

299 N.C. App.—No. 4

Pages 560-822

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 25, 2026

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FILED 2 JULY 2025

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APPEAL AND ERROR

Child visitation—disability accommodation for mother—failure to raise issue in trial court—waiver—In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives, where the mother argued for the first time on appeal that the trial court failed to adequately accommodate her disability as required by the Americans with Disabilities Act (with regard to the location of her visits with the child), the issue was waived for not having been raised at the trial level. **In re A.J.J., 616.**

Frivolous appeal—multiple assertions of nonexistent jurisdiction—sanctions imposed—In a case in which plaintiff took a voluntary dismissal without

APPEAL AND ERROR—Continued

prejudice of a claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), which divested the Industrial Commission of subject matter jurisdiction over the matter, where defendants (the wife's employer and its insurance company) thereafter repeatedly submitted forms and filings to the Commission and asserted that the Commission had jurisdiction to grant their requests for relief, the appellate court determined that defendants' appeal of the Commission's order denying defendants' filings was frivolous and taken to harass and cause an unnecessary increase in the cost of litigation. Therefore, the appellate court decided in its discretion to impose sanctions, pursuant to Appellate Rule 34, by taxing defendants the costs of the appeal and attorney's fees incurred by plaintiff in defending the appeal. **Marlow v. TCS Designs, Inc.**, 680.

Interlocutory appeal—governmental and public official immunity—denial of Civil Procedure Rule 12(b) motion—substantial right—In a tort action brought by the parents of a child who was sexually assaulted during a private after-school language program that used the facilities of a public school system to conduct its business, the interlocutory appeals of defendants (the school system and three of its employees) from the denials of their motions to dismiss the claims pursuant to Civil Procedure Rule 12(b)(2) and (b)(6) were properly before the appellate court because the motions asserted governmental and public official immunity. Those forms of immunity, which are not mere affirmative defenses to liability, but rather shield defendants entirely from having to answer for their conduct in a civil suit for damages, implicate personal jurisdiction and, thus, affect a substantial right. **Brady v. Charlotte-Mecklenburg Bd. of Educ.**, 560.

Preservation of issues—sufficiency of evidence—supporting two separate assault charges—issue raised by trial court—In an appeal from multiple convictions arising from a domestic violence incident, where defendant argued that the trial court erred in submitting two assault by strangulation charges to the jury where the State presented insufficient evidence of two separate assaults, but where defendant expressly excluded both assault by strangulation charges from his general motion to dismiss for insufficiency of the evidence, defendant's appellate argument was still preserved because the trial court had raised the issue at the hearing on defendant's motion, heard arguments from defendant and the State, and then ruled on the issue. **State v. Tadlock**, 754.

ASSAULT

By strangulation—sufficiency of evidence—supporting two separate assault charges—distinct interruptions—In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not err in submitting two separate charges of assault by strangulation to the jury where, viewed in the light most favorable to the State, there was sufficient evidence from which the jury could have found that defendant committed two separate assaults: first, by choking his wife with his hands as they moved across the kitchen, and second, by strangling his wife with his arm after she fell to the floor. Based on the evidence showing changes in both the location and the method of attack, the jury could have found a distinct interruption separating defendant's strangulation of his wife into two different assaults. **State v. Tadlock**, 754.

By strangulation—two charges—injuries caused by each assault—not specified in jury instructions—right to unanimous jury verdict—not violated—In a prosecution for multiple crimes arising from a domestic violence incident between

ASSAULT—Continued

defendant and his wife, the trial court did not plainly err when instructing the jury on two separate charges of assault by strangulation, where its failure to distinguish the injuries caused by each charged assault did not violate defendant's right to a unanimous jury verdict on the number of assaults he had committed. To begin with, the number of counts against him was equal to the number of assaults presented in the evidence, which was also equal to the number of indictments against defendant for assault by strangulation. The trial court also instructed the jury on assault by strangulation twice—once for each charge—and told the jurors that they could not reach a verdict by majority vote. Further, the verdict sheets presented each charge separately and differentiated them by including the words “alleged by hands” or “alleged by arm” in bold font. Finally, the State presented ample evidence of the victim's injuries, including photographs along with testimony from both the victim and the doctor who treated her after the assaults. **State v. Tadlock, 754.**

Multiple assaults—sufficiency of evidence—distinct interruption—change in location—At a trial for three different assault charges arising from the same domestic violence incident, the trial court properly denied defendant's motion to dismiss all but one assault charge where the State presented substantial evidence that defendant committed three separate assaults on his wife rather than one continuous assault. Specifically, the evidence—including testimony from defendant's wife—showed that: defendant pushed his way into the home, struck his wife, and then grabbed her neck, after which she broke free and begged defendant to stop (the first assault); then, defendant pushed his wife up against the kitchen stove, placed one hand around her throat, and struck her in the ribs and stomach with his free hand, after which the wife broke free again and ran to a different part of the home (the second assault); and, finally, defendant pinned his wife onto the floor, got on top of her, and strangled her until she managed to escape and call the police (the third assault). **State v. French, 711.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning—custody to non-parents—delegation of visitation rights—abuse of discretion—In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives (“custodians”) and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court abused its discretion by authorizing the custodians to modify or cease the mother's visitation, including to change visitation from supervised to unsupervised. The visitation provision containing the impermissible delegation of authority in the Chapter 50 order was vacated and the matter was remanded for further proceedings. **In re A.J.J., 616.**

Permanency planning—custody to non-parents—verification—adequacy of resources—In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives (“custodians”) where there was sufficient evidence that the custodians had adequate resources to provide for the child's needs as required by N.C.G.S. § 7B-906.1(j). Although there was no evidence of either custodian's employment or income, section 7B-906.1(j) provides that greater than six consecutive months of placement with a prospective custodian is evidence of adequate resources; here, the child had resided with the custodians for more than six months, and, further, evidence was presented that the child had his own room, storage space, TV, Internet, and phone, and that his needs were being met. **In re A.J.J., 616.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Permanency planning—custody to non-parents—verification—understanding of legal significance—In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives (“custodians,” with whom the juvenile had been placed for over seven months) where there was sufficient evidence that the custodians understood the legal significance of obtaining custody as required by N.C.G.S. § 7B-906.1(j), including testimony from a department of social services (DSS) social worker, testimony from one of the custodians, and reports from DSS and the guardian ad litem. The evidence demonstrated that both custodians understood the recommendations from DSS, wanted to receive custody of the child, had been providing for the various needs of the child since his placement with them, and were willing to continue to meet those needs going forward. **In re A.J.J., 616.**

Stipulation—signed by only one respondent and objected to by the other—sole basis for adjudication—vacated and remanded—In an abuse and neglect proceeding concerning two children, the district court erred in basing its adjudication solely on a stipulation to twenty-three allegations—largely concerning conduct by the mother—that was not signed by the mother or her counsel, but rather was signed only by the father and his counsel, and, moreover, that was accepted over the mother’s specific objection and despite her request that the court hold a hearing on the merits of the petitions. A stipulation by one respondent-parent may not bind or be used against another respondent-parent who was not a party to the stipulation and who objected to its use. Absent the findings of fact derived from stipulations concerning the mother’s conduct, the district court’s conclusion of law that the juveniles were abused and neglected was unsupported, and, accordingly, the adjudication and disposition orders were vacated and the matter was remanded for a new adjudicatory hearing. **In re T.C., 648.**

Transfer to Chapter 50 proceeding—statutory findings—In a neglect and dependency proceeding in which the trial court awarded custody of the minor child to paternal relatives (“custodians”) and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court made the necessary findings of fact pursuant to N.C.G.S. §§ 7B-911(c)(1)-(2) and 50-13.2(a). The court’s findings were supported by the evidence, including the finding that the child was happy in his placement and that his needs were being met. The trial court’s findings regarding other relevant factors, such as the mother’s lack of progress in her case plan and the custodians’ willingness and ability to provide for the child, supported its conclusion that the custody award was in the child’s best interest. Finally, the court’s ultimate finding that continued state intervention was no longer necessary was supported by evidence in the record, including: statements by the custodians and the child’s mother about plans to carry out visitation; a report by the department of social services (DSS) recommending that DSS, counsel, and the guardian ad litem should be released; and testimony from a DSS social worker that there was no reason for the court to stay involved in the child’s life after three years. **In re A.J.J., 616.**

CHILD CUSTODY AND SUPPORT

Grandparents’ complaint for child custody—motion to dismiss for lack of standing—reviewed under wrong standard—After plaintiff-grandparents filed a complaint seeking custody of their minor grandson, an order granting defendant-father’s motion to dismiss for lack of standing—seemingly filed pursuant to Civil Procedure Rule 12(b)(6)—was reversed and the matter was remanded because

CHILD CUSTODY AND SUPPORT—Continued

the trial court had reviewed the motion under the wrong standard. Specifically, the court should not have considered defendant-father's testimony at the hearing on the motion to dismiss, but instead should have focused solely on the sufficiency of the complaint, viewing all allegations as true and in the light most favorable to plaintiff-grandparents. Under the correct standard of review, the complaint sufficiently established plaintiff-grandparents' standing to bring a custody claim, since it alleged that defendant-father acted inconsistently with his constitutionally protected rights as a parent and included specific allegations regarding his failure to provide for and establish a relationship with the child. **White v. Boatwright, 813.**

CONSTITUTIONAL LAW

Effective assistance of counsel—no objection to testimony or jury instructions—performance not deficient—After defendant crashed his car into a tree while his wife was in the passenger seat, defendant received effective assistance of counsel during his subsequent trial for charges of felony death by vehicle and driving while impaired. Specifically, defendant failed to show on appeal that his trial attorney's performance was deficient for failure to object to testimony from the State's expert (regarding defendant's blood alcohol concentration after the crash) and from one of the officers present at the crash scene, or for failure to object to the court's jury instruction on intervening negligence; both testimonies were properly admitted, and there was no error in the court's jury instructions. **State v. Venable, 788.**

CRIMINAL LAW

Motion to sever—co-defendants in first-degree murder and intentional child abuse trial—no error or abuse of discretion—The trial court did not err in denying defendant's motion to sever her trial on charges of first-degree murder and intentional child abuse, arising from the death of her one-year-old son, from that of her co-defendant (the other person who was present when the abuse was inflicted) where: (1) "finger pointing" at trial between the co-defendants about who inflicted the abuse did not deprive defendant of a fair trial; and (2) the cross-examinations by the co-defendants did not illustrate a conflict between their defenses, much less a high degree of conflict. Further, remarks made by the trial court—about previous denials by other judges of defendant's earlier motions to sever—showed that the trial court understood it had the discretion to revisit those decisions, although it ultimately also elected to deny defendant's motion. Defendant's related arguments that the trial court erred in precluding evidence she sought to introduce (out of concern for protecting the co-defendant's rights) lacked merit. **State v. Upchurch, 775.**

Prosecutor's closing argument—defendant's choice not to testify—prejudicial error not shown—At a trial for crimes arising from a home break-in and subsequent attempts to sell wristwatches stolen from the home, where defendant did not testify or present other evidence, the trial court did not commit prejudicial error by failing to intervene *ex mero motu* when the prosecutor stated during closing arguments that "[defendant] doesn't have to testify, but there's no other evidence to say otherwise as to how he got those watches honestly." The prosecutor's remarks were improper, since they violated defendant's statutory and constitutional rights against self-incrimination. Moreover, the error was never cured where the State did not withdraw the remark and the trial court neither made a statement indicating that the remark was improper nor instructed the jury not to consider defendant's failure to testify. Nevertheless, the prosecutor's remarks were not so grossly improper as to

CRIMINAL LAW—Continued

entitle defendant to a new trial given the overwhelming, uncontradicted evidence of his guilt of the charged crimes. **State v. Gilbert, 720.**

Prosecutor's closing argument—remarks about functioning alcoholics—not grossly improper—In a prosecution for multiple crimes arising from a domestic violence incident, where some evidence indicated that defendant had been drinking for several hours before attacking his wife, the trial court did not abuse its discretion by failing to intervene ex mero motu during the State's closing argument, when the prosecutor made several statements about how alcoholics can “still function” and “know right from wrong” even with a high blood alcohol concentration. The prosecutor's statements were, at most, inappropriately speculative, but not grossly improper considering that, viewed in their full context, they were used to highlight the lack of spelling errors in the text messages defendant sent after the incident rather than to indicate that defendant was a functioning alcoholic. **State v. Tadlock, 754.**

Rape and kidnapping—defenses—voluntary intoxication—jury instruction—unnecessary—In a prosecution for charges—including first-degree kidnapping and first-degree forcible rape—arising from a domestic violence incident between defendant and his wife, defendant was not entitled to a jury instruction on voluntary intoxication where, although some evidence indicated that he had been drinking for several hours before the incident, the remaining evidence did not show that he was unable to control himself or was so intoxicated that he could not form the specific intent to commit the charged crimes. Firstly, there was no evidence that defendant had difficulty speaking or walking, or that he had engaged in inexplicable behavior immediately prior to attacking his wife. Moreover, after the incident, defendant helped his wife up from the floor, helped to clean her up, brought her pain medication, and apologized to her, all of which indicated his ability to appreciate the nature of his actions. **State v. Tadlock, 754.**

DAMAGES AND REMEDIES

Restitution—larceny of a firearm—exact value of award—worksheet insufficient—remanded—The trial court's award of \$1,000 in restitution—entered after a jury found defendant guilty of the larceny of a firearm that defendant, an employee at a car detailing business, stole from the trunk of a customer's vehicle—was vacated and the matter was remanded for a rehearing on restitution. While the victim's trial testimony provided some evidence regarding the firearm (that it was a “special” 1911 Colt 45 caliber gun which had been competition-tuned by a gunsmith) which would support an award, the only evidence on the exact value of the gun was the restitution worksheet, a document that has been expressly held insufficient to sustain an award of restitution. **State v. Gray, 728.**

DIVORCE

Division of military pension—calculation—coverture fraction properly applied—In a matter involving the division of military pension benefits, the trial court properly granted plaintiff twenty-one percent of her ex-husband's disposable military retired pay and, in a declaratory judgment, properly interpreted the parties' previous separation and property settlement agreement to require use of a coverture fraction rather than a “Frozen Benefit Rule” to calculate plaintiff's portion of defendant's pension benefits. The clear and unambiguous language in the agreement—that plaintiff was entitled to fifty percent of defendant's benefits “accumulated during the course of the marriage”—was to implement the standard method of calculation in

DIVORCE—Continued

place at the time the parties signed the agreement, which was to multiply the coverture fraction by the disposable retired pay that defendant was to receive upon his retirement. Despite defendant's attempt to invoke the Frozen Benefit Rule (so that plaintiff's share was "frozen" as of the date of the agreement), that rule was not codified until nearly seven years after the parties entered into their agreement. **Green v. Green, 608.**

EVIDENCE

Character evidence—door opened by defendant's cross-examination—properly admitted—In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant's one-year-old son), the trial court properly admitted character evidence (that defendant cheated on the child's father while pregnant with the child) where defendant "opened the door" to such testimony by asking the father, on cross-examination, whether defendant had "been a good woman" to the father during their relationship. **State v. Upchurch, 775.**

Expert testimony—sexual offenses against a child—impermissible vouching for victim's credibility—new trial—In a prosecution for multiple charges of taking indecent liberties with a child and first-degree statutory sexual offense, in which no physical evidence of abuse was presented, defendant was entitled to a new trial because two expert witnesses gave testimony that impermissibly vouched for the victim's credibility. First, the victim's treating therapist made several statements indicating her opinion or assumption that abuse had occurred and, more importantly, testified that she had diagnosed the victim with post-traumatic stress disorder and that the symptoms he exhibited were consistent with the trauma he had reported. Second, the doctor who first evaluated the victim testified that the lack of physical findings was consistent with the victim's disclosure of sexual abuse. These errors rose to the level of plain error since, absent the improper evidence, the jury likely would have reached a different verdict. **State v. Wingate, 800.**

Expert witness testimony—reliability—retrograde extrapolation—blood alcohol concentration—plain error analysis—After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by allowing a forensic chemist to give expert testimony about determining defendant's blood alcohol concentration at the time of the crash through a retrograde extrapolation analysis. This testimony met the reliability requirements of Evidence Rule 702 where it was based on sufficient underlying facts—including blood drawn from defendant roughly an hour after the crash, defendant's own statements about drinking before driving, and other evidence found at the crash scene—which in turn supported the witness's assumption that defendant was in a post-absorptive state when he crashed the car. Furthermore, the trial court did not commit plain error in admitting the testimony where the State had presented ample other evidence of defendant's impairment during the crash, meaning that defendant could not show that the jury would have reached a different result absent the expert's testimony. **State v. Venable, 788.**

Expert witness testimony—Rule 702 reliability requirements—only some Daubert factors addressed—plain error review—In defendant's appeal from her convictions for possession of methamphetamine and possession of drug paraphernalia, the Court of Appeals applied plain error review to defendant's argument that testimony from a forensic scientist—tendered at trial by the State, without objection,

EVIDENCE—Continued

as an expert in using forensic chemistry to detect narcotics—did not meet the reliability requirements of Evidence Rule 702(a). In doing so, the appellate court found no error—much less plain error—where the witness satisfied Rule 702’s requirements by describing a two-part test he used to identify controlled substances, which was generally accepted in the scientific community, and then by explaining how he applied that testing method to the white crystalline material seized from defendant’s purse during her arrest. Furthermore, the witness’s failure to testify as to all of the reliability factors identified in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), did not render his testimony unreliable or inadmissible. **State v. Stidham, 741.**

Hearsay—pre-trial statements—corroborative of trial testimony—properly admitted—In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant’s one-year-old son), the trial court properly admitted pre-trial statements by the child’s father—that he did not believe defendant’s version of the events which resulted in their child’s death—where the challenged statements corroborated, and tended to add weight and credibility to, the father’s trial testimony. **State v. Upchurch, 775.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—competitive review—denial—no substantial prejudice—The decision of the Department of Health and Human Services denying petitioner’s application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute substantial prejudice as a matter of law and was therefore properly upheld by an administrative law judge. Petitioner failed to show that the agency’s decision was erroneous or improper where the agency had no statutory obligation to favor one applicant over another and was not required to weigh market competition in the same city over other relevant factors. Further, although petitioner argued that the denial of its application resulted in a loss of forecasted revenue, its projections were merely hypothetical, particularly where those projections were based on presumptions that residents would shift from two existing MRI units to petitioner’s newly-built one, if it were granted the CON. **Chesapeake Diagnostic Imaging Ctrs., LLC v. N.C. Dep’t of Health & Hum. Servs., 582.**

Certificate of need—competitive review—market access—as-applied constitutionality—The decision of the Department of Health and Human Services denying petitioner’s application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—was not unconstitutional as applied to petitioner where, despite petitioner’s argument, the agency was not required to weigh market competition over other factors in its review process, or to solely consider whether its decision would allow a monopoly of certain services to form. Here, the agency found the competitor’s application to be superior to petitioner’s application in three out of five factors; therefore, the administrative law judge properly affirmed the agency’s decision. **Chesapeake Diagnostic Imaging Ctrs., LLC v. N.C. Dep’t of Health & Hum. Servs., 582.**

Certificate of need—competitive review—property interest asserted—no due process implications—The decision of the Department of Health and Human Services denying petitioner’s application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute a deprivation of a property interest implicating due process rights and,

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

thus, there was no requirement for the reviewing administrative law judge to make findings regarding petitioner's putative property interest. Petitioner had no legitimate claim of entitlement to an approved CON application in a competitive review, in which the agency had the statutory authority to compare multiple applicants and to either approve, approve with conditions, or deny any application. **Chesapeake Diagnostic Imaging Ctrs., LLC v. N.C. Dep't of Health & Hum. Servs.**, 582.

HUSBAND AND WIFE

Separation agreement—validity—reconciliation—no written modification—rescission not required—In an action initiated by plaintiff after her husband died intestate in which plaintiff sought to have their separation agreement, which also contained property settlement provisions, declared void, the trial court's determination that the agreement remained in effect was supported by competent evidence. Even assuming that plaintiff and her husband had reconciled after signing the agreement—about which conflicting evidence was presented—any reconciliation did not operate as a revocation of the agreement because plaintiff and decedent never revoked or modified the agreement in writing as required by the agreement's terms. Plaintiff failed to show that missed payments by her husband pursuant to the agreement constituted a material breach for which rescission was required, since legal remedies were available to compensate her for her loss. Finally, there was no merit to plaintiff's contention that a loan modification executed by her and her husband (modifying the terms of a deed of trust) constituted a modification of the separation agreement, where the two documents were entirely separate in subject matter and intentions. **Jones v. Jones**, 660.

IMMUNITY

Governmental—not applicable—allowing for-profit entity to operate after-school program on public school grounds—proprietary function—In a tort action against a public school system and other defendants, which was brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of the public school system to conduct its business, the school system was not entitled to governmental immunity. In allowing the for-profit program to use school facilities for profit-making activities for a substantial fee but without a contract, the school system was engaged in a commercial activity, rather than the sort of activity traditionally provided by government entities. Governmental immunity does not extend to such a proprietary, as opposed to governmental, function. **Brady v. Charlotte-Mecklenburg Bd. of Educ.**, 560.

Public official—not applicable—allowing for-profit entity to operate after-school program on public school grounds—public employees—In a tort action, brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of a public school system to conduct its business against three employees of the public school system and other defendants, employee-defendants were not entitled to public official immunity because they were public employees, rather than public officials. Even if the employees' positions were created by statute (the Community Schools Use Act, N.C.G.S. §§ 115C-203 through 115C-209.1)—which was unclear—the legislation did not expressly delegate to the employees any power over the approval process for organizations and individuals wishing to use school facilities that was more than ministerial. **Brady v. Charlotte-Mecklenburg Bd. of Educ.**, 560.

INDICTMENT AND INFORMATION

Defective indictment—first-degree statutory sexual offense charged—sentenced to greater offense—In a sexual offense prosecution, where the Court of Appeals vacated defendant’s sentence and remanded for a new trial due to improperly admitted evidence, the appellate court noted an issue with defendant’s indictment for consideration on remand. Although defendant’s indictment charged him with first-degree statutory sexual offense pursuant to N.C.G.S. § 14-27.29—an offense which requires proof that a defendant is at least four years older than the victim—the trial court had sentenced defendant to the greater offense of statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28—an offense which requires the additional proof that a defendant was at least eighteen years old at the time of the offense. Although all of the facts needed to convict defendant pursuant to the latter statute were present in the indictment, the various references at trial to both offenses demonstrated a lack of certainty about which offense defendant had been charged with and, therefore, resulted in prejudice to defendant. **State v. Wingate, 800.**

MOTOR VEHICLES

Driving while impaired—appreciable impairment—blood alcohol concentration—sufficiency of evidence—After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant’s criminal prosecution did not err by denying defendant’s motion to dismiss a charge of driving while impaired (DWI), where the State presented sufficient evidence of defendant’s impairment at the time of the crash. First, the State showed that defendant was “appreciably impaired” through testimony from one of the officers present at the crash scene who, despite not having personally detected an odor of alcohol on defendant, observed other evidence of impairment, including five empty bottles of brandy inside defendant’s car along with defendant’s own admission to drinking before driving. Second, the State presented evidence of defendant’s blood alcohol concentration about an hour after the crash, which was sufficient in and of itself to support a DWI conviction. **State v. Venable, 788.**

Felony death by vehicle—intervening negligence—jury instruction—final mandate—no plain error—After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant’s prosecution for charges of felony death by vehicle and driving while impaired did not err by failing to read the entire instruction on intervening negligence when instructing the jury on proximate cause or by omitting intervening negligence from its final mandate on the felony charge. The court’s instructions sufficiently incorporated the main principles regarding intervening negligence, and its final mandate on felony death by vehicle included the appropriate law on proximate cause. Further, any error here did not amount to plain error where, given the ample evidence presented to support defendant’s guilt of the charged crimes, the jury probably would not have reached a different result had the court read the full intervening negligence instruction. **State v. Venable, 788.**

NEGLIGENCE

Failure to train a minor to comply with rules of a sporting event—tort not recognized—dismissal proper—In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player and defendant player’s school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly

NEGLIGENCE—Continued

dismissed plaintiffs' negligence and negligent infliction of emotional distress claims against defendant school because neither North Carolina statutes nor case law establishes a cause of action for the failure of a school or coach to train a minor in the rules of a sporting event. **Fenderson v. Davidson Day Sch.**, 591.

Standard of care—violation not shown—collisions between players inherent to lacrosse—summary judgment—In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player, as well as defendant player's coach and school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly granted summary judgment in favor of defendant player because none of the evidence forecast showed that defendant player acted willfully or wantonly to injure plaintiff player, given the inherent nature of high-speed, high-impact body collisions in lacrosse. Specifically, all three officials who refereed the game agreed that defendant player did not intentionally make head-to-head (and, thus, illegal) contact, and two of the three officials believed that plaintiff player engaged in a potentially illegal, head-down block during the collision. Accordingly, defendants' related argument—that the trial court should have ruled that plaintiff player was contributorily negligent—and arguments from both parties regarding the trial court's judgment on the pleadings (which preceded the summary judgment ruling) were moot. **Fenderson v. Davidson Day Sch.**, 591.

PROBATION AND PAROLE

Probation revocation—absconding from supervision—evidence sufficient—failure to exercise discretion—Where defendant—a resident of Virginia at the time he received a suspended sentence with 24 months of supervised probation after pleading guilty in North Carolina to two counts of obtaining property by false pretenses—was approved to transfer his North Carolina probation, first to Virginia (where he was already on probation) and then to West Virginia, before returning to Virginia without notifying his North Carolina probation officer and later failing to heed the officer's order to return to North Carolina, the evidence was sufficient to reasonably satisfy the trial court that defendant willfully violated or violated without lawful excuse a valid condition of his probation by absconding from supervision. However, the transcript of the revocation hearing revealed that the trial court failed to exercise its discretion in deciding to revoke defendant's probation, as evidenced by the court's remark that "it looks like the only alternative that I have at this particular time is to revoke [defendant's] probation." Accordingly, the trial court's order was vacated and the matter was remanded for the trial court to determine, in its discretion, whether or not to revoke defendant's probation. **State v. Johnson**, 733.

PROCESS AND SERVICE

Abuse of process—judgment notwithstanding the verdict—more than a scintilla of evidence—In an alienation of affection proceeding that resulted in a jury finding in favor of defendant, the trial court erred in allowing plaintiff's motions for judgment notwithstanding the verdict on defendant's abuse of process claim—that plaintiff brought the action to harass, inconvenience, and embarrass defendant and plaintiff's former wife, who married defendant following her divorce from plaintiff—where plaintiff essentially conceded the existence of the first element of abuse of process (ulterior motive), and, taken in the light most favorable to defendant, more than a scintilla of evidence supported the second element (an act in the use of process

PROCESS AND SERVICE—Continued

not proper in the regular prosecution of the proceeding); namely, that on the pretext of assisting the process server, plaintiff trespassed onto defendant's property and spit on defendant. Further, plaintiff committed those acts after defendant's counsel communicated to plaintiff that counsel would accept service on defendant's behalf. **Ponder v. Been, 691.**

PRODUCTS LIABILITY

Death from over-the-counter inhaler—contributory negligence—failure to read label—summary judgment—In an action brought by the estate of a woman who died after taking a single dose of an over-the-counter bronchodilator, the trial court properly granted summary judgment to defendant (the drug's manufacturer) on claims of negligence and breach of implied warranty of merchantability where the facts did not raise any genuine issue of fact for a jury to resolve. Decedent's boyfriend purchased the inhaler from a drugstore after asking the pharmacist if the product was "good for breathing" without mentioning decedent's underlying health conditions; decedent self-administered one puff of the inhaler even though there were specific, express warnings on the packaging that the product should not be taken unless the user had been diagnosed with asthma—which decedent had not—and to consult a doctor before use if the user had heart disease or high blood pressure—both of which decedent had. Therefore, due to decedent's own contributory and negligent acts, the trial court properly concluded that plaintiff's claims were barred under N.C.G.S. § 99B-4(1) and (3)—even though, since the statute is written in the disjunctive, either one of the subsections would have been sufficient to bar recovery. **Saulsby v. Amphastar Pharm., Inc., 703.**

SEARCH AND SEIZURE

Traffic stop—smell of marijuana alone—probable cause—to suspect possession of marijuana rather than legal hemp—In a juvenile delinquency case involving a charge for possession of marijuana with intent to sell or distribute, which stemmed from a traffic stop in which two officers searched the juvenile's vehicle after smelling what they perceived to be marijuana, the trial court erred by granting the juvenile's motion to suppress and subsequently dismissing all charges against him. Specifically, the court incorrectly concluded that the perceived odor of marijuana, without more, could not establish probable cause to suspect that the juvenile's vehicle contained marijuana rather than legal hemp. Although the court based its conclusion on a memo from the State Bureau of Investigation (SBI) arguing that, because hemp and marijuana are so similar, the perceived smell of marijuana would be insufficient to establish probable cause in cases such as these, the SBI's legal interpretations were not controlling, since probable cause determinations are for the courts to make. Moreover, both officers in this case received special training and had extensive field experience not only in identifying marijuana, but also in distinguishing it from legal hemp; thus, based on their training and experience, the officers had a reasonable belief that the juvenile's vehicle contained marijuana. **In re J.B.P., 640.**

SENTENCING

Multiple assault charges—stemming from the same incident—distinct interruptions between assaults—separate sentences properly imposed—After defendant was convicted on three different assault charges arising from the same domestic violence incident, the trial court properly imposed separate sentences for

SENTENCING—Continued

each assault charge, running consecutively, despite defendant's argument that the statutes under which he was convicted (N.C.G.S. §§ 14-32.4(b) and 14-33(c)(1)-(2)) forbade the court from imposing punishments for the lesser assault offenses (assault on a female and assault inflicting serious injury) where it had already imposed a punishment for the greater offense (assault by strangulation) involving the same conduct. To the contrary, the statutes at issue allowed for multiple sentences based on multiple assaults occurring in the same altercation so long as the State presented substantial evidence of separate assaults delineated by distinct interruptions, as was the case here. **State v. French, 711.**

Prior record level—point added for committing offense while on probation—notice neither given nor waived—improper but not prejudicial error—After defendant was found guilty on drug-related charges, the trial court erred by sentencing her as a prior record level III offender for her conviction of possession of methamphetamine after adding a point under N.C.G.S. § 15A-1340.14(b)(7) for committing the offense while on probation for another crime. First, the State never gave defendant the statutorily-required written notice that it was seeking an additional point under subsection (b)(7), since the sentencing worksheet submitted to defendant was insufficient on its own to satisfy the notice requirement. Second, because defendant never admitted to committing the offense while on probation, she did not waive her right to receive notice under the statute. Third, the court did not make the requisite inquiry into whether notice was given or whether defendant waived her right to notice. Nevertheless, the court's sentencing error was not prejudicial where the minimum sentence imposed by the court was the highest minimum sentence in the presumptive range at both prior record levels II and III. Although the court could have sentenced defendant to a lesser minimum term under the erroneous prior record level, it did not; therefore, defendant failed to show a reasonable possibility that she would have received a lesser punishment had the court sentenced her as a prior record level II. **State v. Stidham, 741.**

Rape and kidnapping—\$25,000 fine—defendant's finances not considered—no abuse of discretion—In a prosecution for charges including first-degree kidnapping and first-degree forcible rape, the trial court did not abuse its discretion by imposing a \$25,000 fine at sentencing without first taking defendant's financial situation into account. Firstly, the court was not required to consider defendant's finances or any of the other factors under N.C.G.S. § 15A-1340.36, which solely concerns the payment of restitution. Secondly, the court's assessment of the fine was not unreasonable under N.C.G.S. § 15A-1362(a), which requires trial courts to consider a defendant's financial resources when determining the method of payment—not the amount—of a fine. Lastly, the fine imposed was appropriate in light of the nature of the crimes of which defendant was convicted. **State v. Tadlock, 754.**

WORKERS' COMPENSATION

Subject matter jurisdiction—voluntary dismissal without prejudice—claim no longer active—After plaintiff took a voluntary dismissal without prejudice of his claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), to which defendants (the wife's employer and its insurance company) did not object, the Industrial Commission no longer had subject matter jurisdiction over the matter, unless and until plaintiff chose to refile his claim within one year of the voluntary dismissal. Although defendants argued that their filing of a Form 60 (Employer's Admission of Employee's Right to Compensation) constituted an "award" from the Commission, after which they began sending weekly compensation

WORKERS' COMPENSATION—Continued

checks to plaintiff (which plaintiff did not cash), defendants' actions did not create jurisdiction in the Commission that would permit the dismissal of plaintiff's claim with prejudice, as sought by defendants. Therefore, the Commission's order denying defendants' request for relief and dismissing plaintiff's claim without prejudice for lack of subject matter jurisdiction was affirmed. **Marlow v. TCS Designs, Inc., 680.**

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.

BRADY v. CHARLOTTE-MECKLENBURG BD. OF EDUC.

[299 N.C. App. 560 (2025)]

JON AND ALICIA BRADY, INDIVIDUALLY AND AS THE NATURAL PARENTS AND LEGAL GUARDIANS OF
V.B., A MINOR, PLAINTIFFS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAYSPANISH, LLC,
RICARDO L. MATA, PEGGY H. HEY, IN HER INDIVIDUAL CAPACITY, PHILLIP GOODMAN, IN
HIS INDIVIDUAL CAPACITY, AND CYNTHIA MARRERO, IN HER INDIVIDUAL CAPACITY, DEFENDANTS

No. COA24-603

Filed 2 July 2025

1. Appeal and Error—interlocutory appeal—governmental and public official immunity—denial of Civil Procedure Rule 12(b) motion—substantial right

In a tort action brought by the parents of a child who was sexually assaulted during a private after-school language program that used the facilities of a public school system to conduct its business, the interlocutory appeals of defendants (the school system and three of its employees) from the denials of their motions to dismiss the claims pursuant to Civil Procedure Rule 12(b)(2) and (b)(6) were properly before the appellate court because the motions asserted governmental and public official immunity. Those forms of immunity, which are not mere affirmative defenses to liability, but rather shield defendants entirely from having to answer for their conduct in a civil suit for damages, implicate personal jurisdiction and, thus, affect a substantial right.

2. Immunity—governmental—not applicable—allowing for-profit entity to operate after-school program on public school grounds—proprietary function

In a tort action against a public school system and other defendants, which was brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of the public school system to conduct its business, the school system was not entitled to governmental immunity. In allowing the for-profit program to use school facilities for profit-making activities for a substantial fee but without a contract, the school system was engaged in a commercial activity, rather than the sort of activity traditionally provided by government entities. Governmental immunity does not extend to such a proprietary, as opposed to governmental, function.

3. Immunity—public official—not applicable—allowing for-profit entity to operate after-school program on public school grounds—public employees

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In a tort action, brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of a public school system to conduct its business against three employees of the public school system and other defendants, employee-defendants were not entitled to public official immunity because they were public employees, rather than public officials. Even if the employees' positions were created by statute (the Community Schools Use Act, N.C.G.S. §§ 115C-203 through 115C-209.1)—which was unclear—the legislation did not expressly delegate to the employees any power over the approval process for organizations and individuals wishing to use school facilities that was more than ministerial.

Appeal by Defendants from order entered 2 April 2024 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 February 2025.

Wallace Law Firm PLLC, by Terry L. Wallace, for Defendants-Appellants Charlotte-Mecklenburg Board of Education, Peggy H. Hey, Phillip Goodman, and Cynthia Marrero.

Susan L. Sowell for Defendant-Appellant Phillip Goodman.

No brief filed for Defendant PlaySpanish, LLC.

James, McElroy, & Diehl, P.A., by Preston O. Odom, III, J. Alexander Heroy, and Jennifer M. Houti, for Plaintiffs-Appellees.

GRIFFIN, Judge.

Defendant Charlotte-Mecklenburg Board of Education (“Defendant CMS”) and Defendants Peggy Hey, Phillip Goodman, and Cynthia Marrero appeal from the trial court’s order denying their motion to dismiss. Defendants claim they are immune from suit under the doctrines of governmental immunity and public official immunity. We hold they are not entitled to either defense and affirm the trial court’s order.

I. Factual and Procedural Background

Because this appeal comes to us from the denial of a motion to dismiss based on Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, the following facts are taken from Plaintiffs’ amended complaint and treated as true. *Est. of Long by and through Long v. Fowler*, 378 N.C. 138, 140–41, 861 S.E.2d 686, 690 (2021).

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Defendant PlaySpanish is a limited liability company that has provided after-school language programming to students in Mecklenburg County since 1997. Defendant PlaySpanish ostensibly used public school facilities to conduct its business through the Charlotte-Mecklenburg Community Use in Schools program (“CUS”); however, Defendant CMS did not adhere to the CUS regulations and policies governing the program when providing Defendant PlaySpanish access to its facilities. CUS allows community organizations not affiliated with Defendant CMS to use its facilities for various civic purposes. Defendants Marrero, Goodman, and Hey were Defendant CMS’s manager of CUS, Director of Property Management within the Facility Planning and Management section of the Operations Department, and Executive Director of the Facility Planning, respectively. All served in their respective positions during at least 2016, 2017, and 2018.

Defendant Ricardo Mata and his wife are the sole owners and proprietors of Defendant PlaySpanish. In October 2013, Defendant CMS received a report of Defendant Mata sexually assaulting a child at an elementary school while he was operating Defendant PlaySpanish. Defendant CMS requested its police division conduct a criminal background check on Defendant Mata, which showed Defendant Mata had been accused of multiple other assaults on both children and adult women between 1993 and 2009. The background check also revealed Defendant Mata had previously been extradited to Georgia because of an investigation for allegedly sexually assaulting a child there.

Following the allegation in October 2013, Defendant Mata met with Defendant CMS’s superintendent and denied the allegations via email. Defendant CMS then closed its investigation of Defendant Mata and failed to inform its principals and students’ parents about the results of their investigation and background check.

During the 2016–2017 and 2017–2018 school years, Plaintiffs enrolled their daughter in Defendant PlaySpanish while she was a kindergarten and first grade student. Defendant Mata sexually assaulted her numerous times during “lock-down drills,” which he was not authorized to perform.

On 4 May 2021, Plaintiffs filed a complaint against Defendant PlaySpanish, Defendant Mata, Defendant CMS, and Defendants Hey, Goodman, and Marrero bringing numerous claims stemming from the assault on their daughter. On 29 July 2021, Plaintiffs amended their complaint. In part, Plaintiffs alleged Defendant CMS and Defendants Hey, Goodman, and Marrero were liable for intentional or reckless infliction

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of emotional distress, negligent infliction of emotional distress, and negligence or gross negligence.¹ Plaintiffs also brought a claim against Defendant CMS for premises liability and, in the alternative, under Article I, section 19 the North Carolina State Constitution.

Defendant CMS and Defendants Hey, Goodman, and Marrero moved to dismiss Plaintiffs' amended complaint on 8 September 2021 pursuant to Rules 12(b)(1), (2), and (6), claiming Defendant CMS is entitled to governmental immunity and Defendants Hey, Goodman, and Marrero are entitled to public official immunity. Defendants attached affidavits and evidentiary exhibits in support of their motion. Plaintiffs filed a memorandum of law opposing Defendants' motion and also submitted an affidavit and exhibits to the trial court.

On 23 June 2022, Defendants' motion came on for hearing in Mecklenburg County Superior Court. The trial court did not receive evidence during the hearing. On 2 April 2024, the trial court dismissed Plaintiffs' constitutional claim but denied Defendants' motion as to all other claims. Specifically, the trial court concluded Plaintiffs' allegations were sufficient to survive Defendants' motion to dismiss, and the issue of whether Defendants were entitled to the respective immunities they claimed required further factual development.

Defendants timely appeal.

II. Analysis

Defendants contend the trial court erred by denying their motion to dismiss on Plaintiffs' remaining claims. Specifically, Defendant CMS argues it is entitled to governmental immunity because it was engaged in a governmental function when allowing Defendant PlaySpanish to use its facilities and did not purchase liability insurance waiving immunity. Taking the facts alleged in the amended complaint as true, we hold Defendant CMS was engaged in a proprietary function, thereby waiving governmental immunity. Therefore, we do not reach the question of whether the insurance policies at issue also had the same effect.

Defendants Hey, Goodman, and Marrero argue they enjoy public official immunity and are therefore also immune from liability. We similarly hold that Defendants Hey, Goodman, and Marrero were not acting as public officials and are therefore not entitled to its protections.

1. As this appeal only addresses Defendant CMS and Defendants Hey, Goodman, and Marrero's motion to dismiss, we do not list or discuss the remaining claims against Defendant PlaySpanish and Defendant Mata.

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A. Jurisdiction

[1] Defendants moved to dismiss Plaintiffs' claims under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Generally, a trial court's decision to deny a Rule 12 motion to dismiss is interlocutory and not immediately appealable. *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (citing *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007)). However, an immediate right of appeal exists where the order affects a substantial right or is an adverse ruling on personal jurisdiction. *Can Am S.*, 234 N.C. App. at 122, 759 S.E.2d at 307.

Being so, an order denying a motion to dismiss made pursuant to Rule 12(b)(6) because of governmental immunity is immediately appealable as it affects a substantial right; governmental immunity "is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337–38, 678 S.E.2d 351, 354 (2009); see also *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 571, 866 S.E.2d 647, 655 (2021) ("[A] municipal corporation may assert governmental immunity[] as a complete defense to a civil lawsuit at the pleading stage."); *Can Am*, 234 N.C. at 122, 759 S.E.2d at 307 ("Had defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a)." (citations omitted)).

Similar to a Rule 12(b)(6) dismissal based on sovereign immunity, we have consistently held "denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Green v. Howell*, 274 N.C. App. 158, 164, 851 S.E.2d 673, 678 (2020) (citation and internal marks omitted); see also *Torres v. City of Raleigh*, 288 N.C. App. 617, 620, 887 S.E.2d 429, 433 (2023) ("This Court has consistently stated that a denial of governmental immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)."); *Can Am*, 234 N.C. App. at 123–24, 759 S.E.2d at 308 ("[T]his Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b).").

Like governmental and sovereign immunity, public official immunity "is more than a mere affirmative defense to liability—it shields a

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defendant entirely from having to answer for its conduct in a civil suit for damages.” *Est. of Graham v. Lambert*, 385 N.C. 644, 651, 898 S.E.2d 888, 895 (2024) (citations omitted). Because public official immunity provides a defendant a complete shield, a trial court’s ruling denying a Rule 12(b)(6) motion to dismiss based upon public official immunity is also immediately appealable as affecting a substantial right because “‘it is effectively lost if a case is erroneously permitted to go to trial.’” *Craig*, 363 N.C. at 337–38, 678 S.E.2d at 354 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 425 (1985)); see also *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (“The denial of summary judgment on the ground of public official immunity is immediately appealable because it affects a substantial right.”).

We will not, however, review whether the trial court properly denied Defendants’ motion on the basis of Rule 12(b)(1) as “that motion does not support an interlocutory appeal.” *Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 93, 782 S.E.2d 531, 536 (2016) (citation omitted); *Green v. Kearney*, 203 N.C. App. 260, 265–66, 690 S.E.2d 755, 760 (2010) (“Nevertheless, this Court has declined to address interlocutory appeals of a lower court’s denial of a Rule 12(b)(1) motion to dismiss despite the movant’s reliance upon the doctrine of sovereign immunity.”).

In sum, the issues of whether the trial court properly denied Defendants’ motion to dismiss because of governmental immunity and public official immunity are properly before this Court as an adverse ruling on personal jurisdiction and as affecting a substantial right.

B. Defendant CMS

[2] Defendant CMS contends the trial court erred by denying its motion to dismiss because it is protected by governmental immunity from lawsuits alleging tortious or negligent conduct. Plaintiffs argue Defendant CMS does not benefit from the protections provided by governmental immunity for two reasons: (1) Defendant CMS was engaging in a proprietary function when it allowed Defendant PlaySpanish to use its facilities; and (2) Defendant CMS waived governmental immunity by purchasing insurance which covers Plaintiffs’ claims. Either ground provides an adequate basis for affirming the trial court’s order because Defendant CMS is subject to the court’s personal jurisdiction if not protected by governmental immunity. We agree with Plaintiffs that Defendant CMS was engaged in a proprietary function when allowing Defendant PlaySpanish on school property and therefore do not reach the issue of whether Defendant CMS waived governmental immunity through purchasing insurance.

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“This Court has consistently stated that a denial of governmental immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2).” *Torres*, 288 N.C. App. at 620, 887 S.E.2d at 433 (2023). “The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court.” *Banc of Am. Sec. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Three postures are typical: “(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.” *Id.*; *Torres*, 288 N.C. App. at 620–21, 887 S.E.2d at 433 (stating the same).

In the third posture, such as here, “the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions.” *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (citation modified). Because the trial court here did not receive evidence at the hearing but decided the motion based upon the pleadings and affidavits alone, it acted much like a juror by “‘determin[ing] the weight and sufficiency of the evidence[.]’” *Id.* (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981)). Our review in this context is to determine “only ‘whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.’” *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140–41, 515 S.E.2d 46, 48 (1999)). But, a trial court “is not required to make specific findings of fact unless a party so requests.” *McCullers v. Lewis*, 265 N.C. App. 216, 220, 828 S.E.2d 524, 530–31 (2019) (citations omitted). When the record does not indicate a party requested “the trial court make specific findings of fact, and the order appealed from contains no findings, we presume that the trial court made factual findings sufficient to support its ruling[.]” and we determine from a review of the record whether there is evidence “that would support the trial court’s legal conclusions[.]” which are reviewed de novo. *Id.* (citations omitted).

Here, the trial court’s order did not contain findings of fact, nor did either party request them, so we “presume that the trial court found facts sufficient to support its ruling, if such findings may be made from the record evidence.” *Torres*, 288 N.C. App. at 622–23, 887 S.E.2d at 434 (citing *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d

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111, 114 (1986)). In sum, we review the record to determine whether there was adequate evidence to support the trial court's conclusions of law, which we then review de novo. *Id.*

Sovereign immunity is a common law doctrine which “bars suits against the State ‘unless it has consented or waived its immunity.’” *Graham*, 385 N.C. at 651, 898 S.E.2d at 895 (quoting *Kinston Charter Acad.*, 379 N.C. at 570, 866 S.E.2d at 655 (internal marks omitted)). Constituent units of the State—cities, counties, and other localities such as school boards—are protected by governmental immunity, a “slice” of sovereign immunity which “shields units of local government from suit for acts committed in their *governmental* capacity.” *Graham*, 385 N.C. at 651, 898 S.E.2d at 895–96 (quoting *Providence Volunteer Fire Dept., Inc. v. Town of Weddington*, 382 N.C. 199, 211–12, 876 S.E.2d 453 (2022) (internal marks omitted) (emphasis added)); *see also Willet v. Chatham Cnty. Bd. of Educ.*, 176 N.C. App. 268, 269, 625 S.E.2d 900, 901 (“School boards enjoy the right of governmental immunity absent waiver or a statute to the contrary.”); *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996) (“A local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity.”).

Two ways a school board may waive governmental immunity are by purchasing liability insurance, N.C. Gen. Stat. § 115C-42 (2023), or when engaging in a proprietary, as opposed to governmental, function, *Kinston Charter Acad.*, 379 N.C. at 571, 866 S.E.2d at 655; *see also Willett*, 176 N.C. App. at 270, 625 S.E.2d at 902 (“Governmental immunity shields a state entity in the performance of governmental functions, but not proprietary functions.” (citing *Hickman v. Fuqua*, 108 N.C. App. 80, 82–83, 422 S.E.2d 449, 451 (1992))).

Our Supreme Court has explained the difference between governmental and proprietary acts undertaken by localities as one in which the locality's motivation, and characteristics of the acts, are determinative:

[a]ny activity of a municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Bynum v. Wilson Cnty., 367 N.C. 355, 358, 758 S.E.2d 643, 646 (2014) (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289,

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293 (1952)). Stated differently, the protections of governmental immunity end where a unit of local government “ ‘undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it [then] becomes subject to liability for contract and in tort as in [the] case of private corporations.’ ” *Providence*, 382 N.C. at 212, 876 S.E.2d at 462 (quoting *Kinston Charter Acad.*, 379 N.C. at 571, 866 S.E.2d at 655).

Our Supreme Court has “adopted a three-step method of analysis for use in determining whether a [local unit of government’s] action was governmental or proprietary in nature.” *Providence*, 382 N.C. at 212–13, 876 S.E.2d at 462 (citing *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dept.*, 366 N.C. 195, 200, 732 S.E.2d 137, 141 (2014)). The first step, and threshold inquiry, requires us to consider “whether, and to what degree, the legislature has addressed the issue.” *Williams*, 366 N.C. at 200, 732 S.E.2d at 141–42.

If the legislature has not designated a function as governmental, we then ascertain whether the act is one that “can only be provided by a governmental agency or instrumentality[,]” because, if it is, then the act is necessarily a governmental function. *Bynum*, 367 N.C. at 358–59, 758 S.E.2d at 646. This factor “has limitations in our changing world [because] many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity.” *Providence*, 382 N.C. at 213, 876 S.E.2d at 462 (quoting *Williams*, 366 N.C. at 202–03, 732 S.E.2d at 137 (citation modified)).

In light of this increasingly difficult reality, if neither of the first two inquiries is dispositive, we then look to “a number of additional factors, of which no single factor is dispositive.” *Williams*, 366 N.C. at 202, 732 S.E.2d at 143. Those factors include “whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether the fee does more than simply cover the operating costs of the service provider.” *Id.* at 202–03, 732 S.E.2d at 143 (citation omitted). When analyzing these factors, we focus on “the governmental act or service that was allegedly done in a negligent manner.” *Bynum*, 367 N.C. at 359, 758 S.E.2d at 646 (citing *Williams*, 366 N.C. at 199, 732 S.E.2d at 141). Moreover, “the distinctions between proprietary and governmental functions are fluid” and our Supreme Court has cautioned “against overreliance on” the factors. *Providence*, 382 N.C. at 213, 876 S.E.2d at 462–63 (quoting *Williams*, 366 N.C. at 202–03, 732 S.E.2d at 143)).

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At bottom, this analysis “is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case.” *Williams*, 366 N.C. at 203, 732 S.E.2d at 143.

Here, Defendant CMS contends the trial court erred by failing to address this factor in its order dismissing their 12(b)(2) motion. Regardless, Defendant CMS argues the first factor of *Williams* is dispositive because the Community Schools Act authorized Defendant CMS to provide for-profit businesses use of school facilities and therefore the General Assembly has designated that a governmental function. Specifically, Defendant cites to *Bynum v. Wilson County* and *Bellows v. Asheville City Board of Education* as analogs in favor of their argument.

In *Bynum*, the plaintiff sued Wilson County for various tort claims after he fell down the steps of a building housing the county government’s offices. 367 N.C. at 359–60, 758 S.E.2d at 646. In determining whether maintenance of the building was a proprietary or governmental function, our Supreme Court relied on section 153A-169, which stated “[t]he board of commissioners shall supervise the maintenance, repair, and use of all county property.” *Id.* at 360, 758 S.E.2d at 646–47. Specifically, the Court held that because the General Assembly “specifically assigned to the county government the responsibilities of locating, supervising, and maintaining” the building where the plaintiff fell, and because the building housed the offices for the county’s “discretionary, legislative, and public functions[,]” which could only be provided by the government, the General Assembly had designated maintenance of the building as governmental. *Id.* at 360–61, 758 S.E.2d at 646–47.

In *Bellows*, the plaintiff and her husband brought claims against the Asheville City Board of Education for negligence after the plaintiff fell out of her wheelchair and sustained injuries while at Asheville High School. 243 N.C. App. 229, 230, 777 S.E.2d 522, 523 (2015). Relying on *Bynum*, we held sections 115C-40 and 115C-521(c), which both directed that school boards shall maintain and repair their property, indicated the “General Assembly’s assignment” of these responsibilities was dispositive to the question of whether property maintenance was a governmental or proprietary function. *Id.* at 232, 777 S.E.2d at 524.

Because the test for whether a function is governmental or proprietary requires a fact-intensive inquiry, we do not find these cases persuasive here for the reasons below. Additionally, it is a well settled principle of law “ ‘that where the language of a statute is clear and unambiguous, there is no room for judicial construction and [we] must construe the statute using its plain meaning.’ ” *Kinston Charter Acad.*, 379 N.C. at

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572, 866 S.E.2d at 656 (quoting *In re Est. of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366 (2005)).

Here, the Community Schools Use Act (“The Act”) encourages “greater community involvement in the public schools and greater community use of public school facilities” and requires school boards to “[d]evelop programs and plans for increased use of public school facilities based upon policies and guidelines adopted by the State Board of Education.” N.C. Gen. Stat. §§ 115C-204; -207(2) (2023). The Act also requires school boards to “[e]stablish rules governing the implementation of such programs and plans in its public schools and submit these rules along with adopted programs and plans to the State Board of Education for approval” by the same. N.C. Gen. Stat. § 115C-207(3). Notably, the Act includes allowing use of school facilities for programs “including tutoring[.]” N.C. Gen. Stat. § 115C-206(2) (2023).

Per record evidence, Defendant CMS, pursuant to this authority, adopted regulations providing for “Commercial Group[s]” to use CMS facilities “to engage in a profit-making enterprise[.]” The regulations also provided that non-profit organizations would be preferred over for-profit organizations during the approval process, and the fee chart required higher payments by for-profit groups as well. Additionally, Defendant CMS discouraged the use of school facilities by for-profit groups.

This being the statutory and subsequent regulatory context, we do not agree the General Assembly has addressed whether a school board’s renting of school properties to for-profit businesses is a governmental or proprietary function. The Act is a broad grant of authority and empowers school boards to allow community organizations within their schools. However, the Act is silent about the use of school facilities by for-profit businesses. In contrast, in both *Bynum* and *Bellows*, the statutory mandates relied upon directly addressed the function at issue: maintenance of government property. Moreover, we read the Act’s explicit authorization for “[t]he use of public school facilities by governmental, charitable, or civic organizations” to be consistent with Defendant CMS’s own policy of preferring non-profit organizations to use school facilities over for-profit organizations. This weighs against characterizing the use of school facilities by for-profit businesses as a governmental function because that section seemingly promotes use by non-profit organizations.

The Act does indicate that it is a policy of the State “[t]o assure maximum use of public school facilities by the citizens of each community in this State[.]” which is indicative of it being a governmental function for a school board to allow all kinds of outside organizations to use

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school facilities. *See Williams*, 366 N.C. at 200, 732 S.E.2d at 141 (holding the following emphasized statutory language, “providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private property acquired” to be a “significant statutory indication” of a government function) (citation modified)). Additionally, the Act requires that local school boards “[d]evelop policies and/or procedures for approving the use of volunteer organizations and for approving the use of individual volunteers[;]” and “[d]evelop programs and plans for increased community use of public school facilities based upon policies and guidelines adopted by the State Board of Education[;]” and “[e]stablish rules governing the implementation of such programs and plans in its public schools[.]” N.C. Gen. Stat. § 115C-207(1)–(3).

But, based on the record developed to this point, it is unclear whether Defendant Mata was acting in the capacity of a volunteer under this authorization. Our standard of review directs us to presume the trial court found sufficient facts to support the conclusion that he was, and therefore Defendant CMS was negligent in allowing him access to its facilities and young children. Regardless, these statutes seemingly provide for the general conduct at issue and are indicative of a governmental function—allowing outside organizations to operate in public school facilities—but even if “the legislature has designated a general activity to be ‘a governmental function by statute, the question remains whether the specific activity at issue, in this case and under these circumstances, is a governmental function.” *Meinck v. City of Gastonia*, 371 N.C. 497, 513–14, 819 S.E.2d 353, 364 (2018) (quoting *Williams*, 366 N.C. at 201, 732 S.E.2d at 142). But we reiterate, in contrast to *Bynum* and *Bellows*, these mandates do not directly address or require school boards to engage in the specific activity and function at issue: allowing for-profit businesses to use its facilities for profit making activities.

Defendant CMS also directs us to section 115C-524 of the North Carolina General Statutes in support of its contention that the General Assembly has resolved the question of whether allowing for-profit groups to use school facilities is a governmental or proprietary function. Section 115C-524, “Repair of school property; use of buildings for other than school purposes[.]” allows local school boards to enter into agreements “permitting non-school groups to use school real and personal property [] for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property.” N.C. Gen. Stat. § 115C-524(c) (2023). The statute then goes on to say, and Defendant emphasizes, “[n]o liability shall attach to any board of education or to any individual board member for personal

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injury suffered by reason of the use of such school property pursuant to such agreements.” *Id.*

We do not read that language to be a legislative insulation of liability from injury suffered by all uses of school facilities. Rather, reading the statute in totality, the plain language of the statute refers to injuries caused by *use of property*; not injuries caused by a business proprietor conducting their business *on the property*. See *Henderson v. Charlotte-Mecklenburg Bd. of Educ.*, 253 N.C. App. 416, 421, 801 S.E.2d 145, 149 (2017) (holding the defendant maintained statutory immunity pursuant to section 115C-524(c) where an individual fell down because of a property defect while present on the property pursuant to an agreement made under the statute).

Additionally, section 115C-524(c) provides for school boards to enter into agreements with businesses, and thus represents a legislative intent to have an executed contract on file prior to facility use. This cuts against Defendant CMS’s argument in that Defendant CMS did not require an executed contract before allowing Defendant PlaySpanish to use school facilities. Moreover, had the General Assembly intended what Defendant CMS argues, it would have included a section to such effect in the Act pursuant to which Defendant PlaySpanish operated under. Instead, the Act seemingly contemplates lawsuits of this kind. Specifically, in the section discussing the maintenance of volunteer records, meaning “[a]n individual who provides services to a local board of education without expectation of compensation and with the understanding that the local board of education is under no obligation to continue accepting those services or to compensate the volunteer for them[,]” the Act states volunteer records should be kept confidential except for inspection by “[a] party to a lawsuit, by authority of a subpoena or proper court order[.]” N.C. Gen. Stat. § 115C-209.1(e)(1), (a)(5) (2023). This language, in contrast to that above, is indicative of the General Assembly’s intent that activities provided under the Act would not benefit from governmental immunity.

So, the General Assembly “has not directly resolved whether” the activity here is a governmental function and we proceed to the second factor of the analysis. *Williams*, 366 N.C. at 202, 732 S.E.2d at 142.

The second factor requires determination of whether the activity “is necessarily governmental in nature [because] it can only be provided by a governmental agency or instrumentality.” *Id.* “[T]his principle has limitations” because many services that were traditionally provided by the government have been privatized and can now be offered by commercial businesses. *Id.* at 202, 732 S.E.2d at 143. This being the case, if

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a “particular service can be performed both privately and publicly, the inquiry involves consideration” of additional factors, none of which are dispositive. *Id.*

Defendant contends the activity here is governmental in nature because only the government can make school property available for public use. We disagree with this characterization and hold that, in this context, public school facilities are a subset of government owned real property placed into the commercial market by Defendant CMS allowing businesses to use them for profit making activities.

In *Kiddie Korner*, the owners and operators of day care centers in Charlotte filed suit bringing numerous claims against the Charlotte-Mecklenburg School Board after the school board adopted a proposal made by its superintendent for an after-school program at Dilworth Elementary School. 55 N.C. App. 134, 135–36, 285 S.E.2d 110, 112 (1981). There, the school board established a committee comprised of “a representative from the Dilworth staff, parents, and the Dilworth Ministerial Association,” which then implemented the proposal and administered the program. *Id.* at 136, 285 S.E.2d at 112. We did not address the issue of governmental immunity but characterized the program “in terms of an educational service *operated by a school sponsored committee.*” *Id.* at 137, 285 S.E.2d at 113 (emphasis added).

In *Schmidt*, we relied upon *Kiddie Korner* in adjudicating a dispute where the plaintiffs’ minor son suffered a head injury while attending an “after-school enrichment program operated and controlled by Charlotte-Mecklenburg Board of Education at the Idlewild Elementary School.” 134 N.C. App. 248, 250, 517 S.E.2d 171, 173 (1999) (citation modified). Plaintiffs claimed the school board was negligent in its operation of the after-school program and waived governmental immunity, in part, by engaging in a proprietary function. *Id.* at 250–51, 517 S.E.2d at 173. We determined the program in *Kiddie Korner* was indistinguishable from the program there and held the Idlewild program was “an undertaking traditionally provided by the local governmental units . . . and correctly classified as a supplemental educational experience.” *Id.* at 254, 517 S.E.2d at 175 (citation modified).

Unlike the programs offered in *Kiddie Korner* and *Schmidt*, here record evidence shows the educational service was operated by a private, for-profit corporation—not by the school board or a constituent committee. This distinction necessarily leads us to the conclusion that this “particular service[, providing facilities to a for-profit tutoring business,] can be performed both privately and publicly.” *Williams*, 366 N.C. at 202, 732 S.E.2d at 143. Because of this, we proceed to analyze the

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remaining factors of whether: (1) “the service is traditionally a service provided by a governmental entity[;]” (2) “a substantial fee is charged for the service provided[;]” and (3) “the fee does more than simply cover the operating costs of the service provider.” *Id.* at 202–03, 732 S.E.2d at 143. But, we remain cognizant that our Supreme Court has cautioned against overreliance on these factors because the distinction “between proprietary and governmental functions [is] fluid” and we remain “adventurous to changes in practice.” *Id.* at 203, 732 S.E.2d at 143. Additionally, our Supreme Court has emphasized the following two principles important here:

First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. Second, it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose.

Id. (quoting *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 21–22, 213 S.E.2d 297, 302 (1975)).

Here, providing educational opportunities has traditionally been a service provided by local government entities. *Schmidt*, 134 N.C. App. at 250, 517 S.E.2d at 173. However, in compliance with our duty to heed changes in practice, we also recognize Defendant CMS still allows use of its properties for programs similar to those at issue in *Schmidt* and *Kiddie Korner* through its After-School Enrichment Program. See Before and After School Programs, <https://www.cmsk12.org/asep> (last visited 8 May 2025); see also *Williams*, 366 N.C. at 203, 732 S.E.2d at 143 (“First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases[.]” (citation omitted)). The record indicates Defendant PlaySpanish did not operate pursuant to such. Because of this reality, the characterization we made over twenty years ago in *Kiddie Korner* holds significantly less, if any, weight here.

Moreover, record evidence received by the trial court indicates Defendant CMS generally charged higher fees when allowing for-profit entities to use its facilities. Defendant CMS’s policies state that the reason it charges for-profit applicants higher fees is to “avoid unfair competition with other commercial enterprises.” Thus, by its own characterization, Defendant CMS’s activity here was in the commercial, not

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governmental, sphere because it was providing a service which could compete with other commercial enterprises. *See Britt*, 236 N.C. 446, 451, 73 S.E.2d at 293 (describing a proprietary function as one that “any corporation, individual, or group of individuals could do”). As such, Defendant CMS essentially stepped into the shoes of a landlord renting property to a company when it allowed Defendant PlaySpanish to operate its business on school property.

While Defendant CMS, as the Plaintiffs allege and the record indicates, waived fees in excess of \$35,000 for Defendant PlaySpanish during multiple years that Defendant PlaySpanish operated on their property, this was because Defendant CMS violated its own policies. This fact, and the argument Defendant CMS makes upon it, misses the forest for the trees. Specifically, emails from Defendant Marrero reflect Defendant CMS allowed Defendant PlaySpanish and other organizations to operate within its facilities without a contract for years and, after the Community Use of Schools Committee discovered this discrepancy, waived fees for subsequent years until changes in their policies were approved.

Essentially, Defendant PlaySpanish should not have been allowed to operate in the facilities during those years without a contract had Defendant CMS adhered to its own policies. Like a business that offers a refund to a customer after making an error, the fee waiver came about from Defendant CMS’s own erroneous conduct. Moreover, Defendant CMS planned on requiring Defendant PlaySpanish to obtain approval and begin paying the fees moving forward despite Defendant PlaySpanish not costing the district any additional expense. *See Evans v. Housing Authority of City of Raleigh*, 359 N.C. 50, 54, 602 S.E.2d 668, 671 (“A fee suggests that an activity is proprietary, particularly if a profit results.” (citation modified)). Had Defendant CMS abided by its own policies, Defendant PlaySpanish would have been paying fees for years despite Defendant CMS incurring no expense, thus making a profit. In consequence, we do not consider the absence of profit here to be of significance.

We do note, however, the fact that Defendant CMS was not motivated by making a profit, even though it would have had it abided by its policies, favors characterizing the activity as a governmental function. *See Meinck*, 371 N.C. at 515, 819 S.E.2d at 365 (acknowledging the City of Gastonia did not seek to make a profit when analyzing this factor).

In totality, Defendant CMS would have charged Defendant PlaySpanish a substantial fee in relation to its expense had it not strayed from its own policies. Moreover, the contrast between the programs operating pursuant to the After-School Enrichment Program, which fit

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squarely within the holdings of *Schmidt* and *Kiddie Korner*, and the program here operating for a profit without an executed contract also show this was not the kind of activity that has been traditionally provided by government entities. We hold Defendant CMS, based upon the facts developed and evidence received upon Defendants' 12(b) motions, was engaged in a proprietary function when it allowed a for-profit tutoring company to use its facilities when conducting its business.

In this context, the protections provided by governmental immunity do not deprive the trial court of personal jurisdiction over Defendant CMS. *See Providence*, 382 N.C. at 231, 876 S.E.2d at 474 (“When a governmental entity exercises proprietary functions without the requisite integrity, shielding it in immunity produces a serious injustice.” (Barringer, J., concurring in part and dissenting in part)). Accordingly, we affirm the trial court’s order denying Defendant CMS’s 12(b)(2) motion to dismiss. Because Defendant CMS waiving the protections of governmental immunity through engaging in a proprietary function is sufficient to uphold the trial court’s order on Defendants’ 12(b) motion, we do not reach the question of whether governmental immunity was also waived through the purchasing of insurance.

C. Defendants Hey, Goodman, and Marrero

[3] Defendants Hey, Goodman, and Marrero contend the trial court erred by failing to grant their motion to dismiss because they are public officials immune from liability for acts of negligence. Plaintiffs argue Defendants Hey, Goodman, and Marrero are merely public employees and therefore not entitled to immunity. We agree with Plaintiffs and affirm the trial court’s order denying Defendant Hey, Goodman, and Marrero’s 12(b)(6) motion to dismiss.

We review a trial court’s decision on a Rule 12(b)(6) motion de novo to determine “whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *Kinston Charter Acad.*, 379 N.C. at 572, 866 S.E.2d at 656 (citation and internal marks omitted). “Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.” *Id.* (quoting *Newberne v. Dep’t of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203–04 (2005)). Public official immunity is one such insurmountable bar because “it shields a defendant entirely from having to answer for its conduct in a civil suit for damages.” *Est. of Graham*, 385 N.C. at 651, 898 S.E.2d at 895 (citations omitted). Pursuant to de novo review, we “consider the matter anew and freely substitute

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our judgment for that of the trial court.” *Matter of K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citation modified).

Plaintiffs sued Defendants Goodman, Hey, and Marrero in their individual capacity because the complaint names them in their individual capacity and Plaintiffs are seeking a monetary remedy. *See Fowler*, 378 N.C. at 144–45, 861 S.E.2d at 692 (explaining the implication of these two factors when determining whether a person has been sued in their individual or official capacity). Being so, Defendants Hey, Goodman, and Marrero do not enjoy the protection of governmental immunity. *Graham*, 385 N.C. at 654, 898 S.E.2d at 897. But, defendants sued in their individual capacity “are not left unshielded—they may assert ‘personal immunity defenses.’” *Id.* (quoting *Moore v. City of Greensboro*, 345 N.C. 356, 368, 481 S.E.2d 14, 22 (1997)).

Public official “immunity is one such personal defense.” *Id.* Public official immunity is a judicially created doctrine which “shields public officials from personal liability for claims arising from discretionary acts or acts constituting mere negligence, by virtue of their office, and within the scope of their governmental duties.” *Bartley*, 381 N.C. at 294, 873 S.E.2d at 533. This immunity is founded upon two societal concerns: first, it allows for “fearless, vigorous, and effective administration of government policies[,]” and second, it encourages competent individuals to assume the responsibilities of public office without fear of incurring liability for actions taken when executing those duties. *Id.* (citations and internal marks omitted). This doctrine does not, however, “immunize conduct at odds with the protections afforded by it and that underlie its utility.” *Graham*, 385 N.C. at 654, 898 S.E.2d at 897–98 (citation modified). To this end, public officials are not immune from liability if their “action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt.” *Bartley*, at 294, 873 S.E.2d at 533 (citation and internal marks omitted). But, we presume a public official discharges their duties in good faith. *Id.* at 295, 873 S.E.2d at 533 (citation omitted).

In contrast to public officials, public employees may be held liable for negligence. *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 887 (1997). Our State recognizes three “basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties.” *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999).

“A position is considered created by statute when the officer’s position has a clear statutory basis or the officer has been delegated

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a statutory duty by a person or organization created by statute or the Constitution.” *Baker v. Smith*, 224 N.C. App. 423, 428, 737 S.E.2d 144, 148 (2012) (citation modified). “[W]here a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vest the authority to delegate passes the first *Isenhour* factor.” *McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532 (citing *Baker*, 224 N.C. App. at 428–30, 737 S.E.2d at 148–49). But, the delegation must be of “some portion of the sovereign power to the position holder.” *Hwang v. Cairns*, 387 N.C. 448, 455, 915 S.E.2d 425, 430 (2025).

Ministerial duties “are absolute and involve merely the execution of a specific duty arising from fixed and designated facts[,]” while discretionary duties “are those requiring personal deliberation, decision and judgment.” *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (citation modified). “Courts applying this framework have recently held that a defendant seeking to establish public official immunity must demonstrate that all three of the *Isenhour* factors are present.” *McCullers*, 265 N.C. App. at 222–23, 828 S.E.2d at 532 (citing *Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017)).

Defendants Hey, Goodman, and Marrero contend they are entitled to public official immunity because their positions have “a clear statutory basis.” They cite to the Act in support of their argument that they are “Community Schools Coordinators.”

The Act defines a “Community Schools Coordinator” as “an employee of a local board of education whose responsibility it is to promote and direct maximum use of the public schools and public school facilities as centers for community development[,]” and states that local school boards “may provide for the . . . employment of one or more [C]ommunity [S]chools [C]oordinators.” N.C. Gen. Stat. § 115C-205(2); -207 (2023). The Act also provides the duties of Community Schools Coordinators:

Every local board of education may employ one or more [C]ommunity [S]chools [C]oordinators and shall establish the terms and conditions of their employment. Community [S]chools [C]oordinators shall be responsible for:

- (1) Providing support to the [C]ommunity [S]chools [A]dvisory [C]ouncils and public school officials.
- (2) Fostering cooperation between the local board of education and appropriate community agencies.
- (3) Encouraging maximum use of community volunteers in the public schools.

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(4) Performing any other duties as may be assigned by the local superintendent and the local board of education, consistent with the purposes of this Article.

N.C. Gen. Stat. § 115C-209 (2023).

Here, whether Defendants Hey, Goodman, and Marrero were Community Schools Coordinators as contemplated by the Act in their respective positions as manager of Defendant CMS's CUS program, Director of Property Management within the Facility Planning and Management section of Defendant CMS's Operations Department, and Executive Director of the Facility Planning and Management section of Defendant CMS's Operations Department is unclear. *See McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532 ("Defendants argue that their positions are 'created by' [statute], but point to no language in our Constitution or any statute expressly creating their positions."). Their positions are not provided for within the Act and the only references to their respective involvement with CUS are the following allegations from Plaintiffs' amended complaint:

31. From at least 2011 through 2017, [Defendant] Marrero was the manager of [Defendant] CMS's CUS program. Upon information and belief, [Defendant] Marrero's duties as an employee of CMS were to follow [Defendant] CMS policies, regulations, and procedures for the review and approval of applications from CUS participants, including [Defendant] PlaySpanish. [Defendant] Marrero did not have discretion to vary from those policies, regulations, and procedures.

32. Upon information and belief, in at least 2016, 2017, and 2018, [Defendant] Goodman was the Director of Property Management within the Facility Planning and Management section of [Defendant] CMS's Operations Department, and [Defendant] Marrero's direct boss. Upon further information and belief, [Defendant] Goodman provided oversight for the CUS program, but did not have discretion to vary from [Defendant] CMS's policies, regulations, and procedures for the review and approval of applications from CUS participants.

33. Upon information and belief, in at least 2016, 2017, and 2018, [Defendant] Hey was the Executive Director of the Facility Planning and Management section of [Defendant] CMS's Operations Department, and [Defendant]

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Goodman's direct boss. Upon further information and belief, [Defendant] Hey was ultimately responsible for the CUS program, but did not have discretion to vary from [Defendant] CMS's policies, regulations, and procedures for the review and approval of applications from CUS participants.

We cannot hold upon the record developed to this point that Defendants Hey, Goodman, and Marrero are entitled to public official immunity solely because their positions were created by statute. Even if their positions were created by statute, the Act does not expressly provide for delegating power of the approval process to Community Schools Coordinators. It does require school boards to develop policies for approving organizations and volunteers, but then allows Community Schools Advisory Councils—"a committee of citizens organized to advise community school coordinators, administrators, and local boards of education in the involvement of citizens in the educational process and in the use of public school facilities"—to assist in the implementation of those procedures. N.C. Gen. Stat. §§ 115C-205(1); -207-08 (2023). Community Schools Coordinators may provide support to Community Schools Advisory Councils pursuant to section 115C-209(1), but it is unclear whether that includes creating approval processes.

Regardless, based on our reading, the Act delegates to school boards and Community Schools Advisory Councils the power to develop and implement an approval process for outside organizations; it does not "expressly create[] the authority to delegate [the] duty" to Defendants Hey, Goodman, or Marrero as needed to satisfy the first *Isenhour* factor. *McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532. Even if Defendants Hey, Goodman, and Marrero's positions were created by statute, or if they were entitled to exercise a portion of the sovereign power through delegation, they have failed to show their duties are anything more than ministerial.

Plaintiffs adequately pled that Defendants Hey, Goodman, and Marrero are not entitled "to vary from [Defendant] CMS's policies, regulations, and procedures for the review and approval of applications from CUS participants." Defendants have failed to rebut this through the evidence they provided. Specifically, Defendant CMS's regulations for the approval process provide that the Community Use Assistant may deny an application for reasons such as: (1) being incomplete or inaccurate; (2) failing to send an accompanying contract; (3) failing to provide a certificate of insurance if needed; (4) prior violation of rules; (5) unavailability of the requested facilities; or (6) the requested activity, in

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the opinion of school officials, could cause damage to the facility. We consider these ministerial acts as they are primarily binary decisions based upon the presence of a necessary condition. Thus, we cannot say Defendants Goodman, Hey, and Marrero were required to exercise their “personal deliberation, decision and judgment” in approving CUS applications. *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

Accordingly, because the record reflects that Defendants Hey, Goodman, and Marrero are public employees and not public officers, they are not entitled to public official immunity. Therefore, we hold the trial court properly denied their 12(b)(6) motion to dismiss Plaintiffs’ amended complaint.

III. Conclusion

For the aforementioned reasons, we affirm the trial court’s order denying Defendant CMS’s Rule 12(b)(2) motion to dismiss because of governmental immunity and Defendants Hey, Goodman, and Marrero’s 12(b)(6) motion to dismiss because of public official immunity.

AFFIRMED.

Judges STROUD and FLOOD concur.

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HEALTH & HUM. SERVS.**

[299 N.C. App. 582 (2025)]

CHESAPEAKE DIAGNOSTIC IMAGING CENTERS, LLC, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION
OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE
OF NEED, RESPONDENT, AND SENTARA ADVANCED IMAGING SOLUTIONS, LLC,
RESPONDENT-INTERVENOR.

No. COA24-1106

Filed 2 July 2025

**1. Hospitals and Other Medical Facilities—certificate of need—
competitive review—denial—no substantial prejudice**

The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute substantial prejudice as a matter of law and was therefore properly upheld by an administrative law judge. Petitioner failed to show that the agency's decision was erroneous or improper where the agency had no statutory obligation to favor one applicant over another and was not required to weigh market competition in the same city over other relevant factors. Further, although petitioner argued that the denial of its application resulted in a loss of forecasted revenue, its projections were merely hypothetical, particularly where those projections were based on presumptions that residents would shift from two existing MRI units to petitioner's newly-built one, if it were granted the CON.

**2. Hospitals and Other Medical Facilities—certificate of need—
competitive review—property interest asserted—no due process
implications**

The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute a deprivation of a property interest implicating due process rights and, thus, there was no requirement for the reviewing administrative law judge to make findings regarding petitioner's putative property interest. Petitioner had no legitimate claim of entitlement to an approved CON application in a competitive review, in which the agency had the statutory authority to compare multiple applicants and to either approve, approve with conditions, or deny any application.

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**3. Hospitals and Other Medical Facilities—certificate of need—
competitive review—market access—as-applied constitutionality**

The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—was not unconstitutional as applied to petitioner where, despite petitioner's argument, the agency was not required to weigh market competition over other factors in its review process, or to solely consider whether its decision would allow a monopoly of certain services to form. Here, the agency found the competitor's application to be superior to petitioner's application in three out of five factors; therefore, the administrative law judge properly affirmed the agency's decision.

Appeal by petitioner and cross-appeal by respondent-intervenor from a final decision entered 26 August 2024 by Administrative Law Judge Michael C. Byrne in the Office of Administrative Hearings. Heard in the Court of Appeals 11 June 2025.

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

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, Candace S. Friel, Noah H. Huffstetler, and Nathaniel J. Pencook, for the petitioner-appellant.

Williams Mullen, by Joy Heath, and Alexander M. Gormley, for the intervenor-appellee.

TYSON, Judge.

Chesapeake Diagnostic Imaging Centers, LLC ("Petitioner") 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 Regulations, Healthcare Planning and Certificate of Need Section ("DHHS"). DHHS approved Sentara Advanced Imaging Solutions, LLC's ("Respondent-Intervenor") application for a certificate of need ("CON") for a magnetic resonance imaging ("MRI") machine.

Petitioner appealed DHHS' decision to the Office of Administrative Hearings ("OAH"). The ALJ affirmed DHHS' decision and entered a Final

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Decision for Respondent-Intervenor on 26 August 2024. Petitioner appeals. Respondent-Intervenor cross-appeals.

I. Background

The 2022 State Medical Facilities Plan (“2022 SMFP”) identified a need for an additional fixed MRI scanner in the northeastern service area of Pasquotank, Camden, Currituck, and Perquimans counties. Respondent-Intervenor operates a fixed hospital-based MRI scanner located at its Sentara Albemarle Medical Center in Elizabeth City, and a mobile MRI which has not moved from the Medical Center since 2017.

Petitioner filed a CON application to build a fixed MRI scanner at a new free-standing diagnostic imaging facility, to be known as Chesapeake Regional Imaging Centers-Elizabeth City. Respondent-Intervenor also filed a CON application to build a new fixed MRI scanner at a new free-standing diagnostic imaging facility, to be known as Sentara Advanced Imaging Solutions-Moyock, in the Town of Moyock located in Currituck County. Respondent-Intervenor also proposed to terminate use of its mobile scanner if its application was approved.

DHHS determined qualified applicants had submitted the two completed applications, and DHHS began its review on or about 1 October 2022. DHHS determined the approval of one application under the 2022 SMFP would result in the denial of the other application. *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.”).

DHHS issued its decision approving Respondent-Intervenor’s application, which rejected Petitioner’s application on 27 February 2023. DHHS articulated Petitioner’s application was deemed superior on two factors while Respondent-Intervenor’s application was superior on three factors during the competitive review. Petitioner’s application was deemed superior on the grounds of Competition (Access to new or alternate provider) and Average Operating Expense per MRI procedure. Respondent-Intervenor’s application was deemed superior on the grounds of Geographic Accessibility, Access by Medicare Patients, and Access by Medicaid Patients.

Petitioner filed a petition for Contested Case Hearing in the OAH to seek administrative review of the 27 February 2023 decision on

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28 March 2023. The ALJ entered a Final Decision and affirmed DHHS' decision to award Respondent-Intervenor a CON to develop its proposed project. Petitioner appeals. Respondent-Intervenor cross-appeals.

II. Jurisdiction

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

III. Issues

Petitioner argues: (1) it was substantially prejudiced by the ALJ's Final Decision; (2) it was deprived of a property interest in the CON; and, (3) the ALJ's Final Decision was unconstitutional.

Respondent-Intervenor's cross-appeal argues Petitioner lacks the statutory authority to apply for and receive a CON in North Carolina, and the ALJ's findings of Petitioner's financial harm as a result of the CON denial are unsupported by record evidence.

IV. 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. Regul.*, 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).

V. Petitioner's Appeal**A. Substantial Prejudice**

[1] Petitioner argues the ALJ erred in determining it did not demonstrate substantial prejudice as a matter of law. Petitioner asserts DHHS' denial of its approvable application, which prevents it from adding competition to a particular service area, was sufficient to establish

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substantial prejudice. Petitioner further argues its appeal brings issues of first impression before this Court by raising the issue of whether limiting competition by denying a competitive applicant's CON is an error of law which warrants reversal.

The Administrative Procedure Act, N.C. Gen. Stat. § 150B-23(a), requires the ALJ to determine whether a petitioner has met its burden by showing the agency substantially prejudiced the petitioner's rights, *and* the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 235 N.C. App. 620, 628, 762 S.E.2d 468, 473 (2014); N.C. Gen. Stat. § 150B-23(a) (2023). "These are discrete requirements and proof of one does not automatically establish the other." *Surgical Care Affiliates, LLC*, 235 N.C. App. at 629-30, 762 S.E.2d at 474. Additionally, a party's status as a denied qualified applicant with a conforming application does not, alone, establish substantial prejudice. *Id.* at 624, 762 S.E.2d at 471.

This Court has examined the issue of competition in the context of substantial prejudice in previous non-competitive CON cases. *See Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195. In *Parkway Urology*, this Court held treating increased market competition as the basis for a substantial prejudice determination would "eviscerate" the statutory intent of the requirements. *Id.* In order to establish substantial prejudice, the petitioner would have to provide specific evidence of harm, which goes beyond any harm resulting from increased competition. *Id.*

This appeal presents the factual inverse of *Parkway Urology*. Here, Petitioner argues its CON being denied created substantial prejudice because it prevented Petitioner from inserting competition into a previously monopolized market. While precedents treat provider monopolies or near-monopolies as salient, monopoly is not a "magic word" without which the ALJ's otherwise sound reasoning becomes prejudicial to reverse the agency and ALJ. *Fletcher Hospital, Inc. v. N.C. Dep't of Health & Hum. Servs.*, 295 N.C. App. 82, 97, 906 S.E.2d 19, 30 (2024). An Agency decision denying a CON application's approval does not establish substantial prejudice just because the applicant of a restricted activity is unable to "conduct business as it chooses" and desires to. *See Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs.*, 282 N.C. App. 413, 417, 871 S.E.2d 555, 559 (2022). The binary "yes" or "no" approval of one application for the additional MRI

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in the service area under the 2022 SMFP results in the denial of the other application. N.C. Gen. Stat. § 131E-183(a)(1) (2023).

Petitioner's substantial prejudice argument centers around two key factors: (1) its inability to construct its proposed imaging center in a market currently served by Sentara; and, (2) its loss of forecasted revenue from that inability. The harm required to establish substantial prejudice must be concrete, particularized, and actual or imminent. *Bio-Medical Applications*, 282 N.C. App. at 417, 871 S.E.2d at 559. The argument for projected loss of revenue is legally insufficient, as it points to notions, which are both conjectural and hypothetical. *Id.*

Petitioner's financial-harm allegations center around projected financial earnings from a proposed fixed MRI center in a market it currently does not serve and where two existing MRI units are already sited. Petitioner's financial projection models rest upon the presumption North Carolina residents would shift to Petitioner's new fixed MRI center for their imaging needs based on the patients' travel times. With two existing MRI units already sited in Elizabeth City, such factors do not establish financial harm for Petitioner's CON application denial given their hypothetical and unsubstantiated nature.

Respondent-Intervenor's approval for a new MRI unit being sited in Currituck County would not necessarily create market competition in Elizabeth City. This fact, standing alone, is insufficient to establish substantial prejudice for Petitioner. Respondent-Intervenor agreed to give up its mobile MRI unit currently in Elizabeth City. The CON service area is a large 4-county rural area of Pasquotank, Camden, Currituck, and Perquimans counties. Having a permanent unit located in another county within the service area and outside of the more-urban Elizabeth City is, as DHHS found, a benefit to outlying residents.

DHHS deciding a CON application between two applicants in a manner, which fails to increase competition in one city, is not an unauthorized, erroneous, arbitrary or capricious action, was not made from improper procedure, or is inapposite to rule or law. *Id.* For Petitioner to meet its burden, it must show an erroneous or improper action by the Agency during evaluation of the applications, which *in turn resulted* in substantial prejudice. DHHS has no statutory obligation to favor one CON applicant over another, simply because granting one would allow a new provider to enter the same city in the service market.

While precedents show new market activity is a positive factor to consider during a CON application review, it is illogical to demand for

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DHHS to favor an applicant, who would provide competition to the market if their application was comparatively less favorable to another on the basis of well-established criteria. DHHS possesses authority to prescribe and weigh the multiple factors analyzed during competitive review. *Id.* DHHS was not required to weigh market competition in the same city over other standard factors it has used during previous MRI CON cases. We affirm the ALJ's finding Petitioner was not substantially prejudiced by the denial of its CON application. *Id.*

B. Property Interest

[2] Petitioner further argues, regardless of the substantial prejudice issue, the ALJ erroneously failed to analyze and rule whether DHHS' decision deprived Petitioner of property. Petitioner claims the ALJ's omission of any finding of fact regarding the putative property interest Petitioner had to an approved CON application took away its right to due process on the issue.

When analyzing a due process claim, the first step is to determine whether a "constitutionally protected property interest exists." *Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 217 (2018). "To demonstrate a [sufficient] property interest...a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *Id.* (citation omitted). Procedural due process safeguards the security of property interests a person has already acquired. *See DeBruhl v. Mecklenburg County Sheriff's Office*, 259 N.C. App. 50, 56, 815 S.E.2d 1, 5 (2018). To have a property interest in a particular benefit as opposed to a mere expectancy, "a person clearly must have more than an abstract need or desire for it . . . he must, instead, have a legitimate claim of entitlement to it." *Id.* at 56, 815 S.E.2d at 5-6 (citation omitted).

After CON applications are submitted to DHHS, the department has the statutory authority to "approve," "approve with conditions," or "deny" any application based upon criteria within DHHS' established purview. N.C. Gen. Stat. § 131E-186(a) (2023).

"In a competitive review, where the Agency finds more than one applicant conforming to the applicable review criteria, it may conduct a comparison of the conforming applications to determine which applicant should be awarded the CON." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Hum. Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006). Comparative review allows DHHS a binary "yes" or "no" decision to find one applicant preferable over another so as to deny the less desirable applicant the CON. *See id.*

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Petitioner's application was competitively reviewed against Respondent-Intervenor's application for the same MRI CON. Both applications were deemed complete and approvable under the CON criteria. Neither applicant was guaranteed approval simply based upon this fact. Both Petitioner and Respondent-Intervenor had equal expectations of approval. DHHS has the statutory authority to "approve," "approve with conditions," or "deny" any application based upon DHHS' established purview. N.C. Gen. Stat. § 131E-186(a) (2023).

Given this circumstantial equality, Petitioner's claim of a recognized property interest in CON application approval is unsupported. Petitioner had no legitimate claim of entitlement to an approved CON application from the competitive review. Petitioner's status as a qualified applicant with an approvable application allowed them to enter the competition. Neither factor guarantees Petitioner would win it. It has shown no reversible error in the process, evaluation, review, or in the ALJ's review. Petitioner's claim its application's approval was a legitimate property interest, protected by due process, is without merit and overruled. *Id.*

C. As-Applied Challenge

[3] The stated legislative purpose of North Carolina's CON law is to "protect the health and welfare" of citizens "by providing affordable access" to health care. *Hope-A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 603, 693 S.E.2d, 673, 680 (2010). The North Carolina Constitution does not permit the General Assembly to authorize state agencies or commissions to forbid hospitals to construct facilities and provide services merely because doing so would subject other competing hospitals to a competitive market. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 549, 193 S.E.2d 729, 734 (1973).

DHHS possesses the statutory authority to select review criteria for competitive CON applications, and the agency's fact finding and review are binding so long as the agency did not "act [] outside its authority, act[] arbitrarily or capriciously, use[] improper procedure, or fail[] to act as required by rule or law." *Parkway Urology, P.A.*, 205 N.C. App. at 536, 696 S.E.2d at 193.

The applicant carries the burden and must "demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed[.]" N.C. Gen. Stat. § 131E-183(a)(18a)(2023). The

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need determination for covered medical services occurs in the 2022 SMFP to initiate the applications and review criteria. *See* N.C. Gen. Stat. § 131E-177 (2023).

This Court has previously held no binding law requires an administrative review agency to examine the effects of a new facility on specific competitors as part of a broader inquiry concerning impact of competition. *See Fletcher Hospital, Inc.*, 295 N.C. App. at 97, 906 S.E.2d at 30. In *Fletcher*, this Court affirmed the ALJ's decision in all respects despite the petitioners' allegations the ALJ had erred by not making a specific analysis of the proposed facilities' effect on the petitioner's ability to do business in the market. *Id.*

Petitioner's argument for unconstitutionality of the ALJ's decision hinges on the allegation DHHS' granting Respondent's CON application prevents it from entering the market and restricts its "ability to do business" within the service area. The ALJ was under no obligation to consider the effects of Petitioner's denial on its ability to compete with Respondent within Elizabeth City specifically or in the greater prescribed 4-county area. While DHHS' CON authority does not permit decisions to perpetuate or develop a monopoly, its authority allows CON applications where monopolies might exist as a byproduct of the determined medical need.

Monopolistic enterprises are frequently considered as one portion of the CON review process, but it is not the sole deciding factor. As noted above, market competition is also not required to be weighted heavier than other review criteria. Petitioner's application was found to be comparatively less desirable than Respondent's application in three out of five areas, including geographical reach. Petitioner's argument is overruled.

VI. Respondent-Intervenor's Cross Appeal

Respondent-Intervenor cross appeals and argues Petitioner lacks the statutory authority to apply for and receive a CON in North Carolina and the ALJ's findings of Petitioner's financial harm as a result of the CON denial are unsupported by evidence in the record. Petitioner has filed a motion to dismiss Respondent-Intervenor's cross appeal.

In light of our holding above to affirm the final decision of the ALJ, we need not reach Respondent-Intervenor's arguments and cross appeal. We dismiss Respondent-Intervenor's cross appeal and Petitioner's motion to dismiss as moot.

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VII. Conclusion

The ALJ reviewed DHHS' evidence and findings and heard arguments from Petitioner, Respondent-Intervenor, and DHHS. Petitioner 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-Intervenor is affirmed. Respondent-Intervenor's cross appeal is dismissed as moot. *It is so ordered.*

AFFIRMED.

Judges STROUD and COLLINS concur.

LANCE FENDERSON, INDIVIDUALLY, CHRISTINE FENDERSON,
INDIVIDUALLY, AND TROY FENDERSON, INDIVIDUALLY, PLAINTIFFS
v.

DAVIDSON DAY SCHOOL, KYLE K. McLAUGHLIN, ROB JOHNSON, ASHEVILLE
SCHOOL, INCORPORATED, AND OLIVER A. FERENBACH, DEFENDANTS

No. COA24-809

Filed 2 July 2025

1. Negligence—standard of care—violation not shown—collisions between players inherent to lacrosse—summary judgment

In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player, as well as defendant player's coach and school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly granted summary judgment in favor of defendant player because none of the evidence forecast showed that defendant player acted willfully or wantonly to injure plaintiff player, given the inherent nature of high-speed, high-impact body collisions in lacrosse. Specifically, all three officials who refereed the game agreed that defendant player did not intentionally make head-to-head (and, thus, illegal) contact, and two of the three officials believed that plaintiff player engaged in a potentially illegal, head-down block during the collision. Accordingly, defendants' related argument—that the trial court should have ruled that plaintiff player was contributorily negligent—and arguments from both parties regarding the trial court's

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judgment on the pleadings (which preceded the summary judgment ruling) were moot.

2. Negligence—failure to train a minor to comply with rules of a sporting event—tort not recognized—dismissal proper

In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player and defendant player’s school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly dismissed plaintiffs’ negligence and negligent infliction of emotional distress claims against defendant school because neither North Carolina statutes nor case law establishes a cause of action for the failure of a school or coach to train a minor in the rules of a sporting event.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Plaintiffs from orders entered 14 July 2021 and 4 May 2022 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2025 in session at Elon University School of Law in the City of Greensboro pursuant to N.C. Gen. Stat. § 7A-19(a)(2023).

Allen, Chesson & Grimes, PLLC, by Anna C. Majestro, David N. Allen and Benjamin S. Chesson, for the Plaintiffs-Appellants.

Waldrep Wall Babcock & Bailey PLLC, by Joseph T. Carruthers and J. Dennis Bailey, for the Defendants-Appellees.

Ball, Barden & Cury, P.A., by Ervin L. Ball, Jr., for the Defendant-Appellee Oliver A. Ferenbach.

WOOD, Judge.

Plaintiffs appeal from a 14 July 2021 order partially granting Defendant Oliver Ferenbach’s Motion for Judgment on the Pleadings and a 4 May 2022 order granting Summary Judgment in favor of Defendants Asheville School, Inc. and Ferenbach.¹

1. All claims and counterclaims between Defendants Davidson Day School, Kyle K. McLaughlin and Ron Johnson (“the DDS Defendants”) and the Plaintiffs were dismissed with prejudice 29 December 2023.

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I. Factual and Procedural History

On 10 May 2019, Davidson Day School (“Davidson”) and Asheville School (“Asheville”) engaged in a high school lacrosse game. Lance Fenderson (“Plaintiff Lance”) was a junior on Davidson’s team, while Oliver Ferenbach (“Defendant Ferenbach”) was a senior on Asheville’s team. Both boys had played lacrosse for several years, including for multiple years on their respective school teams. During the game, both boys wore standard lacrosse gear including helmets, face masks, and pads.

According to a post-game report by the officiating crew, it was a game with “routine” fouls and no significant incidents prior to the fourth quarter. During the second minute of the fourth quarter, Defendant Ferenbach scooped up the ball near the right sideline, approximately halfway down Davidson’s defensive field and charged through the open field towards Davidson’s right goal post. Plaintiff Lance, in a defensive maneuver, ran back and to the right to place himself between Defendant Ferenbach and the goal. Prior to contact, Plaintiff Lance dropped both his body and head, leaning towards Defendant Ferenbach. Defendant Ferenbach also lowered his left shoulder and head, while shifting his stick inside away from Plaintiff Lance, and continued through the contact while taking a shot to score a goal. Plaintiff Lance was knocked to the ground in the collision and did not attempt to rise. A penalty flag was thrown, and play was suspended while Plaintiff Lance received medical care.

While play was suspended the officials discussed the penalty and the appropriate response to the situation. The officials gave Defendant Ferenbach a penalty for a personal foul, a head-to-head hit, and ejected him from the game. Play never resumed, however, as the coaches jointly decided to end the game.

On 13 February 2020, Lance Fenderson, Christine Fenderson, and Troy Fenderson (jointly “the Plaintiffs”) filed a complaint asserting claims against Defendant Ferenbach for injuring Plaintiff Lance, as well as claims against Asheville for failure to properly train Defendant Ferenbach and for vicarious liability for Defendant Ferenbach’s actions. Plaintiffs also sued Davidson Day School and employees Kyle K. McLaughlin and Ron Johnson (“the DDS Defendants”) for failure to properly train Plaintiff Lance and for not providing him with proper safety equipment. Christine and Troy Fenderson also asserted claims for negligent infliction of emotional distress (“NIED”).

On 4 June 2020, Defendants filed their response including affirmative defenses of waiver and contributory negligence, as well as a motion to dismiss.

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On 7 April 2021, Defendant Ferenbach moved for judgment on the pleadings. The trial court heard the motion on 15 June 2021. On 6 July 2021, the trial court partially granted Defendant Ferenbach's motion, dismissing Plaintiff's negligence and NIED claims, reasoning a heightened standard of care applied to the claims against Defendant Ferenbach. The trial court did not dismiss Plaintiff Lance's claim against Defendant Ferenbach for willful and wanton conduct based on his actions during the collision with Plaintiff Lance.

On 8 March 2022, Asheville filed a motion for summary judgment, and Defendant Ferenbach filed a motion for summary judgment on 10 March 2022. Plaintiffs opposed the motions arguing, irrespective of the standard of care, Plaintiff Lance's claims against Defendant Ferenbach should proceed because evidence exists tending to show Defendant Ferenbach had acted intentionally to injure Plaintiff Lance. After a full briefing and a hearing on 7 April 2022, the trial court entered an order on 4 May 2022 granting both summary judgment motions. While the trial court did "not conclude [Plaintiff Lance] caused or legally contributed to his own injuries" it did tax Defendants' costs to Plaintiffs. The case proceeded against the DDS Defendants.

On 26 January 2023, the trial court dismissed Plaintiff's ordinary negligence claims against the DDS Defendants based on the pre-injury release Plaintiffs Christine and Troy signed. Plaintiffs and DDS Defendants resolved their remaining claims, and on 29 December 2023 at the joint request of the parties, the trial court entered a final consent order of dismissal for all claims between Plaintiffs and DDS Defendants.

On 26 January 2024, Plaintiffs filed and served a Notice of Appeal of the 14 July 2021 Motion for Judgment on the Pleadings, as well as the 4 May 2022 Order for Summary Judgment.

II. Analysis

Plaintiffs raise three issues on appeal: (1) the trial court erred in departing from the ordinary standard of care for Plaintiffs' negligence-based claims against Defendant Ferenbach; (2) the trial court erred in finding no genuine issue of material fact for the jury at summary judgment on whether Defendant Ferenbach violated whatever standard he owed to Plaintiff Lance in light of evidence Defendant Ferenbach had acted intentionally or recklessly to injure Plaintiff Lance; and, (3) the trial court erred in dismissing claims against Asheville notwithstanding the outcome of Plaintiff Lance's claim against Defendant Ferenbach.

Defendants contend the trial court did not err in granting summary judgment to both Defendant Ferenbach and Asheville and raise

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two additional issues on appeal: (1) the trial court should have granted Defendant Ferenbach's Motion for Judgment on the Pleadings in its entirety; and, (2) the trial court should have ruled that Plaintiff Lance's actions causing or contributing to his own injuries were another reason to grant summary judgment.

A. Motion for Summary Judgment**1. Standard of Review**

An order allowing summary judgment is reviewed *de novo*. *James H.Q. Davis Tr. v. JHD Props, LLC*, 387 N.C. 19, 23, 910 S.E.2d 652, 657 (2025). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (quoting N.C.G.S. § 1A-1, Rule 56(c) (2023)). "A genuine issue is an issue that is 'supported by substantial evidence, and an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.'" *Id.* Initially, the party seeking summary judgment bears the burden of demonstrating the absence of a "genuine issue of material fact." However, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations. . . ." *Id.* "Its response must set forth specific facts showing that there is a genuine issue for trial." *Id.* (cleaned up).

2. Presence of a Jury Issue

[1] Plaintiffs contend the trial court erred by finding no genuine issue of material fact exists at summary judgment. Specifically, Plaintiffs contend whether Defendant Ferenbach violated whatever standard he owed to Plaintiff Lance, in light of evidence tending to show Defendant Ferenbach had acted willfully or wantonly to injure, Plaintiff Lance was a material fact in dispute. We disagree. The record evidence simply does not support findings or conclusions from which any type of tort liability could be found.

While this Court has previously warned summary judgment "is rarely an appropriate remedy in cases of negligence or contributory negligence, we have clarified summary judgment is appropriate in a cause of action for negligence where the plaintiff's forecast of evidence fails to show negligence on the defendant's part . . ." *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (cleaned up).

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In any ordinary negligence action, “plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages.” *Elm St. Gallery, Inc. v. Williams*, 191 N.C. App. 760, 767, 663 S.E.2d 874, 878 (2008) (cleaned up). Additionally, this Court has determined that willful and wanton negligence is gross negligence.

An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others. An act is willful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, a duty assumed by contract or imposed by law.

McCauley v. Thomas ex rel. Progressive Universal Ins. Co., 242 N.C. App. 82, 89–90, 774 S.E.2d 421, 426 (2015) (cleaned up).

Both parties agree, and this Court concurs, neither our General Assembly nor our case law has established a separate duty or standard of care for contact sports in North Carolina. While future cases may require consideration of whether such a duty should apply, this case does not warrant such action. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, we conclude no facts support negligence under the reasonable and prudent person standard. “Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions.” *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002).

In the current case, Defendant Ferenbach and Plaintiff Lance were opposing high school lacrosse players engaged in a competitive post-season playoff game. The play at issue lasted five seconds from the time Defendant Ferenbach picked up the ball until he took his shot on goal after colliding with Plaintiff Lance.

Plaintiffs’ lacrosse experts testified boys high school lacrosse is a contact sport in which high-impact player collisions are an inherent part of the game. In addition, the high school lacrosse rules entered into evidence clearly state, “Officials shall . . . remain aware of the inherent risk of injury that competition poses to student-athletes.”

A video of the game was entered into evidence as Exhibit 1 and both parties testified to the accuracy of the video. The video clearly depicts Defendant Ferenbach acquiring the ball at the right sideline in the fourth quarter with 10:03 remaining on the game clock. Defendant Ferenbach then runs in a straight line from the right sideline to the right goal post without slowing or changing direction. Plaintiff Lance advances and

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steps into Defendant Ferenbach's line to the goal at 10:00, leaning down, head down, and bracing for impact. Defendant Ferenbach continues forward dropping his head and shoulder maneuvering through Plaintiff Lance and taking a shot on goal at 9:58. No evidence tends to show Defendant Ferenbach went out of his way to hit Plaintiff Lance, and the clear evidence indicates he had two seconds or less to react or respond to Plaintiff Lance stepping into his line to the goal.

Plaintiffs' medical expert testified but for Plaintiff Lance's choice to lower his head, he would not have sustained the blow to the top of his head which caused the neck fractures. Additionally, one of Plaintiff's lacrosse experts testified "it was Lance's movements that allowed for there to be a collision" and both boys had a responsibility for keeping their bodies under control.

Coaches for both teams and all three officials involved in the game gave depositions. There was consistent agreement among the coaches and officials the game was not "chippy," it had been a normal game up until the collision at issue without excessive fouls or aggressive play. In fact, the head official stated that by half time the game was no longer close in score and the teams were "not playing with any high level of physicality."

When asked about the collision at issue, all three officials agreed Defendant Ferenbach had been flagged for initiating a head-to-head collision. However, the "bull dodge" maneuver he was attempting to utilize was a permitted body check by an offensive player attacking the goal as long as the hit occurred in a legal area from the defender's shoulders to his waist. The only reason this particular play became illegal was because the hit ended up being a blow to the head, which is never allowed. None of the officials believed Defendant Ferenbach was targeting Plaintiff Lance and during testimony the head official explicitly refused to state the player's head-to-head contact was intentional.

The evidence tended to show game officials flagged Defendant Ferenbach because the legal bull dodge offensive maneuver resulted in an unintentional illegal hit. Further, the decision to eject Defendant Ferenbach from the game stemmed from game officials reasoning if Plaintiff Lance was not going to be able to return to the game, then Defendant Ferenbach should not return either. After reviewing the game footage during their depositions, two of the three officials, including the head official, indicated Plaintiff Lance's decision to engage in a defensive block with his head down and with the crown of the helmet initiating could have been a defensive personal foul, but it had not been noticed during active play because of the officials' angles of view of the collision.

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Based on this evidence, nothing supports Plaintiffs' contention Defendant Ferenbach failed to display the degree of care a reasonable and prudent high school lacrosse player would exercise during a five second play in a high-speed game in which high-impact body to body collisions are not only allowed, but which are an inherent part of the game.

Although North Carolina case law concerning duty to and liability of players in contact sports is limited, our Courts have considered duties owed to spectators. There is a long-standing "baseball rule" in North Carolina jurisprudence. Our Supreme Court has stated, "where a spectator, with ordinary knowledge of the game of baseball . . . proceeds to sit in an unscreened stand . . . he thereby *accepts the common hazards incident to the game . . .*" *Erickson v. Lexington Baseball Club, Inc.*, 233 N.C. 627, 629, 65 S.E.2d 140, 141 (1951) (cleaned up) (emphasis added). This Court addressed a similar concept analogizing the soccer game at issue to previous baseball cases,

In baseball, . . . the patron participates in the sport as a spectator and in so doing *subjects himself to certain risks necessarily and usually incident to and inherent in the game*; risks that are obvious and should be observed in the exercise of reasonable care. This does not mean that he assumes the risk of being injured by the proprietor's negligence but that by voluntarily entering into the sport as a spectator *he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.*

Allred v. Capital Area Soccer League, Inc., 194 N.C. App. 280, 285, 669 S.E.2d 777, 780 (2008) (cleaned up) (emphasis added). This Court most recently reaffirmed the "baseball rule" in 2020. *Mills for DeBlasio v. Durham Bulls Baseball Club, Inc.*, 275 N.C. App. 618, 625, 854 S.E.2d 126, 132 (2020).

Not unlike baseballs flying at high rates of speed into the stands, high speed, high-impact body-to-body collisions are an inherent part of lacrosse and incident to the game. Both Plaintiff Lance and Defendant Ferenbach were seasoned lacrosse players with more than "ordinary knowledge" of the game. Each player voluntarily chose to participate and during the course of play chose to embark on the course of action precipitating the collision. While we empathize with Plaintiffs amid the life-changing circumstances following the collision, no evidence shows, and we cannot conclude Defendant Ferenbach acted with negligence or willful or wanton behavior. Therefore, we affirm the trial court's granting of summary judgment.

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3. Dismissing Claims Against Asheville

[2] Next, Plaintiff argues the trial court erred in dismissing Plaintiffs' negligence and negligent infliction of emotional distress claims against Asheville for failure to properly train Defendant Ferenbach to comply with the rules regardless of the outcome of Plaintiff Lance's claim against Defendant Ferenbach.

North Carolina does not recognize a tort claim for the failure of a school or coach to train a minor to comply with the rules in a sporting event, and a thorough review of other states' legislation and case law reveals scant additional support for this assertion. Plaintiffs assert the harm was "a direct and proximate result" of Asheville's failure to train Defendant Ferenbach thereby increasing the risk of the sport. In support of their proposition, Plaintiffs cite to a California Supreme Court case which states "the host school and its agents owe a duty to home and visiting players alike to, at minimum, *not increase the risks inherent in the sport.*" *Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal. 4th 148, 162, 131 P.3d 383, 392 (2006) (emphasis added). However, *Avila* addresses a college baseball player being hit by a pitch in a preseason game. The case does not address failure to coach a minor and the court ultimately determined that allowing or coaching a pitcher to hit a batter was a "fundamental part and inherent risk of the sport of baseball." *Id.* at 165, 131 P.3d at 394. We find *Avila* easily distinguishable and are unpersuaded by Plaintiffs' arguments otherwise.

Neither North Carolina statutes nor case law establishes a cause of action for failure of a school or coach to train a minor in the rules of a sporting event. "This Court is an error-correcting court, not a law-making court. We are not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature . . ." *Williams v. N.C. Dep't of Justice, Criminal Standards Div.*, 273 N.C. App. 209, 217, 848 S.E.2d 231, 238 (2020) (cleaned up). Because Plaintiffs fail to state a claim for which relief may be granted under current North Carolina law, we affirm the trial court's dismissal of the claims against Asheville.

4. Contributory Negligence

Defendants argue the trial court should have ruled that Plaintiff Lance's actions causing or contributing to his own injuries were an additional factor supporting summary judgment.

Contributory negligence is negligence on the part of the plaintiff which joins . . . with the negligence of the

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defendant alleged in the complaint to produce the injury of which the plaintiff complains. Contributory negligence is a bar to recovery if a plaintiff has contributed to their injury in any way. In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.

Archie v. Durham Pub. Schs. Bd. of Educ., 283 N.C. App. 472, 474-75, 874 S.E.2d 616, 620 (2022) (cleaned up).

As discussed above, no facts support a finding of negligence, therefore the issue of contributory negligence is moot. The record tends to show both players displayed the degree of care a reasonable and prudent high school lacrosse player would exercise under the facts of this case. We affirm the trial court's order declining to find Plaintiff Lance contributorily negligent.

B. Judgment on the Pleadings

Both Plaintiffs and Defendants raised issues with the trial court's Judgment on the Pleadings preceding summary judgment. Plaintiffs claim the trial court erred by utilizing a higher standard to dismiss their negligence and NIED claims while Defendants contend the trial court should have granted Defendant Ferenbach's motion for judgment on the pleadings in its entirety.

As addressed above, we concluded no facts support negligence under the reasonable and prudent person standard. This is true even upon review of only the pleadings, as required in considering a Rule 12(c) motion for judgment on the pleadings. *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 104, 598 S.E.2d 237, 240 (2004). Plaintiffs' pleading concedes that "[l]acrosse, by its nature, is a sport that is likely to involve physical contact between players and it is readily foreseeable that such physical contact, unless protected against, can cause injury." Although Plaintiffs contend Defendant Ferenbach broke a rule of the game and caused an injury, Plaintiffs acknowledge Plaintiff Lance failed to keep his arms out and head up as players are taught, and instead, lowered his head and braced for the collision when he moved into Defendant Ferenbach's path to the goal. In their answer Defendants contend the Rules speak for themselves. The Rules state, in pertinent part, "Officials shall . . . remain aware of the inherent risk of injury that competition poses to student-athletes." Whether or not a rule was broken during the play at issue, no North Carolina court has

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ever held breaking a rule of a high-school sporting event equates to negligence *per se* as Plaintiffs contend, nor have the courts ever found that a player who is involved in active play in a high-speed contact sport violated the reasonable duty of care in attempting an offensive play on goal. There cannot be a duty to avoid a collision in a high-speed, full contact-sport when players have mere milliseconds to respond to their opponents' movements and the rules of the game state there is an inherent risk of injury. Such a requirement would lead to absurd results and change the play of all contact sports.

Presuming the trial court erred in holding a higher standard of negligence applied when dismissing Plaintiff's negligence and NIED claims, "a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for it." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (cleaned up). Therefore, as no facts support negligence or NIED claims even on the pleadings, the trial court was correct in dismissing the claims. We affirm the order.

Finally, we need not consider Defendant's final argument as this matter is now moot. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 699, 872 S.E.2d 95, 104 (2022) (citation omitted), *disc. review denied*, 282 N.C. 686, 880 S.E.2d 695 (2022). Additionally, our holding affirming the trial court's granting of summary judgment provides all necessary relief for Defendant. Consequently, any further determination relative to concerns with the judgment on the pleadings "cannot have any practical effect on the existing controversy." *Id.* at 699, 872 S.E.2d at 104-05.

Accordingly, we affirm the trial court's order dismissing Plaintiffs' negligence and NIED claims and we do not reach Defendant's assertions concerning the judgment on the pleadings, as they are rendered moot by our disposition of Plaintiffs' appeal of the Summary Judgment order.

III. Conclusion

For the foregoing reasons, we conclude no facts exist *sub judice* to support a finding of any tort claim, including negligence, NIED or willful and wanton behavior. We affirm the trial court's order for judgment on the pleadings dismissing the issues of negligence and NIED and we affirm the trial court's order for summary judgment on the issues of willful and wanton negligence and contributory negligence. Because North

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Carolina does not recognize a tort for a coach's failure to train a minor in the rules in a sport, we affirm the trial court's dismissal of that claim at summary judgment. Finally, all other issues asserted as to the judgment on the pleadings are moot. The trial court's orders for judgment on the pleadings and summary judgment are affirmed.

AFFIRMED.

Judge TYSON concurring.

Judge FREEMAN concurring in part, dissenting in part by separate opinion.

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

I concur with the majority's affirmance of the trial court's dismissal of plaintiffs' claims against defendant Asheville School for the reasoning provided therein. However, because the trial court erred in applying unknown and legally baseless higher standards of care to plaintiffs' claims against defendant Oliver, this Court should vacate the trial court's order granting Oliver's motion for judgment on the pleadings, vacate in part the trial court's order granting summary judgment, and remand for application of the correct legal standards. Instead of exercising judicial restraint and following this course of action, the majority—with a procedurally confused and legally flawed opinion—denies plaintiffs their day in court. I respectfully dissent.

I. Background

At its base, this case involves simple, though tragic, facts. As alleged in plaintiffs' complaint, plaintiff Lance and defendant Oliver were opposing high school lacrosse players participating in a match hosted at Asheville School's campus. Oliver, who was an Asheville School student, gained possession of the ball late in the game and ran towards the opposing goal. Lance, who was a Davidson Day School ("DDS") student, "attempted to place himself in a defensive position to block [Oliver]'s path to goal" and "lowered his head in anticipation of the collision" with Oliver. Oliver "lowered his shoulder, accelerated, and plowed through Lance, hitting Lance in his improperly lowered head with his shoulder, driving Lance's head into the base of his neck, breaking Lance's neck at vertebrae's C5, C6 and C7." As a result of this collision, "Lance is permanently paralyzed from the chest down and will spend the rest of his life confined to a wheelchair, requiring total care and support."

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Lance and his parents sued Oliver, DDS, a DDS coach, a DDS athletic director, Asheville School, and an Asheville School trainer. As is relevant here, plaintiffs asserted claims of negligence, negligent infliction of emotional distress (“NIED”), and vicarious liability against Asheville School and claims of negligence, NIED, and willful and wanton conduct against Oliver.¹ Oliver moved for judgment on the pleadings and the trial court granted this motion as to plaintiffs’ negligence and NIED claims but denied it as to plaintiffs’ willful and wanton claim. Later, both Oliver and Asheville School moved for summary judgment and the trial court granted these motions as to plaintiffs’ willful and wanton claim against Oliver and all of plaintiffs’ claims against Asheville School. Plaintiffs appealed, arguing the trial court erred in: (1) departing from the ordinary standard of care when determining their negligence-based claims against Oliver; (2) concluding no jury issue existed regarding their willful and wanton claim against Oliver; and (3) dismissing their claims against Asheville School.

In addressing plaintiffs’ appeal, the majority confuses these issues. Though it acknowledges the trial court’s legal error in failing to apply the appropriate standard of care to plaintiffs’ claims against Oliver, it places itself in the jury box and affirms the trial court’s summary judgment order—which did not address plaintiffs’ negligence or NIED claims—because “no facts support negligence under the reasonable and prudent person standard.” The majority then employs this flawed analysis of the summary judgment order to conclude it need not reach the trial court’s order granting judgment on the pleadings, even though that order: (1) was entered prior to the summary judgment order, (2) is subject to a meaningfully different legal standard, and (3) actually addressed plaintiffs’ ordinary negligence-based claims.

Regardless of a favorable or unfavorable outcome, litigants in this State deserve effective appellate review of their matters in this Court. Such review necessarily requires delineation of the separate claims and trial court orders on appeal.

II. Judgment on the Pleadings

“We review a trial court’s ruling granting or denying a motion for judgment on the pleadings using a de novo standard of review.” *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 12 (2022).

1. Plaintiffs’ claims against the DDS defendants and the Asheville School trainer were either dismissed by consent or voluntarily dismissed.

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The purpose of a motion for judgment on the pleadings . . . is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit, with the entry of judgment on the pleadings being appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. In deciding whether to grant or deny a motion for judgment on the pleadings, the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party, with all well pleaded factual allegations in the nonmoving party's pleadings being taken as true and all contravening assertions in the movant's pleadings being taken as false. A party seeking judgment on the pleadings must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto.

Id. at 11–12 (cleaned up).

“The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach.” *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450 (2022). To adequately state “a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress.” *Newman v. Stepp*, 376 N.C. 300, 304 (2020) (cleaned up).

The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. The duty of ordinary care is no more than a duty to act reasonably. The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care. Thus, 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 the consequences of a generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury.

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Fussell v. N.C. Farm Bureau Mut. Ins. Co., 364 N.C. 222, 226 (2010) (cleaned up).

Here, the trial court determined that a higher standard of care above and beyond ordinary care applied to plaintiffs' negligence and NIED claims but failed to articulate what standard, if any, guided its decision to grant Oliver's motion for judgment on the pleadings for these claims. As judgment on the pleadings is appropriate when "only questions of law remain," *id.* at 12, and as the majority and I agree that the trial court erred as a matter of law by imposing a higher, unknown standard, this Court should restrain itself to simply vacating the trial court's erroneous order and remanding for application of the correct standard.

However, if I, like the majority, were to go further, I would conclude that the factual allegations in plaintiffs' complaint are sufficient to withstand judgment on the pleadings. When viewed in the light most favorable to plaintiffs, *see Anderson Creek Partners*, 382 N.C. at 12, plaintiffs' complaint adequately alleged: (1) Oliver owed a duty to exercise reasonable care under those circumstances; (2) Oliver breached that duty by not avoiding the collision and instead lowering his shoulder to make contact with Lance's head; and (3) Oliver's breach of duty was the actual and proximate cause of Lance's injuries, as the contact broke Lance's neck and caused him to be paralyzed from the chest down. These factual allegations state a cause of action for negligence sufficient to survive Oliver's motion for judgment on the pleadings.

In the same vein, plaintiffs' complaint adequately stated a claim for NIED. Viewed in the light most favorable to plaintiffs, the complaint alleged: (1) Oliver engaged in negligent conduct; (2) it was reasonably foreseeable that negligently injuring Lance while Lance's parents were watching would cause them severe emotional distress; and (3) Oliver's conduct actually caused them severe emotional distress. Accordingly, plaintiffs' claim for NIED alleged facts sufficient to survive a motion for judgment on the pleadings.

This is not to say that Oliver was in fact negligent or negligently inflicted severe emotional distress. That is not the question to resolve when reviewing the granting of a judgment on the pleadings. Rather, we must determine if the facts alleged, taken in the light most favorable to the plaintiff, fail to state a cause of action. Because plaintiffs' complaint alleged facts sufficient to state causes of action for negligence and NIED, I would reverse the trial court's order granting in part Oliver's motion for judgment on the pleadings.

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III. Summary Judgment

“The standard of review for summary judgment is de novo.” *Forbis v. Neal*, 361 N.C. 519, 524 (2007). “Summary judgment is appropriate if ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *Id.* at 523–24 (quoting N.C. R. Civ. P. 56(c)). “The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact.” *Id.* at 524. “Moreover, ‘all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.’ ” *Id.* (quoting *Caldwell v. Deese*, 288 N.C. 375, 378 (1975)).

“Gross negligence is willful and wanton negligence.” *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, 242 N.C. App. 82, 89 (2015). “The concept of willful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct.” *Id.* (cleaned up). Our Supreme Court “has sometimes found it difficult to distinguish between negligence and gross negligence in practice.” *Cullen v. Logan Devs., Inc.*, 386 N.C. 373, 382 (2024) (citation omitted). “Whereas ordinary negligence involves inadvertence or carelessness, we have used the term gross negligence in the sense of wanton conduct.” *Id.* (cleaned up). “An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.” *Id.* (quoting *Foster v. Hyman*, 197 N.C. 189, 191 (1929)).

Here, the trial court again failed to articulate what standard of care it employed in determining that Oliver was entitled to summary judgment on plaintiffs’ willful and wanton claim. Based upon the trial court’s statements in the transcript and its erroneous imposition of some higher standard for plaintiffs’ negligence claims against Oliver, I would vacate in part the trial court’s order granting summary judgment and remand for application of the correct standard.

IV. Judgment on the Pleadings v. Summary Judgment

As illustrated above, the legal standards and tests governing resolution of motions for judgment on the pleadings and motions for summary judgment differ significantly. When addressing a motion for summary judgment, a trial court may refer to evidence and information outside the pleadings, such as “depositions, answers to interrogatories, . . . admissions on file, . . . [and] affidavits[.]” N.C. R. Civ. P. 56(c). In contrast, when addressing a motion for judgment on the pleadings, “[t]he trial court

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may consider only the pleadings and exhibits which are attached and incorporated into the pleadings[.]” *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 103 (2004).

Rather than review these two orders on appeal under the appropriate respective standards, the majority improperly conflates them. On one hand, plaintiffs’ negligence and NIED claims against Oliver were dismissed by the trial court’s order partially granting Oliver’s judgment on the pleadings. Therefore, in reviewing this order this Court may “consider *only* the pleadings and exhibits which are attached and incorporated into the pleadings[.]” *Id.* (emphasis added). On the other hand, plaintiffs’ willful and wanton conduct, or gross negligence, claim against Oliver was dismissed by the trial court’s order granting Oliver’s motion for summary judgment. Therefore, this Court may look outside the pleadings to depositions, answers to interrogatories, etc., in reviewing this order.

Instead of properly reviewing the *pleadings* to determine whether the trial court erred in dismissing plaintiffs’ negligence and NIED claims, the majority examines evidence outside the pleadings because it purports to review the trial court’s summary judgment order in addressing these claims. The majority’s logic appears to be that because the evidence outside the pleadings fails to establish negligence, summary judgment was proper for plaintiffs’ willful and wanton claim. And because summary judgment was proper for plaintiffs’ willful and wanton claim, judgment on the pleadings was therefore proper for plaintiffs’ negligence and NIED claims. This reasoning is erroneous for at least two reasons.

First, as gross negligence “encompasses conduct which lies somewhere between ordinary negligence and intentional conduct,” *McCauley*, 242 N.C. App. at 89, even *if* plaintiffs’ gross negligence claim was properly dismissed at summary judgment, that would have no bearing on plaintiffs’ negligence and NIED claims. Negligence is necessary to establish gross negligence. Gross negligence is not necessary to establish negligence.

Second, it is wholly inappropriate for the majority to reference evidence outside the pleadings in determining whether plaintiffs established a claim for negligence. Because plaintiffs’ negligence and NIED claims against Oliver were dismissed by the trial court’s order partially granting judgment on the pleadings, our review must be limited to that which was properly before the trial court: “the pleadings and exhibits which are attached and incorporated into the pleadings[.]” *Davis*, 165 N.C. App. at 103.

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The majority’s characterization of the judgment on the pleadings issues as “moot” is unconvincing to say the least. The judgment on the pleadings issues—i.e., whether plaintiffs adequately pled claims for negligence and NIED against Oliver—are only “moot” because the majority addressed them via review of a summary judgment order that did not address those claims.

V. Conclusion

Because the majority opinion fails to adequately address the issues on appeal, and because the trial court undoubtedly erred in applying a heightened standard of care, I dissent and would at minimum vacate and remand the trial court’s orders granting judgment on the pleadings and summary judgment.

TRACY LYNN GREEN, PLAINTIFF
v.
ROBERT LYNN GREEN, DEFENDANT

No. COA24-930

Filed 2 July 2025

Divorce—division of military pension—calculation—coverture fraction properly applied

In a matter involving the division of military pension benefits, the trial court properly granted plaintiff twenty-one percent of her ex-husband’s disposable military retired pay and, in a declaratory judgment, properly interpreted the parties’ previous separation and property settlement agreement to require use of a coverture fraction rather than a “Frozen Benefit Rule” to calculate plaintiff’s portion of defendant’s pension benefits. The clear and unambiguous language in the agreement—that plaintiff was entitled to fifty percent of defendant’s benefits “accumulated during the course of the marriage”—was to implement the standard method of calculation in place at the time the parties signed the agreement, which was to multiply the coverture fraction by the disposable retired pay that defendant was to receive upon his retirement. Despite defendant’s attempt to invoke the Frozen Benefit Rule (so that plaintiff’s share was “frozen” as of the date of the agreement), that rule was not codified until nearly seven years after the parties entered into their agreement.

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Appeal by Defendant from order entered 24 May 2024 and judgment entered 18 June 2024 by Judge Edgar F. Bogle in Gaston County District Court. Heard in the Court of Appeals 9 April 2025.

King Law Offices, by Claudette B. Ericson and Patrick K. Bryan, for Defendant-Appellant.

No brief for Plaintiff-Appellee.

COLLINS, Judge.

This case arises from a dispute between former spouses, Robert Lynn Green (“Defendant” or “Husband”) and Tracy Lynn Green (“Plaintiff” or “Wife”), over the division of Defendant’s military pension in accordance with their Separation and Property Settlement Agreement. Defendant appeals from the trial court’s Military Pension Division Order and subsequent Declaratory Judgment. We affirm both.

I. Background

Plaintiff and Defendant were married on 29 July 1995 and separated about thirteen-and-a-half years later, on 29 December 2008. During their marriage, Defendant spent at least ten years on active duty with the United States Military. The parties executed a Separation and Property Settlement Agreement on 30 January 2009 resolving all issues of property division. The Agreement provided for a division of Defendant’s military pension and retirement benefits and a court order to effectuate that division. The Agreement further provided that it shall be construed in accordance with North Carolina law:

PROPERTY SETTLEMENT

....

5. **HUSBAND’S RETIREMENT BENEFITS:** Military Retirement: The parties acknowledge that Husband is entitled to Pension and Retirement benefits as a result of his service in the military. The parties also acknowledge and agree that Wife is entitled to 50% of Husband’s benefits accumulated during the course of the marriage. Said benefits shall be payable to Wife upon Husband’s retirement. Wife shall be responsible for preparing the appropriate paperwork to secure the transfer of military pension and retirement benefits.

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. . . .

OTHER PROVISIONS

. . . .

4. GOVERNING LAW. This Agreement shall be construed in accordance with and governed by the laws of the State of North Carolina, entirely independent of the forum where the parties now reside or where it may come up for construction or enforcement.

The parties divorced on 22 February 2010. At some point thereafter, Defendant retired from the military and became entitled to receive his military benefits. Plaintiff filed a Complaint for Entry of Military Pension Division Order on 3 February 2023, asking the court to enter a Military Pension Division Order dividing Defendant's pension and retirement benefits in conformity with the Agreement.

Defendant filed an Answer and Counterclaim on 30 May 2023. In this filing, Defendant: 1) moved pursuant to Rule 12(b)(6) to dismiss Plaintiff's Complaint because it "seeks specific performance of distribution" and "[s]pecific performance is not an adequate remedy to effectuate the claim asserted"; 2) "specifically denied that Plaintiff is entitled to retirement benefits"; and 3) moved for declaratory judgment, requesting the court to interpret the "patent ambiguities" in the Agreement "in favor of the Defendant to define the amount, if any, that the Plaintiff shall be entitled to recover."

Plaintiff's Complaint for Entry of Military Pension Division came on for hearing on 14 June 2023. On that date, the parties entered into a Memorandum of Judgment/Order wherein they agreed to exchange certain information including each party's "proposed calculation in conformity with the parties' Separation Agreement" and "any documentation necessary to understand said calculation." Upon this exchange, either party could notice the matter back on for hearing. On 20 July 2023, Plaintiff calendared her Complaint for Entry of Military Pension Division back on for hearing on 24 August 2023.

Defendant filed a Motion for Summary Judgment on 14 August 2023, alleging that the Agreement was "*void ab initio*" because it "was not certified by both parties before a certifying officer" and asking the Court to "summarily deny Plaintiff's claim for entry of a division order by entering summary judgment in favor of Defendant." Defendant also filed an Amended Counterclaim on that date, requesting that the court "enter a declaratory judgment fixing the amount of any pension benefits

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to which [Plaintiff] may be entitled – any such benefit specifically being limited to any benefits Defendant accumulated during the parties’ marriage.” Also on 14 August 2023, Defendant calendared his Motion for Declaratory Judgment and Motion for Summary Judgment for hearing.

Defendant withdrew his Motion for Summary Judgment four days later, on 18 August 2023. The record is silent as to what took place between 18 August 2023 and 17 April 2024.

On 17 April 2024, Plaintiff filed a request for a hearing on her Complaint for Entry of Military Pension Order. After a hearing on 24 May 2024, the trial court entered a Military Pension Division Order. The trial court awarded Plaintiff twenty-one percent of Defendant’s disposable military retired pay and ordered Defendant to promptly provide Plaintiff with any information she needed to ensure direct payment to her of those military pension benefits.

On 18 June 2024, the trial court entered a Declaratory Judgment declaring the meaning of paragraph 5 of the Agreement and the method used to divide Defendant’s military retirement. The trial court found, in part, as follows:

11. Defendant (Husband) contends that the Agreement fixes the amount of any pension benefits to which Plaintiff may be entitled to only any such benefit the Defendant accumulated during the parties’ marriage, and that anything more unduly accounts for his post marriage service.
12. Plaintiff (Wife) contends that she is entitled to twenty-one percent (21%) of the member’s disposable military retired pay - a figure calculated by using a coverture fraction that includes the following variables:
 - a. total military retirement points earned by Defendant;
 - b. Defendant’s present disposable military retirement pay; and
 - c. the amount of military retirement points Defendant earned during the course of the marriage.
13. Plaintiff argued such a coverture fraction was appropriate because the “Frozen Benefit Rule” did not apply at the time the parties were divorced.

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14. Defendant argued the prior state of Equitable Distribution law is inapplicable in this case because the case at hand is a contract analysis case.

Upon its findings and conclusions, the trial court decreed as follows:

1. Because the Agreement between the parties was entered into prior to December 23, 2016, the clear and unambiguous meaning of paragraph five (5) of the Agreement indicates that the Plaintiff is entitled to a calculation of a percentage of the Defendant's retirement pension pursuant to a coverture fraction using as its variables: Defendant's present disposable military retirement pay; Defendant's total military retirement points; and those military retirement points Defendant accumulated during the course of the parties' marriage.
2. Plaintiff, pursuant to the Agreement, is entitled to twenty-one percent (21%) of the Defendant's disposable military retired pay.

Husband appealed both the Military Pension Division Order and the Declaratory Judgment on 20 June 2024.

II. Discussion

The essence of Defendant's arguments is that the trial court erred in its calculation of Plaintiff's portion of Defendant's military pension and retirement benefits.

Parties to a divorce may provide for the division of retirement benefits as part of a separation agreement. *See* N.C. Gen. Stat. § 50-20(d) (2009). A separation agreement that has not been incorporated into a divorce judgment is "governed by general contract principles" and is "enforceable and modifiable only under such principles." *Long v. Long*, 160 N.C. App. 664, 668 (2003) (citation omitted). "Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10 (1973) (citations omitted). "The most common rule of construction used by the courts is to gather the intention of the parties from the four corners of the instrument." *Hamby v. Hamby*, 143 N.C. App. 635, 646 (2001) (quotation marks and citations omitted). "Where a contract is unambiguous, its construction is a matter of law for the court to determine." *Gilmore v. Garner*, 157 N.C. App. 664, 666-67 (2003) (citations omitted). Our review of the trial court's

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order and judgment is de novo. *See Jackson v. Jackson*, 280 N.C. App. 325, 335 (2021).

At issue here is the meaning of the following portion of paragraph five of the Agreement:

The parties acknowledge that Husband is entitled to Pension and Retirement benefits as a result of his service in the military. The parties also acknowledge and agree that Wife is entitled to 50% of Husband's benefits accumulated during the course of the marriage. Said benefits shall be payable to Wife upon Husband's retirement.

There is no dispute between the parties as to the following: 1) Plaintiff is entitled to receive 50% of Defendant's military Pension and Retirement benefits accumulated during the course of the marriage. 2) Plaintiff is entitled to receive 21% of Defendant's military Pension and Retirement benefits. 3) Defendant became entitled to receive his military Pension and Retirement benefits only upon his retirement and, accordingly, these benefits were payable to Plaintiff only upon Defendant's retirement.

Defendant argues that the Agreement's provision that "Wife is entitled to 50% of Husband's benefits *accumulated during the course of the marriage*" plainly and unambiguously indicates that the amount of Defendant's benefits to which Plaintiff is entitled to share was "frozen" on the date they entered into the Agreement. Thus, Defendant argues, Plaintiff is only entitled to receive 21% of what his hypothetical retirement pay would have been had he retired on the date the parties entered into the Agreement. Defendant's proposed reading of the plain language is untenable as it undervalues the "benefits accumulated during the course of the marriage" and fails to construe the Agreement "in accordance with . . . the laws of the State of North Carolina" applicable at the time the parties entered the Agreement.

Plaintiff's *percentage* of Defendant's benefits is calculated by dividing the number of years Defendant served in the military while the parties were married by the number of total years Defendant served in the military to determine the coverture fraction, and then multiplying the coverture fraction by 50% (per the Agreement). Thus, every month Defendant served in the military after the parties entered into the Agreement reduced the coverture fraction and diluted Plaintiff's percentage of benefits. If the amount of Defendant's retirement benefits to which Plaintiff is entitled to share was "frozen" at the time they entered into the Agreement, but her percentage of benefits is calculated based

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on the total number of years Defendant served in the military, the benefits she would receive would be far less than the benefits “accumulated during the course of the marriage.”

Additionally, freezing the amount of Defendant’s military retired pay to which Plaintiff is entitled to share at the amount attributable to his rank and years of military service at the time the parties entered into the Agreement disregards that Defendant’s final retired pay is based on the foundation of marital effort. Again, under Defendant’s reading, the benefits Plaintiff would receive would be far less than the benefits “accumulated during the course of the marriage.”

Additionally, Defendant was entitled to receive his Pension and Retirement benefits only upon his retirement and, accordingly, these benefits were payable to Plaintiff only upon Defendant’s retirement. Under Defendant’s approach, the value of his benefits accumulated during the course of the marriage could grow in value until his retirement while Plaintiff’s portion of those benefits would not grow, notwithstanding her inability to access her portion. Yet again, under Defendant’s reading, the benefits Plaintiff would receive would be far less than the benefits “accumulated during the course of the marriage.”

The Agreement’s provision that “Wife is entitled to 50% of Husband’s benefits *accumulated during the course of the marriage*” plainly and unambiguously indicates that Wife is entitled to receive 21% of Husband’s actual disposable military retirement pay he receives upon his retirement. This reading is supported by construing the agreement in accordance with the standard method of dividing military pensions in North Carolina in effect at the time the parties entered into the Agreement.

Before 1981, military pensions were not subject to division by state courts in marital dissolution proceedings. Congress enacted the Uniformed Services Former Spouses Protection Act (“USFSPA”) to provide that, for pay periods after 25 July 1981, “disposable retired pay” of military personal is subject to division by a state court in a divorce proceeding. 10 U.S.C. § 1408(c)(1) (2009). USFSPA defined “disposable retired pay” as “the total monthly retired pay to which a member is entitled less [certain specified] amounts.” 10 U.S.C. § 1408(a)(4)(A) (2009).

In North Carolina, the amount of an “award of nonvested pension, retirement, or other deferred compensation benefits” in equitable distribution was determined by applying a coverture fraction – “the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested

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and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment” – to the value of “the vested and nonvested accrued benefit” N.C. Gen. Stat. § 50-20.1(b), (d) (2009); see *Cunningham v. Cunningham*, 171 N.C. App. 550 (2005); *Seifert v. Seifert*, 82 N.C. App. 329 (1986). Thus, the coverture fraction was multiplied by a servicemember’s disposable retired pay to determine the value of a military pension.

On 23 December 2016, new rules for the division of military retired pay took effect for servicemembers who were not yet receiving retired pay on a divorce date after 23 December 2016. The “Frozen Benefit Rule,” prescribed in Section 641 of the National Defense Authorization Act (“NDAA”) for 2017 and clarified at Section 624 of the NDAA for 2018, limits the “disposable retired pay” which can be divided to a hypothetical amount of retired pay, calculated as if the servicemember had retired on the date of the decree of divorce, dissolution, annulment, or legal separation. See 10 U.S.C. § 1408(a)(4)(B) (2018).

Here, the parties entered into the Agreement on 30 January 2009. At that time, the standard in North Carolina to determine the value of a military pension was to multiply the coverture fraction (marital service divided by total service) by the disposable retired pay as of retirement. It was not until almost seven years later that the Frozen Benefit Rule came into effect.

Husband argues that his intent when he signed the Agreement “merely forecasted the Frozen Benefit Rule.” However, the clear and unambiguous language of paragraph five does not implement the Frozen Benefit Rule codified in 2016. Instead, the clear and unambiguous language implements the standard in place at the time the parties entered into the Agreement in 2009, and, as the trial court concluded,

indicates that the Plaintiff is entitled to a calculation of a percentage of the Defendant’s retirement pension pursuant to a coverture fraction using as its variables: Defendant’s present disposable military retirement pay; Defendant’s total military retirement points; and those military retirement points Defendant accumulated during the course of the parties’ marriage.

Accordingly, we conclude, as did the trial court, that “Plaintiff, pursuant to the Agreement, is entitled to twenty-one percent (21%) of the Defendant’s disposable military retired pay.”

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III. Conclusion

For the reasons stated above, the trial court’s Military Pension Division Order and the Declaratory Judgment are affirmed.

AFFIRMED.

Judges HAMPSON and CARPENTER concur.

 IN THE MATTER OF A.J.J.

No. COA25-28

Filed 2 July 2025

1. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-parents—verification—understanding of legal significance

In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives (“custodians,” with whom the juvenile had been placed for over seven months) where there was sufficient evidence that the custodians understood the legal significance of obtaining custody as required by N.C.G.S. § 7B-906.1(j), including testimony from a department of social services (DSS) social worker, testimony from one of the custodians, and reports from DSS and the guardian ad litem. The evidence demonstrated that both custodians understood the recommendations from DSS, wanted to receive custody of the child, had been providing for the various needs of the child since his placement with them, and were willing to continue to meet those needs going forward.

2. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-parents—verification—adequacy of resources

In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives (“custodians”) where there was sufficient evidence that the custodians had adequate resources to provide for the child’s needs as required by N.C.G.S. § 7B-906.1(j). Although there was no evidence of either custodian’s employment or income, section 7B-906.1(j) provides that greater than six consecutive months of placement with a

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prospective custodian is evidence of adequate resources; here, the child had resided with the custodians for more than six months, and, further, evidence was presented that the child had his own room, storage space, TV, Internet, and phone, and that his needs were being met.

3. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-parents—delegation of visitation rights—abuse of discretion

In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives (“custodians”) and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court abused its discretion by authorizing the custodians to modify or cease the mother’s visitation, including to change visitation from supervised to unsupervised. The visitation provision containing the impermissible delegation of authority in the Chapter 50 order was vacated and the matter was remanded for further proceedings.

4. Appeal and Error—child visitation—disability accommodation for mother—failure to raise issue in trial court—waiver

In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives, where the mother argued for the first time on appeal that the trial court failed to adequately accommodate her disability as required by the Americans with Disabilities Act (with regard to the location of her visits with the child), the issue was waived for not having been raised at the trial level.

5. Child Abuse, Dependency, and Neglect—transfer to Chapter 50 proceeding—statutory findings

In a neglect and dependency proceeding in which the trial court awarded custody of the minor child to paternal relatives (“custodians”) and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court made the necessary findings of fact pursuant to N.C.G.S. §§ 7B-911(c)(1)-(2) and 50-13.2(a). The court’s findings were supported by the evidence, including the finding that the child was happy in his placement and that his needs were being met. The trial court’s findings regarding other relevant factors, such as the mother’s lack of progress in her case plan and the custodians’ willingness and ability to provide for the child, supported its conclusion that the custody award was in the child’s best interest. Finally, the court’s ultimate finding that continued state intervention was no

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longer necessary was supported by evidence in the record, including: statements by the custodians and the child’s mother about plans to carry out visitation; a report by the department of social services (DSS) recommending that DSS, counsel, and the guardian ad litem should be released; and testimony from a DSS social worker that there was no reason for the court to stay involved in the child’s life after three years.

Appeal by Respondent from orders entered 25 September 2024 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 11 June 2025.

Beaman & Bennington, PLLC, by Attorney Jennifer K. Bennington, for petitioner-appellee Wilson County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Sr. Assistant Parent Defender, J. Lee Gilliam, for respondent-appellant mother.

Manning, Fulton & Skinner, P.A., by Attorney Michael S. Harrell, for petitioner-appellee Guardian ad Litem.

STADING, Judge.

Respondent-Mother (“Mother”) appeals from orders awarding physical and legal custody of her minor child, A.J.J. (“Adam”),¹ to Cliff Padilla and Dorothy Council. On appeal, Mother argues the trial court erred in awarding custody to a non-parent, abused its discretion in imposing visitation provisions, and erred in transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding. For the reasons below, we affirm in part, vacate in part, and remand for further proceedings.

I. Background

In early August 2021, the Wilson County Department of Social Services (“DSS”) received a “child protective services report regarding issues of neglect due to improper care and improper supervision involving [Adam]”² The report stated Mother “had kicked [Adam] out

1. See N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the minor children).

2. Adam was eleven years old at the time of the child protective services report.

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of the house and he was found walking down a highway.” In response, DSS “met with [Adam] and . . . [M]other at the police department where [Mother] decided to send [Adam] to stay with his father in Pitt County.”³ Adam displayed concerning behaviors while living with his father thereafter, including “running away, breaking a window, hitting [a] refrigerator, and bec[oming] physical with his father and grandmother.” As a result, an additional child protective services report was filed in Pitt County.

On 2 September 2021, DSS filed a juvenile petition alleging Adam was neglected and dependent. DSS obtained nonsecure custody of Adam shortly thereafter on 8 September 2021. The petition asserted Adam “does not receive proper care, supervision, or discipline”; Adam “is not provided necessary remedial care”; Adam “lives in an environment injurious to [his] welfare”; Mother “is unable to provide for [Adam’s] care or supervision”; and Mother “lacks an appropriate alternative childcare arrangement.” After a hearing, the trial court adjudicated Adam to be neglected and dependent on 30 March 2022. The trial court found: (1) Mother “ha[s] some physical limitations due to injuries from a car accident”; (2) Mother “reported that she cannot physically take care of [Adam] with his behavioral issues”; (3) Mother “failed to follow up with mental health services” to address Adam’s behavioral concerns; (4) Mother failed to attend the parenting classes referred to her by DSS; and (5) Mother failed “to maintain a clean and safe living environment for [Adam].” The trial court ordered Mother to comply with the following in-home service plan at this time:

- a. Engage with medical and mental health treatment to include completing an updated mental health assessment or psychological evaluation if deemed necessary, follow all recommendations of that mental health provider(s), report any treatment changes, and sign any necessary consent forms for the Department to speak with the medical and mental health providers.
- b. Maintain regular contact with the Department including but not limited to scheduled home visits.
- c. Participate in and complete parenting classes and demonstrate learned skills during scheduled future visitations.
- d. Create a support system committed in support and safety of the child and parent.

3. Adam’s biological father is not a party to or the subject of this appeal.

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From July 2022 through September 2024, the trial court conducted eight permanency planning hearings. The orders entered as a result of those proceedings reflect that Mother failed to make progress towards her service plan during this time. In the third permanency planning order, entered on 1 March 2023, the trial court ordered custody as the primary plan, ordered guardianship as the secondary plan, and “relieved [DSS] of reasonable efforts towards reunification with . . . [Mother].” Before the fifth permanency hearing commenced on 6 November 2023, DSS submitted a report, noting that Adam’s paternal uncle, Cliff Padilla, and his girlfriend, Dorothy Council, “communicated their desire to be assessed for placement and support.” In the November 2023 permanency planning order, the trial court adopted DSS’s placement recommendations, ordering the primary plan as “custody with . . . Cliff Padilla and Dorothy [] Council” and the secondary plan as “Guardianship with . . . Cliff Padilla and Dorothy [] Council.” Adam was ultimately placed with Cliff Padilla and Dorothy Council (“Custodians”) on 2 February 2024.

At subsequent permanency planning hearings held on 21 February 2024 and 1 May 2024, the trial court’s permanent and secondary plans for Adam remained intact—custody or guardianship with the Custodians. And at the eighth and final permanency planning hearing (“Final PPR Hearing”) held on 18 September 2024, the trial court granted legal and physical custody of Adam to the Custodians. The trial court entered its order (“PPR Order”) on 25 September 2024, concluding: “The juvenile case shall be closed, and the jurisdiction of the Juvenile Court terminated, and a separate Chapter 50 order should be entered.” That same day, the trial court entered a Chapter 50 custody order (“Chapter 50 Order”) and made the following findings:

2. The caretakers of [Adam] are Cliff Padilla and Dorothy Council.

3. A Court for Wilson County, North Carolina, obtained jurisdiction over [Adam] and the Court has determined that custody of said Juvenile should be awarded as set forth herein

. . . .

6. The Court finds the following facts in support of the entry of the custody order entered hereafter under Chapter 50:

[Adam] is 14 years old, and he has been residing with his paternal relatives, Cliff Padilla and Dorothy Council, since on or about February 2, 2024. Mr. Padilla and Ms. Council have been meeting [Adam’s] daily and well-being

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needs since he has come to reside with them, and they are ready, willing, and able to continue to do so. [Adam] reports being happy in this placement, and his needs are being met. [Adam] should continue to remain in this placement at this time.

Mother . . . has a history of mental health illness, which she has not consistently addressed over the past three years. She is currently residing in Rocky Mount, NC at a hotel. [Mother] does not have suitable housing for [Adam], and she has not demonstrated on a consistent basis her ability to provide a safe living environment for [Adam]. For the past three years, [Mother] has not been cooperative in working towards reunification with [Adam], and she has only minimally engaged in visitation with [Adam].

. . . .

[Mother's] behaviors and failure to address the concerns that led to [Adam's] remov[al], demonstrate that her conduct is inconsistent with a parent's constitutionally protected status, and she is unfit to parent [Adam] currently. . . .

The Chapter 50 Order also set out the following visitation provisions for Mother:

[Mother] . . . shall have unsupervised, once per week, audio and video contact with [Adam]. [Mother] can have a minimum of once per month, monitored family time in an agreed location but not limited to the Rocky Mount and Greenville community. [Mother] is responsible for reaching out to the [Custodians] to coordinate family time the fifth of every month. The [Custodians] will have the discretion to transition family time between [Adam] and [M]other to unsupervised. If during monitored or future unsupervised family time or contact between the parent or juvenile, begins to trigger regressive behaviors of [Adam] or cause discord between the [Custodians] that may lead to possible placement disruption, and cannot be redirected, visits/contact may be ceased, and a Motion for Review may be filed with the Court.

Mother timely entered her written notice of appeal from the PPR Order and the Chapter 50 Order on 24 October 2024.

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II. Jurisdiction

This Court has jurisdiction to entertain Mother’s appeal under N.C. Gen. Stat. §§ 7A-27(b)(2) (“From any final judgment of a district court in a civil action.”), and 7B-1001(a)(4) (2023) (“Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.”).

III. Analysis

Mother submits three issues for our consideration: (1) whether the trial court erred in awarding permanent custody to non-parents without adequate verification of resources or understanding the placement; (2) whether the trial court abused its discretion regarding visitation provisions; and (3) whether the trial court erred in transferring the Chapter 7B juvenile proceeding without making proper findings.

A. Subsection 7B-906.1(j) Verifications

Mother asserts the trial court erroneously awarded permanent custody to a non-parent since it failed to make the requisite verifications under N.C. Gen. Stat. § 7B-906.1(j) (2023). Mother maintains the trial court failed to verify that the custodians: (1) understood the legal significance of the placement; and (2) had adequate resources to care appropriately for Adam.

“Our review of a permanency planning order ‘is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.’ The trial court’s findings of fact are conclusive on appeal if supported by any competent evidence.” *In re L.R.L.B.*, 377 N.C. 311, 315, 857 S.E.2d 105, 111 (2021) (citations omitted). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *In re J.M.*, 384 N.C. 584, 591, 887 S.E.2d 823, 828 (2023) (citation omitted). “The trial court’s conclusions of law are reviewable *de novo* on appeal.” *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.” *In re E.E.*, 294 N.C. App. 133, 136, 902 S.E.2d 299, 302 (2024) (citations omitted).

N.C. Gen. Stat. § 7B-906.1 provides the procedure a trial court must adhere to when conducting a permanency planning hearing. Relevant here, subsection 7B-906.1(j) states a trial court must make two verifications when awarding custody to somebody other than a parent:

If the court determines that the juvenile shall be placed in the custody of an individual other than a parent . . . , the court shall verify that the person receiving custody . . .

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of the juvenile understands the legal significance of the placement . . . and will have adequate resources to care appropriately for the juvenile. The fact that the prospective custodian . . . has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

Id. § 7B-906.1(j). Thus, where a court awards custody of a juvenile to a non-parent, it must verify the person receiving custody: (1) “understands the legal significance of the placement or appointment”; and (2) “will have adequate resources to care appropriately for the juvenile.” *Id.* “A permanent plan of custody order which does not contain the required verification must be vacated and remanded.” *In re J.C.-B.*, 276 N.C. App. 180, 187, 856 S.E.2d 883, 889 (2021).

Subsection 7B-906.1(j) “does not require the trial court to ‘make any specific findings in order to make the verification.’ However, [] the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship.” *In re J.D.M.-J.*, 260 N.C. App. at 65, 817 S.E.2d at 761 (internal citation omitted); *see also In re P.A.*, 241 N.C. App. 53, 61, 772 S.E.2d 240, 246 (2015) (“[T]he trial court need not make detailed findings of evidentiary facts or extensive findings regarding the [custodian’s] situation and resources, nor does the law require any specific form of investigation of the potential [custodian].”); *see also In re K.P.*, 383 N.C. 292, 306, 306, 881 S.E.2d 250, 259, 259 (2022) (“While this Court has never addressed the minimum evidentiary requirements which are sufficient to support a trial court’s verification . . . the Court of Appeals provided instructive guidance on the matter in the opinion which it rendered in *In re J.D.M.-J.* . . .”); *see also In re J.H.*, 244 N.C. App. 255, 270–71, 780 S.E.2d 228, 240 (2015) (“[T]he record must contain competent evidence of the [custodians’] financial resources and their awareness of their legal obligations.”).

“At a permanency planning hearing [t]he court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” *In re J.R.*, 279 N.C. App. 352, 361, 866 S.E.2d 1, 7 (2021) (quoting N.C. Gen. Stat. § 7B-906.1(c)). Such “evidence may include reports and home studies conducted by the guardian ad litem or department of social services.” *Id.*

“The fact that the prospective custodian . . . has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.” N.C. Gen. Stat. § 7B-906.1(j);

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see also *In re K.P.*, 383 N.C. at 308, 881 S.E.2d at 260; see also *In re A.N.T.*, 272 N.C. App. 19, 23, 845 S.E.2d 176, 179 (2020) (citation omitted) (“[T]he court may consider the guardian to have ‘adequate resources’ when the guardian has ‘provided a stable placement for the juvenile for at least six consecutive months.’”). Although “‘placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources,’ . . . such evidence does not *per se* compel a conclusion that the ‘person receiving custody . . . understands the legal significance of the placement.’” *In re J.C.-B.*, 276 N.C. App. at 188, 856 S.E.2d at 889 (citation omitted) (second ellipses in original). Evidence that a custodian understands the legal significance of the placement may consist of “testimony from the potential [custodian] of a desire to take [custody] of the child . . . and testimony from a social worker that the potential [custodian] was willing to assume legal [custody].” *In re E.M.*, 249 N.C. App. 44, 54, 790 S.E.2d 863, 872 (2016).

1. Legal Significance

[1] Mother first contends the trial court failed to verify whether the custodians understood the legal significance of the placement. Mother maintains the trial court’s verification is inadequate since Ms. Council—the other Custodian—did not testify to understanding the legal significance of obtaining custody of Adam. See *In re L.M.*, 238 N.C. App. 345, 348–49, 767 S.E.2d 430, 433 (2014) (“Although there was sufficient evidence to verify [the juvenile’s] foster father as a suitable guardian, we hold there was insufficient evidence that [the juvenile’s] foster mother understood and accepted the responsibilities of guardianship. As DSS concedes, the foster mother did not testify and did not sign a guardianship form.”); see also *In re E.M.*, 249 N.C. App. at 55, 790 S.E.2d at 872 (“Here, the husband in the custodial couple did not testify, and there is no evidence to indicate that he understood the legal significance of taking custody of [the juvenile]. Further, although his wife testified at the hearing, she never testified regarding her understanding of the legal relationship, and the court never examined her to determine whether she understands the legal significance of the relationship.”). However, a more recent decision from our Supreme Court demonstrates when awarding custody of a juvenile to a custodial couple, the testimony of one of the custodians—without the testimony of the other—is sufficient where the testifying custodian expresses the custodial couple understands the legal significance of the placement.⁴ See *In re K.P.*, 383 N.C. at 308, 881 S.E.2d at 260.

4. The Court of Appeals opinion, which our Supreme Court reversed on the issue of verification, notes that the custodial wife “did not testify at the final permanency planning

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In *In re K.P.*, the respondent-mother appealed from an order awarding physical and legal custody of her minor child to a custodial couple. *Id.* at 298, 881 S.E.2d at 254. The respondent-mother asserted the trial court failed to verify whether the custodial couple understood the legal significance of the minor child's placement and possessed adequate resources under N.C. Gen. Stat. § 7B-906.1(j). *Id.* at 299, 881 S.E.2d at 254. The Court of Appeals agreed, concluding:

the evidence that (1) [the custodial couple] did an excellent job taking care of [the minor child] as the juvenile's court-appointed caretakers; (2) the [custodial] couple were willing to serve as a permanent placement for the child; and (3) the household could financially support [the minor child] without substantial outside assistance *was insufficient to "show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship."*

Id. at 299–300, 881 S.E.2d at 255 (emphasis added). Upon review thereafter, our Supreme Court reversed the Court of Appeals decision, "reject[ing] the majority's conclusion regarding verification." *Id.* at 308, 881 S.E.2d at 260. The Court reasoned:

Despite the lack of any specific findings which are expressly identified in N.C. [Gen. Stat.] § 7B-906.1(j) as being required to authorize a trial court to properly establish verification, we can determine from the record of the 3 June 2020 permanency planning review hearing that the trial court sufficiently verified that the [custodial couple] . . . , in receiving legal and physical custody of the juvenile [], understood the legal significance of the placement and had adequate resources to care appropriately for the child. *The combined testimony rendered by the DSS social worker and [the custodial husband] amply support this determination.*

Id. at 308, 881 S.E.2d at 260 (emphasis added). Although the custodial wife did not testify, the Court determined the social worker's testimony, coupled with the custodial husband's testimony, satisfied the verification requirements under N.C. Gen. Stat. § 7B-906.1(j). *Id.*

hearing . . ." *In re K.P.*, 278 N.C. App. 42, 50, 861 S.E.2d 754, 759 (2021). The Court cited both *In re L.M.* and *In re E.M.* to support the proposition that *both custodians* must testify to understanding the legal significance of the placement. *Id.* at 51, 861 S.E.2d at 760.

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Here, the record contains sufficient evidence showing the Custodians understood the legal significance of obtaining custody over Adam. See *In re J.D.M.-J.*, 260 N.C. App. at 65, 817 S.E.2d at 761. Indeed, a DSS social worker recommended that physical and legal custody be awarded to the Custodians. The social worker testified to “discussing with the [Custodians] what the Department’s recommendations are” prior to the Final PPR hearing, which the Custodians agreed to. See *In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872 (Evidence showing that a custodian understands the legal significance of the placement may consist of “testimony from a social worker that the potential [custodian] was willing to assume legal [custody].”). Moreover, after the trial court ordered reunification efforts by DSS to cease, the Custodians contacted DSS and “communicated their desire to be assessed for placement of [Adam].”

In addition, and similar to *In re K.P.*, Mr. Padilla—one of the Custodians—testified that he and Ms. Council: could continue to meet Adam’s needs on a long term basis; understood the recommendation by DSS; understood that they would receive custody of Adam; wanted to receive custody of Adam; were willing to continue Adam’s counseling sessions moving forward; and were working with Adam on progressing in school, which was a priority to them. See *In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872 (Evidence showing that a custodian understands the legal significance of the placement may consist of “testimony from the potential [custodian] of a desire to take [custody] of the child . . .”). Mr. Padilla also testified that he and Ms. Council were “willing and able to meet [Adam’s] needs going forward for as long as necessary[.]” Finally, the GAL report, prepared in advance of the Final PPR Hearing, notes that the Custodians had been taking care of Adam’s medical and dental needs, including: “establish[ing] [Adam] with a [medical] provider in Greenville”; scheduling a follow up appointment in April 2024; and taking Adam to “a dentist in . . . April 2024 for a routine cleaning and exam.”

In sum, the combined testimony rendered by the DSS social worker and Mr. Padilla, as well as the GAL and DSS reports, shows the Custodians understood the legal significance of being awarded custody of Adam. See *In re K.P.*, 383 N.C. at 308, 881 S.E.2d at 260; see also N.C. Gen. Stat. § 7B-906.1(j). Mother’s assignment of error is overruled.

2. Adequate Resources

[2] Mother next maintains there is insufficient evidence demonstrating the Custodians possessed adequate resources since there was no evidence of the Custodians’ employment and approximate income. Mother also asserts that a juvenile residing with a custodial family for greater than six months, without more evidence, is insufficient to show

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a custodial couple possesses adequate resources.

Mother argues precedent demonstrates there must be evidence of the Custodians' income or employment to verify adequate resources under subsection 7B-906.1(j). See *In re P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248; see also *In re K.B.*, 249 N.C. App. 263, 267, 803 S.E.2d 628, 631 (2016); see also *In re S.B.*, 268 N.C. App. 78, 89, 834 S.E.2d 683, 691 (2019); see also *In re J.D.M.-J.*, 260 N.C. App. at 66, 817 S.E.2d at 762; see also *In re K.P.*, 383 N.C. at 306, 881 S.E.2d at 259.

For example, in *In re J.D.M.-J.*, the trial court awarded custody of the respondent's children to the maternal aunt and uncle. 260 N.C. App. at 58, 817 S.E.2d at 758. On appeal, the respondent argued the trial court failed to verify whether "the couple had adequate resources to care for the children [] and [] understood the legal significance of the placement." *Id.* at 64, 817 S.E.2d at 760. Our Court agreed the record did not contain sufficient evidence of the adequacy of the custodial couple's financial resources. *Id.* at 66, 817 S.E.2d at 762. Although the trial court received a financial affidavit into evidence, and a social worker testified there were no "concerns" with the custodians' financial resources, the Court noted:

While this testimony constituted evidence that the [custodians] did possess *some* income, it did not state the amount of that income or demonstrate that it was sufficient to provide necessary care for the juveniles. Moreover, the social worker's statement that there were no concerns with the [custodians'] financial affidavit is too vague to constitute adequate evidence that they did, in fact, possess adequate resources to care for the juveniles.

Id. at 67, 817 S.E.2d at 762. The Court thus "vacate[d] the trial court's award of custody . . . and remand[ed] for further proceedings." *Id.* at 68, 817 S.E.2d at 763.

We note most of the cases cited by Mother, including *In re J.D.M.-J.*, occurred *before* N.C. Gen. Stat. § 7B-906.1(j) was amended to add:

The fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

Prior to its effective date, 1 October 2019, subsection 7B-906.1(j) did not include this six-month provision as "evidence that the person has adequate resources."

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We remain cognizant of a similar matter decided by our Court in *In re E.M.*—a case decided before the amendment to N.C. Gen. Stat. § 7B-906.1(j). In that case, the respondent appealed from an order awarding legal custody of the minor child to the paternal cousin and his wife. *In re E.M.*, 249 N.C. App. at 44–45, 790 S.E.2d at 866. The respondent asserted, “the district court erred by granting custody to a non-parent without verifying that the person receiving custody understood the legal significance of the placement and will have adequate resources to care appropriately for the juvenile as required by N.C. Gen. Stat. § 7B-906.1(j).” *In re E.M.*, 249 N.C. App. at 44–45, 790 S.E.2d at 866. Our Court disagreed with respect to the adequate resources prong, holding, “direct, specific evidence supports the court’s finding that the paternal cousins have adequate resources to care appropriately for [the minor child].” *Id.* at 54, 790 S.E.2d at 872. The Court determined the following record evidence supported the trial court’s verification: the custodians owned their home; the juvenile resided with the custodians for sixteen months before the hearing; the juvenile had his own bedroom, play area, and toys; the custodians provided all of the juvenile’s medical, dental, vision, and developmental needs; the custodial husband maintained employment with three employers; the custodial wife worked on the weekends and cared for the juvenile during the week; the mother-in-law cared for the juvenile on the weekends; the custodians had taken the juvenile on several vacations; and the custodians held a birthday party for the juvenile’s first birthday. *Id.* Notably, the *In re E.M.* Court did not receive any evidence revealing the amount of income either custodian earned; notwithstanding, the Court held, “[t]his evidence is sufficient to support the district court’s determination that the paternal cousins have adequate resources to care for Eddie.” *Id.*

Here, although the record in this case does not contain evidence as to either of the Custodians’ income or employment, we hold the trial court received sufficient evidence to verify the adequacy of their resources. *Compare In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872; *with In re J.D.M.-J.*, 260 N.C. App. at 65–67, 817 S.E.2d at 761–62. The trial court’s Finding of Fact No. 20 notes Adam had been living with the Custodians more than six months:

[Adam] has resided with [the Custodians] since or about February 2, 2024, and they have been listed as part of the permanency plan for [Adam]. [The Custodians] have been providing [Adam] with a safe and stable home for about six months. [The Custodians] are ready, willing, and able to continue to provide a safe and stable home and meet [Adam’s] needs as long as necessary.

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See In re A.N.T., 272 N.C. App. at 23, 845 S.E.2d at 179 (citation omitted). Subsection 7B-906.1(j) expressly states such evidence “is evidence that the person has adequate resources.” N.C. Gen. Stat. § 7B-906.1(j). In addition, Mr. Padilla testified his household was “financially able to meet [Adam’s] needs” at the hearing, noting Adam “ha[s] his own room, his own bed, TV, Internet, [and] phone.” *See In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872. Moreover, Mr. Padilla’s testimony was corroborated by the social worker’s testimony as follows:

[DSS ATTORNEY]: Have you had an opportunity to observe [Adam] in that placement?

[SOCIAL WORKER]: Yes.

[DSS ATTORNEY]: And describe for the Court what you’ve seen.

[SOCIAL WORKER]: Overall, the [Custodians] are very committed to [Adam]. [Adam] appears to feel comfortable and safe in that environment. He has his own sleeping space, plenty of storage space, plenty of food, clean environment, very warm and open.

Mr. Padilla also testified that he and Ms. Council were willing to continue Adam’s counseling sessions and were “ready, willing, and able to meet [Adam’s] needs going forward for as long as necessary.” Finally, the GAL report notes the Custodians “established [Adam] with a [medical] provider in Greenville,” scheduled a follow up appointment in April 2024, and took Adam to see “a dentist in . . . April 2024 for a routine cleaning and exam.”

As with *In re E.M.*, the evidence in the instant case supports the conclusion that the trial court verified the adequacy of the Custodians’ resources. Although the *E.M.* decision did not have the benefit of our general assembly’s amendment to N.C. Gen. Stat. § 7B-901.6(j), it similarly determined that greater than six months of placement with a prospective custodian is evidence of adequate resources. *Id.* at 54, 790 S.E.2d at 872. The trial court did not commit error in finding the Custodians possessed adequate resources to care for Adam.

B. Visitation Provisions

Mother next asserts the trial court abused its discretion by imposing the visitation provision in its orders. Mother contends the trial court may not grant the Custodians discretion to cease visits, and the visitation provision does not accommodate Mother’s physical disability under the Americans with Disabilities Act.

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“A trial court’s order regarding visitation rights is reviewed for an abuse of discretion.” *In re R.J.P.*, 284 N.C. App. 53, 60, 875 S.E.2d 1, 6 (2022). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *In re A.L.S.*, 374 N.C. 515, 517, 843 S.E.2d 89, 91 (2020) (citation omitted).

1. *Delegation of Visitation Authority to Custodians*

[3] Mother maintains the trial court abused its discretion by granting the Custodians the authority to modify or cease her visitation under *In re C.S.L.B.*, 254 N.C. App. 395, 400, 829 S.E.2d 492, 495 (2017). Although we ultimately agree with Mother on this issue, we note N.C. Gen. Stat. § 7B-905.1 does not apply since the trial court “properly terminated jurisdiction in the abuse, neglect, and dependency proceeding at the disposition phase by opening a new Chapter 50 civil custody case under N.C. Gen. Stat. § 7B-911 . . .” *In re Matter of S.G.*, 288 N.C. App. 489, 885 S.E.2d 143 (Apr. 18, 2023) (unpublished) (“The trial court properly terminated jurisdiction in the abuse, neglect, and dependency proceeding at the disposition phase by opening a new Chapter 50 civil custody case under N.C. Gen. Stat. § 7B-911, thus N.C. Gen. Stat. § 7B-905.1 regarding visitation rights was not applicable.”). In any event, Mother’s contention is correct with respect to the Chapter 50 Order since it impermissibly delegates visitation authority to the Custodians. *In re Custody of Stancil*, 10 N.C. App. 545, 550, 179 S.E.2d 844, 848 (1971).

“[T]he feasible exercise of a parent’s right of visitation should be safeguarded by a definite provision in the order or decree of the court awarding the custody of the child to another person.” *Id.* at 550, 179 S.E.2d at 848 (citation omitted). However,

[t]he order should not make the right of visitation contingent upon an invitation from the party having the custody of the child, or require the consent of one parent for the other to visit the child, or provide that the parent shall have the right of visitation only at such times as may be convenient to the party having the custody of the child, thereby leaving the privilege of visitation entirely to the discretion of the party having the child in custody.

Id. (citation omitted). “When the custody of a child is awarded by the court, it is the exercise of a judicial function. In like manner, when visitation rights are awarded, it is the exercise of a judicial function.” *Id.* at 552, 179 S.E.2d at 849 (internal citation omitted). A trial court may not delegate this judicial function to a custodian since:

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those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

*Id.*⁵

Here, the trial court's orders contain the following visitation provision:

[Mother] . . . shall have unsupervised, once per week, audio and video contact with [Adam]. [Mother] can have a minimum of once per month, monitored family time in an agreed location but not limited to the Rocky Mount and Greenville community. [Mother] is responsible for reaching out to the [Custodians] to coordinate family time the fifth of every month. *The [Custodians] will have the discretion to transition family time between [Adam] and [M]other to unsupervised.* If during monitored or future unsupervised family time or contact between the parent or juvenile, begins to trigger regressive behaviors of [Adam] or cause discord between the [Custodians] that may lead to possible placement disruption, and cannot be redirected, *visits/contact may be ceased*, and a Motion for Review may be filed with the Court.

(emphasis added). In current form, the Chapter 50 Order's visitation provision impermissibly allows the Custodians to modify Mother's visitation from supervised to unsupervised. *See id.* Furthermore, the Chapter

5. The trial court entered the same visitation procedures in the Chapters 7B and 50 orders. *In re C.S.L.B.* addresses visitation entered under Chapter 7B and holds a trial court "may not delegate its judicial function of awarding visitation." 254 N.C. App. at 399, 829 S.E.2d at 495. *In re Custody of Stancil*, involves an action initiated under Chapter 50 and draws the same conclusion with respect to the trial court's improper delegation of authority to award visitation of a minor child. 10 N.C. App. at 552, 179 S.E.2d at 849 ("[W]hen visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.").

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50 Order appears to improperly delegate authority to the Custodians to cease visitation and thus requires clarification. *See id.*

We therefore vacate the trial court’s visitation provision in the Chapter 50 Order and remand for further proceedings consistent with this opinion. *See id.* at 553, 179 S.E.2d at 850. As explained below in section C, since we affirm the Chapter 50 Order, we need not vacate the PPR Order. *See In re S.M.L.*, 272 N.C. App. 499, 519, 846 S.E.2d 790, 803 (2020); *see also In re Matter of S.G.*, 288 N.C. App. 489, 885 S.E.2d 143 (unpublished).

2. Disability Accommodation

[4] Mother next asserts the trial court abused its discretion by failing to “adequately consider [her] disability and provide appropriate accommodation.” Mother contends she is physically disabled, and the Americans with Disabilities Act “extend[s] to parent-child visitation in a child welfare case.”⁶ *See* 42 U.S.C.S. §§ 12102, 12132. As such, Mother maintains the trial court abused its discretion by leaving “the location of the visits in the discretion of the custodians.” In Mother’s view, the visits should occur where she lives, Rocky Mount, in light of her disability.

However, Mother did not raise this argument at the trial level. *See In re B.C.T.*, 265 N.C. App. 176, 193, 828 S.E.2d 50, 61 (2019) (citation omitted) (“[P]arties are not allowed to make different arguments on appeal than before the trial court to ‘swap horses between courts in order to get a better mount.’”); *see also In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81 (Nov. 7, 2017) (unpublished) (“The *Terry* court noted that claims that DSS violated the Americans with Disabilities Act must be asserted at the time the service plan is adopted to be preserved for appeal. . . . We are persuaded that the reasoning in *Terry* should apply here. [The

6. “The ADA provides that ‘no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.’” *In re C.M.S.*, 184 N.C. App. 488, 491–92, 646 S.E.2d 592, 594–95 (2007) (quoting 42 U.S.C.S. § 12132). “Title II of the ADA applies to . . . child welfare agencies and court systems. The ‘services, programs, and activities’ provided by public entities include, but are not limited to, investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services.” U.S. Department of Health and Human Services and U.S. Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, https://archive.ada.gov/doj_hhs_ta/child_welfare_ta.html (2015) (citations omitted).

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r]espondent did not object to the adequacy of the services being offered by DSS before the permanency planning hearing. Likewise, [the r]espondent's counsel did not object on this ground at the permanency planning hearing, instead arguing that [the r]espondent needed more time to work toward reunification in light of her disability. . . . Thus, [the r]espondent waived this argument on appeal.”).

Before Mother's appeal, she did not claim she was entitled to accommodations under the Americans with Disabilities Act, nor did she make arguments to that effect. At the trial level, Mother testified traveling is “a lot on her body,” but she could “sometimes” travel to Greenville:

The distance. Because . . . I do have record of what's going on with my slipped disc and my pain. I was supposed to be getting a[n] e-mail from one of my doctors about not going too far, if I could help it. So I just want to make sure I could get the visits in Rocky Mount, since that's where I'm residing. Because a 45-minute ride, plus two hours activity, plus 45 minutes, can be a lot on my body. So that's one of the things that I wanted to make sure I get, is closer visits. I mean, sometimes I could – I'm sorry. Sometimes I could go to Greenville. But I would have to go kind of by how I'm feeling.

Contrary to Mother's contention, the trial court ordered visitation to be conducted at “an agreed location but not limited to the Rocky Mount and Greenville community.” In any event, the trial court did not have an opportunity to address Mother's assertion since she argues it for the first time on appeal. *See In re B.C.T.*, 265 N.C. App. at 193, 828 S.E.2d at 61. Accordingly, we decline further review of Mother's contention. *See id.*

C. Chapter 50 Findings

[5] Mother asserts the trial court erred in transferring the Chapter 7B juvenile proceeding to a Chapter 50 custody proceeding since it failed to make the requisite findings of fact under N.C. Gen. Stat. §§ 7B-911(c)(1)–(2) and 50-13.2(a) (2023). Mother maintains the Chapter 50 Order's findings are insufficient, conclusory, and do not speak to the Custodians' physical, financial, or mental fitness. She also contends the trial court's PPR Order makes no finding regarding continued State intervention.

“We review an order's compliance with statutory requirements *de novo.*” *In re S.M.L.*, 272 N.C. App. 499, 517, 846 S.E.2d 790, 802 (2020). “Under a *de novo* review, the court considers the matter anew and freely

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substitutes its own judgment for that of the trial court.” *In re E.E.*, 294 N.C. App. at 136, 902 S.E.2d at 302 (citations omitted).

“N.C. Gen. Stat. § 7B-911 specifically provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action.” *McMillan v. McMillan*, 267 N.C. App. 537, 543, 833 S.E.2d 692, 696 (2019) (quoting *Sherrick v. Sherrick*, 209 N.C. App. 166, 169, 704 S.E.2d 314, 317 (2011)). Subsection 7B-911(a) provides, “[u]pon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.” N.C. Gen. Stat. § 7B-911(a). When entering a civil child custody order under section 7B-911, the trial court must “[m]ake findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes” *Id.* § 7B-911(c)(1). In addition, a trial court must make the following findings under subsection 7B-911(c)(2)(a)–(b):

- a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.
- b. At least six months have passed since the court made a determination that the juvenile’s placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Id. § 7B-911(c)(2).

Relevant here, N.C. Gen. Stat. § 50-13.2(a) states a trial court “shall award the custody of [a minor child] to such person . . . as will promote the interest and welfare of the child.” When making this determination, the trial court must consider and make written findings of all relevant factors:

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

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Id. (emphasis added). “The determination of what will best promote the interest and welfare of the child . . . is a conclusion of law, . . . and this conclusion must be supported by findings of fact as to the characteristics of the parties competing for custody.” *Hunt v. Hunt*, 112 N.C. App. 722, 728, 436 S.E.2d 856, 860 (1993) (citation and quotation marks omitted); *see also In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178 (“The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child.”). “These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.” *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978); *accord In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178; *accord Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860.

“[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child . . .” *Dixon v. Dixon*, 67 N.C. App. 73, 76–77, 312 S.E.2d 669, 672 (1984) (citation omitted). Additionally, “custody orders are routinely vacated where the ‘findings of fact’ consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person.” *Id.*

Here, the trial court’s Chapter 50 Order contains the following findings of fact:

[Adam] is 14 years old, and he has been residing with his paternal relatives, Cliff Padilla and Dorothy Council, since on or about February 2, 2024. Mr. Padilla and Ms. Council have been meeting [Adam’s] daily and well-being needs since he has come to reside with them, and they are ready, willing, and able to continue to do so. [Adam] reports being happy in this placement, and his needs are being met. [Adam] should continue to remain in this placement at this time.

Mother . . . has a history of mental health illness, which she has not consistently addressed over the past three years. She is currently residing in Rocky Mount, NC at a hotel. [Mother] does not have suitable housing for [Adam], and she has not demonstrated on a consistent basis her ability to provide a safe living environment for [Adam]. For the past three years, [Mother] has not been cooperative in

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working towards reunification with [Adam], and she has only minimally engaged in visitation with [Adam].

. . . .

[Mother's] behaviors and failure to address the concerns that led to [Adam's] remov[al], demonstrate that her conduct is inconsistent with a parent's constitutionally protected status, and she is unfit to parent [Adam] currently. . . .

1. Subsection 7B-911(c)(1)

Mother maintains the following finding is conclusory: “[Adam] reports being happy in this placement, and his needs are being met.” Contrary to Mother's urging, we hold this finding is supported by the evidence and complies with N.C. Gen. Stat. §§ 7B-911(c)(1) and 50-13.2(a).

Indeed, the DSS report notes that Adam “communicated to the Department his desires to remain in his current relative placement.” At the Final PPR hearing, a social worker from DSS testified to the fact that Adam's needs were being met and he felt comfortable and safe with the Custodians:

[DSS ATTORNEY]: And how is that placement going?

[SOCIAL WORKER]: It's going well.

[DSS ATTORNEY]: Have you had an opportunity to observe [Adam] in that placement?

[SOCIAL WORKER]: Yes.

[DSS ATTORNEY]: And describe for the Court what you've seen.

[SOCIAL WORKER]: Overall, the caretakers are very committed to [Adam]. [Adam] appears to feel comfortable and safe in that environment. He has his own sleeping space, plenty of storage space, plenty of food, clean environment, very warm and open.

Mr. Padilla corroborated that Adam “ha[s] his own room, his own bed, TV, Internet, [and] phone.” Mr. Padilla added that he and Ms. Council were willing to continue Adam's counseling and were “ready, willing, and able to meet [Adam's] needs going forward for as long as necessary.” Moreover, the GAL report notes the Custodians cared for Adam's medical and dental needs, including: “establish[ing] [Adam] with

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a [medical] provider in Greenville”; scheduling a follow up appointment with the provider in April 2024; and taking Adam to “a dentist in . . . April 2024 for a routine cleaning and exam.” Mother’s first challenge is therefore overruled.

Mother next contends the trial court’s Chapter 50 Order does not comply with N.C. Gen. Stat. §§ 7B-911(c)(1) and 50-13.2(a) since there are no detailed findings about the “physical, financial, or mental fitness” of the Custodians. But nothing in subsection 50-13.2(a) requires the trial to make findings as to these factors. Rather, case law posits that a court *may* make findings as to these factors if they are relevant to the best interest determination and brought out by the evidence. *See Steele*, 36 N.C. App. at 604, 244 S.E.2d at 468 (emphasis added) (“These findings *may* concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.”); *see also In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178; *see also Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860.

In any event, the trial court’s Chapter 50 Order contains detailed findings as to several relevant factors in the instant case, including: Mother’s history of mental illness; Mother’s failure to address her mental health concerns; Mother’s lack of suitable housing; Mother’s lack of capability in providing a safe living environment for Adam; Mother’s failure to make progress in her case plan with DSS to effectuate reunification with Adam; Mother’s failure to engage in consistent visitation with Adam; the Custodian’s ability and desire to provide for Adam; and Adam’s feelings towards his placement with the Custodians. Based on these observations, the trial court concluded: “It is in the best interest of [A]dam . . . for legal and physical custody to be granted to [the Custodians].” *See In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178 (holding the trial court rendered sufficient 7B-911(a) findings). The trial court’s conclusion—awarding custody to the Custodians—is therefore “supported by findings of fact of the characteristics of the parties competing for custody.” *Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860. Mother’s argument here is also overruled.

2. Subsection 7B-911(c)(2)(a)—Continued State Intervention

Mother last submits the orders do not contain adequate findings regarding continued State intervention. *See* N.C. Gen. Stat. § 7B-911(c)(2)(a); *see also In re B.E.*, 296 N.C. App. 364, 372, 909 S.E.2d 505, 511 (2024) (citation omitted) (“To terminate a juvenile proceeding and enter the case to a Chapter 50 proceeding as a civil action, the trial court must make certain findings of fact, including whether ‘[t]here is

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not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.’ ”). After careful consideration, we disagree.

The trial court made the following ultimate finding in its PPR Order: “There is no longer a need for the Department or the Juvenile Court to remain involved with this family.” *Cf. In re J.B.*, 197 N.C. App. 497, 502, 677 S.E.2d 532, 535 (2009) (holding subsection 7B-911(c)(2)(a) was not satisfied since “the court did not find that there was no longer a need for continued State intervention on behalf of [the juvenile].”). The trial court also found:

[R]easonable efforts towards reunification shall cease, as reasonable efforts by the Department are no longer necessary as the plan of Custody with relatives, Cliff Padilla and Dorothy [] Council, has been achieved.

As a result of the findings, conclusions, and orders set forth herein, the Court will terminate the Court’s jurisdiction in this Juvenile proceeding. The Court will enter a separate civil custody order with appropriate findings and conclusions of law regarding the custody of [Adam] and said order shall be filed in any pending custody action under Chapter 50. This order will constitute a final order on custody review in this Juvenile case as the Court is also entering, simultaneously with the entry of this order, a separate order with regards to modification of custody in a pending Chapter 50 Civil action or the initiation of a Civil action in custody of [Adam].

Ultimately, the trial court concluded: “The Juvenile case shall be closed, and the jurisdiction of the Juvenile Court terminated, and a separate Chapter 50 order should be entered. All counsel and the Guardian Ad Litem should be released.”

Although the trial court did not use the exact language in subsection 7B-911(c)(2)(a), our Court has previously determined that substance prevails over form when determining the need for continued State intervention. *See In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403–04 (2007) (holding the trial court complied with subsection 7B-911(c)(2)(a) by finding that: regular visitation occurred; the parties communicated sufficiently to arrange their visitation without DSS’s assistance; DSS wished to be relieved of further involvement; the parties had suitable homes for visitation and custody of the children; and “[DSS] and . . . GAL involvement is no longer necessary in this matter”); *cf. In re J.D.R.*, 239

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N.C. App. at 72, 768 S.E.2d at 178 (distinguishing from *In re A.S.* in that “the disposition order contains no findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary.”).

As in *In re A.S.*, the trial court’s State intervention finding is supported by the record in that: (1) the Custodians “are willing to transport and supervise the Juvenile with [M]other outside in Rocky Mount”; (2) Mother testified her niece would be willing to supervise future visitation with the Custodians when available; (3) the visitation protocol requires Mother to reach out to Custodians for scheduling as opposed to DSS; (4) DSS “reached out to maternal aunt . . . to supervise” the visitation that occurred prior to the final PPR hearing; (5) Mother’s virtual visits (once per week) will be conducted without supervision; (6) DSS’s court report recommended that DSS, counsel, and the GAL “should be released”; (6) Mr. Padilla testified that he had “no problem with [Adam] visiting with [M]other” and was willing to work with Mother; (7) Mr. Padilla was “fine with other people supervising” Mother’s visits; and (8) a DSS social worker testified there was no reason for the court “to stay involved in [Adam’s] life after three years.” Accordingly, we hold the trial court’s State intervention findings satisfied N.C. Gen. Stat. § 7B-911(c)(2)(a). Mother’s final argument is overruled.

IV. Conclusion

For the foregoing reasons, we hold the trial court did not err in awarding custody of Adam to the Custodians since it made the requisite verifications under N.C. Gen. Stat. § 7B-906.1(j). We also hold the trial court did not commit error by transferring the Chapter 7B juvenile proceeding to a Chapter 50 custody proceeding since it complied with N.C. Gen. Stat. §§ 7B-911 and 50-13.2. But since the trial court’s Chapter 50 Order impermissibly delegated to the Custodians the authority to modify or cease Mother’s visitation with Adam, this provision is vacated and remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges GRIFFIN and FREEMAN concur.

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IN THE MATTER OF J.B.P.

No. COA23-269

Filed 2 July 2025

Search and Seizure—traffic stop—smell of marijuana alone—probable cause—to suspect possession of marijuana rather than legal hemp

In a juvenile delinquency case involving a charge for possession of marijuana with intent to sell or distribute, which stemmed from a traffic stop in which two officers searched the juvenile's vehicle after smelling what they perceived to be marijuana, the trial court erred by granting the juvenile's motion to suppress and subsequently dismissing all charges against him. Specifically, the court incorrectly concluded that the perceived odor of marijuana, without more, could not establish probable cause to suspect that the juvenile's vehicle contained marijuana rather than legal hemp. Although the court based its conclusion on a memo from the State Bureau of Investigation (SBI) arguing that, because hemp and marijuana are so similar, the perceived smell of marijuana would be insufficient to establish probable cause in cases such as these, the SBI's legal interpretations were not controlling, since probable cause determinations are for the courts to make. Moreover, both officers in this case received special training and had extensive field experience not only in identifying marijuana, but also in distinguishing it from legal hemp; thus, based on their training and experience, the officers had a reasonable belief that the juvenile's vehicle contained marijuana.

Appeal by the State from orders entered 7 and 28 October 2022 by Judge Keith B. Mason in Beaufort County District Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Jeff Jackson, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for Defendant-Appellee.

CARPENTER, Judge.

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The State appeals from two orders: one granting the motion to suppress filed by J.B.P.¹ (the “Juvenile”) and another dismissing the charges against the Juvenile. On appeal, the State argues the trial court incorrectly granted the motion to suppress and dismissed the Juvenile’s charges due to the erroneous conclusion that officers lacked probable cause to search the Juvenile’s vehicle. After careful review, we agree with the State. Accordingly, we vacate in part and reverse and remand in part.

I. Factual & Procedural Background

On 22 September 2022, the Beaufort County Sheriff’s Office filed delinquency petitions² against the Juvenile in Beaufort County District Court following a traffic stop and search of the Juvenile’s vehicle. The petitions alleged the Juvenile was delinquent because he was in possession of marijuana with the intent to sell or distribute and a concealed handgun without a permit. On 3 October 2022, the Juvenile filed a motion to suppress, arguing the evidence obtained from the search of his vehicle violated the Fourth Amendment of the United States Constitution. On 6 October 2022, the trial court conducted a hearing on the matter and the evidence tended to show the following.

On 22 September 2022, Narcotics Investigator Jason Cleary and Lieutenant Russell Davenport, both with the Beaufort County Sheriff’s Office, were surveilling a residence suspected to be involved in the distribution of controlled substances. As Lieutenant Davenport drove by the residence, he passed a silver Dodge Charger parked in front of the residence and smelled what he perceived to be the odor of marijuana in the vehicle’s vicinity. After running the vehicle’s tag, officers determined the vehicle belonged to the Juvenile.

Later that day, after the Juvenile drove away from the residence in his vehicle, Investigator Cleary conducted a traffic stop of the Juvenile’s vehicle. When Investigator Cleary approached the vehicle, he smelled what he believed to be marijuana emanating from inside the vehicle. When Investigator Cleary asked the Juvenile to step out of the vehicle,

1. Initials are used to protect the identity of the Juvenile. *See* N.C. R. App. P. 42(b).

2. “A juvenile petition is the pleading in a juvenile delinquency proceeding” that “must ‘contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile’s commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.’ ” *In re J.U.*, 384 N.C. 618, 621, 887 S.E.2d 859, 862 (2023) (quoting N.C. Gen. Stat. § 7B-1802 (2021)).

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Investigator Cleary identified what he believed to be marijuana odor on the Juvenile's person. Based on the perceived marijuana odor, officers searched the vehicle and seized marijuana, a digital scale, and a handgun.

Investigator Cleary was employed with the narcotics unit for ten years and had hundreds of field experiences involving contact with marijuana. In addition, through the course of his ten years in the narcotics unit, Investigator Cleary participated in several annual narcotics training conferences and in-service trainings. As part of his training and field experiences, Investigator Cleary was trained on how to identify marijuana. According to Investigator Cleary, marijuana has a "very distinct strong smell" and hemp is "not as pungent and strong as marijuana."

Lieutenant Davenport was employed with the narcotics unit since 1997 and conducted approximately five-thousand narcotics investigations. Lieutenant Davenport also completed marijuana spotter school, and one thousand hours of training on marijuana detection. Furthermore, Lieutenant Davenport had field experience in investigating hemp versus marijuana distribution. According to Lieutenant Davenport, based on his training and experience, he could discern the difference between marijuana and hemp.

The Juvenile, through counsel, argued that marijuana odor emanating from a vehicle is not sufficient to establish probable cause for a search of that vehicle. That same day, the trial court orally granted the Juvenile's motion to suppress. On 28 October 2022, the trial court entered a written order memorializing its oral findings and ruling. In the order, the trial court concluded Investigator Cleary had a reasonable, articulable suspicion that the Juvenile's vehicle was involved in criminal activity, justifying the stop of the vehicle. The trial court, however, concluded "Investigator Cleary did not have probable cause to believe the [v]ehicle was carrying marijuana rather than legal hemp, or any other controlled substance which would have justified a warrantless search of the Juvenile's vehicle."

In reaching these conclusions, the trial court took notice of a State Bureau of Investigation ("SBI") 2019 memo (the "SBI Memo"). The SBI Memo was prepared as legislative guidance arguing against the General Assembly's passage of the Industrial Hemp Act ("IHA"). According to the SBI Memo, an officer's supposed sight or smell of marijuana, by itself, cannot establish probable cause of marijuana possession because marijuana is "indistinguishable" from hemp.

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Because the trial court suppressed all the evidence against the Juvenile, the trial court entered an order dismissing the charges against the Juvenile. The State timely appealed from both orders.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7B-2602 and 7B-2604 (2023).

III. Issues

The issues are whether the trial court erred by (1) granting the motion to suppress and (2) dismissing the charges against the Juvenile.

IV. Analysis

The State argues the trial court erred by granting the motion to suppress and subsequently dismissing the charges against the Juvenile. Specifically, the State contends the trial court erred by concluding that an officer's purported sight or smell of marijuana does not create probable cause to suspect marijuana possession.³ We agree with the State.

A. Standard of Review

We review an order granting or denying a motion to suppress to determine “whether the trial court’s findings of fact are supported by competent evidence and whether those findings [of fact] support the conclusions of law.” *State v. Alvarez*, 385 N.C. 431, 433, 894 S.Ed.2d 737, 739 (2023). We review the trial court’s conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). “Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. 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)).

B. Discussion

The Fourth Amendment prohibits “unreasonable searches and seizures.” U.S. Const. amend. IV. The Fourth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *State v. Campbell*, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005). Generally, searches conducted without a warrant are “per se unreasonable under the Fourth Amendment—subject only to a few specifically established

3. The State does not challenge the trial court’s decision to take judicial notice of the SBI Memo, so we will not address that issue.

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and well-delineated exceptions.” *Katz v. U.S.*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967) (footnotes omitted). The automobile exception to the warrant requirement applies when there is probable cause to believe that a vehicle contains contraband, such as controlled substances. *See State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018).

Probable cause is “a reasonable ground for belief of guilt,” *Brinegar v. U.S.*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1890 (1949), requiring only a reasonable probability of guilt, not absolute proof of guilt, *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983). The probable cause determination does not turn on the innocence or guilt of conduct—but instead on the “degree of suspicion that attaches to” the conduct. *Id.* at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13. “ ‘Probable cause exists where the facts and circumstances within their [the officers’] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.’ ” *Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 335 (quoting *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005)) (alteration in original).

Here, the trial court concluded the search of the Juvenile’s vehicle violated the Fourth Amendment. In particular, the trial court concluded the officers did not have probable cause to believe the Juvenile’s vehicle contained marijuana, as opposed to hemp, based on the odor of marijuana emanating from the vehicle. To reach this determination, the trial court took notice of the SBI Memo. Because of the IHA, the SBI, through the SBI Memo, indicated that police no longer have probable cause to suspect marijuana possession based solely off of the perceived sight or smell of marijuana.

Possession of marijuana is unlawful in North Carolina. *See* N.C. Gen. Stat. §§ 90-94(b)(1), -95(a)(3) (2023). As noted in the SBI Memo, however, the “cultivation, processing, and sale of industrial hemp” is lawful. *State v. Parker*, 277 N.C. App. 531, 539, 860 S.E.2d 21, 28 (2021) (citing N.C. Gen. Stat. § 106-568.50 (2019) (*expired pursuant to* N.C. Sess. Laws 2015-299)). Further, “[h]emp and marijuana look the same and have the same odor, both unburned and burned.” *Id.* at 540, 860 S.E.2d at 28.

Parker recognized an issue created by the IHA: Because marijuana and hemp are so similar, does the perceived sight or smell of marijuana, without more, still establish probable cause of marijuana possession for the search of a vehicle? 277 N.C. App. at 541, 860 S.E.2d at 29. *Parker*

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did not answer the question because there, officers “had more than just the scent of marijuana to indicate that illegal drugs might be present in the car.” *See id.* at 541, 860 S.E.2d at 29.

Here, based on the SBI Memo, the trial court answered *Parker*’s question in the negative. But a prior legal interpretation of an agency—like the SBI—is not controlling or binding. *See State ex rel. Utils. Comm’n v. Pub. Staff-N.C. Utils. Comm’n*, 309 N.C. 195, 211–12, 306 S.E.2d 435, 444–45 (1983). The judicial branch—not the executive or legislative—is the final arbiter of the law. *Id.* at 212, 306 S.E.2d at 445; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *Bayard v. Singleton*, 1 N.C. 5, 6–7, 1 Mart. 48, 49–50 (1787) (establishing the doctrine of judicial review in North Carolina, several years before *Marbury*). Thus, the SBI is not the ultimate arbiter of whether probable cause exists to support a search. *See Marbury*, 5 U.S. (1 Cranch) at 177, 2 L. Ed. at 73. The SBI may, as a matter of policy, instruct its agents not to investigate or charge under the circumstances described in the SBI Memo. The SBI, however, lacks authority to declare that an officer cannot establish probable cause under these circumstances. Notably, SBI decisions cannot bind the courts as probable cause determinations are for the courts to discern.

Moreover, the trial court misapprehended the question that must be answered when determining whether probable cause exists. The question is whether an officer, based on his or her training and experience, had reasonable grounds to believe that the suspect possessed marijuana. The question is not whether an officer can discern the difference between illegal marijuana or legal hemp, but rather, based on training and experience, whether the officer reasonably believes he or she smells marijuana. In this case, the trial court erred by granting the motion to suppress based on the SBI Memo’s probable-cause analysis because the search of the Juvenile’s vehicle did not violate the Fourth Amendment.

In *State v. Reel*, this Court considered whether the “plain smell” of marijuana was sufficient to establish probable cause for a search. 297 N.C. App. 205, 214, 910 S.E.2d 307, 315 (2024). Because the officer who identified the marijuana odor in *Reel* worked on hundreds of narcotics investigations and was experienced in identifying marijuana by smell, this Court concluded that the mere marijuana odor emanating from a residence was enough to create probable cause for a search. *Id.*, 910 S.E.2d at 315.

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Similarly, in *State v. Beaver*, this Court considered whether an officer's observation of "only a shot glass containing a film of white substance appearing to be some type of white powder" was enough for the basis of a probable cause determination and search. 37 N.C. App. 513, 517–18, 246 S.E.2d 535, 538–39 (1978). The officer believed that the shot glass might have contained narcotics. *Id.* at 517–18, 246 S.E.2d at 538–39. But the officer

did not testify that, by virtue of his training as a law enforcement officer or his familiarity with controlled substances and those using them in his community, he had any particular reason to know that shot glasses or other types of glasses were commonly used in connection with the use or sale of narcotics in such manner as to leave a similar white film residue.

Id. at 518, 246 S.E.2d at 539.

Because the officer in *Beaver* did not possess special training or experience in narcotics that could have made the officer's belief that the shot glass contained narcotics reasonable, we concluded probable cause did not exist. *Id.* at 517–19, 246 S.E.2d at 538–40. Specifically, we noted that "[a] good faith belief is not enough to constitute probable cause, unless the 'faith is grounded on facts within knowledge of the (officer) which, in the judgment of the court, would make his faith reasonable.'" *Id.* at 518, 246 S.E.2d at 539 (quoting *Carroll v. U.S.*, 267 U.S. 132, 161–62, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925) (alteration in original)).

Here, Lieutenant Davenport, based on his training and extensive experience, smelled what he believed to be marijuana emanating from the Juvenile's vehicle as he drove past the vehicle. Next, after lawfully stopping the vehicle, Investigator Cleary smelled what he believed to be the odor of marijuana emanating from inside the vehicle. After asking the Juvenile to step out of the vehicle, Investigator Cleary also smelled marijuana on the Juvenile's person and observed what he believed to be bits of marijuana on the floor of the vehicle. Like the officer in *Reel*, Lieutenant Davenport and Investigator Cleary received special narcotics training and had numerous field experiences in identifying marijuana based on odor and physical appearance.

Therefore, the officers' belief that they smelled marijuana odor from the vehicle based on their training and experience created a reasonable probability that the vehicle contained marijuana. *See Beaver*, 37 N.C. App. at 517–18, 246 S.E.2d at 538–39; *Reel*, 297 N.C. App. at 214, 910

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S.E.2d at 315. Accordingly, officers had probable cause to believe the vehicle contained marijuana. *See Beaver*, 37 N.C. App. at 517–18, 246 S.E.2d at 538–39; *Reel*, 297 N.C. App. at 214, 910 S.E.2d at 315.

In the context of a motion to suppress, it is immaterial whether the Juvenile actually possessed an illegal substance. Indeed, the only requirement under the Fourth Amendment is that officers develop probable cause to believe the area being searched contained contraband, such as an illegal substance. *See Gates*, 462 U.S. at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13. Thus, because probable cause does not turn on actual innocence or guilt, it does not follow that the possibility of confusing marijuana with hemp prevents the existence of probable cause of marijuana possession. *See id.* at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13 (stating that “innocent behavior frequently will provide the basis for a showing of probable cause”). Accordingly, the warrantless search of the Juvenile’s vehicle complied with the Fourth Amendment because officers had probable cause to believe the vehicle contained marijuana. *See Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

V. Conclusion

The trial court erred by granting the motion to suppress and dismissing the charges against the Juvenile. Contrary to the trial court’s conclusion, an officer’s sight or smell of what he or she reasonably believes to be marijuana, based on his or her training or experience, may create probable cause of marijuana possession. Accordingly, we reverse the trial court’s orders.

VACATED in part; REVERSED AND REMANDED in part.

Judges COLLINS and WOOD concur.

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[299 N.C. App. 648 (2025)]

IN RE T.C. & L.B.C.

No. COA25-71

Filed 2 July 2025

Child Abuse, Dependency, and Neglect—stipulation—signed by only one respondent and objected to by the other—sole basis for adjudication—vacated and remanded

In an abuse and neglect proceeding concerning two children, the district court erred in basing its adjudication solely on a stipulation to twenty-three allegations—largely concerning conduct by the mother—that was not signed by the mother or her counsel, but rather was signed only by the father and his counsel, and, moreover, that was accepted over the mother’s specific objection and despite her request that the court hold a hearing on the merits of the petitions. A stipulation by one respondent-parent may not bind or be used against another respondent-parent who was not a party to the stipulation and who objected to its use. Absent the findings of fact derived from stipulations concerning the mother’s conduct, the district court’s conclusion of law that the juveniles were abused and neglected was unsupported, and, accordingly, the adjudication and disposition orders were vacated and the matter was remanded for a new adjudicatory hearing.

Appeal by Respondent-Mother from orders entered 23 March 2023 by Judge Beth Tanner and 27 August 2024 by Judge Warren M. McSweeney in Moore County District Court. Heard in the Court of Appeals 11 June 2025.

Sharlene Gilmer Anderson for Petitioner-Appellee Moore County Department of Social Services.

Parker, Poe, Adams & Bernstein LLP, by R. Bruce Thompson II, for Guardian ad Litem.

Nathalie M. Doran for Respondent-Appellee Father.

Garron T. Michael, Esq., for Respondent-Appellant Mother.

COLLINS, Judge.

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[299 N.C. App. 648 (2025)]

Mother appeals from an order adjudicating her minor children abused and neglected and from a disposition order granting Father sole physical and legal custody of their minor children. Mother argues that the trial court erred in adjudicating the minor children abused and neglected by relying entirely on a stipulation to which Mother did not agree and to which Mother specifically objected, and by refusing to conduct a hearing on the merits despite Mother's request. We vacate the orders and remand the matter to the trial court.

I. Background

Mother and Father are the biological parents of two minor children: Tyler, born in 2017, and Lauren, born in 2015.¹ On 11 January 2023, the Moore County Department of Social Services ("DSS") filed juvenile petitions alleging that the two children were abused and neglected. Based on the petitions, DSS obtained nonsecure custody of the children and placed them in a kinship placement with their maternal grandfather and step-grandmother, with whom Father was also living.

The petitions came on for a hearing on 2 March 2023; Mother, Mother's attorney, Father, Father's attorney, DSS, and the guardian ad litem ("GAL") were all present at the hearing. The hearing, which encompassed both a pre-adjudication hearing and an adjudication hearing, lasted fifteen minutes, from 12:55 p.m. to 1:10 p.m.; the transcript of the hearing spans fifteen pages. At the outset, DSS introduced a pre-adjudication order that was consented to by all parties, and the trial court found that there were no pre-trial motions pending.

The matter moved to adjudication, and DSS told the trial court it had a "signed stipulation" signed by Father, Father's attorney, DSS, and the GAL. The stipulation stated, in part,

The signatory respondent parents, with assistance of counsel, enter into this stipulation upon personal knowledge or upon information and belief, and while neither admitting nor denying the specific allegations of the petition, stipulate the following facts on the date of the filing of the petition upon which the Court could determine by clear, cogent and convincing evidence the status of the juveniles [Lauren] and [Tyler] as defined under N.C.G.S. § 7B-101.

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

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(Italics omitted). The stipulation listed twenty-three allegations, a vast majority of which concerned Mother's alleged conduct giving rise to the petitions. Despite the assertion that "respondent parents" had entered in the stipulation, DSS admitted that neither Mother nor Mother's attorney had signed the stipulation.

The following exchange then occurred regarding the trial court's acceptance of the stipulation that Mother had not agreed to as a basis for an adjudication:

[DSS]: Your Honor, it is up to the [c]ourt as to whether that is sufficient evidence. 807 says, "A record of stipulated adjudicatory facts shall be made by either reducing the facts to writing, signed by each party stipulating to them; or by reading the facts into the record. If the [c]ourt finds that the allegations have not been proven," et cetera, et cetera.

But, generally, the practice is if -- we can put evidence on Your Honor; however, if we are going to put evidence on, we would need to continue the matter.

THE COURT: Well, I mean, I think -- I'm sorry. And somebody can correct me about this, if I'm wrong. But I think the trouble is these stipulations would be fine, except they haven't been stipulated to by all the parties.

[DSS]: All the parties do not have to stipulate. There is case law on that.

THE COURT: Okay.

[DSS]: As long as one parent stipulates, they can be accepted by the [c]ourt. And I should amend that. One parent who is familiar with the facts, right? If Dad wasn't a party to those facts, then that would be a problem. If he was incarcerated and hadn't been around, had no personal knowledge of them --

THE COURT: Okay.

[DSS]: -- that would be problematic.

THE COURT: Okay. So [DSS] is asking that I accept these adjudication stipulations based upon a case that says that adjudication stipulation only has to be adjudicated -- or stipulated to between [DSS] and at least one other party with knowledge.

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[DSS]: It's also in the code.

THE COURT: Okay. And the party with knowledge is the father and he has stipulated to these, and you would like for me to accept those. Do you want to be heard as to that, [Mother's attorney]?

Mother's attorney objected to the use of the stipulation and requested that the trial court hold a hearing on the merits:

[Mother's attorney]: I would just like to note my objection to this. I think that, once you read these allegations and facts, it should be obvious to the [c]ourt as to why we have refused here to stipulate.

My client desperately wants her children back and would like the opportunity to be heard to -- as to when she can have her children back at the soonest possible time. I realize that that is not going to be today, given the way things are going. But this is very hard for her at this time.

. . . .

So, I mean, my client came today hoping that we could convince the [c]ourt to be heard on the entire merits of the case. I do believe that it would probably take the entire lunch break, the rest of the day, and probably part of the day tomorrow to do that. And that is if we have all the evidence available to us, the -- that we would each need.

DSS responded that the stipulation was sufficient to prove the facts for adjudication, but if the trial court did not believe so, it requested a continuance:

[DSS]: And, Your Honor, I will say that we do not have that evidence in under -- and I would be -- if you're not inclined to accept the stipulation, under 803, I do believe we have good cause for a continuance as it is reasonably required to receive additional evidence, reports, or assessments needed.

. . . So we are unable at this time to go forward on any hearing as to -- definitely as to disposition.

However, if the [c]ourt is inclined to take the stipulation as to adjudication, I believe we have stipulated facts in there in order to prove that. But we would be happy to

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put on evidence in a hearing. It would just have to be at a later date.

Following this exchange, Father's attorney told the trial court, "we do accept these stipulations and hope that the [c]ourt will as well." Father's attorney also clarified that Father did not have personal knowledge of the content of the stipulations stating what DSS found during its investigations. The GAL then told the trial court that "as long as [Father] knows that those are factual allegations, he can stipulate to those, even if [Mother] does not."

The trial court said, "[g]ive me just a second" and read the stipulation, after which the trial court accepted the stipulation and determined that it was clear, cogent, and convincing evidence of abuse and neglect:

THE COURT: Okay. After having heard the argument of counsel and reviewing the adjudication stipulations, I will accept these at this time, noting the objection of [Mother] and her attorney[.]

. . . .

THE COURT: Hold on. Before we get to the disposition, let me just make sure I've been clear. Having accepted the adjudication stipulation, I presume now you would like for me to find that it was determined by clear, cogent, and convincing evidence that the children are abused, neglected, and dependent?

Is that correct?

[DSS]: Yes. Thank you, Your Honor.

THE COURT: You'd like for me to find that now, and then you would like to continue the disposition?

[DSS]: That's correct, Your Honor.

THE COURT: Okay.

[GAL]: I don't think dependency was alleged for all the children. Perhaps not.

[DSS]: It was --

[GAL]: I just looked at one and didn't see that dependency part[.]

[DSS]: I think -- I think that's correct. Dependency has not been alleged.

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[GAL]: Just wanted to --

THE COURT: I'm sorry. Can somebody -- is that on here?
But formally with --

[DSS]: Look at the petitions.

THE COURT: You are correct. I apologize. That was the [c]ourt's mistake. [DSS] has not requested that they be found dependent, only that they be found abused and neglected. Based on that and because, of course, there would've been no notice of a finding -- or a request to find dependent, I will only find the juveniles abused and neglected.

After adjudicating Tyler and Lauren abused and neglected based solely on the stipulation, the trial court continued their non-secure custody with DSS, discussed potential disposition hearing dates with the attorneys, and concluded the adjudication hearing. The trial court entered its written adjudication order on 23 March 2023. In its order, the trial court noted Mother's objection to the stipulation, but its findings of fact in support of the adjudication were based solely on that stipulation and were essentially verbatim recitations of the facts alleged in the stipulation. The matter moved to disposition.

Prior to the disposition hearing, Mother retained new counsel, who filed a motion to "[m]odify the placement and/or visitation of [Tyler] to allow maximum contact with [Mother]" Mother asserted that the modification would be in Tyler's best interest, and she stated that there had "not been an evidentiary hearing on this issue and [Tyler] was removed from [her] custody [on] January 11, 2023" The trial court held a hearing on Mother's motion on 8 June 2023 and found that Mother "has been cooperating with [DSS]" and "has complied with the case plan as currently constituted," but that DSS was "waiting on further recommendations from the children's medical records review" and for the results from Mother's "parental capacity and psychological evaluation." The trial court determined that it was contrary to both Tyler's and Lauren's best interest to return custody to Mother, but it determined that supervised visitation with Mother was in their best interest. The trial court granted Mother two hours of supervised visitation each week and two fifteen-minute phone calls each week. The issue of visitation was again heard on 10 August 2023, and the trial court granted Mother four hours of supervised visitation each week.

The disposition hearing began on 26 October 2023. At the beginning of the hearing, Mother's attorney raised concerns about the adjudication

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hearing and the trial court's reliance on the stipulations that Mother did not sign or agree to, and she moved to dismiss the matter "for lack of subject matter jurisdiction . . . based on the improper adjudication or the fact that the adjudication was not done in keeping with the statute and specifically the statute § 7B-807, which sets out adjudication." The trial court denied Mother's motion to dismiss and began hearing evidence. The disposition hearing took place on four different court dates, spanning a period of six months, and concluded on 4 April 2024.

In its written dispositional order, entered on 27 August 2024, the trial court found that Tyler and Lauren had been adjudicated abused and neglected juveniles and that DSS's efforts were reasonable to achieve the primary plan of family reunification. The trial court granted Father "sole physical and legal custody of the juveniles," reduced Mother's visitation to four hours of supervised visitation every other weekend, and granted Mother "reasonable telephonic access to the minor child[ren]" but gave Father "the discretion to terminate a phone call if he feels the communication is not in the best interests of the minor children." The trial court then converted the matter into a Chapter 50 custody order and terminated its jurisdiction, stating that "any further proceedings. . . shall occur in the Chapter 50 civil custody proceeding established herein."

Mother timely filed notice of appeal from the adjudication and disposition orders on 24 September 2024.

II. Discussion

Mother argues that the trial court erred by adjudicating Tyler and Lauren abused and neglected "where it relied entirely on a stipulation that Mother did not agree to, specifically objected to, and refused to conduct a hearing on the merits despite a clear request by Mother's counsel[.]"

A. Preservation

DSS argues that Mother's issue on appeal regarding the stipulation is not properly before this Court because, "while [Mother] did 'object' to the stipulations, the exact objection and grounds for the objection are not clear in the transcript or the order." DSS further claims that, "[a]t no point in time does [Mother] clearly or specifically object to the facts contained in the stipulation, the use of the stipulation . . . , or competency of the stipulated facts for the adjudication of abuse and neglect." DSS thus argues that Mother "did not preserve the precise issue for appellate review." DSS's arguments are entirely unsupported and border on frivolous.

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The transcript of the adjudicatory hearing and the adjudication order clearly show that the precise issue on appeal was properly preserved. The following exchange took place at the adjudicatory hearing:

THE COURT: Well, I mean, I think – I’m sorry. And somebody can correct me about this, if I’m wrong. But I think the trouble is these stipulations would be fine, except they haven’t been stipulated to by all the parties.

[DSS]: All the parties do not have to stipulate. There is case law on that.

THE COURT: Okay.

[DSS]: As long as one parent stipulates, they can be accepted by the [c]ourt. And I should amend that. One parent who is familiar with the facts, right? If Dad wasn’t a party to those facts, then that would be a problem. If he was incarcerated and hadn’t been around, had no personal knowledge of them –

THE COURT: Okay.

[DSS]: – that would be problematic.

THE COURT: Okay. So [DSS] is asking that I accept these adjudication stipulations based upon a case that says that adjudication stipulation only has to be adjudicated – or stipulated to between [DSS] and at least one other party with knowledge.

[DSS]: It’s also in the code.

THE COURT: Okay. And the party with knowledge is the father and he has stipulated to these, and you would like for me to accept those. Do you want to be heard as to that, [Mother’s attorney]?

[Mother’s attorney]: I would just like to note my objection to this. I think that, once you read these allegations and facts, it should be obvious to the [c]ourt as to why we have refused here to stipulate.

....

So, I mean, my client came today hoping that we could convince the [c]ourt to be heard on the entire merits of the case. I do believe that it would probably take the entire

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lunch break, the rest of the day, and probably part of the day tomorrow to do that. And that is if we have all the evidence available to us, the – that we would each need.

The content and context of this exchange show that Mother and her attorney clearly and specifically objected to the use of the stipulation at the adjudicatory hearing and that Mother wanted to put on evidence and be heard on the “entire merits” of the case.

Moreover, the trial court found as fact in the adjudication order that Mother’s “attorney . . . made an objection to the stipulation as his client did not sign or enter into the stipulation” and that the “objection was overruled, and the Court accepted the stipulation.” The issue regarding the stipulation is properly preserved for our review, and DSS’s assertion to the contrary is unavailing and not appreciated.

B. Standard of Review

A juvenile abuse and neglect proceeding involves two separate phases: an adjudicatory phase and a dispositional phase. *See* N.C. Gen. Stat. §§ 7B-807, 7B-901 (2023). We review a trial court’s adjudication to determine whether the trial court’s findings of fact are supported “by clear and convincing evidence.” N.C. Gen. Stat. § 7B-805 (2023); *In re J.A.M.*, 372 N.C. 1, 8 (2019) (citations omitted). In turn, “the trial court’s findings” must properly “support the trial court’s conclusion[s] of law.” *Id.* at 9. The determination that a child is abused or neglected is a conclusion of law, which this Court reviews *de novo*. *In re G.C.*, 384 N.C. 62, 66 (2023) (citations omitted). Under *de novo* review, we consider the matter anew and “freely substitute” our own judgment for that of the trial court. *Id.* (citation omitted). If the petitioner meets its burden during the adjudicatory phase, the trial court proceeds to the dispositional phase, where it must consider the child’s best interest. *In re A.J.L.H.*, 386 N.C. 305, 310 (2024). We review the trial court’s determination as to the best interest of the child “solely for abuse of discretion.” *Id.* (citations omitted).

C. Stipulations

N.C. Gen. Stat. § 7B-807 “allows factual stipulations made by a party to be used in support of an adjudication.” *In re R.L.G.*, 260 N.C. App. 70, 73 (2018) (citation omitted). N.C. Gen. Stat. § 7B-807(a) provides, “If the court finds from the evidence, including stipulations by a party, that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state.” N.C. Gen. Stat. § 7B-807(a). The statute further provides, “A record of specific stipulated adjudicatory facts shall be made by either reducing the facts to a writing, signed by each

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party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them.” *Id.*

“Despite the contemplation of ‘stipulations by a party’ in the statute, our caselaw has made clear that stipulations do not extend beyond what was agreed to by those stipulating.” *In re E.P.-L.M.*, 272 N.C. App. 585, 605 (2020) (Murphy, J., concurring) (citing *Rickert v. Rickert*, 282 N.C. 373, 380 (1972)). “Stipulations do not extend beyond what was agreed to, and do not extend to parties who did not agree to them either.” *Id.*; see *Lumber Co. v. Lumber Co.*, 137 N.C. 431, 438-39 (1905) (“Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings . . . [but] the court will not extend the operation of the agreement beyond the limits set by the parties or by the law.”); *Rickert*, 282 N.C. at 380 (stating that stipulations “will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished”) (citations omitted).

“A stipulation is a judicial admission. As such, [i]t is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact.” *Moore v. Humphrey*, 247 N.C. 423, 430 (1958) (quotation marks and citation omitted). Accordingly, a stipulation by one respondent parent may not bind another respondent parent who was not a party to the stipulation and objects to its use. See *In re E.P.-L.M.*, 272 N.C. App. at 605.

Here, the only evidence offered at the adjudication hearing to prove the allegations in the juvenile petitions was the stipulation. The stipulation’s sole purpose was to prove Mother’s alleged conduct which constituted the abuse and neglect of the juveniles. Mother did not agree to the stipulation. Neither Mother nor Mother’s attorney signed the stipulation. Mother’s attorney clearly and specifically objected to the trial court accepting the stipulation as evidence of the juveniles’ adjudication. DSS specifically informed the trial court that the juveniles could be adjudicated abused and neglected based on a stipulation not signed by all the parties. While the stipulation could have supported allegations of Father’s conduct, the stipulation could not and did not extend to Mother, who did not agree to it. See *id.*; *Lumber*, 137 N.C. at 438-39; *Rickert*, 282 N.C. at 380.

The findings of fact in support of the juveniles’ adjudication track the “stipulated” facts concerning Mother’s conduct in the stipulation. As the stipulation was not competent to establish those facts, and the trial

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court received no other evidence at the adjudication hearing, the trial court's findings of fact are not supported "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805. As a result, the trial court's conclusions of law that the juveniles are abused and neglected are not supported. *In re G.C.*, 384 N.C. at 66. The trial court thus erred by adjudicating the children abused and neglected.

The GAL, DSS, and Father all cite *In re E.P.-L.M.* for the proposition that North Carolina law allows for the use of a stipulation signed by only one parent who has personal knowledge of the facts. This misrepresents the procedural history and facts of that case. While the stipulation here could have supported allegations of Father's conduct, the holding in *In re E.P.-L.M.* does not support any of the arguments made by the GAL, DSS, or Father at trial or on appeal, and the prescient concurring opinion explains why these parties' arguments are wrong.

In *In re E.P.-L.M.*, DSS filed a juvenile petition alleging the minor child was abused, neglected, and dependent. 272 N.C. App. at 588. The trial court held a hearing on DSS's petition with all parties present and represented by counsel. "DSS, the GAL, and Father tendered stipulations to the trial court concerning [m]other's alleged conduct giving rise to the petition; [m]other, however, did not sign the stipulations." *Id.* "DSS and the GAL both argued that the stipulations could be used to establish [m]other's conduct even absent her agreement to them." *Id.* "As discussion continued, DSS argued to the court that the stipulations could—without more—be used to meet its burden." *Id.* at 589. Mother did not "object to the stipulations or argue that they could not be used to establish her conduct[.]" *Id.*

"The trial court ultimately accepted the stipulations as 'between three out of the four parties as to the facts in the stipulations.'" *Id.* (brackets omitted). The trial court adjudicated the child abused, neglected, and dependent in open court, stating: "All right, on the adjudication then, this order is based on the stipulated facts between DSS, the GAL, and Father, the evidence presented by DSS, and the evidence presented by [m]other, and the arguments of all four counsel." *Id.* at 590 (brackets omitted). The trial court entered a written order adjudicating the child abused, neglected, and dependent, "based upon the stipulated facts, the evidence presented, testimony of [m]other, and arguments of counsel." *Id.* at 591 (brackets omitted).

The mother argued on appeal that the stipulations were not admissible in evidence. *Id.* This Court concluded that mother had failed to preserve her argument for appellate review by failing to object to the

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admission of the stipulations into evidence. *Id.* at 592. Mother also argued that the trial court's adjudication order was not supported by sufficient evidence. *Id.* This Court "h[e]ld that the trial court's unchallenged findings of fact were sufficient to support the trial court's adjudication [order]." *Id.* at 594.

The concurring opinion agreed that mother had failed to preserve her argument about the stipulation for review but wrote separately to reject the GAL's and DSS's arguments that, had the issue been preserved, the trial court's use of the "stipulation" against mother was appropriate. *Id.* at 605. It stated, "The GAL suggests that a party who did not agree to a stipulation may be bound by the content of the stipulation. This is not the law, this has never been the law, and this should never be the law in an adversarial system." *Id.* It further explained:

Stipulations are not evidence of anything against a party beyond what is stipulated to by that party. As our Supreme Court stated [in *Rickert*], even if a stipulation could fully establish a claim on its own, it still would not entitle a party to relief on that claim when the stipulation was not intended to extend to the claim. This further demonstrates that a stipulation is not evidence to the extent there is not agreement to its terms. . . . If a stipulation is not evidence beyond the extent of the parties agreed-upon terms, it cannot be evidence against a party who does not agree to it. If this were not true, it would make the requirement "that the parties or those representing them assent to the stipulation" pointless, as in any action with three or more parties, two parties could enter a stipulation only about the other party, as happened here, that would be included in evidence against all other parties despite the other parties not agreeing to the stipulation. . . . Using the "stipulation" here as evidence against Mother despite her not being a party to it was improper, and the trial court erred in considering the "stipulation" as evidence against her.

Id. at 607-08 (citations omitted).

While a concurring opinion may not be binding, it is surely instructive, and we adopt its reasoning. For the reasons explained in the concurring opinion and stated here in this present opinion, "[u]sing the 'stipulation' here as evidence against Mother despite her not being a party to it was improper, and the trial court erred in considering the 'stipulation' as evidence against her." *Id.* at 608.

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III. Conclusion

Because the trial court's findings of fact are not supported by clear and convincing evidence, the findings of fact fail to support the trial court's conclusion of law that Tyler and Lauren were abused and neglected. We vacate the adjudication and disposition orders, and we remand the matter to the trial court for an adjudicatory hearing in which the parties shall have the opportunity to provide evidence regarding the allegations of abuse and neglect contained in the petitions.

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

VICKIE LYNN JONES, PLAINTIFF

v.

LESTER GREGORY JONES (ADMINISTRATOR), FULTON JONES,
CATHERINE ELLER, DILLARD WAYNE JONES, PATRICIA BOONE,
AND RONNIE (MATT) JONES, DEFENDANTS

No. COA24-544

Filed 2 July 2025

Husband and Wife—separation agreement—validity—reconciliation—no written modification—rescission not required

In an action initiated by plaintiff after her husband died intestate in which plaintiff sought to have their separation agreement, which also contained property settlement provisions, declared void, the trial court's determination that the agreement remained in effect was supported by competent evidence. Even assuming that plaintiff and her husband had reconciled after signing the agreement—about which conflicting evidence was presented—any reconciliation did not operate as a revocation of the agreement because plaintiff and decedent never revoked or modified the agreement in writing as required by the agreement's terms. Plaintiff failed to show that missed payments by her husband pursuant to the agreement constituted a material breach for which rescission was required, since legal remedies were available to compensate her for her loss. Finally, there was no merit to plaintiff's contention that a loan modification executed by her and her husband (modifying the terms of a deed of trust) constituted a modification of the separation agreement,

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where the two documents were entirely separate in subject matter and intentions.

Appeal by plaintiff from order entered 12 October 2023 by Judge Robert J. Crumpton in District Court, Ashe County. Heard in the Court of Appeals 5 November 2024.

Epperson Law Group, PLLC, by Lauren E. R. Watkins, for plaintiff-appellant.

Anné C. Wright for defendants-appellees.

STROUD, Judge.

Plaintiff appeals the trial court's order denying her claim raised in a complaint filed in District Court requesting that the District Court rule on the existence of a separation agreement as stated in her attached "Petition to declare separation agreement void[;] remove the administrator, Lester Gregory Jone[s], and appoint Vickie Lynn Jones as administrator." (Capitalization altered.) Plaintiff contends the trial court "erred by holding that the separation agreement entered into by Plaintiff[] and the decedent was valid" and "by holding that . . . Plaintiff[] and the decedent never modified their separation agreement in writing." In the separation agreement, Plaintiff and the decedent agreed that if they reconciled, "the terms of this agreement will remain in effect unless the parties revoke it in writing." Plaintiff and the decedent never revoked or modified the agreement in writing, so the trial court did not err by entering a declaratory judgment that the agreement is valid. We affirm the trial court's order.

I. Background

Harold Jones ("Decedent") and Plaintiff were married on 28 June 2002. Plaintiff and Decedent separated in April 2018. On 3 April 2018, Plaintiff and Decedent entered into a written separation agreement ("the Agreement"). Relevant portions of the Agreement state:

20. This agreement contains the entire agreement between the parties about their relationship with each other. It replaces any earlier written or oral agreement between the parties.

21. Should any portion of this agreement be held by a court of law to be invalid, unenforceable, or void, such

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holding will not have the effect of invalidating or voiding the remainder of this agreement, and the parties agree that the portion so held to be invalid, unenforceable, or void will be deemed amended, reduced in scope, or otherwise stricken only to the extent required for purposes of validity and enforcement in the jurisdiction of such holding.

22. The parties may only amend this agreement in writing after the parties have obtained legal advice on the changes.

. . . .

28. This agreement will be binding upon and will enure to the benefit of the parties, their respective heirs, executors, administrators, and assigns.

29. If the parties reconcile the terms of this agreement will remain in effect unless the parties revoke it in writing.

30. This agreement may only be terminated or amended by the parties in writing signed by both of them.

On or about 20 July 2021, Decedent died intestate. On 26 July 2021, Lester Gregory Jones, one of Decedent's siblings, applied to be appointed as Administrator of Decedent's estate and he was appointed as Administrator of the estate. On 17 February 2023, Plaintiff filed a Petition in the estate matter, File 22 E 323, entitled "Petition to declare separation agreement void[;] remove the administrator, Lester Gregory Jone[s], and appoint [Plaintiff] as administrator." On the same day, Plaintiff also filed a complaint in the District Court, Ashe County, against the Administrator and Decedent's other heirs requesting that the District Court declare the Agreement void, or in the alternative, that Plaintiff recover the monies owed to her under the Agreement, since the Clerk "could only hear and determine if the Administrator should be removed and not the underlying matters that would be necessary to make that determination" and "the attorneys for all parties agreed that it would be in the best interests of all concerned and the most cost efficient for the matters raised in the Petition, excepting the removal of the Administrator, be heard in District Court[.]"

The complaint alleged that Plaintiff, as Decedent's wife, should be named Administrator of Decedent's estate as the Agreement "had been rendered null and void and was no longer of any force and effect" when Plaintiff and Decedent reconciled after execution of the Agreement. In support of her argument that she and Decedent had reconciled, Plaintiff

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alleged “it was public knowledge that . . . [Plaintiff] and Decedent had reconciled their relationship and were living together as husband and wife” and identified a document in which Decedent identified Plaintiff as “wife,” among other reasons. Plaintiff also argued Plaintiff and Decedent “executed a Mortgage Modification Agreement” in 2021 which was written, signed, and executed with the requisite formalities under North Carolina General Statute Section 52-10.1. Plaintiff argued this document “is clear evidence that the parties waived the provisions of the previously executed” Agreement.

Defendants filed “Motions to Dismiss, Answer, and Counterclaim” on 3 March 2023. The motions to dismiss were under Rule 12(b)(6) and North Carolina General Statute Section 6-21.5 for failing to allege a justiciable issue; the answer admitted some allegations but denied Plaintiff’s allegations regarding reconciliation or modification of the Agreement. Defendants made a counterclaim for a declaratory judgment under North Carolina General Statute Section 1-253 seeking to enforce the Agreement, which granted sole ownership of the real property owned by Plaintiff and Decedent to Decedent and waived Plaintiff’s inheritance rights as a surviving spouse and her right to administer Decedent’s estate.

The matter was heard on 9 October 2023. On 12 October 2023, the trial court entered an order under the Declaratory Judgment Act, North Carolina General Statute Section 1-253, and North Carolina General Statute Section 7A-242. The order included findings of fact regarding Plaintiff’s and Decedent’s marriage, separation, the relevant provisions of the Agreement, and other matters. The trial court found that even if Plaintiff and Decedent had reconciled, “there was no written modification of” the Agreement and that the execution of a loan document was “not a modification of the [A]greement[.]” The trial court concluded as follows:

1. The . . . [A]greement entered into evidence as Plaintiff’s exhibit 1 is and remains the . . . [A]greement between . . . Plaintiff and Decedent.
2. This matter shall be remanded to the Ashe County Clerk of Superior Court to rule on . . . Defendants’ Rule 70 motion and all other proceedings.

On 13 November 2023, Plaintiff timely filed written notice of appeal of the order.

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II. Jurisdiction of the District Court

We first note under North Carolina General Statute Section 28A-2-4, “[t]he clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings. Except as provided in subdivision (4) of this subsection, the jurisdiction of the clerk of superior court is exclusive.” N.C. Gen. Stat. § 28A-2-4 (2023). But under North Carolina General Statute Section 7A-244,

[t]he district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.

N.C. Gen. Stat. § 7A-244 (2023) (emphasis added). The complaint filed in the district court division was solely

for an [o]rder declaring the . . . Agreement between . . . [D]ecedent and . . . Plaintiff be declared void, in whole or in part and[/]or the recovery of monies owed to Plaintiff pursuant to said agreement and the return of her separate property and not part of the Estate of her deceased husband.

The removal and appointment of the Administrator of the estate was specifically excluded from the complaint filed in District Court. Defendants’ counterclaim sought a declaratory judgment, and the trial court entered a declaratory judgment as to the validity of the Agreement. Thus, jurisdiction was proper in the District Court under North Carolina General Statute Sections 7A-244 and 1-253. *See id.*; *see also* N.C. Gen. Stat. § 1-253 (2023). We note only the issue involving the validity of the Agreement was properly before the District Court and this is the only issue on appeal.

III. Validity of the Agreement

Plaintiff contends (1) “the trial court erred by holding that the . . . [A]greement entered into by Plaintiff[] and . . . Decedent was valid” and (2) “the trial court erred by holding that . . . Plaintiff[] and . . . Decedent never modified their . . . [A]greement in writing.” (Capitalization altered.) We disagree.

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial

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court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *In re Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007) (citations and quotation marks omitted).

Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.

The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning.

Lane v. Scarborough, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citations and quotation marks omitted).

A. Trial Court's Determination the Agreement was Valid

Plaintiff first argues the trial court erred in determining the Agreement was still valid. Plaintiff contends (1) "the trial court's finding that the . . . [A]greement was valid even though Plaintiff[] and . . . [D]ecedent had reconciled, and such a reconciliation substantially defeated the purpose of the . . . [A]greement is not based on competent evidence[;]" and (2) "the trial court's finding that the . . . [A]greement was valid even though . . . [D]ecedent's actions constituted a material breach and rescission of the . . . [A]greement is not based on competent evidence." (Capitalization altered.) We disagree.

1. Reconciliation of the Marriage

Although Plaintiff's first argument is that the trial court's "finding" that the Agreement was valid was "not based on competent evidence," she does not challenge any of the trial court's findings of fact as unsupported by the evidence. Therefore, the trial court's findings of fact are binding on appeal. See *Isom v. Duncan*, 279 N.C. App. 171, 172, 864 S.E.2d 831, 834 (2021) ("When a finding of fact is unchallenged, it is binding on appeal."). In reality, Plaintiff's argument is that the trial court's

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findings of fact do not support its conclusion of law that the Agreement had not been rescinded by their reconciliation. We review the trial court's conclusions of law *de novo*. See *Diener v. Brown*, 290 N.C. App. 273, 276, 892 S.E.2d 212, 214 (2023) (“A trial court’s conclusions of law are reviewable *de novo*.”).

In this argument, Plaintiff largely argues the facts supporting her claim that she and Decedent had reconciled after the Agreement was signed. As to Plaintiff’s claims that she and Decedent had reconciled before his death, the trial court found:

12. There is conflicting evidence as to whether . . . Plaintiff and Decedent reconciled after signing the . . . [A]greement.

. . . .

14. Regardless of whether there was a reconciliation, there was no written modification of the . . . [A]greement.

The trial court’s finding is correct: there was conflicting evidence as to reconciliation, and normally, findings must resolve any issues of fact raised by the evidence. *In re L.M.B.*, 284 N.C. App. 41, 52, 875 S.E.2d 544, 551 (2022) (“Under Rule 52, the trial court is required to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings[.]” (citation and quotation marks omitted)). But here, as the trial court also found, whether Plaintiff and Decedent had actually reconciled was not relevant to the legal issue presented.

We will assume for purposes of this opinion that everything Plaintiff alleges about the reconciliation is true. But even if the marriage was reconciled, the Agreement had a provision stating “if the parties reconcile the terms of this agreement will remain in effect unless the [p]arties revoke it in writing.” Plaintiff contends that the reconciliation operates as a revocation of the Agreement, citing *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), and *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996), in support of this argument.

In *Stegall*, the parties entered into a separation agreement in 1983 but then executed a new separation agreement in 1988. 100 N.C. App. at 402, 397 S.E.2d at 308. The 1988 agreement “provide[d] for the distribution of the parties’ property” but made no reference to the 1983 agreement. *Id.* This Court discussed

whether the 1983 separation agreement is itself an enforceable contract in the event that the 1988 agreement is declared void. On this point [the] defendant first argues

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that in determining the intended effects of the 1983 separation agreement it is necessary to separate the property settlement provisions from the marital/support components of the separation agreement. It is his contention that even if the four-year reconciliation voided the marital/support provisions of the agreement, the property provisions of the document are still in effect.

Id. at 402-03, 397 S.E.2d at 308. This Court concluded the parties had reconciled after the 1983 agreement and “h[e]ld that any executory provisions of the 1983 separation agreement were terminated upon the parties’ reconciliation.” *Id.* at 411, 397 S.E.2d at 313. However, in discussing how the case in *Stegall* was different from this Court’s opinion in *In re Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989), we stated the

defendant’s reliance on [*Tucci*] is misplaced for another reason. In *Tucci*, the separation agreement in question contained the following paragraph: “should at any time in the future the parties resume marital cohabitation in any respect the provisions of this Separation Agreement and Property Settlement are and shall remain valid and fully enforceable, and of full legal force and effect.” *Tucci*, 94 N.C.App. at 430, 380 S.E.2d at 783. The *Stegalls*’ document, in contrast, contains no such clause and states that as consideration for the separation agreement the parties “propose to continue to live so separate and apart from one another.”

Id. at 410, 397 S.E.2d at 312-13 (citations, ellipses, and brackets omitted). While Plaintiff attempts to argue the alleged reconciliation voided the entire Agreement without mentioning the reconciliation provision of the Agreement, we cannot overlook that provision in our discussion of the Agreement, and *Stegall* is inapposite to this case. See *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 620, 659 S.E.2d 442, 455 (2008) (“A court must construe a contract as it is written and give effect to every part and provision whenever possible.” (citation and quotation marks omitted)).

In *Fletcher*, the parties executed a separation agreement in 1993 and the plaintiff later sued for breach of the separation agreement alleging that the parties had reconciled and asked “the court [to] rescind the agreement and effect an equitable distribution of the marital property.” 123 N.C. App. at 745-46, 474 S.E.2d at 803-04. This Court discussed in detail whether the parties had reconciled and concluded they had not. See *id.* at 751, 474 S.E.2d at 807. This Court then rejected the plaintiff’s

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argument that the defendant “materially breached” the agreement since any alleged breaches were not material. *Id.* at 751-52, 474 S.E.2d at 807-08. There is no mention in *Fletcher* of a provision in the parties’ separation agreement that reconciliation would not affect the separation agreement.

While Plaintiff argues the alleged reconciliation voided the Agreement entirely, this Court’s discussion in *Bradshaw v. Bradshaw* is instructive on the effect of the reconciliation provision in the Agreement and contains a helpful summary of relevant caselaw. In *Bradshaw*, the husband and wife “married in 1987 in Virginia and separated in 1991.” 264 N.C. App. 669, 670, 826 S.E.2d 779, 781 (2019). The husband and wife “entered into a Stipulation and Agreement in Virginia governed by Virginia law” and the agreement had “provisions addressing separation, spousal support, and property division.” *Id.* The agreement also had a similar provision as to reconciliation as this case, which stated:

In the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this [a]greement for settlement of property rights, spousal support, debt payments and all other provisions shall nevertheless continue in full force and effect without abatement of any term or provisions hereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of the reconciliation.

Id. at 670, 826 S.E.2d at 782. After entering the agreement the parties reconciled, moved to North Carolina, and later separated again; the parties “never entered into any written agreement modifying or revoking the [a]greement.” *Id.* The wife

filed a complaint seeking absolute divorce and equitable distribution, but not postseparation support or alimony. [The h]usband filed an answer admitting the allegations relevant to absolute divorce but denying those relevant to equitable distribution, and he counterclaimed for a declaratory judgment that the [a]greement “remains in full force and effect” and bars [the w]ife’s claim for equitable distribution.

Id. at 671, 826 S.E.2d at 782. The trial court concluded “(1) the [a]greement is valid under Virginia law; (2) application of Virginia law would be contrary to North Carolina’s public policy; (3) the [a]greement’s reconciliation provision violates North Carolina public policy; and, (4) the [a]greement does not apply to [the w]ife’s claim for equitable distribution.” *Id.* at 672, 826 S.E.2d at 783.

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On appeal, as the agreement was entered in Virginia and had a choice of law provision indicating Virginia law would apply to the validity and interpretation of the agreement, this Court first addressed whether this choice of law provision was valid. *See id.* at 673-74, 826 S.E.2d at 783. However, we then recognized “the [a]greement is enforceable in North Carolina only if it is not ‘opposed to the settled public policy’ of this State” and thus addressed “whether the [a]greement is unenforceable because the reconciliation provision is against public policy of North Carolina.” *Id.* at 674, 826 S.E.2d at 783-84. We recognize the case here involves exclusively a North Carolina agreement and Plaintiff does not argue the Agreement is barred by public policy, but Plaintiff essentially contends that since she and Decedent reconciled, the Agreement must be void since reconciliation defeats the purpose of the Agreement. In *Bradshaw*, “the validity of the [a]greement under Virginia law is not at issue in this appeal. . . . [the w]ife has never denied that the [a]greement was a valid and enforceable agreement under Virginia law in 1993 when it was executed[.]” *Id.* at 674, 826 S.E.2d at 784. And since *Bradshaw* discusses the relevant law as to separation and property settlement agreements in the context of a reconciliation provision, it is useful to our determination.

The parties and the trial court here only refer to the Agreement as a separation agreement, but it includes provisions addressing both separation and property settlement. The portions of the Agreement in question here are property settlement provisions. *See Morrison v. Morrison*, 102 N.C. App. 514, 518-19, 402 S.E.2d 855, 858 (1991) (“A separation agreement is defined as a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately. The heart of a separation agreement is the parties’ intention and agreement to live separate and apart forever. A property settlement agreement provides for a division of real and personal property held by the spouses. The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce. A property settlement contains provisions which might with equal propriety have been made had no separation been contemplated.” (citations, quotation marks, ellipses, and brackets omitted)). The Agreement releases Plaintiff and Decedent from equitable distribution claims, estate and testamentary rights in each other’s property, and pension rights in a variety of retirement accounts. While the Agreement also provides for support payments to Plaintiff, most of the Agreement, and the portions relevant to this case, involves settling the property rights of Plaintiff and Decedent. They could have entered into a property settlement agreement with the same terms as to their

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real property and rights of inheritance even if they had never separated. *See id.* (“The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce.”).

Bradshaw also discussed “the distinction between a property settlement agreement and a pure separation agreement [and] how to determine if an agreement with both types of provisions is an integrated agreement[,]” stating:

Whether the executory provisions of a property settlement agreement are rescinded upon resumption of marital relations depends on whether the property settlement is negotiated in reciprocal consideration for the separation agreement. This is so whether the property settlement and the separation agreement are contained in a single document or separate documents. If the property settlement is negotiated as reciprocal consideration for the separation agreements, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement.

Bradshaw, 264 N.C. App. at 676-77, 826 S.E.2d at 785 (citing *Morrison*, 102 N.C. App. at 519, 402 S.E.2d at 858). After reviewing Virginia’s law on contracts, we noted

even under North Carolina law—which the trial court used instead of Virginia law—the agreement to separate was not “reciprocal consideration” for the property settlement, since the [a]greement has a specific provision that the [a]greement’s provisions are severable. *See Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990) (“Where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.”).

Id. at 678, 826 S.E.2d at 786 (brackets omitted). We specifically discussed our earlier decision in *Stegall*, and stated “*Stegall* does not hold that *reconciliation* necessarily voids a property settlement agreement, and it does not address the effect of a reconciliation provision in an agreement at all, since the agreement in *Stegall* did not have this provision.” *Id.* at 679, 826 S.E.2d at 786 (emphasis in original) (citation omitted).

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We then explained *Morrison* in further detail in relation to the trial court's finding that "[t]he terms of the agreement are void[:]"

the primary focus of *Morrison* is the distinction between a separation agreement and a property settlement agreement, and where an agreement includes both types of provisions, how to determine if the agreement is integrated. *Id.* As noted above, we must construe the [a]greement under Virginia law, but as to North Carolina's public policy, *Morrison* also notes that reconciliation provisions in agreements with provisions regarding both separation and property rights are *not* against public policy:

We therefore reject the suggestion that all agreements, whether in one document or two, relating to support and property rights are reciprocal as a matter of law. To so hold would prohibit the parties from entering into contracts which do not violate law or public policy. *Because contracts providing that a reconciliation will not affect the terms of a property settlement are not contrary to law or public policy, adopting the rule that all agreements relating to support and property rights are reciprocal as a matter of law would impermissibly interfere with the parties' freedom of contract rights.* On the other hand, contracts which provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are therefore void.

Id. at 679-80, 826 S.E.2d at 787 (emphasis in original). Finally, after discussing *Porter*, where a separation agreement had a reconciliation provision similar to the one in this case and in *Bradshaw*, we concluded:

even the reconciliation provision of the [a]greement would offend North Carolina's public policy if applied to the "pure separation" provisions of the [a]greement; the "pure separation" provisions were not reciprocal consideration for the property settlement provisions. The parties agreed that the provisions of the [a]greement are severable, and enforcement of the property settlement provisions of the [a]greement does not conflict with North Carolina's public policy.

Id. at 681, 826 S.E.2d at 788.

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The case here is similar to *Bradshaw*. The Agreement has a similar reconciliation provision that “if the parties reconcile the terms of this [A]greement will remain in effect unless the [p]arties revoke it in writing.” And like in *Bradshaw*, “the Agreement has a specific provision that the Agreement’s provisions are severable[:]”

Should any portion of this agreement be held by a court of law to be invalid, unenforceable, or void, such holding will not have the effect of invalidating or voiding the remainder of this agreement, and the parties agree that the portion so held to be invalid, unenforceable, or void will be deemed amended, reduced in scope, or otherwise stricken only to the extent required for purposes of validity and enforcement in the jurisdiction of such holding.

Id. at 678, 826 S.E.2d at 786. Thus, the Agreement is not integrated under *Morrison*. *See Morrison*, 102 N.C. App. at 520, 402 S.E.2d at 859 (“Whether the property settlement agreement was negotiated as reciprocal consideration for the separation agreement ‘requires a determination of the intent of the parties regarding integration or non-integration of’ its provisions. *Hayes v. Hayes*, 100 N.C.App. 138, 147, 394 S.E.2d 675, 680 (1990). There is a presumption that the provisions of a marital agreement are separable and the burden of proof is on the party claiming that the agreement is integrated. *Id.* ‘This presumption of separability prevails unless the party with the burden to rebut the presumption proves by a preponderance of the evidence that an integrated agreement was in fact intended by the parties.’ *Id.* ‘However, where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.’ ”).

And while Plaintiff does not argue the Agreement here is void for public policy reasons specifically, her argument relies mostly on the facts alleging Plaintiff and Decedent had reconciled, and since the facts show they reconciled, the Agreement cannot be valid since the actions of Plaintiff and Decedent “created a situation where the . . . [A]greement was void.” But other than citing the general proposition in *Stegall* and *Fletcher* that reconciliation voids a separation agreement, Plaintiff does not demonstrate why the entire Agreement here would be void when it is not a pure separation agreement and it has reconciliation and severability provisions. Plaintiff and Decedent specifically addressed estate and property rights, stated reconciliation would not affect the Agreement, and agreed the Agreement could only be modified in a writing, indicating Plaintiff and Decedent contemplated this situation and intended the Agreement remain in effect. We cannot say the purpose of

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the Agreement has been defeated when the Agreement is valid under North Carolina law and Plaintiff and Decedent specifically addressed this situation.

The trial court did not err by concluding the Agreement was still valid even if Plaintiff and Decedent had reconciled. This argument is overruled.

2. Rescission of the Agreement

Plaintiff next argues “the trial court’s finding that the . . . [A]greement was valid even though . . . [D]ecedent’s actions constituted a material breach and rescission of the . . . Agreement is not based on competent evidence.” Again, the trial court concluded as a matter of law that the Agreement “was and remains the separation agreement between the Plaintiff and Decedent,” and material breach of the Agreement requiring rescission of the Agreement would be a legal conclusion we review *de novo*, not a finding of fact. *See Long v. Long*, 160 N.C. App. 664, 668-69, 588 S.E.2d 1, 4 (2003) (“The trial court’s decision as to whether a breach is material is a conclusion of law and is therefore not binding on appeal, but is reviewable as any other conclusion of law.”). The trial court did not directly address Plaintiff’s contention that Decedent’s failure to pay her all sums required under the Agreement was a material breach requiring rescission. As to the facts regarding Decedent’s performance under the Agreement, the trial court found as follows:

13. The [c]ourt reviewed the bank records of . . . Decedent’s business, which contained checks written to . . . Plaintiff as agreed in the . . . [A]greement. There is a gap in check payments from November 15, 2020 until July of 2021, which may indicate a reconciliation occurred.

According to the Agreement and to Plaintiff’s complaint, Plaintiff contends the “material breach” of the Agreement was that Decedent “still owed Plaintiff[] \$47,325.00 in payments under the Agreement and had not made any payments since [Plaintiff and Decedent] separated” and that Decedent “had failed to secure an insurance policy to ensure the monies owed to Plaintiff[.]” Plaintiff states “[t]he purpose of [the] . . . [A]greement . . . was to be equitable in nature. The payments from . . . [D]ecedent to Plaintiff[] were to make Plaintiff[] whole in exchange for . . . [D]ecedent keeping certain marital property.”

Rescission, an equitable remedy, is allowed to promote justice. The right to rescind does not exist where the breach is not substantial and material and does not go

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to the heart of an agreement. Rescission of a separation agreement requires proof of a material breach—a substantial failure to perform. *Cator v. Cator*, 70 N.C.App. 719, 722, 321 S.E.2d 36, 38 (1984) (intermittent payment of alimony for six month period a “mere lapse of performance” and not a “substantial failure to perform”).

Fletcher, 123 N.C. App. at 751-52, 474 S.E.2d at 807.

Here, we first note Plaintiff’s contention that Decedent “had not made any payments since [Plaintiff and Decedent] separated” is not supported by the record, and the trial court’s finding of fact, which Plaintiff does not challenge as unsupported by the evidence, is binding on appeal. *See Isom*, 279 N.C. App. at 172, 864 S.E.2d at 834. Plaintiff may have meant these payments stopped upon the alleged reconciliation, but this contention is complicated as Plaintiff testified at the hearing reconciliation happened in 2020 but contended in her brief in support of her Petition in the trial court and her brief to this Court that reconciliation happened in 2019. The record shows Decedent was making payments to Plaintiff from the time Plaintiff and Decedent separated in April 2018 through November 2020, totaling \$47,675.00 in payments. The trial court found “[t]here [was] a gap in check payments from November 15, 2020 until July of 2021[.]” Decedent died on 20 July 2021. Thus, Plaintiff’s claim Decedent “had not made any payments since [Plaintiff and Decedent] separated” is not supported, but both the trial court’s finding and the record support Plaintiff’s contention Decedent failed to fulfill the payment schedule set out in the Agreement and still owed her \$47,325.00 at the time of his death.

Plaintiff contends that Decedent’s missed payments are a “material breach” of the Agreement, sufficient to rescind the Agreement based on *Cator v. Cator*, 70 N.C. App. 719, 321 S.E.2d 36. In *Cator*, the husband made payments from April 1981 through January 1983, but then “did not make the January, March, and June 1983 payments.” *Id.* at 721, 321 S.E.2d at 37. And unlike this case, the separation agreement at issue in *Cator*

expressly grant[ed] the wife the right to bring an action for alimony “if the [h]usband fails to make the monthly payments of alimony as herein specified.” Therefore, the alimony provision could be rescinded independently of the rest of the agreement, which provided for the distribution of real and personal property, payment of medical, dental and hospital bills and charge accounts.

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Id. at 723, 321 S.E.2d at 39 (ellipses omitted). The wife thus wanted to rescind only the alimony provisions of the separation agreement so she could pursue an alimony action. *See id.* at 719-20, 321 S.E.2d at 37. This Court noted that the “husband’s breaches occurred simultaneously with the hearings on the motion for summary judgment and that the husband performed intermittently during that time” and concluded there was no substantial failure to perform as the wife did not prove a material breach. *Id.* at 724, 321 S.E.2d at 39.

Here, in addition to the payment schedule set out in the Agreement, the Agreement also released Plaintiff and Decedent from equitable distribution claims, claims to each other’s respective estates, and claims to their pensions including “IRAs, 401k plans, or any defined contribution plan, defined benefits plan, retirement plan or pension, savings plan, or profit sharing plan of any type[.]” This Court in *Cator* was not considering the entire separation agreement as a whole, even though it had other provisions regarding property distribution and payment of other bills, since “the alimony provision could be rescinded independently of the rest of the agreement[.]” *Id.* at 723, 321 S.E.2d at 39. Here, Plaintiff does not raise any issue regarding alimony, and even if the agreement had been rescinded, any potential claim for alimony would have ended upon Decedent’s death. *See* N.C. Gen. Stat. § 50-16.9(b) (2023) (“Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.”). The relevant provisions of the Agreement here are the property settlement provisions.

“Where there is such a breach as permits a rescission, the parties, are entitled to be placed in status quo, but if the breach is not so material as in effect to defeat the purpose of the contract, the injured party is compensated by damages.” *See Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957). Similarly, in *Morris v. Scenera Research, LLC*, our Supreme Court again emphasized “[a]s with all equitable remedies, rescission will not lend its aid in any case where the party seeking it has a full and complete remedy at law.” 368 N.C. 857, 867, 788 S.E.2d 154, 161 (2016) (citations and quotation marks omitted). The Court stated

[t]he Court of Appeals incorrectly applied the test for rescission. The court held that Scenera’s failure to pay [the] plaintiff his patent bonuses was prima facie evidence of a material breach, and, because [the] defendants breached the contract materially, [the] plaintiff could pursue rescission. But, rescission cannot be the remedy for every material breach. A party may pursue rescission only

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when a material breach occurs *and* all legal remedies falls short of compensating the injured party for its loss.

Id. (emphasis added). And here, just as in *Morris*, Plaintiff's argument as to rescission involves a fixed sum of money which can be recovered via money damages. In fact, Plaintiff's Petition stated in the alternative a request "for an Order enforcing payment of the sums remaining due . . . [Plaintiff] under the . . . Agreement, namely \$55,125.00." Thus, Plaintiff has not demonstrated that a legal remedy of damages would "fall[] short of compensating" her for her loss and the trial court did not err by concluding the Agreement was valid. *Id.*

B. Written Modification of the Agreement

Finally, Plaintiff argues "the trial court erred by holding that . . . Plaintiff[] and . . . Decedent never modified their separation agreement in writing." (Capitalization altered.) As to modification, the trial court found:

15. . . . Plaintiff testified to having to sign on a loan for . . . Decedent. Signing for such a loan is not a modification of the [A]greement.

Plaintiff acknowledges the Agreement was validly executed but contends "the subsequent documents entered into by Plaintiff[] and . . . [D]ecedent qualify as a modification of the . . . [A]greement." We disagree.

We first note that Plaintiff does not clearly state exactly how the loan modification documents would "modify" the provisions of the Agreement; she claims only that the loan modification documents are "directly contradictory" to the provision that she would remove her name from the deed. Plaintiff certainly does not contend that the loan modification documents modified the Agreement by voiding the provision of the Agreement which assigned sole responsibility for the mortgage on the property to Decedent. Instead, she seeks to claim ownership of the real property because she had not yet removed her name from the deed, although it is not clear if she is also seeking full sole responsibility for the payment of the mortgage debt.

Again, the trial court's conclusion was labeled as a finding of fact, but we review the trial court's "finding" as to the lack of modification of the Agreement as a conclusion of law. *See In re V.M.*, 273 N.C. App. 294, 298, 848 S.E.2d 530, 534 (2020) ("As a general rule, 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. Thus, if the lower tribunal labels as a finding of fact what is in substance

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a conclusion of law, we review that ‘finding’ as a conclusion *de novo*.” (citation, quotation marks, and brackets omitted)).

North Carolina General Statute Section 52-10.1 outlines the general requirements for a valid separation agreement: “Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b).” N.C. Gen. Stat. § 52-10.1 (2023). Plaintiff contends the subsequent deed of trust modifies the Agreement since it

was signed by both Plaintiff[] and . . . [D]ecedent before a notary, also known as a certifying officer. The refinancing of the property in the names of both Plaintiff[] and . . . [D]ecedent is directly contradictory to the provision in [Plaintiff and Decedents’] . . . Agreement whereby Plaintiff[] would remove her name from all documents pertaining to the marital house and property.

Plaintiff relies on *Jones v. Jones*, 162 N.C. App. 134, 590 S.E.2d 308 (2004), to contend the deed of trust was a modification of the Agreement. However, *Jones* merely lays out the requirements of North Carolina General Statute Section 52-10.1 and emphasizes oral modifications are not valid. *See id.* at 137, 590 S.E.2d at 310-11. *Jones* dealt with a situation where “the court appears to have relied on testimony from [the] defendant about conversations with [the] plaintiff in which he contended that [the plaintiff] agreed to a modified alimony arrangement” and concluded “[b]ecause separation agreements cannot be orally modified, the testimony of conversations between [the] plaintiff and [the] defendant, even if corroborated, could not constitute a valid modification of the earlier agreement.” *Id.* at 138, 590 S.E.2d at 311-12. *Jones* is inapposite to this case as there is no contention the Agreement was orally modified.

Here, Plaintiff and Decedent first executed a deed of trust for the real property on 12 January 2009. On 29 January 2014, Plaintiff and Decedent entered into a loan modification agreement to change the payment schedule of the original mortgage. On 3 April 2018, Plaintiff and Decedent entered into the Agreement, which provided that Plaintiff or Decedent would pay “any indebtedness secured against, or attributable to, any item of property that either party is receiving under this [A]greement[.]” The [A]greement also specifically provided Decedent would pay the “house an (sic) land payment” and Plaintiff would take her name off of all “home an (sic) land” documents. The Agreement set out a

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schedule of payments Decedent was to make to Plaintiff; Decedent was to pay “a total of \$75,000.00 in cash payments to [Plaintiff] in exchange for her release of the entireties property.”

On 26 April 2021, Plaintiff and Decedent refinanced the loan again in a deed of trust modification agreement, which modified the maturity date of the original deed of trust. The writing Plaintiff contends modified the Agreement was part of the April 2021 refinancing. Plaintiff argues that this document “is directly contradictory” to a provision in the Agreement that Plaintiff “agrees to have her name took (sic) off all home an[d] land documents.” However, the 2021 deed of trust modification agreement does not mention the Agreement.

“Applying contract principles, we determine the intent of the parties by the plain meaning of the written terms. We must decide the case, therefore, by what is written in the contract actually made by them.” *RL Reg'l N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citations, quotation marks, and ellipses omitted).

The making of a second contract dealing with the subject matter of an earlier one does not necessarily abrogate the former contract. To have the effect of rescission, it must either deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution, or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. Before the new contract can be accepted as discharging the old, the fact that such was the intention of the parties must clearly appear.

If upon comparison it should be found that rescission has not been effected, the two instruments must be read and construed together in ascertaining the intent of the parties and in determining what portions of the agreement are still enforceable. In such construction the rules applied to interpretation of a single contract are applicable, perhaps with added propriety. We must, of course, keep within the bounds of the writings, but the circumstances surrounding their execution, the relation of the parties and the object to be accomplished, are all to be consulted in arriving at the intent.

CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y FSB, 297 N.C. App. 234, 242, 911 S.E.2d 384, 391 (2024) (citation omitted).

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Plaintiff is correct that the 2021 deed of trust modification agreement is in writing, signed by Plaintiff and Decedent, and acknowledged before a certifying officer, a notary; but simply meeting the broad requirements for execution or modification of a separation agreement under North Carolina General Statute Section 52-10.1 does not, by itself, show Plaintiff and Decedent intended to modify the Agreement. The Agreement and deed of trust modification are two separate contracts, with different subject matter and intentions. These documents are not even “directly contradictory” as Plaintiff contends. At the time Decedent and Plaintiff entered into the Agreement, both were responsible for the existing mortgage on the real property but Decedent received sole ownership of the property and agreed to pay the mortgage. In 2021, they refinanced that mortgage. At most, the fact that Plaintiff signed the deed of trust modification documents tends to highlight the fact that Plaintiff had not yet taken her name off “all home an[d] land documents” as she was obligated to do under the Agreement, so the lender would have required her signature. In any event, the loan modification does not show Plaintiff and Decedent intended the deed of trust modification to have any effect on the Agreement. And as the deed of trust modification does not reference the Agreement, the trial court did not err by concluding the deed of trust did not modify the Agreement. This argument is overruled.

IV. Conclusion

The trial court did not err in concluding the Agreement was still valid even if Plaintiff and Decedent had reconciled before his death. The trial court also did not err by concluding the written deed of trust did not modify the Agreement. Therefore, we affirm the trial court’s order declaring that the Agreement is valid.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

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[299 N.C. App. 680 (2025)]

JUSTIN TREVOR MARLOW, WIDOWER OF PHELIFIA MICHELLE MARLOW,
DECEASED EMPLOYEE, PLAINTIFF

v.

TCS DESIGNS, INC., EMPLOYER,
FFVA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA24-901

Filed 2 July 2025

1. Workers' Compensation—subject matter jurisdiction—voluntary dismissal without prejudice—claim no longer active

After plaintiff took a voluntary dismissal without prejudice of his claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), to which defendants (the wife's employer and its insurance company) did not object, the Industrial Commission no longer had subject matter jurisdiction over the matter, unless and until plaintiff chose to refile his claim within one year of the voluntary dismissal. Although defendants argued that their filing of a Form 60 (Employer's Admission of Employee's Right to Compensation) constituted an "award" from the Commission, after which they began sending weekly compensation checks to plaintiff (which plaintiff did not cash), defendants' actions did not create jurisdiction in the Commission that would permit the dismissal of plaintiff's claim with prejudice, as sought by defendants. Therefore, the Commission's order denying defendants' request for relief and dismissing plaintiff's claim without prejudice for lack of subject matter jurisdiction was affirmed.

2. Appeal and Error—frivolous appeal—multiple assertions of nonexistent jurisdiction—sanctions imposed

In a case in which plaintiff took a voluntary dismissal without prejudice of a claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), which divested the Industrial Commission of subject matter jurisdiction over the matter, where defendants (the wife's employer and its insurance company) thereafter repeatedly submitted forms and filings to the Commission and asserted that the Commission had jurisdiction to grant their requests for relief, the appellate court determined that defendants' appeal of the Commission's order denying defendants' filings was frivolous and taken to harass and cause an unnecessary increase in the cost of litigation. Therefore, the appellate court decided in its discretion to impose sanctions, pursuant to Appellate

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Rule 34, by taxing defendants the costs of the appeal and attorney's fees incurred by plaintiff in defending the appeal.

Appeal by Defendants from order entered 25 June 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 April 2025.

White & Stradley, PLLC, by J. David Stradley, and Law Office of Lyndon R. Helton, PLLC, by Lyndon R. Helton, for Plaintiff-Appellee.

Cranfill Sumner LLP, by W. Scott Fuller and Steven A. Bader, for Defendants-Appellants.

COLLINS, Judge.

This appeal arises from the death of Plaintiff Justin Marlow's wife, Phelifia "Michelle" Marlow, who had been an employee of Defendant TCS Designs, Inc. when she was shot and killed by a co-employee. TCS and FFVA Mutual Insurance Company (collectively, "Defendants") appeal from the North Carolina Industrial Commission's order denying Defendants' request for relief and dismissing Plaintiff's claim without prejudice. We affirm and impose sanctions against TCS for this frivolous appeal.

I. Background

Michelle was shot and killed by a co-worker on 13 January 2021 while working for TCS, a commercial furniture manufacturer in Hickory, North Carolina. Plaintiff filed a Form 18, Notice of Accident to Employer, in the Commission on 11 February 2021. Defendants responded with a Form 61, Denial of Workers' Compensation Claim, on 26 February 2021, asserting that "Plaintiff's allegations do not establish that plaintiff has carried plaintiff's burden of proving that a compensable event occurred on 01/13/2021." Plaintiff filed a request that the claim be assigned for hearing "for determination and Order from the Industrial Commission for payment of death benefits." Defendants responded that they have been unable to agree because "Defendants continue to investigate the circumstances surrounding [Michelle's] murder. At this time, plaintiff has not established that [Michelle's] death is compensable."

The Commission appointed a mediator on 17 May 2021. A mediated settlement conference was held on 25 October 2021; however, the conference ended in an impasse and no mediated settlement was reached.

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Later that same day, Plaintiff filed an amended request that the claim be assigned for hearing for a determination of death benefits. In this request, Plaintiff also sought sanctions.

On 28 January 2022, Defendants filed a Form 29, Supplemental Report for Fatal Accidents, with the Commission, maintaining that “Plaintiff asserts a claim within the exclusive jurisdiction of the [Commission], but plaintiff has not established compensability.” Also on 28 January, a deputy commissioner filed a discovery order. In this order, the deputy commissioner granted Plaintiff’s “Motion to Compel Defendants to Provide Employee Files of Tangela Parker and Eric Parker,” and set Plaintiff’s claim for a full evidentiary hearing, to be held on 23 February 2022 before the Commission.

On 7 February 2022, Defendants filed a response to Plaintiff’s amended request that the claim be assigned for hearing, asserting “that Plaintiff has refused to identify issues with specificity, that Plaintiff has refused to voluntarily produce relevant documents, and that Plaintiff has refused to participate in discovery, in good faith, making Plaintiff’s claim for sanctions or other similar relief a meritless one.”

On 17 February 2022, Plaintiff moved to voluntarily dismiss his workers’ compensation claim without prejudice in accordance with Commission Rule 616. The Commission granted Plaintiff’s motion by order entered the next day. In its order, the Commission noted that Defendants had no objection to Plaintiff’s motion and that Plaintiff had one year from the date of the order, or until 18 February 2023, within which to refile his claim, “at which time the undersigned agrees to resume jurisdiction over a full evidentiary hearing if so requested.”

Plaintiff then filed a wrongful death action on 21 February 2022 in Catawba County superior court against TCS and a number of other defendants.

On 11 April 2022, approximately two months after Plaintiff voluntarily dismissed his workers’ compensation claim and filed the wrongful death action in superior court, Defendants filed a Form 60, Employer’s Admission of Employee’s Right to Compensation, in the Commission and began sending weekly compensation checks to Plaintiff in conjunction with the form. Defendants then filed a request that the claim be assigned for hearing to determine, among other things, “[Michelle’s] dependent(s),” “those credits/offsets against any compensation benefits due Deceased Employee’s dependent(s),” and “[Michelle’s] average weekly wage.”

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On 15 July 2022, the Commission denied Defendants' Motion Under Commission Rule 605(7) to Serve Requests for Admissions "in light of the fact that [] this claim has been dismissed without prejudice." Defendants appealed this order by filing another request that the claim be assigned for hearing.

TCS and the other defendants moved to dismiss Plaintiff's wrongful death action in superior court for lack of subject matter jurisdiction, arguing that the Commission had exclusive jurisdiction over the matter. The superior court denied the motion on 22 July 2022, concluding that it, not the Commission, had subject matter jurisdiction over the claims arising from Michelle's death. TCS and the other defendants appealed that order to this Court on 10 August 2022.

Meanwhile, Defendants continued sending compensation checks to Plaintiff, pursuant to the Form 60. Plaintiff has never cashed them; the uncashed checks have remained in the possession of Plaintiff's counsel. On 26 August 2022, Plaintiff filed in the Commission a "Motion to Stay Matter in All Aspects, Including Requests for Hearing, Discovery, and Motions." Defendants filed an objection, arguing that Plaintiff's motion was "not supported by fact, law, or policy." Defendants noted that they had been sending weekly compensation checks to Plaintiff, and that, pursuant to N.C. Gen. Stat. § 97-82, such payment "shall constitute an award of the Commission on the question of compensability." Defendants therefore argued that they "followed the statutory procedure [in] N.C. Gen. Stat. § 97-18(b), that [they] made payments to plaintiff, and that the time that plaintiff has to contest the award of the Commission has long since passed A stay does nothing except serve plaintiff's interest in making trouble in civil court." The deputy commissioner entered an order on 20 September 2022, finding in part, as follows:

- Plaintiff's claim had been dismissed without prejudice on 18 February 2022;
- "Plaintiff ha[d] not undertaken any affirmative action within the workers' compensation claim . . . since the dismissal without prejudice of h[is] claim except to respond, through counsel, to Defendants['] filings and motions";
- "On April 11, 2022, Defendants filed a Form 60 stating that they accept Plaintiff's claim as compensable and began sending to counsel for Plaintiff compensation checks to Plaintiff";

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- Defendants filed and served Form 33s on 13 May and 15 July 2022;
- “Defendants argue that pursuant to [N.C. Gen. Stat. §] 97-18, the acceptance and payment of compensation, even after a dismissal without prejudice of Plaintiff’s claim for benefits, is an award of the Commission”;
- “It is well settled that the North Carolina Rules of Civil Procedure are not strictly applicable to [] Commission proceedings but are nevertheless instructive”;
- “In both the North [Carolina] General Courts of Justice and the United States District Courts, a dismissal means that Plaintiff’s claim ceases to be and is no longer operative or extant until the refile of the Complaint or order of the court”;
- Once Plaintiff’s claim was dismissed, the cause of action “cease[d] to exist, and Defendants cannot force Plaintiff to accept what they offer and Plaintiff does not claim – here, acceptance of a workers’ compensation claim . . . and the payment of temporary total disability payments sent to counsel for the Plaintiff”;
- “If [the Commission] were to interpret ‘Dismissal without prejudice’ as anything other than the termination of a ‘claim’ made by the Plaintiff along with the cessation of all discovery and motions, a plaintiff would be forced to defend motions, allegations, and requests of Defendants when [P]laintiff has no desire and/or ability to do so.”

Upon entry of its findings the deputy commissioner granted Plaintiff’s motion because “Plaintiff’s claim for workers’ compensation benefits was dismissed without prejudice and, therefore, the Commission’s obligation to adjudicate the issues before it does not exist until Plaintiff refiles his claim” The deputy commissioner ordered Plaintiff’s case stayed and/or removed from the hearing docket until Plaintiff refiled the claim. The deputy commissioner “noted and recognized” that although he was entering an order staying and temporarily removing the case from the docket when “Plaintiff’s claim at this time is without effect as it was dismissed without prejudice,” the Commission was still “required to rule on the motions within some framework in order to properly address the issues raised by the parties.” The deputy commissioner further stressed

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that the order “is not meant in any way [to] validate Defendants’ arguments that Plaintiff’s claim, although dismissed without prejudice, can be accepted by Defendants after the dismissal thereby becoming an award of the Commission.”

On 1 January 2023, Defendants appealed this order to the Full Commission wherein they raised several arguments, including that “[t]he deputy commissioner erred in entering the stay, which obstructs TCS’s right to provide prompt payment for a compensable claim.” Defendants then, on 1 March 2023, filed in the Commission a Form 62, Notice of Reinstatement or Modification of Compensation.

On 2 May 2023, this Court affirmed the superior court’s order denying TCS’s motion to dismiss Plaintiff’s wrongful death action, concluding that because “Michelle’s death did not arise out of her employment with TCS, the Industrial Commission does not have exclusive jurisdiction over the matter.” *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 574 (2023).

On 11 July 2023, the Full Commission affirmed the deputy commissioner’s order granting Plaintiff’s Motion to Stay Matter in All Aspects, Including Requests for Hearing, Discovery, and Motions. Defendants filed a motion to reconsider on 21 July 2023; the Full Commission denied the motion on 11 August 2023. Defendants filed a second motion to reconsider on 28 August 2023.

The North Carolina Supreme Court denied TCS’s petition for discretionary review of this Court’s opinion on 30 August 2023. *Marlow v. TCS Designs, Inc.*, 385 N.C. 318 (2023) (unpublished).

The Full Commission denied Defendant’s second motion to reconsider on 5 September 2023.

Defendants then filed in the Commission a Request for Relief, asking for entry of “a final award that nullifies [P]laintiff’s Commission Form 18, that vacates the Commission Form 60, that reimburses [D]efendants for all workers’ compensation benefit that [D]efendants have paid on account of [Michelle’s] death, and that dismisses all workers’ compensation claims against [D]efendants that arise out of [Michelle’s] death.”

Plaintiff filed a response, arguing that the Commission did not have subject matter jurisdiction over the matter and indicating that Defendants’ checks had not been cashed.

Defendants then filed a Motion for Dismissal With Prejudice once again asking for entry of “a final award that nullifies [P]laintiff’s

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Commission Form 18, that vacates the Commission Form 60, that reimburses [D]efendants for all workers' compensation benefit that [D]efendants have paid on account of [Michelle's] death, and that dismisses all workers' compensation claims against [D]efendants that arise out of [Michelle's] death."

Plaintiff filed a response and moved for a hearing to determine sanctions against Defendants. Plaintiff specifically asked for attorney's fees as a sanction for Defendant's "undue and unreasonable litigiousness over the entire course of this claim."

After a hearing, by order entered 6 May 2024, the Commission denied Defendants' Request for Relief, dismissed Plaintiff's claim without prejudice for lack of subject matter jurisdiction, and denied Plaintiff's request for sanctions. Defendants appeal.

II. Discussion**A. Defendants' Appeal**

[1] Defendants articulate the issue on appeal as follows: "Whether the [] Commission must vacate its award, which requires the defendants to pay ongoing workers' compensation death benefits, after the Commission dismissed the case because it lacked subject matter jurisdiction over the claim." Defendants' argument is meritless.

1. Standard of Review

When reviewing a decision of the Commission, this Court examines "whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496 (2004) (brackets and citation omitted). "The Industrial Commission's 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 (1995) (citation omitted). Conclusions of law are reviewed de novo. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483 (2003).

2. Subject Matter Jurisdiction

"Subject 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 (2006). "Subject matter jurisdiction is conferred upon courts by law and operates as a structural limitation on the power of courts." *Slattery v. Appy City, LLC*, 385 N.C. 726, 729 (2024) (citing N.C. Const. art. IV §§ 1, 12). It is well-settled

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that “the existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent.” *Id.* (brackets and citation omitted).

“[A] court without subject matter jurisdiction can do nothing more than recognize its lack of jurisdiction and make rulings that are directly consequent to that determination.” *Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 423 (2018). “Any additional action taken would be a nullity and unenforceable.” *Id.*

3. Voluntary Dismissal Without Prejudice

The Commission has adopted rules establishing processes and procedures to be used for carrying out the provisions of the Workers’ Compensation Act. *See* N.C. Gen. Stat. § 97-80(a) (2023). Commission Rule 616 allows a claim filed under the Workers’ Compensation Act to be dismissed without prejudice “upon order of the Commission in the interest of justice.” 11 N.C. Admin. Code 23A.0616(a) (2018). “Unless otherwise ordered by the Commission in the interests of justice, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal Without Prejudice to refile his claim.” *Id.*

While the Commission’s rules allow for a voluntary dismissal without prejudice of a workers’ compensation claim, neither the Workers’ Compensation Act nor the Commission’s Rules articulate the effect of a plaintiff’s voluntary dismissal without prejudice on the Commission’s subject matter jurisdiction. As a result, we look to Civil Procedure Rule 41(a) and cases applying that rule for guidance. *See Lauziere v. Stanley Martin Cmtys., LLC*, 271 N.C. App. 220, 223 (2020) (looking to Rule 41(b) for guidance on involuntary dismissals); *see also Lentz v. Phil’s Toy Store*, 228 N.C. App. 416, 421 (2013) (emphasizing that the Rules of Civil Procedure “may provide guidance in the absence of an applicable rule under the Workers’ Compensation Act”) (citations omitted).

Civil Procedure Rule 41(a) governs voluntary dismissals of actions. The rule allows an action to be dismissed upon a plaintiff’s written notice or the parties’ written stipulation, N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2023), or “upon order of the judge and upon such terms and conditions as justice requires,” *Id.* § 1A-1, Rule 41(a)(2) (2023). Unless such order states otherwise, “a dismissal under this subsection is without prejudice” and “a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.” *Id.*

A voluntary dismissal divests the court of jurisdiction over the matter. *See VSD Commc’ns, Inc. v. Lone Wolf Publ’g Grp., Inc.*, 124

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N.C. App. 642, 643-44 (1996) (“The filing of a voluntary dismissal strips the trial court of its authority to enter further orders in the adversary proceedings, ‘except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs.’”) (citation omitted); *see also Walker Frames v. Shively*, 123 N.C. App. 643, 646 (1996) (recognizing that, as a general proposition, a Rule 41(a) dismissal “terminate[s] all adversary proceedings in [the] case”) (citations omitted). Upon a plaintiff’s voluntary dismissal, “the action [is] terminated. The case [is] closed and nothing further [can] be done regarding it.” *Lowe v. Bryant*, 55 N.C. App. 608, 611 (1982) (“The case having been voluntarily dismissed, there was no pending action upon which a valid order could be rendered.”); *see also Doe v. Duke Univ.*, 118 N.C. App. 406, 408 (1995) (“Once a party voluntarily dismissed her action pursuant to [Rule 41(a)(1)], it is as if the suit had never been filed, and the dismissal carries down with it previous rulings and orders in the case.”) (cleaned up).

4. Analysis

Here, Plaintiff filed a Form 18, Notice of Accident to Employer, in the Commission on 11 February 2021. TCS filed a Form 61 in response, denying Plaintiff’s workers’ compensation claim on 17 February 2022. Defendants maintained that “[P]laintiff has not established that [Michelle’s] death is compensable.” A mediated settlement conference held on 25 October 2021 ended in an impasse, and as a result, Plaintiff filed an amended request that the claim be assigned for hearing. The Commission then filed a discovery order, granting Plaintiff’s motion to compel Defendants to provide certain discovery and setting Plaintiff’s claim for a full evidentiary hearing. Defendants, however, asserted that “Plaintiff has refused to identify issues with specificity, that Plaintiff has refused to voluntarily produce relevant documents, and that [P]laintiff has refused to participate in discovery, in good faith”

On 17 February 2022, Plaintiff moved to voluntarily dismiss the workers’ compensation claim without prejudice in accordance with Commission Rule 616. The Commission granted Plaintiff’s motion by order entered the next day. In its order, the Commission noted that Defendants had no objection to Plaintiff’s motion and that Plaintiff had one year from the date of the order, or until 18 February 2023, within which to refile his claim. Although Plaintiff had a year within which to refile his claim, he was not required to do so.

Upon entry of this order, the Commission no longer had subject matter jurisdiction over the matter. *See VSD Commc’ns, Inc.*, 124 N.C. App. at 643-44. The Commission could therefore do nothing more than

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recognize its lack of jurisdiction and make rulings that were “directly consequent to that determination.” *Quevedo-Woolf*, 261 N.C. App. at 423. Accordingly, the Commission repeatedly “recognize[d] its lack of jurisdiction” and made rulings “directly consequent to that determination” in response to Defendants’ continuous filings. *Id.*

Defendants did not and could not create jurisdiction in the Commission after Plaintiff’s claim had been dismissed by filing the Form 60 and sending weekly compensation checks to Plaintiff. Defendants argue that the Form 60 constitutes an “Award” from the Commission. However, because the Commission did not have subject matter jurisdiction over the claim, the Form 60 was nothing more than a nullity. As the deputy commissioner correctly stated in its 20 September 2022 order:

Once that claim is dismissed (especially here as [TCS] originally denied Plaintiff’s claim), the cause of action . . . ceases to exist, and [TCS] cannot force Plaintiff to accept what [it] offer[s]

. . . .

. . . Plaintiff’s claim for workers’ compensation benefits was dismissed without prejudice and, therefore, the Commission’s obligation to adjudicate the issues before it does not exist until the Plaintiff refiles his claim for benefits as ordered by [the Commission]

Accordingly, we affirm the Commission’s denial of Defendants’ Request for Relief and Motion for Dismissal With Prejudice.

B. Plaintiff’s Request for Sanctions

[2] Plaintiff moves this Court to sanction TCS for pursuing a frivolous appeal.

Pursuant to Rule 34 of our Rules of Appellate Procedure, we may sanction a party, an attorney, or both if we determine an appeal was frivolous because it “was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” or was “taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]” N.C. R. App. P. 34(a). We may impose as sanctions “single or double costs” and “reasonable attorney fees, incurred because of the frivolous appeal[.]” N.C. R. App. P. 34(b)(2).

In evaluating a Rule 34 motion, we focus on whether the appeal itself is frivolous. *See Yeager v. Yeager*, 232 N.C. App. 173, 183 (2014).

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Generally, we impose sanctions under Rule 34 when parties repeatedly advance frivolous arguments. *See, e.g., ACC Constr., Inc. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 272 (2015) (imposing sanctions in the form of costs and attorney’s fees when a plaintiff asked the trial court to set aside an order from a different trial court, and the plaintiff received numerous sanctions at the trial-court level for raising frivolous arguments); *Shebalin v. Shebalin*, 284 N.C. App. 86, 91 (2022) (imposing sanctions due to a party’s “insistence to pursue [a] frivolous appeal” after he “repeatedly and baselessly asserted” that an interlocutory order was “a final order, despite the order’s interlocutory nature being apparent on its face [and] multiple admonitions from opposing counsel”); *Ritter v. Ritter*, 176 N.C. App. 181, 184-85 (2006) (imposing sanctions pursuant to Rule 34 when a party appealed from an interlocutory order, “fill[ed] numerous non-meritorious motions in the trial court and this Court,” and “was cautioned several times by the trial court for ignoring its previous orders, ignoring court rules and procedural requirements, and harassing court personnel”).

Here, Plaintiff argues TCS’s appeal is frivolous because it “disregards ‘a universal principle as old as the law itself’ . . . that proceedings in the absence of subject-matter jurisdiction are ‘a nullity.’ ” Plaintiff further argues that “TCS has made no argument—good faith or otherwise—to change this ‘universal principle,’ nor has TCS even attempted to distinguish the cases which hold that a court that lacks jurisdiction may only dismiss the action without prejudice.” Plaintiff finally argues that “TCS has suffered no harm from the [C]ommission’s order” because Plaintiff has not cashed any of the weekly compensation checks sent by TCS in accordance with the Form 60.

Since the entry of the Commission’s order dismissing Plaintiff’s workers’ compensation claim without prejudice on 18 February 2022, TCS has continued to submit forms and filings to the Commission. The Commission has repeatedly explained in its orders denying relief that it lacked subject matter jurisdiction over the claim. On appeal, TCS makes no different argument for subject matter jurisdiction than it repeatedly made to the Commission, and the applicable law and analysis undertaken by this Court is no different from the law relied upon and the analysis undertaken by the Commission.

Indeed, TCS’s appeal is “not well-grounded in fact,” is “not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,” and has been taken “to harass [and] cause unnecessary [] increase in the cost of litigation[.]” N.C. R. App. P. 34(a). In our discretion, we tax TCS with the costs of this appeal, as well

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as the attorney's fees incurred by Plaintiff in the defense of this appeal. Pursuant to Rule of Appellate Procedure 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney's fees incurred by Plaintiff in defense of this appeal.

III. Conclusion

For the foregoing reasons, we affirm the Commission's order denying Defendants' request for relief and dismissing Plaintiff's claim without prejudice. We allow Plaintiff's request for sanctions for filing a frivolous appeal.

AFFIRMED AND REMANDED.

Judges FREEMAN and MURRY concur.

MARK W. PONDER, PLAINTIFF

v.

STEPHEN R. BEEN, DEFENDANT

No. COA24-552

Filed 2 July 2025

Process and Service—abuse of process—judgment notwithstanding the verdict—more than a scintilla of evidence

In an alienation of affection proceeding that resulted in a jury finding in favor of defendant, the trial court erred in allowing plaintiff's motions for judgment notwithstanding the verdict on defendant's abuse of process claim—that plaintiff brought the action to harass, inconvenience, and embarrass defendant and plaintiff's former wife, who married defendant following her divorce from plaintiff—where plaintiff essentially conceded the existence of the first element of abuse of process (ulterior motive), and, taken in the light most favorable to defendant, more than a scintilla of evidence supported the second element (an act in the use of process not proper in the regular prosecution of the proceeding); namely, that on the pretext of assisting the process server, plaintiff trespassed onto defendant's property and spit on defendant. Further, plaintiff committed those acts after defendant's counsel communicated to plaintiff that counsel would accept service on defendant's behalf.

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Appeal by defendant from order entered 14 December 2023 by Judge Nathaniel J. Poovey in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 February 2025.

Sodoma Law, P.C., by Amy E. Simpson and Caitlin H. Hickman, for plaintiff-appellee.

Womble Bond Dickinson (US) LLP, by James P. Cooney III and Patrick Grayson Spaugh, for defendant-appellant.

STROUD, Judge.

This matter is before us following a jury verdict finding Stephen Been (“Defendant”) not liable for alienation of affections and Mark Ponder (“Plaintiff”) liable for abuse of process. The jury awarded Defendant compensatory and punitive damages, and Plaintiff moved for judgment notwithstanding the verdict (“JNOV”). The trial court granted Plaintiff’s motion and Defendant appealed. We reverse the trial court’s order setting aside the jury verdict.

I. Factual and Procedural Background

The factual background and procedural history of this case were set forth by this Court in *Ponder v. Been*, 275 N.C. App. 626, 853 S.E.2d 302 (2020) (“*Ponder I*”). We briefly summarize *Ponder I*, the Supreme Court’s subsequent reversal, and the additional facts now pertinent to Defendant’s argument on appeal. The relevant facts from *Ponder I* are as follows. *See id.* at 626-628, 853 S.E.2d at 304.

Plaintiff met Mary in 2008, and they married in June 2010. Mary had two children from a prior marriage, John¹ and Max, and worked in the home as a stay-at-home mother. Plaintiff owned a home in Naples, Florida and Mary occasionally vacationed alone at the home. During one of her visits in May 2013, Mary met Defendant, who lived nearby. Following this visit, Mary and Defendant remained in frequent contact through text messages and telephone calls.

In November 2013, Plaintiff confronted Mary and accused her of having an affair with Defendant. This encounter resulted in Mary seeking a domestic violence protection order against Plaintiff. On 13 November 2013, the order was granted and Mary and Plaintiff separated. After their separation, Mary remained in the marital home until June 2014, when

1. We have used pseudonyms to protect the identities of the children.

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she and her children moved to Naples, Florida and lived in properties owned by Defendant.

On 5 November 2015, Plaintiff filed a complaint against Defendant alleging alienation of affections. Plaintiff voluntarily dismissed this action on 15 September 2016 after Defendant moved to dismiss for lack of personal jurisdiction. On 14 September 2017, Plaintiff refiled his claim for alienation of affections against Defendant, seeking compensatory and punitive damages. Plaintiff alleged “[w]ith full knowledge of her marital status, Defendant, willfully, maliciously and intentionally engaged in a campaign to alienate [Mary] from Plaintiff,” which severed Plaintiff and Mary’s marital bond. In response, Defendant again moved to dismiss Plaintiff’s action for lack of personal jurisdiction, citing a violation of North Carolina’s long-arm statute, North Carolina General Statute Section 1-75.4.

On 29 October 2019, the trial court entered its order denying Defendant’s motion to dismiss for lack of personal jurisdiction. Defendant appealed. On 31 December 2020, with a divided panel, this Court in *Ponder I* reversed the trial court’s order. *Ponder I*, 275 N.C. App. at 635, 853 S.E.2d at 308. On 11 March 2022, our Supreme Court reversed this Court’s decision in *Ponder I* for the reasons discussed in the dissenting opinion. *Ponder v. Been*, 380 N.C. 570, 869 S.E.2d 193 (2022). Thus, consistent with the dissenting opinion in *Ponder I*, the trial court’s order denying Defendant’s motion to dismiss for lack of personal jurisdiction was affirmed.

Following the issuance of the Supreme Court’s decision, on 20 April 2022 Defendant filed an answer to Plaintiff’s 2017 complaint for alienation of affections. Defendant also asserted a counterclaim against Plaintiff for abuse of process and sought an award of punitive damages. The basis of his claim arose from Plaintiff’s service of process of the 14 September 2017 complaint. Defendant alleged that on 28 October 2017 Plaintiff appeared at Defendant’s home, allegedly to locate Defendant to serve him with the complaint. Plaintiff was highly intoxicated when he arrived and he initiated an altercation involving Defendant, Mary, and Mary’s son. Following the altercation, a court in Florida issued a domestic violence protection order against Plaintiff. Defendant alleged that Plaintiff used the service of his complaint as a pretextual basis for appearing at his home.

The trial on Plaintiff’s alienation of affections claim and Defendant’s abuse of process counterclaim spanned 14 August 2023 to 24 August 2023. The evidence presented at trial regarding the background of

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this matter and Defendant's abuse of process claim tended to show the following.²

After Plaintiff and Mary wed in 2010, Plaintiff engaged in verbal, physical, and emotional abuse toward Mary on a daily basis. The severity of the abuse worsened as Plaintiff began consuming alcohol heavily about six out of seven days per week. Mary's sons, who were ages 6 and 7 in 2010, often witnessed the abuse and experienced it themselves. Plaintiff yelled and cursed at them and occasionally hit them. Mary's older son, John, testified that Plaintiff would hit him across the face with an open palm and continued to do so until Plaintiff got a reaction out of him. When Mary tried to intervene as Plaintiff engaged in this behavior with her sons, Plaintiff redirected the abuse toward Mary. At trial, Plaintiff denied the abuse of Mary and her children.

Mary met Defendant in May 2013, and they remained in contact through text messages and telephone conversations. The last incident of Plaintiff's abuse of Mary occurred in November 2013, after Plaintiff accused Mary of having an affair with Defendant. On 10 November 2013, Plaintiff arrived home drunk and told Mary's sons that they had a new father, Defendant, and they needed to leave. Plaintiff made threatening remarks to Mary, stating he would "cut her [vagina] out so that no one else could have her." Mary's younger son, Max, called the police and Mary and her sons stayed in a hotel that night. On 13 November 2013, after Mary and her sons returned home, Plaintiff yelled at John and made several degrading comments to him. Max again called the police. Later that day, Mary obtained a domestic violence protection order against Plaintiff, and he was required to leave the marital home. During Plaintiff's testimony, he denied what occurred on 10 and 13 November 2013.

Thereafter, Plaintiff and Mary communicated through attorneys about their separation and tried to settle their dispute about their Premarital Agreement. Mary ultimately moved to Florida in June 2014 and got engaged to Defendant in 2017.

Plaintiff refiled his complaint³ on 14 September 2017 and Defendant's attorney informed Plaintiff's attorney that he would accept service on

2. The only issue on appeal arises from the trial court's order granting JNOV in favor of Plaintiff on Defendant's abuse of process claim. Therefore, we do not address the evidence presented at trial regarding Plaintiff's alienation of affections claim except to the extent necessary to address the issue presented on appeal.

3. As noted above, Plaintiff had filed the first complaint against Defendant alleging alienation of affections in November 2015 and voluntarily dismissed that action on 15 September 2016.

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behalf of Defendant. But Plaintiff did not attempt to have Defendant's attorney accept service. Instead, on 28 October 2017, Plaintiff arrived at Defendant's home purportedly to locate Defendant for service. That day, Defendant and John were upstairs watching a football game when they heard "screaming noises" coming from Mary. John immediately ran downstairs, with Defendant following behind, though he struggled to keep up due to the condition of his health. When John entered the garage, he saw Plaintiff yelling at Mary and "backing her up against the wall." Upon noticing John, Plaintiff turned to him and stated "[y]ou think you're big now. I'm going to hire someone to f*** your mom in the a**." Once Defendant made it downstairs, he saw Plaintiff "stumbling around drunk." Defendant told Plaintiff he needed to leave. In response, Plaintiff walked up to Defendant, spat on him, and left the home. They called the police, and Defendant was arrested and convicted in connection with the altercation.

According to Plaintiff's testimony, Defendant's attorney indicated that he would not accept service on behalf of Defendant, so Plaintiff hired a private investigator in Florida to serve him. The private investigator attempted to serve Defendant at his home three times before the date of the altercation. Following the unsuccessful attempts, Plaintiff drove to Defendant's home in Florida with a passenger in his vehicle. The passenger took photographs of Defendant's home and the vehicles parked in the driveway. Plaintiff then sent the photographs to the private investigator, along with a text message stating "[f]ound [Defendant] at home. See photos. Black Tahoe is his." Plaintiff testified that he never exited his vehicle, did not observe anyone at the home, and left immediately after the photographs were taken.

Two days after the altercation, Mary filed a petition for a domestic violence protection order against Plaintiff in a court in Florida. The court held a hearing and heard testimony from Plaintiff, the passenger in Plaintiff's vehicle, Mary, and John. The court granted the petition and found: "there was absolutely no reason for [Plaintiff] to be over at [Defendant]'s residence;" "[Plaintiff] has a recent history of harassment towards [Mary];" and "[Plaintiff's] actions are of a larger scheme of harassment of [Mary] and her family."

Defendant was eventually served with the summons and complaint on 1 November 2017 while he was attending one of John's football games. The trial began on 14 August 2023. Following the evidence, Plaintiff moved for a directed verdict on Defendant's abuse of process claim. The trial court denied Plaintiff's motion. On 24 August 2023, the jury found Defendant not liable for alienation of affections and found Plaintiff

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liable for abuse of process. The jury awarded Defendant \$932,042.00 in compensatory damages and \$606,502.31 in punitive damages.

On 25 September 2023, Plaintiff filed a motion for JNOV, or alternatively, a new trial. The trial court held a hearing on Plaintiff's motion on 9 November 2023. By written order entered 30 November 2023, the trial court granted Plaintiff's motion. The trial court found "Defendant failed to introduce competent evidence to support both requisite elements for the counterclaim of abuse of process" and that "no reasonable jury could have reached a verdict in favor of Defendant." Thus, the trial court ordered that the judgment entered based on the jury verdict should be amended to reflect that Plaintiff is not liable to Defendant for either abuse of process or punitive damages. On 14 December 2023, Defendant appealed from the trial court's order granting Plaintiff's motion for JNOV and "any amendments to the Judgment directed by the Order."

II. Analysis

Defendant argues the trial court erred by granting Plaintiff's motion for JNOV. He argues there was substantial evidence presented to support his abuse of process claim and the trial court erred by setting aside the jury verdict and award of punitive damages.

A motion for JNOV is made under Rule 50 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 50 (2023). The motion "is essentially a renewal of an earlier motion for directed verdict." *Jones v. Corn*, 293 N.C. App. 596, 602, 902 S.E.2d 17, 23 (2024) (citation omitted); see *Martin v. Pope*, 257 N.C. App. 641, 644, 811 S.E.2d 191, 194 (2018) ("[A] directed verdict motion is an 'absolute prerequisite' to a JNOV motion." (citation omitted)). Accordingly, when the trial court denies a party's motion for directed verdict, that party "may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.]" N.C. Gen. Stat. § 1A-1, Rule 50.

Both a motion for a directed verdict and a motion for JNOV challenge the sufficiency of the evidence. A motion for a directed verdict addresses whether there is sufficient evidence to submit the case to the jury, while a JNOV "provides the trial court with an opportunity to reconsider the question of the sufficiency of the evidence after the jury has returned a verdict." *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.*, 211 N.C. App. 252, 256-57, 712 S.E.2d 670, 675 (2011) (citation omitted). Stated differently, "[t]he purpose of a motion for JNOV is to test the sufficiency of the evidence on which the jury relied and to enter a judgment contrary to the jury's verdict if, as a matter of

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law, the evidence presented does not support that verdict.” *Vanguard Pai Lung, LLC v. Moody*, 387 N.C. 376, 379, 912 S.E.2d 788, 791 (2025) (citation omitted).

When contemplating a motion for JNOV, “the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor.” *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 65, 577 S.E.2d 918, 923 (2003) (citation omitted). This motion should not be granted “where there is more than a scintilla of evidence to support each element of a plaintiff’s case.” *Id.*; see *Morris v. Scenera Rsch., LLC*, 368 N.C. 857, 861, 788 S.E.2d 154, 158 (2016) (defining scintilla as “very slight evidence” (citations omitted)). “The nonmovant meets this low bar by demonstrating that the evidence would permit the jury to resolve the evidentiary conflicts in its favor based on more than raw ‘suspicion, conjecture, guess, surmise, or speculation.’ ” *Moody*, 387 N.C. at 380, 912 S.E.2d at 792 (citation omitted).

Our Supreme Court has cautioned the trial court when considering a motion for JNOV, establishing that such a motion should be “cautiously and sparingly granted.” *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985) (citation omitted). When a JNOV is granted, the trial court is, in effect, “deciding that the question has become one exclusively of law and that the jury has no function to serve.” *Primerica Life Ins. Co.*, 211 N.C. App. at 257, 712 S.E.2d at 675 (citation omitted). In other words, it enables the trial court to “usurp the jury’s role.” *Corn*, 293 N.C. App. at 602, 902 S.E.2d at 23 (citation omitted). Consequently, “[t]he legal standard applied to a JNOV motion is quite demanding.” *Moody*, 387 N.C. at 379, 912 S.E.2d at 791.

On appeal, “questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law[.]” *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 508, 648 S.E.2d 531, 535 (2007) (citation omitted). Therefore, this Court’s review of a trial court’s ruling on a motion for JNOV is *de novo*. See *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 455, 873 S.E.2d 567, 577 (2022). Under a *de novo* review, “we consider the matter anew and freely substitute our judgment for that of the trial court[.]” *Hodgson Const., Inc. v. Howard*, 187 N.C. App. 408, 412, 654 S.E.2d 7, 11 (2007) (citation, quotation marks, and ellipses omitted).

Here, the trial court granted Plaintiff’s motion for JNOV on Defendant’s abuse of process claim. Abuse of process is “the misuse

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of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.” *Chidnese v. Chidnese*, 210 N.C. App. 299, 310, 708 S.E.2d 725, 734 (2011) (emphasis in original) (citation omitted). Two elements must be established to prove abuse of process: “(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceeding.” *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 99-100, 618 S.E.2d 739, 747 (2005) (citation omitted). Moreover, “the mere filing of a civil action with an ulterior motive is not sufficient to sustain a claim for abuse of process. . . . [A] plaintiff must allege the misuse of process after an action between the parties has already commenced.” *Chidnese*, 210 N.C. App. at 312, 708 S.E.2d at 735.

The first element, “ulterior purpose,” is met “when the plaintiff alleges that the prior action was initiated by [the] defendant or used by him to achieve a collateral purpose not within the normal scope of the process used.” *Fox v. City of Greensboro*, 279 N.C. App. 301, 327, 866 S.E.2d 270, 291 (2021) (citation omitted). Likewise, “[o]ne who uses legal process . . . for the purpose of oppression or annoyance is liable in damages in a common law action for abuse of process.” *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E.2d 276, 278 (1945). The second element, the “act” requirement, “is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.” *Fox*, 279 N.C. App. at 327, 866 S.E.2d at 291 (citation and emphasis omitted). Stated another way, an “improper act or perversion taking place after the filing of the complaint that is wholly inconsistent with and collateral to the action instituted.” *Fox v. Barrett*, 90 N.C. App. 135, 138, 367 S.E.2d 412, 414 (1988); see *Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (noting that use of the legal proceeding “as a vehicle” to “achieve a purpose for which [the cause of action] was never intended” fulfills the “act” requirement).

We now must examine the evidence presented at trial to determine whether there is more than a “scintilla of evidence” to support each element of Defendant’s abuse of process claim. *Hummer*, 157 N.C. App. at 65, 577 S.E.2d at 923. When assessing the evidence, we view all the evidence in the light most favorable to Defendant, considering any evidence which supports Defendant’s claim as being true. *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-38; see also *Corn*, 293 N.C. App. at 607, 902 S.E.2d at 26 (“[W]e must give [the nonmovant] the benefit of every reasonable

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inference that may legitimately be drawn from the evidence[.]” (citations and quotation marks omitted)).

As to the first element, ulterior motive, Plaintiff’s brief essentially concedes that the evidence, taken in the light most favorable to Defendant, would support a finding that Plaintiff had an ulterior purpose. Defendant presented evidence that Plaintiff initiated this action to harass, inconvenience, and embarrass Mary and Defendant. Because we have omitted many facts presented in this trial based on the jury’s ruling against Plaintiff on his claim for alienation of affections and the limited issue on appeal, we will simply note that even Plaintiff’s summary of the circumstances leading up to his complaint illustrates the level of animosity he had against both Defendant and Mary:

From [Plaintiff]’s vantage point, [Mary] had cheated on him, falsely accused him of domestic violence, taken his house away from him for one year, stolen his furniture, and started a new life with her now husband (and her then boyfriend). It was for that reason that his lawyer demanded that [Mary] honor the Premarital Agreement and give him back his home, settle and give him his life back or else he would do what it would take legally to do so.

In this litigation, [Plaintiff] contended that [Defendant] alienated the affections of [Mary] which actions caused (in part if not in whole) the demise of the marriage and what [Plaintiff] contended were the baseless domestic violence proceedings (although he acknowledges that Judge Strickland did not believe his innocence in the original 50B filings and ruled against him).

As to the first element of ulterior motive, there is more than a scintilla of evidence that Plaintiff instituted this action against Defendant to continue his abuse of Mary.

Plaintiff’s argument that the trial court did not err by granting the motion for JNOV focuses mainly on the second element, “an act in the use of the process not proper in the regular prosecution of the proceeding.” *Beroth Oil Co.*, 173 N.C. App. at 99-100, 618 S.E.2d at 747 (citation omitted). Plaintiff argues that even if Plaintiff’s filing of the lawsuit and the issuance of the summons “was undertaken maliciously,” this is not sufficient to uphold the verdict for abuse of process because the “process was limited to the regular and legitimate function in relation to the cause of action stated in the complaint that initiated the process.” Plaintiff’s argument then focuses entirely on his version of the facts

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surrounding the attempted service of process at Defendant's home: that he "drove by [Defendant's] condo in an attempt to help his private investigator locate [Defendant] so he could serve him with process;" he "had a friend take photographs of [Defendant's] driveway and cars parked in it using [Plaintiff's] phone;" and Plaintiff's "process server ultimately served [Defendant] in public while attending [Mary's] son's football game." Plaintiff argues that he "had every right" to drive by Defendant's home on a public street and to allow someone in his car to take photographs of the "driveway or the cars in it" and he himself did not "actually [try] to serve that process." If these were the facts upon which we review the order granting JNOV, Plaintiff would be correct. Even if he had "evil purpose" in bringing the lawsuit against Defendant, "regular and legitimate use of process" in attempting to serve Defendant with the complaint would not be an abuse of process. As noted by our Supreme Court in *Melton v. Rickman*: "Evil purpose alone is not sufficient. The bad intent must finally culminate in the abuse, for it is only the latter which is the gist of the action. . . . Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." 225 N.C. 700, 704, 36 S.E.2d 276, 278 (1945) (citations and quotation marks omitted).

But for purposes of review of the trial court's order granting JNOV, we must view the evidence in the light most favorable to Defendant, and those facts differ greatly from those posited in Plaintiff's brief. Defendant's evidence shows that Plaintiff's "bad intent" did "finally culminate in the abuse." *Id.* The "abuse" was Plaintiff's trespass on Defendant's property and spitting on Defendant while he was at Defendant's home on the pretext of assisting the process server in serving the complaint. Had Plaintiff merely driven by Defendant's home, taken photographs of a car, and later had Defendant served in a public place, this would be a very different case.

Defendant presented evidence that, after Plaintiff's complaint was filed on 14 September 2017, Defendant's attorney offered to accept service on behalf of Defendant. Rather than letting Defendant's attorney accept service, Plaintiff used the need to serve Defendant as an excuse to drive to Defendant's home in Florida allegedly to locate him to assist the process server. But Plaintiff did not merely drive by; he trespassed on Defendant's property, went into the garage, and confronted Mary. John saw Plaintiff yelling at Mary and backing her against a wall. Plaintiff made verbal threats to John, stating he would hire someone to sexually assault Mary. Plaintiff spat on Defendant before leaving the home. Following this incident, a court in Florida granted Mary's petition for a domestic violence protection order against Plaintiff. The Florida court

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found that there was no reason for Plaintiff to be at Defendant's home and his actions were of a larger scheme of harassment toward Mary and her family. And although the findings of the Florida court are not determinative for purposes of this action, they are part of the evidence presented to the jury and which we must consider in the light most favorable to Defendant for review of the order granting JNOV.

From this evidence, a jury could reasonably conclude that Plaintiff used the legal process for an ulterior purpose *and* committed acts to further that purpose which were not proper in the regular course of proceedings. He used the legal process—his claim he was helping the private process server to serve the summons and complaint on Defendant—as a pretext to trespass on Defendant's property, to confront Mary and John, and to assault Defendant by spitting on him. This evidence would allow the jury to conclude that Plaintiff brought this suit for an ulterior purpose and then committed an act to further his ulterior purpose in his visit to Defendant's home for the claimed purpose of serving the complaint. *See Corn*, 293 N.C. App. at 605, 902 S.E.2d at 25 (explaining that when reviewing the denial of a JNOV, “it was the jury’s role to weigh the evidence—not ours”).

Importantly, Plaintiff committed these acts *after* Defendant's attorney communicated that he would accept service on his behalf. Despite the attorney's offer to accept service for Defendant, Plaintiff did not even attempt to have Defendant's attorney accept service. Under Rule 4(a) of the North Carolina Rules of Civil Procedure, Plaintiff himself could not serve Defendant; this rule provides that “[o]utside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made.” N.C. Gen. Stat. § 1A-1, Rule 4(a) (2023). Although Plaintiff himself could not serve Defendant, his actions were directed at “locating” Defendant for service. Plaintiff claimed there was a need for him to drive from his home in North Carolina to Defendant's home in Florida to assist the private process server by checking to see if Defendant was present at his home. But even if the process server needed help in locating Defendant, there would be no legitimate need for Plaintiff to get out of his car and trespass on Defendant's property, much less to confront and accost Defendant, Mary, and her son. Plaintiff could have simply advised the process server that Defendant was at home to allow the process server to serve the complaint. Based on this evidence, a jury could reasonably conclude that Plaintiff used the legal proceeding, specifically service of process, as a pretext to further abuse and harass Mary and Defendant.

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We recognize that Plaintiff presented conflicting evidence, including his testimony that he was attempting to locate Defendant for service and that he merely drove by his home. However, we resolve all discrepancies in the evidence in Defendant's favor. *See Morris*, 368 N.C. at 862, 788 S.E.2d at 158 (“[I]n the context of a directed verdict and JNOV, the trial court must resolve [evidentiary] conflicts in [the nonmovant’s] favor.”). Thus, in the light most favorable to Defendant, there was “more than a scintilla of evidence” that Plaintiff used the process to accomplish an ulterior motive which was not within the normal scope of the process. *Hummer*, 157 N.C. App. at 65, 577 S.E.2d at 923. As Defendant presented sufficient evidence to support his claim for abuse of process, the trial court erred by granting Plaintiff’s motion for JNOV and setting aside the jury verdict. *See Scarborough v. Dillard’s, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (noting that a JNOV is “not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the [nonmovant] *upon any view of the facts* which the evidence reasonably tends to establish” (emphasis added) (citations and quotation marks omitted)).

III. Conclusion

Defendant presented more than a scintilla of evidence supporting his abuse of process claim. Specifically, Defendant presented evidence that Plaintiff had an ulterior purpose and committed willful acts that were collateral to the action instituted. Thus, the trial court erroneously granted Plaintiff’s motion for JNOV on Defendant’s abuse of process claim. The trial court’s order is reversed.

REVERSED.

Judges ARROWOOD and FREEMAN concur.

SAULSBY v. AMPHASTAR PHARM., INC.

[299 N.C. App. 703 (2025)]

ARTEZ ROMEL SAULSBY, AS THE ADMINISTRATOR OF THE ESTATE OF
SHARON SAULSBY ASKEW, PLAINTIFF

v.

AMPHASTAR PHARMACEUTICALS, INC., DEFENDANT

No. COA24-931

Filed 2 July 2025

**Products Liability—death from over-the-counter inhaler—
contributory negligence—failure to read label—summary
judgment**

In an action brought by the estate of a woman who died after taking a single dose of an over-the-counter bronchodilator, the trial court properly granted summary judgment to defendant (the drug's manufacturer) on claims of negligence and breach of implied warranty of merchantability where the facts did not raise any genuine issue of fact for a jury to resolve. Decedent's boyfriend purchased the inhaler from a drugstore after asking the pharmacist if the product was "good for breathing" without mentioning decedent's underlying health conditions; decedent self-administered one puff of the inhaler even though there were specific, express warnings on the packaging that the product should not be taken unless the user had been diagnosed with asthma—which decedent had not—and to consult a doctor before use if the user had heart disease or high blood pressure—both of which decedent had. Therefore, due to decedent's own contributory and negligent acts, the trial court properly concluded that plaintiff's claims were barred under N.C.G.S. § 99B-4(1) and (3)—even though, since the statute is written in the disjunctive, either one of the subsections would have been sufficient to bar recovery.

Appeal by defendant from judgment entered 18 March 2024 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 10 April 2025.

Lanier Law Group, P.A., by Robert O. Jenkins, for the plaintiff-appellant.

Hall Booth Smith, P.C., by Brenda S. McClearn, and Katherine W. Dandy, for the defendant-appellee.

TYSON, Judge.

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Sharon Saulsby Askew (“Decedent”) died after taking a single dose from a Primatene Mist inhaler, an over-the-counter bronchodilator manufactured by Amphastar Pharmaceuticals, Inc. (“Defendant”). Artez Saulsby (“Plaintiff”), Administrator of the Estate of Sharon Saulsby Askew, appeals the trial court’s order granting Defendant’s Motion for Summary Judgment. We affirm.

I. Background

Sharon Askew experienced shortness of breath on 4 May 2021. Decedent’s long-term boyfriend of nine years, Tyrone Hayes, went to a Walgreens drugstore to seek a product to aid Decedent with relief from her shortness of breath. Hayes asked the pharmacist on duty, “Is Primatene Mist good for breathing?” The pharmacist responded, “Exactly.” Hayes purchased the Primatene Mist. At the time of purchase, Hayes did not convey or discuss any of Decedent’s underlying health issues with the pharmacist.

Hayes returned to Decedent’s home and gave her the product. Decedent administered one puff of the Primatene Mist to herself. Shortly thereafter, Decedent experienced cardiopulmonary arrest and was transported to the hospital by ambulance. Decedent died at the hospital on 9 May 2021.

Primatene Mist is approved by the Food and Drug Administration for the treatment of “temporary relief of mild symptoms of intermittent asthma.” This statement appeared in a red box on the front of the Primatene Mist packaging. It is undisputed Decedent was not diagnosed with, treated for, or prescribed medication for asthma. The Primatene Mist box provided the following warning: “Do not use unless a doctor said you have asthma.” It also instructed potential users to “Ask a doctor before use if you have . . . heart disease [or] high blood pressure.” It is undisputed Hayes did not read the Primatene Mist packaging at the time of purchase. There is no evidence of whether Decedent read the warning box or labels prior to her self-administration.

Decedent suffered from congestive heart failure, chronic kidney disease, and high cholesterol. Decedent also experienced high blood pressure and was a recipient of an implanted pacemaker.

Plaintiff filed a Complaint against Defendant on 15 March 2023 alleging Defendant was negligent in selling Primatene Mist and had breached the implied warranty of merchantability. Defendant filed a Motion to Dismiss, Answer, and Defenses on 22 May 2023.

Defendant also filed a Motion for Summary Judgment on 28 December 2023 and submitted a supplemental memorandum of law

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in support on 14 March 2024. The trial court concluded Defendant was “entitled to summary judgment as to Plaintiff’s claims for negligence and breach of implied warranty and further is entitled to summary judgment due to the contributory negligence of Plaintiff’s Decedent and pursuant to N.C.G.S. § 99B-4.” The trial court granted Defendant’s Motion for Summary Judgment by Order entered on 3 April 2024. Plaintiff filed his Notice of Appeal on 16 April 2024.

II. Jurisdiction

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

III. Issues

Plaintiff asserts the trial court erred by granting Defendant’s Motion for Summary Judgment. He argues whether Decedent was contributorily negligent is a question for the jury pursuant to N.C. Gen. Stat. § 99B-4 (2023). Plaintiff further alleges Defendant breached the implied warranty of merchantability and asserts Primatene Mist is a dangerous and an essentially useless product.

IV. Motion for Summary Judgment

Plaintiff argues the trial court erred in granting Summary Judgment. Plaintiff argues the statute Defendant cites for its contributory negligence defense, N.C. Gen. Stat. § 99B-4(1) and (3), requires the jury to make a negligence determination of whether Decedent exercised reasonable care under the circumstances *and* whether the warning was adequate. Plaintiff contends Hayes’ purchase of Primatene Mist, which he made with a pharmacist’s assistance and was preceded by an online search, demonstrates the general public’s perception that over-the-counter medications are inherently risk-free. Plaintiff lastly argues, regardless of the warnings on the use of Primatene Mist, the Supreme Court of North Carolina has previously held a jury can find a consumer exercised reasonable care, even if that consumer did not read the instructions or warnings accompanying a product.

A. Standard of Review

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). Summary judgment is not appropriate where questions exist about the credibility of witnesses or

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about the weight of evidence. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

A defendant may show entitlement to summary judgment by “(1) proving that an essential element of the plaintiff’s case is nonexistent, or (2) showing through discovery [] the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing [] the plaintiff cannot surmount an affirmative defense.” *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

“Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000). “To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.” *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992).

B. Analysis

Issues of contributory negligence are appropriate for summary judgment “where the evidence establishes plaintiff’s own negligence so clearly that no other reasonable conclusion may be reached[.]” *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997).

“In order for contributory negligence to apply, it is not necessary that plaintiff be *actually aware* of the unreasonable danger of injury to which his conduct exposes him.” *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980). “[T]he existence of contributory negligence does not depend on [the] plaintiff’s subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an objective standard of behavior ‘such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.’ ” *Id.* (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965)).

N.C. Gen. Stat. § 99B-4 provides guidance for assessing knowledge or reasonable care in a products liability case. No manufacturer or seller will be held liable if:

- (1) The use of the product giving rise to the product liability action was contrary to any express and adequate

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instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; *or*

(2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; *or*

(3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of.

N.C. Gen. Stat. § 99B-4 (2023) (emphasis supplied).

Plaintiff argues N.C. Gen. Stat. § 99B-4 shields Defendant from product liability claims, only if Defendant can satisfy both subsections (1) *and* (3). Plaintiff asserts N.C. Gen. Stat. § 99B-4 only bars liability if Defendant demonstrates Decedent exercised reasonable care under the circumstances (pursuant to § 99B-4(1)) *and* the warning on the Primatene Mist was adequate (pursuant to § 99B-4(3)).

Here, the trial court applied a disjunctive approach to the statutory language of “or”, not the conjunctive “and.” We agree. “Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g., ‘or’), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.” *Davis v. N.C. Granite*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963).

Each subsection of the statute can operate to independently bar recovery based on the specific facts of each case. *See Lee v. Crest Chemical Co.*, 583 F. Supp. 131, 132 (M.D.N.C. 1984) (concluding N.C. Gen. Stat. § 99B-4(1) is a complete defense when the plaintiff read the product’s warning prior to use, but did not wear gloves as directed and suffered chemical burns, and therefore granting the defendant’s motion for summary judgment). Satisfying any one of the statute’s subsections in N.C. Gen. Stat. § 99B-4 is sufficient to bar liability. *See Nicholson*, 346 N.C. at 772-74, 488 S.E.2d at 243-44 (explaining N.C. Gen. Stat. § 99B-4(1) and (3) codify the defense of contributory negligence, applying § 99B-4(3) to the plaintiff’s products liability claim, and providing

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§ 99B-4(3) “does not create a different rule for products liability actions”); *Smith*, 300 N.C. at 678, 268 S.E.2d at 510 (finding the application of contributory negligence as a defense in product liability actions under N.C. Gen. Stat. § 99B-4(3)); *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 453, 406 S.E.2d 856, 860 (1991) (“In addition to codifying the general doctrine of contributory negligence, § 99B-4 sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action.”). The trial court properly applied the statute in the disjunctive. N.C. Gen. Stat. § 99B-4 (2023); *Davis*, 259 N.C. at 675, 131 S.E.2d at 337.

C. Warnings and Instructions

1. *Smith v. Selco*

Plaintiff argues N.C. Gen. Stat. § 99B-4(1) requires consideration of whether a consumer knew or should have known, through the exercise of reasonable and diligent care, of a product’s warnings and instructions. In *Smith v. Selco*, this Court held § 99B-4(1) was not conclusively established as a matter of law where the plaintiff violated a warning attached to the product. *Smith v. Selco Prod., Inc.*, 96 N.C. App. 151, 156, 385 S.E.2d 173, 175 (1989). The court emphasized “[a] manufacturer must properly inform users of a product’s hazards, uses, and misuses or be liable for injuries resulting therefrom under some circumstances.” *Id.* In *Smith*, the Court concluded the warning was inadequate, because it had failed to advise the plaintiff the tape-switch sensor might malfunction, resulting in the plaintiff’s injury. *See id.* at 157, 385 S.E.2d at 176.

The warnings on the Primatene Mist packaging clearly informed and warned potential users not to use the product unless they had been diagnosed with asthma, and it also instructed users with heart disease or high blood pressure to consult with a doctor before using Primatene Mist. It is undisputed that Decedent was not diagnosed with asthma. At the time of purchase, Hayes did not know if Decedent had asthma or not. Both Decedent and Hayes were also aware Decedent had heart disease and high blood pressure. Despite this knowledge, Decedent used and inhaled the product contrary to the express instructions and warnings.

The Primatene Mist packaging contained specific, express warnings directly addressing Decedent’s medical conditions, unlike those in *Smith*, where the warning was incomplete. *See id.* Both Decedent and Hayes either knew or, with the exercise of reasonable and diligent care, should have known of these warnings. *See Lee*, 583 F. Supp. at 133-34; *Padgett v. Synthes, Ltd.*, 677 F. Supp. 1329 at 1335 (W.D.N.C. 1988) (finding warnings given to the physician in the insert constitute sufficient

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notice to the plaintiff under N.C. Gen. Stat § 99B-4). The trial court properly concluded N.C. Gen. Stat. § 99B-4(1) bars recovery.

2. *Champs Convenience Stores Inc. v. United Chem. Co., Inc.*

Plaintiff argues the Supreme Court of North Carolina has previously held a jury can find a consumer exercised reasonable care, despite failing to read the instructions or warning accompanying a product. *Champs*, 329 N.C. at 456, 406 S.E.2d at 862. The facts of this case are distinguishable.

In *Champs*, the Court held the evidence was insufficient to establish contributory negligence as a matter of law because there were “questions of fact to be decided.” *Id.* The defendant in *Champs* had delivered the wrong product to the plaintiff. *Id.* When the product was delivered, the plaintiff checked the invoice, which inaccurately indicated the plaintiff had received the correct product. *Id.* The plaintiff had previously received complete usage instructions from the defendant’s employee over the telephone. *Id.* The plaintiff subsequently cleaned the floors with the delivered product, which was a toxic chemical that ruined half of the store’s inventory. *Id.* Although the plaintiff had failed to read the written instructions, which accompanied the delivered product, the Court concluded: “[w]hether [plaintiff] could reasonably rely on the instructions given over the telephone and on the invoice is a jury question, and the trial court properly submitted the question to the jury.” *Id.*

Here, Decedent was not given the wrong product, nor were there any extensive conversations by Hayes with the pharmacist regarding the product’s instructions or warnings. Hayes only asked whether Primatene Mist was “good for breathing?” The pharmacist, unaware of Decedent’s lack of an asthma diagnosis or her underlying heart and medical conditions, had no opportunity to provide further individualized warnings. Unlike in *Champs*, where the wrong product was delivered and extenuating circumstances had created a factual dispute, the facts in the present case do not raise genuine issues for a jury. *See id.* With the exercise of reasonable or diligent care, Decedent or Hayes knew, or should have known, of the express warnings on Primatene Mist’s packaging. The trial court properly concluded Decedent’s contributory negligence barred Plaintiff’s claims as a matter of law. N.C. Gen. Stat. § 99B-4(1) (2023).

D. Reasonable Care Under the Circumstances

The care an ordinarily prudent person should or would exercise under the same or similar circumstances determines whether Decedent

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was contributorily negligent. *See Smith*, 300 N.C. at 677, 268 S.E.2d at 508. N.C. Gen. Stat. § 99B-4(3) indicates a plaintiff's behavior "under the circumstances" must be considered in determining whether contributory negligence exists. *See Smith*, 96 N.C. App. at 159, 385 S.E.2d at 177. It is undisputed Hayes did not inform the pharmacist of Decedent's underlying health conditions when he only asked, "Is Primatene Mist good for breathing?" This omission, combined with the failure to read the product's instructions and warnings, and the fact Hayes, rather than Decedent herself, sought Primatene Mist to address her mild symptoms, demonstrates both Hayes and Decedent failed to exercise the care an ordinarily prudent person would exercise under the same or similar circumstances. *See Smith*, 300 N.C. at 676-77, 268 S.E.2d at 507-08. Their failure to exercise reasonable care contributed to and proximately caused Decedent's death. *See Lee*, 583 F. Supp. at 135 (finding plaintiff's disregard for product instructions was the proximate cause of her injury). The trial court properly concluded N.C. Gen. Stat. § 99B-4(3) also bars recovery.

V. Implied Warranty of Merchantability

In light of our holding, we need not review this issue because the contributory negligence statute bars a product liability claim against a manufacturer based on breach of implied merchantability. *See Nicholson*, 346 N.C. at 773, 488 S.E.2d at 244 ("[C]ontributory negligence also bars a products liability claim against a manufacturer or seller based on breach of implied warranty." (citing N.C. Gen. Stat. § 99B-4 ("No manufacturer or seller shall be held liable in *any* product liability action if [plaintiff is contributorily negligent.]") (emphasis supplied))); *Gillespie v. American Motors Corp.*, 69 N.C. App. 531, 317 S.E.2d 32 (1984).

VI. Conclusion

The trial court properly applied N.C. Gen. Stat. § 99B-4 and did not err in granting summary judgment due to Decedent's own contributory and negligent acts. Under the objective standard, a person experiencing mild respiratory distress must either read the product's warnings and instructions or consult a doctor before use, particularly when the product is expressly indicated for asthma, and Decedent had not been diagnosed with asthma. *See* N.C. Gen. Stat. § 99B-4(1) (2023).

Primatene Mist's labeling clearly and expressly warned against its use by individuals with heart disease and high blood pressure, both conditions for which Decedent had been diagnosed. Despite these express warnings and Decedent's known medical conditions, she proceeded to use the product.

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The evidence clearly establishes Decedent's own negligence. No genuine issues of material fact exist, and no other reasonable conclusion may be reached. *See Nicholson*, 346 N.C. at 772-74, 488 S.E.2d at 243-44. The trial court properly granted Defendant's Motion for Summary Judgment. *Id.* The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
NICOLAS GANNAR FRENCH

No. COA24-704

Filed 2 July 2025

1. Assault—multiple assaults—sufficiency of evidence—distinct interruption—change in location

At a trial for three different assault charges arising from the same domestic violence incident, the trial court properly denied defendant's motion to dismiss all but one assault charge where the State presented substantial evidence that defendant committed three separate assaults on his wife rather than one continuous assault. Specifically, the evidence—including testimony from defendant's wife—showed that: defendant pushed his way into the home, struck his wife, and then grabbed her neck, after which she broke free and begged defendant to stop (the first assault); then, defendant pushed his wife up against the kitchen stove, placed one hand around her throat, and struck her in the ribs and stomach with his free hand, after which the wife broke free again and ran to a different part of the home (the second assault); and, finally, defendant pinned his wife onto the floor, got on top of her, and strangled her until she managed to escape and call the police (the third assault).

2. Sentencing—multiple assault charges—stemming from the same incident—distinct interruptions between assaults—separate sentences properly imposed

After defendant was convicted on three different assault charges arising from the same domestic violence incident, the trial court properly imposed separate sentences for each assault charge,

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running consecutively, despite defendant's argument that the statutes under which he was convicted (N.C.G.S. §§ 14-32.4(b) and 14-33(c)(1)-(2)) forbade the court from imposing punishments for the lesser assault offenses (assault on a female and assault inflicting serious injury) where it had already imposed a punishment for the greater offense (assault by strangulation) involving the same conduct. To the contrary, the statutes at issue allowed for multiple sentences based on multiple assaults occurring in the same altercation so long as the State presented substantial evidence of separate assaults delineated by distinct interruptions, as was the case here.

Appeal by defendant from judgments entered 7 December 2023 by Judge Robert C. Roupe in Onslow County Superior Court. Heard in the Court of Appeals 10 April 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney Generals Lisa T. Pakela, Melody R. Hairston, and Christopher R. McLennan, for the State.

Law Office of John W. King, Jr. PLLC, by John W. Moss, for the defendant-appellant.

TYSON, Judge.

Nicolas French ("Defendant") appeals from the jury's verdicts and the final judgments entered thereon for assault by strangulation, assault on a female, and assault inflicting serious injury. Our review discerns no error.

I. Background

Defendant and Christine Riley ("Ms. Riley") were married in October 2016. Defendant moved into Ms. Riley's home during May 2017. Both Defendant and Ms. Riley testified, but each gave differing accounts of events, which occurred on 4 October 2022. Defendant and Ms. Riley were home and Defendant began drinking alcohol. Ms. Riley asked Defendant to stop drinking and told him to leave and stay out of the house if he planned to continue drinking. Defendant left to go to a neighbor's house.

Ms. Riley further testified she was awoken by Defendant banging on the back door of their home at around 11:20 p.m. or 11:30 p.m. He was demanding to come inside and requested his phone. Ms. Riley answered and again told Defendant, if he was going to continue drinking, she did not want him inside the house. She went inside to retrieve his phone.

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When Ms. Riley returned with his phone, Defendant forced his way into the home and began to strike her on the right side of her head. Defendant put his hands around her neck and applied pressure. The two fell onto the floor. Ms. Riley was able to break free from Defendant and ran away.

Defendant caught up with Ms. Riley and pushed her into the kitchen stove, keeping one hand around her throat while using his other to strike her in the ribs and stomach. Ms. Riley was again able to get away from Defendant and ran towards the living room.

Defendant knocked her into an area between the kitchen and living room, pushed her onto the floor, and got on top of her. Defendant again placed his hands around Ms. Riley's neck and throat, making it difficult for her to breathe. Ms. Riley testified this assault lasted at least 45 seconds. Ms. Riley was able to get away for yet a third time and ran into the living room to call 911 for help.

Defendant saw Ms. Riley speaking on the phone and briefly left the house before returning. Officers from the Jacksonville Police Department and EMS shortly arrived at the scene. Defendant was restrained and placed under arrest. Ms. Riley drove herself to and was treated at Onslow Memorial Hospital the following day.

On 7 March 2023, Defendant was indicted on charges of assault by strangulation and assault on a female. A superseding indictment was entered on 3 October 2023 on charges of assault by strangulation, assault on a female, and assault with a dangerous weapon inflicting serious injury. The jury found Defendant guilty of assault by strangulation, assault on a female, and guilty of the lesser-included offense of assault inflicting serious injury.

On 7 December 2023, Defendant was sentenced in the presumptive range as a prior record level I offender to an active term of 6 months to 17 months for the offense of assault by strangulation. Defendant was also sentenced to an active term of 60 days for assault on a female, which was set to run consecutively to his first sentence. Defendant was lastly sentenced to an active term of 60 days for assault inflicting serious injury, which was set to run consecutively to his second sentence. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

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III. Issues

Defendant was charged with and convicted of three separate assaults. Defendant argues the State failed to present substantial evidence indicating the assaults were distinct incidents and asserts the trial court erred in denying Defendant's motion to dismiss two of the three assault charges. Defendant also contends he was improperly sentenced separately and consecutively for assault by strangulation, assault on a female, and assault inflicting serious injury, in violation of the General Assembly's statutory mandates.

IV. Motion to Dismiss

[1] Defendant moved to dismiss all charges at the close of the evidence. The trial court denied the motion. Defendant argues the trial court erred by denying his motion to dismiss two of the three assault charges. Defendant contends his assaults on Ms. Riley occurred "during one continuous interaction," the State presented evidence of only a single assault, and the State had failed to offer sufficient evidence to support the other two separate assaults for which Defendant was charged and convicted.

A. Standard of Review

"Whether the State presented substantial evidence of each essential element of the offense is a question of law." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (internal citations omitted). 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). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradiction in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

B. Analysis

Defendant asserts the State's evidence shows only one assault occurred, with no distinct interruption from beginning to end. Defendant argues the State's evidence was insufficient to prove multiple assaults, and the trial court erred when it failed to dismiss all but one of the assault charges.

To survive a motion to dismiss based on insufficiency of the evidence, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein,

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and (2) of defendant being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

The relevant question is whether the State presented substantial evidence of not just one, but three, distinct assaults. Defendant was charged with assault by strangulation, assault on a female, and assault with a dangerous weapon inflicting serious injury. The crime of assault is defined by common law rules as:

[A]n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Dew, 379 N.C. 64, 70, 864 S.E.2d 268, 273-74 (2021).

“[T]he State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults.” *Dew*, 379 N.C. at 72, 864 S.E.2d at 275. “[A] distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.” *Id.*

Defendant argues the State failed to present sufficient evidence of separate assaults, but rather only showed proof of one continuous assault. The State argues two distinct interruptions took place, resulting in three separate assaults.

We conclude the evidence supports the State’s contention. Testimony from Ms. Riley asserted Defendant first assaulted her by pushing his way into the home and immediately striking her on the right side of her head on 4 October 2022. Defendant then put his hands around Ms. Riley’s neck and applied pressure before the two fell onto the floor. The first

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distinct interruption of the attack occurred when Ms. Riley briefly broke free, begged Defendant to stop, and told him he could stay at the house.

The evidence presented by the State regarding this distinct interruption, specifically Ms. Riley's testimony she had "managed to get up at that point [and] ran over [while] begging him to stop," is sufficient to show an "interruption in the momentum of the attack." *Dew*, 379 N.C. at 72, 864 S.E.2d at 275. This interruption in the momentum delineates the end of the first assault and the beginning of the second.

The State's evidence further shows Defendant then pushed Ms. Riley up against the kitchen stove, placed one hand around her throat and struck her in the ribs and stomach with his other. The second distinct interruption in the second attack occurred when Ms. Riley again escaped from Defendant and ran from the kitchen stove toward a different area of the home between the kitchen and living room. The evidence presented by Ms. Riley's testimony tended to show she "managed to get away . . . tried running toward the living room[,] and then he pushed [her] into the area that's between the kitchen and the living room." This testimony, pursuant to *Dew*, is sufficient to show "a change in location." *Id.* This change in location of the attack delineates the end of the second assault and the beginning of the third assault.

In this new area of the home, Defendant pushed Ms. Riley to the floor, got on top of her, and again placed both hands around her neck, causing her to begin to lose consciousness. Ms. Riley testified she kicked her legs in an attempt to stop the assault until she was able to again get away and call the police, ending the third and final assault.

The evidence presented supports each distinct interruption and is sufficient to delineate the end of one assault and the beginning of another, showing both interruptions in the momentum of the attacks and changes in the location of the home where they occurred. These distinct interruptions occurred first when Ms. Riley ran and begged Defendant to stop, and later, when Ms. Riley ran into a different area of the home near the living room. The State also presented evidence supporting each separate charge through documentary evidence, including pictures from 4 October 2022 and previous assaults, as well as testimonial evidence from Ms. Riley, medical providers from Onslow Memorial Hospital, and law enforcement officers from Jacksonville Police Department.

1. *State v. Dew and State v. Robinson*

Defendant argues *State v. Dew* and *State v. Robinson* supports his contention only one continuous assault occurred. *Dew*, 379 N.C. 64, 864

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S.E.2d 268; *State v. Robinson*, 381 N.C. 207, 219, 872 S.E.2d 28, 37 (2022). Those cases are distinguishable from the evidence here. In *Dew*, the victim testified the defendant had hit her “‘over and over,’—a continuous non-stop beating—for at least two hours.” *Dew*, 379 N.C. at 65, 864 S.E.2d at 270. In *Robinson*, the victim’s statement described the attack as “continuous . . . without pause or interruption.” 381 N.C. at 219, 872 S.E.2d at 37.

During Ms. Riley’s testimony, she did not describe the attack as an ongoing and continuous assault, but rather described two distinct interruptions, supporting three separate assault charges. We conclude the trial court did not err in denying Defendant’s motion to dismiss two of the three assault charges. The State presented sufficient evidence to support presenting all three charges to the jury. Defendant’s arguments are overruled.

V. Sentencing

[2] Defendant was sentenced in the presumptive range to an active term of 6 months minimum to 17 months maximum for the offense of assault by strangulation; to an active term of 60 days for assault on a female, consecutive to the first sentence; and, to an active term of 60 days for assault inflicting serious injury consecutive to the second sentence.

Defendant argues he was improperly sentenced separately and consecutively for assault by strangulation under N.C. Gen. Stat. § 14-32.4(b), assault on a female under N.C. Gen. Stat. § 14-33(c)(2), and assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1) in violation of the legislature’s statutory mandates. N.C. Gen. Stat. §§ 14-32.4(b); 33(c)(1)-(2) (2023). Defendant contends the General Assembly authorized punishment only once for the same assault through the language of these statutes. Defendant further contends the trial court lacked statutory authority to impose additional sentences for assault on a female and assault inflicting serious injury by imposing consecutive active punishments on him after sentencing him for the greater offense of assault by strangulation.

A. Standard of Review

Defendant’s argument involves a question of statutory interpretation. “Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.” *State v. Jones*, 237 N.C. App. 526, 530, 767 S.E.2d 341, 344 (2014) (citation omitted). “The prefatory clause of assault on a female statute . . . imposed a statutory mandate that preserved for appellate review [D]efendant’s claim that he

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could not be punished for [each assault] based on the same conduct, despite his failure to object.” *Id.*; N.C. Gen. Stat. § 14-33(c) (2023).

“When a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.” *State v. Harding*, 258 N.C. App. 306, 316, 813 S.E.2d 254, 262 (2018) (quoting *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (citations and quotation marks omitted)).

VI. Analysis

Defendant argues he was improperly punished because the beginning clause of each statute under which he was convicted limits the trial court’s ability to impose punishment for lesser assault offenses if a higher offense punishment is imposed for a higher offense involving the same conduct. The State asserts Defendant was properly sentenced because the trial court may impose punishment for multiple assaults when sufficient evidence is presented of, and the jury finds, multiple separate assaults occurred.

As noted, the jury found Defendant guilty of assault by strangulation under N.C. Gen. Stat. § 14-32.4(b), assault on a female under N.C. Gen. Stat. § 14-33(c)(2), and the lesser included assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1). Pursuant to N.C. Gen. Stat. § 14-32.4(b), “[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony.” N.C. Gen. Stat. § 14-32.4(b) (2023).

N.C. Gen. Stat. § 14-33(c)(1) and (2) provide:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) [i]nflicts serious injury upon another person or uses a deadly weapon; (2) [a]ssaults a female, he being a male person at least 18 years of age;

See N.C. Gen. Stat. § 14-33(c)(1) and (2) (2023).

Each statute begins with the clause “unless the conduct is covered under some other provision of law providing greater punishment.” *See* N.C. Gen. Stat. § 14-32.4(b); and N.C. Gen. Stat. § 14-33(c). Defendant contends this language indicates the General Assembly intended for

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punishment to be imposed either for the more serious offense or for the lesser offense, but not both. *See id.* “The intent of the Legislature controls the interpretation of a statute [and] [w]hen a statute is unambiguous, this Court will give effect to the words without resorting to judicial construction.” *Jones*, 237 N.C. App. at 530, 767 S.E.2d at 344 (quoting *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010)).

“In order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction,” in accord with double jeopardy principles, “the evidence must establish ‘a distinct interruption in the original assault followed by a second assault[,]’ so that the subsequent assault may be deemed separate and distinct from the first.” *Littlejohn*, 158 N.C. App. at 635, 582 S.E.2d at 307 (quoting *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000)). “[T]he evidence must show that ‘two separate and distinct assaults occurred’ in order to support more than one charge.” *State v. Prince*, 271 N.C. App. 321, 324, 843 S.E.2d 700, 701, writ allowed, 375 N.C. 280, 842 S.E.2d 601 (2020) (quoting *State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 872 (2005)).

“[W]here multiple assaults occurring during one altercation may be ‘deemed separate and distinct,’ multiple sentences based on those assaults may be imposed.” *Harding*, 258 N.C. App. at 316, 813 S.E.2d at 262 (quoting *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (explaining that where multiple assault convictions arise from “one transaction, the evidence must establish ‘a distinct interruption in the original assault followed by a second assault[,]’ so that the subsequent assault may be deemed separate and distinct from the first” (citation omitted)). A trial court may sentence a defendant for multiple counts of assault when there is substantial evidence of a distinct interruption between assaults. *Id.*; *Dew*, 379 N.C. at 65, 864 S.E.2d at 270.

Here, the State presented sufficient evidence tending to show the attacks on Ms. Riley were not one continuous or non-stop assault, but rather three separate assaults, separated by distinct interruptions. The State offered substantial evidence in support of each assault, including photographs, documents, and testimony from Ms. Riley, medical providers, and law enforcement officers.

Based upon the evidence presented by the State, Defendant’s attack on Ms. Riley was interrupted by at least two distinct breaks in the assaults, which occurred after she broke away from him twice. The evidence supports the jury’s conclusion that three separate assaults occurred.

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Defendant was properly sentenced separately and consecutively, within the trial court's discretion, for each of the three offenses. *Prince*, 271 N.C. App. at 324, 843 S.E.2d at 702. Defendant's arguments are overruled.

VII. Conclusion

The trial court properly denied Defendant's motion to dismiss two of the three assault charges. Defendant was properly sentenced within the presumptive ranges, consecutively, for three separate assaults on Ms. Riley.

Defendant received a fair trial, free from prejudicial errors he brought forth and argued. We discern no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
QUINTERIUS JAMAL GILBERT

No. COA25-32

Filed 2 July 2025

Criminal Law—prosecutor's closing argument—defendant's choice not to testify—prejudicial error not shown

At a trial for crimes arising from a home break-in and subsequent attempts to sell wristwatches stolen from the home, where defendant did not testify or present other evidence, the trial court did not commit prejudicial error by failing to intervene *ex mero motu* when the prosecutor stated during closing arguments that “[defendant] doesn't have to testify, but there's no other evidence to say otherwise as to how he got those watches honestly.” The prosecutor's remarks were improper, since they violated defendant's statutory and constitutional rights against self-incrimination. Moreover, the error was never cured where the State did not withdraw the remark and the trial court neither made a statement indicating that the remark was improper nor instructed the jury not to consider defendant's failure to testify. Nevertheless, the prosecutor's remarks

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were not so grossly improper as to entitle defendant to a new trial given the overwhelming, uncontradicted evidence of his guilt of the charged crimes.

Judge TYSON concurring by separate opinion.

Appeal by Defendant from judgments entered 17 April 2024 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 11 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Daniel J. Burke, for the State-Appellee.

Joseph E. Gerber for Defendant-Appellant.

COLLINS, Judge.

Defendant Quinterius Jamal Gilbert appeals from judgments entered upon jury verdicts of guilty of various crimes related to a break in and upon his guilty plea to having attained habitual felon status. Defendant argues that the trial court prejudicially erred by failing to intervene ex mero motu during the State's closing argument when it referenced Defendant's decision not to testify. After careful consideration, we find no prejudicial error.

I. Background

Defendant was indicted in April 2023 for felony breaking and entering, felony larceny after breaking and entering, and obtaining property by false pretenses. Defendant was subsequently indicted as a habitual felon. Defendant's case came on for trial in March 2024. The evidence at trial tended to show the following:

The Troncoso-Ortiz family's home in High Point, North Carolina was broken into on 8 December 2022. Mr. Troncoso-Ortiz reported seven wristwatches and a container of loose coins missing and gave the police a description of the watches. The next day, Defendant showed his identification to the manager of Cash American Pawn in High Point and sold two watches to the pawn shop. Law enforcement accessed the pawn shop's records and put a hold on the watches sold by Defendant because they matched the description of the stolen watches. Mr. Troncoso-Ortiz subsequently identified the watches as his. Defendant attempted to sell additional watches to the pawn shop on 12 December 2022, but the pawn shop refused to purchase them.

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After deliberating for thirty minutes, the jury found Defendant guilty of all charges. Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant to an active term of 96-128 months of imprisonment with a credit of 424 days served. Defendant gave notice of appeal in open court.

II. Discussion

Defendant's sole argument on appeal is that the trial court prejudicially erred by failing to intervene *ex mero motu* during the State's closing argument when the State referenced Defendant's decision not to testify.

"The standard of review for assessing alleged improper closing arguments that fail[ed] 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) (italics and citation omitted). This Court must determine "(1) whether the argument was improper; and if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179 (2017). "In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers." *State v. Trull*, 349 N.C. 428, 451 (1998) (citations omitted).

A criminal defendant cannot be compelled to testify, and the State's reference to or comment on his decision not to testify violates the defendant's right to remain silent under the Fifth Amendment of the United States Constitution. *State v. Grant*, 293 N.C. App. 457, 458 (2024) (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)). Likewise, the North Carolina Constitution provides that a criminal defendant cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Additionally, our North Carolina General Statutes provide that a criminal defendant shall not be compelled to testify or "answer any question tending to criminate himself." N.C. Gen. Stat. § 8-54 (2024). Because a criminal defendant's right to remain silent is constitutionally and statutorily protected, "a prosecution's argument which clearly suggests that a defendant has failed to testify is error." *State v. Reid*, 334 N.C. 551, 555 (1993) (citation omitted).

However, "a comment implicating a defendant's right to remain silent, although erroneous, is not invariably prejudicial." *State v. Ward*, 354 N.C. 231, 251 (2001) (citation omitted). "The error may be cured by a withdrawal of the remark or by a statement from the court that it

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was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.” *Trull*, 349 N.C. at 452-53 (brackets and citation omitted). The trial court’s “inclusion in the jury charge of an instruction on a defendant’s right not to testify” alone is insufficient to cure the State’s error. *Reid*, 334 N.C. at 556.

In this case, Defendant did not offer evidence and exercised his right not to testify. The State made the following remark about Defendant’s decision during its closing argument, without objection:

You don’t have any other evidence to say otherwise. Now, *he doesn’t have to testify*, but there’s no other evidence to say otherwise as to how he got those watches honestly. . . .

(emphasis added). This specific and direct statement made during closing argument, that Defendant “doesn’t have to testify,” violated Defendant’s constitutional and statutory rights. *Reid*, 334 N.C. at 555. The error was not cured because the State did not withdraw the remark, nor did the trial court indicate that the remark was improper or instruct the jury not to consider “the failure of the accused to offer himself as a witness.” *Trull*, 349 N.C. at 452-53 (citation omitted). Although the trial court included in the jury charge an instruction on a defendant’s right not to testify, this instruction alone was not sufficient to cure the improper remark. *Reid*, 334 N.C. at 556.

Notwithstanding this error, Defendant is not entitled to a new trial because he has failed to show the error “was so grossly improper as to impede [his] right to a fair trial.” *Huey*, 370 N.C. at 179. The State presented substantial uncontradicted evidence of Defendant’s guilt. Law enforcement discovered that Defendant had presented identification and sold two watches to a pawn shop in High Point the day after seven watches were reported stolen from the Troncoso-Ortiz family’s High Point home. The watches Defendant sold matched the description of the stolen watches given by Mr. Troncoso-Ortiz, and Mr. Troncoso-Ortiz subsequently identified the watches as belonging to him. Defendant returned to the same pawn shop a few days later to sell additional watches. The State’s remark and the trial court’s lack of curative action, while error, was not so grossly improper as to impede Defendant’s right to a fair trial in light of the overwhelming and uncontradicted evidence of Defendant’s guilt.

III. Conclusion

For the reasons above, the trial court did not prejudicially err.

NO PREJUDICIAL ERROR.

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Judge ZACHARY concurs.

Judge TYSON concurs by separate opinion.

TYSON, Judge, concurring.

I. Background

This case addresses a Defendant's right to not answer questions or make statements, to remain silent upon the advice of counsel or otherwise, to not testify at trial, and, more specifically, for the State not to refer to, comment on, nor to use or challenge Defendant's silence, or his assertion or retention of those rights, against him at trial. We all agree the State's unlawful comments on Defendant's decision to exercise his right to remain silent violated Defendant's rights. This Court's patience and tolerance for the State's unlawful conduct is thin. Despite the clear prejudice Defendant demonstrated, I fully concur in this Court's ultimate decision to not award Defendant a new trial given the overwhelming evidence of guilt.

II. Preservation

North Carolina's appellate courts are "mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002). Because of this reluctance, "it is incumbent on the trial court to monitor vigilantly the course of such arguments, to *intervene as warranted*, to entertain objections, and to *impose any remedies* pertaining to those objections." *Id.* (emphasis supplied).

If counsel or the State makes improper remarks during closing argument, the trial court should implement remedies, such as "requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments." *Id.*

"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). Defendant's counsel timely did so here prior to the jury beginning deliberations, and his argument is properly preserved.

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See id.; *Jones*, 355 N.C. at 129, 558 S.E.2d at 105; *State v. Earley*, 298 N.C. App. 172, 193-94, 914 S.E.2d 79, 94-95 (2025) (Tyson, J., dissenting).

III. Closing Argument Remarks**A. Standard of Review**

A prosecutor's closing argument must avoid appeals to passion or prejudice. *Jones*, 355 N.C. at 135, 558 S.E.2d at 108. "[F]or an inappropriate prosecutorial comment to justify a new trial, it must be sufficiently grave that it is prejudicial error." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (citation and internal quotation marks omitted). "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." N.C. Gen. Stat. § 15A-1443(b) (2023).

B. Analysis

The Fifth and Fourteenth Amendments of the Constitution of the United States preserve and protect a criminal defendant's right to remain silent and not be compelled to testify or offer evidence. U.S. Const. amend. V; XIV. North Carolina's Constitution also provides a criminal defendant cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Our General Assembly has implemented these Constitutional provisions by statutorily mandating a criminal defendant shall not be compelled to testify or "answer any question tending to incriminate himself." N.C. Gen. Stat. § 8-54 (2023).

"[A] criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001). "A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and *any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional.*" *Id.* (emphasis supplied).

Our General Statutes also mandate the State's limits of permissible commentary during a prosecutor's closing argument:

During a closing argument to the jury an attorney *may not become abusive*, inject his personal experiences, *express his personal belief as to the truth or falsity of the evidence* or as to the guilt or innocence of the defendant,

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or make *arguments on the basis of matters outside the record* except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2023) (emphasis supplied).

“[A] prosecution’s argument which clearly suggests that a defendant has failed to testify is error.” *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993).

Our Supreme Court has further held:

[C]ounsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. A prosecutor must present the State’s case vigorously while at the same time *guarding against statements which might prejudice the defendant’s right to a fair trial*.

State v. Hill, 311 N.C. 465, 473, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted) (emphasis supplied).

The Supreme Court of the United States over 90 years ago warned prosecutors:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 1324 (1935). *See also State v. Smith*, 279 N.C. 163, 167, 181 S.E.2d 458, 460 (1971).

Our Supreme Court explained: “The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or

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overzealous partisanship which would result in taking unfair advantage of the accused.” *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978).

This Court has also repeatedly warned prosecutors about impermissible statements during closing arguments and cautioned them, like Daedalus warned Icarus, not to “fly too close to the sun”:

Notwithstanding our conclusions that Defendant has failed to object or to show prejudice in the prosecutor’s statements and demonstrations to warrant a new trial, we find the prosecutor’s words and actions troublesome. Without hesitation, the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact. *See* BERGEN EVANS, *DICTIONARY OF MYTHOLOGY* 62-63 (Centennial Press 1970). We emphasize, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor’s duty is to seek justice, not merely to convict.” Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special Responsibilities of a Prosecutor) cmt. [1] (2015).

State v. Martinez, 251 N.C. App. 284, 296, 795 S.E.2d 386, 394 (2016).

Defendant correctly argues the prosecutor made impermissible comments during closing argument. Our Supreme Court stated in *Hembree* and *Reid*, with or without the benefit of counsel’s recorded objection, the “prosecutor’s statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*.” *State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 90 (2015); *Reid*, 334 N.C. at 556, 434 S.E.2d at 197. The trial court’s “inclusion in the jury charge of an instruction on a defendant’s right not to testify” alone is insufficient to cure the State’s error. *Reid*, 334 N.C. at 556, 434 S.E.2d at 197.

“The error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.” *State v. Trull*, 349 N.C. 428, 452-53, 509 S.E.2d 178, 194 (1998) (brackets and citation omitted).

As is held in this Court’s opinion, the State presented substantial uncontradicted evidence of Defendant’s guilt beyond a reasonable doubt. On appeal, he has failed to show the State’s error, while prejudicial, “was so grossly improper as to impede [his] right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017).

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STATE OF NORTH CAROLINA

v.

JAVIER TYQUAN GRAY

No. COA24-898

Filed 2 July 2025

Damages and Remedies—restitution—larceny of a firearm—exact value of award—worksheet insufficient—remanded

The trial court's award of \$1,000 in restitution—entered after a jury found defendant guilty of the larceny of a firearm that defendant, an employee at a car detailing business, stole from the trunk of a customer's vehicle—was vacated and the matter was remanded for a rehearing on restitution. While the victim's trial testimony provided some evidence regarding the firearm (that it was a "special" 1911 Colt 45 caliber gun which had been competition-tuned by a gunsmith) which would support an award, the only evidence on the exact value of the gun was the restitution worksheet, a document that has been expressly held insufficient to sustain an award of restitution.

Appeal by Defendant from Judgments entered 25 October 2023 by Judge Henry L. Stevens in Wayne County Superior Court. Heard in the Court of Appeals 20 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Monique Nketah, for the State.

Parry Law, PLLC, by Edward Eldred, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Javier Tyquan Gray (Defendant) appeals from Judgments entered pursuant to jury verdicts finding him guilty of Larceny of a Firearm and Possession of a Firearm by a Felon. The Record before us, including evidence presented at trial, tends to reflect the following:

On 19 August 2022, Travis Skaggs took his car to Ojay's Auto Detailing for service. Defendant worked at Ojay's Auto Detailing and was the only person who serviced Skaggs' vehicle. Upon entering the shop, the owner of Ojay's observed Defendant shut Skaggs' trunk. Video footage

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from cameras in the shop also showed Defendant opening the trunk of Skaggs' car. The detailing service Skaggs requested did not require any work to be done in the trunk, and Ojay's policy is that employees do not go into a customer's trunk unless asked. The owner then saw Defendant look around, exit, and walk around the building in a manner suggesting he had an item in his sweatpants. The owner asked Skaggs "do you have a gun or any money in your car?" and specifically inquired whether Skaggs had "anything in the trunk of any value." Skaggs stated he had a 1911 Colt 45 caliber gun in a safe in the trunk. The two inspected the trunk and noticed the trunk's safe was cracked and the gun was missing. Defendant had left the premises and did not return.

On 6 March 2023, Defendant was indicted for Larceny of a Firearm, Safecracking, Misdemeanor Larceny, and Possession of a Firearm by a Felon. The case came on for trial on 24 October 2023.

At trial, Skaggs testified to buying the gun at issue from a police officer with whom he had worked. Skaggs described the gun as "special" in that it had been ported by a gunsmith to be competition-tuned so that it would not jam. Skaggs did not testify to the purchase price or value of the gun. At the close of the State's evidence, defense counsel moved to dismiss the case for insufficient evidence. The trial court dismissed the Safecracking charge but denied the Motion as to all other charges. On 25 October 2023, the jury returned verdicts finding Defendant not guilty of Misdemeanor Larceny, but guilty of Larceny of a Firearm and Possession of a Firearm by a Felon.

At sentencing, the State's attorney reported he had "a restitution worksheet in the amount of \$1,000 for what was put on the victim impact statement as the cost and value of that Colt 1911 pistol." The State's attorney then asked, "May I approach?" to which the Court responded "Yes, sir." The sentencing discussion moved to the topic of Defendant's prior record level. The victim impact statement had not been filed or admitted by the trial court. In its Judgments, the trial court ordered Defendant to pay restitution in the amount of \$1,000.00. At the conclusion of sentencing, Defendant orally gave notice of appeal in open court.

Issue

The issue on appeal is whether the trial court erred by ordering Defendant to pay \$1,000.00 in restitution for Larceny of a Firearm.

Analysis

"On appeal, we review *de novo* whether the restitution order was 'supported by evidence adduced at trial or at sentencing.'" *State*

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v. Wright, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (quoting *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004)). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Hill*, 291 N.C. App. 633, 648, 896 S.E.2d 216, 226 (2023) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

“The amount of restitution must be limited to that supported by the record[.]” *Wright*, 212 N.C. App. at 645, 711 S.E.2d at 801 (quoting N.C. Gen. Stat. § 15A-1340.36 (2009)). “[T]he quantum of evidence needed to support a restitution award is not high.” *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). “When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.” *Id.* (quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)). “In applying this standard our appellate courts have consistently engaged in fact-specific inquiries rather than applying a bright-line rule.” *Id.* “Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed.” *Id.* (emphasis in original).

Testimony regarding the purchase price of an item is enough to support a restitution award of that exact amount. *See State v. Cousart*, 182 N.C. App. 150, 154-55, 641 S.E.2d 372, 375 (2007). This Court has also determined written victim impact statements, together with oral victim statements, an expense worksheet, and other accompanying documentation constituted sufficient evidence to support a restitution award. *See State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704-05 (2018). In contrast, this Court “has repeatedly held that ‘a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.’ ” *Moore*, 365 N.C. at 285, 715 S.E.2d at 849 (quoting *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citing *State v. Swann*, 197 N.C. App. 221, 225, 676 S.E.2d 654, 657-58 (2009))).

For example, in *Mauer*, where no evidence was presented at trial or sentencing supporting the restitution worksheet, this Court vacated the trial court’s restitution order and remanded for rehearing on the issue. 202 N.C. App. at 552, 688 S.E.2d at 778. Further, in *Moore*, the State argued the victim’s testimony for estimated repairs of “thirty-something thousand dollars” was “sufficient to support an award ‘anywhere between \$30,000.01 and \$39,999.99.’ ” 365 N.C. at 285-86, 715 S.E.2d at 849. Our Supreme Court disagreed, concluding while “there was ‘some evidence’

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to support an award of restitution . . . , the evidence was not specific enough to support the award of \$39,332.49.” *Id.* at 286, 715 S.E.2d at 849. Thus, the Supreme Court remanded the matter to the trial court “to calculate the correct amount of restitution.” *Id.* at 286, 715 S.E.2d at 849-50.

Here, the State introduced no evidence—testimonial or documentary—concerning the value of the gun. Although there was testimony regarding the gun itself, including some of its modifications, there was no indication of its purchase price or market value. These facts are distinguishable from *Cousart*, where the victim specifically testified to the item’s purchase price, and from *Hillard*, where the victim impact statements were viewed together the accompanying documentation.¹ The only evidence offered in this case as to the value of the firearm was the restitution worksheet, which this Court has expressly held is insufficient

1. Indeed, the victim impact statement in this case was neither included in the Record on appeal nor submitted to the trial court for consideration. Recognizing the victim impact statement was not in the Record on appeal, the State filed a Record Supplement pursuant to Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure containing the victim impact statement. *See* N.C. R. App. P. 9(b)(5)(a) (2024) (“If the record on appeal as settled is insufficient to respond to the issues presented in an appellant’s brief, . . . the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9.”) and 9(d) (2024) (“Exhibits and other items that have been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be included in the record on appeal under this subsection if a party believes that they are necessary to understand an issue on appeal.”). Defendant subsequently filed a Motion to Strike the Supplement, arguing the victim impact statement was not an appropriate supplement under Rule 9. Although both sides agree the victim impact statement was not filed, served, admitted, or made the subject of an offer of proof, the State argues it “may have been submitted for consideration” based on the following exchange: At sentencing, the State’s attorney told the trial court he had “a restitution worksheet in the amount of \$1,000 for what was put on the victim impact statement as the cost and value of that Colt 1911 pistol. May I approach?” (emphasis added). The trial court replied that he could. Thus, the Record reflects that the victim impact statement was not submitted—only the restitution worksheet was.

Further, there is no evidence the State sought judicial settlement of this issue under our Rule of Appellate Procedure 11. Rather, the Record reflects “The Record on Appeal has been settled pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure because the time has expired for the State of North Carolina to serve a notice of approval of the Proposed Record on Appeal served 29 August 2024, or objections, amendments, or an alternative Proposed Record on Appeal.” *See* N.C. R. App. P. 11(b) (2024) (“If all appellees within the times allowed them . . . fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant’s proposed record on appeal thereupon constitutes the record on appeal.”). Thus, there is no evidence the victim impact statement was submitted to the trial court for consideration or that its inclusion in the Record was an issue the State sought to address in settling the Record on appeal. Therefore, the victim impact statement is not an appropriate supplement to the Record under Rule 9(b)(5). Consequently, we allow Defendant’s Motion to Strike the State’s Rule 9(b)(5) Supplement.

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when not supported by additional evidence. *See, e.g., Moore*, 365 N.C. at 285, 715 S.E.2d at 849. Thus, the State’s evidence is insufficient to support the restitution award of \$1,000.00.

Defendant requests this Court vacate the restitution award while the State asks us to vacate and remand for rehearing. Where “there is ‘some evidence’ to support an award of restitution, but ‘the evidence was not specific enough to support the award,’ the ‘appropriate course here is to remand for the trial court to determine the amount of damage proximately caused by [the] defendant’s conduct and to calculate the correct amount of restitution.’ ” *State v. Villarreal*, 296 N.C. App. 136, 144, 907 S.E.2d 80, 87 (2024) (quoting *Moore*, 365 N.C. at 286, 715 S.E.2d at 849-50). As in *Villarreal*, there is “some evidence” in the instant case to support an award of restitution, but the evidence is not specific enough to support the amount the trial court awarded. Thus, we must vacate the restitution order and remand for rehearing solely on the amount of restitution due.

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court’s restitution award and remand for rehearing on restitution.

VACATED AND REMANDED.

Chief Judge DILLON and Judge ARROWOOD concur.

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[299 N.C. App. 733 (2025)]

STATE OF NORTH CAROLINA

v.

LUTHER MELVIN JOHNSON, II

No. COA24-1029

Filed 2 July 2025

Probation and Parole—probation revocation—absconding from supervision—evidence sufficient—failure to exercise discretion

Where defendant—a resident of Virginia at the time he received a suspended sentence with 24 months of supervised probation after pleading guilty in North Carolina to two counts of obtaining property by false pretenses—was approved to transfer his North Carolina probation, first to Virginia (where he was already on probation) and then to West Virginia, before returning to Virginia without notifying his North Carolina probation officer and later failing to heed the officer’s order to return to North Carolina, the evidence was sufficient to reasonably satisfy the trial court that defendant willfully violated or violated without lawful excuse a valid condition of his probation by absconding from supervision. However, the transcript of the revocation hearing revealed that the trial court failed to exercise its discretion in deciding to revoke defendant’s probation, as evidenced by the court’s remark that “it looks like the only alternative that I have at this particular time is to revoke [defendant’s] probation.” Accordingly, the trial court’s order was vacated and the matter was remanded for the trial court to determine, in its discretion, whether or not to revoke defendant’s probation.

Judge GRIFFIN concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 6 May 2024 by Judge Bob R. Cherry in New Hanover County Superior Court. Heard in the Court of Appeals 21 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Janon M. Harris, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant-Appellant.

COLLINS, Judge.

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Defendant Luther Melvin Johnson, II, appeals from a judgment revoking his probation and activating his sentence. Defendant argues that the trial court erred by revoking his probation where there was insufficient evidence tending to show he had absconded from supervision. We conclude the trial court did not abuse its discretion in determining that Defendant had absconded. However, the trial court failed to exercise its discretion to decide whether to revoke Defendant's probation. Accordingly, we vacate the trial court's revocation of Defendant's probation and remand the matter to the trial court.

I. Factual and Procedural Background

Defendant pled guilty on 12 July 2022 to two counts of obtaining property by false pretenses. Pursuant to the plea agreement, he was sentenced to 11 to 23 months in prison, suspended for 24 months of supervised probation. At this time, he was also on probation in Virginia, and his residence was located in Abingdon, Virginia. Defendant sought to have his North Carolina probation transferred to Virginia under the Interstate Compact for Adult Offender Supervision. Defendant's application was approved, and he returned to Virginia. Defendant then applied on 25 August 2022 to have his North Carolina probation transferred to West Virginia. Defendant's application was again approved, and he moved to West Virginia.

At some point, Defendant committed some misdemeanors in West Virginia and served some jail time. After having been in West Virginia for about a year, Defendant returned to Virginia. Defendant did not notify his North Carolina probation officer, Officer Daniel Mattlin, of his return to Virginia. Defendant testified that he thought his probation had been successfully transferred to Virginia.

Mattlin did not learn Defendant had moved back to Virginia until he was notified by someone other than Defendant on or around 27 October 2023, about two months after the fact. Mattlin sent a "request for reporting instructions" to Virginia, asking Virginia to supervise Defendant again. Virginia denied the request because "they wanted time to investigate whether [Defendant] had a verifiable residence and employment" in Virginia.

Mattlin and Defendant had been in regular contact, and on 17 December 2023, Mattlin ordered Defendant to return to North Carolina. Mattlin testified,

I told him that the request for reporting instructions were denied and to advise him to report back to North Carolina Monday at 4:00 until transfer process can be completed.

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And at that point he responded he has no money or no vehicle.

Defendant testified that he told Mattlin his probation officer in Virginia was telling him to stay in Virginia, and he had no money and no car because he had just had a car accident. Mattlin thought he and Defendant “spoke a couple more times after that.”

Defendant did not return to North Carolina as ordered. Mattlin filed a probation violation report on 3 January 2024, alleging, among other violations, that Defendant had absconded supervision. Mattlin sent the case to an investigative team to further investigate Defendant’s whereabouts and to communicate with him. The investigative team spoke with Defendant’s Virginia probation officer, and at one point, “probation in Virginia went to [Defendant’s] given address and he wasn’t there.” Defendant testified, “I work. I might not have been there when they showed up at my place.”

On or around 6 February 2024, the investigative team contacted Defendant and told him to report to his Virginia probation officer. Defendant made some phone calls to some friends in law enforcement in Virginia and West Virginia and learned a warrant was issued for his arrest in North Carolina. Defendant testified, “I was worried to death but I went ahead and reported . . . knowing that was the only way I could get to North Carolina.” When Defendant reported to the probation officer, he was arrested.

After hearing the evidence, the trial court was reasonably satisfied that Defendant had violated his probation by, among other ways, absconding. The trial court announced, “The absconding being the one that revocation could be had, it looks like the only alternative that I have at this particular time is to revoke his probation.” The trial court thus revoked Defendant’s probation on 6 May 2024 and activated his sentence. Defendant timely appealed.

II. Discussion

Defendant argues that the trial court abused its discretion by revoking his probation because there was insufficient evidence to show that he absconded.

A hearing to revoke a defendant’s probation requires that the evidence be such as to “reasonably satisfy” the trial court “in the exercise of [its] 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.”

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State v. Young, 190 N.C. App. 458, 459 (2008) (citation and quotation marks omitted). “If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation.” *State v. Terry*, 149 N.C. App. 434, 438 (2002) (citation omitted). When the State presents “competent evidence establishing a defendant’s failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms.” *State v. Talbert*, 221 N.C. App. 650, 652 (2012) (quotation marks and citation omitted).

“We review a trial court’s decision to revoke a defendant’s probation for abuse of discretion.” *State v. Melton*, 258 N.C. App. 134, 136 (2018) (citation omitted). A trial court abuses its discretion “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. Maness*, 363 N.C. 261, 279 (2009) (quotation marks and citation omitted). A misapprehension of the law suffices to show abuse of discretion. *See State v. Tuck*, 191 N.C. App. 768, 771 (2008).

A trial court may revoke a defendant’s probation only if the defendant (1) commits a criminal offense in any jurisdiction, (2) absconds from supervision, or (3) has already served two periods of confinement for violating other conditions of probation. N.C. Gen. Stat. § 15A-1344(a) (2024); *State v. Williams*, 243 N.C. App. 198, 199-200 (2015). A defendant absconds by “willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer.” N.C. Gen. Stat. § 15A-1343(b)(3a) (2024).

A. Relevant time period

Defendant first argues that “[t]he trial court should have only considered the relevant period of 18 December 2023 through 3 January 2024 in determining whether [Defendant had] absconded.” The State, on the other hand, asserts that “[t]he trial court correctly considered 27 October 2023 through 3 January 2024 as the relevant period in determining whether Defendant absconded.”

Both sides cite *State v. Melton* for the proposition that, in determining whether a defendant absconded, the relevant time frame for the trial court is limited to the dates alleged in the violation report until the date the violation report is filed. *See Melton*, 258 N.C. App. at 137.

Here, the probation violation report alleges that Defendant willfully violated:

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Regular Condition of Probation: General Statute 15A-1343(b)(3a) “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that,

ON OR ABOUT 10/27/23, IT WAS FOUND THAT OFFENDER FAILED TO NOTIFY NC THAT HE HAD MOVED FROM WEST VIRGINIA TO VIRGINIA, WITHOUT PERMISSION AND HAS FAILED TO REPORT BACK TO NORTH CAROLINA AS DIRECTED FOR SUPERVISION. OFFENDER FAILED TO REPORT TO NORTH CAROLINA AS DIRECTED ON 12/18/23, BY 4PM.

This paragraph plainly alleges that Defendant’s failure to notify North Carolina that he had moved from West Virginia to Virginia, which was discovered on 27 October 2023, was behavior supporting allegations Defendant had absconded. The probation violation report was filed on 3 January 2024. Accordingly, under *Melton*, the relevant period is 27 October 2023 to 3 January 2024.

B. Sufficiency of the evidence

Defendant next argues that the State presented insufficient evidence that Defendant willfully avoided supervision or willfully made his whereabouts unknown to his supervising probation officer. Defendant specifically argues that the allegations in the report “only amounted to a failure to report under [N.C. Gen. Stat.] § 15A-1343(b)” or “a mere technical violation of the Interstate Compact for Adult Offender Supervision Rules.” We disagree.

A defendant absconds by either “willfully avoiding supervision” or by “willfully making [his] whereabouts unknown to the supervising probation officer.” N.C. Gen. Stat. § 15A-1343(b)(3a). A defendant’s mere failure to report as directed to his probation officer, in violation of section 1343(b)(3a), does not, without more, constitute absconding. *See State v. Johnson*, 246 N.C. App. 139, 146 (2016) (holding that a defendant’s failure to report for an appointment with his probation officer “does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these exact actions violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence”) (citations and emphasis omitted). However, a defendant’s behavior can “independently serve as the bases for both violating the regular conditions of probation as codified in [N.C.

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Gen. Stat. §] 15A-1343(b)(3) and the revocable violation of absconding” *State v. Crompton*, 380 N.C. 220, 227 (2022).

“As a practical matter, th[e] conditions laid out in Section 15A-1343(b)(3) make up the necessary elements of ‘avoiding supervision’ or ‘making one’s whereabouts unknown.’” *Id.* (brackets and citation omitted). For example, “[a] defendant cannot avoid supervision without failing to report as directed to his probation officer at reasonable times and places. Neither can a defendant make his whereabouts unknown without failing to answer reasonable inquiries or notify his probation officer of a change of address.” *Id.* (citation omitted).

In *State v. Thorne*, we determined that the trial court did not abuse its discretion by revoking the defendant’s probation for absconding where the defendant was asked to provide a drug test, but he left the probation office and did not return. 279 N.C. App. 655, 658, 662 (2021). There, the State presented evidence that the defendant’s probation officer “was twice unable to locate [the d]efendant at his last known address,” the defendant failed to report to his probation officer “despite a message left with his family requesting that he do so,” and the defendant “otherwise failed to contact or make his whereabouts known” to his probation officer for a twenty-two-day period. *Id.* at 662.

Like the defendant in *Thorne*, Defendant here relies on *State v. Williams*, 243 N.C. App. 198 (2015), to support his argument that his actions did not amount to absconding. In *Williams*, we concluded that even though the defendant had missed home and office contacts, traveled back and forth between North Carolina and New Jersey, and failed to return his probation officer’s messages, revocation was improper because his probation officer knew his whereabouts through their phone conversations. 243 N.C. App. at 203-05.

Similarly, in *State v. Melton*, we held that the defendant’s failure to attend meetings and the probation officer’s inability to reach defendant for a span of two days was not sufficient evidence that the defendant absconded. 258 N.C. App. at 140. While some of the facts in *Williams* and *Melton* are present here, key differences make this case distinguishable from those cases and are more similar to *Thorne*.

Here, Defendant applied to have his probation transferred from North Carolina to Virginia and then from North Carolina to West Virginia, demonstrating his knowledge and understanding of the transfer process. Yet, when Defendant moved from West Virginia to Virginia, he failed to apply for a transfer of his North Carolina probation. Additionally, like the defendant in *Thorne*, Defendant was not located at his last known

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address. Unlike the defendant in *Williams*, Defendant failed to notify Mattlin of his return to Virginia and his new address and remained in Virginia under their probation supervision for more than sixty days without contacting Mattlin, an even longer period of time than the twenty-two-day period in *Thorne*. It was not until Mattlin contacted Defendant that Defendant apprised Mattlin of his whereabouts in Virginia.

Furthermore, although Mattlin told Defendant to report to North Carolina on 18 December 2023, like the defendant in *Thorne*, Defendant failed to do so. Mattlin and Defendant spoke after that, but Defendant still had not returned to North Carolina more than two weeks later. As a result, Mattlin filed a probation violation.

Defendant emphasizes portions of his testimony where he offered reasons why he failed to contact Mattlin upon moving from West Virginia to Virginia and why he could not report in person to North Carolina. However, the trial court sat as the fact finder in the probation revocation hearing, N.C. Gen. Stat. § 15A-1345(e), and had discretion to determine the weight and credibility of the evidence, *Sellers v. Morton*, 191 N.C. App. 75, 79 (2008).

Accordingly, as the State presented competent evidence that Defendant willfully avoided supervision or willfully made his whereabouts unknown to Mattlin, the trial court did not abuse its discretion by being reasonably satisfied Defendant that had violated the condition of probation to not abscond.

It is apparent from the transcript, however, that the trial court did not exercise its discretion in deciding to revoke Defendant's probation and instead acted under a misapprehension of law believing that it was constrained to do so. After finding that it was reasonably satisfied that Defendant had violated his probation by, among other ways, absconding, the trial court announced, "The absconding being the one that revocation could be had, *it looks like the only alternative that I have at this particular time is to revoke his probation.*" (emphasis added).

Because it is within the trial court's "sound discretion [to] revoke the probation" of a Defendant who has absconded, *Terry*, 149 N.C. App. at 438, we vacate Defendant's probation revocation and remand the case to the trial court to exercise its discretion to make this determination.

III. Conclusion

Defendant has failed to show the trial court abused its discretion in determining that Defendant had absconded. Because the trial court did not exercise its discretion in deciding whether to revoke Defendant's

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probation, we vacate the trial court's order and remand the case to the trial court to exercise its discretion.

VACATED AND REMANDED.

Judge TYSON concurs.

Judge GRIFFIN concurs in parts and dissents in part by separate opinion.

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

I concur with the majority in affirming the trial court's finding Defendant willfully absconded from probation. I disagree with their holding that the trial court abused its discretion by operating under a misapprehension of the law.

The majority hangs their hat on one statement from the trial judge: "The absconding being the one [count] that revocation could be had, it looks like the only alternative that I have at this particular time is to revoke [Defendant's] probation." However, given the context of the probation violation hearing, I would not hold the judge misapprehended the law.

The trial court found Defendant willfully absconded from probation. It also found he willfully committed three additional probation violations. The court plainly and regretfully acknowledged Defendant was not a good candidate for probation. The majority asks us to believe a trial court judge, who has served as a prosecutor, district court judge, and superior court judge, abused his discretion by misapprehending the law—based on one inconclusive statement. I respectfully dissent from the majority decision to vacate and remand the revocation and would affirm the trial court.

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[299 N.C. App. 741 (2025)]

STATE OF NORTH CAROLINA

v.

LINDA STIDHAM

No. COA24-353

Filed 2 July 2025

1. Sentencing—prior record level—point added for committing offense while on probation—notice neither given nor waived—improper but not prejudicial error

After defendant was found guilty on drug-related charges, the trial court erred by sentencing her as a prior record level III offender for her conviction of possession of methamphetamine after adding a point under N.C.G.S. § 15A-1340.14(b)(7) for committing the offense while on probation for another crime. First, the State never gave defendant the statutorily-required written notice that it was seeking an additional point under subsection (b)(7), since the sentencing worksheet submitted to defendant was insufficient on its own to satisfy the notice requirement. Second, because defendant never admitted to committing the offense while on probation, she did not waive her right to receive notice under the statute. Third, the court did not make the requisite inquiry into whether notice was given or whether defendant waived her right to notice. Nevertheless, the court's sentencing error was not prejudicial where the minimum sentence imposed by the court was the highest minimum sentence in the presumptive range at both prior record levels II and III. Although the court could have sentenced defendant to a lesser minimum term under the erroneous prior record level, it did not; therefore, defendant failed to show a reasonable possibility that she would have received a lesser punishment had the court sentenced her as a prior record level II.

2. Evidence—expert witness testimony—Rule 702 reliability requirements—only some Daubert factors addressed—plain error review

In defendant's appeal from her convictions for possession of methamphetamine and possession of drug paraphernalia, the Court of Appeals applied plain error review to defendant's argument that testimony from a forensic scientist—tendered at trial by the State, without objection, as an expert in using forensic chemistry to detect narcotics—did not meet the reliability requirements of Evidence Rule 702(a). In doing so, the appellate court found no error—much

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[299 N.C. App. 741 (2025)]

less plain error—where the witness satisfied Rule 702’s requirements by describing a two-part test he used to identify controlled substances, which was generally accepted in the scientific community, and then by explaining how he applied that testing method to the white crystalline material seized from defendant’s purse during her arrest. Furthermore, the witness’s failure to testify as to all of the reliability factors identified in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), did not render his testimony unreliable or inadmissible.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 28 September 2022 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 23 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Sean K. Lloyd, for the State-Appellee.

Mikayla Mann for Defendant-Appellant.

COLLINS, Judge.

Defendant Linda Stidham appeals from the judgments entered upon a jury’s guilty verdicts of possession of methamphetamine and possession of drug paraphernalia. Defendant argues that the trial court erred by sentencing her as a prior record level III instead of a prior record level II, and plainly erred by admitting certain expert testimony under North Carolina Rule of Evidence 702. Although the trial court erred by sentencing Defendant as a prior record level III, Defendant has failed to show that the error was prejudicial. Additionally, because the state’s expert witness sufficiently explained the procedures he employs when identifying controlled substances and how he applied those procedures to the facts of the instant case, the trial court did not err by admitting his expert opinion testimony.

I. Background

Defendant was pulled over on 17 February 2022 while driving her car by Officer Steven Hawkins with the Shelby Police Department who ran her vehicle’s tag and discovered that her license was revoked. Officer Hawkins called for K-9 Officer Andrew Sumner to come to the scene and began issuing Defendant a citation for “[n]o operator license.”

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Officer Sumner arrived soon after, and his K-9 alerted on Defendant's vehicle. Officer Hawkins then searched the vehicle and found a "crystal-like substance which tested positive for methamphetamine" in a blue coin purse. Officer Hawkins arrested Defendant. Defendant told Officer Hawkins that "she was on probation at that time[.]"

At trial, the State tendered and the trial court received Thomas Rockhold, a forensic scientist at the North Carolina State Crime Lab, as an expert in the field of forensic chemistry, without objection. Rockhold spoke to his extensive background in forensic science and chemistry, his experience with testing for controlled substances, and how he has testified in court over twenty times. Rockhold described the "two-part test" that the North Carolina State Crime Lab routinely conducts when analyzing potential controlled substances. Rockhold then testified that he used the same procedure to test the substance found in the coin purse in Defendant's vehicle and ultimately concluded that the material found in Defendant's car was 3.21 grams of methamphetamine. The official lab report with Rockhold's findings was entered into evidence. Defendant did not object to the admission of Rockhold's testimony.

The jury found Defendant guilty of possession of methamphetamine and possession of drug paraphernalia. At the sentencing hearing, the State tendered Defendant as a prior record level III "as stipulated by the defendant and her counsel." The State pointed out that Defendant had "recently been convicted of another meth charge," and that Defendant "received this while she was out on bond for that one." The State asked the trial court to sentence Defendant at the top of the presumptive range. Defense counsel argued that Defendant should receive a suspended sentence and asked for the payment of attorney's fees. The trial court then ordered the following:

In the Class 1 misdemeanor, possession of drug paraphernalia, the defendant has stipulated to the convictions shown on the prior record worksheet. Four of those convictions were on the same date. That will be three convictions, making her a prior conviction level 2 for misdemeanor purposes. For felony purposes, she has 6 prior record points, making her a record level 3.

Defendant did not object to either record level classification. The State provided defense counsel with the prior record worksheet containing six felony sentencing points, which defense counsel signed. The trial court sentenced Defendant to 45 days in Cleveland County jail for her misdemeanor conviction. The trial court sentenced her to 6 to 17

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months of imprisonment, suspended for 18 months of supervised probation with the special condition that she serve 60 days in confinement, for her felony conviction. Defendant appeals.

II. Discussion

A. Prior Record Level

[1] Defendant first argues that the trial court erred by adding a prior record level point for Defendant having been on probation when she committed the offense in this case and thus sentencing her as a prior record level III for her felony conviction.

“The determination of an offender’s prior record level is a conclusion of law that is subject to *de novo* review on appeal.” *State v. Martin*, 230 N.C. App. 571, 572 (2013) (citation omitted). A defendant’s argument that the trial court erred in calculating the defendant’s prior record level is preserved for appellate review as a matter of law; the defendant need not have objected on that basis at the sentencing hearing. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2023); *State v. Ray*, 274 N.C. App. 240, 243-44 (2020).

1. Notice Requirement & Waiver

“The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender’s prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section.” N.C. Gen. Stat. § 15A-1340.14(a) (2023). Subsection (b)(7) of the statute assigns one point “[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision[.]” N.C. Gen. Stat. § 15A-1340.14(b)(7) (2023).

If the State intends to assign a prior record level point pursuant to subsection (b)(7), “[t]he State must provide a defendant with written notice of its intent . . . at least 30 days before trial[.]” N.C. Gen. Stat. § 15A-1340.16(a6) (2023). However, a “defendant may waive the right to receive such notice.” *Id.* In either scenario, the trial court must specifically “determine whether the State seeks a finding that a prior record level point should be found under [subsection] [(b)(7).” N.C. Gen. Stat. § 15A-1022.1(a) (2023). The trial court must also determine “whether the State has provided the [required] notice to the defendant” or “whether the defendant has waived his or her right to such notice.” *Id.*

Where the defendant seeks to admit to the existence of a prior record level point under subsection (b)(7), N.C. Gen. Stat. § 15A-1022.1

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sets out additional procedures the trial court must follow. *See* N.C. Gen. Stat. § 15A-1022.1(b) (2023). The trial court “shall address the defendant personally and advise the defendant” that “she is entitled to have a jury determine the existence of any . . . points under [subsection] (b)(7)” and that “she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.” *Id.* Additionally, “the court shall determine that there is a factual basis for the admission[] and that the admission is the result of an informed choice by the defendant.” *Id.* § 15A-1022.1(c) (2023). The trial court is required to abide by these provisions “unless the context clearly indicates that they are inappropriate.” *Id.* § 15A-1022.1(e) (2023); *see State v. Scott*, 287 N.C. App. 600, 608 (2023).

Here, the record does not support the State’s assertion that it provided the requisite notice to Defendant. The State argues that it satisfied the notice requirement because “Defendant’s counsel [] signed the Sentencing Worksheet to indicate his acknowledgment and agreement with the worksheet, which listed the extra point for probation.” However, it is well-settled that a sentencing worksheet, without more, is insufficient to establish notice under N.C. Gen. Stat. § 15A-1340.16(a6). *See State v. Crook*, 247 N.C. App. 784, 797 (2016) (“At most, this prior record worksheet constituted a possible calculation of Defendant’s prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point . . . as required by N.C. Gen. Stat. § 15A-1340.16(a6).”) (citation omitted).

The State further contends that even if it failed to give proper notice, Defendant waived her right to notice by stipulating to having committed the offense while on probation. Defendant, however, did not so stipulate. At trial, Defendant testified about crimes she had previously been convicted of, but Defendant never admitted that she was on probation while she committed the offenses she was on trial for in this case.

Therefore, the State did not provide Defendant with notice and Defendant did not waive her right to notice under N.C. Gen. Stat. § 15A-1340.16(a6).

Furthermore, at the sentencing hearing, the State tendered Defendant as a prior record level III after adding a prior record level point under subsection (b)(7), and the following colloquy ensued:

[THE STATE]: Your Honor, the State is tendering [Defendant] as a record level 3 as stipulated by the defendant and her counsel. . . .

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THE COURT: Okay. What do you want to say?

[THE STATE]: Your Honor, [Defendant], as you can see, has recently been convicted of another meth charge last month. She received this while she was out on bond for that one. . . .

I would ask the Court to sentence her at the top of the presumptive range.

Despite the State's claim that Defendant committed this offense while she was "out on bond" for a previous offense, the trial court made no inquiry into whether written notice was given or whether Defendant waived her right to notice. The only instance in which the trial court personally addressed Defendant was regarding Defendant's ability to pay her attorney's fees. The procedures outlined in N.C. Gen. Stat. § 15A-1022.1 were not followed by the trial court in this case. Furthermore, the context does not clearly indicate that such procedures were unnecessary. *See* N.C. Gen. Stat. § 15A-1022.1(e); *see also* *Scott*, 287 N.C. App. at 608. The trial court thus erred by failing to follow them.

Accordingly, the trial court erred by adding a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7). As the addition of this prior record level point elevated Defendant from a prior record level II to a prior record level III, the trial court erred by sentencing Defendant as a prior record level III.

2. Prejudice

Nonetheless, Defendant has failed to show that the trial court's sentencing error was prejudicial.

A defendant bears the burden of showing not only error in the trial court's calculation of her prior record level, but prejudice resulting from that error. N.C. Gen. Stat. § 15A-1443(a) (2023); *see State v. Lindsay*, 185 N.C. App. 314, 315-16 (2007) ("This Court applies a harmless error analysis to improper calculations of prior record level points.") (citations omitted). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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. Gen. Stat. § 15A-1443(a).

The sentence imposed by the trial court "shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified

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for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.” *Id.* § 15A-1340.13(b) (2023).

There are three kinds of sentence dispositions: active punishment, intermediate punishment, and community punishment. *Id.* An active punishment is a sentence that “requires an offender to serve a sentence of imprisonment and is not suspended.” *Id.* § 15A-1340.11(1) (2023). An intermediate punishment is a sentence that “places an offender on supervised probation” and “may include” recovery court, special probation, and one or more community or intermediate probation conditions. *Id.* § 15A-1340.11(6) (2023). A community punishment is a sentence that does not include an active punishment, recovery court, or special probation but “may include” one or more community or intermediate probation conditions. *Id.* § 15A-1340.11(2) (2023).

The block on the felony punishment chart for a class I felony for a prior record level II authorizes a community or an intermediate punishment and a minimum presumptive range sentence of 4-6 months. *Id.* § 15A-1340.17 (2023). The block for a class I felony for a prior record level III authorizes only an intermediate punishment and a minimum presumptive range sentence of 5-6 months. *Id.*

Here, the trial court sentenced Defendant as a prior record level III to an intermediate punishment of 6 to 17 months imprisonment, suspended for 18 months of supervised probation with the special condition that she complete 60 days in confinement.

This 6-month minimum was the highest minimum sentence in the presumptive range for a class I felony at both prior record levels II and III. *See id.* § 15A-1340.17. Although the trial court could have sentenced Defendant to a minimum of 5 months in prison at the erroneous prior record level III, it did not do so. Accordingly, Defendant has failed to show that there is a “reasonable possibility” that the trial court would have sentenced Defendant to a minimum term of 5 or 4 months had it sentenced Defendant at the correct prior record level II. *See id.* § 15A-1443(a).

This case is therefore distinguishable from *State v. Williams*, 355 N.C. 501 (2002). There, the trial court incorrectly sentenced defendant as a prior record level VI instead of V for several noncapital felony convictions. *Id.* at 587. The trial court imposed the highest minimum sentence allowed in the presumptive range for all but one of the convictions. *Id.* Had the trial court considered defendant’s prior record level to be V rather than VI, the trial court “could not have imposed

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minimum sentences of [the] duration” it did for those convictions. *Id.* On the remaining noncapital felony conviction, the trial court sentenced defendant to a minimum term that was less than the highest minimum term. *Id.* The State argued that this lesser sentence indicated that “the trial court may have been somewhat lenient” with the sentence such that “defendant has not suffered any harm” by the improper prior record level calculation. *Id.* The Supreme Court rejected this argument, explaining that “[i]f the trial court was lenient with regard to sentencing defendant” on that charge, “then that is for the trial court to determine, not the State.” *Id.* Accordingly, the Supreme Court sent the case back for resentencing on all defendant’s noncapital felony convictions. *Id.*

Unlike in *Williams*, the minimum sentence imposed in this case was the highest minimum sentence in the presumptive range at both prior record levels II and III. Also unlike in *Williams*, the trial court in this case could have sentenced Defendant to a lesser minimum term at the erroneous prior record level, but did not. Accordingly, *Williams* does not control this case.

Furthermore, although the trial court was authorized to impose a special condition of probation as part of an intermediate punishment at the erroneous prior record level III, it was not *required* to do so. *See* N.C. Gen. Stat. § 15A-1340.11(6) (An intermediate punishment is a sentence that “places an offender on supervised probation” and “may include” special probation.). Accordingly, there is no reasonable possibility that the trial court would have imposed a lesser intermediate punishment or a community punishment had it sentenced Defendant at the correct prior record level II.

For these reasons, Defendant has failed show prejudice resulting from the trial court’s error in calculating her prior record level.

B. Rule 702

[2] Defendant next contends that the trial court plainly erred by admitting Rockhold’s expert opinion testimony because it failed to meet the reliability requirements of Rule 702. Specifically, Defendant argues that Rockhold “did not demonstrate that his opinions were the product of reliable principles and methods that he reliably applied to the facts of this case.”

1. Preservation & Standard of 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

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to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). In criminal cases, “an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4). Generally, “[a] trial court’s ruling on Rule 702(a) is reviewed for abuse of discretion.” *State v. Phillips*, 268 N.C. App. 623, 634 (2019). However, “an unpreserved challenge to the performance of [the] trial court’s gatekeeping function under Rule 702 in a criminal trial is subject to plain error review.” *State v. Stephen*, 910 S.E.2d 911, 916 (N.C. Ct. App. 2024) (quoting *State v. Gray*, 259 N.C. App. 351, 354 (2018) (citation omitted)).

Our Supreme Court has applied plain error review to the admission of evidence under Rule 702. *See State v. Clark*, 380 N.C. 204, 209 (2022); *State v. Jones*, 358 N.C. 330, 346-47 (2004); *State v. Stancil*, 355 N.C. 266, 267 (2002). Although our Supreme Court has recently reiterated that “plain error review is unavailable for issues that fall ‘within the realm of the trial court’s discretion,’” *State v. Gillard*, 386 N.C. 797, 821 (2024) (citation omitted), that case, and the cited supporting cases, all concern a trial court’s discretionary ruling under Rule 403. *Id.* Furthermore, *Gillard* does not specifically disavow its own plain error review of Rule 702 arguments in *Clark*, *Jones*, or *Stancil*.

This Court has issued conflicting opinions on whether a trial court’s unchallenged admission of expert testimony under Rule 702 may be reviewed for plain error. *Compare State v. Hunt*, 250 N.C. App. 238, 246 (2016) (holding that “an unpreserved challenge to the performance of a trial court’s gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts”) *with State v. Norton*, 213 N.C. App. 75, 80-81 (2011) (noting that as “our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review,” and because the trial court’s decision to allow expert testimony under Rule 702 is discretionary, this Court did not address the issue) (citing *State v. Steen*, 352 N.C. 227, 256 (2000)). Given the lack of clarity on whether and when plain error review is available for a ruling under Rule 702(a), in the interest of ensuring that Defendant received a fair trial free from prejudicial error, and because Defendant specifically and distinctly argued plain error on appeal, we address the merits of her argument.

For a trial court’s error to amount to plain error, “a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citation omitted). A fundamental

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error is one that prejudices the defendant, meaning “that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (quotation marks and citations omitted). “[B]ecause plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (cleaned up).

2. Admissibility of Expert Testimony Under Rule 702

“Whether expert testimony is admissible under Rule 702(a) is a preliminary question” that is to be decided by the trial court. *State v. McGrady*, 368 N.C. 880, 892 (2016) (citations omitted). Rule 702(a) provides a three-part test for determining whether a witness can be qualified as an expert:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023). These three requirements together make up the reliability inquiry discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *McGrady*, 368 N.C. at 890.

“The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test.” *Id.* (citation omitted). “In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability. . . .” *Id.* at 890-91 (citing *Daubert*, 509 U.S. at 593-94). The trial court may consider the *Daubert* factors when “they are reasonable measures of the reliability of expert testimony.” *Id.* at 891 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). The *Daubert* factors “are part of a flexible inquiry,

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so they do not form a definitive checklist or test, [a]nd the trial court is free to consider other factors that may help assess reliability” *Id.* (quotation marks and citations omitted).

Here, Defendant challenges the second and third elements of the Rule 702 test for reliability, and in doing so emphasizes that Rockhold failed to address several of the *Daubert* factors. Rockhold was tendered and received, without objection, as an expert “in the field of forensic chemistry for the purposes of determining narcotics or controlled substances.” Regarding the second element of the Rule 702(a) test, which includes the reliability of Rockhold’s principles and methods, the following exchange took place between the prosecutor and Rockhold:

Q: Okay. And what types of controlled substances would those be?

A: It includes methamphetamine, heroin, [and] fentanyl. It comes in all shapes and sizes; powders, pills, crystal material.

Q: Can you describe for the jury how you go about testing those substances?

A: Generally, we use a two-part test. The first test is a preliminary test. That’s usually a color test where we will take a small amount of the sample material that we are testing and place it in a spot well. I will add the material to the spot well with the reagent and look for a color reaction. Based on that reaction and the material I am dealing with, I will then do a confirmatory test which uses instrumentation to analyze the material.

Q: And is that generally accepted in the scientific community as a way to test substances for narcotics?

A: Yes, it is.

Rockhold testified that when evidence is delivered to the crime lab, it is in a secure location at all times and documented on a chain of custody.

Rockhold then satisfied the third element of the Rule 702(a) test by explaining how he applied his principles and methods to the facts of the instant case in the following exchange:

Q: . . . [W]hat kind of testing did you do on this evidence?

A: So once I receive the material, I compare the information on the packaging to the [request for examination] to

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make [sure] that I have the right evidence. I then remove the Ziploc plastic bag from State's Exhibit No. 5, the blue purse. And then I remove the white crystalline material from that Ziploc plastic bag. I placed it on a scale to get a net weight of just the crystal material itself.

After that, I used a color test reagent for my preliminary test. I used a marquee color test which is a chemical that I prepare myself at the crime lab and did a quality control to check to make sure it functioned properly before I use it in case work. I added a small amount of the material to the marquee chemical in a spot well and observed an orange color reaction.

From there, I went on to my confirmatory test and measured the material on the infrared spectrometer, or IR. That instrument measures the material and generates a graph of peaks. I compared those peaks to our library of drug standards. And based on that comparison and the color test, I formed an opinion as to what the material contained.

....

The preliminary test, the colors we see can give us an idea of a certain class of drug. Orange can indicate drugs including [] methamphetamine. . . . It gives me an idea of what I might be dealing with and then I move on to my confirmatory test.

Q: And that is the infrared spectrometer?

A: Yes.

....

So as the material is measured, the instrument looks at how the light interacts. It uses light to measure the material. And the material interacts with that light and the instrument detects those changes and creates a graph of peaks. Those graphs are unique for each substance and then we compare those to known drug standards.

As a result of the application of these tests to the facts of this case, Rockhold "determined that State's Exhibit No. 4 was a plastic Ziploc bag found to contain methamphetamine with a net weight of material of 3.21 plus or minus 0.06 grams." The State also submitted as evidence,

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without objection, Rockhold's laboratory report that accurately represents the analysis he performed and the conclusions he generated.

Rockhold explained in detail the procedures he routinely employs when identifying controlled substances and how he applied those procedures to the facts of the instant case. His failure to testify as to all of the *Daubert* factors does not render his testimony unreliable or inadmissible. *See McGrady*, 368 N.C. at 891. Therefore, the trial court did not err, much less plainly err, by admitting Rockhold's testimony.

III. Conclusion

For the foregoing reasons, the trial court did not commit prejudicial error by sentencing Defendant as a prior record level III and did not err, much less plainly err, by admitting Rockhold's expert testimony under Rule 702.

NO PREJUDICIAL ERROR; NO ERROR.

Judge MURRY concurs.

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

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

I concur with the majority opinion with the sole exception of the application of plain error review to the trial court's discretionary Rule 702 determination. In my view, because the admittance of expert testimony is a discretionary decision of the trial court, plain error review is unavailable and the merits of defendant's arguments concerning this testimony may not be considered. Accordingly, I respectfully dissent from that portion of the majority opinion.

Our Supreme Court rejected application of plain error review for discretionary decisions in *State v. Steen*, stating that "this Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now." 352 N.C. 227, 256 (2000). Although our Supreme Court later deviated from this principle in *State v. Stancil*, 355 N.C. 266 (2002), *State v. Jones*, 358 N.C. 330 (2004), and *State v. Clark*, 380 N.C. 204 (2022), none of those cases mentioned *Steen* or its principle. Further, our Supreme Court has recently reiterated that "plain error is unavailable for issues that fall 'within the realm

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of the trial court's discretion' ” and applied that principle in declining review of the trial court's Rule 403 determinations. *State v. Gillard*, 386 N.C. 797, 821 (2024) (quoting *Steen*, 352 N.C. at 256).

My colleagues correctly note that “*Gillard* does not specifically disavow its own plain error review of Rule 702 arguments in *Clark*, *Jones*, or *Stancil*.” However, because *Steen*'s rule, recently reiterated in *Gillard*, does not provide for any exceptions, it does not appear that Rule 702 determinations are exempt from the plain error review bar. This case may provide our Supreme Court an opportunity to clarify whether the rule announced in *Steen* and reiterated in *Gillard* applies to all discretionary trial court decisions, including Rule 702 determinations, or whether it applies exclusively to the trial court's discretionary decisions made under Rule 403.

STATE OF NORTH CAROLINA

v.

BRYAN SCOTT TADLOCK

No. COA24-459

Filed 2 July 2025

1. Criminal Law—rape and kidnapping—defenses—voluntary intoxication—jury instruction—unnecessary

In a prosecution for charges—including first-degree kidnapping and first-degree forcible rape—arising from a domestic violence incident between defendant and his wife, defendant was not entitled to a jury instruction on voluntary intoxication where, although some evidence indicated that he had been drinking for several hours before the incident, the remaining evidence did not show that he was unable to control himself or was so intoxicated that he could not form the specific intent to commit the charged crimes. Firstly, there was no evidence that defendant had difficulty speaking or walking, or that he had engaged in inexplicable behavior immediately prior to attacking his wife. Moreover, after the incident, defendant helped his wife up from the floor, helped to clean her up, brought her pain medication, and apologized to her, all of which indicated his ability to appreciate the nature of his actions.

2. Appeal and Error—preservation of issues—sufficiency of evidence—supporting two separate assault charges—issue raised by trial court

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In an appeal from multiple convictions arising from a domestic violence incident, where defendant argued that the trial court erred in submitting two assault by strangulation charges to the jury where the State presented insufficient evidence of two separate assaults, but where defendant expressly excluded both assault by strangulation charges from his general motion to dismiss for insufficiency of the evidence, defendant's appellate argument was still preserved because the trial court had raised the issue at the hearing on defendant's motion, heard arguments from defendant and the State, and then ruled on the issue.

3. Assault—by strangulation—sufficiency of evidence—supporting two separate assault charges—distinct interruptions

In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not err in submitting two separate charges of assault by strangulation to the jury where, viewed in the light most favorable to the State, there was sufficient evidence from which the jury could have found that defendant committed two separate assaults: first, by choking his wife with his hands as they moved across the kitchen, and second, by strangling his wife with his arm after she fell to the floor. Based on the evidence showing changes in both the location and the method of attack, the jury could have found a distinct interruption separating defendant's strangulation of his wife into two different assaults.

4. Assault—by strangulation—two charges—injuries caused by each assault—not specified in jury instructions—right to unanimous jury verdict—not violated

In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not plainly err when instructing the jury on two separate charges of assault by strangulation, where its failure to distinguish the injuries caused by each charged assault did not violate defendant's right to a unanimous jury verdict on the number of assaults he had committed. To begin with, the number of counts against him was equal to the number of assaults presented in the evidence, which was also equal to the number of indictments against defendant for assault by strangulation. The trial court also instructed the jury on assault by strangulation twice—once for each charge—and told the jurors that they could not reach a verdict by majority vote. Further, the verdict sheets presented each charge separately and differentiated them by including the words “alleged by hands” or “alleged by arm”

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in bold font. Finally, the State presented ample evidence of the victim's injuries, including photographs along with testimony from both the victim and the doctor who treated her after the assaults.

5. Criminal Law—prosecutor's closing argument—remarks about functioning alcoholics—not grossly improper

In a prosecution for multiple crimes arising from a domestic violence incident, where some evidence indicated that defendant had been drinking for several hours before attacking his wife, the trial court did not abuse its discretion by failing to intervene *ex mero motu* during the State's closing argument, when the prosecutor made several statements about how alcoholics can “still function” and “know right from wrong” even with a high blood alcohol concentration. The prosecutor's statements were, at most, inappropriately speculative, but not grossly improper considering that, viewed in their full context, they were used to highlight the lack of spelling errors in the text messages defendant sent after the incident rather than to indicate that defendant was a functioning alcoholic.

6. Sentencing—rape and kidnapping—\$25,000 fine—defendant's finances not considered—no abuse of discretion

In a prosecution for charges including first-degree kidnapping and first-degree forcible rape, the trial court did not abuse its discretion by imposing a \$25,000 fine at sentencing without first taking defendant's financial situation into account. Firstly, the court was not required to consider defendant's finances or any of the other factors under N.C.G.S. § 15A-1340.36, which solely concerns the payment of restitution. Secondly, the court's assessment of the fine was not unreasonable under N.C.G.S. § 15A-1362(a), which requires trial courts to consider a defendant's financial resources when determining the method of payment—not the amount—of a fine. Lastly, the fine imposed was appropriate in light of the nature of the crimes of which defendant was convicted.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Defendant from Judgments entered 26 October 2023 by Judge Gary M. Gavenus in Haywood County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Danielle M. Orait, for the State.

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Phoebe W. Dee for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Bryan Scott Tadlock (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of First-Degree Kidnapping, two counts of Assault by Strangulation, Assault with a Deadly Weapon Inflicting Serious Injury, and First-Degree Forcible Rape. The Record before us, including evidence presented at trial, tends to reflect the following:

On 11 July 2022, Defendant was indicted for First-Degree Kidnapping, First-Degree Forcible Rape, Assault with a Deadly Weapon with Intent to Kill or Inflict Serious Injury, two counts of Assault by Strangulation, and Attempted First-Degree Murder.

The matter came on for trial on 23 October 2023. At trial, the State's evidence tended to show Defendant and the victim, K.S., were married and lived together with K.S.'s teenaged daughter, T.S.¹ During the week of 13 March 2022, Defendant began acting "[v]ery distant and quiet." On the evening of 18 March 2022, K.S. picked Defendant up from work and the two arrived home at approximately 11:00 p.m. T.S. had left earlier in the day to stay with her biological father for the weekend. Once inside, Defendant began drinking. Due to Defendant's "demeanor", K.S. went to bed "as soon as [they] got home."

K.S. testified she woke up at "about 1:30 [a.m.]" when Defendant entered their bedroom screaming at her. When K.S. ignored Defendant, he left the room and went outside. Defendant returned a few minutes later with a loaded gun and pointed it at K.S. as she laid in bed. He told her to "[g]et up or I'm going to make you get up." K.S. complied and Defendant "held the gun against [her] head," demanding K.S. go get a necklace they had given to T.S. for her birthday. K.S. retrieved the necklace from the living room and brought it into the kitchen at Defendant's behest. Defendant told K.S. to get a hammer. When K.S. resisted, Defendant "grabbed [K.S.] by [her] hair and kind of dragged [her] . . . to go get the hammer." Defendant "pinned [K.S.'s head] down to the stove" and screamed for her to destroy the necklace. After Defendant forced the gun's barrel into the back of her throat, K.S. "started hitting the necklace with the hammer." The two began to fight, and Defendant "wrapped his hands around [K.S.'s] neck" from behind and "started choking [her]

1. We use initials to protect the privacy of the victim and her minor daughter.

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and just wouldn't stop." K.S. described a struggle between herself and Defendant, during which the two fell to the floor. Defendant continued to strangle K.S. with his hands. "At some point" Defendant set the gun down, and K.S. "threw it across the room." Defendant proceeded to use his arm around K.S.'s throat to strangle K.S. until she fell unconscious.

When K.S. regained consciousness, Defendant helped her off the floor. Defendant apologized to K.S., found painkillers for her, and helped her clean herself up. He alleged T.S. had made sexual advances toward him when the family watched a movie together in the week prior, and K.S. "had to be taught a lesson[.]"

Around 4:30 a.m., Defendant told K.S. she "needed to go get some rest and that he would sleep on the couch." K.S. asked Defendant to join her in bed instead, "[b]ecause if he's on the couch, [she] can't get to the door." When the pair laid down, Defendant initiated sex with K.S. K.S. testified, in the hope she "would live through what [she] thought [she] wasn't going to live through," she "did whatever [Defendant] wanted[.]" Eventually, Defendant fell asleep and K.S. "ran out" to go to the hospital.

At the close of the State's evidence, defense counsel moved to dismiss the charges of Attempted First-Degree Murder, First-Degree Forcible Rape, Assault with a Deadly Weapon with Intent to Kill, and First-Degree Kidnapping. Defense counsel expressly chose not to challenge the two charges of Assault by Strangulation, stating: "Now, with respect . . . to the assault by strangulation, I can't stand here in good faith and ask the court to dismiss those." The trial court denied defense counsel's Motion. Defense counsel renewed its Motion at the close of all evidence. The trial court, *sua sponte*, requested both sides present arguments as to whether the evidence supported two separate charges of Assault by Strangulation. For its part, defense counsel said it would leave the issue in the trial court's discretion:

[Defense Counsel]: Judge, the only thing, in both of the indictments, the language is talking about and/or, you know, how the assaults occurred. It could have been conceivably consolidated into one indictment. I can see how you break it down. I can see how you could have added an extra "and/or" and just consolidated into one indictment that way. But I'll just leave it in the court's discretion, Judge. I think you know more about this than I do. I'll leave it in the court's discretion about how you want to proceed on it.

The trial court denied defense counsel's Motion again, finding "sufficient evidence of each and every element of each and every crime to submit to this jury."

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Defense counsel also requested the trial court instruct the jury on the defense of voluntary intoxication. The trial court denied this request. During closing arguments, the prosecutor argued

the thing about alcoholics is they can drink and they can drink and they can drink and they can drink. They can blow super high blood alcohol levels and still function. They can still know right from wrong. They still know what they're doing. And how do you know that he knew what he was doing? "I'm sorry. I'm sorry. You're not going to call the cops, are you?" In those text messages, did you see any typos? When somebody's drunk and they're typing, there's usually some typos. None. This is methodical. It's thought out. It's planned. He knows exactly what he's doing. But the common excuse and the way to diminish the bad behavior is, "I was drunk. I'm sorry. You know I didn't mean it, honey. I just had too much to drink. I love you. I'm going to protect you. I'll never do it again." And a wife is going to hope and pray that that's true.

Defense counsel raised no objections.

On 26 October 2023, the jury returned verdicts finding Defendant guilty of First-Degree Kidnapping, both charges of Assault by Strangulation, Assault with a Deadly Weapon Inflicting Serious Injury, and First-Degree Forcible Rape. The jury found Defendant not guilty of Attempted First-Degree Murder. The trial court entered Judgments in accordance with the verdicts and sentenced Defendant to 73 to 100 months imprisonment for Kidnapping; 6 to 17 months imprisonment for each charge of Assault by Strangulation; 25 to 42 months imprisonment for Assault with a Deadly Weapon Inflicting Serious Injury; and 240 to 348 months imprisonment for First-Degree Forcible Rape. The trial court ordered all sentences to run consecutively. The trial court also ordered Defendant to register as a sex offender for his natural life and to pay a \$25,000 fine. Defendant orally gave Notice of Appeal in open court.

Issues

The issues on appeal are whether the trial court erred by: (I) refusing to instruct the jury on the defense of voluntary intoxication; (II) denying Defendant's Motion to Dismiss one charge of Assault by Strangulation; (III) failing to distinguish between the injuries caused by each Assault by Strangulation; (IV) failing to intervene *ex mero motu* during the State's closing arguments; (V) assessing a \$25,000 fine against Defendant at sentencing.

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AnalysisI. Voluntary Intoxication Instruction

[1] Defendant first argues the trial court erred in denying his request to instruct the jury on voluntary intoxication. Defendant contends he was entitled to a jury instruction on voluntary intoxication because the evidence, taken in the light most favorable to Defendant, tended to show he had been drinking for at least three hours, drank at least half of a fifth of whiskey, was behaving abnormally, broke a glass, was too impaired to have sex, ultimately passed out after assaulting K.S., and there were numerous bottles of alcohol in the part of the home where Defendant had been that evening. Thus, Defendant asserts, there was substantial evidence supporting the conclusion he could not form the specific intent to support his convictions for First-Degree Kidnapping and First-Degree Forcible Rape,² such that he was entitled to an instruction on voluntary intoxication.

“A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence.” *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citing *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988)). We review whether a defendant was entitled to a jury instruction on voluntary intoxication de novo to determine whether the evidence supported such an instruction when considered in the light most favorable to the defendant. *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citing *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)).

“In certain instances voluntary drunkenness, while not an excuse for a criminal act, may be sufficient to negate the requisite intent element. However, no inference of the absence of [specific intent] arises from intoxication, as a matter of law.” *Mash*, 323 N.C. at 347, 372 S.E.2d at 537 (alteration, citations and quotation marks omitted). The burden is on the defendant to “produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form” the requisite intent. *Id.* at 346, 372 S.E.2d at 536.

“Evidence of mere intoxication, however, is not enough to meet defendant’s burden of production.” *Id.* “The evidence must show that at

2. Defendant was charged with four specific-intent crimes—First-Degree Kidnapping, First-Degree Forcible Rape, Attempted First-Degree Murder, and Assault with a Deadly Weapon with Intent to Kill—but convicted only of First-Degree Kidnapping and First-Degree Forcible Rape.

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the time of the [crime] the defendant's mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]." *State v. Meader*, 377 N.C. 157, 162, 856 S.E.2d 533, 538 (alterations in original) (quoting *Mash*, 323 N.C. at 346, 372 S.E.2d at 536). Absent such evidence, a trial court is not required to instruct the jury on voluntary intoxication. *Id.*

Although the Record indicates Defendant had been drinking for several hours before the incident in question, evidence of mere intoxication is insufficient to require a jury instruction on voluntary intoxication. *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. We analyze whether a defendant was unable to form the requisite intent because of his intoxication based on his actions leading up to the incident. *Id.* In *Mash*, the defendant was charged with first-degree murder stemming from an assault on multiple people. *Id.* at 342-43, 372 S.E.2d at 534-35. There, the evidence presented at trial included testimony the defendant had been drinking alcohol for at least seven hours; "swerved" his car while driving to buy more alcohol; his eyes were dilated, and his eyes and face were red; he was "sweating"; and he had difficulty speaking and walking. *Id.* at 340-42, 372 S.E.2d at 533-34. The Court held this evidence was sufficient to warrant a voluntary intoxication instruction. *Id.* at 348, 372 S.E.2d at 538.

Here, there is not substantial evidence Defendant could not control himself or was so intoxicated he could not form the intent for First-Degree Kidnapping and First-Degree Forcible Rape. Unlike the defendant in *Mash*, there was no evidence Defendant had trouble speaking or walking. Also unlike in *Mash*, the Record does not indicate Defendant engaged in inexplicable behavior immediately prior to attacking K.S.; K.S. testified Defendant's demeanor and behavior had been "off" for an entire week leading up to the incident. Moreover, after the incident, Defendant helped K.S. get up from the floor, helped clean her up, brought her pain medication, and apologized, saying, "I'm sorry you had to go through that, but I had to teach you a lesson." Indeed, Defendant's apology tends to indicate he appreciated the nature of his actions. Thus, although there was evidence Defendant was intoxicated, there was not substantial evidence—even taken in the light most favorable to Defendant—Defendant was intoxicated to the point he could not control himself and could not form the specific intent required to support the charges of First-Degree Kidnapping and First-Degree Forcible Rape. *See Meader*, 377 N.C. at 162, 856 S.E.2d at 538. Therefore, the trial court did not err by not instructing the jury as to Defendant's voluntary intoxication.

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II. Motion to Dismiss

[2] Defendant argues the trial court erred by denying his Motion to Dismiss one of the charges of Assault by Strangulation. As a threshold matter, we note Defendant did not actually make a motion to dismiss either charge of Assault by Strangulation. Rather, defense counsel moved to dismiss all charges *except* the two charges of Assault by Strangulation. Neither party has addressed preservation of this issue on appeal.

“In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial.” N.C. R. App. P. 10(a)(3) (2024). Our Supreme Court has held a timely motion to dismiss “preserves all issues related to the sufficiency of the evidence for appellate review[,]” regardless if the defendant stated the grounds for his motion. *See State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020). Here, by contrast, rather than failing to state upon what grounds he was moving to dismiss the charges of Assault by Strangulation, defense counsel expressly excluded the charges of Assault by Strangulation from his Motion to Dismiss.

The trial court, however, raised the issue of whether the evidence was sufficient to support two charges of Assault by Strangulation. At that point, defense counsel argued the charges could have been “consolidated into one indictment.” After hearing arguments from the State and defense counsel, the trial court found there was sufficient evidence “of each and every element of each and every crime[,]” such that both charges of Assault by Strangulation should be submitted to the jury.

Although the issue was raised by the trial court—rather than defense counsel—it was ultimately addressed by both the State and defense counsel during arguments on Defendant’s Motion to Dismiss and treated as a motion to dismiss one of the charges of Assault by Strangulation. Moreover, the State has not argued the issue is not preserved for our review. Thus, we will address Defendant’s arguments as to the sufficiency of the evidence for the charges of Assault by Strangulation on appeal. *Cf. Golder*, 374 N.C. at 246, 839 S.E.2d at 788 (“[U]nder Rule 10(a)(3) and our case law, defendant’s simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review.”).

[3] “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “Upon [a] defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each

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essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

"[A]ny person who assaults another person and inflicts physical injury by strangulation is guilty of" assault by strangulation. N.C. Gen. Stat. § 14-32.4(b) (2023). Thus, one of the offense's essential elements is an assault. *Id.* Our Supreme Court has explained, in cases of assault, not every overt act will count as a separate offense; rather, this Court "must look beyond the number of physical contacts with the victim to determine whether more than one assault has occurred such that the State can appropriately charge a defendant with multiple assaults." *State v. Dew*, 379 N.C. 64, 70-71, 864 S.E.2d 268, 274 (2021). In *Dew*, our Supreme Court held "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." *Id.* at 72, 864 S.E.2d at 275. A distinct interruption "may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.*

The victim in *Dew* described a "continuous, nonstop beating" where the defendant "hit her 'over and over,'" which took place in a trailer home while they were away visiting family. *Id.* at 65, 864 S.E.2d at 270. The victim testified, after that assault, she cleaned up the trailer, packed their bags, and got in a car with the defendant to drive home. *Id.* at 66, 864 S.E.2d at 271. The defendant beat the victim again during the "entire

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car ride” home. *Id.* The defendant was charged with five discrete assault charges and convicted of three. *Id.* at 69, 864 S.E.2d at 273. On appeal, the defendant argued there was insufficient evidence to support all but one charge of assault. *Id.* at 68, 864 S.E.2d at 272. Our Supreme Court held there was sufficient evidence to support two of the assault charges—one assault in the trailer and one assault in the car. *Id.* at 73-74, 864 S.E.2d at 276. The Court explained: “The process of cleaning up and packing up was an intervening event interrupting the momentum of the attack. In addition, the beating in the trailer was distinct in time and location from the beating in the car.” *Id.* at 74. In concluding there was insufficient evidence to support the third assault charge, which stemmed from the attack in the trailer, the Court noted “different injuries or different methods of attack standing alone are insufficient evidence of a distinct interruption” and “all of the evidence” including the victim’s testimony, “indicated that it was an ongoing, continuous attack.” *Id.*

The Supreme Court revisited this principle in *State v. Robinson*, 381 N.C. 207, 872 S.E.2d 28 (2022). In concluding there was insufficient evidence of a distinct interruption to support multiple charges of assault, the Court observed the evidence presented “a confined and continuous attack in which defendant choked and punched [the victim] in rapid succession and without pause or interruption.” *Id.* at 219, 872 S.E.2d at 37. However, the Court acknowledged “one can *imagine* a distinct interruption being described here with additional facts.” *Id.* (emphasis in original). “For instance, if the facts indicated that the attack began in the bathroom but then moved to the bedroom, such a change in location may constitute a distinct interruption.” *Id.* Likewise, evidence of a “discernable sequence of events” could show a distinct interruption in an attack. *Id.*

Here, the evidence “as it was presented” provides sufficient evidence from which the jury could have found a distinct interruption. *See id.* Unlike in *Dew* and *Robinson*, K.S. testified to a discernable sequence of events, rather than a “confined and continuous attack[.]” *See id.* At trial, K.S. testified Defendant first choked her from behind with his hands. She then described fighting Defendant, turning her body to face towards him, moving across the kitchen “from the stove” to “in front of the refrigerator.” K.S. explained Defendant then hit her multiple times with the gun before she fell to the floor; next, she was able to throw the gun across the room, and Defendant strangled her again, now using his arm around her throat. This testimony tends to show not only a discernable sequence of events, but also evidence of a change in location, from the across the kitchen and from standing to lying on the floor—in

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addition to the different methods of attack, i.e., Defendant's use of his hands to strangle K.S. versus his arm.

Thus, the State's evidence was more than "different injuries or different methods of attack standing alone[.]" *Dew*, 379 N.C. at 74, 864 S.E.2d at 276. Therefore, viewed in the light most favorable to the State, there was sufficient evidence from which the jury could find a distinct interruption between Defendant's strangulation of K.S. with his hands and his strangulation of K.S. with his arm. Consequently, the trial court properly denied Defendant's Motion to Dismiss.

III. Physical Injuries

[4] Defendant contends the trial court plainly erred by "failing to distinguish the injuries caused" by each charge of Assault by Strangulation. Specifically, Defendant argues neither the indictments, jury instructions, nor jury verdict sheets "specified what injury was associated with each of" the two charges of Assault by Strangulation.

At trial, Defendant did not object to the trial court's jury instructions. Thus, he is limited to arguing plain error. N.C. R. App. P. 10(a)(4) (2024) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."); *see also State v. Bowman*, 292 N.C. App. 290, 898 S.E.2d 27 (2024) (reviewing for plain error).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 224 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's findings that the defendant was guilty.'" *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). In other words, plain error requires a defendant to meet a three-factor test:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

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State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citations and quotation marks omitted).

In addition to an assault, Assault by Strangulation requires the infliction of a “physical injury.” See N.C. Gen. Stat. § 14-32.4(b) (2023). Defendant argues because “none of the injuries were tied specifically to either strangulation,” his “right to a unanimous verdict was jeopardized[.]” In so arguing, Defendant relies on *Bowman* and *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280 (2005).

It is worth noting this Court’s decision in *Bates*, cited by Defendant, was remanded by our Supreme Court for reconsideration in light of *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). See *State v. Bates*, 360 N.C. 537, 634 S.E.2d 218 (2006). On remand—contrary to its original decision—this Court held the defendant’s right to a unanimous verdict was *not* violated. See *State v. Bates*, 179 N.C. App. 628, 634, 634 S.E.2d 919, 923 (2006), *disc. rev. denied*, 361 N.C. 696, 653 S.E.2d 2 (2007). In so holding, the Court considered four factors: “(1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets.” *Id.* at 633, 634 S.E.2d at 922.

Concerning the evidence and indictments, we looked to determine whether “it is possible” to match guilty verdicts with specific incidents. Concerning the jury instructions, we looked to whether the “instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge.” And concerning the verdict sheets, we looked to whether “the presentation of the charges on the verdict sheets was adequate for the jury to distinguish the charges based on the evidence presented at trial.”

Bowman, 292 N.C. App. at 294, 898 S.E.2d at 31 (internal citations omitted) (quoting *Bates*, 179 N.C. App. at 633-34, 634 S.E.2d at 922-23).

As to the evidence and indictments, the Court observed the defendant was charged with eleven counts of first-degree sexual offense, but evidence was presented of “only six to ten incidents.” *Bates*, 179 N.C. App. at 633, 634 S.E.2d at 922 (noting the Courts in *Lawrence* and *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 34 (2004) “found no unanimity problem” where the number of counts equaled the number of incidents presented as evidence). Nonetheless, it was not “impossible to match the jury verdict to the evidence.” *Id.* As to the jury instructions, the trial court instructed the jury separately as to each count and instructed the jurors they must

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reach a unanimous verdict. *Id.* Lastly, as to the verdict sheets, although the case numbers were not provided on the sheets, each charge was listed separately with a notation of the felony charged, had “date ranges for the different counts to differentiate the charges for the jury[,]” and some of the counts had descriptors next to the charges, “reducing the risk that the jurors considered different incidents in reaching their verdict and increasing the likelihood of unanimity.” *Id.* at 634, 634 S.E.2d at 922-23. Thus, the Court concluded “it [was] possible to match the jury’s verdict of guilty with specific incidents presented in evidence and in the trial court’s instructions.” *Id.* at 634, 634 S.E.2d at 923.

More recently, in *Bowman*, this Court considered these factors in concluding the trial court plainly erred in instructing the jury only once where the defendant was charged with two counts of first-degree sexual offense. 292 N.C. App. at 294, 898 S.E.2d at 31. While the trial court “advised the jury that its verdict must be unanimous as to each charge,” the Court was particularly concerned the verdict sheet “did not specify which sexual act was to be considered for each charge.” *Id.* Thus, it was “impossible to know if the jury convicted Defendant of the *particular* offense[s] charged in the warrant or bill of indictment.” *Id.* at 295, 898 S.E.2d at 32 (emphasis and alteration in original) (citation and quotation marks omitted). Consequently, the trial court’s failure to “differentiate counts by the type of alleged sexual act” jeopardized the defendant’s right to a unanimous verdict. *Id.*

Here, as in *Bates*, the number of counts equals the number of incidents presented in evidence. Likewise, there were two indictments for Assault by Strangulation. *See Bates*, 179 N.C. App. at 633, 634 S.E.2d at 922 (“Where the number of incidents equal the number of indictments, the risk of a non-unanimous verdict is substantially lower.”). The trial court instructed the jury twice—once for each charge of Assault by Strangulation. And like in *Bates*, the trial court instructed the jurors they could not reach a verdict by majority vote. Lastly, the verdict sheets presented each charge separately and identified the felony charged by name and case number. Unlike in *Bowman*, the sheets further differentiated each offense by including the words “alleged by hands” or “alleged by arm” in bold font.

Moreover, the State published to the jury a series of photographs taken of K.S.’s injuries. *See State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008) (photographs showing bruises on victim’s neck were sufficient evidence of physical injury for assault by strangulation). K.S. identified swelling, bruising, and marks on her throat that were not there prior to Defendant’s assault. She also used her hands to illustrate

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to the jury where Defendant had placed his hands on her neck. Doctor Jan Feltowicz, who treated K.S. while she was at the hospital, testified K.S. had “abrasions” on her neck and “spasm in the upper neck, which is consistent with . . . being assaulted and strangled.” Thus, we cannot agree with Defendant that “there was ambiguity in what evidence the jury should consider regarding the physical injury caused [by] each instance of alleged strangulation[.]” Therefore, the trial court did not err by not distinguishing the physical injuries for the jury.

IV. Closing Arguments

[5] Defendant contends the prosecutor’s remarks regarding alcoholics in her closing argument constituted gross impropriety, making it an error for the trial court to fail to intervene *ex mero motu*. Because defense counsel did not object to the prosecutor’s statements at trial, our review is conducted under a heightened standard:

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.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). In conducting this review, we must analyze “(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017).

“Grossly improper” is an “exceedingly high bar.” *Reber*, 386 N.C. at 163, 900 S.E.2d at 789. “[I]t is not enough that the prosecutors’ remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) (citation and quotation marks omitted). “In order to determine whether the prosecutor’s remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual

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circumstances to which they refer.” *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citation omitted).

Further, even when an argument is deemed so improper, the defendant has the burden of demonstrating prejudice. *See Huey*, 370 N.C. at 186, 804 S.E.2d at 474. Additionally, when the Supreme Court of North Carolina “has found the existence of overwhelming evidence against a defendant, [it has] not found statements that are improper to amount to prejudice and reversible error.” *Id.* at 181, 804 S.E.2d at 470.

“During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.” N.C. Gen. Stat. § 15A-1230(a) (2023). Here, the prosecutor made several statements about alcoholism in her closing argument, including that alcoholics can “still function” and “know right from wrong” with a high blood alcohol level. Defendant argues the prosecutor, in making these statements, impermissibly argued facts not in evidence and inserted her unsupported opinion about how alcohol affected—or did not affect—Defendant’s behavior. Presuming, without deciding, the prosecutor’s statements and argument thereon was improper, Defendant cannot show the argument was so grossly improper, in light of the full context and the evidence presented against Defendant, that his “right to a fair trial was prejudiced by the trial court’s failure to intervene.” *Huey*, 370 N.C. at 180, 804 S.E.2d at 469-70 (citing *Jones*, 355 N.C. at 133, 558 S.E.2d at 107).

In *State v. Cole*, 343 N.C. 399, 471 S.E.2d 362 (1996), the defendant was convicted of first-degree murder and involuntary manslaughter. Testimony given at trial indicated the defendant had been drinking at the time of the killings. *Id.* at 419, 471 S.E.2d at 372. However, the defendant testified he did not know how much he had to drink on the night in question and no evidence was admitted as to his blood alcohol level. *Id.* at 418-19, 471 S.E.2d at 371-72. During closing arguments, the prosecutor made speculative statements about the defendant’s level of intoxication:

Their last straw is this alcohol thing. That’s it for them. They have conceded and admitted everything else in the face of overwhelming evidence. That’s where they are. That’s all they’ve got left. Don’t let them fool you. Had he been drinking? Clearly from the testimony he had. Clearly had. Moderate odor of alcohol, officer said, strong odor of

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alcohol. Shouldn't he have been arrested for driving while impaired? Maybe. He'd blown an eight or nine? Maybe. He consumed some alcohol. The only way we know that is we've heard people talk about odors and we've heard him say how much he consumed.

Id. at 418, 471 S.E.2d at 371. Our Supreme Court agreed with the defendant the argument was improper because it was speculative, but nonetheless held it was “not so grossly improper that the trial court abused its discretion by not intervening *ex mero motu*.” *Id.* at 419, 471 S.E.2d at 372.

Here, as in *Cole*, the prosecutor's statements were, at most, inappropriately speculative. Moreover, for the reasons explained regarding Defendant's request for a voluntary intoxication instruction, *supra*, there was not substantial evidence Defendant could not control himself or was so intoxicated he could not form the specific intent required to convict him. Indeed, the prosecutor's statements, viewed in full context, were used to highlight a lack of “typos” in text messages Defendant sent after the incident in question—rather than to indicate Defendant was a functioning alcoholic. Thus, we cannot agree the prosecutor's comments were prejudicial. Therefore, Defendant has not established the State's closing argument was so grossly improper the trial court was required to intervene *ex mero motu*. Consequently, the trial court did not plainly err by not intervening in the State's closing argument.

V. Sentencing

[6] Lastly, Defendant argues the trial court erred by imposing a \$25,000 fine on him at sentencing. We review sentencing decisions for abuse of discretion. *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962) (“A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.”). To show an abuse of discretion, the defendant “must demonstrate that the trial court's action was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Cannon*, 341 N.C. 79, 87, 459 S.E.2d 238, 243 (1995) (citation and quotation marks omitted).

Under N.C. Gen. Stat. § 15A-1361, “[a] person who has been convicted of a criminal offense may be ordered to pay a fine as provided by law.” As to felony sentencing, “the amount of the fine is in the discretion of the court.” *Id.* § 15A-1340.17(b) (2023). “In exercising its discretion, the trial court must take into account the nature of the crime, the

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level of the offense, and the aggravating and mitigating factors, just as it would in setting the length of imprisonment for a defendant.” *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 557, 553 S.E.2d 217, 218 (2001), *disc. rev. denied*, 355 N.C. 221, 560 S.E.2d 359 (2002).

Defendant argues he has no ability to pay the fine and will likely never be able to pay the fine. He argues the trial court did not take his financial situation into consideration when it imposed the fine, as required by statute. Defendant cites *State v. Mucci*, 163 N.C. App. 615, 594 S.E.2d 411 (2004) in support of his argument. There, the Court remanded the case for a new sentencing hearing in part because the trial court did not consider the statutory factors outlined in N.C. Gen. Stat. § 15A-1340.36. *Id.* at 627-28, 594 S.E.2d at 419-20. Section 15A-1340.36, however, is concerned with payment of restitution. Here, by contrast, Defendant was ordered to pay a fine—and the statutory obligations of Section 15A-1340.36 do not apply to the trial court’s assessment of a fine. *See* N.C. Gen. Stat. § 15A-1340.36 (2023).

Defendant also argues the trial court’s assessment of the fine was unreasonable under N.C. Gen. Stat. § 15A-1362(a), which provides: “In determining the method of payment of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant.” This argument was expressly rejected by this Court in *State v. Zubiena*:

We are also unpersuaded by Defendant’s argument that the trial court erred by failing to consider her resources when it imposed the fine. The statute Defendant cites for this proposition, N.C. Gen. Stat. § 15A-1362, states that “[i]n determining the *method of payment* of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant.” N.C. Gen. Stat. § 15A-1362(a) (2015) (emphasis added). As its plain language indicates, this statute relates to the method of payment of the fine rather than its amount.

251 N.C. App. 477, 489, 796 S.E.2d 40, 49 (2016). It is the same here. We are unable to identify any basis for determining the trial court’s imposition of the \$25,000 fine against Defendant constituted an abuse of discretion or was otherwise unlawful—particularly in light of the nature of the crimes of which Defendant was convicted. *See Sanford Video & News, Inc.*, 146 N.C. App. at 557, 553 S.E.2d at 218. Thus, Defendant has not shown the trial court abused its discretion in assessing a \$25,000 fine against him. Therefore, the trial court did not err in ordering Defendant to pay a \$25,000 fine.

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Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgments of the trial court.

NO ERROR.

Judge GORE concurs.

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

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

I concur in full with the majority opinion with the sole exception of its conclusion that there was substantial evidence of two separate assaults to survive defendant's motion to dismiss one of the two assault by strangulation charges.

This case requires us to determine whether the trial court properly determined there was substantial evidence of a distinct interruption in the overall assault to support two separate assault by strangulation charges. Prior to a recent decision from our Supreme Court in *State v. Dew*, 379 N.C. 64 (2021), this Court issued conflicting opinions on how to determine whether a distinct interruption occurred. Under one analytical framework, this Court looked for "evidence of a clear and significant break or demarcation within the assaultive episode." *State v. Robinson*, 381 N.C. 207, 217 (2022) (citing *State v. McPhaul*, 256 N.C. App. 303, 317–18 (2017)). Under the other framework, however, this Court used the factors set out in *State v. Rambert*, 341 N.C. 173 (1995), to determine whether (1) the defendant employed a separate thought process before each act, (2) each act was distinct in time, and (3) each act resulted in a discrete, identifiable injury. *E.g.*, *State v. Dew*, 270 N.C. App. 458, 462–63 (2020).

Here, defendant choked the victim with his hands until she broke free. Subsequently, the victim "went from the stove across the kitchen," ending up by the refrigerator. Defendant then hit her on the head with a gun, causing her to drop to the floor, where defendant continued attacking the victim. Defendant choked her again with one hand while he pressed the gun to her head with the other. The victim then grabbed the gun and tossed it away. Defendant then choked her for a third time: he

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used his bodyweight to press his arm into her throat until she became unconscious. When she regained consciousness, defendant “helped [her] off the floor, and he walked [her] over to the chair at his computer desk and sat [her] down.”

The State argues that there was a distinct interruption to support separate assault by strangulation charges because there was enough time for defendant for “form separate thought processes. There was a break in time, and a separate assault with the firearm separating” the different strangulations. Indeed, under the *Rambert* factors, this is enough to support a distinct interruption. Defendant first decided to strangle the victim; then he decided to hit the victim over the head with the gun after she broke free from the first chokehold; and once the gun was out of his control, he decided to choke the victim again with his arm.

However, our Supreme Court did away with the *Rambert* framework for determining whether there was a distinct interruption between assaults in *State v. Dew*. There, the Court held that “the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults.” 379 N.C. at 72. The Court elaborated that appropriate factors to consider are “an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.” *Id.* Additionally, “different injuries or different methods of attack standing alone are insufficient evidence of a distinct interruption.” *Id.* at 74.

This rule was carried forward in a more recent Supreme Court case, where the Court emphasized that when the facts show “a confined and continuous attack” of hitting and choking, there must be a “clear break delineating the end of one assault and the beginning of another.” *Robinson*, 381 N.C. at 219.

In *Dew*, for example, there was single assault when the defendant hit the victim in a “continuous, non-stop beating for at least two hours” at their shared trailer, where the defendant “hit her upside the head and ear, on each side, kicked her in the chest, hit her nose and her ear puncher her in the nose, headbutted her twice, and strangled her until vomiting.” 379 N.C. at 65, 73. The victim then cleaned up their trailer and put luggage in their car, while the defendant put his daughter in car seat in the backseat of the car. *Id.* at 73–74. Once they were in the car, the beating began again for another two hours. *Id.* at 74. The Court held that this was “substantial evidence of a distinct interruption between

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the occurrences in the trailer and those in the car.” *Id.* However, it held that the assault in the trailer was one continuous assault, and the assault in the car was a second continuous assault. *Id.*

In *Robinson*, the defendant assaulted the victim while holding her captive in their shared home for three days. 381 N.C. at 219. However, the Court concluded that this was one continuous assault with no clear break in the violence. *Id.* The defendant “grabbed the victim around the neck, punched her several times in the face and chest, and strangled her while holding her down on a bed.” *Id.* at 208. Had there been something like a change in location, or multiple attacks over the course of the three-day captivity, there would have been a distinct interruption to support multiple assault convictions. *Id.* at 219. But because no such evidence existed, the Court held that this was one continuous assault. *Id.*

Since *Dew* and *Robinson*, this Court has held there was substantial evidence of a distinct interruption to support multiple assault charges where there was a five-hour long break between the assaults and the assaults occurred in different parts of the house. *State v. Martin*, 292 N.C. App. 505, 508–09 (2024). In *Martin*, the defendant choked the victim “at least twice” in a single assaultive episode where “he got on top of her, wrapped his hand around her neck, and choked her.” *Id.* at 508. The victim tried to fight back, and subsequently the defendant choked her until she became unconscious. *Id.* at 509. However, the defendant was only charged with a single count of assault by strangulation. *Id.* at 507.

In another case, we held there was substantial evidence of a distinct interruption where the defendant choked the victim, left the room and attacked another person, then quickly returned to choke the first victim again. *State v. Tucker*, 291 N.C. App. 379, 389–90 (2023).

There is no such interruption in the present case. The three strangulations happened in short succession, in the same room, and while defendant was exclusively focused on attacking the victim. Though defendant used different methods of attack and had time to form a separate thought process before choking the victim again, there is no clear break in the action to definitively show where one assault ended and the other began. Even in the light most favorable to the State, there is not substantial evidence of a distinct interruption to support two separate assault by strangulation charges.

I agree with the majority that the victim’s testimony showed a discernable sequence of events; however, that is not the test. Cases like *Dew* and *Martin* illustrate that there can be a discernable sequence of events—and even multiple strangulations—within a single assault. And

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so too here. While there is evidence of defendant's distinct actions within the assault, the only apparent distinct interruption occurred when the victim fell unconscious after defendant choked her for the third time. Therefore, I would hold that the trial court erred in denying defendant's motion to dismiss one of the two assault by strangulation charges.

STATE OF NORTH CAROLINA
v.
JOSALYN RAHSHELL UPCHURCH

No. COA24-460

Filed 2 July 2025

1. Criminal Law—motion to sever—co-defendants in first-degree murder and intentional child abuse trial—no error or abuse of discretion

The trial court did not err in denying defendant's motion to sever her trial on charges of first-degree murder and intentional child abuse, arising from the death of her one-year-old son, from that of her co-defendant (the other person who was present when the abuse was inflicted) where: (1) "finger pointing" at trial between the co-defendants about who inflicted the abuse did not deprive defendant of a fair trial; and (2) the cross-examinations by the co-defendants did not illustrate a conflict between their defenses, much less a high degree of conflict. Further, remarks made by the trial court—about previous denials by other judges of defendant's earlier motions to sever—showed that the trial court understood it had the discretion to revisit those decisions, although it ultimately also elected to deny defendant's motion. Defendant's related arguments that the trial court erred in precluding evidence she sought to introduce (out of concern for protecting the co-defendant's rights) lacked merit.

2. Evidence—character evidence—door opened by defendant's cross-examination—properly admitted

In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant's one-year-old son), the trial court properly admitted character evidence (that defendant cheated on the child's father while pregnant with the child) where defendant "opened the door" to such testimony

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by asking the father, on cross-examination, whether defendant had “been a good woman” to the father during their relationship.

3. Evidence—hearsay—pre-trial statements—corroborative of trial testimony—properly admitted

In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant’s one-year-old son), the trial court properly admitted pre-trial statements by the child’s father—that he did not believe defendant’s version of the events which resulted in their child’s death—where the challenged statements corroborated, and tended to add weight and credibility to, the father’s trial testimony.

Appeal by Defendant from judgments entered 3 November 2022 by Judge Keith O. Gregory in Chatham County Superior Court. Heard in the Court of Appeals 9 April 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.

Joseph P. Lattimore for Defendant-Appellant.

COLLINS, Judge.

Defendant Josalyn Rahshell Upchurch appeals from judgments entered upon a jury’s guilty verdicts of first-degree murder under the felony murder rule and intentional child abuse inflicting serious bodily injury. Defendant asserts that the trial court erred by denying her motions to sever her trial from her co-defendant’s trial and by admitting certain evidence. We find no error.

I. Procedural History

Defendant and her co-defendant, Ricky Adams, were each indicted on one count of first-degree murder and one count of intentional child abuse inflicting serious bodily injury stemming from the death of Defendant’s one-year-old child, De’Andre. The State’s motion to join the cases for trial was granted on 28 October 2019, over Defendant’s objection, and the matter was set for trial on 12 July 2021. Defendant moved to sever her trial from Adams’ trial on 28 June 2021. Prior to hearing Defendant’s motion to sever, the trial court continued the trial due to Covid.

Defendant’s motion to sever was heard on 30 August 2021. At the conclusion of the hearing, the State agreed to conduct a review pursuant

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to *Bruton v. United States*, 391 U.S. 123 (1968), for out-of-court statements made by either Defendant or Adams that directly referenced the guilt of the other party for the crimes charged. The State agreed that such statements would not be admitted during the State's case in chief absent consent of the party against whom it would be admitted. The trial court denied Defendant's motion to sever by order entered 12 October 2021.

Defendant renewed her motion to sever on 31 May 2022. The motion was denied. On 23 September 2022, in response to Defendant's motion to Prohibit Co-Defendant Ricky Adams' Extrajudicial Incriminating Statements,¹ the trial court ordered "that statements made by either defendant that '*I didn't do it*' or similar language, as well as statements that '*it must have been him/her*' are subject to *Bruton* and shall be redacted or otherwise not admissible."

Defendant renewed her motion to sever prior to trial on 26 September 2022. The motion was denied. Defendant and Adams were jointly tried. At the conclusion of all of the evidence and prior to final arguments, Defendant renewed her motion to sever. The motion was denied. After closing arguments were given and the jury charged, Defendant moved to sever and for a mistrial. The motion was denied.

The jury convicted Defendant of first-degree murder based on the felony murder rule and intentional child abuse inflicting serious bodily injury. The jury acquitted Adams of both charges. Defendant timely appealed.

II. Factual Background

The evidence at the trial tended to show the following: Defendant gave birth to De'Andre in April 2016. Defendant, De'Andre, and De'Andre's father, Darius Cotton, resided at an apartment together until De'Andre was around 2-3 months old. Defendant had custody of De'Andre, and Cotton had him on alternating weekends.

On Sunday, 16 July 2017, Defendant had De'Andre and called Chatham County 911 at 1:48 p.m. for assistance. Officer Samuel Bradburn with the Pittsboro Police Department and John Burkett and Kenneth Perry with the Pittsboro Fire Department responded. When they arrived at the scene at 1:55 p.m., they found De'Andre lying on the floor while Defendant gave him emergency breaths. It was immediately obvious to the first responders that De'Andre was dead because he had no pulse, was cold to the touch, and his joints, wrists, and elbows were seized up.

1. This motion does not appear in the record but is referenced in the order ruling on it.

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When Burkett placed an AED device on De'Andre to shock his heart back into normal rhythm, it indicated "no shock was needed" because no pulse was detected. An EKG revealed no heart activity. As a result, the first responders did not perform CPR on De'Andre.

Defendant was not crying and was described by Burkett as not very emotional. Adams was sitting on the couch watching television. *Burkett* described Adams as acting "way more interested in what was going on on the TV than what was going on in the room." Defendant told the first responders that she had checked on De'Andre "around 12:00," and "he was unresponsive then."

A. Alene Cameron's Testimony

Alene Cameron, a Paramedic Supervisor with FirstHealth with training and certification in cardiac life support, also responded to the scene because the 911 call was a cardiac arrest call. When she arrived, De'Andre had no pulse, was cool to the touch, and had a rigid jaw. She noticed that De'Andre was not "as flaccid as you would expect to find" a child who had gone into "a witnessed [cardiac] arrest." According to Cameron, this aligned with delayed reporting. Cameron told Defendant De'Andre was dead. Defendant leaned into Adams; she said she "felt numb" and "really didn't have any more questions."

Defendant told Cameron that she tried to give De'Andre some milk around 10:00 a.m. and then checked on him at 11:00 a.m. and 12:00 p.m. that day, but he did not want anything or was sleeping. Defendant then checked on him again, and that is when she called 911. Cameron noticed De'Andre had some bruising along his abdomen, which did not appear to be a result of CPR, and a little mark above his right eye.

B. Nick Victorino's Testimony

Nick Victorino, the county medical examiner, examined De'Andre's body at the scene. Victorino observed bruises on De'Andre's face and chest/abdomen, a swollen right eye, and discoloration behind the right ear. De'Andre was cold to the touch and undergoing rigor mortis. According to Defendant, De'Andre had been healthy and had nothing wrong with him. Defendant said she put De'Andre to bed around 10:30 p.m. the night before; when she went into his room to check on him around 12:00 a.m., he was sleeping. Defendant heard De'Andre on the baby monitor moving around at 2:00 a.m., but he went back to sleep.

Defendant went into his room at 10:00 a.m. to try to feed him, but he did not want anything and went back to sleep. Defendant checked on De'Andre at 12:00 p.m.; she found him sleeping on his back and

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attempted to feed him again. At 1:40 p.m., Defendant went in and found De'Andre cold and unresponsive. Defendant stated De'Andre's diaper had been changed the evening before. Victorino noted De'Andre's diaper was lightly soiled with no odor.

Adams told Victorino that De'Andre had been put to bed at 10:30 p.m. or 11:00 p.m. Defendant woke him up yelling that she needed help because De'Andre was ill.

C. Officer Bradburn's Testimony

Defendant told Officer Bradburn that she put De'Andre to bed at 10:30 p.m., checked on him around midnight, and woke up around 10:00 a.m. and tried to feed De'Andre, but he would not eat. She put De'Andre back to bed, checked on him around 12:00 p.m. and then again right before she called 911. Defendant stated she found De'Andre in the bed and put him on the living room floor to attempt CPR. Officer Bradburn noticed Defendant was talking calmly and clearly, but seemed slightly flustered.

D. Gene Harris's Testimony

EMT Gene Harris, Jr., overheard Defendant give a timeline of the events leading up to her calling 911. She said she checked on De'Andre at 10:00 a.m. to attempt to feed him, but he did not want food. She checked on him again at noon. Defendant stated De'Andre was "cold as bricks" when she checked on him at 1:00 p.m. According to Harris, Defendant was calm, was not crying, and seemed traumatized, in shock, or indifferent.

E. Darius Cotton's Testimony

Defendant called Cotton, and his wife, Melissa, at around 1:55 p.m. on 16 July 2017 to tell them they needed to get to her house because De'Andre was cold and unresponsive. According to Cotton, Defendant sounded worried and frantic. Defendant said De'Andre wasn't sick. Defendant told them she laid De'Andre down for a nap and he was "cold as ice" when she went to check on him.

When Cotton and Melissa had De'Andre the weekend before, he was healthy and did not have any injuries. De'Andre usually woke up at 4:30 a.m. or 5:00 a.m. to play or for a bottle, went back to sleep around 7:30 a.m. or 8:00 a.m., and then woke up no later than 9:30 a.m. De'Andre never slept until 11:00 a.m. or 1:00 p.m.

On 31 May 2017, about six weeks before De'Andre's death, Defendant posted on her Facebook page, "If this son of mines headbutt me in my breasts 1 more time imma throw him into the wall! What in the world is wrong with him[.]"

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F. Detective Delanie Womack's Testimony

Detective Delanie Womack of the Pittsboro Police Department was the lead detective assigned to the investigation into De'Andre's death. She interviewed Defendant on 18 July 2017, 26 July 2017, and 15 March 2018. Defendant was also interviewed by the SBI on 1 August 2017. Defendant's story of the events leading up to De'Andre's death changed in each interview.

Detective Womack noted significant changes in Defendant's statement about who laid De'Andre down on 15 July 2017. Initially, Defendant wrote in her statement and stated in her first interview that she put De'Andre to bed that night. In her last interview, Defendant for the first time stated that she was sure Adams put De'Andre to bed that night.

On 26 July 2017, Defendant told Detective Womack that she heard a noise on the monitor at 12:00 a.m. and went to check on De'Andre; he was fine. Around 1:00 a.m. or 1:30 a.m., she checked on De'Andre and changed his diaper. Defendant later told Detective Womack in the second interview that she got up around 12:00 a.m., checked on De'Andre because she heard a noise on the monitor and changed his diaper at the same time, rather than doing it separately at 1:00 a.m.

Adams told Detective Womack that he left Defendant and De'Andre at the apartment around 6:30 p.m. to go to Durham and returned around 9:00 p.m. Adams changed De'Andre's diaper, and Defendant later put De'Andre to bed. Adams had seen Defendant hit De'Andre on the leg or hand, but he did not see anything that night. Defendant often stated De'Andre was clingy and spoiled and that people needed to stop holding him.

G. Dr. Susan Venuti's Testimony

Dr. Susan Venuti, associate chief medical examiner with the Office of the Chief Medical Examiner, testified as an expert in forensic pathology. Dr. Venuti performed De'Andre's autopsy and observed multiple injuries: three rib fractures with hemorrhaging, six distinct bruises to the stomach/abdomen area, a large liver laceration, abdominal cavity bleeding, two bruises on the top of his head corresponding to the hemorrhaging in the periosteum, hemorrhaging in the adrenal glands, bruising on the right side of his face from his chin to just above his right eye, contusions like a black eye under his right eye with a slight amount of edema, an abrasion on the lateral right eyebrow, bruising behind the ear, cheek bruising, bruising along and below the costal margin where the ribs end on the right side of the body, bruising in the middle of the chest nipples (below the xiphoid or below the rib in the middle), bruising in the abdomen, a pressure mark on the right side of the body, and

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petechiae in lower eyelid of the right eye. When De'Andre was found, his jaw was locked and his arms and legs were stiffening up, indicating rigor mortis, which normally starts within a couple of hours of death.

Dr. Venuti opined that De'Andre's cause of death was blunt force trauma to the chest and abdomen, and the manner of death was homicide. Dr. Venuti opined that based on De'Andre's chest and abdomen injuries, his death may have been caused by one or multiple recent impacts in the abdomen. Dr. Venuti stated that the liver laceration injury "would require a pretty significant amount of force." Dr. Venuti equated the amount of force needed to cause De'Andre's liver laceration to "injuries that we typically would see in motor vehicle crashes where there is a large impact stopping at a high rate of speed." Dr. Venuti also equated the significant amount of force needed to cause a liver laceration injury like De'Andre's to a heavy and large older-generation television falling on top of a child. Dr. Venuti opined that the presence of rigor mortis in the jaw and extremities indicate that the child was deceased when emergency personnel arrived.

III. Discussion**A. Joint Trial**

[1] Defendant first argues that the trial court erred by denying her motions to sever her trial from Adams' trial.

North Carolina "has a strong policy of favoring consolidated trials of defendants accused of collective criminal behavior." *State v. McKeithan*, 140 N.C. App. 422, 430 (2000) (citation omitted). N.C. Gen. Stat. § 15A-926(b)(2)(a) "authorizes joinder of defendants where the state seeks to hold each defendant accountable for the same crimes[.]" *State v. Rasor*, 319 N.C. 577, 581 (1987). "The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge." *State v. Pickens*, 335 N.C. 717, 724 (1994). "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. 573, 586 (1979) (citations omitted). Nevertheless, pursuant to N.C. Gen. Stat. § 15A-927(c)(2), "the trial court must deny a joinder for trial or grant a severance of defendants whenever it is necessary to promote a fair determination of the guilt or innocence of one or more defendants." *Pickens*, 335 N.C. at 724.

"The existence of antagonistic defenses will not, standing alone, warrant a severance." *Id.* at 725 (citation omitted). "On the other hand, the fact that the evidence may be substantial against a defendant will not preclude severance where joinder denies a defendant a fair trial."

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Id. (citations omitted). “The test is whether the conflict in defendants’ respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.” *State v. Lowery*, 318 N.C. 54, 59 (1986) (quoting *Nelson*, 298 N.C. at 587).

1. Antagonistic Defenses

Defendant argues that “[t]he defenses in this case were diametrically opposed to one another,” as illustrated by the defendants’ respective closing arguments. Defendant’s counsel told the jury, “If you believe that there has been proof beyond a reasonable doubt of who committed a crime, that somebody is Ricky Adams” Adams’ counsel, on the other hand, told the jury that Adams was in Durham when Defendant inflicted De’Andre’s injuries. While each defendant sought to implicate the other, such a potential for “finger pointing” does not necessitate separate trials. *See, e.g., State v. Harrington*, 171 N.C. App. 17, 22-23 (2005) (holding the trial court did not err in joining defendants’ cases for trial even where “each of their defense counsel had to deflect blame from his respective client by casting blame on the other” while examining witnesses); *Lowery*, 318 N.C. at 60-61 (rejecting misjoinder claim even though both defendants denied involvement in the crime and the strategy employed by the attorney for one defendant was to suggest the other defendant killed the victim); *State v. Cook*, 48 N.C. App. 685, 687 (1980) (holding joinder was proper in homicide trial even where “only one defendant logically could have fired the fatal shots”). Here, even with a conflict in defendants’ respective positions, considering all the evidence at trial, Defendant has failed to show she was deprived of a fair trial.

2. Conflicting evidence

Defendant also argues that “[i]n terms of the evidence at trial, there was a high degree of conflict between the defenses.” Defendant points to the cross-examination of Burkett as an example of this conflict. There, Defendant elicited testimony that when Burkett arrived on the scene, Adams did not appear engaged in any life-saving activities and was more engaged in the television than what was going on with the child. Adams elicited testimony that when Burkett arrived on the scene, Defendant wasn’t crying or screaming and appeared oddly calm. These cross-examinations do not illustrate conflict between the defenses, much less a high degree of conflict.

3. Discretionary ruling

Defendant next argues that the trial court erred as a matter of law by denying her motion to sever because “[t]he judge’s comments show

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that . . . he did not believe he had the discretion to revisit the earlier decision of another judge made before trial.” Defendant mischaracterizes the trial court’s ruling.

In response to Defendant’s motion to sever made at trial, the trial court ruled as follows:

Mr. Silverman, you -- you mentioned *Melvin*. It’s very interesting. I think that -- I agree that the [c]ourt, with the dynamic of a trial, the -- the judges that ruled beforehand, when they are not boots on the ground during the trial, things happen in the trial that can cause maybe that same judge that ruled then to have a different approach at the time the game is actually going on.

That being said, I didn’t rule before. I was not a part of that. I’m boots on the ground. And even being boots on the ground, I still feel respectfully that even with -- as you said with *Melvin*, the [c]ourt can make -- still -- decisions; but I still stick to that I don’t believe it would be appropriate, based on even the dynamics of this case, for this [c]ourt to step out and say, “Well, I’m going to change a motion to join respectfully.”

In this ruling, the trial court acknowledged that prior judges had denied Defendant’s motion to sever and that he was not involved in those decisions. The trial court also acknowledged that things can happen in a trial after such a ruling that would cause a judge to have a different approach. The trial court then explained that he was presently involved in the case -- “I’m boots on the ground” -- and that, based on “the dynamics of the case,” he was still going to deny the motion to sever. Contrary to Defendant’s argument, nothing in these remarks indicates that the trial court “did not believe he had the discretion to revisit the earlier decision of another judge made before trial.”

4. *Preclusion of evidence*

Defendant next argues that there were several times where Defendant’s evidence was erroneously precluded because of the trial court’s concerns with protecting Adams’ rights.

a. *Adams showed a gun*

Defendant first argues that the trial court erred by excluding certain evidence she sought to elicit on the cross examination of Cotton where Adams objected but the State did not. This is not an accurate reflection of the transcript.

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Defendant attempted to elicit that Adams showed Cotton a .45 caliber handgun just before De'Andre's funeral. Both Adams and the State immediately objected, and the jury was asked to step out of the court room. At that point, the State said, "And, Your Honor, I wasn't clear if the [c]ourt heard that the State also lodged an objection to that." The trial court responded, "Yes." The State then reiterated, "There is a lot going on. I just wanted the record to be clear that the State also objected to elicitation – to the eliciting of the information about the gun." The trial court responded, "All right. Let me – and that record – the record shall reflect that." Adams explained his objection was because of the evidence's potential to "associate him with a violent firearm." The State explained that it did not elicit that information "because with the context, it did not appear to be relevant to any particular material fact."

Defendant's assertion that the State did not object to the testimony is simply not accurate. Furthermore, Defendant's assertion that she "probably could have gotten that in[to evidence]" is unsupported. Defendant makes no argument as to why this evidence was relevant and would have been admissible at trial had Defendant been tried separately. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2021) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *id.* § 8C-1, Rule 402 (2021) ("Evidence which is not relevant is not admissible."). Accordingly, the trial court's exclusion of this evidence was not erroneous, and Defendant's argument thus lacks merit.

b. Defendant's statements

Defendant next argues that, as a result of the trial court's *Bruton* ruling, Defendant was prevented from offering portions of her statements made to Detective Womack.

Detective Womack interviewed Defendant several times between 18 July 2017 and 15 March 2018. At trial, Detective Womack testified to the general contents of those interviews and to a timeline of events she constructed from those interviews. Recordings redacted to comply with the *Bruton* rulings were played for the jury. Defendant contends that she was precluded from introducing the following statements: Detective Womack noted in her report that "[Defendant] then looked at me and put her hand on her chest while stating, 'I don't – I mean, I know I didn't do anything, so I don't know what could have been the cause of that. I don't have any idea.'" Detective Womack also noted, "I then ask[ed] [Defendant] how De'Andre got all the injuries listed; and she stated, 'I

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don't know. I didn't do it.' ” Counsel for Defendant also pointed out that, on multiple other occasions, Defendant told Detective Womack, “I didn't abuse my child” and “I don't put nothing past nobody.”

Defendant has failed to show how these statements were admissible. “ ‘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) (2021). “Hearsay is not admissible except as provided by statute or by these rules.” *Id.* § 8C-1, Rule 802 (2021). Defendant fails to argue why these statements are not hearsay or point to an exception that would allow their admission. Although these statements could potentially have come into evidence to corroborate her in-court testimony, Defendant did not testify at trial and makes no argument that she would have taken the stand had she been tried separately. Accordingly, Defendant has failed to show that she was prevented from offering portions of her statements “as a result of” the trial court's *Bruton* ruling.

5. Summary

Defendant's arguments as to why the trial court erred by denying her motion to sever her trial from Adams' trial lack merit. Defendant has failed to show that the conflict in defendants' respective positions at trial were “of such a nature that, considering all of the other evidence in the case,” Defendant was “denied a fair trial.” *Lowery*, 318 N.C. at 59 (citation omitted). For these reasons, we reject Defendant's argument that the trial court erred by denying her motions to sever.

B. Character Evidence

[2] Defendant next contends that the trial court erred by admitting character evidence that Defendant cheated on Cotton while she was pregnant with De'Andre. Defendant specifically argues that she did not open the door to that evidence.

“Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]” N.C. Gen. Stat. § 8C-1, Rule 404(a) (2021). However, a trial court may admit otherwise inadmissible evidence “if the opposing party opens the door through cross-examination of the witness.” *State v. Thaggard*, 168 N.C. App. 263, 273 (2005) (citation omitted). “ ‘Opening the door’ is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially.” *Id.* (citation omitted).

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“A trial court’s decision to admit or exclude evidence to which a party has opened the door is subject to review on appeal for abuse of discretion.” *State v. McKoy*, 385 N.C. 88, 97 (2023).

Here, during the State’s direct examination of Cotton, the State played a video recording of him being interviewed by a detective. Before it was played, the parties agreed to redact his comment to the investigators that Defendant “had sex in our house . . . in our bed while she was pregnant with De’Andre.”

On cross examination, Defendant asked, “Did you say during the course of that interview that [Defendant] had been a good woman to you?” Cotton responded, “I guess, yes.” Defendant then asked, “And had she been a good woman to you?” Cotton responded, “Yes.” On redirect examination, the State asked, “So what happened in your relationship that caused you to end the relationship, understanding all of that that had gone before?” Cotton responded, “She - - she told me that she had slept with someone else while she was pregnant with De’Andre in our home.”

By asking Cotton, “And had she been a good woman to you?” Defendant “opened the door” to the State’s rebuttal evidence she now challenges. Accordingly, the trial court did not abuse its discretion in overruling Defendant’s objection and admitting the evidence.

C. Hearsay

[3] Defendant next argues that the trial court erred by admitting Cotton’s pre-trial statements that he did not believe Defendant’s version of events. Defendant specifically argues that the statements were inadmissible hearsay. The State, on the other hand, argues that the challenged statements were properly admitted to corroborate Cotton’s trial testimony.

“When preserved by an objection, a trial court’s decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*.” *State v. Johnson*, 209 N.C. App. 682, 692 (2011). 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). Hearsay is not admissible except as provided by statute or by the Rules of Evidence. *Id.* § 8C-1, Rule 802.

“Prior statements admitted for corroborative purposes are not hearsay because they are not offered for the truth of the matter asserted.” *State v. Lindsay*, 292 N.C. App. 641, 650 (2021). “Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.” *Id.* (citations omitted). “To

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be admissible as corroborative evidence, prior consistent statements merely must tend to add weight or credibility to the witness's testimony." *Id.* (quotation marks and citations omitted). "[S]uch corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." *Id.* (citations omitted).

At trial, Cotton testified that he had expressed concerns to law enforcement about information Defendant had told him regarding De'Andre's death. He was concerned that the things Defendant told him "were changing as far as her account of what happened." Cotton testified that Defendant told him over the phone when he was on the way to the apartment that "[s]he had laid him down for a nap. And when she went back to get him up, he was cold and unresponsive." He testified, "'Cold as ice' is her words." Defendant calmly told Cotton's wife that De'Andre was dead. Cotton did not talk to Defendant between the time of De'Andre's death and his funeral when Cotton "was still under the impression that she put him down for a nap and when she went back to check on him or get him up, he was cold and unresponsive."

The video of Cotton's interview with Detective Womack was introduced to corroborate his in-court testimony. As articulated by the State in response to Defendant's objection to the evidence at trial, Defendant's recitation of objected-to statements indicated that "the video and the live testimony of Mr. Darius Cotton were almost perfectly consistent with each other." Moreover, the portions of the objected-to video that were not "almost perfectly consistent with" the live testimony still "tend[ed] to add weight or credibility" to Cotton's testimony. *Id.* Accordingly, the evidence was not hearsay, and the trial court did not err by allowing its admission.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges HAMPSON and CARPENTER concur.

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[299 N.C. App. 788 (2025)]

STATE OF NORTH CAROLINA

v.

JOHN AKBAR VENABLE, DEFENDANT

No. COA24-707

Filed 2 July 2025

1. Motor Vehicles—driving while impaired—appreciable impairment—blood alcohol concentration—sufficiency of evidence

After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's criminal prosecution did not err by denying defendant's motion to dismiss a charge of driving while impaired (DWI), where the State presented sufficient evidence of defendant's impairment at the time of the crash. First, the State showed that defendant was "appreciably impaired" through testimony from one of the officers present at the crash scene who, despite not having personally detected an odor of alcohol on defendant, observed other evidence of impairment, including five empty bottles of brandy inside defendant's car along with defendant's own admission to drinking before driving. Second, the State presented evidence of defendant's blood alcohol concentration about an hour after the crash, which was sufficient in and of itself to support a DWI conviction.

2. Evidence—expert witness testimony—reliability—retrograde extrapolation—blood alcohol concentration—plain error analysis

After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by allowing a forensic chemist to give expert testimony about determining defendant's blood alcohol concentration at the time of the crash through a retrograde extrapolation analysis. This testimony met the reliability requirements of Evidence Rule 702 where it was based on sufficient underlying facts—including blood drawn from defendant roughly an hour after the crash, defendant's own statements about drinking before driving, and other evidence found at the crash scene—which in turn supported the witness's assumption that defendant was in a post-absorptive state when he crashed the car. Furthermore, the trial court did not commit plain error in admitting the testimony where the State had presented ample other evidence of defendant's impairment during the crash, meaning that

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defendant could not show that the jury would have reached a different result absent the expert's testimony.

3. Motor Vehicles—felony death by vehicle—intervening negligence—jury instruction—final mandate—no plain error

After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by failing to read the entire instruction on intervening negligence when instructing the jury on proximate cause or by omitting intervening negligence from its final mandate on the felony charge. The court's instructions sufficiently incorporated the main principles regarding intervening negligence, and its final mandate on felony death by vehicle included the appropriate law on proximate cause. Further, any error here did not amount to plain error where, given the ample evidence presented to support defendant's guilt of the charged crimes, the jury probably would not have reached a different result had the court read the full intervening negligence instruction.

4. Constitutional Law—effective assistance of counsel—no objection to testimony or jury instructions—performance not deficient

After defendant crashed his car into a tree while his wife was in the passenger seat, defendant received effective assistance of counsel during his subsequent trial for charges of felony death by vehicle and driving while impaired. Specifically, defendant failed to show on appeal that his trial attorney's performance was deficient for failure to object to testimony from the State's expert (regarding defendant's blood alcohol concentration after the crash) and from one of the officers present at the crash scene, or for failure to object to the court's jury instruction on intervening negligence; both testimonies were properly admitted, and there was no error in the court's jury instructions.

Appeal by Defendant from judgment entered 9 August 2023 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 8 April 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kathryn E. Hathcock, for the State.

Stephen G. Driggers for Defendant.

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GRIFFIN, Judge.

Defendant John Akbar Venable appeals from the trial court's judgment entered after a jury found him guilty of felony death by vehicle and driving while impaired. Defendant raises four issues on appeal. Defendant contends the trial court erred by (1) denying his Motion to Dismiss for insufficient evidence; (2) admitting expert testimony of retrograde extrapolation; and (3) declining to give the entire civil pattern jury instruction on intervening negligence. Defendant also argues he received ineffective assistance of counsel. We hold the trial court did not err, and Defendant did not receive ineffective assistance of counsel.

I. Factual and Procedural Background

This case arises from a car crash resulting in the death of Lee Venable in Raleigh, North Carolina. The evidence presented at trial tended to show as follows:

Around 7:26 p.m. on 2 August 2021, Defendant crashed his car into a tree at Old Wake Forest Road and Forest Oaks Drive in Raleigh. Defendant's wife, Mrs. Venable, was in the passenger seat of the vehicle. Seth Wood witnessed Defendant drive off Old Wake Forest Road in his red Kia Rio. Defendant crashed into a tree seconds later. Mr. Wood immediately called 911 and went to assist Defendant and Mrs. Venable. Defendant's vehicle was severely damaged and both airbags were deployed. Defendant exited the vehicle to check on Mrs. Venable. Mr. Wood observed Defendant's balance was poor, his speech was difficult to understand, and he appeared disoriented. Defendant walked a short distance away from the car and lay down on the grass while several residents of nearby houses tended to Mrs. Venable. Mr. Wood found Mrs. Venable's oxygen tank behind the passenger seat and attached it to her nose.

Mary Gerow, a registered trauma nurse, was one of the people to help. Ms. Gerow found Mrs. Venable unconscious and potentially not breathing. Ms. Gerow performed CPR on Mrs. Venable until EMS arrived. During this time, Ms. Gerow observed an odor of alcohol on Defendant.

Officer Jenks responded to the scene shortly after the crash. Mr. Wood explained to Officer Jenks what he had witnessed leading up to the crash and indicated Defendant had been driving. Ms. Gerow told Officer Jenks Defendant smelled like alcohol. Officer Jenks and Officer Daniel Egan searched Defendant's vehicle and found five empty airplane bottles of E&J brandy. Local ABC store surveillance video footage later revealed Defendant purchased eight airplane bottles of E&J brandy

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and one airplane bottle of Fireball whiskey just after 5:00 p.m. on the day of the crash. Also, inside Defendant's vehicle, officers found Food Lion grocery bags and three Food Lion receipts, two of which were time stamped around an hour prior to the crash. One of the grocery bags contained raw chicken breast.

Paramedic Mark Underhill of Wake County EMS responded to the scene and treated Defendant for chest pain. He found Defendant alert and aware of the situation he was in. Defendant admitted he drank "a few beers" and claimed his wife had "grabbed [his] face," causing him to crash. Defendant and Mrs. Venable were transported to Wake Med Hospital for treatment. Mrs. Venable died at the hospital from blunt force trauma as a result of her injuries in the crash.

At the hospital, Defendant told Officer Egan he had consumed E&J brandy and Fireball whiskey. Defendant stated he drank one of the airplane bottles around forty-five minutes prior to driving. Officer Egan later contacted the witnesses present at the scene. Ms. Gerow stated she "smelled a strong odor of alcohol on [Defendant]," and Mr. Wood stated Defendant was "generally incoherent." After investigating the incident, and through his own observations, Officer Egan believed Defendant was appreciably impaired at the time of the crash due to alcohol consumption.

While at the hospital, a blood sample was collected from Defendant for medical purposes at 8:37 p.m. The blood test reflected an alcohol concentration of 0.0883 grams of alcohol per 100 milliliters of blood. Later that evening, Defendant consented to a chemical analysis blood test, and at 10:43 p.m., a second blood sample was collected from Defendant. The test revealed an estimated alcohol concentration of 0.05 grams of alcohol per 100 milliliters of blood.

Dr. Richard Waggoner, a forensic chemist for the Raleigh-Wake County Bureau of Identification, performed a retrograde extrapolation analysis to determine Defendant's blood alcohol concentration at the time of the accident. Dr. Waggoner extrapolated Defendant's blood alcohol concentration was 0.1078 grams of alcohol per 100 milliliters of blood at the time of the crash.

On 29 November 2021, Defendant was indicted for felony death by vehicle and driving while impaired. Defendant's case came on for trial on 7 August 2023 in Wake County Superior Court.

At trial, Defendant requested the jury receive a civil intervening negligence instruction. A portion of the instruction was given to the jury.

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On 9 August 2023, the jury found Defendant guilty of both driving while impaired and felony death by motor vehicle. Defendant timely appeals.

II. Analysis

Defendant contends the trial court erred by (1) denying his Motion to Dismiss for insufficient evidence; (2) admitting expert testimony of retrograde extrapolation; and (3) declining to give the entire civil pattern jury instruction on intervening negligence. Defendant also argues he received ineffective assistance of counsel.

A. Motion to Dismiss

[1] Defendant argues the trial court erred by denying his Motion to Dismiss for insufficient evidence. Specifically, Defendant contends Officer Egan’s opinion that Defendant was “appreciably impaired” at the time of the crash was unsupported by the evidence. We disagree.

We review the denial of a motion to dismiss for insufficient evidence de novo. *State v. Tucker*, 380 N.C. 234, 236, 867 S.E.2d 924, 927 (2022) (citation and internal marks omitted). “In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *Id.* at 237, 867 S.E.2d at 927. If there is substantial evidence to support each element of the charged crime, the trial court properly denied the motion to dismiss. *Id.* at 236, 867 S.E.2d at 927. Substantial evidence is more than a scintilla of evidence. *Id.* at 237, 867 S.E.2d at 927.

To be found guilty of driving while impaired, “the State must prove beyond a reasonable doubt” the defendant drove a vehicle “upon a public vehicular area” (1) while appreciably impaired “or (2) after having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.” *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008) (citation and internal marks omitted) (emphasis added); N.C. Gen. Stat. § 20-138.1(a) (2023). Notably, these are two “separate, independent, and distinct ways” to be convicted of driving while impaired. *State v. Watson*, 286 N.C. App. 143, 149, 879 S.E.2d 355, 360 (2022). Thus, the jury may convict a person of driving while impaired based on appreciable impairment “without proof of the person’s blood alcohol concentration.” *Id.* Or “[t]he jury may independently convict a person of driving while impaired for driving with an alcohol concentration of 0.08 or more if the State proves that the person’s blood alcohol concentration was 0.08 or more.” *Id.* Here, there was sufficient evidence to convict Defendant under either prong.

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1. Appreciable Impairment

A person is appreciably impaired when their impairment can be “recognized and estimated.” *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985).

“[I]t is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness’s personal observation.” *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000) (citation omitted). This Court has held that “[a]n officer’s opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer’s personal observation of an odor of alcohol and of faulty driving or other evidence of impairment.” *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (emphasis added).

Here, Officer Egan did not personally observe an odor of alcohol on Defendant, but he did observe “other evidence of impairment.” *Id.* See *Rich*, 351 N.C. at 399, 527 S.E.2d 299 at 306 (holding an officer’s opinion sufficient where it was not solely based on the “odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers”).

Here, Officer Egan personally observed the collision scene, the roadway marks and Defendant’s vehicle found in the trees; found five empty E&J brandy bottles inside Defendant’s vehicle; and spoke with Defendant at the hospital. Defendant admitted to Officer Egan he had been drinking before driving. Thus, we hold Officer Egan’s personal observations constitute “other evidence of impairment” sufficient to support his opinion testimony.

Moreover, the State’s evidence was not limited to Officer Egan’s opinion. The State presented ample evidence to support Defendant’s impairment at the time of the crash. See *Rich*, 351 N.C. at 398–99, 527 S.E.2d at 306 (holding evidence sufficient to support impairment where an officer “observed the collision scene[,] observed [the] defendant at the hospital, [] two witnesses testified that they saw [the] defendant’s car going seventy mph around a curve just before the collision[,] and other witnesses testified as to [the] defendant’s odor of alcohol”); *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965) (“The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [section] 20-138.1(a).” (citation omitted)).

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Here, in addition to Officer Egan's testimony, the jury heard Mr. Wood testify Defendant's balance was poor, his speech was difficult to understand, and he appeared disoriented. Ms. Gerow stated Defendant smelled like alcohol, and Officer Jenks explained what he observed and collected at the scene. Thus, we hold there was sufficient evidence presented to the jury to support Defendant being appreciably impaired at the time of the crash.

2. Alcohol Concentration

In addition to the evidence presented to support Defendant's appreciable impairment, the State presented evidence of Defendant's alcohol concentration at the time of the crash. "The results of a chemical analysis are sufficient to prove a person's blood alcohol concentration." *Watson*, 286 N.C. App. at 150, 879 S.E.2d at 361 (citing N.C. Gen. Stat. § 20-138.1(a)(2)).

Dr. Waggoner extrapolated Defendant's blood alcohol concentration was 0.1078 grams of alcohol per 100 milliliters of blood at the time of the crash. Dr. Waggoner based his analysis on Defendant's blood drawn at the hospital at 8:37 p.m. and 10:43 p.m., Defendant's own statements, and the evidence found at the scene. The crash occurred at 7:26 p.m., and Defendant's blood sample taken at 8:37 p.m., just over an hour after the crash, revealed an alcohol concentration of 0.0883 grams per 100 milliliters of blood. *See State v. Patterson*, 209 N.C. App. 708, 714, 708 S.E.2d 133, 137 (2011) (holding it was not error to admit a blood sample taken three hours after the defendant's arrest). Thus, Defendant's blood alcohol concentration was sufficient in and of itself to convict Defendant of driving while impaired. N.C. Gen. Stat. § 20-138.1(a)(2).

Accordingly, we hold there was sufficient evidence presented to support Defendant's DWI conviction on grounds of appreciable impairment and blood alcohol concentration. As a result, the trial court did not err by denying Defendant's Motion to Dismiss.

B. Retrograde Extrapolation

[2] Defendant alleges the trial court plainly erred by admitting expert testimony of retrograde extrapolation. Specifically, Defendant contends Dr. Waggoner's testimony regarding Defendant's blood alcohol concentration at the time of the crash was unreliable because he made "critical assumptions" unsupported by the record. We disagree.

For this Court to hold a trial court plainly erred, the defendant must satisfy a three-factor test. *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024). First, the defendant must demonstrate a "fundamental

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error occurred at trial.” *Id.* (citing *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). Second, “that the error had a ‘probable impact’ on the outcome, meaning that ‘absent the error, the jury probably would have returned a different verdict.’” *Id.* (quoting *Lawrence*, 365 N.C. at 518-19, 723 S.E.2d at 334). Third, “that the error is an ‘exceptional case’ that warrants plain error review . . . showing that the error seriously affects ‘the fairness, integrity or public reputation of judicial proceedings.’” *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

Rule 702(a) of the North Carolina Rules of Evidence “‘incorporates the standard from the *Daubert* line of cases’ in federal evidentiary jurisprudence.” *State v. Babich*, 252 N.C. App. 165, 167, 797 S.E.2d 359, 361-62 (2017) (quoting *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016)). Rule 702(a) permits an expert witness to testify in the form of an opinion if: “(1) [t]he testimony is based upon sufficient facts or data[;] (2) [t]he testimony is the product of reliable principles and methods[;] and (3) [t]he witness has applied the principles and methods reliably to the facts of the case.” N.C. R. Evid. 702(a) (1–3) (2023).

When the reliability of expert testimony is challenged on appeal, we cannot consider “data or theories . . . which were neither before the trial court when the expert opinion was admitted nor made part of the record on appeal.” *State v. Gray*, 259 N.C. App. 351, 351–52, 815 S.E.2d 736, 738 (2018).

On appeal, Defendant does not dispute that retrograde extrapolation is a widely acceptable method of proving blood alcohol content. *See State v. Cook*, 362 N.C. 285, 293, 661 S.E.2d 874, 879 (2008) (“North Carolina courts have consistently regarded blood alcohol retrograde extrapolation as the domain of expert witnesses.”); *State v. Davis*, 142 N.C. App. 81, 90, 542 S.E.2d 236, 241 (2001) (“We have accepted the reliability of extrapolation evidence since 1985.” (citation omitted)). Rather, Defendant contends Dr. Waggoner’s opinion that Defendant was in a post-absorptive state with a blood alcohol concentration of 0.1078 at the time of the crash was unreliable because his analysis “was not properly tied to the facts of the particular case.” Defendant contends Dr. Waggoner assumed, based on information unsupported by the record, Defendant was drinking on an empty stomach, and that the crash occurred fifty-one minutes after his last drink.

When an expert performs a retrograde extrapolation analysis, the subject needs to be in a “post-absorptive or post-peak state—meaning that alcohol is no longer entering the subject’s bloodstream and thus [his] blood alcohol level is declining.” *Babich*, 252 N.C. App. at 168, 797

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S.E.2d at 362. Factors, “such as when the person last consumed alcohol (and how much was consumed), and whether the person consumed any food that could delay the alcohol’s absorption into the bloodstream” can impact whether a person is in a post-absorptive state. *Id.* at 169, 797 S.E.2d at 362.

This Court has held “when an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts[.]” *Id.* at 172, 797 S.E.2d at 364. “This might come from the defendant’s own statements during the initial stop, from the arresting officer’s observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant’s consumption of alcohol.” *Id.* “When there are at least some facts that can support the expert’s assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony.” *Id.* The weight and credibility of the expert testimony is for the jury to decide. *State v. Dew*, 225 N.C. App. 750, 760, 738 S.E.2d 215, 222 (2013) (citation omitted).

Defendant relies on *State v. Babich*, a case where this Court held the trial court abused its discretion by admitting retrograde extrapolation testimony because “the opinion of the State’s expert was not sufficiently tied to the particular facts of [the] case[.]” *Babich*, 252 N.C. App. at 167, 797 S.E.2d at 361. There, the expert “conceded [] she had no factual information in [the] case from which she could assume that [the] [defendant] was in a post-absorptive state.” *Id.* at 169, 797 S.E.2d at 362. She admitted she had not been provided with any facts or data “whatsoever” “about when [the defendant’s] last consumption of alcohol was, or whether [the] [defendant] consumed food . . . prior[.]” *Id.*

Here, unlike in *Babich*, Dr. Waggoner considered several facts in making his calculations and in determining whether Defendant was in a post-absorptive state at the time of the crash. Dr. Waggoner explained he based his analysis on the blood drawn at the hospital at 8:37 p.m. and 10:43 p.m., Defendant’s own statements, and the evidence found at the scene. Defendant purchased nine airplane bottles of alcohol just after 5:00 p.m. Defendant admitted he drank three airplane bottles, but seven were found empty. Defendant also admitted he drank an airplane bottle forty-five minutes before driving. Defendant left Food Lion at 6:35 p.m., and the crash occurred at 7:26 p.m. Defendant did not eat or drink anything after the crash, and there was no evidence that he had eaten any of the groceries in the car prior to the crash. Defendant’s blood sample,

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taken at 8:37 p.m., just over an hour after the crash, revealed an alcohol concentration of 0.0883 grams of alcohol per 100 milliliters of blood. Defendant's second blood sample, taken at 10:43 p.m., revealed an alcohol concentration of 0.05 grams of alcohol per 100 milliliters of blood.

Thus, because Dr. Waggoner based his opinion on underlying facts and explained to the jury what those underlying facts were, we hold the trial court did not err by admitting Dr. Waggoner's opinion testimony.

Moreover, even if it was error to admit Dr. Waggoner's testimony, it does not amount to plain error. Defendant has not shown a reasonable probability that had the alleged error not occurred, a different result would have been reached at trial. *Reber*, 386 N.C. at 158, 900 S.E.2d at 786. See *Babich*, 252 N.C. App. at 173, 797 S.E.2d at 365 (holding retrograde extrapolation testimony error but not prejudicial error because there was ample evidence presented to support the defendant's impairment outside of the challenged testimony); *State v. Taylor*, 165 N.C. App. 750, 758, 600 S.E.2d 483, 489 (2004) (holding "even if the admission of [the] [expert's] testimony was error, the error was not prejudicial" because of the evidence presented to support the defendant's appreciable impairment under the first prong of section 20-138.1). See also *State v. Sigmon*, 74 N.C. App. 479, 482, 328 S.E.2d 843, 846 (1985) (rejecting the defendant's contention that an alcohol concentration of 0.06 must create a presumption that the defendant is not impaired; "substantial evidence, separate and apart from [a] breathalyzer result" can support a conviction on grounds of appreciable impairment).

Here, like in *Babich* and in *Taylor*, as discussed in the section above, there was ample evidence presented to support Defendant's conviction on the basis of appreciable impairment, absent any testimony of Defendant's blood alcohol concentration at the time of the crash. Thus, we hold the trial court did not plainly err by admitting the testimony.

C. Intervening Negligence Jury Instruction

[3] Defendant argues the trial court plainly erred by failing to give the entire jury instruction on intervening negligence and did not include intervening negligence in its final mandate on the charge of felony death by motor vehicle. We disagree.

"The elements of felony death by vehicle are: (1) [the] defendant unintentionally causes the death of another; (2) while driving impaired as defined by N.C. Gen. Stat. §§ 20-138.1 or 20-138.2 [(2023)]; and (3) the impairment was the proximate cause of the death." *State v. Bailey*, 184 N.C. App. 746, 748, 646 S.E.2d 837, 839 (2007) (citing N.C. Gen. Stat. § 20-141.4(a1)).

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In *State v. Bailey*, a felony death by vehicle case, the jury was instructed the defendant's negligence need not be the sole proximate cause. *Id.* at 749, 646 S.E.2d at 839. Intervening negligence is found where the negligence of another "break[s] the causal chain of the defendant's negligence[.]" *Id.* (citation and internal marks omitted). If it does not break the causal chain, the defendant's act is still a proximate cause. *Id.* (citation omitted). Here, the trial court properly instructed the jury on proximate cause. The instructions provided:

A proximate cause is . . . a cause without which the victim's death would not have occurred and one that a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result. The defendant's act need not have been the last or nearest cause. It is sufficient if it concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's death.

A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence was not reasonably foreseeable by the first person and causes its own natural and continual sequence which interrupts, breaks, displaces, or supersedes the consequences of the first person's negligence. Under such circumstances, the negligence of the second person . . . insulates the negligence of the first person and would be the sole proximate cause of the incident.

The intervening negligence jury instruction sufficiently incorporated the necessary principles outlined in *Bailey*. Additionally, the trial court's final mandate on felony death by vehicle included the appropriate law on proximate cause.

Moreover, even if it was error for the court not to read the entire jury instruction, the error does not amount to plain error—the jury probably would not have returned a different verdict—based on the evidence presented to support Defendant's guilt. *Reber*, 386 N.C. at 158, 900 S.E.2d at 786. Here, ample evidence, including the testimony of two eyewitnesses, was presented to show Defendant drove off the roadway into a tree while appreciably impaired and caused the single-vehicle crash that resulted in his wife's death.

We hold the trial court did not err in its jury instructions, but even if it did, it does not amount to prejudicial error.

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D. Ineffective Assistance of Counsel

[4] Defendant argues he received ineffective assistance of counsel because his trial counsel failed to object to the testimony of Officer Egan and Dr. Waggoner, and because Defense counsel failed to object to the incomplete jury instruction. We disagree.

To challenge a conviction based on ineffective assistance of counsel, a defendant must establish that his counsel's conduct "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[T]o meet this burden, the defendant must satisfy a two-part test." *Id.* at 562, 324 S.E.2d at 248. First, the defendant must prove that his "counsel's performance was deficient," such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the defendant must prove his counsel's performance was prejudicial, such that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

As held above, the challenged testimony was not error, nor was the lack of objection to the allegedly incomplete jury instruction on intervening negligence. Thus, Defendant cannot meet the first prong of the ineffective assistance of counsel test and Defendant's argument fails.

III. Conclusion

We hold the trial court properly denied Defendant's Motion to Dismiss, properly admitted Dr. Waggoner's retrograde extrapolation analysis, and properly gave appropriate jury instructions on intervening negligence. Additionally, we hold Defendant did not receive ineffective assistance of counsel.

NO ERROR.

Judges ZACHARY and FLOOD concur.

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STATE OF NORTH CAROLINA

v.

KEVIN LEIGH WINGATE

No. COA24-815

Filed 2 July 2025

1. Evidence—expert testimony—sexual offenses against a child—impermissible vouching for victim’s credibility—new trial

In a prosecution for multiple charges of taking indecent liberties with a child and first-degree statutory sexual offense, in which no physical evidence of abuse was presented, defendant was entitled to a new trial because two expert witnesses gave testimony that impermissibly vouched for the victim’s credibility. First, the victim’s treating therapist made several statements indicating her opinion or assumption that abuse had occurred and, more importantly, testified that she had diagnosed the victim with post-traumatic stress disorder and that the symptoms he exhibited were consistent with the trauma he had reported. Second, the doctor who first evaluated the victim testified that the lack of physical findings was consistent with the victim’s disclosure of sexual abuse. These errors rose to the level of plain error since, absent the improper evidence, the jury likely would have reached a different verdict.

2. Indictment and Information—defective indictment—first-degree statutory sexual offense charged—sentenced to greater offense

In a sexual offense prosecution, where the Court of Appeals vacated defendant’s sentence and remanded for a new trial due to improperly admitted evidence, the appellate court noted an issue with defendant’s indictment for consideration on remand. Although defendant’s indictment charged him with first-degree statutory sexual offense pursuant to N.C.G.S. § 14-27.29—an offense which requires proof that a defendant is at least four years older than the victim—the trial court had sentenced defendant to the greater offense of statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28—an offense which requires the additional proof that a defendant was at least eighteen years old at the time of the offense. Although all of the facts needed to convict defendant pursuant to the latter statute were present in the indictment, the various references at trial to both offenses demonstrated a lack of certainty about which offense defendant had been charged with and, therefore, resulted in prejudice to defendant.

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Chief Judge DILLON dissenting.

Appeal by defendant from judgment entered 27 July 2023 by Judge Keith O. Gregory in Superior Court, Wake County. Heard in the Court of Appeals 19 May 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Tamika L. Henderson, for the State.

George B. Currin, and Cheshire Parker Schneider PLLC, by Hart Miles, for defendant.

ARROWOOD, Judge.

Kevin Leigh Wingate (“defendant”) appeals from judgment following a jury verdict finding him guilty of four counts of indecent liberties with a child and one count of a first degree statutory sex offense, and subsequent imposition of a 364 months minimum, 536 months maximum prison sentence. For the following reasons, we vacate defendant’s sentence, and remand this matter to the trial court for a new trial.

I. Factual Background

On 29 January 2018, the Apex Police Department issued three warrants for the arrest of defendant, on two counts of taking indecent liberties with a child under N.C.G.S. § 14-202.1, and one count of first degree statutory sex offense under N.C.G.S. § 14-27.29. Defendant was ultimately indicted on four counts of indecent liberties and one count of first degree statutory sex offense, all under the statutes cited in the arrest warrants. Following his arraignment, defendant pleaded not guilty on 25 July 2018. Defendant’s trial began a full five years later on 24 July 2023, lasting four days and concluding on 27 July. The testimony at trial tended to show the following.

Defendant is father to a son, James,¹ who was 12 years old in September 2017. At that time, James’ mother was vacationing in Scotland, leaving his father to watch him and his sister. James testified that defendant walked into James’ room while he was playing video games and began discussing puberty and adolescence, which James found unusual. Defendant then proceeded to pull his pants down and

1. A pseudonym is used to protect the identity of the victim, who was a minor at the time of the offense and at the time of trial.

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told James to touch his penis; when James declined, defendant grabbed James' hand and forced him to pull on defendant's penis. James then pulled his own pants down at defendant's request, and defendant performed what James described as a "doctor's examination," where defendant inspected James' penis, although James was unable to remember if defendant touched it. Defendant then lay on the bed with his penis out and asked James if he had any questions.

Defendant then left the room and James resumed playing video games, only for defendant to return again two hours later. Defendant began to talk to James about his uncles who were gay, and some details about gay relationships; James found this puzzling, as his uncles were not a significant part of his life. Defendant left, then returned an hour later and told James that if he played with defendant the way his uncles played, he would get pizza. James declined, to which defendant responded, "Good job," and gave James a high five. Defendant left and a little while later made a frozen pizza for the children. James testified that there were no more uncomfortable encounters while his mother was in Scotland, but defendant would occasionally wrestle with him.

James did not tell his mother what defendant had done when she arrived home, as he thought it could have simply been a normal experience. However, during a health class covering instances of abuse, James testified that he realized that what defendant had done was not actually normal. Then, the first weekend after his mother had returned home, she and James' sister were downstairs, while he was upstairs in his room playing video games. James testified that defendant came in and began wrestling with James as he had in the past; but defendant proceeded to overpower James, who was wearing cotton pajama pants, and he said he felt defendant's penis go inside his anus about 12 times. James brought his arm forward to try and get off the bed, but defendant grabbed and pulled on his arm. After James began to cry, defendant let him go, and James went downstairs to tell *him* mother that defendant had hurt his shoulder.

James did not initially tell his mother about anything that defendant had done other than hurt his shoulder; he testified that immediately afterwards, his mind was "clouded with the fact that my shoulder was hurting and I was crying," and that he was unsure whether what had just happened was a type of wrestling move. He eventually told his mother that defendant had made James touch his penis, but not about the anal penetrations; he testified that he was unsure why he did not tell his mother this. James' mother had him visit her own therapist, then James spoke with Kennedy Ganyo ("Mr. Ganyo"), an intake social worker with

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Child Protective Services, on 25 October 2017. Mr. Ganyo testified at trial that James told him about the incident of defendant pulling his pants down and trying to force James to touch his penis. Mr. Ganyo did a home visit to defendant that same day, where defendant admitted to pulling down his pants and showing James his penis, but denied forcing him to touch it. Defendant agreed to move out of the home due to his admitted exposing himself.

James met with Leigh Howell (“Ms. Howell”), a child abuse evaluation specialist at SAFEchild, a child advocacy center, on 28 November 2017, where she conducted a forensic interview. At trial, Ms. Howell was deemed an expert in the diagnostic interviewing of children and the disclosure process for child sexual abuse. During this interview, James told Ms. Howell that he never touched his father’s penis, nor did he disclose the anal penetrations. That same day, James received a physical examination from Dr. Elizabeth Witman (“Dr. Witman”), a general pediatrician on staff at Wake Medical Children’s Hospital. Dr. Witman testified that the results of this exam were normal, including the genital/anal exam. She testified that it did not surprise her that James’ exam was normal, as abnormal physical findings in cases of child sexual abuse are exceptional, in about five percent of cases. Dr. Witman stated that the lack of physical findings were consistent with James’ disclosure of sexual abuse.

James began seeing therapist Miriane Portes (“Ms. Portes”) on 1 December 2017. Ms. Portes had a bachelor’s degree in psychology, a master’s degree in social work, a certification in Eye Movement Desensitization and Reprocessing (EMDR) therapy (a trauma-treatment therapy), and was deemed by the trial court to be an expert in trauma therapy. James met with Ms. Portes regularly over the ensuing months, and began to relate to her in a piecemeal fashion what he remembered while engaging in EMDR. It is not entirely clear from Ms. Portes’ testimony how or when James disclosed the alleged anal penetrations; on 22 January 2018, he described defendant coming into the room and thrusting his genitals towards him and pulling his arm back. He continued to discuss feelings of guilt from the experience over the next few sessions. On 5 June, Ms. Portes attempted to create a chronology of the abuse James suffered; at this session, James told her that defendant penetrated him 8–9 times. Sometime in the spring of 2018, Ms. Portes diagnosed James with PTSD; she testified that the symptoms he was experiencing were consistent with the trauma he had reported.

Defendant did not present any witnesses during the trial, and evidence closed at the end of Ms. Portes’ testimony. Defendant moved to dismiss all charges, which the trial court denied. The jury found

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defendant guilty on all charges, and he was subsequently sentenced to 364 months minimum, 536 months maximum active prison sentence. Defendant gave notice of appeal 7 August 2023.

On 22 April 2025, the State filed a Motion to Correct Error in Appellate Brief. We exercise our discretion to allow the motion and incorporate the correction into the State's argument on appeal.

II. Discussion

Defendant raises five issues on appeal: (1) whether the indictment provided sufficient notice that defendant had been charged with the offense of which he was ultimately convicted; (2) whether the trial court erred in sentencing defendant to the mandatory 300 month minimum sentence for a sexual offense with a child by an adult, since he was not indicted for this offense; (3) whether the trial court committed plain error by allowing expert testimony that vouched for the credibility of the victim and constituted an improper opinion of guilt; (4) whether the trial court committed reversible error by denying defendant's motion to dismiss the charge of first degree statutory sexual offense; and (5) whether defendant's trial counsel rendered ineffective assistance of counsel.

A. Standard of Review

In order to preserve an issue for appellate review, a party must object before the trial court; otherwise, the issue is deemed waived. N.C. R. App. P. 10(a)(1). However, in criminal cases, even if an issue is unpreserved, it may be raised for the first time on appeal on the basis of plain error. *Id.* Rule 10(a)(4). Plain error is a fundamental error that so affected the trial proceedings that the jury would have returned a different verdict absent the error. *State v. Lawrence*, 365 N.C. 506, 518 (2012). Plain error is to be applied cautiously and reserved for exceptional cases. *Id.* Where we find plain error to have affected a jury verdict, the appropriate remedy is to order a new trial. *See, e.g., State v. Towe*, 366 N.C. 56, 63 (holding that testimony characterizing a victim as sexually abused amounted to plain error, and ordering a new trial). Because defendant counsel did not object to the testimony of the expert witnesses at trial, we review this issue for plain error.

B. Impermissible Vouching

[1] "Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219 (1988) (citations omitted). The application of this holding to cases involving the alleged sexual abuse of children has produced

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the rule that an expert witness, in the absence of physical evidence, may not testify that sexual abuse actually occurred. *State v. Stancil*, 355 N.C. 266, 266–67 (2002); *see also State v. Chandler*, 364 N.C. 313 (2010) (“And for expert testimony presenting a definitive diagnosis of sexual abuse, an adequate foundation requires supporting physical evidence of the abuse.”). Improper testimony need not take form of an explicit statement by the expert witness that the alleged victim was sexually abused: we have held that a doctor testifying that a child’s “disclosure” was “consistent with sexual abuse” was impermissible vouching, where the “disclosure” was the child’s description of abuse. *State v. Frady*, 228 N.C. App. 682, 685–86 (2013). *But see State v. Betts*, 267 N.C. App. 272, 281 (“*Frady* does not stand for the proposition that use of the word ‘disclosure’ was error. Rather, the expert’s testimony in *Frady* that the victim’s description of the abuse ‘was consistent with sexual abuse’ was the equivalent of testifying the victim was credible.”).

1. Miriane Portes

In the case *sub judice*, Ms. Portes made a number of statements during her testimony that communicated to the jury her own belief that James had been sexually abused by defendant, thereby engaging in impermissible vouching. Ms. Portes testified that “since there’s a lot of avoidance with trauma, I knew that there was a lot of things that [James] hadn’t reported yet” The entire basis for Ms. Portes’ belief that there were “things” James had not yet reported was her belief that James had been sexually abused, as she almost explicitly states. In subsequent testimony, she stated, “I started understanding that some things [defendant did] were part of the grooming behavior before it escalated to the wrestling incident.” When Ms. Portes described the beginning of her therapy sessions with James, she stated that she “already knew why he was there because he had been referred by a colleague of mine, so I already knew that he was seeking therapy for sexual abuse.” Ms. Portes does not use the term “alleged” or “reported” sexual abuse; rather, her testimony indicates that James was in therapy for sexual abuse that actually occurred. The State contends that this was merely a description of the referral process rather than vouching. Even assuming this is true, Ms. Portes should not have testified in this way, given the implication of the actual occurrence of abuse.

Finally, and perhaps most importantly, we address Ms. Portes’ testimony that she diagnosed James with PTSD. Our Supreme Court has held that “evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred.” *State v. Hall*,

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330 N.C. 808, 821 (1992). The process for diagnosing PTSD is a therapeutic process, rather than a fact-finding one, and the jury may accord too much weight to this therapeutic diagnosis. *Id.* at 820. However, a PTSD diagnosis may be introduced for other purposes, such as corroboration or as explanation for delays in reporting. *Id.* at 822.

Ms. Portes testified that she eventually diagnosed James with PTSD, and that the symptoms with which he presented were consistent with the trauma that he had reported. This testimony is of the precise sort forbidden by *Hall*, and by extension, *Fraday* and *Stancil*: by stating that these PTSD symptoms were consistent with James' disclosures of the trauma of sexual abuse, Ms. Portes was in effect stating that these disclosures were more credible, because James had these symptoms. Not all of Ms. Portes' references to PTSD were necessarily in error, given that *Hall* permits the introduction of a PTSD diagnosis for the purposes of explaining delays in reporting. Because James's report of defendant's anal penetration came much later than his reports of defendant's other behaviors, a PTSD diagnosis would be useful in explaining this delay. Instead, however, Ms. Portes's testimony that she diagnosed James with PTSD was used as substantive evidence to bolster James' reports of abuse, which is impermissible.

2. Dr. Elizabeth Witman

Dr. Witman's interaction with James was limited to her physical evaluation of him as part of the SAFEchild Advocacy Center, however at trial she stated that the lack of physical findings was consistent with James' disclosure of sexual abuse. This testimony was in error.

"Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry." *Chandler*, 364 N.C. at 313. In *State v. Warden*, our Supreme Court reaffirmed the rule that a definitive diagnosis of sexual abuse was impermissible without supporting physical evidence, but declined to specify what would qualify as a "diagnosis" or whether a lack of physical evidence could be incorporated into an expert opinion. *See* 376 N.C. 503, 506–07 (2020).

In *State v. Davis*, this Court held that it was "impermissible for an expert to offer an opinion that a lack of physical evidence *is consistent with* sexual abuse . . ." while recognizing that "it may be permissible for the State to offer expert testimony that the lack of physical evidence *does not necessarily rule out* that sexual abuse may have occurred." 265 N.C. 512, 517 (2019) (emphasis in original). On the other hand, in *State v. Perdomo*, we concluded that expert witness testimony that a girl's disclosure of sexual abuse was consistent with a lack of physical finding

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was not in error, since her testimony was based on her expertise and “provided the jury with an opinion, based on her expertise, that a lack of physical findings of sexual abuse does not generally correlate with an absence of sexual abuse.” 276 N.C. App. 136, 141–42 (2021).

Here, Dr. Witman stated that her findings, specifically the absence of physical signs of abuse, were nevertheless consistent with James’s disclosure of sexual abuse. She did not clarify that the lack of evidence did “not necessarily rule out” abuse, or provide a general opinion that the lack of physical findings does not generally correlate with an absence of sexual abuse, both of which may have been permissible under *Davis*. Instead, she described the lack of physical findings as “consistent” with a disclosure of sexual abuse, which is impermissible under *Davis*. Therefore, Dr. Witman’s testimony amounted to impermissible vouching.

C. Plain Error

Because defense counsel never objected to Ms. Portes’ or Dr. Witman’s testimony, we review only for plain error. Applying the framework of *State v. Ryan*, we hold that impermissible vouching from this testimony rose to the level of plain error, requiring a new trial.

Expert testimony that amounts to impermissible vouching often draws no objection during trial, leading to a significant number of cases that have consequently reviewed this issue for plain error. *See, e.g., State v. Couser*, 163 N.C. App. 727 (2004) (holding that the physical evidence was insufficient to support the expert witness’ opinion of sexual abuse, and other evidence was lacking such that the testimony was plain error); *State v. Crabtree*, 249 N.C. App. 395 (holding that one of the expert witnesses impermissibly vouched for the victim, but eyewitness testimony prevented this from rising to plain error). Our review of many of these cases has produced a useful framework for evaluating plain error under these circumstances:

Notably, a review of relevant case law reveals that where the evidence is fairly evenly divided, or where the evidence consists largely of the child victim’s testimony and testimony by corroborating witnesses with minimal physical evidence, especially where the defendant has put on rebuttal evidence, the error is generally found to be prejudicial, even on plain error review, since the expert’s opinion on the victim’s credibility likely swayed the jury’s decision in favor of finding the defendant guilty of a sexual assault charge.

State v. Ryan, 223 N.C. App. 325, 337 (2012) (citations omitted).

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In this case, there was no physical evidence indicating that an assault occurred, as Dr. Witman's testimony emphasized. The State's evidence was primarily the testimony of James himself, with Mr. Ganyo, Dr. Witman, Ms. Howell and Ms. Portes serving as witnesses corroborating James's story. Ms. Portes was the only one who testified that James had told her that defendant penetrated him, and it was her testimony that attempted to explain why it took James as long as he did to actually disclose the anal penetrations. Ms. Portes saw James for many months, and had more significant interactions with him on this matter than anyone else in his life, as James shared more memories with Ms. Portes than he did his own mother.

The errors of Ms. Portes's testimony are compounded when viewed in the context of Dr. Witman's testimony concerning the physical exam. Dr. Witman's testimony placed more weight and significance on the corroborating testimony of Ms. Portes. She also impermissibly vouched for the credibility of the allegations as previously discussed. Given the crucial role Ms. Portes played in the trial coupled with the vouching and de-emphasis of the lack of physical evidence from Dr. Witman's testimony, it is apparent from the transcript that their testimony "likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge." *Ryan*, 223 N.C. App. at 337. Because the jury would have reached a different verdict absent this impermissible testimony, we order defendant's sentence to be vacated and this case remanded to the trial court for a new trial.

D. Sufficiency of Defendant's Indictment

[2] We briefly address defendant's argument that the indictment under which he was eventually convicted of statutory sex offense on a child by an adult was insufficient to place him on notice that he had been charged with that offense. We agree and address this issue to ensure that defendant is properly indicted and arraigned, and thereby properly placed on notice, before the commencement of his new trial.

Although defendant failed to raise the issue of a defective indictment before the trial court, a defendant may raise the issue of jurisdiction at any point, including for the first time on appeal. *See State v. Harwood*, 243 N.C. App. 425, 427–28 (2015). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652 (2009).

A sufficient indictment requires the following:

- (1) The offense is charged in a plain, intelligible, and explicit manner;
- (2) The offense is charged properly so as

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to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court, on conviction or plea of *Nolo contendere* or guilty to pronounce sentence according to the rights of the case.

State v. Reavis, 19 N.C. App. 497, 498 (1973) (citation omitted). If these requirements are met, a reference to the wrong statute, and the caption of the indictment referring to the name of the wrong offense, is not fatal to the sufficiency of the indictment. *Id.*; *State v. Billinger*, 213 N.C. App. 249, 257 (2011).

The indictment at issue listed the offense as “First Degree Statutory Sex Offense,” and cited N.C.G.S. § 14-27.29 as the statute violated. At defendant’s arraignment, the State read the charge as “one count of first degree statutory sex offense,” to which defendant pled not guilty. The jury verdict sheet listed the offense with this same name, and the trial court initially sentenced defendant under § 14-27.29 before the State noted that it was “the big B1.” While defendant was ultimately sentenced in accordance with the minimum sentence required under § 14-27.28, statutory sex offense on a child by an adult, his judgment and commitment sheet read that he was convicted under § 14-27.29.

At trial, the State announced that defendant had been charged with first degree statutory sex offense with a child by an adult, although later that day the trial court referred to the charge as first degree statutory sex offense. During a motion conference, the State again referred to the charge as sex offense with a child by an adult, and during the charge conference and jury, the trial court referred to the offense in this way and read the proper elements of that offense, including the element that the defendant must be over 18. However, defendant was announced in open court of having been convicted of first-degree statutory sex offense.

It is clear from this summary of the various references to defendant’s charge that the indictment violates the third requirement of the *Reavis* test: “such certainty” in the indictment to allow the defendant to prepare for trial and the court to pronounce sentence. We read the holdings of *Reavis* and *Billinger* relating to statute references and captions not as permission to ignore as a rule these portions of the indictment, but as guidance that when an indictment is otherwise clear, these aspects will not render an indictment fatally flawed. Contained within defendant’s indictment were all the facts necessary to convict under § 14-27.28; however, § 14-27.29 is a lesser-included offense, as it contains all the same elements except the adulthood of the defendant. It was *uncertain* under

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the indictment with which offense defendant had been charged, as was made clear by the confusion of the trial court.

Under *State v. Singleton*, our Supreme Court requires that a defendant raising the issue of an insufficient indictment must show prejudice. 386 N.C. 183, 210 (2024). Here, defendant was prejudiced by the insufficient indictment; the difference in length of the sentences he could receive under the two different offenses is significant, and, at the very least, may well have played a role in his decision to plead not guilty at his arraignment. Therefore, while we ultimately hold that defendant is entitled to a new trial due to the plain error of the expert witness testimony at trial, we also place the State and the trial court on notice that defendant's conviction would have been vacated if we were required to rule on the sufficiency of the indictment, and urge them to ensure that any errors of notice are addressed.

III. Conclusion

For the foregoing reasons, we vacate the sentence of the trial court, and remand for a new trial on these charges.

VACATED AND REMANDED.

Judge HAMPSON concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

The majority's mandate is to vacate the judgment and remand for a new trial. For the reasoning below, my vote is to vacate the judgment sentencing Defendant under N.C.G.S. § 14-27.28 and remand, not for a new trial, but rather for entry of judgment sentencing Defendant based on the jury's verdict convicting Defendant of first-degree statutory sex offense under N.C.G.S. § 14-27.29. Accordingly, I respectfully dissent.

The majority reaches its result based on its conclusion that the vouching of the victim's credibility by two witnesses for the State constituted plain error. I certainly agree that the vouching was not competent evidence to prove Defendant's guilt. However, I conclude *the trial court* did not commit plain error concerning the vouching testimony for two independent reasons.

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First, I do not believe *the trial court* erred at all concerning the vouching testimony, much less plainly erred.

Our Supreme Court recently explained that a defendant mounting a challenge on appeal based on plain error must show three things, including that “a fundamental error occurred at trial.” *State v. Reber*, 386 N.C. 153, 158 (2024). In other cases, that Court has instructed that the fundamental error must be “error *by the trial court*.” *State v. Duke*, 360 N.C. 110, 138 (2005) (emphasis added). *See also State v. Cummings*, 352 N.C. 600, 636 (2000); *State v. Walker*, 316 N.C. 33, 39 (1986). For instance, a defendant is entitled to plain error review where his attorney fails to object to evidence offered at trial where the trial court previously made a ruling outside the presence of the jury that the evidence was admissible. *See State v. Williams*, 370 N.C. 526 (2018) (adopting dissenting opinion in 253 N.C. App. 606 (2017)). And a defendant may be entitled to plain error review where his attorney fails to object to trial testimony but where the trial court had an affirmative duty to intervene *ex mero motu* when the evidence was being offered. *See, e.g., State v. Jones*, 355 N.C. 117, 133 (2002) (holding the trial court errs by failing to intervene during a prosecutor’s closing when the prosecutor makes grossly improper remarks).

However, where the error in allowing improper vouching testimony or other inadmissible evidence is simply that of a defendant’s attorney failing to object, the defendant’s remedy is to file a motion for appropriate relief alleging ineffective assistance of counsel. In such a case, the defendant has failed to meet the first prong of showing plain error, that a fundamental error was committed *by the trial court*.

In the present case, it may be that Defendant’s attorney chose *not* to intervene based on trial strategy. Perhaps Defendant’s trial counsel did not want to draw extra attention to the improper vouching statements by objecting to them. In any event, this mystery can only be resolved in a hearing on a motion for appropriate relief.

Second, even assuming the trial court had a duty to intervene to address the improper vouching statements, I conclude such error by the trial court did not rise to the level of plain error. The statements were, indeed, prejudicial to Defendant. However, Defendant has failed to demonstrate that the jury “probably” would have reached a different verdict, but for the vouching. *See Reber*, 386 N.C. at 160. Specifically, there was evidence of Defendant’s guilt apart from the vouching statement, including the victim’s first-hand account of Defendant’s acts.

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My vote, though, is to vacate the trial court's judgment and remand for entry of a new judgment. I agree with the majority in its *dicta* contained in the section of its opinion titled "Sufficiency of Defendant's Indictment" that the trial judge should have sentenced under N.C.G.S. § 14-27.29 rather than under N.C.G.S. § 14-27.28.

The indictment states that Defendant was being charged for violating N.C.G.S. § 14-27.29, which requires proof that the defendant is at least four years older than his child victim. N.C.G.S. § 14-27.28, though, requires extra proof that the defendant is, in fact, at least 18 years of age.

Admittedly, there is no question Defendant was at all times relevant to this matter over 18 years of age and that the jury would have had no issue making this additional finding sufficient to convict Defendant under N.C.G.S. § 14-27.28. And I am not contending that the defect was jurisdictional. However, I agree with the majority that Defendant suffered prejudice by the pleading deficiency in the indictment as carried forward in subsequent proceedings. *See State v. Singleton*, 386 N.C. 183, 210 (2024). As noted by the majority, at his arraignment, Defendant was never asked to plead to a charge under N.C.G.S. § 14-27.28. He was merely asked to plead to a charge under N.C.G.S. § 14-27.29. And the jury's verdict sheet shows that they were convicting Defendant for violating N.C.G.S. § 14-27.29.

Defendant's belief that he was being prosecuted under N.C.G.S. § 14-27.29 may have played a role in his pleading "not guilty" at his arraignment and otherwise not negotiating a plea bargain, as a conviction under N.C.G.S. § 14-27.28 carries the possibility of a substantially greater sentence than the charge for which he thought he was being prosecuted. Surely, it is within the discretion of the prosecutor to charge a defendant with a lesser crime if (s)he so chooses, though the prosecutor may have evidence of the defendant's guilt of a greater crime.

Accordingly, my vote is to vacate the judgment convicting Defendant of and sentencing him under N.C.G.S. § 14-27.28 and remand with instructions that the trial court enter judgment convicting Defendant of violating N.C.G.S. § 14-27.29 and sentence him accordingly.

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[299 N.C. App. 813 (2025)]

MAJOR WHITE, LINDA PERRY WHITE, PLAINTIFFS

v.

RONALD BOATWRIGHT, DEFENDANT

No. COA24-780

Filed 2 July 2025

Child Custody and Support—grandparents’ complaint for child custody—motion to dismiss for lack of standing—reviewed under wrong standard

After plaintiff-grandparents filed a complaint seeking custody of their minor grandson, an order granting defendant-father’s motion to dismiss for lack of standing—seemingly filed pursuant to Civil Procedure Rule 12(b)(6)—was reversed and the matter was remanded because the trial court had reviewed the motion under the wrong standard. Specifically, the court should not have considered defendant-father’s testimony at the hearing on the motion to dismiss, but instead should have focused solely on the sufficiency of the complaint, viewing all allegations as true and in the light most favorable to plaintiff-grandparents. Under the correct standard of review, the complaint sufficiently established plaintiff-grandparents’ standing to bring a custody claim, since it alleged that defendant-father acted inconsistently with his constitutionally protected rights as a parent and included specific allegations regarding his failure to provide for and establish a relationship with the child.

Appeal by plaintiffs from order entered 26 February 2024 by Judge Alyssa M. Levine in District Court, Mecklenburg County. Heard in the Court of Appeals 27 February 2025.

McDonald Williams, PLLC, by Simoné A. Williams, for plaintiffs-appellants.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal from the trial court’s order dismissing their complaint for custody of their grandson, Tom.¹ Because the trial court

1. A pseudonym is used to protect the identity of the minor child.

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applied the wrong standard for reviewing Defendant’s motion to dismiss the complaint, we reverse the order dismissing the complaint.

I. Factual and Procedural Background

On 12 December 2023, Plaintiffs Major White and Linda Perry White (“Grandparents”) filed a complaint for child custody and attorney’s fees against Tom’s father, Defendant Ronald Boatwright (“Father”). According to Grandparents’ verified complaint, their daughter—Shonté White—was the mother of Tom, who was born in 2016. Defendant and Tom’s mother never married. Tom lived with his mother in Cabarrus County, North Carolina, and had some weekend visits with Father, who lived in Mecklenburg County, North Carolina. Grandparents resided in South Carolina. In August of 2023, Tom’s mother became ill and was hospitalized, and Grandparents moved in with Tom and his mother to assist in caring for both of them during her illness. On 11 November 2023, Tom’s mother died. Grandparents continued to care for Tom in Cabarrus County until 1 December 2023, when Grandparents allowed Tom to visit with Father for the weekend. Father refused to allow Tom to return to Grandparents after this visit. They filed their complaint for custody about two weeks later.

Grandparents’ complaint also alleged the following:

17. At all times since [Tom’s] birth in 2016, [Father] has acted inconsistent with his constitutional right as a parent in that he has failed and refused to establish and maintain a consistent relationship with [Tom] and failed to provide for [Tom]’s basic physical, emotional and developmental needs.

18. [Father] does not have an adequate living environment for [Tom]. Upon information and belief, [Father] resides in a three-bedroom apartment with a roommate and her two adult children. On the few occasions when [Tom] has stayed overnight with [Father], [Tom] has slept on a couch as there is no bedroom or bed available for [Tom].

....

33. [Father] is not a fit and proper person to be awarded physical and/or legal custody of [Tom] and it is in the best interests of [Tom] for [Grandparents] to be awarded physical or legal custody of [Tom].

Grandparents alleged they “have been an integral part of [Tom’s] life since his birth” and they “have a close, loving and significant relationship” with Tom.

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On 8 January 2024, Father filed a *pro se* motion to dismiss Grandparents' complaint for child custody and attorney's fees. In the motion, Father alleged: "I am seeking dismissal of the filing. I am the child's biological father with his best interest [sic] mentally, emotionally and for the child's welfare." Father further alleged, as the reason he wanted the court to grant his motion, that "the child is in a safe environment and very stable. The child is happy and continues to excel in his educational and sport environments. The child does not lack in any areas of his life." Father also scheduled the motion to dismiss for hearing; Father checked the box indicating his motion was filed to "dismiss under Rule 12" in the "notice of motion" form.

On 26 February 2024, the trial court held a hearing on Father's motion to dismiss. Father represented himself and appeared at the hearing; Grandparents' counsel appeared but Grandparents did not. Grandparents' attorney noted that the hearing was scheduled for Father's motion to dismiss pursuant to Rule 12(b)(6). The attorney argued that because the motion to dismiss was filed under Rule 12(b)(6), the trial court was required to consider the allegations of the complaint as true and in the light most favorable to Grandparents. She pointed out that Grandparents had alleged that they had a significant relationship with Tom and that Father had acted inconsistently with his constitutionally protected rights as a parent. For those reasons, Grandparents' attorney argued that the complaint stated a claim upon which custody could be awarded to Grandparents and the motion to dismiss should be denied.

The trial court allowed Father to testify at the hearing. Father testified generally that many of the allegations of the complaint were not true. He testified that he had been involved in Tom's life since his birth and he had provided financial support and was providing good care for Tom.

The trial court entered an order dismissing Grandparents' complaint with prejudice on the same day as the hearing. The reason for dismissal was stated as follows: "[Grandparents]' [a]ttorney Simone Williams appeared. [Grandparents] did not appear. [Father] appeared. [Father]'s motion to dismiss is hereby granted." (Capitalization altered.) Grandparents appeal.

II. Analysis

Grandparents argue the trial court erred in granting Father's motion to dismiss because Father's motion failed to set forth any basis to dismiss Grandparents' complaint under Rule 12 of the North Carolina Rules of Civil Procedure, the trial court erred in granting Father's motion pursuant to Rule 12(b)(6), and the trial court failed "to making findings of fact and conclusions of law sufficient to support an order of dismissal with prejudice[.]" (Capitalization altered.)

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Although Father’s motion to dismiss did not state a particular rule under which it was filed, the notice of hearing referenced “Rule 12.” A motion to dismiss under Rule 12(b) of the Rules of Civil Procedure “shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial.” N.C. Gen. Stat. § 1A-1, Rule 12(d) (2023). At the hearing, Grandparents’ attorney noted that the motion appeared to be under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. She also noted that Father’s motion was really more like an answer than a motion to dismiss, as he addressed the facts alleged in the complaint and he alleged he was providing appropriate care for Tom.

From a review of the record and transcript, Father’s motion to dismiss could be considered as falling under either Rule 12(b)(1) or Rule 12(b)(6) of the North Carolina Rules of Civil Procedure:

b) . . . Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

....

(6) Failure to state a claim upon which relief can be granted[.]

N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (b)(6) (2023). However, whether the trial court considered the motion to dismiss as falling under Rule 12(b)(1) or Rule 12(b)(6), the result here would be the same, as we use the same standard of review for both. *See United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43 (2022) (“This Court reviews a trial court’s decision to grant or deny a motion to dismiss for lack of standing using a *de novo* standard of view, under which it views the allegations as true and the supporting record in the light most favorable to the non-moving party, with this being the applicable standard of review regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6)[.]” (citation, quotation marks, and brackets omitted)). It is well established that we review an order regarding a motion to dismiss *de novo*:

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At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. We review de novo whether a plaintiff has standing to bring a claim.

[North Carolina General Statute Section] 50-13.1(a) provides that any parent, relative, or other person claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child. N.C. Gen. Stat. § 50-13.1(a) (2019). The statute grants grandparents the broad privilege to institute an action for custody. Although grandparents have the right to bring an initial suit for custody, they must still overcome the parents' constitutionally protected rights.

To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. *See, e.g., Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("The plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that the defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("Grandparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody.").

Thomas v. Oxendine, 280 N.C. App. 526, 530-31, 867 S.E.2d 728, 733-34 (2021) (citations, quotation marks, brackets, and ellipses omitted).

Grandparents' arguments on appeal can be resolved by applying the appropriate standard of review for a motion to dismiss under Rule 12(b)(6). At the hearing on Father's motion to dismiss, the trial court allowed Father to testify. Normally, it is not appropriate to consider testimony at a hearing on a motion to dismiss under Rule 12(b)(6), because a motion to dismiss is based only on the sufficiency of the complaint. *See Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003) ("A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." (citation omitted)). Also, Rule 12(d) states that the motion to dismiss "shall be heard and determined before trial on application of any party, unless

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the judge orders that the hearing and determination thereof be deferred until the trial.” N.C. Gen. Stat. § 1A-1, Rule 12(d) (emphasis added). Here, the trial court allowed Father to testify instead of hearing the motion to dismiss on the pleadings. But in any event, for purposes of a motion to dismiss, the trial court must accept all of the complaint’s material factual allegations as true. *See Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (“On a motion to dismiss, the complaint’s material factual allegations are taken as true.” (citation omitted)).

The allegations in the complaint, taken as true, would establish Grandparents’ standing to bring a custody claim for Tom. *See Thomas*, 280 N.C. App. at 531, 867 S.E.2d at 733-34. Grandparents alleged that Father acted in a manner inconsistent with his constitutionally protected rights as a parent and made specific allegations regarding his failure to provide for Tom, to establish a relationship with Tom, and to be able to provide an adequate home for Tom. *See id.* It is entirely possible—as the trial court apparently concluded—that these allegations are not entirely true and that Father is a fit and proper parent, but that would be a factual determination contrary to the allegations of the complaint. For purposes of *de novo* review of a motion to dismiss under Rule 12(b)(6), we are required to consider the allegations as true. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428. Therefore, Grandparents’ complaint adequately stated a claim upon which relief can be granted and the allegations of the complaint, taken as true, establish Grandparents’ standing to bring a claim under North Carolina General Statute Section 50-13.1. *See Deanes v. Deanes*, 294 N.C. App. 29, 33, 901 S.E.2d 880, 883 (2024) (“Before addressing [the g]randparents’ arguments directly, we first note a procedural issue complicating our review. Standing to bring a custody claim should be based upon the allegations of the pleadings.” (citation omitted)).

Grandparents also argue that the trial court should have made findings of fact or conclusions of law to explain the rationale for the dismissal of the claim. However, the trial court’s order clearly granted Father’s motion to dismiss. Beyond dismissing the complaint, the order only noted that Father was present and that Grandparents were not. Grandparents’ counsel was present and a motion to dismiss is normally heard upon the pleadings. The motion to dismiss is required to be heard before a trial on the merits according to Rule 12(d) “*unless* the judge orders that the hearing and determination thereof be deferred until the trial.” N.C. Gen. Stat. § 1A-1, Rule 12(d) (emphasis added). Here, the trial court did not order “that the hearing and determination of the motion to dismiss be deferred until the trial” and there would be no reason for Grandparents to be present to testify at the hearing on a motion

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to dismiss under Rule 12(b)(1) or (b)(6). *See id.* There is generally no need for findings of fact in a motion either allowing or denying a motion to dismiss under Rule 12(b)(6) since this motion merely tests the sufficiency of the pleading and the trial court must consider the allegations as true. *See Maynard v. Crook*, 289 N.C. App. 357, 367, 890 S.E.2d 164, 172 (2023) (“The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact, to make clear what was decided for purposes of res judicata and estoppel, and to allow for meaningful appellate review.” (citations omitted)).

Although we are reversing the trial court’s order of dismissal, we note that on remand the trial court may fully consider the evidence presented by the parties at a properly noticed hearing, and the trial court may rule upon the custody claim based upon its findings of fact and conclusions of law. This opinion addresses *only* the issue of whether Grandparents’ complaint was sufficient to state their claims for custody and their standing to bring a custody claim under North Carolina General Statute Section 50-13.1, and based on the allegations of the complaint, which we must consider as true, they have standing. Beyond this, we express no opinion as to the merits of the case on remand.

III. Conclusion

For the reasons stated above, the trial court’s order granting Father’s motion to dismiss is reversed. This matter is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JULY 2025)

CHARLOTTE CHRISTIAN ASSEMBLY OF THE END TIME MESSAGE, INC. v. ROMANELLI No. 24-1023	Mecklenburg (22CVS000076)	Affirmed
IN RE A.B.W.-H. No. 24-626	Pitt (21JA000008)	Reversed
IN RE A.E.A. No. 25-10	Mecklenburg (23JA000169-590)	Affirmed
IN RE A.G. No. 24-1032	Chatham (21JT000040-180) (21JT000041-180) (21JT000042-180) (21JT000043-180)	Affirmed
IN RE A.R. No. 25-48	Forsyth (23JT000012-330) (23JT000011-330)	Affirmed
IN RE D.A.-R.H. No. 24-993	Mecklenburg (23JA000061-590) (24JT000026-590)	Affirmed
IN RE E.W.P. No. 24-643	Avery (13SPC000068-050)	Affirmed
IN RE G.T.N. No. 24-678	Stokes (19JT000008) (19JT000009)	Affirmed
IN RE H.M.D. No. 24-1108	Wake (19JA000156-910)	Affirmed.
IN RE I.M.W. No. 24-1064	Gates (22JT000003-360)	Affirmed
IN RE J.E.K. No. 24-988	Stokes (22JT000075) (22JT000076) (22JT000077)	Affirmed
IN RE J.S.N.R. No. 24-1000	Rowan (24JT000068)	Affirmed

IN RE M.L.G. No. 24-504	Chatham (22JT000007)	Remanded
IN RE O.J. No. 25-42	Mecklenburg (24JA000063-590) (24JA000064-590) (24JA000065-590) (24JA000062-590)	Affirmed
IN RE S.R.-H. No. 24-1055	Guilford (20JT000748-400)	Affirmed
IN RE Z.G. No. 24-763	Scotland (24JB000001)	Affirmed
LOWREY v. CHOICE HOTELS INT'L, INC. No. 24-900	Durham (19CVS003400)	Affirmed
PORTER v. GOODYEAR TIRE & RUBBER CO. No. 24-808	N.C. Industrial Commission (17-034676)	Affirmed
PRICE v. YUENGLING No. 24-522	Durham (18CVS001380-310)	Dismissed
STATE v. COLEY No. 24-1079	Wake (23CR225054-910)	No Error
STATE v. CURRY No. 25-76	Davie (23CR000064-290) (23CR223478-290)	Dismissed
STATE v. FONVILLE No. 24-985	Onslow (22CRS053002) (22CRS053003)	DISMISSED IN PART; REMANDED FOR CORRECTION OF JUDGMENT.
STATE v. GREENE No. 24-1057	Watauga (24CRS000168)	Vacated
STATE v. HEWITT No. 17-1157-3	Catawba (11CR003822-170) (11CR003823-170) (11CR004077-170) (11CR051398-170) (11CR051400-170) (11CR051401-170)	No Error

STATE v. JENKINS No. 24-693	Guilford (19CR068242-400) (19CR068243-400) (19CR068244-400) (22CR026016-400)	No Error
STATE v. NUNEZ No. 24-1034	Cumberland (22CRS010133)	No Plain Error In Part, and No Error In Part
STATE v. SHEILDS No. 24-1005	Moore (21CRS051122-24) (22CRS000786)	Dismissed
STATE v. SMITH No. 24-1017	Iredell (23CRS314427) (23CRS314428) (24CRS216718) (24CRS216754)	Dismissed
STATE v. WILSON No. 24-1084	Rutherford (23CRS000546)	No Error.
STATE v. YARBOROUGH No. 24-490	Franklin (20CR050072-340)	No Error

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