and preserving Umstead Park, so The Umstead Coalition would not be entitled to intervene pursuant to Rule 24(a).

We agree that the ALJ did not abuse his discretion by denying The Umstead Coalition's motion for permissive intervention and instead granting leave to file an *amicus curiae* brief. The ALJ denied The Umstead Coalition's motion for permissive intervention because it would cause the parties undue delay or prejudice. Specifically, the ALJ believed that adding The Umstead Coalition as a party after the scheduling order was issued would require deadlines to be extended, that it would burden Wake Stone with additional discovery demands, and that it would hinder mediation or settlement negotiations. The superior court determined that each of these concerns was reasonable based on the administrative record. We agree and accordingly conclude that the ALJ's decision to deny intervention was not so arbitrary that it could not have been the result of a reasoned decision. Moreover, we find that the ALJ's decision to allow The Umstead Coalition to submit an *amicus curiae* brief further substantiates that his decision was reasoned, because it allowed The Umstead Coalition to present any arguments or expertise not captured by the Division's case that might have been relevant to the ALJ's final decision without risking undue delay or prejudice to the parties or the proceeding. Therefore, we affirm the superior court's finding that the ALJ did not abuse his discretion in denying The Umstead Coalition's motion to intervene pursuant to Rule 24(b)(2).

B. Mootness

[2] Assuming *arguendo* that Appellants should have been permitted to intervene as parties to the contested case, we nevertheless agree with the judgment of the superior court that Appellants' claims are moot because the relief sought is no longer available.

Our Supreme Court has stated that our courts "will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *In re Swindell*, 326 N.C. 473, 474–75 (1990) (quotation omitted). This is so because "the existence of an actual controversy is necessary to the court's subject matter jurisdiction." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585

(1986). "If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action." *In re Peoples*, 296 N.C. 109, 148 (1978).

A case or controversy is moot when a "determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647 (2003) (quotation omitted). Our Court has previously determined that mootness occurs where, during an appeal of a decision denying a permit, the permit in question is voluntarily issued. In *Carolina Marina v. New Hanover County Board of Commissioners*, 207 N.C. App. 250 (2010), the superior court reversed a Board of Commissioner's decision to deny the plaintiff a special use permit. *Id.* at 251. A neighbor of the plaintiff, whom the superior court allowed to intervene in the case, appealed from the superior court's order. *Id.* While that appeal was pending, the Board voluntarily granted the permit to the plaintiff pursuant to the superior court's order. *Id.* at 252. This Court dismissed the intervenor's appeal, concluding that the Board's subsequent decision to grant the permit mooted the issues presented on appeal. *Id.* at 254–55.

Here, Appellants sought to intervene in order to defend the Division's denial of Wake Stone's mining permit. As in *Carolina Marina*, by settling its dispute with Wake Stone and voluntarily issuing the permit, the Division ended the controversy from which Appellants would have appealed had they been parties in the case. In other words, once the Division decided to grant the permit, a decision from this Court finding that the Division's original denial was lawful would have no legal effect—the permit would still be granted. To wit, the settlement mooted the case in its entirety, and Appellants no longer have a live controversy in which to intervene.

As we have determined that the Division's decision to issue Wake Stone's permit has mooted any issues pertaining to the Division's original denial, we decline to address Appellants' remaining arguments.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
MARTIN MUSINGUZI, ATTORNEY, DEFENDANT

No. COA24-661

Filed 18 June 2025

1. Appeal and Error—appellate jurisdiction—order from State Bar Disciplinary Hearing Commission—timely notice of appeal

The Court of Appeals had jurisdiction to review an attorney's appeal from an order of discipline entered against him by the State Bar Disciplinary Commission, where the attorney timely filed his notice of appeal within thirty days of the order's entry in compliance with N.C.G.S. § 7A-29(a) (allowing appeals from any final order of the State Bar) and Rule 18(b)(2) of the Rules of Appellate Procedure (governing the timing for appeals from administrative tribunal decisions).

2. Jurisdiction—disciplinary—attorney licensed out of state—statutory basis for jurisdiction—limited to attorneys admitted to practice in North Carolina

An order of discipline from the North Carolina State Bar Disciplinary Hearing Commission (DHC) was reversed where the DHC lacked subject matter jurisdiction over defendant, since N.C.G.S. § 84-28 limits the DHC's disciplinary jurisdiction to any attorney "admitted to practice law in [North Carolina]," and defendant—though he lived in North Carolina and maintained a law office there—was licensed in New York and limited his practice to federal immigration court. Importantly, the more specific language in section 84-28 controlled over the more general language in section 84-23 granting the State Bar disciplinary authority over any "licensed lawyer," which, when read in conjunction with section 84-28, necessarily referred to any lawyer licensed to practice in North Carolina.

3. Jurisdiction—disciplinary—attorney licensed out of state—Rule 8.5 of the Rules of Professional Conduct

In an action before the North Carolina State Bar Disciplinary Hearing Commission (DHC) involving an attorney (defendant) who lived in North Carolina and maintained an office there but was licensed in New York and limited his practice to federal immigration court, a disciplinary order disbarring defendant was reversed where the DHC lacked subject matter jurisdiction over defendant under Rule 8.5 of the Rules of Professional Conduct, which authorized the State Bar to discipline attorneys not licensed in North Carolina but

who "render any legal services in North Carolina." Rule 8.5 could not confer jurisdiction over defendant beyond the jurisdiction granted under N.C.G.S. § 84-28, which limited the DHC's disciplinary jurisdiction to attorneys "admitted to practice law in [North Carolina]." Furthermore, Chapter 84 defined the "practice [of] law" in terms of the specific legal services performed, not the physical location where an attorney works or meets with clients.

Appeal by defendant from orders entered 11 January 2024 and 10 June 2024 by the North Carolina State Bar Disciplinary Hearing Commission. Heard in the Court of Appeals 29 January 2025.

The North Carolina State Bar, by Deputy Counsel Robert W. Weston and Counsel Carmen H. Bannon, for plaintiff-appellee.

Dowling PLLC, by Troy D. Shelton, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an Order of Discipline and an Order on Motion for Relief from Judgment and Lifting Stay from the North Carolina State Bar Disciplinary Hearing Commission. Defendant is an attorney licensed by the State of New York who practices in the federal immigration court in North Carolina, but he is not and has never been admitted to practice in the North Carolina courts. Based on the plain language of North Carolina General Statute Section 84-28, which grants "disciplinary jurisdiction" to the Disciplinary Hearing Commission over "[a]ny attorney admitted to practice law in this State[,]" the Disciplinary Hearing Commission did not have subject matter jurisdiction to issue an Order of Discipline of Defendant, so we reverse the Order of Discipline and the Order on Motion for Relief from Judgment and Lifting Stay. N.C. Gen. Stat. § 84-28 (2023).

I. Background

The facts in this case are not in dispute. Defendant is a licensed attorney who is a member of the New York Bar. He is not and has never been a member of the North Carolina State Bar ("State Bar"). He lives in North Carolina, maintains a law office in Charlotte, North Carolina, and represents clients in the federal immigration court in Charlotte. His practice is limited to federal immigration law and Defendant does not appear in North Carolina state courts, although his clientele in the immigration court "regularly included North Carolina clients." Defendant's

law practice maintained a trust account in North Carolina with Bank of America and as required by North Carolina Rule of Professional Conduct 1.15-2, this trust account was registered with the North Carolina Interest on Lawyer's Trust Account ("IOLTA") program.[1] In North Carolina, all trust accounts used by attorneys must be registered with IOLTA. *See* 27 N.C. Admin. Code 1D.1316. If a lawyer's trust account has insufficient funds, the bank at which the account is maintained is required by law to report the insufficient funds to the State Bar. *See* N.C. R. Pro. Conduct 1.15-2(f).

In 2017, Bank of America sent the State Bar notices of insufficient funds in Defendant's trust account. The notices of insufficient funds resulted from Defendant's misappropriation of funds during his representation of clients A.B. and P.M., both North Carolina residents.[2] Ultimately, the State Bar "opened grievance file number 17G0374 against [Defendant] after receiving" the notice of insufficient funds. On 27 June 2017, the State Bar served Defendant with a "Letter of Notice in 17G0374" and he responded to the Letter of Notice. The Disciplinary Hearing Commission ("DHC") found that as the investigation progressed, Defendant

> continued to acknowledge both the State Bar's disciplinary jurisdiction over him and his obligation to comply with the North Carolina Rules of Professional Conduct, including a Consent Order of Preliminary Injunction he executed in an action the State Bar brought against him in Wake County Superior Court, bearing the caption *The North Carolina State Bar v. [Defendant]*, File No. 17-CVS-15617.

The "consent injunction enjoined [Defendant] from handling entrusted funds." The State Bar also reported Defendant's trust account issue to New York's First Judicial Department Attorney Grievance Committee ("Attorney Grievance Committee"). On 26 September 2019, the Attorney Grievance Committee sent a letter to the State Bar stating it had "completed its investigation" and "issued a Letter of Admonition" to

---

1. IOLTA was created by order of the Supreme Court of North Carolina on 23 June 1983 and was implemented by the North Carolina Bar Association in January 1984. *See* Amendments to the Code of Professional Responsibility, 307 N.C. 707, 716-20. It is currently administered by the Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts, which is a standing committee of the North Carolina State Bar Council. *See* 27 N.C. Admin. Code 1D.1302.

2. The State Bar does not contend that it has disciplinary jurisdiction over Defendant based on his maintenance of an IOLTA account.

Defendant. Later, Defendant "stopped participating in the . . . State Bar disciplinary process at all."

On 19 July 2022, the State Bar filed a complaint against Defendant with the Disciplinary Hearing Commission ("DHC"). The State Bar alleged Defendant failed to respond to its grievance and requested Defendant be disciplined by the DHC under North Carolina General Statute Section 84-28. Defendant did not respond to the complaint and the State Bar eventually "moved for entry of default against [Defendant], which [the DHC] entered" on 9 May 2023. The State Bar filed an amended motion for entry of default on 22 August 2023 and an amended entry of default was entered 23 August 2023. On 11 January 2024, the DHC entered an Order of Discipline ordering that "Defendant, Martin Musinguzi, is hereby DISBARRED from the practice of law." The Order of Discipline also required Defendant to "comply with all provisions of 27 N.C. Admin. Code 1B.0128" and to take other actions to terminate his law practice.

On 2 February 2024, Defendant filed a Motion for Relief from Judgment under Rules 55(d) and 60(b)(4) of the North Carolina Rules of Civil Procedure alleging that the State Bar and the DHC "lack jurisdiction and authority to discipline someone who is not a member of the . . . State Bar." On 5 February 2024, Defendant filed a notice of appeal from the Order of Discipline to this Court. On 12 February 2024, the parties filed a Joint Motion to Stay the Order of Discipline pending consideration of Defendant's Motion for Relief from Judgment. On the same date, this Court entered an order holding the appeal in abeyance and remanding the matter to the DHC to consider the Motion for Relief from Judgment and certify its order to the Court of Appeals.[3]

After hearing on the Motion for Relief from Judgment, the DHC entered an Order on Motion for Relief from Judgment and Lifting Stay ("Order on Motion for Relief") on 10 June 2024. The DHC concluded that "[a]s a licensed lawyer practicing in North Carolina, [Defendant] is subject to the disciplinary jurisdiction of the . . . State Bar under N.C. Gen. Stat. § 84-23(a) and Rule 8.5(a) of the Rules of Professional Conduct, and this Hearing Panel has subject matter jurisdiction over this matter."

---

3. This Court's order required DHC to consider the motion under the procedure established in *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980), which states "[t]his procedure allows the trial court to rule in the first instance on the Rule 60(b) motion and permits the appellate court to review the trial court's decision on such motion at the same time it considers other assignments of error."

The Order on Motion for Relief did *not* amend the Order of Discipline, but stated in the findings of fact that Defendant was

> incorrect to interpret the directions in paragraphs 3 through 7 of the decretal section of the Order of Discipline as requiring him to wind down any portion of his presentation and practice in North Carolina that is permitted by federal law before federal courts. Paragraphs 3 through 7 of the decretal section of the Order of Discipline only apply to any portion of his presentation and practice in North Carolina not permitted by federal law before federal courts.

Defendant filed written notice of appeal of the DHC's Order on Motion for Relief that same day.

II. Jurisdiction

[1] The Order of Discipline was entered on 11 January 2024 and Defendant filed written notice of appeal on 5 February 2024. The Order on Motion for Relief was entered on 10 November 2024 and Defendant filed written notice of appeal that same day.

Under North Carolina General Statute Section 7A-29(a), governing "[a]ppeals of right from certain administrative agencies[,]" a defendant may appeal "any final order or decision of . . . the North Carolina State Bar under G.S. 84-28 . . . appeal as of right lies directly to the Court of Appeals." N.C. Gen. Stat. § 7A-29(a) (2023). Under Rule 18(b)(2) of our Rules of Appellate Procedure,

> [a]ny party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal.

N.C. R. App. P. 18(b)(2). Thus, Defendant properly filed his notice of appeal of the Order of Discipline within 30 days of its entry in compliance with North Carolina General Statute Section 7A-29(a) and North Carolina Rule of Appellate Procedure 18(b)(2). Defendant then filed a Joint Motion to Stay the Order of Discipline on 12 February 2024 pursuant to this Court's decision in *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

As Defendant filed timely written notice of appeal of the Order of Discipline and of the Order on Motion for Relief, this Court has jurisdiction to hear Defendant's appeal of each order.

III. Analysis

Defendant contends that the State Bar does not have disciplinary jurisdiction over him because he is not a member of the State Bar and has not been "otherwise admitted to practice in North Carolina." Defendant argues the DHC does not have subject matter jurisdiction over him for three reasons: (1) "jurisdiction is barred by the disciplinary jurisdiction statute[,]" North Carolina General Statute Section 84-28; (2) "jurisdiction is barred by the Supreme Court's decision in" *Disciplinary Hearing Commission v. Frazier*, 354 N.C. 555, 556 S.E.2d 262 (2001); and (3) "jurisdiction is barred by the [State] Bar's own rules." (Capitalization altered.) Because North Carolina General Statute Section 84-28 limits the DHC's disciplinary jurisdiction to attorneys admitted to practice in this State, we reverse the DHC's Order of Discipline and Order on Motion for Relief.

A. Standard of Review

"[W]hen the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review." *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020) (footnote omitted). Further, "[w]hether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012) (citation and quotation marks omitted). "When conducting de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Bracey v. Murdock*, 286 N.C. App. 191, 193, 880 S.E.2d 707, 709 (2022) (citation and quotation marks omitted).

To resolve the question of the State Bar's subject matter jurisdiction over Defendant, we must consider several statutes:

> Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning. However, where a statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Additionally, although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those

> interpretations are not binding. Our Supreme Court has also stated that
>
> > it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes. While the interpretation of the agency responsible for their administration may be helpful and entitled to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. It is the Court and not the agency that is the final interpreter of legislation.

N.C. State Bar v. Brewer, 183 N.C. App. 229, 236, 644 S.E.2d 573, 577 (2007) (citations, quotation marks, and brackets omitted). If two or more statutes apply to the same "matter or subject," we must also construe the statutes together: "It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, must be construed together in order to ascertain legislative intent." *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (citation, quotation marks, and ellipses omitted).

B. Statutory Basis for Disciplinary Jurisdiction of the State Bar

[2] Defendant first argues "jurisdiction is barred by the disciplinary jurisdiction statute[,]" North Carolina General Statute Section 84-28. (Capitalization altered.) Specifically, Defendant contends North Carolina General Statute Section 84-28 grants the State Bar "disciplinary jurisdiction" only as to "attorneys admitted to practice in North Carolina," and since he has not been admitted to practice in North Carolina, the State Bar has no jurisdiction to disbar him. The State Bar argues the General Assembly has granted it disciplinary jurisdiction over all "licensed lawyers" who practice in North Carolina, including Defendant, who is licensed as a lawyer by the State of New York, under North Carolina General Statute Section 84-23(a) and Rule 8.5 of the Rules of Professional Conduct. Specifically, the State Bar contends that North Carolina General Statute Section 84-23(a) grants it the authority to "regulate the professional conduct of licensed lawyers," and under Rule 8.5(a), even a lawyer not admitted in North Carolina "is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina."

1. Jurisdiction Cannot be Conferred by Consent

We first note that the State Bar states in its brief that Defendant "*acknowledged the State Bar's disciplinary jurisdiction and his obligation to comply with the rules*." (Emphasis in original.) The State Bar also concedes "a litigant cannot consent to subject matter jurisdiction" but then contends Defendant's "extensive history of recognizing the State Bar's jurisdiction over his practice . . . is a significant data point demonstrating the correct, most reasonable interpretation of Chapter 84." But Defendant's initial belief about subject matter jurisdiction is simply not a relevant "data point." It is well-established that "[p]arties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists. A lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative." *Conner Bros. Mach. Co., Inc. v. Rogers*, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006) (citations and quotation marks omitted). Thus, even if Defendant first believed the DHC had subject matter jurisdiction over this matter, his belief is immaterial and we will not consider it in this analysis. Likewise, the State Bar's interpretation of North Carolina General Statute Sections 84-23 and 84-28 and its determination that Section 84-23 grants it subject matter jurisdiction is also of limited relevance. "While the interpretation of the agency responsible for [the administration of a statute] may be helpful and entitled to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. It is the Court and not the agency that is the final interpreter of legislation." *Brewer*, 183 N.C. App. at 236, 644 S.E.2d at 577 (citation omitted).

2. North Carolina General Statute Sections 84-23 and 84-28

Because we must construe statutes *in pari materia*, we consider North Carolina General Statute Sections 84-23 and 84-28 in the context of Chapter 84 of the North Carolina General Statutes, which is entitled "Attorneys-at-Law." N.C. Gen. Stat. Ch. 84 (2023). Article 4, entitled "North Carolina State Bar," establishes the State Bar as "an Agency of the State" in Section 84-15 and the rest of the Article sets out provisions addressing the membership in the State Bar and the organization, governance, structure, powers, and duties of the State Bar. N.C. Gen. Stat. § 84-15 (2023); *see generally* N.C. Gen. Stat. Ch. 84, art. 4.

North Carolina General Statute Section 84-16, entitled "[m]embership and privileges[,]" defines the "membership" of the State Bar. N.C. Gen. Stat. § 84-16 (2023). There are two classes of members, active and inactive:

> The active members shall be all persons who have obtained a license or certificate, entitling them to practice law in the State of North Carolina, who have paid the membership dues specified, and who have satisfied all other obligations of membership. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute and natural persons representing themselves.

Id.

The governing body of the State Bar is the Council, which is created by North Carolina General Statute Section 84-17:

> The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to in this Chapter as the "Council." . . . . The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the borrowing of money, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments to this Chapter, and all other matters.

N.C. Gen. Stat. § 84-17 (2023).

The powers of the Council are established by North Carolina General Statute Section 84-23:

> (a) The Council is vested, as an agency of the State, *with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals*. Among other powers, the Council shall administer this Article; take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; formulate and adopt rules of professional ethics and conduct; investigate and prosecute matters of professional misconduct; expunge disciplinary actions; grant or deny petitions for reinstatement; resolve questions pertaining to membership status; arbitrate disputes concerning legal fees; certify legal specialists and paralegals and charge fees to applicants and participants necessary to administer these certification programs; determine whether a member is disabled; maintain an annual registry of interstate and international law firms doing business in this State;

> and formulate and adopt procedures for accomplishing these purposes. The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law.

N.C. Gen. Stat. § 84-23(a) (2024) (emphasis added).

North Carolina General Statute Section 84-28, entitled "[d]iscipline and [d]isbarment" sets out the disciplinary jurisdiction of the Council and procedures for disciplinary actions against "respondent attorney[s.]" N.C. Gen. Stat. § 84-28. Subsection (a) provides that "[a]*ny attorney admitted to practice law in this State* is subject to the disciplinary jurisdiction of the Council *under such rules and procedures as the Council shall adopt as provided in G.S. 84-23*." N.C. Gen. Stat. § 84-28(a) (emphasis added). Therefore, Section 84-23 grants the Council "the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals," including the authority to "adopt rules of professional ethics and conduct" and to "investigate and prosecute matters of professional misconduct," while Section 84-28 grants the Council "disciplinary jurisdiction" over "[a]ny attorney admitted to practice law in this State" to enforce the rules the Council is empowered to adopt under Section 84-23. N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). Thus, State Bar has "disciplinary jurisdiction" over "[a]ny attorney admitted to practice law in this State" to enforce the rules adopted in accord with Section 84-23.

Subsection 84-28(b) confirms that the disciplinary jurisdiction is limited to "[a]ny attorney admitted to practice law in this State" by identifying the specific "acts or omissions *by a member of the North Carolina State Bar* or any attorney admitted for limited practice under G.S. 84-4.1[4]" that "shall constitute misconduct and shall be grounds for discipline[.]" N.C. Gen. Stat. § 84-28(a), (b) (emphasis added). Thus, the plain language of North Carolina General Statute Section 84-28(b) limits the "grounds for discipline" to "acts of omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1." N.C. Gen. Stat. § 84-28(b). Subsection 84-28(c) then outlines the types of discipline available, ranging from the least severe discipline, admonition, to the most severe, disbarment. N.C. Gen. Stat. § 84-28(c).

In interpreting statutory language, "[w]e begin with the text of the statute and, if that text is clear and unambiguous, we conclude that

---

4. North Carolina General Statute Section 84-4.1 authorizes *pro hac vice* limited practice and does not apply to this case. *See* N.C. Gen. Stat. § 84-4.1 (2023).

the legislature intended the statute to be implemented according to the plain meaning of its terms." *Arter v. Orange Cnty.*, 386 N.C. 352, 354, 904 S.E.2d 715, 717 (2024) (citation and quotation marks omitted). If two statutes "apparently overlap," the more particular statute controls over the more general statute, unless it is clear that the General Assembly intended for the more general statute to be controlling:

> The rules of statutory construction require that a more specific statute controls over a statute of general applicability. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.

Technocom Bus. Sys. Inc., v. N.C. Dep't of Revenue, 219 N.C. App. 207, 212, 723 S.E.2d 151, 155 (2012) (citations, quotation marks, and brackets omitted).

In comparing North Carolina General Statute Sections 84-23 and 84-28, the State Bar contends that Section 84-23 addresses its "authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals" while Section 84-28 specifically addresses the "disciplinary jurisdiction of the Council" over "[a]ny attorney admitted to practice law in this State[.]" N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). The State Bar contends that Section 84-23 differs from Section 84-28 since Section 84-23 is broader in scope because it applies to "licensed lawyers" while Section 84-28 is more limited and applies to "[a]ny attorney admitted to practice law in this State[.]" N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). The Order on Motion for Relief concluded that the State Bar has subject matter jurisdiction over Defendant based on North Carolina General Statute Section 84-23(a) and Rule 8.5(a) of the Rules of Professional Conduct because Defendant is a "licensed lawyer" who has an office in Charlotte and represents clients who live in North Carolina, although his practice is limited to federal immigration court. But the plain language of the more specific statute, Section 84-28, read in conjunction with Section 84-23, grants the State Bar disciplinary jurisdiction only over "attorney[s] admitted to practice law in this State[.]" N.C. Gen. Stat. § 84-28.

The plain language of Section 84-23 is a general grant of authority for the Council to perform many duties. *See* N.C. Gen. Stat. § 84-23. The plain language of Section 84-28 is a specific grant of "disciplinary jurisdiction" which only applies to "[a]ny attorney admitted to practice

law in this State[.]" N.C. Gen. Stat. § 84-28. And if we read the statutes *in pari materia*, Section 84-23 is consistent with Section 84-28. Both statutes must be read in the context of Article 4, which deals with the State Bar of North Carolina and regulation of lawyers *licensed* by North Carolina. N.C. Gen. Stat. Ch. 84, art. 4. For example, it would be absurd to interpret Section 84-23 as requiring the State Bar to "take actions that are necessary to ensure the competence of lawyers" who do not practice in North Carolina or who are licensed only in another State. N.C. Gen. Stat. § 84-23. And lawyers licensed by another state, such as Defendant, are not required to obtain continuing legal education, which is required for lawyers licensed in North Carolina.[5] 27 N.C. Admin. Code 1D.1501 ("Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar."). Nor does the State Bar purport to "certify legal specialists and paralegals" who practice in the courts of another state or exclusively in the federal courts; to reinstate lawyers disbarred in another jurisdiction; to "expunge disciplinary actions" against a lawyer in another jurisdiction; or to "resolve questions pertaining to membership status" of a lawyer who is a member of the bar of another state. N.C. Gen. Stat. § 84-23. All these situations may involve a "licensed lawyer," if we define this as a lawyer licensed to practice law in any jurisdiction, but Section 84-23 and Section 84-28 together grant the State Bar regulatory powers only over "licensed lawyers" who are licensed in North Carolina. Under the State Bar's interpretation of Section 84-23 as granting disciplinary jurisdiction applicable to "licensed lawyers" in general, the State Bar would theoretically have the authority to discipline or disbar any "licensed lawyer" admitted to the bar in any state or jurisdiction, not just North Carolina, but its other powers and duties granted by Section 84-23 would be limited to lawyers (and paralegals) who are licensed in North Carolina. So although the phrases "licensed lawyer" and "attorney admitted to practice law in this State" are different, the meaning is the same in the context of these two statutes. N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). Thus, in determining disciplinary jurisdiction, Section 84-28 controls over Section 84-23 since Section 84-28 is the more specific statute. *See Technocom Bus. Sys. Inc.*, 219 N.C. App. at 212, 723 S.E.2d at 155.

The State Bar does not seriously dispute its lack of authority over lawyers who practice only in the federal courts, as is indicated by its

5. The Rules of Professional Conduct require only "active member[s]" who are "licensed by the North Carolina State Bar" to obtain Continuing Legal Education hours. 27 N.C. Admin. Code 1D.1501.

"clarification" in the Order on Motion for Relief. In its brief to the DHC regarding the Motion for Relief from Judgment, the State Bar noted that it

> does not construe the Order of Discipline's reference to § .0128 to require [Defendant to shut down his law practice]. Rather, the State Bar construes this reference as a requirement that [Defendant] comply with § .0128 as to any portion of his North Carolina practice not confined to the practice of law before federal immigration courts, as the State Bar cannot prohibit the federal immigration courts from permitting a lawyer (or non-lawyer, such as an accredited representative) from appearing before them. To the extent the Panel feels this is not clearly expressed in the Order of Discipline, the State Bar asks for an appropriate conclusion of law or amendment clarifying the same.

The original Order of Discipline ordered that Defendant "is hereby DISBARRED from the practice of law." Despite the State Bar's request, the DHC's Order on Motion for Relief did not amend the original Order of Disbarment, nor did it include a conclusion of law or decree provision limiting the effect of the Order of Discipline. Instead, the Order on Motion for Relief includes a *finding of fact* addressing Defendant's erroneous "interpretation" of the Order of Discipline. It states that Defendant

> is incorrect to interpret the directions in paragraphs 3 through 7 of the decretal section of the order of discipline as requiring him to wind down any portion of his presentation and practice in North Carolina that is permitted by federal law before federal courts. Paragraphs 3 through 7 of the decretal section of the Order of Discipline only apply to any portion of his presentation and practice in North Carolina not permitted by federal law before federal courts.

Defendant's brief also notes the DHC's agreement regarding its lack of authority over lawyers engaged only in practice in federal courts:

> The State Bar recognizes attorneys can appear before federal immigration tribunals in North Carolina without a North Carolina law license. N.C. State Bar, *Reporting and Preventing the Unauthorized Practice of Law*, https://dub.sh/xyWv0MO. Federal law confirms that an attorney licensed to practice law in any state may appear before these federal agencies and practice federal immigration law. See 8 C.F.R. § 1001.1(f); *id.* § 1292.1(a)(1).

But according to the findings in the Orders on appeal, Defendant does not practice in North Carolina courts. In addition, while the Order of Discipline disbars Defendant, the Order on Motion for Relief specifically denied Defendant's Motion for Relief from Judgment and did not change the requirements of the Order of Discipline. The finding of fact regarding Defendant's "interpretation" of the Order of Discipline leaves us wondering exactly what it would mean for Defendant to shut down his "presentation and practice" in North Carolina while still being allowed to practice in the federal immigration court in Charlotte when – according to the findings of fact – he practices *only* in the federal immigration court in Charlotte.

The State Bar argues interpreting Section 84-28 to mean the State Bar only has disciplinary jurisdiction over attorneys admitted to practice in North Carolina would "render[ ] Section 84-23 surplusage."

> It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.

Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (citation omitted). But our interpretation would not render Section 84-23 surplusage since the general grant of authority would remain unaffected. The Council would still have general authority to "administer this Article," and one of the provisions of "this Article" is Section 84-28, so the State Bar has the authority to "administer" Section 84-28 by exercising its "disciplinary jurisdiction" under Section 84-28. *See* N.C. Gen. Stat. § 84-28. The State Bar has the general authority to "take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; formulate and adopt rules of professional ethics and conduct; [and] investigate and prosecute matters of professional misconduct[.]" N.C. Gen. Stat. § 84-23(a). As Defendant notes in his reply brief, Section 84-23 does not use the word "jurisdiction." We disagree with the State Bar that interpreting the statutes in this way would render Section 84-23 surplusage. *See Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447.

The State Bar also contends that if we interpret North Carolina General Statute Sections 84-23 and 84-28 to limit its disciplinary jurisdiction only to "attorney[s] admitted to practice law in this State[,]" this will create absurd and terrible consequences. One of these absurdities is that lawyers admitted *pro hac vice* would be "subject to the Rules

but not to the State Bar's investigatory powers or the DHC's jurisdiction[.]" (Emphasis in original.) But *pro hac vice* admission is not the issue in this case, and the State Bar's argument is also simply not correct: Attorneys from other states who practice in North Carolina courts must be admitted *pro hac vice* under North Carolina General Statute Section 84-4.1, and an attorney who is admitted *pro hac vice* has subjected himself to the disciplinary jurisdiction of the State Bar. *See Couch v. Priv. Diagnostic Clinic*, 146 N.C. App. 658, 670, 554 S.E.2d 356, 365 (2001) ("Under N.C. Gen.Stat. § 84-28, attorneys admitted to practice *pro hac vice* are subject to the same disciplinary jurisdiction of this State as are attorneys licensed to practice here. That statute provides that a violation of the Rules of Professional Conduct of this State 'shall be grounds for discipline,' including disbarment or 'suspension for a period up to but not exceeding five years.' " (citations and brackets omitted)).

We also briefly note that this opinion does not address the statutory provisions addressing unauthorized practice of law in North Carolina, whether by a layperson or by an attorney licensed by another jurisdiction.[6] Under North Carolina General Statute Section 84-37, the State Bar is authorized to "inquire into and investigate any charges or complaints of (i) unauthorized or unlawful practice of law . . . by individuals who have not been certified in accordance with the rules adopted by the North Carolina State Bar." N.C. Gen. Stat. § 84-37 (2023). The unauthorized practice of law is forbidden by statute. *See* N.C. Gen. Stat. § 84-4 ("Persons other than members of State Bar prohibited from practicing law."); *see also* N.C. Gen. Stat. § 84-7 (2023) ("District attorneys, upon application, to bring injunction or criminal proceedings."). Any person "who is damaged by" the unauthorized practice of law is also "entitled to maintain a private cause of action to recover damages and reasonable attorneys' fees and other injunctive relief as ordered by court." N.C. Gen. Stat. § 84-10.1 (2023) ("Private cause of action for the unauthorized practice of law."). This opinion does not affect the protections available to citizens of this State who may be harmed by the unauthorized practice of law, but Defendant was not accused of unauthorized practice of law. He was certified to practice in the federal immigration court and limited his practice to that court.

The State Bar also contends that it would be absurd to interpret North Carolina General Statute Section 84-23 and 84-28 as limiting its

---

6. The State Bar also presents an argument regarding North Carolina Rule of Professional Conduct 5.5, which deals with unauthorized practice of law. We will not address Rule 5.5 since there is no issue of unauthorized practice of law in this case.

disciplinary jurisdiction to "attorney[s] admitted to practice law in this State" because this would leave "a pocket of lawyers practicing law in North Carolina and representing North Carolinians" without being subject to disciplinary jurisdiction of the State Bar. This is correct, but that is what the plain language of Section 84-28 requires. *See* N.C. Gen. Stat. § 84-28. Defendant does not fall within the categories of professionals over which the State Bar has disciplinary jurisdiction under Section 84-28. He is a licensed attorney, but he is not licensed in North Carolina. He is not "admitted to practice law in this State." *Id*. He practices only in a federal court located in North Carolina. There are many federal courts in North Carolina, including the immigration court where Defendant practices. All federal courts, including the immigration court, have their own requirements for attorneys to be admitted to practice before the court. As the Order on Motion for Relief acknowledges in its finding regarding Defendant's "interpretation" of the Order of Discipline, the procedures and practices of the federal courts are not subject to control by the State of North Carolina. Federal courts, and the admission of attorneys who practice in federal courts, are controlled by federal law.

To obtain jurisdiction over this "pocket of lawyers," the State Bar asks us to rewrite North Carolina General Statute Section 84-28 to apply to "any attorney admitted to practice law" *in any state* if the attorney practices in a federal court physically located in North Carolina or has an office in North Carolina for a federal practice. But this Court does not have the authority to rewrite the statute to cover this group of attorneys who practice only in federal court and are licensed by another state. Defendant is a member of and subject to discipline by the New York Bar. As an attorney practicing before the federal immigration court, Defendant is also subject to discipline by the Executive Office for Immigration Review. *See* 8 C.F.R. § 1003.1(d)(5) ("Discipline of practitioners and recognized organizations. The Board shall have the authority pursuant to § 1003.101 *et seq*. to impose sanctions upon practitioners who appear in a representative capacity before the Board, the Immigration Courts, or DHS, and upon recognized organizations.").

The State Bar notes that "[n]umerous courts have held that a state's disciplinary authority has jurisdiction to discipline—and even disbar—a lawyer who is not licensed in the state but is practicing in a federal tribunal or agency within the state." The State Bar argues that

> the federal immigration courts afford great significance to predicate discipline, reflecting the immigration courts' expectation that a state should be able to investigate and impose appropriate discipline upon an attorney practicing

> within its borders. The Board of Immigration Appeals (the "BIA") may impose sanctions on practitioners appearing before it (or before the immigration courts or Department of Homeland Security) for professional misconduct. 8 C.F.R. § 1003.1(d)(5) (2024). The BIA routinely looks to state disciplinary actions as a predicate for reciprocal discipline against its practitioners. 8 C.F.R. § 1003.103(a)(1). This is true *even when the practitioner is not licensed by the state imposing the predicate suspension or disbarment against him.*

(Emphasis in original). The State Bar notes as examples cases in which the BIA considered disciplinary actions against immigration attorneys by Colorado and Maryland, although the attorneys in those cases were not licensed in those states. *See People v. Hooker*, 318 P.3d 77 (Colo. 2013); *Att'y Grievance Comm'n of Md. v. Ndi*, 184 A.3d 25 (Md. 2018). It is true that the BIA may consider discipline imposed by a state as a factor in the federal disciplinary process, but the question before us is whether North Carolina's State Bar has jurisdiction to impose discipline on an attorney not licensed in this State who is practicing only in the federal court. The other states noted by the State Bar have different regulatory schemes for attorneys; for example, in Colorado and Maryland, and many other states, the state's appellate court has exclusive authority to regulate the practice of law. *See In re Wimmershoff*, 3 P.3d 417, 420 (Colo. 2000) ("The regulation of the practice of law, including the determination of a lawyer's compliance or noncompliance with the Code of Professional Responsibility (such as Colo. RPC 1.5(a)), resides exclusively with this court."); *see In re Application of Kimmer*, 896 A.2d 1006, 1017 (Md. 2006) ("Therefore, it has been clear, since 1898, that the Court of Appeals has had exclusive jurisdiction over the regulation of, and admission to, the practice of law." (citations omitted)). In other states, statutes or caselaw may support subject matter jurisdiction for disciplinary action as to attorneys not licensed in those states, but we are bound by North Carolina's statutes.

The State Bar also contends Defendant's "assumption that he cannot be disbarred because he was not admitted to practice in North Carolina misapprehends the broad public-protection function of attorney discipline." We appreciate the "public-protection function of attorney discipline," but the extent of the disciplinary power granted to the State Bar by the General Assembly is a public policy matter. "Absent [a] constitutional restraint, questions as to public policy are for legislative determination." *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 285, 177 S.E.2d 291, 298 (1970) (citation omitted). This

Court's role is to interpret and apply the law as it is written. If the General Assembly would like to expand the disciplinary jurisdiction of the State Bar to cover attorneys who are not admitted to practice in North Carolina, it may do so by statutory amendment, but this Court may not re-write the statutes.

C. Jurisdiction Based on the Rules of Professional Conduct

[3] The Order on Motion for Relief also concluded that the State Bar had subject matter jurisdiction to discipline Defendant under Rule 8.5 of the Rules of Professional Conduct. Rule 8.5 addresses "disciplinary authority [and] choice of law" and provides:

> (a) Disciplinary Authority. A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. *A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina*. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction for the same conduct.

N.C. R. Pro. Conduct 8.5(a) (emphasis added). Defendant contends "Rule 8.5 doesn't create disciplinary jurisdiction" over Defendant. Specifically, Defendant contends "the [State] Bar argued, and DHC agreed, that the [State] Bar had lawfully expanded its jurisdiction beyond the disciplinary jurisdiction statute through administrative rulemaking" and "[t]hat argument, however, runs counter to basic principles of administrative law." The State Bar argues it has jurisdiction over Defendant under Rule 8.5, and this rule is consistent with Chapter 84 since our Supreme Court "approved and caused [Rule 8.5] to go into effect after finding it consistent with Chapter 84." The State Bar's argument that our Supreme Court has already decided Rule 8.5 is consistent with Chapter 84 is based on North Carolina General Statute Section 84-21, which states

> The rules and regulations adopted by the Council under this Article may be amended by the Council from time to time in any manner not inconsistent with this Article. Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: Provided,

> that the court shall decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article.

N.C. Gen. Stat. § 84-21(b) (2023).

The State Bar's argument turns on the meaning of rendering or offering to render "legal services in North Carolina." The State Bar's argument is based on the physical location of Defendant's practice in North Carolina, even if he only practices in federal court. The State Bar argues that based on Rule 8.5(b), by having an office in this State and representing clients who live in North Carolina, even if his practice was limited to federal immigration court, Defendant was "render[ing] or offer[ing] to render any legal services *in North Carolina*." (Emphasis added.) In other words, the State Bar argues that Defendant may appear in federal immigration court and represent clients there, but if he "establish[es] an office or other systematic and continuous presence in this jurisdiction for the practice of law" even in federal court only, he is "rendering legal services" *in North Carolina* and is subject to the disciplinary jurisdiction of the State Bar. *See* N.C. R. Pro. Conduct 5.5(b)(1); N.C. R. Pro. Conduct 8.5.

The State Bar's claim regarding its definition of the practice of law focuses on the *physical location* where Defendant, as an attorney, consults with clients, prepares documents, or appears in a court, and not the subject matter or purpose of his work or the court he appears in. Yet the definition of the practice of law in North Carolina General Statute 84-2.1(a) does not mention the physical location where an attorney may meet with a client or do his work; it addresses the specific legal services performed for the purpose of advising a client or preparing documents or representing a client before a particular tribunal:

> The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or

> quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

N.C. Gen. Stat. § 84-2.1(a) (2023).

Here, the DHC found that Defendant "*practices law* in North Carolina, where he maintains a law office in Charlotte, North Carolina, and appears in federal immigration courts in Charlotte on behalf of his clients." (Emphasis added.) But Defendant was *practicing* only in federal immigration court, although that court is in North Carolina and he maintained an office in Charlotte. To the extent that Rule 8.5 may purport to extend the disciplinary jurisdiction of the State Bar beyond "attorney[s] admitted to practice law in this State" to attorneys not admitted in North Carolina practicing only in a federal court simply because the attorney has a home or office in North Carolina, this Rule is not in accord with North Carolina General Statute Section 84-28. *See* N.C. R. Pro. Conduct 8.5(a); N.C. Gen. Stat. § 84-28. The State Bar has "disciplinary jurisdiction" over "attorney[s] admitted to practice law in this State" no matter where they live or where their offices are located or where they do their work. It does not have disciplinary jurisdiction over attorneys who are not admitted to practice in North Carolina and who practice *only* in federal court just because they may live in North Carolina or have an office in North Carolina.

Rule 8.5 does not change our analysis because the Rules of Professional Conduct cannot grant or expand the subject matter jurisdiction of the State Bar beyond the boundaries set by North Carolina General Statute Section 84-28. As we concluded above, North Carolina General Statute Section 84-28 only gives the DHC disciplinary jurisdiction over those attorneys admitted to practice in this State. *See* N.C. Gen. Stat. § 84-28.

We next address the State Bar's argument that since our Supreme Court allowed the rules to be "entered . . . upon its minutes," the rules have been found to be consistent with Chapter 84. N.C. Gen. Stat. § 84-21(b). Under Section 84-21, the rules must be approved only by the Chief Justice. *See* N.C. Gen. Stat. § 84-21. And even if we assumed that

the Chief Justice's decision to allow a rule to be "entered . . . upon [the Court's] minutes" could be considered as a form of approval of the rule, this approval is not a decision of the Supreme Court. The Chief Justice's action is part of the rule-making authority of the Supreme Court, which is distinct from the Supreme Court's authority to adjudicate disputed cases brought before the Supreme Court on appeal or petition for review from a lower court. A binding decision of the Supreme Court requires a vote of at least four of the seven justices. *See* N.C. Gen. Stat. § 7A-10 (2023) ("Four justices shall constitute a quorum for the transaction of the business of the court."). While we are bound by the *decisions* of our Supreme Court, *see Snipes v. TitleMax of Va., Inc.*, 285 N.C. App. 176, 184, 876 S.E.2d 864, 870 (2022) ("Of course, we are also bound by *decisions* of our Supreme Court and by prior panels of this Court" (emphasis added) (citations omitted)), the Chief Justice's approval of a rule is not a decision of the Supreme Court. Neither the Chief Justice nor the Supreme Court ruled on the disputed issue raised in this case of the State Bar's disciplinary jurisdiction over attorneys who are not admitted to practice in North Carolina and the interpretation of Sections 84-23 and 84-28 simply by the Chief Justice's approval of Rule 8.5.

More fundamentally, this Court and our Supreme Court have long concluded an administrative agency only has those powers given to it by statute. *See Rouse v. Forsyth Cnty. Dep't of Soc. Servs.*, 373 N.C. 400, 407, 838 S.E.2d 390, 395 (2020) ("[A]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." (citation and quotation marks omitted)); *see also Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 89, 92 S.E.2d 673, 677 (1956) ("The jurisdiction of the Industrial Commission in relation to the subject matter over which it may exercise authority is limited by the North Carolina Workmen's Compensation Act, and this jurisdiction can be enlarged or extended only by the General Assembly its creator."). While Defendant cites both *Rouse* and *Hart*, the State Bar does not address these cases and instead relies on its argument that Section 84-28 does not limit the DHC's jurisdiction and Rule 8.5 is valid since it was approved by the Chief Justice. But as both of those arguments fail, we agree with Defendant that since the General Assembly limited the DHC's disciplinary jurisdiction to "[a]ny attorney admitted to practice law in this State[,]" the State Bar cannot enlarge the DHC's jurisdiction via rulemaking. N.C. Gen. Stat. § 84-28. Based on this interpretation of the disciplinary jurisdiction of the State Bar under Section 84-28, we need not address Defendant's remaining arguments on appeal.

IV. Conclusion

The DHC did not have subject matter jurisdiction over Defendant since North Carolina General Statute Section 84-28 limits its disciplinary jurisdiction to "[a]ny attorney *admitted to practice law in this State*" and Defendant is licensed in New York, not North Carolina, and limits his practice to federal immigration court. N.C. Gen. Stat. § 84-28 (emphasis added). The more specific language in Section 84-28 controls over the more general grant of authority in Section 84-23. Further, Rule 8.5 of the Rules of Professional Conduct cannot confer subject matter jurisdiction over Defendant beyond the plain language of North Carolina General Statute Section 84-28. The DHC's Order of Discipline and Order on Motion for Relief are both reversed.

REVERSED.

Chief Judge DILLON and Judge CARPENTER concur.

LAWANDA T. SESSOMS, PLAINTIFF
v.
JOHN M. RAY, DEFENDANT.

No. COA23-919

Filed 18 June 2025

Civil Procedure—alimony and postseparation support—involuntary dismissal—with prejudice absent specific language to contrary—no jurisdiction over refiled claims

In a divorce matter relating to plaintiff ex-wife's claims for alimony and postseparation support, where the trial court's order dismissing plaintiff's alimony claim for failure to prosecute did not explicitly state that the dismissal was without prejudice, the order constituted an involuntary dismissal with prejudice under Civil Procedure Rule 41(b), which in turn terminated the ex-wife's post-separation support claim (under N.C.G.S. § 50-16.1A(4)(c)). Consequently, after plaintiff filed a new complaint seeking alimony and postseparation support, the court's subsequent order awarding postseparation support to plaintiff was vacated on appeal because the court lacked subject matter jurisdiction to hear the refiled claim. Although the second order included a finding that the prior order constituted a dismissal without prejudice, this finding did not cure

the jurisdictional defect; further, plaintiff's argument that the finding was an amendment to the prior order pursuant to Civil Procedure Rule 60(a) was meritless, since that Rule does not grant trial courts the authority to correct substantive errors in their decisions.

Appeal by defendant from order entered 22 July 2020 by Judge David H. Hasty in District Court, Cumberland County. Heard in the Court of Appeals 30 April 2024.

Sandlin Law Firm, P.A., by Deborah Sandlin and Caroline J. Lonon, for plaintiff-appellee.

Harold Lee Boughman, Jr. for defendant-appellant.

STROUD, Judge.

Defendant ("Husband") appeals from an order awarding Plaintiff ("Wife") postseparation support ("Postseparation Support Order"). Because the trial court's prior order granting involuntary dismissal of Wife's alimony claim for failure to prosecute did not provide that the dismissal was without prejudice, the dismissal was with prejudice under North Carolina Rule of Civil Procedure 41(b). Because the parties had already been divorced and Wife's prior claim for alimony was dismissed with prejudice, the trial court erred by denying Husband's motion to dismiss Wife's new claim for postseparation support under North Carolina Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. We therefore vacate the Postseparation Support Order.

I. Background

Wife and Husband were married in September 2000 and separated in May 2017. Husband and Wife have two children together; one was born in 2003 and the other in 2005.

On 21 September 2017, Husband filed a complaint against Wife for child custody and child support in file number 17 CVD 7324. On 9 October 2017, Wife filed an answer and counterclaims. On 17 October 2017, Wife filed an amended answer and counterclaims for divorce from bed and board, child custody, child support, postseparation support, alimony, equitable distribution, and attorneys' fees. On 25 October 2017, Husband filed a reply to the amended answer.

On 24 September 2018, a judgment of absolute divorce was entered. The trial court severed Husband's claim for equitable distribution and

Wife's claims for postseparation support, alimony, and equitable distribution to be heard at a later date.

Wife's claim for postseparation support was heard on 16 April 2019. The trial court entered an order on 27 January 2020 concluding that Wife was a dependent spouse and Husband was a supporting spouse. Husband was ordered to pay Wife postseparation support of $1,400.00 per month, beginning 1 March 2019, and continuing every month until further order of the trial court.

Wife's claim for alimony was set for hearing on 17 February 2020, and Wife did not appear for this hearing. On 16 March 2020, the trial court entered an order dismissing Wife's claim for alimony for "failure to prosecute" ("Order of Dismissal"). The Order of Dismissal in its entirety stated:

> THIS CAUSE coming on to be heard and being heard before the Honorable David H. Hasty, Judge presiding over the February 17, 2020 Session of Civil Court for Domestic Relations for the Twelfth Judicial District, Cumberland County, North Carolina, upon a hearing of [Wife]'s claim for Alimony; [Husband] was present in [c]ourt and was represented by Attorney Harold Lee Boughman, Jr. and [Wife] was not present in [c]ourt and was not represented by an attorney; and the [c]ourt, after hearing statements of counsel, finds that [Wife]'s claim for alimony should be dismissed for failure to prosecute.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:
>
> 1. [Wife]'s claim for alimony is hereby dismissed.
>
> 2. This matter is retained for further Orders of the [c]ourt.

Husband's counsel served the Order of Dismissal on Wife on 16 March 2020. Wife did not appeal from the Order of Dismissal or seek modification of the Order of Dismissal.

Three days later, on 19 March 2020, Wife filed a new complaint including claims for alimony, postseparation support, and attorneys' fees in file number 20 CVD 1968. In this complaint, Wife made allegations regarding her entitlement to postseparation support and alimony and she also alleged:

> 9. [Wife] had a prior claim pending for alimony in 17 CVD 7324, which was dismissed for failure to prosecute on February 17, 2020 when [Wife] was ill and unable to be present. She is refiling those claims well within one year of that dismissal.

On 2 April 2020, Husband filed an answer and motion to dismiss Wife's claims for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted under North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6). Husband contended the trial court did not have "subject matter jurisdiction" because the parties were "divorced on September 24, 2018" and "[w]hen the [c]ourt dismissed [Wife]'s claim for alimony based upon failure to prosecute, [Wife]'s claim for post separation is dismissed with prejudice pursuant to [North Carolina General Statute Section] 50-16.1A.(4)." He also moved to dismiss under North Carolina Rule of Civil Procedure 12(b)(6) based on "failure to state a claim upon which relief may be granted" because the trial court had dismissed Wife's alimony claim "based upon failure to prosecute" so "[Wife]'s claim for post separation is dismissed with prejudice pursuant to [North Carolina General Statute Section] 50-16.1A.(4)."

On 14 May 2020, the trial court heard both Husband's motion to dismiss Wife's complaint and Wife's claim for postseparation support. On 22 July 2020, the trial court entered the Postseparation Support Order finding that Wife's prior claims for postseparation support and alimony were "previously dismissed, without prejudice" and that Wife could refile her postseparation support claim. Husband's motion to dismiss was denied. Husband was ordered to pay Wife the sum of $1,300.00 per month, beginning 1 May 2020, "until the death of either party, the remarriage or cohabitation of [Wife], or the entry of an order on the issue of permanent alimony, which ever first occurs."

On 29 June 2023, the trial court entered an order denying Wife's claim for alimony and dismissing her claim with prejudice. Wife's postseparation support was terminated. Husband appeals from the 22 July 2020 Postseparation Support Order.

II. Appellate Jurisdiction

"Postseparation support is only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court." *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998). Thus, while the 22 July 2020 Postseparation Support Order was not a final order, it became appealable upon entry of the 29 June 2023 order which denied Wife's claim for alimony and dismissed her claim with prejudice.

See Thompson v. Thompson, 223 N.C. App. 515, 517, 735 S.E.2d 214, 216 (2012) ("The [postseparation support] order is reviewable once the trial court has entered an order awarding or denying alimony." (citation omitted)). On 27 July 2023, Husband entered timely notice of appeal.

III. Analysis

On appeal, Husband presents two issues: (1) whether the trial court erred in denying Husband's motion to dismiss for lack of subject matter jurisdiction because Wife's claim for postseparation support terminated pursuant to North Carolina General Statute Section 50-16.1A(4)(c) when the trial court previously dismissed Wife's claim for alimony based on her failure to prosecute the claim pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure; and (2) whether the trial court erred in denying Husband's motion to dismiss for failure to state a claim upon which relief may be granted because Wife's claim for postseparation support terminated pursuant to North Carolina General Statute Section 50-16.1A(4)(c) when her alimony claim was previously dismissed for her failure to prosecute the claim pursuant to Rule 41(a)(2).

Specifically, Husband argues that "[t]his case presents a conflict between a general statute of North Carolina Civil Procedure and a specific statute addressing post separation support in chapter 50 of the North Carolina General Statutes." Although North Carolina General Statute Section 50-16.2A addresses how a claim for postseparation support may be brought and what the trial court must consider in awarding postseparation support, North Carolina General Statute Section 50-16.1A(4), defines "Postseparation support." *See* N.C. Gen. Stat. § 50-16.2A (2023); *see also* N.C. Gen. Stat. § 50-16.1A(4) (2023). Husband's argument addresses the definition of postseparation support, which is:

> spousal support to be paid until the earlier of any of the following:
>
> a. The date specified in the order for postseparation support.
>
> b. The entry of an order awarding or denying alimony.
>
> c. The dismissal of the alimony claim.
>
> d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.
>
> e. Termination of postseparation support as provided in G.S. 50-16.9(b).

> Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if postseparation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce.

N.C. Gen. Stat. § 50-16.1A(4).

Overall, Husband presents this case as primarily a question of statutory construction of Section 50-16.1A(4)(c) – "the dismissal of the alimony claim" – and determining whether this statute or Rule 41(a)(2) should apply to this situation. He argues we should determine that this situation is controlled only by Section 50-16.1A(4)(c) because it conflicts with Rule 41(a)(2).

Wife states the issue on appeal as whether a dismissal without prejudice of a party's alimony claim bars Wife from refiling her claim for postseparation support when she refiles her alimony claim. Wife contends Section 50-16.1A(4)(c) is ambiguous and we must consider the legislative history of our former statute regarding alimony *pendente lite* and our current statute regarding postseparation support to resolve this interpretative dilemma.

The parties' briefs are somewhat like the proverbial "two ships passing in the night," and for reasons we have been unable to ascertain from the record, neither has directly addressed the real issue in this case: the straightforward application of *Rule 41(b)*, not Rule 41(a)(2). Rule 41 of the North Carolina Rules of Civil Procedure addresses both voluntary and involuntary dismissals of claims. Rule 41(a)(2) addresses *voluntary* dismissals. Wife did not take a voluntary dismissal of her alimony claim. Here, the dismissal was an *involuntary* dismissal for failure to prosecute. Rule 41(b) provides as follows:

> (b) Involuntary dismissal; effect thereof.--*For failure of the plaintiff to prosecute* or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts

> may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). *Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.*

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2023) (emphasis added).

Despite their arguments about Section 50-16.1A and Rule 41(a)(2), both parties have acknowledged that the trial court's Order of Dismissal *appears* to be an order for involuntary dismissal under Rule 41(b). Husband states:

> There is no dispute that [Wife]'s claim for alimony was dismissed for failure to prosecute on 16 March 2020 at the time when a post separation order entered on 27 January 2020 was in effect. [Wife]'s claim for post separation support was not dismissed but terminated due to the dismissal of [Wife]'s alimony claim. The [O]rder of [D]ismissal for failure to prosecute does not indicate whether the dismissal is "with" or "without" prejudice. Although the Order states the grounds for dismissal as a "failure to prosecute", it appears the dismissal was made pursuant to Rule 41(a)(2) which allows a party to refile a new action based on the same claim within one year of the dismissal.

Based upon his conclusion that it "appears" the dismissal was made under Rule 41(a)(2), Husband then proceeds with his arguments about the Postseparation Support Order based on this assumption. Despite the trial court's "finding" that the Order of Dismissal was without prejudice, the Order of Dismissal does not "appear" to be a dismissal without prejudice. It is clearly an order for involuntary dismissal under Rule 41(b) for failure to prosecute, which is a dismissal with prejudice since the Order of Dismissal does not state that it is "without prejudice." It is

well-established that the trial court must *specifically* state if an order of dismissal under Rule 41(b) is "without prejudice." Otherwise, the dismissal is with prejudice. *See Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E.2d 378, 383 (1987) ("Since the dismissal order operates as an adjudication on the merits *unless the order specifically states to the contrary*, the party whose claim is being dismissed has the burden to convince the court that the party deserves a second chance; thus, the party should move the trial court that the dismissal be without prejudice." [*Whedon v.*] *Whedon*, 313 N.C. [200], 212-13, 328 S.E.2d [437], 444-45 [(1985)] (quoting W. Shuford, N.C.Civ.Prac. and Proc. Sec. 41-8)." (emphasis added)). Wife never moved that the trial court condition the terms of its dismissal. Absent such a motion as contemplated by the Supreme Court in *Whedon*, this record is devoid of any facts from which the trial court or this Court could determine why Wife should be given a chance to re-file her claim. Nor did Wife appeal the Order of Dismissal, so it is a binding order for purposes of this appeal.

Wife notes that the Postseparation Support Order on appeal states that Wife's "[c]omplaint made claims for postseparation support and alimony as this [c]ourt previously dismissed, *without prejudice*, those claims for lack of prosecution in file 17 CVD 7324." (Emphasis added.) Wife clearly has good reason not to dispute Husband's assumption regarding the "appearance" of the Order of Dismissal as being without prejudice, so she contends we must accept his assumption as correct because the same judge stated in the order on appeal that the Order of Dismissal was "without prejudice":

> Despite Husband's Motions to Dismiss on the basis that the alimony and postseparation support claims were dismissed with prejudice, *Judge Hasty, the same judge who dismissed the alimony claim for failure to prosecute, effectively amended his previous order dismissing the claim to clarify the dismissal was indeed without prejudice in the 17 July 2020 Postseparation Support Order.* (R pp 49-50). *The court in effect amended or clarified his order sua sponte as allowed in N.C. R. Civ. P. R. 60(a) when it determined its original dismissal of the alimony claim was without prejudice and [Wife] should be able to refile. The trial judge may correct any clerical mistakes arising from an oversight or omission on his own initiative. Id.* For argument's sake and given the fact the issue the dismissal without prejudice has not been raised, [Wife] proceeds under the assumption that everyone has accepted the judge's ruling on that issue. Judge

> Hasty found, consistent with [Wife]'s argument herein, that the dismissal of the alimony claim without prejudice, while terminating [Husband]'s obligation to pay under the previous postseparation support order, did not terminate [Wife]'s right to refile her claims within one year of the dismissal without prejudice. (R p 50).

(Emphasis added.)

But even if we assume that the trial court intended the Order of Dismissal to be without prejudice, as Wife suggests, the Postseparation Support Order does not indicate that the trial court was "amending" the Order of Dismissal, either *sua sponte* or otherwise, nor did Wife request any such amendment. Wife does not cite any authority to support her contention that under Rule 60 the trial court has the authority to *sua sponte* amend an assumed "clerical error" in the Order of Dismissal without entering an order noting this correction or even mentioning it on the record.[1] *See Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985) ("The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." (citations omitted)). Omitting the provision that the dismissal was "without prejudice," even if done by mistake, is not a mere clerical error, and this assumed unwritten "correction" of the Order of Dismissal would have a substantive effect since it would "alter [ ] the effect of the original order." *Angarita v. Edwards*, 278 N.C. App. 621, 630, 863 S.E.2d 796, 803 (2021). Wife did not appeal the Order of Dismissal, so even if that Order is erroneous in some way, it is not subject to collateral attack in this appeal. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) ("An erroneous order is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles. An erroneous order may be remedied by appeal; it may not be attacked collaterally." (citations and quotation marks omitted)).

We also appreciate Wife's contention that Husband's brief has failed to argue directly that the Order of Dismissal was actually with prejudice under Rule 41(b), and in most cases, if an appellant fails to make an

1. No transcripts of any hearing were provided for this appeal.

argument, we need not address it. But unfortunately for Wife, in this case the issue is the subject matter jurisdiction of the trial court to order postseparation support after her claim for alimony had been dismissed with prejudice. This Court has an obligation to address a lack of subject matter jurisdiction, even *ex mero motu*, if neither party raises the issue. *See 4U Homes & Sales, Inc. v. McCoy*, 235 N.C. App. 427, 432, 762 S.E.2d 308, 312 (2014) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." (citation omitted)). Put another way, "[s]ubject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). In addition, "subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." *Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) (citation omitted). And although we would be required to address subject matter jurisdiction even if Husband had not raised it, here, Husband's motion to dismiss under Rules 12(b)(1) and 12(b)(6) alleged the claims should be dismissed for lack of subject matter jurisdiction.

This Court cannot address a case based upon assumptions of the parties or claims about what may "appear" to be, particularly where the trial court's Order of Dismissal was clear and unambiguous. We are required to rely upon the trial court's Order of Dismissal as it is, not as the parties have treated it in their briefs or as the trial court treated it in the Postseparation Support Order. In the Postseparation Support Order on appeal, the trial court made the following findings regarding Husband's motion to dismiss for lack of subject matter jurisdiction:

> 6. This action for postseparation support and alimony was filed by [Wife] on March 19, 2020. [Husband] was served with process and filed responsive pleadings. This matter is before the [c]ourt upon . . . [Wife]'s issue of postseparation support and . . . [Husband]'s Motion to Dismiss.
>
> 7. . . . [Wife]'s Complaint made claims for postseparation support and alimony as this [c]ourt previously dismissed, *without prejudice*, those claims for lack of prosecution in file 17 CVD 7324.
>
> 8. In File #17 CVD 7324 [Husband] was ordered to pay postseparation support to . . . [Wife] in the amount of $1400.00 but terminated when the court dismissed . . . [Wife]'s alimony claim on March 12, 2020.

> 9. [Husband] alleges that . . . [Wife]'s claim for postseparation support should be dismissed as postseparation support terminates when alimony is dismissed and cannot be refiled.
>
> 10. [Wife] alleges that postseparation support is ancillary to alimony and the dismissal terminates any obligation under an Order for Postseparation Support but, like alimony, can be refiled and is not barred from being refiled within one year of being involuntarily dismissed.
>
> 11. The [c]ourt determines that the issue of postseparation support can be refiled and [Husband]'s Motion to Dismiss should be denied.

(Emphasis added.)

The Postseparation Support Order has no labeled conclusion of law addressing the motion to dismiss but the trial court "determined" in the findings of fact that the Order of Dismissal did not bar Wife from refiling her claim within one year. But despite the label of "findings," the trial court's statements in findings numbers 7 and 11 are conclusions of law, not findings of fact. "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) (citations omitted). These "findings" are legal conclusions about the effect of the Order of Dismissal on Wife's refiled claim based upon "fixed rules of law," including North Carolina General Statute Section 50-16.1A(4) and Rule 41(b). Despite the trial court's labels of these statements as findings of fact, these are conclusions of law, and we must review conclusions of law *de novo*:

> Appellate review of the trial court's conclusions of law is de novo. [*Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)]. "The labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review. If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion de novo." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) (citing *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011)).

Knuckles v. Simpson, 293 N.C. App. 260, 264-65, 900 S.E.2d 336, 340 (2024).

The effect of the Order of Dismissal is controlled by both North Carolina General Statute Section 50-16.1A(4) and by Rule 41(b). Under Rule 41(b), the Order of Dismissal states that Wife's alimony claim was dismissed for failure to prosecute and it does not state that the dismissal is without prejudice. In 1985, our Supreme Court addressed some then-recent revisions to Rule 41 and the trial court's discretion under Rule 41(b) to grant involuntary dismissal either with or without prejudice:

> One of the more far-reaching changes in North Carolina civil trial practice effected by the rules is found in the method for testing the sufficiency of evidence. Rule 41(b) deals with an involuntary dismissal in an action tried by the court without a jury, while Rule 50 covers the motion for a directed verdict in a jury trial. Perhaps the most significant change lies in the fact that a dismissal for insufficiency operates as an adjudication on the merits unless the court specifies otherwise. Under previous law, a compulsory nonsuit allowed the plaintiff to have an automatic second chance on his claim. Too often this right resulted in the unnecessary crowding of court dockets and harassing of defendants with claims that did not deserve a second chance. Rule 41(b) allows the court to dispose of such a claim in final fashion, while at the same time protecting those parties who can demonstrate that they should be afforded another opportunity to produce sufficient evidence.
>
> W. Shuford, N.C. Civil Practice and Procedure, § 41.3.
>
> The same writer offers these further observations on the effect of an involuntary dismissal under Rule 41(b):
>
> > *The major exception to the general proposition that an involuntary dismissal operates as a final adjudication is found in the power lodged by Rule 41(b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits. Unless the order dismissing the action states specifically to the contrary, the dismissal under Rule 41(b) does constitute an adjudication on the merits*[.]
>
> *Id.* at § 41-8.

Whedon, 313 N.C. at 212, 328 S.E.2d at 444 (some emphasis added) (some emphasis omitted).

The Order of Dismissal simply cannot be construed as "without prejudice," and the trial court erred by its tacit conclusion that the prior dismissal was without prejudice. The Order of Dismissal does not specifically state that it is "without prejudice" nor does it specify "that a new action based on the same claim may be commenced within one year or less after such dismissal." N.C. Gen. Stat. § 1A-1, Rule 41(b). And although both parties recognized in their briefs that the language of the Order of Dismissal did "appear" to be an involuntary dismissal under Rule 41(b) because it does not state it is "without prejudice," Husband has not argued that there is any language in the Order of Dismissal which may render it unclear or ambiguous but seems to rely entirely on the trial court's finding in the Postseparation Support Order that the prior Order of Dismissal was without prejudice. Although we recognize the possibility that an order of dismissal might somehow be worded in a way to convey the same meaning as "without prejudice" without necessarily using the exact words "without prejudice," here, the Order of Dismissal simply does not include any such language.

The only additional language in the decree of the Order of Dismissal beyond dismissing the alimony claim is this oft-used phrase: "This matter is retained for further Orders of the [c]ourt." No case addresses what this phrase actually means. In most instances, it at least implies that there may be other claims or motions still pending in the case and the trial court anticipates ruling on those matters later, if needed, *in the same proceeding*.[2] Here, it appears there were still some existing claims in file number 17 CVD 7324 after the dismissal of the alimony claim, since there were claims for child custody and child support in the same case and the youngest child did not attain the age of 18 until August 2023. But whatever the intent of the sentence in the Order of Dismissal, use of these words in the Order does not change the effect of the Order under Rule 41(b). Wife's alimony claim in the prior case, file number 17 CVD 7324, was in fact dismissed with prejudice by the Order of Dismissal. Her alimony claim had been dismissed even if the child custody and child support claims still existed, and there was nothing for the trial court to "retain" as to the alimony claim for later orders. Wife recognized the effect of the Order of Dismissal, as indicated by her

2. Our interpretation of this sentence as *not* indicating a dismissal "without prejudice" is also supported by the trial court's other orders in this case, file number 20 CVD 1968. For example, the trial court's last order entered on 29 June 2023, which explicitly dismissed Wife's alimony claim "with prejudice" and terminated her postseparation support also included the same phrase, "This matter is retained for further Order of the [c]ourt."

allegation in her complaint that her "prior claim" for "alimony in 17 CVD 7324" was "dismissed for failure to prosecute on February 17, 2020 when [Wife] was ill and unable to be present." For this reason, Wife filed her new complaint for alimony and postseparation support and issued a new summons in file number 20 CVD 1968 to attempt to assert new claims for alimony and postseparation support against Husband. We cannot interpret the phrase "[t]his matter is retained for further Orders of the [c]ourt" as meaning that the dismissal was without prejudice, especially where Rule 41(b) clearly requires the order to *specifically state* that the dismissal is "without prejudice" or that "it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal." N.C. Gen. Stat. § 1A-1, Rule 41(b) (emphasis added).

IV. Conclusion

The trial court erred by denying Husband's motion to dismiss Wife's postseparation claim because the prior Order of Dismissal was with prejudice under Rule 41(b), and the trial court did not have subject matter jurisdiction to rule on Wife's new postseparation support claim. The 22 July 2020 Postseparation Support Order is therefore vacated.

VACATED.

Judges COLLINS and WOOD concur.

STATE v. CLARK

[299 N.C. App. 445 (2025)]

STATE OF NORTH CAROLINA
v.
DAMIAN DANELLE CLARK, DEFENDANT

No. COA24-909

Filed 18 June 2025

Criminal Law—motion to suppress—affidavit accompanying warrant application—not conclusory—not stale

In a drug trafficking and firearms prosecution, the trial court properly denied defendant's motion to suppress evidence obtained during the search of a residence pursuant to a warrant where competent evidence supported a finding of fact which defendant contended was merely a recitation of conclusory and stale assertions from a detective's affidavit accompanying the warrant application. The underlying circumstances presented in the application (including corroborating information) supported the credibility and reliability of the informant upon whom the detective relied, and the information relied upon dated from only one to two weeks past—not an unreasonable delay given the ongoing nature of the alleged trafficking behavior—and thus was not stale.

Appeal by Defendant from judgments entered 1 & 2 May 2024 by Judge William A. Wood II in Cabarrus County Superior Court. Heard in the Court of Appeals 21 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Christine Wright, for the State.

Everson Law Office, PLLC, by Cynthia Everson, for Defendant.

GRIFFIN, Judge.

Defendant Damian D. Clark appeals from judgments entered after the trial court denied his Motion to Suppress. Defendant pled guilty to trafficking opium or heroin, possession of a firearm by a felon, and possession of a stolen firearm. Defendant contends (1) the trial court's findings are not supported by competent evidence; and (2) the trial court's conclusions of law are not supported by its findings. We affirm the trial court's order denying Defendant's Motion to Suppress.

I. Factual and Procedural Background

On 4 May 2022, Detective A.L. Favia applied for a search warrant for property located at 1451 Tygress Drive, Kannapolis, NC 28081. In support of the warrant, Detective Favia indicated she received an anonymous tip from a credible and reliable informant, who "provided information . . . on a number of occasions prior to the application for [the] search warrant." Detective Favia specified "on multiple occasions within the past week/two weeks" the informant had "purchased schedule II-controlled substances from the residence 1451 Tygress Drive, Kannapolis, NC 28081 utilizing Cabarrus County Sheriffs' [O]ffice special funds." All the sales were "arranged and carried out by [Defendant]." The schedule II-controlled substances "[were] turned over to detectives and placed into evidence immediately after the purchase." After reviewing the information presented to him, Magistrate Bill Baggs II found probable cause and issued the search warrant.

Upon executing the search warrant, officers seized 119.7 grams of suspected heroin, 81.3 grams of marijuana, two handguns, scales, and assorted ammunition.

On 6 June 2022, Defendant was indicted by a Cabarrus County Grand Jury for felony trafficking in opium or heroin by possessing 28 grams or more of heroin. On 13 February 2023, the Grand Jury returned a superseding indictment alleging the substance to be fentanyl instead of heroin.

On 26 April 2024, Defendant filed a Motion to Suppress alleging the search warrant lacked probable cause. On 30 April 2024, a suppression hearing was held and the trial court denied Defendant's Motion. On 1 May 2024, Defendant pled guilty pursuant to a plea agreement to trafficking opium or heroin, possession of a firearm by a felon, and possession of a stolen firearm. Defendant reserved the right to appeal the denial of his Motion to Suppress. The order denying Defendant's Motion was entered 2 May 2024. Defendant timely appeals.

II. Analysis

Defendant alleges the trial court erred by denying his Motion to Suppress. Specifically, Defendant contends (1) the trial court's findings are not supported by competent evidence; and (2) the trial court's conclusions of law are not supported by its findings.

"Our review of a trial court's denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event

they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Eddings*, 280 N.C. App. 204, 209, 866 S.E.2d 499, 503 (2021) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review a trial court's conclusions of law de novo. *State v. Jones*, 267 N.C. App. 615, 620, 834 S.E.2d 160, 164 (2019).

"An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Brown*, 248 N.C. App. 72, 74, 787 S.E.2d 81, 84 (2016) (citation and internal marks omitted).

A. Findings

Defendant challenges Finding of Fact 13 as unsupported by competent evidence. He argues Finding of Fact 13 is a recitation of Detective Favia's search warrant application unsupported by probable cause.

Finding of Fact 13 states the following:

> Probable cause for the issuance of the search warrant included the following: A) over the several months preceding the issuance of the search warrant, detectives with the Cabarrus County Sheriff's Office received reliable information from trusted sources indicating that [Defendant] was involved with the purchase and sale of [s]chedule II[-] controlled substances, B) within the couple of weeks preceding the issuance of the search warrant, Detective Favia met with an individual referred to in the search warrant as [Informant], C) [Informant] is not identified by name in the search warrant due to fear of personal retaliation should his/her identity be known, D) [Informant] has been proven credible and reliable due to having provided information to Detective Favia on a number of occasions prior to the application for this search warrant which she had personally verified to be true and correct, E) throughout this investigation, including multiple times in the week/two weeks preceding the application for this search warrant, [Informant] has purchased [s]chedule II[-]controlled substances from the residence located at 1451 Tygress Dr., Kannapolis, NC, F) Cabarrus County Sheriff's Office funds were utilized for these purchases, G) each of the sales was arranged and carried out by [Defendant],

> H) the purchased [s]chedule II[-] controlled substances were turned over to detectives and placed into evidence immediately after the purchase, I) based on Detective Favia's training and experience, she knows that individuals involved with the illegal sale of narcotics commonly possess firearms in order to protect themselves or their controlled substances, J) Detective Favia's application for the search warrant requested court authorization based on probable cause for the search of any and all evidence that is related to the crime of possession with the intent to sale/deliver a schedule II[-]controlled substance at 1451 Tygress Dr., Kannapolis, NC.

A trial court's findings must be supported by competent evidence. *Eddings*, 280 N.C. App. at 209, 866 S.E.2d at 503. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Maye*, 295 N.C. App. 248, 252, 905 S.E.2d 293, 296 (2024) (citation and internal marks omitted).

"Under North Carolina law, an application for a search warrant must be supported by an affidavit detailing 'the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched.' " *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (quoting N.C. Gen. Stat. § 15A-244(3) (2023)). Under the probable cause standard, "[a] magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a fair probability that contraband will be found in the place to be searched." *Id.* (citation and internal marks omitted). The magistrate is permitted to draw "reasonable inferences from the evidence in the affidavit supporting the application for the warrant[.]" *Id.* at 164, 775 S.E.2d at 824–25 (citation and internal marks omitted). "[The] evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience[.]" *Id.* 164–65, 775 S.E.2d at 825 (citations and internal marks omitted).

Probable cause does not require certainty, but only "a probability or substantial chance of criminal activity." *Id.* at 165, 775 S.E.2d at 825 (citation and internal marks omitted). We give great deference to a magistrate's determination of probable cause, and we are only "responsible for ensuring that the issuing magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed.' " *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) (alterations in *Gates*)).

Here, Defendant contends the warrant lacked probable cause because Detective Favia's assertions in his warrant application were "conclusory" and "stale."

1. "Conclusory"

Defendant alleges Detective Favia's assertions regarding the credibility and reliability of the informant were "conclusory" because Detective Favia merely stated the informant was credible and reliable without any additional information. We disagree.

We recognize "[p]robable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based." *State v. Campbell*, 282 N.C. 125, 130–31, 191 S.E.2d 752, 756 (1972) (citation and internal marks omitted). "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable." *State v. Edwards*, 286 N.C. 162, 165, 209 S.E.2d 758, 760 (1974) (citation and internal marks omitted).

Here, there were sufficient "underlying circumstances" presented in the application to support the credibility and reliability of the informant. The record shows the informant had previously provided information to Detective Favia "on a number of occasions" prior to the application for the search warrant at issue, and Detective Favia "personally verified" that information "to be true and correct." "[T]hroughout [the] investigation" and "multiple times" in the week/two weeks preceding the application, the informant purchased schedule II-controlled substances from the residence sought to be searched. The informant was given funds by the Cabarrus County Sheriff's Office, and sales were "arranged and carried out" by Defendant. The controlled substances "were turned over to detectives and placed into evidence immediately after the purchase."

Contrary to Defendant's contention, Detective Favia did not merely state the informant was credible and reliable. Instead, Detective Favia provided a detailed explanation showing how the informant was reliable through collecting evidence at the residence in question. Detective Favia involved the informant in the investigation and obtained corroborating evidence through a series of staged drug deals to support the informant's original tip. *See State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) ("[A]n officer may rely upon information received through an informant, rather than upon his direct observations, so long as the

informant's statement is reasonably corroborated by other matters within the officer's knowledge." (citation and internal marks omitted)). Thus, we hold there was sufficient information in the warrant application to support the credibility and reliability of the informant, and the information presented was not conclusory.

2. "Stale"

Next, Defendant contends the information in the warrant application was "stale" because "it is unclear how much time lapsed between the information provided by the informant and the application for the search warrant." We disagree.

"The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued." *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85 (citation and internal marks omitted). This Court has held that there is no hard and fast rule for how much time is allowed to pass between the alleged criminal activity and the affidavit seeking the warrant. *Id.* (citation omitted). "The general rule is that no more than a reasonable time may have elapsed." *Id.* (citation omitted). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock." *Id.* (citation omitted).

Even though we measure staleness based on what is "reasonable," we have held "an interval of two or more months between the alleged criminal activity and the affidavit" is an "unreasonably long delay." *State v. Lindsey*, 58 N.C. App. 564, 565–66, 293 S.E.2d 833, 834 (1982) (citation and internal marks omitted). However, criminal activity observed "within a day or two of the affidavit and warrant application" is generally not stale. *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85 (citing *State v. Walker*, 70 N.C. App. 403, 405, 320 S.E.2d 31, 33 (1984) (upholding a search warrant where an informant had seen marijuana within 48 hours of the warrant application)).

Additionally, the affidavit must specify when the informant observed the activity, so the magistrate can properly evaluate whether probable cause exists at the time of issuing the warrant. *See id.* at 80, 787 S.E.2d at 87 (reversing a trial court's suppression order where the officer stated when he spoke to the informant but "failed to state the time the informant's observations were made." (citation and internal marks omitted)).

Here, Detective Favia stated in her affidavit:

> Throughout this investigation, including on multiple occasions within the past week/two weeks, [Informant] has

> purchased schedule II-controlled substances from the residence 1451 Tygress Dr., Kannapolis, NC 28081 utilizing Cabarrus County Sheriffs' [O]ffice special funds. All sales were arranged and carried out by [Defendant]. The purchased schedule II[-]controlled substance was turned over to detectives and placed into evidence immediately after the purchase.

Here, it is apparent from Detective Favia's affidavit the informant obtained the controlled substances from Defendant at his residence within a week or two weeks of the warrant application. Thus, the affidavit does specify "the time the informant's observations were made." *Id.*

The only question left for us to decide is whether one or two weeks is an "unreasonable delay."

In *State v. McCoy*, this Court had to determine whether circumstances of two prior drug deals in different motel rooms within a ten-day period would "reasonably lead[] to the inference that cocaine could be found in the third room." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 357 (1990). We looked at two factors to make this determination: "(1) the amount of criminal activity and (2) the time period over which the activity occurred." *Id.* at 577, 397 S.E.2d at 358. There, we stated the following regarding time:

> Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

Id. (citations and internal marks omitted).

As a result of the "continuous nature" of the activity, we held ten days to be sufficient because there was a "reasonabl[e] probab[ility], judging from the totality of the circumstances, that the contraband sought could be found in the location to be searched." *Id.* at 578, 397 S.E.2d at 358. This Court reasoned that the defendant, who had been previously convicted of selling drugs, "had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and that at two of those locations he had sold cocaine." *Id.* Thus, it was "reasonable to infer that when the suspect occupied the third room, he still possessed the cocaine." *Id.*

Here, similar to the facts in *McCoy*, there was a continuous pattern of drug deals between Defendant and the informant. Detective Favia stated in the warrant application that "throughout [the] investigation" and on "multiple occasions" in the week/two weeks preceding the application, the informant purchased schedule II-controlled substances from Defendant at his residence. Notably, the facts of the present case are even more compelling than in *McCoy*, because unlike *McCoy*, Defendant was not relocating to different locations or taking up residence in multiple motel rooms during the investigation. The evidence shows all the arranged drug deals occurred at 1451 Tygress Dr., Kannapolis, NC 28081, Defendant's residence.

Thus, considering the circumstances of the present case, and the continuous nature of the drug activity, we hold one or two weeks does not amount to an "unreasonable delay" because there is a "fair probability" the substances would still be at Defendant's residence. *See McKinney*, 368 N.C. at 164, 775 S.E.2d at 824. Accordingly, the information presented in the warrant application was not stale.

B. Conclusions of Law

Defendant contends the trial court's conclusions of law are unsupported by its findings of fact because, in his view, Finding of Fact 13 is unsupported by competent evidence.

As discussed above, Finding of Fact 13 is supported by competent evidence and is therefore binding on appeal. *See Eddings*, 280 N.C. App. at 209, 866 S.E.2d at 503.

"[A] trial court may not consider facts beyond the four corners of a search warrant in determining whether a search warrant was supported by probable cause at a suppression hearing." *Id.* at 211, 866 S.E.2d at 505 (citation and internal marks omitted). Here, the trial court did this and explained how the information presented in the affidavit was sufficient to establish probable cause in Finding of Fact 13.

As a result, the trial court denied Defendant's Motion to Suppress concluding the affidavit was not "conclusory" or "stale" and that "the evidence as a whole provides a substantial basis for concluding that probable cause exists to support the issuance of the search warrant[.]"

Because we held competent evidence supports the trial court's finding of probable cause based on the affidavit submitted, this in turn supports the trial court's conclusion that the information presented was not "conclusory" or "stale" and that probable cause existed to support the issuance of the warrant. *See State v. McHone*, 158 N.C. App. 117,

122, 580 S.E.2d 80, 84 (2003) (holding competent evidence sufficient to support the trial court's findings "which, in turn, support its conclusion that the affidavit did not contain sufficient information to establish probable cause"). As a result, we hold the trial court did not err in denying Defendant's Motion to Suppress.

III. Conclusion

For the aforementioned reasons, we hold the trial court properly denied Defendant's Motion to Suppress.

AFFIRMED.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JARON MONTE CORNWELL

No. COA23-36-2

Filed 18 June 2025

Indictment and Information—continuing criminal enterprise—non-jurisdictional, non-statutory defect—prejudice not established

On remand from the North Carolina Supreme Court for reconsideration in light of *State v. Singleton*, 386 N.C. 183 (2024) (holding that the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule), the Court of Appeals held that, although defendant's indictment on a charge of continuing criminal enterprise (CCE)—related to his alleged involvement with a cocaine trafficking ring—was defective, defendant was not entitled to relief. While the indictment failed to enumerate the alleged underlying offenses comprising CCE, that defect was non-jurisdictional in nature, and defendant did not establish that the indictment failed to satisfy constitutional purposes. Further, defendant failed to establish that the flawed indictment was prejudicial in light of the overwhelming evidence of his guilt.

On remand from the Supreme Court of North Carolina for reconsideration in light of *State v. Singleton*, 386 N.C. 183 (2024). Appeal by defendant from judgments entered 11 October 2021 by Judge Martin

B. McGee in Catawba County Superior Court, Nos. 18CRS001848-170, 18CRS001849-170, 18CRS052417-170. Originally heard in the Court of Appeals 19 September 2023.

Attorney General Jeff Jackson, by Criminal Bureau Chief Benjamin O. Zellinger, for the State.

Jason Christopher Yoder for defendant.

FREEMAN, Judge.

On 4 November 2019, defendant was indicted for possession of a firearm by a convicted felon. On 20 September 2021, a grand jury issued superseding indictments charging defendant with conspiracy to traffic cocaine and continuing criminal enterprise ("CCE"). Defendant's matter came on for trial in Catawba County Superior Court on 4 October 2021. The State introduced extensive evidence tending to show defendant's significant involvement in a cocaine trafficking ring, including wiretaps, surveillance footage, and incriminating items seized from defendant's residence. The evidence tied defendant, referred to as the "Kingpin of Hickory" by an associate, to numerous drug transactions, including the purchase and transport of a one-kilogram brick of cocaine. The jury found defendant guilty of all charges.

Defendant initially announced in court he would not appeal his case, but he then returned to court two days later and gave oral notice of appeal. On appeal to this Court, defendant petitioned for a writ of certiorari "in the event that this Court finds his trial counsel's oral notice of appeal . . . was defective because it was not given 'at trial' as required by Rule 4(a)(1)." Because we determined defendant had "not properly appealed," this Court "allow[ed] his petition for writ of certiorari only in part with respect to the adequacy of his CCE indictment."[1] *State v. Cornwell*, No. COA23-36, 2024 WL 1406627, at *1 (N.C. Ct. App. Apr. 2, 2024).

This Court vacated defendant's conviction for CCE because the indictment charging defendant with that offense was "insufficient to

1. After our prior opinion issued, defendant filed a motion for us to reconsider our dismissal of the remainder of his appeal. Defendant has similarly argued in his supplemental brief that we should consider all of his original arguments on appeal. We decline defendant's invitation to expand the scope of our review on remand beyond that which is properly before us for reconsideration in light of *Singleton*.

support subject matter jurisdiction with respect to that charge." *Id.* The State filed a petition for discretionary review with the Supreme Court of North Carolina, and that Court entered an order allowing the State's petition "for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Singleton*[.]"

Upon remand, this Court ordered the parties to submit supplemental briefing on three issues. The parties' supplemental briefs have been filed and considered by this Court and this matter is now ripe for decision. For the reasons below, we conclude that although our precedent compels us to hold that the indictment charging defendant with CCE contained a non-jurisdictional defect, such defect did not prejudice defendant.

I. Factual and Procedural Background

As our prior opinion in this matter dealt solely with defendant's indictment for CCE, and as our Supreme Court's remand instructed us to reconsider that opinion in light of *Singleton*, our review is limited to that sole issue regarding defendant's indictment. Accordingly, we omit facts and procedure irrelevant to this issue.

The indictment charging defendant with CCE stated:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that from on or about December 1, 2017, through on or about May 30, 2018, in Catawba County, the Defendant named above unlawfully, willfully, and feloniously did engage in a continuing criminal enterprise by violating N.C.G.S. §90-95(h)(3)(c), by trafficking in cocaine, and by violating N.C.G.S. §90-95(a)(1) by selling and delivering cocaine. The violations were part of a continuing series of violations of Article 5 of Chapter 90 of the General Statutes, which the defendant undertook in concert with more than five other persons, including, Naeem Mungro, Gevon King, Terrence Geter, John Gaither, Devonta Beatty, Shamaine Edwards, and Robert Jenkins, with respect to whom the defendant occupied a position of organizer and a supervisory position and from which the defendant obtained substantial income and resources. This act was done in violation of N.C.G.S. §90-95.1.

In our original opinion in this case we relied on *State v. Guffey*, 292 N.C. App. 179 (2024), to analyze defendant's argument that this indictment was "fatally defective for failing to separately allege each

underlying offense as elements of CCE." *Cornwell*, 2024 WL 1406627, at *2. We concluded that:

> Here, the same issues that existed with the CCE indictment in *Guffey* are present. While the indictment specifies that "Defendant . . . unlawfully, willfully, and feloniously did engage in a continuing criminal enterprise by violating N.C.G.S. § 90-95(h)(3)(c), by trafficking in cocaine, and by violating N.C.G.S. § 90-95(a)(1) by selling and delivering cocaine" and names the participants of the alleged enterprise, a juror would have no way of knowing how many criminal acts were committed within the organization or how Defendant's acts advanced them. The indictment was therefore insufficient to confer subject matter jurisdiction over the trial court, and we must vacate the judgment with respect to that charge.

Id. at *3 (cleaned up).

As previously noted, our Supreme Court issued its opinion in *State v. Singleton*, 386 N.C. 183 (2024), shortly after we issued our initial opinion in this matter. In *Singleton*, the Supreme Court held that "an indictment raises jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this State." *Singleton*, 386 N.C. at 184-85. Before *Singleton* was issued, the State petitioned our Supreme Court for discretionary review of our original opinion in this case. The Supreme Court allowed the State's petition "for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Singleton*[.]" On remand, we ordered the parties to submit supplemental briefing on three issues:

> 1) [T]he validity of *State v. Guffey*, 292 N.C. App. 179 (16 January 2024), *disc. rev. denied* 904 S.E.2d 554 (Mem) (N.C. 21 August 2024), following *Singleton*;
>
> 2) [A]ssuming *Guffey* is still binding caselaw, whether the concerns *Guffey* addresses in continuing criminal enterprise indictments are constitutional or non-constitutional in nature; and
>
> 3) [A]ny arguments from the parties regarding the applicable prejudice standards discussed in *Singleton*, 386 N.C. at 211, so that the parties may carry their respective burdens to present prejudice arguments under N.C.G.S. § 15A-1443(a) and/or (b).

With the parties' supplemental briefing now in hand, we proceed to reconsider our previous opinion in light of our Supreme Court's decision in *Singleton*.

II. Standard of Review

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250 (2019).

III. Discussion

At the time we first considered this case, our courts followed the common law jurisdictional indictment rule. That rule provided that: (1) a valid indictment was necessary to bestow subject-matter jurisdiction on the trial court; (2) arguments regarding the validity of indictments could be raised at any time, including on appeal; and (3) the remedy for a fatally defective indictment was vacatur of the judgment for that indicted charge. *See generally State v. Rankin*, 371 N.C. 885 (2018). Applying this rule to defendant's indictment, we relied on *Guffey* to hold that defendant's CCE indictment was defective as it failed to specifically enumerate each of defendant's alleged underlying acts in the criminal enterprise. *Cornwell*, 2024 WL 1406627, at *3. Under the common law jurisdictional indictment rule, we were therefore compelled to vacate defendant's judgment "with respect to that charge." *Id.*

However, one month after our decision, the Supreme Court of North Carolina held that "the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule" and that the "common law rule has been supplanted and is no longer the law in this State." *Singleton*, 386 N.C. at 209.[2] Our close reading of *Singleton* reveals a three-step process appellate courts must follow when reviewing allegedly defective indictments.

First, the court must determine whether the challenged indictment in fact contains a material defect. Second, if a material defect is present, the court must determine whether the defect is jurisdictional or non-jurisdictional in character. Third, depending on the character of the defect, the court must determine if the defendant is entitled to relief. Applying this framework here, we determine that although defendant's

---

2. Although our Supreme Court cautioned that "where non-jurisdictional deficiencies exist in criminal indictments, the better practice is for defendants to raise the issue in the trial courts," *Singleton*, 386 N.C. at 210, "issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved despite a defendant's failure to object to the indictment at trial," *id.*

CCE indictment contained a non-jurisdictional defect, defendant is not entitled to relief because the defect was not prejudicial.

A. Review of Defendant's CCE Indictment

1. The Existence of a Defect

At the first step of our review process we must determine whether defendant's indictment contained a defect. As we relied on *Guffey* in reaching our prior conclusion that defendant's CCE indictment was defective, and as *Guffey* was issued prior to *Singleton*, the first issue we directed the parties to supplementally brief was the continuing validity of *Guffey* following *Singleton*.

Defendant relies on *In re Civil Penalty* to argue that we are bound by *Guffey* because that case has not been specifically overturned by our Supreme Court. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision . . . addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court."). The State contends that *Singleton* overruled *Guffey* by rejecting *Guffey*'s premise "that an indictment flaw robs the trial court of subject matter jurisdiction, and that the judgment must be vacated."

The State appears to have misapprehended its first supplemental briefing task. While it is self-evident that *Singleton* overruled *Guffey* to the extent it treated all indictment flaws as jurisdictional errors, the crux of our request for supplemental briefing on the continued validity of *Guffey* related to the only portion of that opinion that could conceivably survive *Singleton*: the holding that a CCE indictment is defective if it fails to enumerate the alleged underlying offenses comprising the CCE.

Because *Singleton* does not specifically address this question, we agree with defendant that we are bound to follow that portion of *Guffey*. *See In re Civil Penalty*, 324 N.C. at 384 ("[A] panel of the Court of Appeals is bound by a prior decision . . . addressing *the same question* . . . unless overturned by an intervening decision from a higher court." (emphasis added)). Accordingly, we reiterate our previous conclusion that defendant's CCE indictment was defective because it failed to enumerate the underlying acts comprising the CCE and thereby failed to allege an essential element of the crime. *Cornwell*, 2024 WL 1406627, at *3 (cleaned up).

2. The Character of the Defect

Having concluded that defendant's CCE indictment was defective, we turn to the second step of our framework: determining whether such defect was jurisdictional or non-jurisdictional in character.[3] A jurisdictional defect "*only* aris[es] where an indictment wholly fails to allege a crime against the laws or people of this State." *Singleton*, 386 N.C. at 184 (emphasis added). This type of defect arises if the indictment charges "conduct that does not constitute a criminal offense," for example, charging "the accused with wearing a pink shirt on Wednesday," or "with a crime committed in another state." *Id.* at 205–06.

All other "species of errors," such as an indictment's failure "to provide notice sufficient to prepare a defense" or failure "to satisfy relevant statutory strictures," are non-jurisdictional defects. *Id.* at 210. This is so because "an indictment charging a defendant with violating the laws of this State is sufficient to invoke the superior court's jurisdiction without regard to an indictment's statutory or constitutional infirmities[.]" *Id.* at 211.

Here, there is no question that defendant's CCE indictment charged defendant "with violating the laws of this State," *id.*, as the indictment alleged that defendant "unlawfully, willfully, and feloniously did engage in a continuing criminal enterprise . . . in violation of N.C.G.S. §90-95.1," the CCE statute. Therefore, because the CCE indictment did not wholly fail to charge defendant with a crime against the laws or people of this State, the defect is non-jurisdictional in nature.[4]

3. Entitlement to Relief

Having concluded that defendant's indictment contained a non-jurisdictional defect, we now proceed to the third step of our

---

3. In his supplemental brief, defendant contends "*Singleton* cannot be constitutionally applied to this case retroactively." However, our Supreme Court's mandate remanding this case for reconsideration in light of *Singleton* requires *Singleton*'s retroactive application here.

4. Defendant relies on *State v. Wilkins*, 295 N.C. App. 695 (2024), to argue that notwithstanding *Singleton*'s clear directives to the contrary, "where an indictment fails to allege facts supporting an essential element of the offense, it fails to state a crime and therefore is jurisdictionally defective." In *Wilkins*, we reviewed an indictment charging the defendant with the *common law* crime of obstruction of justice and held that the indictment did not "allege conduct that could be understood to constitute common law obstruction of justice and therefore fail[ed] entirely to allege a criminal act[.]" *Id.* at 701 n.2. *Wilkins* is inapposite here because there is no question that defendant's CCE indictment alleged a criminal act by charging him with violating a criminal *statute*, section 90-95.1.

framework: determining whether this non-jurisdictional defect entitles defendant to relief.[5] Under *Singleton*, "a defendant seeking relief" based on a non-jurisdictional indictment defect "must demonstrate not only that such an error occurred, but also that such error was prejudicial." *Singleton*, 386 N.C. at 210.

> In determining whether an error was prejudicial, the prejudicial error tests provided in section 15A-1443 are applicable. Subsection 15A-1443(a) is the appropriate test for indictment errors that fail to satisfy statutory strictures, and subsection 15A-1443(b) is the appropriate test for indictment errors that fail to satisfy the constitutional purposes of indictments. However, it would appear that the longer a defendant waits to raise issues related to deficient criminal pleadings, the more difficult it would be to establish prejudice.

Id. at 211 (cleaned up).

Under section 15A-1443, a defendant is prejudiced by a statutory defect "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2023). "The burden of showing such prejudice" for a statutory defect "is upon the defendant." *Id.* In contrast, a constitutional defect "is prejudicial unless the appellate court finds that [the defect] was harmless beyond a reasonable doubt." *Id.* § 15A-1443(b) (2023).

To determine which prejudicial error test to apply, we must first ascertain whether the indictment "fail[s] to satisfy constitutional purposes" or "fail[s] to satisfy relevant statutory strictures." *Singleton*, 386 N.C. at 210. "An indictment might fail to satisfy constitutional purposes by failing to provide 'notice sufficient to prepare a defense and protect against double jeopardy,' or it might fail to satisfy relevant statutory strictures by failing to 'assert[ ] facts supporting every element of a criminal offense.' " *Id.* (alteration in original) (first quoting *State v. Lancaster*, 385 N.C. 459, 462 (2023), then quoting N.C.G.S. § 15A-924(a)(5) (2023)).

---

5. If the appellate court determines that a defendant has carried his or her burden of demonstrating an indictment contains a *jurisdictional* defect, the remedy remains vacatur of judgment. *See Singleton*, 386 N.C. at 184 ("To be sure, where a criminal indictment suffers from a jurisdictional defect, courts lack the ability to act. . . . Where a court has no power to act in the first instance, jurisdictional defects can be raised at any time.").

Here, defendant contends that because "*Guffey* raised multiple constitutional concerns, all of which apply to the indictment" here, "the indictment failed to provide constitutionally adequate notice to allow him to maintain a defense or allow [him] to protect himself against double jeopardy at the current trial or in a future trial." However, apart from these conclusory statements, defendant fails to articulate any facts demonstrating that this indictment defect prevented him from maintaining a defense or subjected him to multiple punishments for the same offense.

In *Guffey*, this Court "h[e]ld that each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense" and that the indictment there was fatally defective because it failed to allege these elements. *Guffey*, 292 N.C. App. at 185–86. While *Guffey* did discuss constitutional concerns, it did not create a per se rule that any *Guffey* defect automatically prevents a defendant from maintaining a defense or instantly subjects him or her to multiple punishments for the same offense. A defendant must still carry his or her burden of establishing that the defect actually, not theoretically, impaired his or her ability to present a defense or subjected him or her to multiple punishments for the same offense. Here, defendant has failed to carry this burden.[6]

As defendant has failed to establish that this indictment did not satisfy constitutional purposes, and as the defect stems from the indictment's omission of "an essential element of the offense," *Guffey*, 292 N.C. App. at 185, we conclude the indictment failed to satisfy relevant statutory strictures. *See* N.C.G.S. § 15A-924(a)(5) (providing that a criminal pleading must contain a "plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense[.]"). Accordingly, we apply subsection 15A-1443(a)'s prejudicial error test to determine if defendant is entitled to relief. *See Singleton*, 386 N.C. at 211 ("Subsection 15A-1443(a) is the appropriate test for indictment errors that fail to satisfy statutory strictures[.]").

Under subsection 15A-1443(a), defendant's burden is to establish a reasonable possibility that if the error had not been committed—i.e., if the indictment had properly alleged the underlying acts comprising the CCE—the jury would not have convicted him of that charge. Defendant contends that if the indictment had not been defective, "he could have prepared a defense to the Article 5 violations, requested a special verdict form, and identified convictions in a way that would

6. We note that defendant did not move for a bill of particulars or otherwise indicate any confusion about the charge against him at trial.

prevent double jeopardy." However, defendant fails to articulate how any of these actions would have created a reasonable possibility of a different result on the CCE charge.

Considering the overwhelming evidence of defendant's guilt as to both the underlying Article 5 violations and the CCE charge—including extensive video surveillance, wiretaps, and weapons and drug sale paraphernalia seized from defendant's residence—we hold that defendant has failed to establish prejudice under section 15A-1443(a). Accordingly, we conclude that defendant received a fair trial free from prejudicial error and is therefore not entitled to relief.

IV. Conclusion

In this case, the indictment charging defendant with CCE was defective because it failed to allege the underlying acts comprising the CCE. Under our Supreme Court's precedent in *Singleton*, this defect is non-jurisdictional and therefore does not afford defendant relief absent a showing of prejudice. Under the facts of this case, the failure to allege these underlying acts was a statutory defect that did not prejudice defendant because there is no reasonable possibility that, had the indictment properly alleged these underlying acts, the jury would have acquitted defendant of the CCE charge.

NO PREJUDICIAL ERROR.

Judges STROUD and FLOOD concur.

STATE v. FRALEY

[299 N.C. App. 463 (2025)]

STATE OF NORTH CAROLINA
v.
KIM YOST FRALEY, DEFENDANT

No. COA24-602

Filed 18 June 2025

1. Evidence—hearsay—exceptions—excited utterance—startling event—bank statement showing large sum of money missing

In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her mother-in-law, an elderly woman who later discovered upon reading a bank statement that a significant amount of money was missing from her bank account, the trial court properly admitted hearsay statements that the mother-in-law made immediately after reading the bank statement (including "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account,") as substantive evidence that defendant withdrew the money for her personal use without her mother-in-law's knowledge or permission. Given the mother-in-law's circumstances—as an eighty-four-year-old widow who suffered from dementia and had no control over her finances—and visible emotion immediately after her discovery, the act of opening a bank statement and noticing a large sum missing from her life savings qualified as a sufficiently startling event such that the excited utterance exception to the rule against hearsay applied to her statements.

2. Crimes, Other—exploitation of an older adult—elements—acting knowingly and with deception—sufficiency of evidence

In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her elderly mother-in-law, the trial court properly denied defendant's motion to dismiss the charges where substantial evidence showed that, in withdrawing large sums of money from her mother-in-law's bank account without the latter's knowledge or permission, defendant acted knowingly and with deception. The State's evidence included testimony from defendant's sister-in-law, who described the mother-in-law's shock upon discovering that the money had been withdrawn, defendant's refusal to accept the sister-in-law's help with managing the mother-in-law's finances, and defendant's lies about the mother-in-law's tax documents going

missing. Additionally, a bank employee testified that defendant: insisted that the mother-in-law had authorized the withdrawals until, after the bank employee confronted defendant with the withdrawal forms, defendant confessed to copying her mother-in-law's signatures; and made suspicious statements concerning the withdrawals, such as "my husband, knew about this. It wasn't just me."

Appeal by Defendant from judgment entered 15 July 2022 by Judge Jonathan W. Perry in Rowan County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Phillip K. Woods, for the State.

Appellate Defender Glenn Gerding, Assistant Appellate Defender Jillian C. Franke, for Defendant-Appellant.

CARPENTER, Judge.

Kim Yost Fraley ("Defendant") appeals from judgment entered after a jury found her guilty of two counts of exploitation of an older adult of more than $100,000 and one count of exploitation of an older adult of less than $20,000. Defendant argues the trial court erred by: (1) admitting hearsay statements from Edith Fraley ("Edith") as excited utterances, and (2) denying Defendant's motion to dismiss the exploitation charges for insufficient evidence. After careful review, we discern no error.

I. Factual & Procedural Background

On 18 May 2020, a Rowan County grand jury indicted Defendant for: two counts of obtaining property valued at $100,000 or more by false pretenses; two counts of exploitation of an older adult of more than $100,000; one count of obtaining property valued at $20,000 or more by false pretenses; and one count of exploitation of an older adult of less than $20,000. On 23 May 2022, Defendant's case proceeded to trial, and the evidence tended to show the following.

Edith was born in 1933. Edith's husband, who was the sole income provider and managed all the finances, passed away in 2012. Edith was diagnosed with dementia in 2013. In 2016, Edith's son, Bill Fraley ("Bill"), and his wife, Defendant, began caring for Edith. Bill and Defendant became Edith's power of attorney and managed her medical appointments, finances, mail, and taxes. Defendant was employed at Thrivent Financial, Edith's bank, as an office professional from 2007 to 2018.

Cynthia Fraley ("Cynthia"), Edith's daughter, often visited Edith. In September 2017, while Cynthia was visiting Edith, Cynthia observed Edith open her mail, which included bank statements. Defendant and Bill usually picked up Edith's mail, but they were out of town on vacation on this occasion. According to Cynthia, as Edith read her bank statements, Edith appeared surprised and instantly became upset and angry. Cynthia further testified that, immediately after reading her bank statements, Edith exclaimed "that she didn't know who had been doing it, that she wanted her money back right then, [and that] she had given nobody permission to get money out of her account."

In February 2018, Edith was admitted to the hospital with health problems. Subsequently, Cynthia, Bill, and their brother, Robert Fraley, were informed that Edith was going to require full-time care either at home or in an assisted living facility. When Cynthia and her brothers began using Edith's Thrivent Financial bank account to pay for her care, they discovered "someone had been in there taking withdrawals out and it was down to very, very little." As a result, Cynthia filed a report with Thrivent Financial and reached out to law enforcement, who began an investigation into Edith's finances.

Edith passed away in 2019; consequently, she was unavailable to testify at trial. Thus, Defendant objected to Edith's statements as inadmissible hearsay, including "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account." When the trial court conducted a voir dire on the matter, the State sought to admit these statements as exceptions to the hearsay rule, arguing excited utterances or then-existing mental, emotional, or physical conditions. The trial court ruled the statements were admissible as excited utterances.

At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence. The trial court granted Defendant's motion to dismiss as to the charges of obtaining property by false pretenses but denied the motion as to the exploitation charges. At the close of Defendant's evidence, Defendant renewed her motion to dismiss the exploitation charges. According to Defendant, the State did not present substantial evidence to prove Defendant knowingly deceived Edith. The trial court denied Defendant's motion.

The jury found Defendant guilty of two counts of exploitation of an older adult of more than $100,000 and one count of exploitation of an older adult of less than $20,000. The trial court sentenced Defendant to: sixteen months minimum to twenty-nine months maximum for the first count of exploitation of an older adult of more than $100,000;

sixteen months minimum to twenty-nine months maximum for the second count of exploitation of an older adult of more than $100,000; and six months minimum to seventeen months maximum for the conviction for exploitation of an older adult of less than $20,000. The trial court also ordered Defendant to pay $267,698.27 in restitution, less the restitution or settlement amount in Defendant's related civil case.[1] Defendant gave oral notice of appeal in open court.

In December 2022, Defendant withdrew her appeal, which according to Defendant, was based on representations from her trial counsel. Subsequently, Defendant contacted North Carolina Prisoner Legal Services, who determined that Defendant withdrew her appeal because she erroneously believed she would risk receiving a longer sentence if she prosecuted her appeal. Counsel from North Carolina Prisoner Legal Services filed a petition for writ of certiorari ("PWC") with this Court asking for Defendant's appeal to be reinstated, and for the superior court to conduct an indigency determination. On 24 October 2023, this Court granted Defendant's PWC.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issues

The issues are whether the trial court erred by: (1) admitting Edith's statements as excited utterances and (2) denying Defendant's motion to dismiss the exploitation charges for insufficient evidence.

IV. Analysis

A. Excited Utterances

[1] First, Defendant argues the trial court erred by admitting Edith's hearsay statements as excited utterances. In particular, Defendant asserts that seeing an unexpected balance in a bank statement is not a sufficiently startling event. We disagree.

A trial court's determination as to the admissibility of hearsay is reviewed de novo. *State v. Lowery*, 278 N.C. App. 333, 338, 860 S.E.2d 332, 336 (2021). " 'Under a *de novo* review, [this Court] considers the matter

1. A civil case related to the instant case was pending during Defendant's criminal trial. In particular, Edith filed a lawsuit against Defendant, Bill, and Chapman Signs based on the same allegations made during Defendant's criminal trial.

anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). "Hearsay is not admissible except as provided by statute or by [the Rules of Evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2023). One such hearsay exception is the excited utterance exception. N.C. Gen. Stat. § 8C-1, Rule 803(2) (2023). An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

The excited utterance exception requires: "(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985) (citation omitted). We recognize excited utterances as an exception to the hearsay rule because:

> [C]ircumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces spontaneous and sincere utterances . . . . The trustworthiness of this type of utterance lies in its spontaneity. . . . There is simply no time to fabricate or contrive statements spontaneously made during the excitement of an event.

State v. Reid, 335 N.C. 647, 662, 440 S.E.2d 776, 782 (1994) (quotation marks and citation omitted).

Here, the State elicited three of Edith's statements through Cynthia's testimony, including: "someone is taking money out of my bank account;" "I want it back now;" and "[I] never told them nor gave permission to anyone to withdraw money from [my] account." The State sought to use these statements to prove that Defendant withdrew money for personal use from Edith's bank account without Edith's knowledge or permission. Both parties concede the statements are hearsay and, therefore, are inadmissible unless an exception applies. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c).

The trial court ultimately admitted Edith's statements under the excited utterance exception. Defendant does not challenge the spontaneity of the statements, instead arguing the circumstances were not

sufficiently startling as required for excited utterances. In essence, Defendant argues that opening a bank statement and discovering an unexpectedly low balance is not a sufficiently startling event. Defendant's argument, however, overlooks significant context and prior caselaw regarding the excited utterance exception.

It is well established that "[w]hether a statement is an excited utterance is determined by *the state of mind of the speaker*." *State v. Wilkerson*, 363 N.C. 382, 417, 683 S.E.2d 174, 195 (2009) (citation omitted and emphasis added). Whether an event is sufficiently startling or stressful to the declarant involves a primarily subjective standard. *State v. Thomas*, 119 N.C. App. 708, 713, 460 S.E.2d 349, 352 (1995). Specifically, we must consider whether circumstances were capable of "suspending [the declarant's] reflective thought." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

In September 2017, Edith—an approximately eighty-four-year-old widow with dementia—made the challenged statements immediately upon her discovery that a significant amount of money was missing from her bank account. Leading to this discovery, Edith did not manage her finances so that she was aware of each withdrawal as they occurred. As a result, this was an instance where Edith discovered a large sum of money missing at once.

Given the context of her finances and visible emotion immediately after she read her bank statements, Edith's circumstances demonstrate the suspension of her reflective thought. *See Smith*, 315 N.C. at 86, 337 S.E.2d at 841. In evaluating "the state of mind of the speaker," when Edith made the challenged statements, she was under the stress of excitement from discovering a large sum of money was missing from her life savings. *See Wilkerson*, 363 N.C. at 417, 683 S.E.2d at 195. Accordingly, the trial court did not err in allowing Edith's statements as excited utterances.

Additionally, Defendant argues that even if Edith's statements were excited utterances, they are unreliable and should not have been admitted at trial. Specifically, Defendant contends that Edith's dementia makes her statements unreliable. Given the circumstances surrounding Edith's statements and Defendant's own assertion at trial that Edith knowingly authorized Defendant to make the withdrawals despite her dementia, Defendant's argument does not overcome the presumption of reliability for statements that qualify as a hearsay exception. *See State v. Dawkins*, 162 N.C. App. 231, 234, 590 S.E.2d 324, 327–28 (2004). Therefore, we need not address Defendant's residual hearsay argument under *State v. Stutts*, 105 N.C. App. 557, 414 S.E.2d 557 (1992). Accordingly, Defendant's argument fails.

B. Motion to Dismiss

[2] Finally, Defendant argues the trial court erred by denying her motion to dismiss the exploitation charges. Specifically, Defendant contends the State did not present sufficient evidence to prove she knowingly acted with deception. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under a de novo review, " '[this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319).

With a motion to dismiss, " 'the question [] is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

In making this determination, the evidence must " 'be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . .' " *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* at 575, 780 S.E.2d at 826 (internal quotation marks and citations omitted). " 'Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration.' " *State v. Agustin*, 229 N.C. App. 240, 242, 747 S.E.2d 316, 318 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

A person commits exploitation of an older adult if they: (1) stand in a position of trust and confidence with an older adult; and (2) knowingly, by deception; (3) obtain or use the older adult's funds, assets or property; (4) to temporarily or permanently deprive the older adult of

the use, benefit, or possession of the funds, assets, or property or to benefit someone else; and (5) the value of the funds, property, or assets reaches a certain dollar amount. *See* N.C. Gen. Stat. § 14-112.2(b) (2023).

Here, Defendant only challenges the sufficiency of the evidence as to one element of the exploitation charges—whether she acted knowingly, by deception. As explained above, however, the State provided admissible evidence that Edith was unaware of the extent of the withdrawals Defendant made from Edith's bank account. Particularly, Cynthia testified that as Edith discovered the withdrawals from her bank account, Edith exclaimed, "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account."

In addition, Cynthia testified that, on several occasions, she offered to help Defendant manage Edith's finances to which Defendant told Cynthia to "keep [her] nose out of [Defendant's] business" and that Defendant would handle Edith's finances by herself. Cynthia similarly testified that when she attempted to complete Edith's taxes in 2018 and asked Defendant for Edith's tax-related paperwork from the previous years, because Defendant was then responsible for Edith's taxes, Defendant repeatedly told Cynthia that Edith's tax paperwork was lost. But Cynthia later discovered Defendant was lying because she had not filed taxes for Edith since 2015.

Finally, Thrivent Financial employee Alayne Rossum testified that she interviewed Defendant following Cynthia's complaint to Thrivent Financial about the withdrawals from Edith's account. Rossum stated that after she asked Defendant if she knew why she was being investigated, Defendant inquired, "if it was having anything to do with the withdrawals that were made from [Edith's] account?" Rossum also testified that Defendant was "adamant" that Edith signed the withdrawal forms until Defendant admitted she copied Edith's signature after Rossum confronted Defendant with the withdrawal signatures that did not match Edith's signature. In addition, when discussing the withdrawals with Rossum, Defendant said "Bill, my husband, knew about this. It wasn't just me."

In the light most favorable to the State, Edith's excited utterances and the testimony by Cynthia and Rossum are evidence that "a reasonable mind might accept as adequate to support" that Defendant acted knowingly, with deception. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. Because the State presented substantial evidence of each element of exploitation of an older adult, the trial court did not err by denying Defendant's motion to dismiss.

V. Conclusion

As Edith's statements were spontaneous and made in the context of a sufficiently startling event, the trial court properly admitted them as excited utterances. Additionally, the trial court did not err by denying Defendant's motion to dismiss the exploitation charges. Accordingly, we discern no error.

NO ERROR.

Judges ZACHARY and MURRY concur.

STATE OF NORTH CAROLINA
v.
SHANNON EDWARD GAULT, DEFENDANT

No. COA24-5

Filed 18 June 2025

1. Probation and Parole—subject matter jurisdiction—to revoke probation—probation violation report—adequate notice of alleged violation

The trial court had jurisdiction to revoke defendant's probation where the State's probation violation report alleged that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was "a violation of [defendant's] probation." The violation report gave defendant sufficient notice of the alleged probation violation such that he could prepare his defense, where: it stated the condition of probation he allegedly violated—that he commit no criminal offense; mentioned the specific acts that the State contended constituted the violation; and indicated which criminal offense he allegedly committed, referring to his failure to report an online identifier pursuant to N.C.G.S. § 14-208.11(a)(10), which is a Class F felony.

2. Probation and Parole—revocation of probation—alleged violation—insufficiency of evidence

The trial court's judgment revoking defendant's probation was reversed where the State presented insufficient evidence to support the allegations in its probation violation report—that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was

"a violation of [defendant's] probation." First, although the report alleged that defendant violated a condition of his probation by committing a crime on "18 January 2023," all of the evidence offered at the revocation hearing referenced events that occurred on a later date (in March 2023). Second, although the evidence established that defendant had accounts on certain social media platforms, there was no evidence showing that he failed to register these accounts within the ten-day window prescribed under N.C.G.S. §§ 14-208.11(a)(10) and 14-208.9(e) (requiring registered sex offenders to report any "online identifier" to the registering sheriff), thus committing a crime.

Appeal by defendant from judgment entered 26 June 2023 by Judge Angela B. Puckett in Superior Court, Surry County. Heard in the Court of Appeals 13 August 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Megan Shook, for the State.

Jason Christopher Yoder for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment revoking his probation and activating his sentence. On appeal, Defendant argues that the trial court lacked jurisdiction to revoke his probation. Alternatively, Defendant argues that the evidence was insufficient to establish that he violated a condition of his probation. Although the trial court had jurisdiction to rule on the probation violation, the State failed to present evidence of the violation alleged in the probation violation report. We reverse the trial court's judgment.

I. Factual and Procedural Background

On 18 July 2022, Defendant entered a plea of guilty to second-degree exploitation of a minor and disseminating obscenity. Under a plea agreement, Defendant's charges were consolidated into one judgment, and he was sentenced to 20 to 84 months of imprisonment, suspended for 36 months of supervised probation. As a condition of probation, Defendant was prohibited from accessing the internet during the thirty-six-month probationary period. The trial court additionally ordered no contact between Defendant and the minor victim, and he was required to register as a sex offender.

On 21 March 2023, Defendant's supervising probation officer, Officer Lyle Burnette ("Burnette"), filed a report alleging that Defendant had violated the terms of his probation. The violation report stated:

> Of the conditions of probation imposed in that judgment, the defendant has willfully violated:
>
> 1. General Statute 15A-1343(b) (1) "Commit no criminal offense in any jurisdiction" in that . . . DEFENDANT WAS CHARGED WITH A FAILURE TO REGISTER IN REGARDS TO HAVING SOCIAL MEDIA CITE (sic) NOT REGISTERED WITH THE SHERIFF'S DEPARTMENT ON 1/18/23. THIS IS A VIOLATION OF . . . DEFENDANTS PROBATION.

Defendant denied the allegation and requested a hearing on the violation.

On 26 June 2023, the trial court held Defendant's probation violation hearing. Defendant's counsel first sought a continuance, explaining that the violation involved a new felony charge for which he did not have discovery. The trial court denied Defendant's counsel's request. At the hearing, Burnette did not testify. Instead, the trial court heard testimony from another probation officer, Officer Seth Cook ("Cook"), who conducted the check-up on Defendant alongside Burnette.

Cook testified he and Burnette performed a "multiple sex offender check up" in March 2023. Cook was aware that Defendant was "not to have in his possession any social media [or] any pornographic material[.]" Also, that sex offenders under supervision are required to register all social media accounts with the sheriff's office. When they entered Defendant's apartment, he was on Facetime with a female who appeared to be young. Cook detained Defendant and went through his phone. On his phone, Cook found pornographic websites and multiple social media applications, including Snapchat and Facebook.

To Cook's knowledge, Defendant did not have any social media accounts registered with the sheriff's office; however, he testified that Burnette was the one who checked the registration status. During his testimony, Cook accessed Burnette's narrative notes and testified about their contents. He testified that Burnette spoke to a sergeant in the transportation department at the sheriff's office, who confirmed that Defendant did not have any accounts or "online identifier[s]" registered.

Burnette's notes also included several screenshots from Defendant's phone. The screenshots were taken from various online platforms that both Burnette and Cook discovered during their examination of his

phone. One screenshot was from Snapchat and displayed Defendant's username as "RHEC_Shannon33." Cook confirmed that Snapchat is a social media-based company. Another screenshot was of a forum on the Reddit platform, which is an "online multi-purpose forum where you register to get an identifier, which you can then post to that [forum]." However, a user may access Reddit without registering for an account. The screenshot stated, "Top Stories for Shannon" and the specific forum was titled "I'm 15 and my crush is 40. Is it normal?" The other screenshots on Defendant's phone were "pornographic in nature." However, the State presented no evidence of any actions of Defendant on or around 18 January 2023, the date stated in both the probation violation report and in the order. The testimony all related to the visit to Defendant's home in March 2023.

Based on this evidence, the trial court concluded that Defendant was in violation of his probation by failing to register "a social media [site] with the Sheriff's department." As a result, Defendant's probation was revoked and his sentence was activated. Defendant provided oral notice of appeal following sentencing.

That same day, the trial court documented its oral findings and conclusions in a supplemental order with written findings of fact:

> The [c]ourt after hearing all of the evidence presented by both the State and by . . . Defendant finds that the [c]ourt is reasonably satisfied in its discretion that . . . Defendant did violate the condition of his probation that he not commit any new criminal offense in any jurisdiction in that on January 18, 2023 . . . [D]efendant did have a social media cite (sic), to wit Snapchat and Reddit, that was not registered with the Sheriffs Department that was required by law due to [D]efendant's underlying conviction in this case.
>
> The [c]ourt finds the condition was a valid a condition of probation and . . . Defendant violated the condition willfully and without valid excuse at a time prior to the expiration or termination of his probation.

II. Analysis

Defendant asserts three arguments on appeal: (1) the trial court lacked jurisdiction to revoke his probation for commission of a criminal offense because the violation report failed to state any criminal conduct or provide adequate notice of the criminal conduct alleged; (2) alternatively, the trial court erred by revoking his probation because the

State failed to prove the allegation in the violation report; and (3) the trial court's findings of fact were not supported by competent evidence, therefore, it erred by concluding that Defendant committed a new criminal offense based on the evidence. We hold the trial court had jurisdiction to revoke Defendant's probation and he received adequate notice of the alleged criminal offense. However, we further hold the trial court erred by revoking Defendant's probation, as the State failed to prove the allegation in the violation report and presented insufficient evidence of the violation.

A. Subject Matter Jurisdiction

[1] Defendant first argues the trial court lacked subject matter jurisdiction to revoke his probation because the probation violation report failed to allege any criminal conduct and failed to provide adequate notice of the alleged offense, which would have allowed him to prepare his defense.

"[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "A defendant may raise this issue at any time, even for the first time on appeal." *State v. Knox*, 239 N.C. App. 430, 432, 768 S.E.2d 381, 383 (2015) (citation omitted).

Under North Carolina law, a registered sex offender must "inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use." N.C. Gen. Stat. § 14-208.11(a)(10) (2023). An "online identifier" is defined as "[e]lectronic mail address, instant message screen name, user ID, chat or other Internet communication name, but it does not mean social security number, date of birth, or pin number." N.C. Gen. Stat. § 14-208.6(1n) (2023). If an offender changes or obtains a new online identifier, this information must be reported within ten days to the registering sheriff. N.C. Gen. Stat. § 14-208.9(e) (2023). A failure to report an online identifier is a Class F felony. N.C. Gen. Stat. § 14-208.11(a).

Put together, if a registered sex offender fails to report an online identifier to the sheriff within ten days, he is guilty of a Class F felony and therefore, committed a criminal offense within our jurisdiction. Of relevance here, a trial court may revoke probation if the defendant commits a criminal offense within any jurisdiction. *See* N.C. Gen. Stat. § 15A-1343(b)(1) (2023) ("As regular conditions of probation, a defendant must . . . [c]ommit no criminal offense in any jurisdiction.").

In order to revoke a defendant's probation, the trial court must, at the discretion of the defendant, "hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision." N.C. Gen. Stat. § 15A-1345(e) (2023). If a defendant elects to hold a hearing, "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." *Id.* "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted). Stated differently, "[a] statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing." *State v. Moore*, 370 N.C. 338, 342, 807 S.E.2d 550, 553 (2017).

Notwithstanding, "[a] court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *State v. McCaster*, 257 N.C. App. 824, 827, 811 S.E.2d 211, 213 (2018) (citation omitted). Thus, as North Carolina General Statute Section 15A-1345(e) prescribes a certain limitation, a notice requirement, before the trial court can act, it is jurisdictional. Moreover, without adequate notice and a statement of the alleged violation, the trial court lacks jurisdiction to revoke a defendant's probation. *See id.* at 828, 811 S.E.2d at 214 ("Without prior and proper statutory notice and a statement of violations provided to Defendant, the trial court lacked jurisdiction to revoke her probation.").

Our Supreme Court in *Moore* articulated the standard for what constitutes a sufficient statement of an alleged violation to invoke the trial court's jurisdiction. *Moore*, 370 N.C. at 340-46, 807 S.E.2d at 552-55. There, the Supreme Court held, "while the condition of probation which [the d]efendant allegedly violated might have been ambiguously stated in the [violation] report, the report also *set forth the specific facts that the State contended constituted the violation*." *Id.* at 342, 807 S.E.2d at 553 (emphasis added). Accordingly, the "[d]efendant received notice of the specific behavior [the d]efendant was alleged and found to have committed in violation of [the d]efendant's probation." *Id.*

The Court in *Moore* established, "the notice needed to contain a statement of the actions defendant allegedly took that constituted

a violation of a condition of probation—that is, a statement of what the defendant allegedly *did* that violated a probation condition." *Id.* at 344, 807 S.E.2d at 554-55. As the State alleged that the defendant violated the condition that he "commit no criminal offense[,]" the defendant, therefore, "needed to receive a statement of the criminal offense or offenses he allegedly committed." *Id.*

Defendant argues he was not given sufficient notice of the alleged violation in two ways. First, the report failed to state a criminal offense, as the failure to report a "social media cite" is not a crime. Second, that the report failed to identify the case file number, the county where the alleged violation occurred, the statutory subsection of the alleged criminal offense, and what he failed to register.

The violation report stated Defendant "willfully violated: [North Carolina] General Statute [Section] 15A-1343(b)(1) 'Commit no criminal offense in any jurisdiction.' " As to the term "cite," we note that the violation report and other documents refer to a social media "cite." Briefs for both Defendant and the State consider the word "cite" as a misspelling of the word "site" as a shortened form of the word "website" and we agree and will interpret the probation violation report accordingly.[1] According to *Moore*, we are to interpret the violation report using the "natural, approved, and recognized meaning" of the words. *Id.* at 344, 807 S.E.2d at 554. Although the statute gives a definition for "online identifier," the relevant statutes do not include a definition of the words "site" or "website." Since the statutes do not provide a definition, we use the dictionary definition. *See Surgical Care Affiliates, LLC v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 621, 807 S.E.2d 679, 684 (2017) ("When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term—but to simply consult a dictionary." (citation omitted)). Using the word in context, the relevant definition for the word "site" in Merriam-Webster's Collegiate Dictionary is "one or more Internet addresses at which an individual

1. Article 26 does not include a definition of a "site" or "social media site." North Carolina General Statute Section 14-202.5 has a definition of "commercial social networking Web Site" but this definition applies only for the purposes of North Carolina General Statute Section 14-202.5 which applies to "high-risk sex offenders." N.C. Gen. Stat. § 14-202.5 (2023). There is no indication Defendant was charged with any violation under this section. In addition, the United States Supreme Court has held this statute to be unconstitutional. *See Packingham v. North Carolina*, 582 U.S. 98, 103, 198 L. Ed. 2d 273 (2017).

or organization provides information to others." Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

The violation report alleged that Defendant was "*charged*" with a failure to "*register*" a social media site "*with the Sheriff's department*," and that this was "*a violation of [ ] Defendants probation*." Defendant is correct in his assertion that the failure to report use of a social media site does not constitute a *per se* criminal offense. However, as discussed *supra*, because of Defendant's status as a registered sex offender, he was required to report "online identifiers" to the registering sheriff. *See* N.C. Gen. Stat. § 14-208.11(a)(10). The failure to report an online identifier to the registering sheriff is a Class F felony, a criminal offense. *See* N.C. Gen. Stat. § 14-208.11(a). The commission of a criminal offense is a violation of Defendant's probation. *See Moore*, 370 N.C. at 345, 807 S.E.2d at 555 ("While incurring criminal charges is not a violation of a probation condition, criminal charges are alleged criminal offenses. And committing a criminal offense is a violation of a probation condition.").

We hold the violation report provided Defendant with sufficient notice of his action which allegedly violated a condition of his probation. The report stated the condition of probation that Defendant allegedly violated, that he commit no criminal offense, and cited to the proper statute. It included "a statement of what [D]efendant allegedly *did* that violated a probation condition[,]" which was his failure to register a social media site with the sheriff's office. *Id.* at 344, 807 S.E.2d at 554-55. Likewise, it included "a statement of the criminal offense . . . that he allegedly committed[,]" as Defendant was "charged" for his failure to register, which is a Class F felony, and that the offense was a violation of his probation terms. *Id.*

For these reasons, we hold the probation violation report provided Defendant sufficient statutory notice of the alleged probation violation. The report included a statement of what Defendant allegedly did that violated a probation condition and specifically, the condition he allegedly violated. Thus, because Defendant had adequate notice, the trial court had subject matter jurisdiction during his probation revocation hearing.

B. Probation Revocation

[2] Defendant next argues that the State failed to present sufficient evidence to support the allegations in the probation violation report. He further asserts that, due to this insufficient evidence, the trial court's findings of fact were not supported by competent evidence and the trial court abused its discretion in concluding that Defendant violated his probation.

"Probation violation hearings are generally informal, summary proceedings and the alleged probation violations need not be proven beyond a reasonable doubt." *State v. Johnson*, 246 N.C. App. 132, 135, 782 S.E.2d 549, 552 (2016) (citation omitted). During a probation revocation hearing, 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 or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation omitted). "The burden of proof rests upon the State to show a defendant willfully violated his probation conditions." *Johnson*, 246 N.C. App. at 135, 782 S.E.2d at 552 (citation omitted).

"In order to revoke a defendant's 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). "The evidence is sufficient when 'the trial court can independently find that the defendant committed a new offense.' " *State v. McCullough*, 297 N.C. App. 183, 188, 909 S.E.2d 889, 894 (2024) (citations omitted).

Before the trial court may revoke a defendant's probation, it must "make findings to support the decision and a summary record of the proceedings." N.C. Gen. Stat. § 15A-1345(e). The findings of fact must outline the evidence which the trial court relied on and the reason for its decision. *Johnson*, 246 N.C. App. at 136, 782 S.E.2d at 552. If the trial court concludes that a probation condition has been violated, its findings must be supported by competent evidence. *State v. Jones*, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013).

This Court reviews the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citation omitted). "An abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Pettiford*, 282 N.C. App. 202, 206, 869 S.E.2d 772, 776 (2022) (citations and quotation marks omitted). "Though trial judges have discretion in probation proceedings, that discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge as to a just result." *State v. Talbert*, 221 N.C. App. 650, 653, 727 S.E.2d 908, 911 (2012) (citations and quotation marks omitted).

Although the probation violation report met the notice requirement under North Carolina General Statute Section 15A-1345(e), we hold the

evidence at the hearing was insufficient to support the revocation of Defendant's probation.

We must first address the date of the violation as alleged in the violation report versus the evidence presented at the hearing. The probation violation report specifically alleged that Defendant failed to register a "social media [site]" with the sheriff's office on 18 January 2023. The report was filed on 21 March 2023. At the hearing, Cook testified that he and Burnette performed the check-up on Defendant sometime in March 2023. In the trial court's supplemental order, it found that "on January 18, 2023 . . . [D]efendant did have a social media [site.]" Also, the violation report, citing the 18 January 2023 date, was incorporated by reference in the trial court's judgment. Thus, the violation report alleged, and the trial court's subsequent order and judgment found, that Defendant violated a condition of his probation on 18 January 2023; however, the evidence and testimony at the hearing only referenced the March 2023 date. There was no evidence presented as to 18 January 2023 and the State made no attempt to reconcile this discrepancy.

This Court previously addressed a similar issue in *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018). There, the violation report alleged that the defendant violated her probation when she absconded from 2 November 2016 to 4 November 2016, the date the reports were filed. *Id.* at 136, 811 S.E.2d at 680. At the hearing, the State presented evidence of the defendant absconding during that specific period; however, it also presented evidence outside of that date range. *Id.* Ultimately, the defendant's probation was revoked and she appealed, arguing that the trial court erred by revoking her probation because there was insufficient evidence to support a finding that she absconded during the period alleged in the violation reports. *Id.*

The Court in *Melton* recognized, "[i]n order to provide a defendant with notice of the allegations against him, as required by [North Carolina General Statute Section] 15A-1345(e), probation violation reports must contain a statement of the specific violations alleged." *Id.* at 137, 811 S.E.2d at 681. In applying the notice requirement, this Court limited its review to whether there was sufficient evidence that the defendant absconded based on the dates alleged in the violation reports, from 2 November 2016 to 4 November 2016. *Id.* at 137, 811 S.E.2d at 681. After considering all the evidence, this Court held, "there was insufficient evidence that [the] defendant willfully refused to make herself available for supervision from 2 November to 4 November 2016 (*the only time period we can consider under the violation report and the court's written finding*)." *Id.* at 139, 811 S.E.2d at 682 (emphasis added).

While the Court in *Melton* addressed an absconding violation, and here Defendant is alleged to have violated probation through the commission of a criminal offense, we consider its analysis and application of the notice requirement to be persuasive. Here, the probation violation report, incorporated by reference into the trial court's judgment, along with the trial court's written findings of fact, alleged that Defendant failed to register a "social media cite" with the sheriff's office on 18 January 2023. Therefore, under *Melton*, our review is limited to the consideration of evidence from 18 January 2023.

As discussed *supra*, there was no evidence regarding a violation on 18 January 2023, "the only time period we can consider under the violation report and the court's written finding." *Id.* Even if the alleged date was a mere oversight, the burden was on the State to prove that Defendant violated his probation; consequently, it was the State's responsibility to identify and address this error. *Johnson*, 246 N.C. App. at 135, 782 S.E.2d at 552. There is insufficient evidence, much less *competent* evidence, to show Defendant violated his probation by committing a criminal offense on the alleged date.

This holding is further supported by considering, in combination, the specific timing requirements outlined in North Carolina General Statute Section 14-208.9(e) and the purpose of the notice requirement. A registered sex offender has ten days to report a new online identifier, or any changes to an existing one, to the registering sheriff. N.C. Gen. Stat. § 14-208.9(e). Thus, the date alleged in the violation report, along with the date on which the ten-day period ended, is determinative. Even if we were to assume the violation report contained a typographical error and was intended to state "3/18/23" rather than "1/18/23," the report's filing date of 21 March 2023 would fall within the ten-day period, meaning Defendant would not yet be in violation of his probation for the alleged criminal offense.

The State contends to the extent that the trial court incorporated a specific date into its revocation order that was not supported by the evidence, that is not dispositive where the *conduct* underlying the violation was supported by Cook's testimony. This argument contradicts the controlling statutory authority and established case law.

First, the date of establishing or changing an online identifier on social media "site" is critical because Defendant had ten days to register an online identifier with the sheriff before he would have committed the criminal offense alleged as a violation of probation. *See id.* There is no evidence in the record as to the specific date on which Burnette and

Cook conducted the check-up or when the ten-day period began and ended. There is no evidence showing when Burnette inquired with the sheriff about Defendant's registration status, nor whether this occurred after the ten-day period had expired. Absent this evidence, this Court cannot determine the timing that would have proven Defendant violated North Carolina General Statute Section 14-208.11(a).

Moreover, in addition to the 18 January 2023 date, we cannot conclude that the evidence was sufficient to support a finding that Defendant committed a criminal offense by failing to register a "social media [site]," specifically Snapchat and Reddit. The State presented evidence of the alleged violation through Cook's testimony. Cook testified that he found multiple social media applications, including Snapchat, on Defendant's phone. Cook's involvement was limited to the check-up on Defendant, with his remaining testimony based only on Burnette's narrative notes. We acknowledge that during a probation revocation hearing, the trial court is "not bound by the formal rules of evidence" and may consider hearsay evidence. *Murchison*, 367 N.C. at 465, 758 S.E.2d at 359 (citation omitted).

However, this Court has held that evidence was insufficient when the State only relied upon a violation report and testimony from the probation officer stating that the defendant was arrested for a crime, as this evidence only showed that he was arrested, not that he committed a crime. *See Graham*, 282 N.C. App. at 160, 869 S.E.2d at 778. The same is true here. The State presented the violation report and testimony from Cook, stating that Defendant had unregistered online identifiers. Cook was not aware, even with Burnette's notes, who was contacted in the sheriff's office, when the sheriff was contacted, and how the sheriff learned that Defendant had unregistered Snapchat and Reddit accounts. Further, there was no evidence of registration documentation showing what Defendant had or had not registered. Thus, the evidence showed only that Defendant had accounts on Snapchat and Reddit in March 2023, and the trial court could infer he used some sort of online identifier on these accounts. The evidence, however, did not show that Defendant failed to register these accounts within the ten-day period after he created or changed an online identifier, thus committing a crime.

We hold there was insufficient evidence to show that Defendant failed to register an online identifier within ten days of its creation or change to the registering sheriff. Therefore, the trial court abused its discretion by revoking Defendant's probation on the grounds that he committed a criminal offense under North Carolina General Statute Section 15A-1343(b)(1).

III. Conclusion

We hold the violation report complied with the notice requirement under North Carolina General Statute Section 15A-1345(e), so the trial court had subject matter jurisdiction in Defendant's probation revocation hearing. We further hold, however, that there was insufficient competent evidence that Defendant violated his probation by committing a criminal offense. The trial court's judgment revoking Defendant's probation is reversed.

REVERSED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
TYSHON GEROD SOLOMON

No. COA24-748

Filed 18 June 2025

1. Homicide—first-degree murder—defendant as perpetrator—sufficiency of evidence—surveillance and tracking data

In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the State presented substantial evidence of defendant's identity as the perpetrator to survive defendant's motion to dismiss, including defendant's locations, cell phone communications, and actions taken before and after the shootings. Although circumstantial, the evidence consisting of video surveillance footage, cell phone analysis, ankle monitoring data, and internet search history raised more than mere suspicion or conjecture as to defendant's participation in the shootings.

2. Evidence—prior crime—murder trial—Rule 404(b)—identity of defendant as shooter—prejudice analysis

In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the trial court's admission of defendant's involvement in a prior drive-by shooting—for which defendant pleaded guilty to assault with a deadly weapon with intent to kill—did not amount to prejudicial error. Leaving aside the question of whether the separate shooting incidents were sufficiently

similar for purposes of proving defendant's identity as the perpetrator in the instant case, defendant could not show prejudice given the overwhelming other evidence of his guilt—even if circumstantial—and, therefore, there was not a reasonable possibility that the jury would have acquitted him absent the challenged evidence.

3. Criminal Law—prosecutor's closing argument—defendant's propensity to commit drive-by shootings—not grossly improper

In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the prosecutor's statement that defendant "like[d] to shoot out of the backs of cars at people," in reference to evidence of a prior drive-by shooting involving defendant which was introduced at trial, was not so grossly improper as to require the trial court to intervene ex mero motu. Taking the statement in context of the prosecutor's entire closing, in which the prosecutor reminded the jury that the prior incident was introduced solely for the purpose of showing defendant's identity as the perpetrator in the instant case, the statement did not impede defendant's right to a fair trial.

Appeal by defendant from judgments entered 2 June 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General John H. Schaeffer, for the State.

William D. Spence for defendant.

FREEMAN, Judge.

Defendant appeals from judgments entered upon a jury verdict finding him guilty of two counts of first-degree murder. Defendant argues the trial court erred by: (1) denying his motion to dismiss; (2) admitting evidence of his commission of a drive-by shooting in 2017; and (3) failing to intervene *ex mero motu* during the State's closing argument. After careful review, we conclude defendant received a fair trial free of prejudicial error.

I. Factual and Procedural Background

On 4 September 2019, Vincent Arocho and Jaquan Dumas were sitting in Mr. Arocho's parked car when they were murdered in a drive-by

shooting in Raleigh. Mr. Arocho, who suffered nine gunshot wounds—including six gunshot wounds to the head—was found in the driver's seat with his seatbelt still on. Mr. Dumas, who suffered seven gunshot wounds, was found lying on the street beside the vehicle's open passenger door. Witnesses at a nearby daycare center heard the shots, saw a white car driving away from the scene, and called 911.

As part of its investigation into the murders, the Raleigh Police Department collected video surveillance footage from several nearby businesses. These businesses included a Taco Bell, a McDonald's, a non-profit center, a Food Lion, and the daycare center. Footage from the nearby McDonald's showed a white vehicle driving from the McDonald's parking lot to the Food Lion parking lot at 12:06 p.m., about an hour before the murders occurred. Then, at 12:08 p.m., footage from the Taco Bell showed the white vehicle park outside the restaurant. The footage captured three occupants exit the vehicle, interact with a fourth individual in the parking lot, and then enter the restaurant with the fourth individual. Based on this footage and interior surveillance footage from the Taco Bell, police identified these individuals as Jesse Dontez Fraizer, Jonathan Isaiah Manning, Bert Thomas Lucas, Jr., and defendant. Both Mr. Frazier and defendant were known to police as members of the Bloods gang.

The surveillance footage showed defendant place his phone to his ear at 12:15 p.m., and defendant's cell phone records later revealed that defendant received a call from Mr. Arocho at this time. The individuals re-entered the white vehicle at 12:26 p.m. and left the Taco Bell parking lot. Surveillance footage showed that defendant was not driving the vehicle.

At 1:16 p.m., Mr. Arocho's vehicle arrived at the daycare center. About a minute later, the white suspect vehicle arrived with its passenger side pulling up to the driver's side of Mr. Arocho's vehicle. A burst of gunfire erupted from the white vehicle into Mr. Arocho's vehicle, at which point Mr. Dumas exited Mr. Arocho's vehicle to escape. The white vehicle then pulled in front of Mr. Arocho's vehicle, unleashed a second volley of gunfire towards Mr. Dumas, and left the scene. Footage from the McDonald's showed the same white vehicle "going outbound" away from the murder scene at 1:20 p.m. Police later located and stopped the white suspect vehicle and took its driver, Mr. Manning, into custody.

A few days after the murders, Mr. Lucas voluntarily spoke to police about his interaction with the other three suspects. According to Mr. Lucas, he approached the suspects in the Taco Bell parking lot and asked for a ride to a nearby friend's house. The suspects agreed, drove

Mr. Lucas to his destination, and then drove away. Mr. Lucas' friend was not at the destination so he decided to leave and walk back the way he came. As nearby surveillance footage corroborated Mr. Lucas' story and showed him walking down the street near the time of the murders, the police excluded Mr. Lucas as a suspect.

Raleigh police obtained and executed a search warrant on defendant's residence, where they found ammunition of the same caliber used to inflict some of the wounds on Mr. Arocho. Defendant's ankle monitor, a condition of his release from prison on a prior conviction stemming from a separate drive-by shooting, showed he was outside his home on the day of the shooting from 11:05 a.m. to 12:40 p.m. and from 12:44 p.m. to 1:37 p.m.

Cell phone analysis of defendant's cell phone revealed that the phone was new and had been activated less than four hours after the murders. However, because defendant used this new phone to log into his existing accounts, it contained all of defendant's old phone data. This data revealed that defendant contacted an individual regarding a drug sale and told the individual that defendant would be in a white car. Analysis of defendant's phone and Mr. Arrocho's phone showed the two had been in contact in the days leading up to the shooting and that the last four calls made by Mr. Arocho were to defendant. Cell phone analysis also placed defendant's phone "within a block or two" of the crime scene at the time of the shooting.

Less than four hours after the shooting, defendant used his newly activated phone to message a contact saved as "Wifeyyy," writing "My new number, Bae." "Wifeyyy" messaged defendant: "Oh, Bae. That shit all over the news. You never told me why." Defendant responded: "You know we can't talk on phones, Baby." Within the first 48 hours after the shooting, defendant exchanged 39 calls with suspects Mr. Frazier and Mr. Manning. Defendant also searched WRAL.com for stories about the shootings, visited Mr. Arocho's Facebook page, viewed numerous images of Mr. Arocho, and searched the Wake County Court Calendar for cases involving his own name.

Two days after the murders, Raleigh police spoke with defendant's probation and parole officer, John Kidd, and informed him that a warrant for defendant's arrest had been issued. After this discussion, defendant showed up unannounced and unscheduled at Officer Kidd's office. Defendant was subsequently arrested, and on 23 September 2019, defendant was indicted on one count of first-degree murder for the death of Mr. Dumas and one count of first-degree murder for the death of Mr. Arocho.

Defendant's matter came on for trial on 22 May 2023 in Wake County Superior Court. At trial, under Rule 404(b) and over defendant's objection, the State introduced evidence of defendant's involvement in a 2017 drive-by shooting for the purpose of proving defendant's identity. Defendant had pleaded guilty to a charge of assault with a deadly weapon with intent to kill stemming from that incident and had been released from prison one month prior to the murders of Mr. Arocho and Mr. Dumas. In closing arguments, the State referenced this incident and told the jury that defendant "likes to shoot out of the backs of cars at people, like he did" in the 2017 incident. Defendant did not object to the State's closing remarks.

At the conclusion of trial, and after the trial court denied defendant's motion to dismiss, the jury convicted defendant of both charges of first-degree murder under three different theories: premeditation and deliberation, lying in wait, and felony murder. The trial court sentenced defendant to consecutive terms of life imprisonment without parole. Defendant gave oral notice of appeal at the sentencing hearing and now argues the trial court erred in: (1) denying his motion to dismiss the first-degree murder charges; (2) admitting evidence of the 2017 shooting; and (3) failing to intervene *ex mero motu* during the State's closing argument.

II. Jurisdiction

This Court has jurisdiction to consider defendant's appeal of right from the Wake County Superior Court's final judgment. *See* N.C.G.S. § 7A-27(b)(1) (2023); *see also id.* § 15A-1444(a) (2023).

III. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298 (1982)). Similarly, "whether Rule 404(b) evidence is properly admitted is a question of law and is reviewed de novo on appeal." *State v. Pickens*, 385 N.C. 351, 355 (2023) (citing *State v. Beckelheimer*, 366 N.C. 127, 130 (2012)). "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002) (citing *State v. Trull*, 349 N.C. 428, 451 (1998), *cert. denied*, 528 U.S. 835 (1999)).

IV. Discussion

Defendant raises three arguments on appeal. First, defendant contends the trial court erred in denying his motion to dismiss the

first-degree murder charges. Second, defendant argues the trial court erred by admitting evidence of defendant's involvement in the 2017 drive-by shooting under Rule 404(b). Finally, defendant contends the trial court erred in failing to intervene *ex mero motu* during the State's closing arguments. We address each argument in turn.

A. Defendant's Motion to Dismiss

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charges of first-degree murder because "the State failed to present substantial evidence that defendant shot either Mr. Dumas or Mr. Arocho or had any part in the shootings." Specifically, defendant contends that because the State presented only circumstantial evidence "of defendant's identity as the perpetrator" or that defendant "was even present in the shooter's car," and because the State "presented no evidence that [d]efendant had . . . the opportunity to commit the crimes," the State's evidence raised only suspicion and conjecture as to defendant's guilt.[1] We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98 (1980) (citations omitted). "Substantial evidence only requires more than a scintilla of evidence, or the amount necessary to persuade a rational juror to accept a conclusion." *State v. Dover*, 381 N.C. 535, 547 (2022) (cleaned up).

> In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. Moreover, any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. Courts considering a motion to dismiss for insufficiency of the evidence should not be concerned with the weight of the evidence.

---

1. Defendant also argues the trial court erred in denying his motion to dismiss because the State failed to present substantial evidence of defendant's motive. This argument is without merit as our Supreme Court has held that "proof of motive is not necessary to sustain a conviction for murder." *State v. Stone*, 323 N.C. 447, 453 (1988) (citing *State v. Landingham*, 283 N.C. 589, 600 (1973)).

> The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made. Therefore, it is appropriate for a jury to make inferences on inferences when determining whether the facts constitute the elements of the crime. Thus, circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

Id. (cleaned up).

Here, defendant relies on *State v. Stallings*, 77 N.C. App. 189 (1985), *disc. rev. denied*, 315 N.C. 596 (1986); *State v. Chavis*, 270 N.C. 306 (1967); *State v. Jones*, 280 N.C. 60 (1971); and *State v. Heaton*, 39 N.C. App. 233 (1978), to support his contention that the State failed to present substantial evidence of his identity as the perpetrator. Upon our review of these cases—decided between forty and fifty-nine years ago—we agree with the State that these cases "are distinguishable as none of them have the technological evidence present in this case." None of these cases involved evidence similar to the key circumstantial evidence presented by the State here, such as video surveillance, cell phone analysis, ankle monitoring data, or internet search history.

The evidence in this case, taken in the light most favorable to the State, tends to show that: (1) prior to the shootings, defendant set up a drug meet with an individual and informed that individual he would be in a vehicle similar to the suspect vehicle; (2) defendant was in contact with one of the victims directly before the shootings; (3) the last calls made by this victim were placed to defendant; (4) defendant left his home about thirty minutes before the shootings and returned about twenty minutes after the shootings; (5) defendant was a passenger in the suspect vehicle shortly before the shootings; (6) defendant's cell phone was within one or two blocks of the crime scene at the time of the shootings; (7) defendant had access to the same type of ammunition used in the shootings; (8) defendant activated a new cell phone mere hours after the shootings; (9) defendant exchanged incriminating messages with a contact mere hours after the shootings; (10) defendant exchanged nearly forty phone calls with other suspects within 48 hours of the shootings; (11) defendant conducted incriminating internet searches,

including a search for his own name on the Wake County Court Calendar, shortly after the shootings; and (12) defendant made a surprise visit to his probation and parole officer two days after the shootings.

Although we agree with defendant that "[w]hether there is sufficient evidence to go to the jury is often a difficult and troublesome question in a criminal case," the question in this case is neither difficult nor troublesome. The State's evidence here, taken together, raises far more than mere suspicion or conjecture as to defendant's identity as one of the perpetrators of this crime and was sufficient "to persuade a rational juror to accept [that] conclusion." *Dover*, 381 N.C. at 547 (cleaned up). Accordingly, the trial court did not err in denying defendant's motion to dismiss.

B. Evidence of the 2017 Shooting

[2] Defendant next argues the trial court erred in admitting evidence of his involvement in a 2017 drive-by shooting under Rule 404(b). Specifically, defendant contends the trial court's admission of this evidence for the purpose of proving defendant's identity constituted prejudicial error because the 2017 incident was not sufficiently similar to the shootings of Mr. Arocho and Mr. Dumas. We disagree.

Rule 404(b) of our Rules of Evidence provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2023).

"Generally, Rule 404 acts as a gatekeeper against 'character evidence': evidence of a defendant's character . . . admitted 'for the purpose of proving that he acted in conformity therewith on a particular occasion.' " *State v. Pabon*, 380 N.C. 241, 258 (2022) (quoting N.C.G.S. § 8C-1, Rule 404(a)). Evidence proffered under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002).

However, because "Rule 404(b) states a clear general rule of *inclusion*," *Pabon*, 380 N.C. at 258 (cleaned up), character evidence is inadmissible *only* if its sole probative value "is to show that the defendant

has the propensity or disposition to commit an offense of the nature of the crime charged," *State v. Coffey*, 326 N.C. 268, 279 (1990). If the proffered evidence is "relevant to any fact or issue other than the defendant's propensity to commit the crime," *State v. Beckelheimer*, 366 N.C. 127, 130 (2012) (cleaned up), including but not limited to the purposes described in Rule 404(b), the evidence is admissible. To determine whether character evidence is admissible under Rule 404(b), our Courts rely on "the useful guidance of twin north stars: similarity and temporal proximity." *Pabon*, 380 N.C. at 259. As defendant does not contend the evidence here was too remote in time to the charged offenses, our analysis focuses on similarity.

"[P]rior bad acts are considered sufficiently similar under Rule 404(b) if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* (cleaned up). However, "[w]hen the State's efforts to show similarities between crimes establish no more than characteristics inherent to most crimes of that type, the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b)." *State v. Carpenter*, 361 N.C. 382, 390 (2007) (cleaned up).

If an appellate court "determines in accordance with these guiding principles that the admission of the Rule 404(b) testimony was erroneous, it must then determine whether that error was prejudicial" by applying the prejudicial error test set forth in subsection 15A-1443(a) of our General Statutes. *Pabon*, 380 N.C. at 260. Under this subsection, the defendant bears the burden of demonstrating "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2023).

Here, the State sought to introduce evidence regarding defendant's involvement in a drive-by shooting that occurred in April 2017 for the purpose of establishing defendant's identity as the perpetrator of the charged offenses. In the 2017 incident, defendant, who was sitting in the back passenger seat of a white car, fired two or three shots at another vehicle carrying Taisha Ferrell and two other individuals. Defendant filed a motion to exclude evidence of this incident, and the trial court held a hearing on defendant's motion prior to trial.

At the hearing, the State argued there was sufficient evidence that defendant committed the prior act because defendant "pled guilty . . . to assault with a deadly weapon [with] intent to kill for which he was convicted and sent to prison for." The State contended the 2017 incident was substantially similar to the shootings of Mr. Arocho and Mr. Dumas

because both incidents involved: (1) "car-to-car combat"; (2) "shooting . . . from one car into another car"; (3) defendant in a vehicle with two other individuals; (4) "semiautomatic handguns"; (5) a shooting in a public place in southeast Raleigh; and (6) a white car. The trial court agreed the incidents were "similar in nature," determined the evidence was not unduly prejudicial under Rule 403, and allowed the evidence to be admitted with a limiting jury instruction that it be considered for identity purposes only.

On appeal, defendant argues the trial court erred in admitting this evidence because the two acts were not sufficiently similar and the evidence therefore served no proper purpose "other than to show defendant's propensity or disposition to commit an offense like the one he was on trial for." Defendant essentially contends that because the similarities between the two drive-by shootings "establish no more than characteristics inherent to most crimes of that type, the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b)." *Carpenter*, 361 N.C. at 390 (cleaned up).

This case raises an interesting question: when reviewing whether similarities are merely "characteristics inherent to most *crimes of that type*," *id.* (emphasis added), should an appellate court construe "crimes of that type" as a broad or narrow category? For example, whether sufficient similarities exist between the two events in this case may turn on whether both crimes are categorized broadly as assaults with a deadly weapon or narrowly as drive-by shootings. Defendant appears to prefer this Court employ a narrow construction and argues the "details of the 2017 shooting were generic to the act of shooting into an occupied vehicle." The State appears to prefer a broader construction and contends the "2017 shooting . . . was sufficiently similar to the 2019 shootings[.]"

However, because defendant bears the burden of demonstrating both error and prejudice, we need not answer this question in the instant case. *See Pabon*, 380 N.C. at 260 (foregoing error analysis and resolving the defendant's 404(b) argument on prejudice grounds). Even if we presume, without deciding, that the trial court erred in admitting evidence of defendant's commission of the 2017 drive-by shooting, we are convinced that any such error was harmless. The State's other evidence in this case—discussed in detail above—was overwhelming despite its circumstantial nature, and defendant cannot demonstrate a reasonable possibility that he would have been acquitted absent the admission of the State's 404(b) evidence. Accordingly, the trial court did not prejudicially err in admitting evidence of the 2017 shooting.

C. The State's Closing Remarks

[3] Finally, defendant argues the trial court reversibly erred in failing to intervene *ex mero motu* during the State's closing argument. Specifically, defendant contends the State's comment that defendant "likes to shoot out of the back of cars at people, like he did Ms. Ferrell and her sister" was extreme and grossly improper. We disagree.

When, as here, a defendant fails to object to "comments made by the prosecutor during closing arguments, only an extreme impropriety will compel this Court to hold that the trial judge abused his [or her] discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Parker*, 377 N.C. 466, 471 (2021) (cleaned up).

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id. (quoting *State v. Jones*, 355 N.C. 117, 133 (2002)).

"A trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *Id.* at 472 (cleaned up). Thus, an argument is only "grossly improper" if it constitutes "conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process." *Id.* (quoting *State v. Fair*, 354 N.C. 131, 153 (2001)).

"To meet the gross-impropriety standard, a prosecutor's remarks must be both improper and prejudicial." *State v. Copley*, 386 N.C. 111, 117 (2024) (cleaned up).

> A statement is improper if calculated to lead the jury astray. That is because the lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn serves to sharpen and

> clarify the issues for resolution by the trier of fact. Closing remarks must thus be limited to relevant legal issues, and counsel may not place before the jury incompetent and prejudicial matters. For that reason, incorrect statements of law in closing arguments are improper. And arguments stray beyond permissible bounds when lawyers become abusive, inject their personal experiences, express their 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.
>
> The prejudice prong looks to whether a prosecutor's remarks were so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions. Put differently, the closing comments must have veered far enough into improper terrain to impede the defendant's right to a fair trial. To examine prejudice, we assess the likely impact of any improper argument in the context of the entire closing. Rather than atomizing statements and wrenching them from their surroundings, we consult the setting in which the remarks were made and the overall factual circumstances to which they referred.

Id. at 117–18 (cleaned up).

Here, "[r]ather than atomizing" the statement defendant challenges "and wrenching [it] from [its] surroundings," *id.* at 118, we must consider the allegedly improper argument in context. The State's full closing argument regarding the 2017 incident, with the challenged statement italicized, was:

> You will also hear about prior bad acts and you'll be instructed with two limitations. One is going to be about April of 2017 that the defendant discharged a firearm at a vehicle. The evidence was received solely for the purpose of showing identity of the person that committed the crime charged in that case. We'll go to this part in a second, but first let's focus on the 2017 part. You can only consider it for identity. It's a limited purpose. And the law is designed that way. But what about 2017 that you heard goes towards identity? The identity of Mr. Solomon being the perpetrator of this double homicide. Because you heard that from testimony elicited by Mr. Cheston as he asked detective—yes, now Detective Kuchen about the

> distance between the area of Community Drive over to Solar Drive—and you heard a lot about Solar Drive, questions about that—was .66 miles. It's not within a block and a half. It's outside the range of those cell towers, but it's .66 miles. It's in Mr. Solomon's neighborhood. It's in the area that he fled to after he shot at Taisha Ferrell.
>
> He knows the neighborhood. He knows where to put people into place after he has them on the phone. He knows how to navigate the area. *And he likes to shoot out of the backs of cars at people, like he did Ms. Ferrell and her sister.* It goes to his identity and that's the only purpose you can use it for, to be clear, but the similarities are uncanny.

Even if we presume such statement improperly expressed the prosecutor's opinion, we cannot say this statement "veered far enough into improper terrain to impede the defendant's right to a fair trial." *Copley*, 386 N.C. at 118. Properly viewed in the context of the prosecutor's repeated cautions and reminders that the 2017 evidence was to be considered solely for the purpose of identity, this statement was not "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *Id.* Accordingly, we conclude this statement was not grossly improper and the trial court did not err in failing to intervene *ex mero motu*.

V. Conclusion

The State's extensive technological evidence—including surveillance, cell phone analysis, and monitoring of defendant's ankle monitor—tended to show defendant's identity as one of the perpetrators of this double murder and was therefore sufficient to survive defendant's motion to dismiss. Due to this extensive evidence, any error in admitting 404(b) evidence of defendant's commission of a drive-by shooting in 2017 was harmless. Finally, the State's reference to the 2017 incident during closing arguments was not so grossly improper as to require the trial court to intervene *ex mero motu*. Defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge DILLON and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
MARSHJE TREANNAH SWINSON

No. COA24-414

Filed 18 June 2025

1. Homicide—second-degree murder—malice—intentional act—use of deadly weapon—sufficiency of evidence

In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally, the State presented substantial evidence from which a jury could find that defendant acted with malice to support second-degree murder. Testimony from multiple witnesses stating that they saw defendant raise a gun and fire at the victim supported an inference that defendant acted intentionally. Moreover, although defendant's account of the incident differed in some details, she related pulling out the gun and cocking it before the victim was shot; in any event, any inconsistencies in the evidence were for the jury to resolve, and did not require dismissal of the charge.

2. Sentencing—classification—second-degree murder—malice theory\—unambiguous verdict

The trial court properly sentenced defendant as a Class B1 felon after she was convicted of second-degree murder where there was no evidence that defendant was merely reckless in her handling of the gun used in the incident—which would support depraved-heart malice, the only malice theory that would require classifying second-degree murder as a B2 offense—and, therefore, the jury's general verdict of guilty was not ambiguous. Further, where the evidence showed that defendant acted intentionally when she shot the victim, the trial court did not err, much less plainly err, by failing to instruct the jury on depraved-heart malice.

3. Assault—assault with deadly weapon with intent to kill inflicting serious injury—intent element—sufficiency of evidence

In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally (for which defendant was found guilty of second-degree murder), the State presented substantial evidence to support the charge of assault with a deadly weapon with intent to kill inflicting serious injury; specifically, the evidence supported an inference of defendant's intent to kill, including that

defendant raised her loaded and cocked gun and shot at the second victim, who was running toward defendant immediately after the first victim was shot.

Appeal by defendant from judgment entered 15 June 2023 by Judge George Robert Hicks III in Duplin County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

William D. Spence for defendant.

FREEMAN, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty on the charges of second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury. On appeal, defendant argues that the trial court erred by: (1) denying her motion to dismiss the second-degree murder charge; (2) sentencing her as a Class B1 felon instead of a Class B2 felon for the second-degree murder conviction; and (3) denying her motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. After careful review, we conclude that defendant received a trial free of prejudicial error.

I. Factual and Procedural Background

In October 2020, defendant was living with the murder victim, Lonnel Henderson, at the Wells Trailer Park. On the morning of 23 October, defendant and Lonnel had a volatile argument and defendant left to stay with Lonnel's sister, Lannel Henderson, in the same park.

Later that day, defendant went shopping with her cousin, Zeniqua Carr. Defendant then returned to Lonnel's trailer with Lannel to retrieve some personal belongings while Zeniqua waited outside. Defendant visibly carried a handgun in her pants. Lonnel, who was inside the trailer, noticed that defendant was carrying a handgun and the two began arguing. At this point, two of Lonnel's other sisters, Shardonnay Langley and Kyra Pearsall, came to the trailer and the argument escalated. Ultimately, the argument moved outside where it turned into a physical altercation.

At trial, the State and defendant presented conflicting evidence as to what occurred next. The State's evidence tended to show that

once outside of the trailer, Lonnel pushed Zeniqua to the ground, then Shardonnay jumped on top of her and began beating her. Defendant then took out her gun and used it to hit Shardonnay on the back of her head. Shardonnay continued to fight Zeniqua, and Lonnel knocked the gun out of defendant's hand. Zeniqua then picked up the gun, and defendant told her, "There's one in the head, [Zeniqua]," which meant there was "one bullet ready to be fired." Zeniqua handed the gun back to defendant. Defendant raised the gun and shot Lonnel.

Shardonnay then ran at defendant. Defendant again raised the gun and shot Shardonnay; the bullet grazed her forehead, causing her to bleed. Lonnel died at the scene of a gunshot wound to the chest, as the bullet entered his shoulder and pierced both of his lungs and his pulmonary artery.

In contrast, defendant's testimony painted a different version of events. According to defendant, Lonnel pushed Zeniqua to the ground and began hitting her, while Shardonnay started "coming at" defendant after the fracas started. Defendant then pulled out the gun "for her safety," cocked it, and asked everyone to "chill" and "leave [Zeniqua] alone." Then, Shardonnay tried "to grab the gun out of [her] hand," and defendant "kept trying to move it so the gun was pretty much going which or every way." During this clash, the gun discharged, and defendant saw Lonnel holding his arm. Shardonnay "still kept trying to fight like nothing ever happened," which resulted in the gun "going off a second time." After the second shot went off, Shardonnay let go of the gun and "ended up trying to get towards her brother." Defendant testified that she did not know who pulled the trigger for either shot.

Defendant left the trailer park after the shootings. Early the next morning, defendant voluntarily went to the Wallace Police Department where she was placed under arrest. Defendant was indicted for the first-degree murder of Lonnel Henderson. Defendant was also indicted for the attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury upon Shardonnay Langley.

Defendant's matter came on for trial on 30 May 2023. At the close of evidence, defendant moved to dismiss the murder and assault with a deadly weapon with intent to kill inflicting serious injury charges. The trial court denied these motions. The jury found defendant guilty of second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury.

The trial court found no aggravating or mitigating factors and sentenced defendant to 240–300 months imprisonment upon the Class B1 felony conviction of second-degree murder. The trial court further sentenced defendant to 73–100 months imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury convictions, to run consecutively with defendant's second-degree murder sentence. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review "any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere[.]" N.C.G.S. § 7A-27(b)(1) (2023); *see also* N.C.G.S. § 15A-1444(a) (2023) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered."). Accordingly, we have jurisdiction over defendant's appeal of right.

III. Standard of Review

We review a denial of a motion to dismiss de novo to determine whether "there was substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense[.]" *State v. Collins*, 283 N.C. App. 458, 465 (2022) (cleaned up). We review sentencing errors de novo. *State v. Mosley*, 256 N.C. App. 148, 150 (2017).

IV. Discussion

Defendant argues that the trial court erred by: (1) denying her motion to dismiss the second-degree murder charge; (2) sentencing her as a Class B1 felon instead of a Class B2 felon upon conviction of second-degree murder; and (3) denying her motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. We address each argument in turn.

A. Motion to Dismiss the Second-Degree Murder Charge

[1] Defendant first contends that the trial court erred in denying her motion to dismiss the second-degree murder charge. Specifically, defendant argues the State failed to present substantial evidence that she acted with the malice necessary to sustain a conviction of second-degree murder.

To survive a motion to dismiss, the State must submit substantial evidence of each essential element of the charge. *Collins*, 283 N.C. App.

at 465. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236 (1991) (cleaned up). This evidence need only be more than a "mere scintilla, which only raises a suspicion or possibility of the fact in issue." *State v. Earnhardt*, 307 N.C. 62, 66 (1982) (quoting *State v. Johnson*, 199 N.C. 429, 431 (1930)). "[I]t is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom." *State v. Alexander*, 337 N.C. 182, 187 (1994). "Any contradictions or conflicts in the evidence are resolved in favor of the State[.]" *State v. Miller*, 363 N.C. 96, 98 (2009).

The elements of second-degree murder are "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Arrington*, 371 N.C. 518, 523 (2018) (cleaned up). "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522 (1991). There are three theories of malice:

> (1) express hatred, ill will, or spite; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to manifest a mind utterly without regard for human and social duty and deliberately bent on mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Coble, 351 N.C. 448, 450–51 (2000) (cleaned up). The second kind of malice is commonly referred to as depraved-heart malice. *State v. Fuller*, 138 N.C. App. 481, 484 (2000). The third kind of malice, condition of mind malice, may be "established by [an] intentional infliction of a wound with a deadly weapon that results in death." *Coble*, 351 N.C. at 451 (cleaned up).

This Court has held that the State presented substantial evidence of malice by showing a defendant's intentional act under circumstances analogous to those present here. For instance, evidence that a defendant shot two people at close range after a heated argument was "sufficient evidence presented that defendant unlawfully murdered [the victim] with malice." *State v. Stitt*, 201 N.C. App. 233, 246 (2009). In another case, when "the State presented evidence that [the] defendant retrieved a gun from his vehicle and intentionally fired the gun" at the victim, we held that there was "sufficient evidence for the jury to infer malice on

the part of defendant" to survive a motion to dismiss. *State v. Banks*, 191 N.C. App. 743, 746, 751 (2008).

Here, defendant's argument that there was insufficient evidence to show malice fails. The State's evidence, viewed in the light most favorable to the State, provided more than a "mere scintilla of evidence," *Earnhardt*, 307 N.C. at 66 (citation omitted), that defendant acted intentionally when she retrieved and fired the gun. Specifically, the State presented the testimonies of three witnesses who saw defendant raise the gun and shoot Lonnel. Their testimonies further established that defendant was in control of the gun when it was discharged because Shardonnay was occupied with fighting Zeniqua at the time Lonnel was shot. Additionally, defendant's own testimony showed that she pulled out the gun and cocked it before Lonnel was shot.

Though portions of defendant's evidence conflict with the State's evidence, "[a]ny contradictions or conflicts in the evidence are resolved in favor of the State." *Miller*, 363 N.C. at 98. Accordingly, defendant's contradictory evidence does not impact our analysis of whether the State presented substantial evidence to survive defendant's motion to dismiss.

This evidence, including the testimony that defendant raised the gun and shot Lonnel, is sufficient to allow a reasonable mind to accept as adequate to support the conclusion that defendant acted intentionally when she fired the gun. And because evidence of such intentional conduct is "sufficient evidence for the jury to infer malice on the part of the defendant," *Banks*, 191 N.C. App. at 751, the trial court did not err by denying defendant's motion to dismiss the second-degree murder charge.

B. Sentencing

[2] Defendant next asserts that the trial court erred in sentencing her as a Class B1 felon upon her conviction of second-degree murder because the jury's verdict was ambiguous. Specifically, defendant argues her testimony "that she did not intend to shoot [Lonnel] and that the gun went off during a struggle for the gun" was sufficient evidence to support sentencing as a Class B2 felon because this testimony demonstrated that she acted with depraved-heart malice.

"Any person sentenced who commits second degree murder shall be punished as a Class B1 felon[.]" N.C.G.S. § 14-17(b) (2023). However, if "the malice *necessary* to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and

wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief[,]" then the defendant "shall be punished as a Class B2 felon." *Id.* (emphasis added). In other words, a defendant convicted of second-degree murder can be sentenced as a Class B2 felon *only if* there is no evidence to show that they acted with anything other than depraved-heart malice. *See id.*

When a defendant is charged with second-degree murder, the trial court may provide the jury with special verdict form to identify under which theory of malice it found the defendant guilty. *See State v. Borum*, 384 N.C. 118, 118 (2023). Otherwise, the trial court gives the jury a general verdict form, which means that the specific theory for the jury's finding is unknown. *See Mosley*, 256 N.C. App. at 149.

When there is no evidence "presented that would support a finding that an accused acted with depraved-heart malice, . . . it would be inferred from a general verdict that the jury found the accused guilty of B1 second-degree murder." *State v. Lail*, 251 N.C. App. 463, 471 (2016). However, a general verdict form is ambiguous for sentencing purposes when "the jury is . . . presented with evidence that may allow [it] to find that either B2 depraved-heart malice or another B1 malice theory existed." *Id.* at 475. With a verdict so ambiguous, "neither we nor the trial court [are] free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant." *Mosley*, 256 N.C. App. at 153.

In determining whether the defendant in *Mosley* was entitled to resentencing as a Class B2 felon, we reasoned:

> In the case *sub judice*, . . . there was evidence of defendant's reckless use of a rifle, a deadly weapon. Specifically, defendant testified that as he was arguing with the victim, he was holding the rifle with his finger on the trigger and without the safety on. Defendant stated this was how he always handled the rifle—finger on the trigger and no safety. Defendant testified that in this instance, the gun went off when the victim grabbed the barrel of the rifle and he pushed her away. There was also testimony about the safety of the rifle and testimony from a firearm expert that "you would never teach anyone to have their finger on the trigger until they are ready to fire."

Id. at 152–53 (cleaned up).

We held that this was evidence "from which the jury could have found depraved-heart malice to convict [the] defendant of a Class B2

second degree murder." *Id.* at 153. Because the evidence there *could* have supported a finding of depraved-heart malice, we concluded that the jury's general verdict form was ambiguous and that the trial court therefore erred by sentencing the defendant as a Class B1 felon rather than construing the verdict in favor of the defendant. *Id.*

On the other hand, in *State v. Crisp*, we concluded the defendant was not entitled to resentencing in part because there was no "*reckless use* of a deadly weapon constitut[ing] depraved heart malice." 281 N.C. App. 127, 137 (2021) (emphasis added) (citing *Mosley*, 256 N.C. App. at 152–53). There, we determined the evidence that the defendant "left an empty-chambered gun unattended, or that [the victim] grabbed the gun, which [the defendant] maintain[ed] *he did not use* and believed was unloaded" was "insufficient to show that [the defendant] committed an inherently dangerous act" that would support a finding of depraved-heart malice. *Id.* (emphasis added). Because this evidence—which did not indicate the defendant's reckless use of a deadly weapon—could not support a finding of depraved-heart malice, the general verdict was unambiguous and the trial court did not err by sentencing the defendant as a Class B1 felon. *Id.*

Here, defendant's contention that the jury's verdict was ambiguous because this case is "identical" to *Mosley* fails because there was no "evidence of defendant's reckless use . . . [of] a deadly weapon." *Mosley*, 256 N.C. App. at 152. At trial, the State's evidence tended to show that the defendant intentionally raised the gun and shot Lonnel. Defendant's own testimony, on the other hand, failed to provide evidence of her reckless use of the firearm. Specifically, when repeatedly asked to describe "how the gun discharged," defendant testified:

> Q. Now, you testified that you shot twice?
>
> A. I did not say I shot twice. I said someone's trying to get the gun out of my hand and fight me while the gun was in my hand, and that's how the gun went off.
>
> Q. Okay. Twice?
>
> A. Yes. It went twice. She never stopped trying to fight. She kept going . . .
>
> A. She kept trying to fight me with the gun in my hand repeatedly. That's how the gun went off the first time, and she kept going, and that's how it went off the second time.
>
> . . .

> Q. Did you fire the handgun that night, Ms. Swinson?
>
> A. No, sir, I did not.
>
> . . .
>
> Q. Do you know how the gun discharged that night?
>
> A. Because me and Shardonnay—again, like I stated, she kept trying to fight me with the gun in my hand, was trying to jump on me with the gun in my hand. And I constantly kept saying, Shardonnay stop, stop Shardonnay, stop. She wouldn't stop. That's when the first shot went off.
>
> . . .
>
> Q. Originally, where was it when you—you had possession of it?
>
> A. I had it right here, like on my side, telling her to stop.
>
> Q. When Shardonnay was grabbing for the handgun, where did it go, to the best of your recollection?
>
> A. Pretty much like I said, pretty much everywhere 'cause I kept saying to Shardonnay, stop. So I'm trying to pull, and she's keep trying to fight me and keep swinging and swinging and swinging. I'm, Shardonnay, stop, and that's when the first pow went off. Like I said I just stood there after the first pow went off.

Thus, according to defendant, she did not recklessly use the firearm because she did not *use* the firearm at all. Unlike in *Mosley*, where the defendant testified that "he was holding the rifle with his finger on the trigger and without the safety on" and that "the gun went off when the victim grabbed the barrel of the rifle and he pushed her away," 256 N.C. App. at 152–53, defendant here did not provide any evidence that she was using the firearm in such a reckless manner or any explanation of how the gun discharged. Instead, according to defendant, the gun mysteriously fired twice because Shardonnay "kept going."

Neither version of events—the State's version in which defendant intentionally fired two shots, or defendant's version in which she did nothing wrong and the gun mysteriously fired two shots—constitute the kind of reckless conduct that could support depraved-heart malice. Based on the evidence presented at trial, the jury only could have found defendant guilty of second-degree murder under the theories that support sentencing as a Class B1 felon. Therefore, the jury's verdict is

unambiguous, and the trial court did not err by sentencing defendant as a Class B1 felon.

Defendant alternatively argues that the trial court plainly erred by failing to instruct the jury on the depraved-heart theory of malice. An instruction on depraved-heart malice would be warranted when there is evidence presented at trial that would support a finding that a defendant acted with depraved-heart malice. *See Lail*, 251 N.C. App. at 475; *see also State v. Clark*, 201 N.C. App. 319, 323 (2009) ("An instruction on a lesser-included offense must be given only if the evidence would permit the jury to rationally find [the] defendant guilty of the lesser offense and to acquit him of the greater." (citation omitted)). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to defendant." *Clark*, 201 N.C. App. at 323 (citation omitted).

As discussed above, the evidence in this case, even in the light most favorable to defendant, could not support a finding that defendant acted with depraved-heart malice because the evidence does not demonstrate reckless use of the firearm. Accordingly, the trial court did not err, let alone plainly err, by failing to instruct the jury on the depraved-heart theory of malice.

C. Motion to Dismiss Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury Charge

[3] Finally, defendant contends the trial court erred by denying her motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. Defendant specifically argues the State did not present substantial evidence that defendant had an intent to kill.

"The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Liggons*, 194 N.C. App. 734, 742 (2009) (cleaned up); *see also* N.C.G.S. § 14-32(a) (2023) ("Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.").

"An intent to kill is a mental attitude, and ordinarily it must be proved . . . by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Cauley*, 244 N.C. 701, 708 (1956). "An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Thacker*,

281 N.C. 447, 455 (1972). "The surrounding circumstances include the foreseeable consequences of a defendant's deliberate actions[,] as a defendant must be held to intend the normal and natural results of his deliberate act." *Liggons*, 194 N.C. App. at 739 (cleaned up).

Here, the State offered evidence that defendant raised her loaded and cocked gun and shot at Shardonnay while she was running towards defendant. Shardonnay's death would have been a natural and foreseeable consequence of shooting directly at her, so the jury could have reasonably found that defendant acted with intent to kill when she shot at Shardonnay.

Considering the evidence in the light most favorable to the State, there was substantial evidence to show that defendant acted with intent to kill Shardonnay. Therefore, the trial court did not err by denying defendant's motion to dismiss the assault with a deadly weapon with intent to kill inflict serious injury.

V. Conclusion

The trial court correctly denied defendant's motion to dismiss the second degree murder charge because the State presented substantial evidence that defendant acted with malice. Because there was no evidence presented by either party to support that defendant acted with depraved-heart malice such to render the jury's verdict ambiguous, the trial court properly sentenced defendant as a Class B1 felon upon the conviction of second-degree murder. Finally, the trial court also correctly denied defendant's motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge because the State presented substantial evidence that defendant acted with intent to kill. Accordingly, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges HAMPSON and GORE concur.

STATE v. TATE

[299 N.C. App. 507 (2025)]

STATE OF NORTH CAROLINA
v.
PAUL EMMANUEL TATE, JR., DEFENDANT

No. COA24-450

Filed 18 June 2025

1. Jury—due process right to a unanimous jury—jury instructions and verdict sheets—no error

In a prosecution that resulted in defendant being found guilty of second-degree rape—where the indictment alleged that defendant "knew" the victim was mentally incapacitated and was physically helpless (due to having consumed alcohol), while the jury was instructed that, to convict defendant, it must find beyond a reasonable doubt that he "knew or should reasonably have known" of the victim's condition—defendant's due process rights to a unanimous jury verdict and to be convicted only of an offense for which he was charged were not violated. First, N.C.G.S. § 15-144.1(c) provides that short-form indictments for second-degree rape (based on victim incapacity) need not allege the element of actual or constructive knowledge of the victim's condition. Second, the disjunctive instruction on knowledge did not deny defendant a unanimous jury verdict because defendant's actual versus constructive knowledge of the victim's incapacity did not implicate separate criminal acts, but, instead, constituted alternative factual avenues to prove the same element.

2. Sexual Offenses—inability of the victim to consent—defendant's knowledge of the victim's condition—evidence sufficient

In a prosecution that resulted in defendant being found guilty of second-degree rape (of a woman who had become incapacitated due to alcohol consumption), the trial court properly denied defendant's motion to dismiss for insufficient evidence of two elements: the victim's incapacity and defendant's knowledge of her condition. The evidence of the victim's incapacity included records of the victim's blood and urine alcohol levels, statements and testimony from the victim, and comments made by defendant to investigators about the victim's intoxication level; the evidence of defendant's knowledge of the victim's condition included defendant's comments to investigators that the victim was "wasted" and "a drunk bitch" at the time he had sex with her.

3. Constitutional Law—Confrontation Clause—DNA analyses—challenge to one witness not preserved—no error regarding other witness

In a rape prosecution, the admission of DNA results from a private laboratory and related testimony from two employees of the State Crime Lab, did not offend defendant's Sixth Amendment rights. As to one employee's testimony, defendant made only general objections and an objection on hearsay grounds and, thus, did not preserve his constitutional arguments for appellate review. As to the second employee's testimony (to which defendant made a specific, timely objection on Confrontation Clause grounds), the out-of-court statement introduced—test results from the private lab, which found male DNA in the swabs from the victim's rape kit—satisfied only one of the two requirements needed to implicate defendant's Confrontation Clause rights. While the DNA profile produced by the private lab was used by the employee to identify defendant after the profile was matched, first, to a state database, and, then, after independent analyses conducted by the employee, to defendant's sample (and, thus, constituted hearsay), it was not testimonial because it was not generated solely to aid a police investigation. Finally, even assuming any error in the admission of the DNA results, any error was harmless in light of the other evidence of defendant's guilt.

Appeal by defendant from judgment entered 2 February 2023 by Judge Marvin K. Blount, III in Superior Court, Pitt County. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General J. Joy Strickland, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

STROUD, Judge.

Defendant Paul Tate appeals from judgment entered following a jury trial finding him guilty of second-degree rape. On appeal, Defendant contends the trial court's jury instructions violated his due process right to a unanimous jury verdict. Defendant also contends the trial court erred in denying his motion to dismiss because there was not sufficient evidence that Robin was incapable of consenting to sexual activity and that Defendant knew or should have known Robin was mentally incapacitated or physically helpless. Defendant also contends the trial court

violated his rights under the confrontation clause of the 6th Amendment of the United States Constitution by allowing expert testimony from employees of the State Crime Lab based in part on DNA test results generated by Sorenson, a private third-party laboratory, since the State did not present testimony from the Sorenson analyst who did the initial DNA testing. We have carefully analyzed these three issues and for the reasons discussed below, the trial court did not commit any reversible error.

I. Background

Defendant's indictment and conviction arose from an alleged sexual assault on Robin[1] which occurred on 1 June 2011. Robin testified she spent the day visiting some friends from high school in Greenville, North Carolina. After lunch, Robin and her friends went to the pool at her friend's apartment community. Robin testified that she had "a few beers" while at the pool that day, and eventually began "drinking a clear liquor . . . straight from the bottle."

Although Robin could "vivid[ly]" remember "going to the pool," she could not recall many details regarding the rest of her time there. One interaction she recalled, however, was with a group of "three guys that were hanging out . . . [and] playing beer pong[ ] . . . across the pool." One of these men presented Robin with the question of "[i]f [she] could handle him and his two friends." Following this interaction, the next thing Robin could remember was "[b]eing in a car, falling out of it, and throwing up." Robin recognized that it was now dark outside, at least two white men were in the car with her, and she had been taken to an apartment complex she did not recognize.

Robin's next memory was waking up on a bed with a guy behind her having vaginal sex with her. Robin could also remember a second man wearing swim trunks being "called in" and she was "motioned" to perform oral sex on him. After the second man left, the man behind Robin "motioned" a third man into the room, apparently for Robin to perform oral sex on him also. At this point, Robin began regaining awareness and "realized something wasn't right[.]"

The two men in the room began having a conversation and discussing how the second man "ran out of the room." Robin recognized "things stopped[ ]" and the two men left the room, presumably to "check [on] the friend that left[.]" After the men left, Robin fled the apartment. Robin ran to a nearby apartment complex she recognized because she had

1. Stipulated pseudonym agreed to by the parties to protect the identity of the victim.

once lived there with her daughter's father. Someone at the complex assisted Robin in transporting her to the hospital. Robin was placed in a room at ECU Health's Emergency Department shortly "after midnight" on 2 June 2011.

While at the hospital, Robin had a sexual assault forensic examination performed by a nurse who had specialized training in performing such examinations. The nurse gathered samples and evidence from Robin and performed various examinations used for reported sexual assaults. In one of the forms filled out by the Sexual Assault Nurse Examiner ("SANE"), she noted Robin had some "bleeding in her vaginal canal." After completion of this examination, the nurse packaged the samples in the sexual assault kit and delivered it to Detective Smith, a law enforcement officer with the Greenville Police Department assigned to the special victims' unit in 2011.

After receiving the sexual assault kit, Detective Smith went to the apartment complex where Robin and her friends went to the pool. The apartment community staff told Detective Smith neither of their security cameras covering the area were operational. Detective Smith placed Robin's sealed sexual assault examination kit and other evidence into a locker at the Greenville Police Department.

In his testimony, Detective Smith indicated the case went "inactive" for some time as there was not enough evidence to move forward any further. However, a few years later, James Tilly joined the Greenville Police Department on a federal grant designated to "help law enforcement track, catalogue, and test . . . untested [sexual assault] kits[.]" On 12 December 2017, Mr. Tilly acquired Robin's sealed, untested sexual assault kit and mailed it to Sorenson Labs, a private DNA testing facility in Utah. Sorenson's analysis of Robin's test kit returned positive for the presence of male DNA from her vaginal, rectal, and oral swabs. Mr. Tilley then sent these results to the North Carolina State Crime Lab in 2018. Cortney Cowan, forensic scientist with the State Crime Lab, reviewed the data compiled by Sorenson, extracted the "unknown component" of the DNA mixture, i.e., the male portion of the DNA, and entered it into the State's DNA database.

In June or July of 2019, Detective Michael Cunningham with the Greenville Police Department was assigned to Robin's case. While reviewing Robin's case file and the DNA data, Detective Cunningham saw Defendant's DNA came back as an initial match for the male DNA extracted by the State Crime Lab. Detective Cunningham determined Defendant was incarcerated at Carteret Correctional Center and he

began the process of obtaining a search warrant to collect Defendant's DNA. Detective Cunningham met with Defendant in November of 2019, read over the search warrant with Defendant and provided him a copy, and obtained a buccal swab from the inside of Defendant's cheek for further DNA testing. Detective Cunningham testified this additional DNA testing was routine practice to ensure the DNA of the suspect returned the same match as the initial report. Blood and urine samples were also obtained from Defendant using a State Bureau of Investigation suspect kit.

Tricia Daniels, a forensic scientist for the North Carolina State Crime Lab, tested the samples obtained from Defendant and compared them to the DNA profile generated by Sorenson from Robin's sexual assault test kit. At trial, after being tendered as an expert in her field, Ms. Daniels opined the DNA samples collected from Defendant were a probable match to DNA results generated by Sorenson. Specifically, she testified that

> [t]he probability of randomly selecting an unrelated individual with a DNA profile that is consistent with the deduced DNA profile obtained from the sperm fraction of the vaginal swabs as provided by Sorenson Forensics item 1-1 is approximately 1 in 101 sextillion in the Caucasian population, 1 in 271 sextillion in the African-American population and 1 in 452 sextillion in the Hispanic population using the population databases generated by NIST.

On 25 October 2021, Defendant was indicted for one count of second-degree forcible rape against Robin. Trial began on 30 January 2023, and the jury returned a guilty verdict on 1 February 2023. Judgment was entered 2 February 2023. Defendant gave oral notice of appeal and timely filed written notice of appeal to this Court that same day.

II. Analysis

Defendant presents three main arguments on appeal. First, Defendant argues the trial court's jury instructions violated his due process right to a unanimous jury verdict. Second, Defendant argues the trial court erred in denying his motion to dismiss, contending the State did not present substantial evidence of each element of second-degree forcible rape. Finally, he argues the trial court violated his Confrontation Clause rights by allowing introduction of the private lab DNA results, through testimonies of State Crime Lab analysts, without also requiring the State to present the analyst who actually performed the analysis for testimony. We address each argument in turn.

A. Jury Instructions and Verdict

[1] Defendant first argues the trial court's jury instructions and verdict sheets violated his due process right to a unanimous jury. At trial, Defendant's counsel objected to the jury instruction as including the constructive knowledge element of second-degree rape, arguing Defendant's indictment was premised only on actual knowledge of Robin's incapacitation. Defendant's counsel specifically objected to and challenged this instruction on due process grounds, contending Defendant was not put on notice of needing to prepare a defense as to allegedly having constructive knowledge of Robin's incapacitation. Defendant further contends this instruction was a "fatally ambiguous disjunctive instruction regarding the knowledge element[ ]" which denied Defendant the right to a unanimous jury verdict. We disagree.

"The Due Process Clause prohibits any state from depriving 'any person of life, liberty, or property, without due process of law.' " *State v. Joyner*, 284 N.C. App. 681, 693, 877 S.E.2d 73, 83 (2022) (quoting U.S. Const. amend. XIV). "When determining whether a defendant's due process rights were violated, we apply a *de novo* standard of review." *Id.* (citation omitted).

Defendant was indicted for one count of second-degree rape on 25 October 2021 for acts occurring in June of 2011. Because Defendant's actions giving rise to the indictment occurred in 2011, we must look to the version of North Carolina General Statute Section 14-27.3 ("the Statute") in effect at that time, which was later recodified as Section 14-27.22 by Session Law 2015-181, Section 4(a), effective 1 December 2015.[2]

North Carolina General Statute Section 14-27.3 provided, in relevant part:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know

2. Section 14-27.22 only changed the name of the offense to "second-degree forcible rape"; the elements remained the same. *See* S.L. 2015-181, § 4(a).

> the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.3 (2011). Defendant's first argument on appeal centers mainly on Subsection (a)(2) of the Statute and the element "should reasonably know the other person . . . is mentally incapacitated or physically helpless." *Id.*

Defendant's indictment indicated

> [t]he jurors of the State . . . present that . . . [D]efendant . . . willfully and feloniously did carnally know and abuse [Robin], who was at the time was [sic] mentally incapacitated, physically helpless and by force and against her will. . . . [D]efendant knew that [Robin] was mentally incapacitated and was physically helpless."

Defendant specifically contends "[t]he State didn't charge [him] with a constructive knowledge offense, *i.e.*, while [he] didn't actually know or believe Robin was physically helpless and/or mentally incapacitated, the circumstances surrounding the vaginal intercourse reasonably should've informed him Robin was one or both."

The trial court instructed the jury that "to find . . . Defendant guilty of this offense the State must prove . . . Defendant knew or should reasonably have known that the alleged victim was mentally incapacitated and/or physically helpless." Defendant argues the trial court should have only instructed the jury that Defendant "knew" Robin was mentally incapacitated, since that was the only language in Defendant's indictment. Because Defendant's indictment did not include the constructive knowledge language of "or should reasonably [have] known[,]" as outlined by the Statute, Defendant contends this instruction violated his due process right of a unanimous verdict by "allow[ing] the jury to potentially convict him for an offense not charged in the indictment." This argument is without merit.

In making his argument, Defendant relies heavily on our Supreme Court's decision in *State v. Gibson*, which provided "[i]t is an elementary rule in the criminal law that a defendant must be convicted, if at all, of the particular offense alleged in the bill of indictment." 169 N.C. 380, 382, 85 S.E. 7, 8 (1915).

> In *Gibson*, our Supreme Court reversed a conviction for obtaining money under false pretenses where the indictment alleged that the defendant had obtained $350.00 and the evidence was that the defendant signed and obtained a

> promissory note for that amount. The Court reasoned that there was a substantial difference between "money" and a "promissory note," and they concluded that the difference between the allegation and the evidence was fatal.

State v. Walston, 140 N.C. App. 327, 335-36, 536 S.E.2d 630, 636 (2000) (citations omitted). The reversal of the conviction in *Gibson* was "based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed." *Gibson*, 169 N.C. at 385, 85 S.E. at 9 (emphasis in original).

However, since *Gibson*, our North Carolina General Assembly has enacted "short-form" indictment statutes that provide "it is not necessary [for an indictment] to allege every matter required to be proved on the trial[.]" N.C. Gen. Stat. § 15-144.1(a) (2023). "If the victim is a person who . . . is mentally incapacitated or physically helpless, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who . . . was mentally incapacitated or physically helpless[.]" N.C. Gen. Stat. § 15-144.1(c). An indictment for second-degree rape need not allege every element of the crime to be proven at trial, including the elements of knowledge or constructive knowledge as Defendant argues.

Our Supreme Court recently upheld a short-form indictment for second-degree rape where, similar to this case, the indictment did not specifically allege the element of knowledge:

> A plain reading of section 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim's physical helplessness. Certainly, such knowledge is an element of the offense and must be proven at trial, but the purpose of short-form indictments is to relieve the State of the common law requirement that every element of the offense be alleged. In other words, while there is a knowledge element necessary to sustain a conviction at trial, that element is not required to be alleged in the indictment. It cannot reasonably be said that this indictment deprived [the] defendant of notice of the charge such that he could not prepare a defense, or that the court could not enter judgment.

State v. Singleton, 386 N.C. 183, 213, 900 S.E.2d 802, 823 (2024) (citations, quotation marks, and emphasis omitted).

Here, based on our Supreme Court's reasoning in *Singleton*, Defendant's indictment put him on sufficient notice of the alleged offense for him to reasonably anticipate needing to prepare a defense as to the element of knowledge. *See id.* The State's indictment was not fatally deficient in not including the element of constructive knowledge, nor was the trial court precluded from including it in the jury instruction due to its absence from the indictment.

Further, Defendant argues the "disjunctive instruction regarding the knowledge element[ ]" denied him of "his Sixth Amendment and due process right to a unanimous jury verdict for the charged offense." Specifically, Defendant contends instructing the jury that it could find he knew *or* reasonably should've known Robin's compromised state was "disjunctive" in allowing the jury two alternatives for returning a guilty verdict as to the single offense charged. We disagree.

As noted by our Supreme Court in *State v. Walters*, "[t]wo lines of cases have developed regarding the use of disjunctive jury instructions." 368 N.C. 749, 753, 782 S.E.2d 505, 507 (2016) (citations and quotation marks omitted). In *State v. Lyons*, relying on *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), our Supreme Court provided that

> a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis in original).

> In contrast, this Court has recognized a second line of cases stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), standing for the proposition that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

Walters, 368 N.C. at 753, 782 S.E.2d at 507-08 (emphasis in original) (citations, quotation marks, and brackets omitted).

Also, in *State v. Haddock*, this Court explained that "[t]o decide whether the underlying acts joined by the disjunctive are separate offenses or merely alternative ways to establish a single offense, this

Court considers the gravamen of the offense, determined by considering the evil the legislature intended to prevent and the applicable statutory language." 191 N.C. App. 474, 480, 664 S.E.2d 339, 344 (2008) (citation omitted). This Court in *Haddock* explained "mental incapacity and physical helplessness are but two alternative means by which the force necessary to complete a rape may be shown, and not discrete criminal acts[.]" *Id.* at 481, 664 S.E.2d at 345. Similarly, here, whether Defendant knew or reasonably should've known of Robin's compromised state "are but two alternative means by which" the element of knowledge "may be shown, and not discrete criminal acts[.]" *Id.*

Here, Defendant's case falls squarely into the second category identified in *Hartness* as the disjunctive elements of knowledge are not separate criminal acts, but merely alternative avenues to conclude the existence of a single element of the crime. *See State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990).

We conclude no error in the trial court's jury instruction as the jury instruction was not "fatally" disjunctive and did not deny Defendant the opportunity to receive a unanimous jury verdict.

B. Motion to Dismiss

[2] Defendant next argues the trial court erred in denying his motion to dismiss, contending the State "failed to present substantial evidence regarding each element" of second-degree rape. Specifically, Defendant contends the State failed to present substantial evidence: (1) "proving Robin was incapable of consenting to the encounter . . . with [Defendant]"; and (2) "proving [Defendant] knew or reasonably should've known Robin was mentally incapacitated and/or physically helpless[.]" We disagree.

We review the issue of the denial of the motion to dismiss *de novo*:

> In evaluating the correctness of the trial court's decision concerning a motion to dismiss for insufficiency of the evidence, a reviewing court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator, with substantial evidence consisting of that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. In the course of making this inquiry, the reviewing court must view the evidence in the light most favorable to the State, with the State being entitled to every reasonable intendment and every reasonable inference to

> be drawn therefrom. As long as the record contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law, so, accordingly, we review the denial of a motion to dismiss de novo.

State v. Elder, 383 N.C. 578, 586, 881 S.E.2d 227, 234 (2022) (citations, quotation marks, and brackets omitted).

On the special verdict forms, the jury concluded "[t]he victim was mentally incapacitated[ ]" and "incapable of appraising the nature of the . . . conduct" and "incapable of resisting an act of vaginal intercourse[.]" However, the jury also determined "[t]he victim was [not] physically helpless[.]" Essentially, Defendant was convicted of second-degree forcible rape because he had intercourse with Robin, who was mentally incapable of assessing the nature of the act or resisting, and that Defendant knew or should have known of this mental incapability. Defendant's conviction hinged on the elements of (1) "[b]y force and against the will" of another person "who was mentally incapacitated[,]" and (2) Defendant's knowledge of such mental incapacitation. *See* N.C. Gen. Stat. § 14-27.3. Defendant argues there was insufficient evidence as to either of these elements for his conviction.

Under North Carolina General Statute Section 14-27.20(2),[3] an individual is considered "[m]entally incapacitated" when "due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.20(2) (2023).

Defendant argues "the only evidence" presented as to Robin's compromised state "came from Robin herself[,]" and this evidence was not sufficient to survive Defendant's motion to dismiss. However, even if the only evidence was Robin's testimony – and it was not in this case – "[o]ur courts have repeatedly held victim statements and testimony alone are sufficient evidence to support a conviction." *State v. Gibbs*,

---

3. During the time of Defendant's actions in 2011, the definition of mentally incapacitated was contained in North Carolina General Statute Section 14-27.1. This statute was later recodified as Section 14-27.20 by Session Law 2015-181, Section 2, effective 1 December 2015. The language of this section remained unchanged.

293 N.C. App. 707, 713-14, 901 S.E.2d 649, 655 (2024) (citations omitted). Here, there was evidence supporting Robin's intoxication and her mental incapacity other than her testimony. In fact, some of this evidence came from Defendant's own comments to investigators: Detective Cunningham testified that when he met with Defendant in November of 2021, Defendant described Robin as a "drunk bitch" and "wasted" the night of the incident. Evidence of Robin's alcohol levels also corroborated her testimony about her intoxication.

During trial, Melanie Thornton, forensic scientist supervisor with the North Carolina State Crime Lab, was tendered and accepted without objection from Defendant as an expert in the field of forensic toxicology. She testified as to the alcohol levels in Robin's blood and urine, collected at the hospital following the incident. Ms. Thornton testified Robin's urine sample returned "0.15 grams of alcohol per 100 milliliters" and her blood alcohol content ("BAC") returned "0.02 grams of alcohol per 100 milliliters[.]" These test results corroborate Robin's testimony regarding her mental state, and Defendant's statement to Detective Cunningham that Robin was "wasted" the night of the incident and further evidences Robin was mentally incapacitated and incapable of appraising the nature of the conduct and incapable of resisting an act of vaginal intercourse when taken in the light most favorable to the state.

Robin testified there were some holes in her memory and that she had difficulty remembering "in a chronological order" the events occurring that afternoon at the pool and into the evening. Though she did not remember exactly when she left the pool, nor under what circumstances, her next memory was "[b]eing in a car, falling out of it, and throwing up." Her next memory was "[c]oming to on [a] bed[ ]" with a man behind her having sex with her. All the while she "wasn't sure what was going on[.]" After another man entered the room, attempting to perform more sexual acts with her, Robin testified:

> That's when I realized something wasn't right and I tried – I knew I had to talk myself through and figure out what was going on because everything was – I was so confused, where I was, how I was there. I had to talk myself – you need to figure out what's going on. You need to figure yourself out, you need to – I had to like have a conversation with myself in my mind.

Robin's testimony, along with the testimony of Ms. Thornton corroborating the presence of alcohol in her system and Defendant's statements to Detective Cunningham Robin was a "drunk bitch" and was "wasted," is

sufficient evidence to allow a reasonable jury to accept as true Robin was mentally incapacitated during the incident.

Defendant also argues there was insufficient evidence to prove Defendant was aware of Robin's mental incapacitation. But as noted above, Defendant described Robin as a "drunk bitch" and "wasted" the night of the incident to Detective Cunningham.

Viewed in the light most favorable to the State, we conclude the evidence presented was sufficient to allow a reasonable jury to accept as true that Robin was mentally incapacitated at the time of this incident, and that Defendant knew of such mental incapacitation. The trial court did not err in denying Defendant's motion to dismiss.

C. Confrontation Clause

[3] Defendant argues the trial court improperly allowed into evidence the DNA results generated by Sorenson, a private, third-party laboratory, "without [also] forcing the State to produce the . . . analyst who performed the . . . DNA testing[.]" Specifically, Defendant contends the DNA results from Sorenson was introduced through testimony of Cortney Cowan and Tricia Daniels, both employees of the State Crime Lab, and his Sixth Amendment Confrontation Clause rights were violated when he was not given the opportunity to cross-examine the Sorenson analyst who conducted the analysis.

"The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citations omitted).

We first note Defendant's argument regarding the testimony of Ms. Cowan is an issue not properly preserved for appellate review. "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." N.C. R. App. P. 10(a)(1).

Ms. Cowan testified that she had received the testing information from Sorenson and did a technical review of the data. She then took the "portion of the mixture that was from the unknown component" and entered this information into the DNA database to submit a "routine inquiry." In summary, Ms. Cowan did not compare the DNA information from Sorenson to a known sample from Defendant; she merely processed the Sorenson test results and submitted the unknown DNA sample to the DNA database. The database then matched the DNA

profile to Defendant, and Ms. Cowan sent the results "to the State Crime Lab" and notified Robin that there was "a positive hit in the DNA testing" in her case.

At trial, during Ms. Cowan's testimony, Defendant's counsel made four objections. The first three were general objections, indicating no specific ground for the objection. In the fourth and final objection, Defendant's counsel stated: "Objection; calls for hearsay." Ms. Cowan then testified about receiving the male DNA samples from Sorenson and sending them to the State Crime Lab.

In *State v. Mendoza*, this Court explained that

> North Carolina Rule of Appellate Procedure 10(a)(1) requires that a criminal defendant present *specific* and *detailed* objections to a trial court's evidentiary rulings in order to preserve an issue for appellate review. For example, in *State v. Rainey*, 198 N.C. App. 427, 680 S.E.2d 760 (2009), the defendant argued on appeal that certain evidence was barred by the Confrontation Clause. This Court held the defendant failed to properly preserve the issue for appellate review because, while [the] defendant had objected at trial on general constitutional and due process grounds, he did not specifically object on Confrontation Clause grounds.

250 N.C. App. 731, 748-49, 794 S.E.2d 828, 840 (2016) (emphasis added) (citations and quotation marks omitted).

In criminal cases, if an issue is unpreserved for appellate review through proper objection made to the trial court, the issue may still be reviewed by this Court under plain error review. *See* N.C. R. App. P. 10(a)(4). However, "[t]o have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (quoting N.C. R. App. P. 10(a)(4)) (other citations omitted). Here, in his brief on appeal, Defendant did not "specifically and distinctly" contend the issue was plain error. *See id.* Because Defendant did not present "specific and detailed objections" on grounds of Confrontation Clause violations at trial, nor did he allege plain error in his brief on appeal, the issue regarding Ms. Cowan's testimony was not properly preserved for this Court's review.

During the testimony of Ms. Daniels, however, counsel for Defendant did specifically object on Confrontation Clause grounds. Our analysis of any alleged Confrontation Clause violations will be confined only to

the testimony of Ms. Daniels. Although some evidence regarding the Sorenson testing of the samples was presented through Ms. Cowan, Ms. Daniels was the witness who testified about the analysis of Defendant's DNA and the comparison of his DNA to the rape test kit information. Therefore, Defendant did not lose the opportunity to raise the Confrontation Clause argument by his failure to object to Ms. Cowan's testimony. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection the benefit of the objection is lost." (citation omitted)); *see also State v. Lewis*, 231 N.C. App. 438, 442, 752 S.E.2d 216, 219 (2013) (holding an issue was not preserved for this Court's review where the "defendant did not object to the evidence the first time it was introduced").

Ms. Daniels was the forensic scientist for the North Carolina State Crime Lab who analyzed the samples obtained from Defendant in 2019 and compared them to the DNA profile generated by Sorenson from Robin's sexual assault test kit.

In *Smith v. Arizona*, the United States Supreme Court explained "[t]he Confrontation Clause provides that 'in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.' In operation, the Clause protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom." 602 U.S. 779, 783-84, 219 L. Ed. 2d 420, 426 (2024) (brackets and ellipsis omitted) (quoting U.S. Const. amend. XI).

> The Clause's prohibition applies only to testimonial hearsay—and in that two-word phrase are two limits. First, in speaking about witnesses—or those who bear testimony—the Clause confines itself to testimonial statements[.]
>
> . . . .
>
> Second . . . , the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered to prove the truth of the matter asserted. When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's role in protecting the right of cross-examination is not implicated. That is because the need to test an absent witness ebbs when her truthfulness is not at issue.

Id. at 784-85, 219 L. Ed. 2d at 427 (citations and quotation marks omitted). The Court in *Smith* outlined a two-step approach to analyze when the Confrontation Clause is implicated: first, the evidence being

introduced by the State must be testimonial; second, it must be hearsay evidence, "offered to prove the truth of the matter asserted." *See id.* Here, Defendant contends the statements and results of the absent Sorenson analyst are both testimonial and hearsay in nature and the Confrontation Clause is implicated.

1. Hearsay

We must first consider whether the evidence from the DNA analysis by Sorenson was "offered to prove the truth of the matter asserted." *See id.* In *Smith*, the defendant was charged with various drug-related offenses after law enforcement "found a large quantity of what appeared to be drugs and drug-related items[ ]" in his possession. *Id.* at 789, 219 L. Ed. 2d at 430. The state then sent these seized items to the state crime lab for testing and analysis of the substances. *See id.* An analyst with the crime lab completed the requested testing, but at the trial, a "substitute" analyst was called to testify about the test results. *See id.* at 790, 219 L. Ed. 2d at 430-31. "Because [the substitute analyst] had not participated in the . . . case, [he] prepared for trial by reviewing [the original analyst]'s report and notes. And when [he] took the stand, he referred to those materials and related what was in them, item by item by item." *Id.* at 791, 219 L. Ed. 2d at 431. The defendant in *Smith* appealed his conviction, contending "the [s]tate's use of a 'substitute expert'—who had not participated in any of the relevant testing—violated his Confrontation Clause rights. . . . The real witness against him, [the defendant] urged, was [the original analyst], through her written statements; but he had not had the opportunity to cross-examine her." *See id.*

As to whether the original analyst's lab results were hearsay and offered "for their truth[,]" the Court in *Smith* stated that

> [i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts.
>
> . . . .
>
> Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion.
>
> . . . .
>
> Or to see the point another way, consider it from the fact-finder's perspective. In the view of the Arizona courts, an

> expert's conveyance of another analyst's report enables the factfinder to determine whether the expert's opinion should be found credible. That is no doubt right. The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite. But that very fact is what raises the Confrontation Clause problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.

Id. at 795-96, 219 L. Ed. 2d at 434 (citations, quotation marks, and brackets omitted). The Court concluded the defendant's Confrontation Clause rights may have been violated because the substitute analyst's testimony relied only on the results obtained by the original analyst; his own personal knowledge of common lab practice and procedure never came into play. *See id.* at 799, 219 L. Ed. 2d at 436. "[T]he [s]tate used [the substitute analyst] to relay what [the original analyst] wrote down about how she identified the seized substances. [The substitute analyst] thus effectively became [the original analyst]'s mouthpiece." *Id.* at 800, 219 L. Ed. 2d at 437.

Recently, this Court was presented with a similar issue in *State v. Clark*, 296 N.C. App. 718, 909 S.E.2d 566 (2024). In *Clark*, this Court relied on *Smith* in holding that forensic lab results obtained by an original analyst cannot form the "basis" of a "substitute" expert's testimony, "[w]ithout independent testing on . . . [the] part [of the substitute expert.]" *Id.* at 722, 909 S.E.2d at 569.

After Ms. Daniels was tendered as an expert in the field of "forensic DNA analysis[,]" the following interaction occurred on direct examination by the State:

> Q. Ms. Daniels, first, I want to show you what's been marked as State's Exhibit 8. Can you tell me what that is? Do you recognize it?
>
> A. Yes, ma'am.
>
> Q. And how do you recognize it?
>
> A. State's Exhibit 8 is lab item number 2 that I received in this case. And the way that I recognize it is that it has our lab sticker on the outside of the envelope that bears our lab number, the item number, and it also has my initials and the date.

Q. What was included in that envelope sent to you?

A. A DNA standard from [Defendant].

. . . .

Q. Now, Ms. Daniels, I am showing you what has been marked as State's Exhibit 12, can you tell me what that is?

A. Yes, ma'am.

Q. What is it?

A. State's Exhibit 12 is the DNA extract from item 2 and, of course, mine in control. So it's basically my work product following my analysis.

. . . .

Q. Ms. Daniels, what were you asked to do with the samples that were sent to you in this particular case?

A. I received a – the standard, which is our item number 2, and was asked to compare it to a previous item, an item 1-1.

Q. And what was item 1-1?

A. Item 1-1 was a DNA profile generated from sperm fraction of the vaginal swabs.

Q. And who had performed the testing on those vaginal swabs?

A. That was performed by Sorenson Forensics.

Q. And that was a DNA profile that had been placed on file at the Crime Lab; is that right?

A. Yes, ma'am.

Q. And so your job, is it my understanding, was to compare –

A. Yes, ma'am.

Q. – the DNA profiles from item – that has been marked as State's Exhibit 8 and compare it to the DNA profile submitted by Sorenson Labs; is that correct?

A. Yes, ma'am, that's correct.

Q. And how did you go about doing that?

> A. Well, I went through my normal DNA process to develop a profile for item number 2, State's Exhibit 8, which is the standard from [Defendant]. And then following that I then performed a statistical analysis on that particular standard with the profile that was developed from item 1-1.
>
> Q. And were the samples that you received in this case tested using the procedures you've already described?
>
> A. Yes, ma'am.
>
> Q. And were you able to form an opinion and obtain a result in that comparison?
>
> A. Yes, ma'am.
>
> Q. And what was your opinion?
>
> . . . .
>
> A. The DNA profile obtained from [Defendant] item 2 is included as a possible contributor to the deduced DNA profile obtained from the sperm fraction of the vaginal swabs, item 1-1 as provided by Sorenson Forensics.

Robin's sexual assault test kit was sent to Sorenson, a private lab, only for the purpose of "male screening[,]" a process of simply determining the presence of *any* male DNA. Sorenson then provides a "raw DNA profile[,]" which the State can then use to determine "how many people are in the DNA profile[ ]" and extract any "unknown component[s]" to enter into the State's database. In addition, to provide context as to the role played by Sorenson, Detective Tilley testified that

> [p]rivate laboratories don't have access to the DNA databases that we utilize in forensic DNA casework so we have an agreement with those private laboratories . . . to receive the data that they generate in their casework. We do a full technical review of their data to ensure the quality of their results and to ensure that we agree with their conclusions that they generate. And the State Crime Laboratory is the laboratory that has access to these DNA databases.

Ms. Cowan had taken the Sorenson test results and submitted them to the DNA database which matched the male sample to Defendant. Sorenson's testing only identified the male portion of the DNA sample.

The case at bar is distinguishable from the scenarios presented in both *Smith* and *Clark*. For example, the substitute expert in *Smith*

came to the same conclusions as the original analyst, relying only on the original analyst's notes and records. *See Smith*, 602 U.S. at 791, 219 L. Ed. 2d at 431 ("And [the substitute expert] did come to the same conclusion [as the original analyst], in reliance on [the original analyst]'s records."). Similarly, in *Clark*, the substitute expert was called to testify the substance obtained from the defendant was methamphetamine, the same conclusion drawn by the original analyst. *See Clark*, 296 N.C. App. at 719, 909 S.E.2d at 567. Here, however, Ms. Daniels did not specifically testify about the lab results generated by Sorenson, nor the practices it may have used in obtaining the results. To the contrary, Ms. Daniels's testimony addressed her own practices and procedures, and the analyses she ran to match the DNA profile generated by Sorenson to Defendant's DNA from the State's database.

But after determining that Defendant was a potential match to the DNA in the rape kit, Ms. Daniels then performed her own independent research and analyses, unlike the substitute experts in both *Smith* and *Clark*. The Sorenson DNA test results simply showed that some male DNA was present in the rape kit taken from Robin; the unknown analyst at Sorenson did not give any opinion on whose DNA was in the kit. However, the DNA profile from Sorenson did form part of the basis for Ms. Daniels's own analyses and trial testimony, and Ms. Daniels did not perform any independent tests on the rape test kit. The conclusions reached by Sorenson and Ms. Daniels were not the same, since Sorenson's analysis returned a result of some presence of male DNA in Robin's sexual assault test kit swabs and the adjoining DNA profile, while Ms. Daniels's analysis returned a match to Defendant's DNA, but the results from Sorenson served as the basis for the results obtained by Ms. Daniels. At trial, the evidence based on the DNA profile generated by Sorenson was presented as true and Ms. Daniels's opinions depended on the truthfulness of the DNA profile, since this is the profile used to identify Defendant after it was matched to the State database and then matched after analysis of the buccal swab from Defendant in 2019. *See Smith*, 602 U.S. at 780, 219 L. Ed. 2d at 425 ("The truth of the basis testimony is what makes it useful to the [s]tate; that is what supplies the predicate for—and thus gives value to—the state expert's opinion. And from the factfinder's perspective, the jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based."). Because the DNA profile generated by Sorenson "gives value" to the match produced by Ms. Daniels, this out-of-court statement is hearsay since it was offered "for the truth" of Defendant being the perpetrator of this crime. *See id.*

2. Testimonial Evidence

The next question is whether the Sorenson lab test results were testimonial evidence. Even if the forensic results generated by Sorenson were hearsay, Defendant's Confrontation Clause rights were not implicated as they were not testimonial. The Confrontation Clause is not implicated unless the out-of-court statement offered against a defendant is both hearsay *and* testimonial. *See Smith*, 602 U.S. at 800, 219 L. Ed. 2d at 437 ("To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other." (citation omitted)).

In *Smith*, the United States Supreme Court did not make a ruling on whether the out-of-court statements of the original analyst were testimonial, *see id.* at 800, 219 L. Ed. 2d at 437, as the only issue presented to the Supreme Court was whether they were offered "for their truth." *See id.* at 792-93, 219 L. Ed. 2d at 432.[4] Although the United States Supreme Court did not rule on the issue of whether the statements were testimonial, it did "offer a few thoughts, based on the arguments made . . . , about the questions the state court might usefully address if the testimonial issue remains live."[5] *Id.* at 801, 219 L. Ed. 2d at 438. The Court noted that the state court would need to "identify the out-of-court statement introduced, and must determine, given all the 'relevant circumstances,' the principal reason it was made." *Id.* at 801-02, 219 L. Ed. 2d at 437 (quoting *Michigan v. Bryant*, 562 U.S. 344, 369, 179 L. Ed. 2d 93, 114 (2011)).

---

4. The Supreme Court did not address the issue of whether the evidence was testimonial because it was not presented to the Court:

> But that issue is not now fit for our resolution. The question presented in Smith's petition for certiorari did not ask whether [the substitute analyst]'s out-of-court statements were testimonial. Instead, it took as a given that they were. That presentation reflected the Arizona Court of Appeals' opinion. As described earlier, that court relied on the "not for the truth" rationale we have just rejected. It did not decide whether [the substitute analyst]'s statements were testimonial. Nor, to our knowledge, did the trial court ever take a stance on that issue. Because we are a court of review, not of first view, we will not be the pioneer court to decide the matter.

Smith, 602 U.S. at 801, 219 L. Ed. 2d at 437 (citations and quotation marks omitted).

5. The Supreme Court vacated the judgment of the Arizona Court of Appeals and remanded the case for that court "to address the additional issue of whether [the substitute analyst]'s records were testimonial (including whether that issue was forfeited)[.]" *Id.* at 803, 219 L. Ed. 2d at 439.

Here, the out-of-court statement introduced was the DNA test results from Sorenson which identified male DNA in the swabs in the rape test kit. So we must consider "given all the relevant circumstances, the principle reason" the Sorenson test was made. *See id.* (citation and quotation marks omitted).

In *Bullcoming v. New Mexico*, the United States Supreme Court addressed use of a "Report of Blood Alcohol Analysis" prepared by an analyst at the New Mexico Department of Health, Scientific Laboratory Division. 564 U.S. 647, 652-53, 180 L. Ed. 2d 610, 616 (2011). The Supreme Court determined that the report was "[a] document created *solely* for an 'evidentiary purpose,' . . . made in aid of a police investigation, [and] ranks as testimonial." *Id.* at 664, 180 L. Ed. 2d at 623 (emphasis added) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 174 L. Ed. 2d 314, 321 (2009)). In *State v. Craven*, three different SBI agents had performed testing of substances seized from the defendant on different "buy dates," but only one of the agents testified at trial. 367 N.C. 51, 54, 744 S.E.2d 458, 460 (2013). Agent Schell testified about the test results of the other two agents as well as her own testing, but she

> merely parroted Agent Shoopman's and Agent Allcox's conclusions from their lab reports. Like the lab report in *Bullcoming*, these lab reports contained an analyst's certification prepared in connection with a criminal investigation or prosecution. Specifically, Agent Shoopman's and Agent Allcox's certifications stated: "This report represents a true and accurate result of my analysis on the item(s) described." There is no doubt that the lab reports were documents created solely for an evidentiary purpose, made in aid of a police investigation, and rank as testimonial. Thus, the statements introduced by Agent Schell constituted testimonial hearsay, triggering the protections of the Confrontation Clause.

Id. at 56-57, 744 S.E.2d at 461 (citations, quotation marks, brackets, and ellipses omitted). Our Supreme Court then concluded that the "admission of the out-of-court testimonial statements . . . was error[.]" *Id.* at 57, 744 S.E.2d at 462. Likewise, in *State v. Clark*, this Court addressed testimony by a surrogate expert who relied on testing by another analyst who was "unavailable to testify" about a "crystalline substance" found in a search of the defendant's home. *Clark*, 296 N.C. App. at 719, 909 S.E.2d at 567. The expert opined that the substance was methamphetamine but based his opinion only on the testing done by the other analyst. *See id.* This Court held that the statements in the lab report were "testimonial

as a matter of law[ ]" because they were "created *solely* to aid in the police investigation of [the d]efendant[.]" *Id.* at 723, 909 S.E.2d at 570.

But the facts and circumstances we are presented with here differ from those in the cases noted above, which dealt with laboratory testing done to identify controlled substances seized from or found with the defendant or to determine the defendant's blood alcohol level. Here, the testing involved has two phases. First, samples were taken from Robin immediately after the alleged rape, and those samples were tested for the presence of male DNA by Sorenson. Next, DNA samples were taken from Defendant, analyzed, and compared to the Sorenson test results, leading to Ms. Daniels's opinion outlined above. Here, the facts and circumstances are more similar to those presented in *Williams v. Illinois*, 567 U.S. 50, 183 L. Ed. 2d 89 (2012).

First, we recognize that *Smith v. Arizona* abrogated *Williams v. Illinois* on the issue of whether the test result were hearsay or used for the truth of the matter asserted. But *Smith* specifically did not address the second part of the *Williams* analysis, whether the test results were testimonial evidence, and *Smith* did not overrule or disapprove of this portion in *Williams*.[6] As noted by the United States Supreme Court in *Smith*, the *Williams* Court "failed to produce a majority opinion[,]" *Smith*, 602 U.S. at 788, 219 L. Ed. 2d at 429, and its opinions "have sown confusion in courts across the country about the Confrontation Clause's application to expert opinion testimony." *Id.* at 789, 219 L. Ed. 2d at 430 (citation and quotation marks omitted). However, the Court in *Smith* indicated much of the "confusion" coming from the opinions in *Williams* centered on the issue of whether out-of-court statements are to be considered hearsay. *See id.* ("Some courts have applied the *Williams* plurality's 'not for the truth' reasoning to basis testimony, while others have adopted the opposed five-Justice view. This case emerged out of that muddle." (footnote omitted)). As to whether the out-of-court statements are testimonial, the Court in *Smith* essentially left that an open-ended question for lower courts to decide. *See id.* at 801-02, 219 L. Ed. 2d at 438.

---

6. The Supreme Court noted that "Smith argues that the State has forfeited the argument [that the report was not testimonial]: Arizona, he says, 'gave no hint in the proceedings below that it believed the [substitute analyst]'s statements were anything but testimonial.' . . . The State denies that assertion, pointing to a passage about *Williams* in its lower court briefing. . . . The dispute is best addressed by a state court. So we return the testimonial issue, including the threshold forfeiture matter, to the Arizona Court of Appeals." *Smith*, 602 U.S. at 801, 219 L. Ed. 2d at 438.

And in *Williams*, five justices supported the majority's conclusion that the DNA test results generated by the analysis of the samples from the victim were not testimonial, although only four agreed on the rationale.[7]

In *Williams*, DNA test results from samples obtained from a sexual assault victim were sent to a private laboratory for DNA testing and the Supreme Court addressed whether the test results were testimonial. *See Williams*, 567 U.S. at 56-57, 183 L. Ed. 2d at 98. At trial,

> the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of [the] petitioner's blood. On direct examination, the expert testified that Cellmark was an accredited laboratory and that Cellmark provided the police with a DNA profile.
>
> . . . .
>
> The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced.

Id. Similar to the case at bar, the expert called to testify in *Williams* was an Illinois State Police analyst who received the DNA profile generated by a private, third-party lab, and through her own independent work, compared and matched the profile with DNA records in Illinois's database. *Id*. at 59, 183 L. Ed. 2d at 100.

In *Williams*, the Court explained that the Cellmark test's purpose was not testimonial, and this was an independent basis for the decision:

> As a second, independent basis for our decision, we also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been

---

7. Justice Thomas agreed with this result as to whether the evidence was testimonial but used a different analysis in his concurring opinion. *See Williams*, 567 U.S. at 104, 183 L. Ed. 2d at 129 (Thomas, J., concurring). He disagreed with the majority opinion's ruling that the test results were not hearsay, essentially for the same reasons as the Supreme Court later ruled in *Smith v. Arizona*. *See id*. at 109, 183 L. Ed. 2d at 132 (Thomas, J., concurring). However, he agreed that the test results were not testimonial but rejected the "primary purpose" test used by the majority opinion. *See id*. at 113-14, 183 L. Ed. 2d at 135 (Thomas, J., concurring).

> no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.

Id. at 58-59, 183 L. Ed. 2d. at 99 (citation omitted). Here, just as in *Williams*, Robin's sexual assault test kit was sent to Sorenson before Defendant was identified as a potential suspect. Robin's test kit went undisturbed for many years as the Greenville Police Department did not have enough evidence or resources at the time to move forward with the investigation. No progress occurred on solving Robin's case until the police department received funding specifically for testing un-tested sexual assault kits. Robin's test kit was delivered to Sorenson for the sole purpose of identifying the potential presence of any DNA other than her own, not to identify a potential suspect. Sorenson's DNA profile was not testimonial in nature since it was not generated "*solely* to aid in the police investigation" of Defendant. *Clark*, 296 N.C. App. at 723, 909 S.E.2d at 570 (emphasis original). And as in *Williams*, the profile provided by Sorenson "was not inherently inculpatory" but it tends to exculpate "all but one of the more than 7 billion people in the world today." *Williams*, 567 U.S. at 58, 183 L. Ed. 2d. at 99. Therefore, the trial court

did not err in allowing Ms. Daniels's testimony based on her comparison of Defendant's DNA profile with the DNA profile generated by Sorenson because the Sorenson report was not testimonial.

3. Harmless Error

Recognizing the evolving state of the law regarding use of lab testing results in this type of case, as a second and independent basis for our decision, if Defendant's confrontation rights were violated by the use of the Sorenson test results, this violation only amounts to harmless error.

> When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts. A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

State v. Ortiz-Zape, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (citations and quotation marks omitted). Our Supreme Court has held admissions of testimonial evidence will be construed as "harmless error" in relation to an alleged Confrontation Clause violation where there is "other competent overwhelming evidence of [the] defendant's guilt[.]" *State v. Lewis*, 361 N.C. 541, 544, 648 S.E.2d 824, 827 (2007) (citation and quotation marks omitted).

In *Ortiz-Zape*, our Supreme Court concluded an alleged Confrontation Clause violation was harmless error where

> [t]he arresting officer testified that when he found the plastic baggy containing a white substance, he picked it up and asked [the] defendant, "What's this?" The officer further testified that defendant acknowledged it was his cocaine—and asserted it was for personal use and he was not dealing drugs.
>
> . . . .
>
> Under these facts, in which [the] defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine, any possible error in allowing the expert opinion was harmless.

Ortiz-Zape, 367 N.C. at 14, 743 S.E.2d at 164-65 (citation omitted).

At trial, Detective Cunningham testified as to statements made by Defendant during an interview conducted in November of 2021. Detective Cunningham testified that during this interview Defendant recalled his interactions with Robin that day at the pool, describing her as "drunk" but alleged she was "not impaired to the point she was incapacitated[.]" Defendant also admitted to being present in the room where the incident occurred and to having sex with Robin until "she jumped up and ran out of the room." The statements made by Defendant during this interview corroborated many events described by Robin in her testimony. The entire purpose of the DNA evidence was to identify Defendant as the man who sexually assaulted Robin in 2011; Defendant admitted that he met Robin at the pool that day and had sex with her.

Under these facts, there was substantial evidence to convict Defendant of second-degree rape, even without the testimony of Ms. Daniels. Even if Defendant's Confrontation Clause rights were implicated, the admission of Ms. Daniels's testimony amounts only to harmless error.

III. Conclusion

We conclude no error was committed by the trial court as to the issues raised in Defendant's appeal. The instructions provided to the jury did not deprive Defendant of a unanimous verdict, nor were they disjunctive in outlining multiple avenues for finding Defendant guilty. Also, the trial court did not err in denying Defendant's motion to dismiss as there was substantial evidence that he had committed second-degree rape. Finally, though the DNA profile generated by Sorenson was hearsay evidence, Defendant's Confrontation Clause rights were not violated because these out-of-court lab results were not testimonial in nature.

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

THOMAS THEUERKORN, PLAINTIFF
v.
MELISSA BETH HELLER, DEFENDANT

No. COA24-715

Filed 18 June 2025

1. Civil Procedure—Rule 60(a)—clerical error rather than substantive change—motion properly allowed

In a proceeding for equitable distribution, alimony, and child support, the trial court properly granted defendant's Civil Procedure Rule 60(a) motion to correct a clerical error in an order—where the court had left blank the amount of alimony awarded to defendant from plaintiff—because the original order already provided that plaintiff must pay defendant an alimony award and the amended order still required plaintiff to pay defendant an alimony award. Thus, the amended order did not alter the effect of the original order or change the source from which the award was derived, but rather only corrected the amount of money involved, a change not implicating a substantive right.

2. Divorce—equitable distribution—distributive award—no explicit finding of fact—ability to pay ascertainable from the record

In a proceeding for equitable distribution, alimony, and child support, the trial court did not abuse its discretion in ordering plaintiff to pay defendant a distributive award, rather than making an in-kind distribution, as provided for in N.C.G.S. § 50-20(e), where, although the court did not make an explicit finding of fact regarding plaintiff's ability to pay the award with liquid assets, plaintiff's ability to do so was ascertainable from unchallenged findings of fact, including that plaintiff was awarded portions of two retirement accounts, as well as a home with significant equity.

3. Divorce—alimony—income and expenses—insufficient findings of fact

In a proceeding for equitable distribution, alimony, and child support, the trial court erred in awarding alimony from plaintiff to defendant where the court's amended order incorrectly calculated plaintiff's income—by relying on plaintiff's income from a prior year instead of upon his current income, despite plaintiff having provided evidence regarding his current income—and failed to make findings of fact as to the parties' respective expenses or standards of living.

4. Child Custody and Support—child support award—parent's income—findings of fact insufficient

In a proceeding for equitable distribution, alimony, and child support, the trial court erred in calculating child support based upon plaintiff's income from a previous year (rather than his income at the time of the order's entry) without making findings of fact that would support such an award.

5. Appeal and Error—preservation of issues—affidavit treated as a pretrial order—failure to object at hearing

In a proceeding for equitable distribution, alimony, and child support, plaintiff's appellate argument—that the trial court erred in ordering that defendant's equitable distribution affidavit be treated as a pretrial order—was not preserved for appellate review where plaintiff did not raise a timely objection to the trial court's decision (because plaintiff, while duly noticed, did not attend the hearing or timely submit his own equitable distribution affidavit).

Appeal by plaintiff from orders entered 14 June 2024 by Judge David W. Aycock in Catawba County District Court. Heard in the Court of Appeals 22 May 2025.

Collins Family & Elder Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Wesley E. Starnes, PC, by Wesley E. Starnes, for defendant-appellee.

FLOOD, Judge.

Plaintiff Thomas Theuerkorn appeals from the trial court's amended equitable distribution, alimony, and child support order entered 14 June 2024 (the "Amended Order"); and from the trial court's order, entered 14 June 2024, granting Defendant Melissa Beth Heller's Rule 60 motion (the "Rule 60 Order") to amend the equitable distribution, alimony, and child support order entered 27 March 2024 (the "Original Order"). On appeal, Plaintiff argues the trial court erred in: first, modifying the Original Order "under the guise of correcting a clerical error"; second, ordering a distributive award; third, awarding alimony, where the Amended Order incorrectly calculated Plaintiff's income and failed to include findings as to the parties' expenses; fourth, calculating child support using incorrect income information; and fifth, ordering Defendant's equitable distribution affidavit to be treated as the pretrial order, and "refusing to

allow [Plaintiff] to present evidence." Upon review, we conclude: first, the trial court did not abuse its discretion in granting Defendant's Rule 60 motion because the Amended Order corrected only a clerical error in the Original Order; second, the trial court did not err in ordering a distributive award because Plaintiff's ability to pay the award can be ascertained from the Record; third, the trial court erred in awarding alimony where it failed to make findings of fact as to Plaintiff's income; fourth, the trial court erred in calculating child support where it failed to make findings of fact as to Plaintiff's income; and fifth, Plaintiff's argument concerning the pretrial order is not preserved for appellate review. We therefore affirm the Rule 60 Order, affirm the Amended Order in part, vacate and remand the Amended Order as to alimony and child support, and dismiss Plaintiff's argument regarding the pretrial order.

I. Factual and Procedural Background

Plaintiff and Defendant married on 11 June 2011 and separated on 11 March 2022. Both parties were employed during their marriage and had three children together. On 20 May 2022, Plaintiff initiated the underlying action by filing an action for child custody and equitable distribution. On 2 September 2022, the trial court entered an order for child custody by agreement of the parties. On 6 October 2022, Defendant filed an answer and counterclaim for child custody, child support, equitable distribution, postseparation support, and alimony. On 8 May 2023, the trial court entered an order for postseparation support and temporary child support.

On 31 October 2022, Defendant filed a financial affidavit listing her gross monthly income as $3,519.17. On 7 November 2022, Plaintiff filed a financial affidavit listing his gross monthly income as $15,298. On 19 April 2023, Defendant filed an equitable distribution affidavit; Plaintiff did not file an equitable distribution affidavit. On 24 May 2023, Defendant filed a motion for the trial court to adopt her equitable distribution affidavit as the pretrial order. The trial court heard Defendant's motion on 16 January 2024, at which hearing "[P]laintiff was not present, but was duly noticed." Several days later, on 19 January 2024, the trial court entered an order adopting Defendant's equitable distribution affidavit as the pretrial order, and on 12 February 2024, entered an order granting Defendant's motion (the "February 2024 Order"). In the February 2024 Order, the trial court ordered, in relevant part, that "Plaintiff shall not introduce any evidence as to his retirement accounts[.]"

On 13 February 2024, the matters regarding equitable distribution, child support, and alimony came on for hearing. Plaintiff testified, in pertinent part, to the following:

> And here's a paycheck of mine. This is a recent one, as in this January. And my situation currently is such, that . . . it looks like this; I get $3,134.00 a month in my paycheck. . . . Now, there [are] bonus payments that are potentially coming this year, not guaranteed as always are bonus, but I have to make it there first.

Defendant, on cross-examination, introduced into evidence Plaintiff's pay stub "for the period ending on . . . December 31st, 2023[,]" as well as Plaintiff's W-2 showing his 2023 income. Defendant's counsel engaged in the following exchange with Plaintiff:

> Q: All right. And let me show you what's marked as Defendant's Exhibit 23[.]
>
> . . . .
>
> Q. . . . And it shows that your Medicare wages and tips for 2023 were $248,739.71, is that correct?
>
> A. . . . [T]hat is correct in the sense that this is the total number, but this is not what I get; not before tax or anything. This is including everything, my retirement, everything.
>
> . . . .
>
> Q. It is your gross income, correct?
>
> A. Yeah[.]

Plaintiff also testified as to his expenses, Defendant testified as to her income, and the trial court took judicial notice of Defendant's financial affidavit—which included her expenses.

In the Original Order, the trial court distributed assets and debts between the parties, and ordered Plaintiff to pay a distributive award of $132,840.26. In its award of alimony, the trial court found, in relevant part:

> 31. . . . Plaintiff is employed at Corning and earns $20,728.31 gross per month. After his deductions from income, Plaintiff has a net income of $12,458.76 per month.

The trial court did not make any findings regarding the parties' expenses, only providing:

> 44. That the [trial c]ourt consider[ed] the financial affidavits filed by the parties and finds that [D]efendant is a dependent spouse and [P]laintiff is the supporting spouse.

> 45. That Defendant is in need of support from [P]laintiff and that [P]laintiff is capable of providing the same.

In its alimony award, the trial court did not state an actual amount that was awarded, but instead left a blank space where the amount should have been filled in. Plaintiff filed a notice of appeal from the Original Order on 22 April 2024.[1]

Following entry of the Original Order, on 2 May 2024, Defendant filed a Rule 60(a) motion requesting the trial court to fill in the blank space for alimony. On 14 June 2024, the trial court granted Defendant's motion, entered the Rule 60 Order, and that same day entered the Amended Order, which was identical to the Original Order, except that the blank space had been filled with an award of alimony of $1,250.00 per month. Plaintiff timely appealed from both the Rule 60 Order and the Amended Order.

II. Jurisdiction

This Court has jurisdiction to review this appeal from final judgments of a district court, pursuant to N.C.G.S. § 7A-27(b) (2023).

III. Analysis

On appeal, Plaintiff argues the trial court erred in: (A) modifying the Original Order "under the guise of correcting a clerical error"; (B) ordering a distributive award; (C) awarding alimony, where the Amended Order incorrectly calculated Plaintiff's income and failed to include findings as to the parties' expenses; (D) calculating child support using incorrect income information; and (E) ordering Defendant's equitable distribution affidavit to be treated as the pretrial order, and "refusing to allow [Plaintiff] to present evidence." We address each argument, in turn.

A. Rule 60 Motion

[1] Plaintiff first argues the trial court erred in modifying the Original Order "under the guise of correcting a clerical error[.]" Specifically, Plaintiff argues the trial court erred by making a substantive change—an award of alimony of $1,250.00 per month—to the Original Order. We disagree.

---

1. Defendant also filed a notice of appeal on 2 May 2024, but withdrew her notice of appeal on 20 June 2024.

"Rule 60 motions are addressed to the sound discretion of the trial court and will not be disturbed absent a finding of abuse of discretion." *Lumsden v. Lawing*, 117 N.C. App. 514, 518 (1995). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Hartsell v. Hartsell*, 189 N.C. App. 65, 68 (2008) (citation omitted).

Pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. R. Civ. P. 60(a). "Relief under Rule 60(a) is limited to the correction of clerical errors, and it does not permit the correction of serious or substantial errors." *Bossian v. Bossian*, 284 N.C. App. 208, 220 (2022) (citation omitted) (cleaned up); *see also In re D.D.J.*, 177 N.C. App. 441, 444 (2006) (providing that the trial court does "not have the power under Rule 60(a) to affect the substantive rights of the parties or to correct substantive errors in their decisions"). "A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *In re D.D.J.*, 177 N.C. App. at 444 (citation omitted) (cleaned up).

"A trial court abuses its discretion and enters an order outside the scope of the Rule when it alters the effect of the original order." *In re Estate of Meetze*, 272 N.C. App. 475, 479 (2020) (citation omitted); *see also Food Servs. Specialists v. Atlas Rest. Mgmt., Inc.*, 111 N.C. App. 257, 259 (1993) ("We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." (citation omitted)). This Court, however, has consistently concluded that "[t]he amount of money involved is not what creates a substantive right. Instead, it is the source from which this money is derived that determines whether a change in the amount owed is substantive for the purposes of Rule 60(a)." *Robertson v. Steris Corp.*, 237 N.C. App. 263, 270–71 (2014) (quoting *Lee v. Lee*, 167 N.C. App. 250, 254 (2004)) (cleaned up); *see also Ice v. Ice*, 136 N.C. App. 787, 792 (2000).

Here, the trial court properly granted Defendant's Rule 60(a) motion to correct a clerical error. *See Bossian*, 284 N.C. App. at 220. The Original Order provided, in relevant part, the following:

> 26. Plaintiff shall pay Defendant forty-eight (48) monthly alimony payments of $_____ beginning April 15, 2024, and continuing thereafter on the 15th day of each month, with the final payment being April 15, 2028, by electronic transfer or any other method that the parties agree upon in writing. A text message shall constitute a sufficient writing.

The Amended Order was identical to the Original Order, except for the following change in language:

> 26. Plaintiff shall pay Defendant forty-eight (48) monthly alimony payments of $1,250.00 beginning April 15, 2024, and continuing thereafter on the 15th day of each month, with the final payment being April 15, 2028, by electronic transfer or any other method that the parties agree upon in writing. A text message shall constitute a sufficient writing.

Because the Original Order already provided that Plaintiff was required to pay Defendant an alimony award, the Amended Order—which still required Plaintiff to pay Defendant an alimony award—did not "alter[] the effect of the original order" or change the source from which the award was derived. *See In re Estate of Meetze*, 272 N.C. App. at 479; *Robertson*, 237 N.C. App. at 270–71. By filling in only the blank space to set the award of alimony in its Amended Order, the trial court made a change that, at most, affected only "the amount of money involved[,]" which does not affect a substantive right. *See Robertson*, 237 N.C. App. at 270–71; *In re D.D.J.*, 177 N.C. App. at 444. The error in the Original Order was, instead, the type of error that resulted "from a minor mistake or inadvertence," rather than from "judicial reasoning or determination." *See In re D.D.J.*, 177 N.C. App. at 444.

Accordingly, because the trial court, by entry of the Amended Order, did not alter "the effect of the [O]riginal [O]rder" and only altered the amount of money involved, the trial court did not abuse its discretion in granting Defendant's Rule 60(a) motion and in entering the Rule 60 Order and Amended Order. *See In re Estate of Meetze*, 272 N.C. App. at 479; *Robertson*, 237 N.C. App. at 270–71; *see also Lumsden*, 117 N.C. App. at 518. We therefore affirm the correction of the clerical error in the

Amended Order pursuant to Rule 60(a), but as we discuss below, vacate and remand the trial court's awards of alimony and child support.

B. Distributive Award

[2] Plaintiff next argues the trial court erred in ordering a distributive award "without finding that [Plaintiff] had liquid assets from which to pay the award." We disagree.

"Equitable distribution is governed by [N.C.G.S. § 50-20 (2023)], which requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property." *Brackney v. Brackney*, 199 N.C. App. 375, 381 (2009).

> A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination. Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed only upon a showing that it is so arbitrary that it could not have been the result of a reasoned decision.

Id. at 381 (citations and internal quotation marks omitted).

Pursuant to N.C.G.S. § 50-20(e), "it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable." N.C.G.S. § 50-20(e). This presumption is rebuttable "by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind." N.C.G.S. § 50-20(e). The statute further provides that "[i]n any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties." N.C.G.S. § 50-20(e).

"The trial court is required to make findings as to whether the [party] has sufficient liquid assets from which he can make the distributive award payment." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507 (2004). If, however, "a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." *Pellom v. Pellom*, 194 N.C. App. 57, 69 (2008). "[T]he money derived from refinancing the mortgage on the marital home is a source of liquid funds available to a defendant." *Peltzer v. Peltzer*, 222 N.C. App. 784, 791 (2012) (citation omitted) (cleaned up). Similarly, this Court has

provided that an inherited trust retirement account is a liquid asset where it "was available as a resource from which the trial court could order a distributive award." *Comstock v. Comstock*, 240 N.C. App. 304, 321 (2015).

Here, the unchallenged findings of fact demonstrate that Plaintiff was awarded: fifty percent of a "401(k) Investment Plan with Corning," which had a total value of $890,472.43; fifty percent of a "Pension Plan with Corning," which had a total value of $202,602.14; and a home valued at $255,706.77, excluding the value of the mortgage as of the date of separation, which was valued at $158,993.23. Plaintiff was ordered to pay a distributive award of $132,840.26 to Defendant. Given that Plaintiff was awarded the home, and given its value of $255,706.77 with a remaining mortgage of $158,993.23, Plaintiff could seek to refinance the mortgage in order to obtain "a source of liquid funds[.]" *See Peltzer*, 222 N.C. App. at 791. Further, given that the retirement accounts were valued at over $1,093,074, even though Plaintiff was awarded half of the value of these accounts, the remaining value of the accounts is "a resource from which the trial court could order a distributive award." *See Comstock*, 240 N.C. App. at 321.

Accordingly, because Plaintiff's "ability to pay an award with liquid assets can be ascertained from the record," the trial court did not abuse its discretion in awarding a distributive award. *See Pellom*, 194 N.C. App. at 69; *Brackney*, 199 N.C. App. at 381. We therefore affirm the trial court's distributive award.

C. Alimony

[3] Plaintiff next argues the trial court erred in awarding alimony where the Amended Order incorrectly calculated Plaintiff's income and failed to include findings as to the parties' expenses. We agree.

"In all non-jury trials, the trial court must specifically find those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Carpenter v. Carpenter*, 245 N.C. App. 1, 4 (2016) (internal quotation marks omitted). "A trial court's determination of whether a party is entitled to alimony is reviewable *de novo* on appeal." *Id.* at 4. "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re S.W.*, 914 S.E.2d 457, 461 (N.C. Ct. App. 2025) (citation omitted). "The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in

the absence of an abuse of discretion." *Wise v. Wise*, 264 N.C. App. 735, 738 (2019) (citation omitted).

Whether a party is entitled to alimony is governed by N.C.G.S. § 50-16.3(A) (2023). According to the statute, "a party is entitled to alimony if three requirements are satisfied: (1) that party is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors." *Barrett v. Barrett*, 140 N.C. App. 369, 371 (2000); *see also* N.C.G.S. § 50-16.3(A)(a).

> A "dependent spouse" must be either actually substantially dependent upon the other spouse or substantially in need of maintenance and support from the other spouse. A party is "actually substantially dependent" upon her spouse if she is currently unable to meet her own maintenance and support. A party is "substantially in need of maintenance and support" if she will be unable to meet her needs in the future, even if she is currently meeting those needs.

Carpenter, 245 N.C. App. at 4 (citations omitted); *see also* N.C.G.S. § 50-16.1(A)(2) (2023). "To properly find a spouse dependent[,] the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses." *Helms v. Helms*, 191 N.C. App. 19, 24 (2008) (citation omitted) (cleaned up). "It necessarily follows that the trial court must look at the parties' income and expenses in light of their accustomed standard of living." *Id.* at 24.

"[T]he trial court must base this determination [of dependency] on findings of fact sufficiently specific to indicate that the court considered the factors set out" in *Williams v. Williams*, 299 N.C. 174 (1980). *Hunt v. Hunt*, 112 N.C. App. 722, 726 (1993) (citation and internal quotation marks omitted). These factors include:

> (1) [T]he accustomed standard of living of the parties prior to the separation, (2) the income and expenses of each of the parties at the time of the trial, (3) the value of the estates, if any, of both spouses at the time of the hearing, and (4) the length of the marriage and the contribution each party has made to the financial status of the family over the years.

Id. at 726–27 (citing *Williams*, 299 N.C. at 183–85).

Once the trial court has determined that a dependent spouse is entitled to alimony, the trial court must "exercise its discretion in determining the amount, duration, and manner of payment of alimony." N.C.G.S. § 50-16.3(A)(b). To determine the amount, duration, and manner of payment of alimony, the trial court is required to consider the sixteen factors set forth in N.C.G.S. § 50-16.3(A)(b). *See* N.C.G.S. § 50-16.3(A)(b).

1. Plaintiff's Income

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Works v. Works*, 217 N.C. App. 345, 347 (2011) (citation omitted). "To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." *Id.* at 347 (citation omitted). This Court has concluded that the trial court did not abuse its discretion in using a party's income from years prior to those of the hearing where "the trial court expressed concerns about [the party's] reported income and found that [the party's] numbers were not credible." *Zurosky v. Shaffer*, 236 N.C. App. 219, 243 (2014).

In *Green v. Green*, the trial court made no findings of fact regarding the defendant's "current income at the time of the order" and based its decision on whether the defendant had the ability to pay alimony based "on an average of [the d]efendant's two prior years' income." 255 N.C. App. 719, 734 (2017). On appeal, this Court provided that "the trial court did not make findings of fact as to whether [the d]efendant's professed actual income at the time of the order was reliable or unreliable before basing its decision regarding [the d]efendant's ability to pay alimony on an average of prior years' income." *Id.* at 734. This Court concluded that the trial court "abused its discretion in basing its decision regarding [the d]efendant's ability to pay alimony on an average of [the d]efendant's monthly gross income from prior years without first determining [the d]efendant's current monthly income, and whether that reported current income was credible." *Id.* at 734–35. This Court further concluded that "[o]n remand, the trial court must make findings of fact regarding [the d]efendant's" current income, and "may only use prior years' incomes if the trial court finds as fact that [the d]efendant's actual income is not credible, or is otherwise suspect." *Id.* at 735.

Here, the matter came on for hearing in February 2024. In its award of alimony, the trial court found, in relevant part:

> 31. . . . Plaintiff is employed at Corning and earns $20,728.31 gross per month. After his deductions from income, Plaintiff has a net income of $12,458.76 per month.

During the hearing, however, Plaintiff testified that that he earned "$3,134.00 a month[,]" based on a paycheck from January 2024. Defense counsel, on cross-examination, introduced evidence of Plaintiff's income solely via a pay stub "for the period ending on . . . December 31st, 2023[,]" and via Plaintiff's 2023 W-2. Defense counsel then elicited from Plaintiff that his 2023 gross income was $248,739.71. Although the trial court's Finding of Fact 31, on its face, purports to demonstrate Plaintiff's current 2024 earnings, it actually demonstrates Plaintiff's 2023 income: dividing $248,739.71 annual income by twelve months yields the result of $20,728.31 per month, the gross monthly amount included in Finding of Fact 31. This result also contrasts with Plaintiff's financial affidavit, which demonstrates a gross monthly income of $15,298—significantly higher than Plaintiff's testimony as to his January 2024 paycheck of "$3,134.00"—an amount less than that included in Finding of Fact 31.

Similar to *Green*, where the trial court based its decision on whether the defendant had the ability to pay alimony based on "an average of [the d]efendant's two prior years' income" rather than on the defendant's current income, so here did the trial court base its decision on whether Plaintiff had the ability to pay alimony based on evidence of Plaintiff's 2023 income, rather than based on evidence of Plaintiff's "current income at the time of the order[.]" 255 N.C. App. at 734; *see also Works*, 217 N.C. App. at 347. While the trial court was permitted to consider Plaintiff's ability to pay based on evidence of his 2023 income, it was required to either make a finding as to Plaintiff's 2024 income, or make findings of fact that Plaintiff's "actual income [was] not credible, or [was] otherwise suspect" before making a finding as to Plaintiff's 2023 income, both of which the trial court failed to do in the case *sub judice*. *Green*, 255 N.C. App. at 735; *see also Works*, 217 N.C. App. at 347; *Zurosky*, 236 N.C. App. at 243.

Defendant argues this Court's holding in *Robinson v. Robinson* demonstrates that the trial court "was permitted to consider Plaintiff's yearly income" and could appropriately rely on evidence of Plaintiff's 2023 income in determining his current income. 210 N.C. App. 319, 329 (2011). Defendant's reliance on *Robinson*, however, is misplaced. In *Robinson*, the trial court determined that the plaintiff "consistently earned over $100,000 per year[.]" *Id.* at 327. The trial court made this determination by relying on the parties' tax returns from previous years. *Id.* at 327. On appeal, the plaintiff did not challenge the defendant's entitlement to alimony, but challenged only "the amount of alimony awarded." *Id.* at 326. This Court concluded that, in determining the "reasonable needs and expenses of the parties[,]" the trial court did not abuse its discretion "in

relying upon [the plaintiff's] previous year tax records, [the plaintiff's] testimony as to his expenses, and the [trial] court's 'own common sense and every-day experiences' in order to conclude that the alimony payment was affordable." *Id.* at 329 (citations omitted). This Court further provided that "[t]he trial court's inability to make more detailed findings of fact regarding [the plaintiff's] current actual ability to pay was due to his failure to attend and testify at the hearing or to submit more detailed financial information about his current expenses." *Id.* at 329.

Here, unlike in *Robinson*, Plaintiff has specifically challenged Defendant's entitlement to alimony, which warrants a de novo review, rather than solely a review based on the trial court's abuse of discretion. *See Carpenter*, 245 N.C. App. at 4; *Wise*, 264 N.C. App. at 738. Additionally, unlike in *Robinson*, where the plaintiff failed "to attend and testify at the hearing or to submit more detailed financial information[,]" here, Plaintiff: attended the hearing, testified as to his 2024 income, and had also provided a financial affidavit prior to the hearing. 210 N.C. App. at 329. The trial court, therefore, had the ability to make findings of fact about Plaintiff's 2024 income—as opposed to solely his 2023 income—and alternatively, had the ability to make findings of fact that Plaintiff's current income was "not credible, or [] otherwise suspect[,]" which would have permitted the trial court to use Plaintiff's 2023 income. *See Green*, 255 N.C. App. at 735; *Robinson*, 210 N.C. App. at 329. The trial court therefore erred in basing its award of alimony on Plaintiff's 2023 income without making the appropriate findings of fact. *See Green*, 255 N.C. App. at 734–35.

2. The Parties' Expenses

In addition to the lack of appropriate findings of fact as to Plaintiff's income, the trial court failed to make "findings of fact sufficiently specific to indicate that the court considered" the parties' expenses at the time of trial. *See Hunt*, 112 N.C. App. at 726–27 (citation and internal quotation marks omitted). The trial court made no findings of fact on the parties' expenses or as to their standard of living, only finding that the trial court "consider[ed] the financial affidavits filed by the parties" in determining that Defendant was the dependent spouse, and Plaintiff the supporting spouse, as set out in Findings of Fact 44 and 45. Because the trial court "must look at the parties' income and expenses in light of their accustomed standard of living[,]" in order to determine whether a spouse is a dependent spouse, and the trial court's order lacks any findings of fact as to their specific income or as to their standard of living, this Court cannot ascertain whether the trial court considered the *Williams* factors in making its award of alimony, and much less

ascertain whether it abused its discretion in the amount awarded. *See Helms*, 191 N.C. App. at 24; *Hunt*, 112 N.C. App. at 726–27; *see also Wise*, 264 N.C. App. at 739; N.C.G.S. § 50-16.3(A)(b).

Accordingly, we vacate the trial court's award of alimony, and remand for further findings of fact as to Plaintiff's current income at the time of the order, or as to Plaintiff's prior year's income, so long as the trial court makes the requisite findings of fact that demonstrate Plaintiff's current income was "not credible, or [] otherwise suspect." *See Green*, 255 N.C. App. at 735. We further remand for specific findings regarding the parties' expenses and accustomed standard of living. *See Hunt*, 112 N.C. App. at 726–27; *see also Wise*, 264 N.C. App. at 739.

D. Child Support

[4] Plaintiff next argues the trial court erred in calculating child support using incorrect income information. For the same reasons discussed previously, we agree.

"Upon appellate review, a trial court's determination of the proper child support payment will not be disturbed absent a clear abuse of discretion." *State v. Williams*, 163 N.C. App. 353, 356 (2004). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287 (2005).

Under N.C.G.S. § 50-13.4(c) (2023), the trial court "shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to" N.C.G.S. § 50-13.4(c)(1). N.C.G.S. § 50-13.4(c). The trial court may deviate from the guidelines if,

> after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate[.]

N.C.G.S. § 50-13.4(c). In doing so, "the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." N.C.G.S. § 50-13.4(c).

"[A] party's ability to pay child support is ordinarily determined by his or her actual income at the time the award is made or modified." *Greer v. Greer*, 101 N.C. App. 351, 355 (1991); *see also Eidson*

v. Kakouras, 286 N.C. App. 388, 403 (2022) ("It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." (citation omitted)). Similar to the income requirements for alimony, "[a] person's *capacity* to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Greer*, 101 N.C. App. at 355–56.

Although this Court has provided that "a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes[,]" *see State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 208 (2009), when a trial court uses prior years' income, it must still make the appropriate findings of fact, *see Green*, 255 N.C. App. at 735; *see also Kaiser v. Kaiser*, 259 N.C. App. 499, 506 (2018) ("What matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income.").

Here, for the same reasons discussed previously as to the trial court's award of alimony, we conclude the trial court erred in using Plaintiff's 2023 income to calculate Plaintiff's income for purposes of awarding child support without making the appropriate findings of fact. *See Green*, 255 N.C. App. at 735; *see also Greer*, 101 N.C. App. at 355. Accordingly, we vacate the trial court's order, and remand for additional findings of fact. We therefore do not reach the merits of Plaintiff's further argument regarding the child support guidelines.

E. Pretrial Order

[5] Plaintiff finally argues that the trial court erred in ordering Defendant's equitable distribution affidavit to be treated as the pretrial order, and "refusing to allow [Plaintiff] to present evidence." For the following reasons, Plaintiff's argument is not preserved for appellate review.

Pursuant to the North Carolina Rules of Appellate Procedure, an appellant's notice of appeal "shall designate the judgment or order from which appeal is taken[.]" N.C. R. App. P. 3(d). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347 (2008). This Court, however, "has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to" N.C.G.S. § 1-278 (2023). *Id.* at 348; *see* N.C.G.S.

§ 1-278. "Review under N.C.G.S. § 1–278 is permissible if three conditions are met: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Yorke*, 192 N.C. App. at 348 (citation and internal quotation marks omitted).

Here, Plaintiff has failed to meet the first requirement permitting review of the February 2024 Order. *See id.* at 348. In the trial court's order, the trial court found that: "[P]laintiff was not present, but was duly noticed[,]" and "[P]laintiff has failed to timely submit his equitable distribution affidavit pursuant to local rules[.]" As Plaintiff was not present at the hearing, and did not submit an equitable distribution affidavit prior to the hearing, Plaintiff did not raise a timely objection before the trial court and thus failed to preserve the issue for appellate review. *See* 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."); *see*, *e.g.*, *Kaylor v. Kaylor*, 296 N.C. App. 80, 88 (2024) (concluding that the defendant failed to preserve his argument for appellate review where the defendant had "failed to attend" multiple case review hearings and the equitable distribution trial, and "failed to offer an equitable distribution inventory affidavit at any point").

Accordingly, because Plaintiff did not timely object to the trial court's order, Plaintiff did not meet the first requirement to have the trial court's order reviewed under N.C.G.S. § 1-278; as such, we dismiss Plaintiff's alleged error as to the February 2024 Order. *See Yorke*, 192 N.C. App. at 347–48.

IV. Conclusion

Upon review, we conclude: first, the trial court did not abuse its discretion in granting Defendant's Rule 60 motion because the Amended Order corrected only a clerical error in the Original Order; second, the trial court did not err in ordering a distributive award because Plaintiff's ability to pay the award can be ascertained from the Record; third, the trial court erred in awarding alimony where it failed to make findings of fact as to Plaintiff's income; fourth, the trial court erred in calculating child support where it failed to make findings of fact as to Plaintiff's income; and fifth, Plaintiff's argument concerning the pretrial order is not preserved for appellate review. We therefore affirm the Rule 60 Order, affirm the Amended Order in part, vacate and remand the

Amended Order as to alimony and child support, and dismiss Plaintiff's argument regarding the pretrial order.

AFFIRMED In Part, VACATED AND REMANDED In Part, and DISMISSED In Part.

Judges STADING and MURRY concur.

KAREN TYSON, AS ADMINISTRATOR OF THE ESTATE OF FRANKLIN SCOTT TYSON, PLAINTIFF
v.
ELG UTICA ALLOYS, INC., ELG UTICA ALLOYS HOLDING CORP., ELG UTICA ALLOYS (HARTFORD), INC., AND ELG UTICA ALLOYS (MONROE) LLC, D/B/A ABS ALLOYS & METALS USA, LLC, DEFENDANTS.

No. COA24-740

Filed 18 June 2025

Workers' Compensation—exclusivity provision—Woodson claim—forecast of evidence insufficient—denial of summary judgment reversed

In a tort action brought on behalf of the estate of an employee who was killed by an explosive fire while operating a zirconium crusher at a metal recycling plant owned and operated by defendants (a parent company and its subsidiaries), the trial court erred in denying defendants' motion for summary judgment where plaintiff failed to forecast evidence that would establish a *Woodson* claim—an exception to the exclusivity provision of the Workers' Compensation Act permitting civil tort claims arising from work-related injuries resulting from conduct tantamount to an intentional tort. The exacting standard and high bar for a *Woodson* claim was not satisfied where no evidence showed that defendants—despite having knowledge of some possibility (or even probability) of injury or death—recognized the immediacy of the hazard facing the employee, and, thus, no evidence indicated defendants intended, or were manifestly indifferent to, the employee's injury and death. Accordingly, the trial court's denial of defendants' motion for summary judgment was reversed.

Appeal by defendants from order entered 23 April 2024 by Judge Jonathan Perry in Union County Superior Court. Heard in the Court of Appeals 18 March 2025.

Comerford Chilson & Moser, LLP, by John A. Chilson, The Law Offices of William K. Goldfarb, by William K. Goldfarb, and Love & Hutaff, PLLC, by Richard R. Hutaff, for plaintiff-appellee.

Raynor Law Firm, PLLC, by Kenneth R. Raynor, for defendants-appellants.

ZACHARY, Judge.

This case concerns the *Woodson* exception to the exclusivity provision of the North Carolina Workers' Compensation Act ("the Act"). *See* N.C. Gen. Stat. § 97-10.1 (2023); *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991). As discussed in greater detail herein, a *Woodson* claim presents "an exception to the Act's exclusivity provision . . . for civil actions brought as a result of conduct that is tantamount to an intentional tort." *Hidalgo v. Erosion Control Servs., Inc.*, 272 N.C. App. 468, 471, 847 S.E.2d 53, 56 (2020) (cleaned up).

Plaintiff Karen Tyson, as the administratrix of the estate of her deceased brother, Franklin Scott Tyson ("Decedent"), asserted a *Woodson* claim against Defendants ELG Utica Alloys, Inc., ELG Utica Alloys Holding Corp., ELG Utica Alloys (Hartford), Inc., and ELG Utica Alloys (Monroe) LLC, d/b/a ABS Alloys & Metals USA, LLC.[1] Defendants appeal from the trial court's order denying their motion for summary judgment. We conclude that Plaintiff's forecast of evidence failed to establish a *Woodson* claim, and therefore, the trial court erred in denying Defendants' motion for summary judgment. Accordingly, we reverse and remand.

I. Background

On 7 April 2020, Decedent was killed by an explosive fire while operating the zirconium crusher at Defendants' metal processing plant in Monroe, North Carolina. Defendants' Monroe facility recycled metal used in the aerospace industry, including zirconium. Defendants processed zirconium turnings, which are spiral shavings of the metal, using a crusher.

1. In Plaintiff's amended complaint, she refers to Defendants collectively as "members of a conglomerate," including a parent company and subsidiaries. In that Defendants do not object to their treatment as a collective party, for the purposes of this appeal and for ease of reading, we refer to them collectively as "Defendants."

Prior to the fatal explosion, there had been a few inconsequential, slow-burning zirconium fires at the Monroe facility—including at least one that could not be put out by Class D fire extinguishers, which was resolved when Defendants' employees "pulled the materials involved in [the] fire outside the building to let it burn out."

Defendants had also previously received citations from federal and state authorities for various safety violations. Significantly, none of these citations specifically related to zirconium. The federal Occupational Safety and Health Administration ("OSHA") cited Defendants' facility in Hartford, Connecticut, regarding its handling of combustible titanium dust. The Occupational Safety and Health Division of the North Carolina Department of Labor ("NC OSHA") cited Defendants for multiple violations at the Monroe facility, including several related to the safe handling of hazardous materials. Following the fatal incident, NC OSHA issued several additional citations related to Defendants' handling of zirconium and the crusher.

Acting as the administratrix of Decedent's estate, on 4 March 2022, Plaintiff filed a complaint against Defendants in Union County Superior Court. Defendants filed a motion to dismiss and answer on 9 May 2022. On 7 September 2022, Plaintiff filed an amended complaint, asserting a *Woodson* claim as well as "all other available claims not barred/excluded under [the Act]." Defendants filed their motion to dismiss and answer on 31 October 2022.

After extensive discovery, Defendants filed a motion for summary judgment on 16 February 2024. On 27 February 2024, Plaintiff likewise filed a motion for summary judgment. Both motions came on for hearing in Union County Superior Court on 8 April 2024.

On 23 April 2024, the trial court entered a pair of orders denying the parties' respective motions for summary judgment. Defendants timely filed notice of appeal from the order denying their motion for summary judgment.

II. Appellate Jurisdiction

Defendants acknowledge the interlocutory nature of the order from which they appeal but nonetheless assert that this Court may properly exercise jurisdiction because the trial court's order affects a substantial right.

"Generally, a party has no right of appeal from an interlocutory order." *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 581, 668 S.E.2d 114, 116 (2008). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it

for further action by the trial court in order to settle and determine the entire controversy." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted).

"An exception exists when the order will deprive the party of a substantial right absent an immediate appeal." *Edwards*, 193 N.C. App. at 581, 668 S.E.2d at 116; *see* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a). "As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a substantial right." *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (cleaned up).

However, as Defendants note, it is well established that the denial of a motion for summary judgment based upon the Act's exclusivity provision affects a substantial right. *See, e.g.*, *Hidalgo*, 272 N.C. App. at 470–71, 847 S.E.2d at 55 (exercising jurisdiction where the plaintiff appealed denial of a summary judgment motion pursuant to the exclusivity provision of the Act); *see also Edwards*, 193 N.C. App. at 581, 668 S.E.2d at 116. In that Defendants have sufficiently demonstrated that the trial court's interlocutory order denying their motion for summary judgment affects a substantial right, this appeal is properly before us.

III. Discussion

On appeal, Defendants argue that the trial court erred by denying their motion for summary judgment because "Plaintiff's evidence in this case fails to meet the conduct tantamount to an intentional tort required by *Woodson*." (Italics added). We agree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Hidalgo*, 272 N.C. App. at 471, 847 S.E.2d at 55 (citation omitted). When conducting de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

"There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim." *Edwards*, 193 N.C. App. at 582, 668 S.E.2d at 117 (cleaned up). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Id.* (citation omitted).

B. The *Woodson* Exception

The Act is intended "to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003), *reh'g denied*, 358 N.C. 159, 593 S.E.2d 591 (2004). "However, to balance competing interests between employees and employers, the Act includes an exclusivity provision, which 'limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damage awards in civil actions.' " *Hidalgo*, 272 N.C. App. at 471, 847 S.E.2d at 56 (quoting *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227).

In *Woodson*, our Supreme Court recognized a limited exception to the Act's exclusivity provision:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

329 N.C. at 340–41, 407 S.E.2d at 228.

Woodson set forth "an exacting standard that plaintiffs must meet in order to escape the exclusivity provision" of the Act. *Hidalgo*, 272 N.C. App. at 471, 847 S.E.2d at 56. Since *Woodson*, our Supreme Court has clarified that plaintiffs must produce "uncontroverted evidence of the employer's intentional misconduct . . . where such misconduct is substantially certain to lead to the employee's serious injury or death." *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668. Thus, "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct." *Id.*

C. Analysis

On appeal, Defendants argue that the trial court erred by denying their motion for summary judgment because Plaintiff failed to meet the exacting standard required by *Woodson*. Specifically, they contend that Plaintiff failed "to show that there was evidence that . . . [Defendants]

intended that [Decedent] would be injured from working on the crusher to process zirconium or that they were manifestly indifferent to the consequences of his doing so as required by the *Woodson* exception."

This case illustrates the high bar established by our Supreme Court in *Woodson* and reinforced by *Whitaker*. In fact, at the hearing below, Defendants noted that Plaintiff's interrogatory responses "summarize[d] a case for negligence, maybe willful and wanton negligence" against Defendants, but maintained that Plaintiff had not shown that any "misconduct [wa]s tantamount to an intentional tort" as required by *Woodson* and its progeny. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228; *see also*, *e.g.*, *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993) (recognizing that a *Woodson* claim requires "a higher degree of negligence than willful, wanton and reckless negligence").

Defendants rely on a series of cases from our appellate courts rejecting *Woodson* claims in which there was a "lack of evidence of the defendant[-]employer's recognition of the immediacy of the hazard the injured employee [wa]s faced with and thus there [wa]s no evidence that the employer intended the employee to be injured or that they were manifestly indifferent to the consequence." For example, in *Edwards*, this Court reversed the denial of a defendant-employer's motion for summary judgment—notwithstanding the plaintiff's presentation of "evidence relating to the results of investigations following the [fatal gas leak], including expert testimony regarding the likelihood of an accident"—where "there [wa]s no evidence that [the employer] knew, prior to [the] decedent's death, that a carbon monoxide leak was substantially certain to occur." 193 N.C. App. at 584, 668 S.E.2d at 118. Indeed, "although the evidence tended to show that [the employer] did not adequately maintain its equipment," this Court nonetheless explained that "even a knowing failure to provide adequate safety equipment in violation of [NC] OSHA regulations does not give rise to liability under *Woodson*." *Id.* (cleaned up).

As in *Edwards*, here, Plaintiff relies in part upon NC OSHA's subsequent investigation of the fatal fire and resulting citations for "Serious" and "Repeat Serious" violations arising from Defendants' alleged failure "to protect [Decedent] from recognized hazards likely to cause death or serious physical harm." However, in *Edwards*, although the "plaintiff presented evidence relating to the results of investigations following the accident, including expert testimony regarding the likelihood of an accident, there [wa]s no evidence that [the employer] knew, *prior* to [the] decedent's death, that [the accident] was *substantially certain* to occur." *Id.* (emphasis added). "As discussed in *Woodson*, simply

having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a *substantial certainty* of injury or death." *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 668–69 (emphasis added).

In addition, Plaintiff maintains that Defendants were "aware of, but repeatedly ignored, safety warnings associated with the grinding of zirconium." But as Defendants persuasively observe, the evidence shows that their employees "thought that any fires resulting from the processing of zirconium would be slow burning and easily capable of extinguishment." Plaintiff points to prior zirconium fires at the Monroe facility, one of which Defendants admitted could not be extinguished with a Class D fire extinguisher; however, even that fire was not remotely comparable to an explosion. Defendants' employees simply "pulled the materials involved in [the] fire outside the building to let it burn out." The record evidence suggests that, while zirconium fires were not unprecedented, Defendants had no "knowledge of a substantial certainty" of a sudden conflagration with the sustained force and intensity of the one that tragically killed Decedent in this case. *Id.* at 558, 597 S.E.2d at 669.

Plaintiff also repeatedly asserts that Defendants "purposefully placed [Decedent] in an unprotected location, without safety gear, directly above known sparks and fires emitting from an explosive metal being ground within a crusher." However, our Supreme Court in *Pendergrass* concluded that knowledge that "certain dangerous parts of [a] machine were unguarded when [the employer] instructed [the employee] to work at the machine" did not support "an inference that [the employer] intended that [the employee] be injured or that they were manifestly indifferent to the consequences of his doing so." 333 N.C. at 238, 424 S.E.2d at 394.

Defendants candidly acknowledge that, when viewed in the light most favorable to Plaintiff, there was evidence presented "from which a juror could find that the management of [Defendants] should have or could have recognized that their understanding of the risk of processing zirconium was flawed and that they should have taken some additional actions, much like those identified by . . . Plaintiff's experts." Yet as Defendants correctly note, although this evidence might support a claim for negligence, it does not amount to misconduct "tantamount to an intentional tort," as is required for a successful *Woodson* claim. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228.

Ultimately, our careful review of the record in the light most favorable to Plaintiff reveals that Defendants have "demonstrate[d] that [Plaintiff] cannot prove the existence of an essential element" of the

asserted *Woodson* claim. *Edwards*, 193 N.C. App. at 582, 668 S.E.2d at 117 (citation omitted). "Although we are sensitive to the facts of this case, we emphasize as did our Supreme Court in *Whitaker*, there must be 'uncontroverted evidence of the employer's intentional misconduct . . . where such misconduct is substantially certain to lead to the employee's serious injury or death.' " *Hidalgo*, 272 N.C. App. at 474, 847 S.E.2d at 57 (quoting *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668).

We conclude that "Plaintiff has not forecast evidence of intentional misconduct by Defendants substantially certain to lead to Decedent's death so as to create a genuine issue of material fact sufficient to survive summary judgment on Plaintiff's claims arising under *Woodson*." *Id.* Accordingly, the trial court erred by denying Defendants' motion for summary judgment.

IV. Conclusion

For the foregoing reasons, the trial court's order denying Defendants' motion for summary judgment is reversed, and this matter is remanded for entry of an order granting Defendants' motion for summary judgment. *See id.* at 474, 847 S.E.2d at 58.

REVERSED AND REMANDED.

Judges STROUD and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JUNE 2025)

BRINDLEY v. MOORE No. 24-724	Dare (17CVD000228)	Affirmed
BRYANT v. FIELDS No. 24-573	Wake (22CVS014854-910)	Affirmed
BRYANT v. FIELDS No. 24-610	Wake (22CVS014854)	Affirmed
DEMARIA BLDG. CO., INC. v. LAB'Y DESIGN, EQUIP. & INSTALLATIONS LLC No. 24-882	Wake (23CVS008595-910)	Affirmed
GRAHAM v. TAYLOR No. 24-904	Wake (23CVS023366-910)	Dismissed
IN RE W.G.T. No. 24-862	Henderson (23JT000010) (23JT000011)	Affirmed
IN RE WILL OF HOBGOOD No. 24-876	Durham (22E000983)	Affirmed
LINEBERGER v. GLENN WILLIAMS CONSTR. CO. No. 24-608	N.C. Industrial Commission (IC19-733745)	Affirmed in Part, Vacated in Part, and Remanded.
LONANO v. MURPHY No. 24-256	Guilford (23CVD520660)	Remanded
McMILLAN v. McMILLAN No. 24-850	Yancey (19CVD000113)	Affirmed
ROBESON CNTY. DEP'T OF SOC. SERVS. v. MOORE No. 24-709	Robeson (15CVD002684)	Vacated and Remanded
STATE v. BRASWELL No. 24-864	Pitt (22CRS052534)	No Error
STATE v. BRYANT No. 24-708	Caldwell (21CRS052409) (21CRS052410)	Vacated and Remanded
STATE v. CARDENAS No. 24-778	Alamance (20CRS052648)	No Error.

STATE v. COREY No. 24-512	Pitt (22CRS051777) (23CRS000190)	No Error
STATE v. GUZMAN-LOBO No. 24-589	Mecklenburg (17CRS246281) (17CRS246282) (17CRS246362) (17CRS246363) (17CRS246994) (17CRS246995) (17CRS246996) (17CRS246997) (18CRS201187) (18CRS201932) (18CRS201933)	No Error in part; Denied in part.
STATE v. JOHNSON No. 24-762	Guilford (22CRS028200) (22CRS067207)	Affirmed
STATE v. KELTON No. 24-513	Wake (20CR002127-910) (20CR215474-910) (20CR215486-910) (21CR001359-910) (21CR201282-910)	No Plain Error In Part, and Dismissed In Part.
STATE v. MARTINEZ No. 24-963	Brunswick (21CRS051816-19)	No Error
STATE v. MOSS No. 24-1024	Cabarrus (20CRS053990)	Affirmed
STATE v. SATAPATHY No. 24-359	New Hanover (21CRS53963)	No Error
STATE v. SPEAS No. 24-1001	Forsyth (22CRS000171) (22CRS054589)	No Error
STATE v. SUTTON No. 24-524	Swain (19CRS050255)	No Error
STATE v. WATSON No. 24-696	Macon (22CRS290151)	Affirmed
WOODRUFF v. MARTIN No. 24-1110	Halifax (24CVD000186)	Vacated

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