

# ADVANCE SHEETS

OF

## CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*APRIL 1, 2026*

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

**THE COURT OF APPEALS  
OF  
NORTH CAROLINA**

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COURT OF APPEALS

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FILED 16 JULY 2025

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APPEAL AND ERROR

**Civil Procedure Rule 60—summary judgment—time for taking appeal not tolled—Appellate Rule 3(c)**—In a proceeding that originated in small claims court when plaintiff sought damages for allegedly improper repairs to her vehicle by defendant, plaintiff’s 9 August 2024 notice of appeal was not timely as to an order granting summary judgment in favor of defendant entered on 13 July 2022. A motion for “Reconsideration” filed by plaintiff later on the day the summary judgment order was entered (giving unforeseen traffic as the reason she had not appeared at the summary judgment hearing) and treated by the court as a motion constituting a viable ground for relief pursuant to Civil Procedure Rule 60—which led to the court hearing plaintiff on defendant’s summary judgment motion, but ultimately holding that plaintiff had no meritorious defense—did not toll the time for taking appeal from the summary judgment order pursuant to Appellate Rule 3(c). **Cunningham v. Bravo 4 Autoworks LLC, 23.**

CHILD CUSTODY AND SUPPORT

**Permanent custody order—best interests determination**—The trial court’s permanent custody order contained unchallenged findings of fact regarding each party’s parental fitness and ability to provide a stable environment that supported the court’s determination that the custody provisions set forth in the order were in the best interests of the children. **Morrow v. Morrow, 60.**

## CHILD CUSTODY AND SUPPORT—Continued

**Permanent custody order—custodial exchange—prohibition on recording other parent**—The trial court did not abuse its discretion by forbidding the parties from recording each other during custodial exchanges of their children, which the court included in its permanent custody order after noting the high level of conflict between the parties. Although plaintiff argued that the restriction violated the Federal Wiretap Act and North Carolina’s Electronic Surveillance Act, trial courts have broad discretion over custody matters. Here, the restriction did not violate the wiretapping laws where it was put in place for the best interests of the children. **Morrow v. Morrow, 60.**

**Permanent custody order—custody schedule—exchange time—discretionary decision**—The trial court did not abuse its discretion by setting a custodial exchange time of 5:00 p.m. on Saturdays as part of the parties’ summer custody schedule—which took into account defendant’s work schedule—or in prioritizing the summer schedule over the custody order’s provision allowing additional vacation time. The court had broad discretion to establish a schedule that would work for all parties and that would be in the children’s best interest. **Morrow v. Morrow, 60.**

**Permanent custody order—Father’s Day visitation—discretionary decision**—The trial court did not abuse its discretion by setting a custody schedule that had different provisions for the Mother’s Day and Father’s Day weekends, where the two holidays fell during different schedules—the regular schedule and the summer schedule (which was evenly split between the parties), respectively—and, thus, the Father’s Day plan depended on the parties’ summer arrangement in any given year. Although the parties had previously stipulated to a shared custody arrangement, the trial court had broad discretion to establish a schedule that would work for all parties and that would be in the best interests of the children. **Morrow v. Morrow, 60.**

**Permanent custody order—international travel provision—not restricted to Hague Convention signatories**—The trial court did not abuse its discretion by setting a custody schedule that allowed one parent to travel internationally with the children but that did not restrict travel only to countries which were parties to the Hague Convention (which includes legal rights and procedures for the return of wrongfully removed or abducted children). Trial courts have broad discretion over custody matters and, here, the court took into account information from defendant that her family was from India (a country that is not a party to the Hague Convention), that many of her extended family still lived in India, and that the parties had taken the children to India previously. **Morrow v. Morrow, 60.**

**Prospective support award—defendant’s gross income—imputation of defendant’s income—plaintiff’s income—support of other children—proper worksheet**—In a proceeding for child support, competent evidence supported the trial court’s findings of fact concerning: (1) the calculation of defendant’s monthly gross income, based on the court’s credibility determinations regarding defendant’s testimony, financial affidavit, and tax returns; (2) the imputation of defendant’s income, based on his past income, due to its determination that defendant’s most recent financial evidence was unreliable; (3) the calculation of plaintiff’s 2023 income, based upon her past income, where the parties’ evidence was conflicting on the 2023 income; and (4) the choice not to credit defendant for support paid for another biological child with a different woman, where the child support guidelines provided only that such payments “may” be considered and where defendant failed to show he consistently paid support for an extended time period. However, because the trial court failed to make findings of fact as to the number of nights the children

## CHILD CUSTODY AND SUPPORT—Continued

spent with each parent between 2018 and 2021, the appellate court could not determine whether the trial court used the appropriate worksheet in calculating its award; accordingly, the child support order was vacated and the matter was remanded for the entry of additional factual findings. **Denis v. Chandler, 30.**

**Retroactive support award—family health insurance premiums—calculation pursuant to child support guidelines**—In a proceeding for child support, the trial court’s award of retroactive child support from defendant to plaintiff was proper where plaintiff requested reimbursement for previous expenditures on premiums for a family health care plan; however, that portion of the trial court’s order was vacated, and the matter was remanded for recalculation of the amount of retroactive support because the trial court failed to calculate the parties’ children’s specific portion of the premiums, in contradiction of the child support guidelines established by the Conference of Chief District Court Judges pursuant to N.C.G.S. § 50-13.4(c1). **Denis v. Chandler, 30.**

## CIVIL PROCEDURE

**Rule 60(b) motion for relief—from voluntary dismissal with prejudice—done in good faith—excusable neglect**—In a legal dispute arising from a failed attempt to purchase a self-storage business and the land on which it sat, where the parties—a real estate investment company (plaintiff) and the self-storage business (defendant)—entered a settlement agreement that would allow the sale to proceed provided that plaintiff met certain requirements, including voluntarily dismissing with prejudice its breach of contract action against defendant, the trial court did not abuse its discretion by concluding—in an indicative order previously requested by the Court of Appeals—that, were an appeal not currently pending in the case, it would grant plaintiff’s Rule 60(b) motion for relief from its voluntary dismissal with prejudice where, after the dismissal took effect, defendant refused to sell on the ground that plaintiff signed a new purchase agreement outside of the fourteen-day deadline prescribed in the settlement agreement. Plaintiff’s voluntary dismissal constituted “excusable neglect” under Rule 60(b)(1) since, in filing for it, plaintiff was trying in good faith to fulfill its obligations under the settlement agreement; furthermore, because the fourteen-day deadline to sign a new contract was not a material term of the settlement agreement, defendant’s refusal to go through with the sale arbitrarily deprived plaintiff of the benefit of their bargain. **Yang Real Est. Invs., LLC v. Affordable Mini Storage of Newton, LLC, 114.**

**Rule 63—order entered by chief district court judge—no error**—The chief district court judge properly entered an order—denying plaintiff’s motion to reconsider an order granting summary judgment in favor of defendant—pursuant to Civil Procedure Rule 63 (providing for the chief judge of a district to sign and ministerially enter an order where another district court judge made findings of fact and conclusions of law but did not enter a written order before leaving office). The chief district court judge listened to a recording of the hearing on plaintiff’s motion conducted by a judge whose term ended before a written order was entered; concluded that the former judge had clearly stated her facts, reasoning, and conclusions on the record; and then prepared, signed, and ministerially entered an order containing the former judge’s findings and fact and conclusions of law. **Cunningham v. Bravo 4 Autoworks LLC, 23.**

## CONTRACTS

**Breach—settlement agreement—deadline to sign new contract to purchase a business—not a material term**—In a legal dispute arising from a failed attempt to purchase a self-storage business and the land on which it sat, where the parties—a real estate investment company (plaintiff) and the self-storage business (defendant)—entered a settlement agreement that would allow the sale to proceed provided that plaintiff met certain requirements, including signing a new purchase agreement within fourteen days of the settlement agreement’s execution, the trial court did not err by granting plaintiff’s motion to enforce the settlement agreement after defendant refused to sell on the ground that plaintiff signed a new purchase agreement two days after the fourteen-day deadline had passed. The fourteen-day deadline was not a material term of the settlement agreement, as evidenced by the fact that defendant had unilaterally chosen to allow plaintiff an extra day to meet the deadline since the fourteenth day landed on Labor Day. Thus, plaintiff’s breach of the settlement agreement was not a material breach, especially given that plaintiff had already performed its other obligations under the agreement. **Yang Real Est. Invs., LLC v. Affordable Mini Storage of Newton, LLC, 114.**

**Construction contract—ambiguous as to parties—summary judgment improper**—In a dispute arising from a residential construction project, which was initially undertaken by Anderson Construction under a limited license before plaintiff AC Developments, LLC took over under an unlimited license, where the construction contract referred to both entities but only named Anderson Construction as “Contractor,” the contract was ambiguous regarding the identities of the parties to the contract. Since the contract’s enforceability depended on which parties were subject to its terms, a genuine issue of material fact existed; therefore, the trial court erred by entering summary judgment for defendant homeowners on plaintiff’s relevant claims and indemnity crossclaim. **AC Devs., LLC v. Edwards, 1.**

## CRIMINAL LAW

**Post-conviction discovery—statutory sex offenses—records of past juvenile abuse allegations—not material**—The trial court properly denied defendant’s motion for post-conviction discovery (filed after defendant’s conviction of two counts of statutory sexual offense and one count of statutory rape) following the court’s in camera review of department of social services (DSS) records concerning the victim’s prior allegations of abuse (against persons other than defendant) and its determination that those records were not material to defendant’s defense or sentence. Upon its own review, the Court of Appeals concluded that, in light of expert testimony and physical evidence that the victim had been sexually abused—as well as testimony from the victim and witnesses to whom she reported the abuse—while the details of one allegation contained in the DSS records could have been used by defendant to impeach the victim’s credibility, there was no reasonable probability that the result at defendant’s trial would have been different had the records been disclosed to the defense. **State v. Cataldo, 87.**

## DIVORCE

**Equitable distribution award—affirmed in part—vacated and remanded in part**—In an equitable distribution matter, some portions of the trial court’s award, which were supported by competent evidence, were affirmed, including the classification of \$8,996 gifted to plaintiff by her cousin as separate property, and the valuation of plaintiff’s wedding rings. Additionally, the choice not to award a credit to

## **DIVORCE—Continued**

defendant for (or to consider as a distributional factor) the parties' post-separation use of the marital home was an appropriate exercise of the trial court's discretion. However, the portion of the award setting aside an agreement by the parties (that \$48,000 would be given to defendant upon the sale of certain real estate) on grounds of undue influence and duress was reversed because, while the evidence showed that plaintiff felt external pressure to sign, the pressure did not rise to the level of overriding her free will. Finally, the court abused its discretion in ordering a deduction to the retroactive child support arrearage defendant owed to plaintiff from the sale of certain real estate, in violation of N.C.G.S. § 50-20(f) (equitable distribution awards to be made without regard to child support obligations); accordingly, that portion of the award was vacated and the matter was remanded for entry of an award in compliance with the statute. **Denis v. Chandler, 30.**

## **EVIDENCE**

**Drug Recognition Expert—testimony regarding defendant's impairment—reliability requirements—harmless error**—At a trial for charges of second-degree murder and felony death by vehicle arising from a fatal car collision, the trial court erred by allowing the State's Drug Recognition Expert (DRE) to testify that, in his professional opinion, "multiple drug categories" contributed to defendant's impairment during the crash. Under the most recent version of Evidence Rule 702, a certified DRE who is qualified to give expert testimony on the issue of impairment under subsection (a1) must still satisfy the reliability requirements of subsection (a) for giving expert testimony in general; here, those requirements were not satisfied where the DRE—testifying nearly two years after the crash and without having performed an actual DRE evaluation—based his opinion solely on evidence presented at trial and a review of defendant's records. Nevertheless, the court's error did not constitute prejudicial error where, absent the DRE's testimony, the State still presented overwhelming evidence of defendant's impairment during the crash; thus, defendant was not entitled to a new trial. **State v. Moore, 101.**

**Rule 404(b)—driving record—proof of malice for second-degree murder—similarity and temporal proximity**—At a trial for criminal charges arising from a fatal car crash, in which defendant was driving his car at nearly twice the legal speed limit before crashing head-on into the victim's car, the trial court did not err by admitting defendant's driving record—containing multiple speeding citations—as evidence of malice to prove second-degree murder pursuant to Evidence Rule 404(b), where the record showed that the court properly weighed considerations of similarity and temporal proximity in determining the evidence's probative value. First, the court limited temporal proximity by disregarding citations occurring more than five years before the crash. Second, although the court did not explicitly verbalize its Rule 404(b) similarity analysis, there was a clear similarity between defendant's prior speeding citations and his speeding during the crash. **State v. Moore, 101.**

## **NEGLIGENCE**

**Governmental immunity—operation and supervision of county recreation center—governmental function**—In a tort action brought against defendant county as a result of a man's death due to hyperthermia—which occurred following his participation in an "adult free play" basketball session in the unairconditioned gymnasium at a community recreation center owned and operated by defendant—the trial court properly allowed defendant's motion for summary judgment on the

## NEGLIGENCE—Continued

basis of governmental immunity. A weighing of the relevant factors revealed that defendant was engaged in a governmental (as opposed to a proprietary) function. First, as to legislative designation, the General Assembly had determined that the operation of a recreation center is a proper governmental function (N.C.G.S. §§ 160A-351, -353). Second, as to government exclusivity, while providing gymnasium space for recreation is not a function exclusively reserved to governmental entities, it is a traditional government activity. Third, as to fees and costs, defendant charged only a minimal fee for participation (which would be waived upon request) and the recreation center operated at a large financial loss to defendant. **Smith v. Scotland Cnty., 76.**

## SEXUAL OFFENDERS

**Reportable conviction—out-of-state adjudication—registration required in issuing state**—Defendant was required to register as a sex offender after moving to North Carolina where, pursuant to N.C.G.S. § 14-208.6(4)(b), his adjudication in Delaware as delinquent for rape in the first degree was a reportable offense because it was a final conviction for which Delaware law required him to register as a sex offender in that state. The rule of lenity did not apply because the language of section 14-208.6(4)(b) was unambiguous. **State v. Jackson, 95.**

## UNFAIR TRADE PRACTICES

**Construction project—nonpayment by homeowners—no evidence of deceit—summary judgment proper**—In a dispute arising from a residential construction project, in which plaintiff construction company raised, among other claims, a claim for unfair and deceptive trade practices (UDTP), the trial court did not err by proceeding to hear defendant homeowners' motion for summary judgment where plaintiff did not object to the hearing or request a continuance to allow additional time for discovery. The court properly granted summary judgment to defendants on the UDTP claim because plaintiff failed to produce any evidence that defendants acted in a deceitful manner when communicating their intent to make payment for work completed. **AC Devs., LLC v. Edwards, 1.**

## ZONING

**Amendments—legislative—standing to challenge—special damages not required**—Plaintiffs sufficiently alleged in their declaratory judgment action that they would be directly and negatively affected by a county's rezoning legislation (consisting of two amendments to the county's unified development ordinance, which changed the permitted use of property abutting or in close proximity to plaintiffs' properties from residential agriculture to highway commercial and which allowed various types of development, including electronic gaming operations, by right rather than by special use permit), including by: increased water contamination, traffic, safety concerns, noise, light, and litter. Therefore, the trial court erred by granting defendants' motion to dismiss for lack of subject matter jurisdiction based on a lack of standing. **Camp Carefree, Inc. v. Rockingham Cnty., 9.**

**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.



CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
NORTH CAROLINA  
AT  
RALEIGH

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AC DEVELOPMENTS, LLC, PLAINTIFF  
v.  
TODD C. EDWARDS, AND OKCHA EDWARDS, DEFENDANTS

No. COA24-822  
Filed 16 July 2025

**1. Contracts—construction contract—ambiguous as to parties—summary judgment improper**

In a dispute arising from a residential construction project, which was initially undertaken by Anderson Construction under a limited license before plaintiff AC Developments, LLC took over under an unlimited license, where the construction contract referred to both entities but only named Anderson Construction as “Contractor,” the contract was ambiguous regarding the identities of the parties to the contract. Since the contract’s enforceability depended on which parties were subject to its terms, a genuine issue of material fact existed; therefore, the trial court erred by entering summary judgment for defendant homeowners on plaintiff’s relevant claims and indemnity crossclaim.

**2. Unfair Trade Practices—construction project—nonpayment by homeowners—no evidence of deceit—summary judgment proper**

In a dispute arising from a residential construction project, in which plaintiff construction company raised, among other claims, a claim for unfair and deceptive trade practices (UDTP), the trial

**AC DEVS., LLC v. EDWARDS**

[300 N.C. App. 1 (2025)]

court did not err by proceeding to hear defendant homeowners' motion for summary judgment where plaintiff did not object to the hearing or request a continuance to allow additional time for discovery. The court properly granted summary judgment to defendants on the UDTP claim because plaintiff failed to produce any evidence that defendants acted in a deceitful manner when communicating their intent to make payment for work completed.

Appeal by plaintiff from judgment entered 4 March 2024 by Judge Michael L. Robinson in Henderson County Superior Court. Heard in the Court of Appeals 21 May 2025.

*Capua Law Firm, P.A., by Paul A. Capua, and Natalia L. Talbot, for the plaintiff-appellant.*

*The Van Winkle Law Firm, by Philip S. Anderson, for the defendant-appellees.*

TYSON, Judge.

AC Developments, LLC ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Todd C. Edwards and Okcha Edwards (collectively "Defendants"). We affirm in part, reverse in part, and remand.

### **I. Background**

Shawn D. Anderson is a general contractor doing business as Anderson Construction under license number 80145, a limited license permitting him to construct residential buildings up to a value of \$500,000. In April 2021, Plaintiff was issued an unlimited license authorizing it to construct residential buildings without regard to amount. After this application, but before issuance of his unlimited license, Anderson was approached by Defendants to serve as the general contractor for their residential building in Hendersonville, North Carolina. Anderson agreed to begin work under Anderson Construction, which was licensed to start immediately, then take over as AC Developments once the unlimited license was issued, due to the estimated project cost exceeding \$500,000.

The parties entered into a contract on 9 February 2021 stating in relevant part,

This Construction Contract (the "Contract" or "Agreement") is made as of February 9, 2021 (the "effective

**AC DEVS., LLC v. EDWARDS**

[300 N.C. App. 1 (2025)]

Date”) by and between Todd and Okcha Edwards (Owners) of Lot 131 at Grand Highlands at Bear Wallow Mountain Hendersonville NC 28792 and AC Developments LLC (“Anderson Construction”) of 405 Sand Meadow Ct Fletcher NC 28732.

Contractor desires to provide Construction Services to Owner and Owner desires to obtain such services from contractor.

...

5. PAYMENT. Payment shall be made to Contract [sic], Anderson Construction, 405 Sand Meadow Ct., Fletcher, NC 28732.

...

10. ENTIRE AGREEMENT. This Contract contains the entire agreement father [sic] parties, and there are no other promises or conditions in any other contract or agreement whether oral or written concerning the subject matter of the agreement. Any amendments must be in writing and signed by each party. This agreement supersedes any prior written or oral agreements between the parties.

...

13. SIGNATORIES. This agreement shall be signed by Owners and on behalf of Contractor, Anderson Construction by Shawn Anderson, President (Contractor’s License: 80145) and shall be effective as of the date first written above.

Anderson Construction began work on the project and received the requested payments from Defendants until Plaintiff received its unlimited license, at which time it took over the work and payments were directed to it. At the time the authority over the work was transferred to Plaintiff, the total work completed was within Anderson Construction’s \$500,000 license authorization.

Defendants contend Anderson and his companies issued fraudulent and erroneous invoices and failed to complete the work in a workmanlike manner. Plaintiff claims Defendant stopped making payments over the course of the process and brought this action on 19 April 2023 to collect \$702,654.81 in unpaid construction materials and labor. Plaintiff alleged claims of breach of contract, breach of covenant of

**AC DEVS., LLC v. EDWARDS**

[300 N.C. App. 1 (2025)]

good faith and fair dealing, construction lien foreclosure, misrepresentation, *quantum meruit*, and unjust enrichment.

In a separate case arising out of the same circumstances, Anderson filed additional crossclaims against Defendants of unfair and deceptive trade practices under Chapter 75, contribution, and indemnity. Defendants moved for summary judgment on the grounds the contract between the parties was illegal and Plaintiff could not recover under it. The trial court granted Defendant's motion for summary judgment and dismissed all of Plaintiff's claims and crossclaims. Plaintiff timely filed notice of appeal. Plaintiff did not appeal the trial court's order on *quantum meruit* and unjust enrichment. The trial court's order is final concerning those claims.

**II. Jurisdiction**

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

**III. Standard of Review**

This Court reviews an appeal from summary judgment *de novo*. *Baer v. Baer*, 294 N.C. App. 551, 558, 904 S.E.2d 815, 819 (2024). Summary judgment is appropriate only when the record shows no genuine issue of material fact exists and a "party is entitled to a judgment as a matter of law." *Id.* The Court assesses whether a genuine issue of material fact exists and whether the movant is entitled to judgment as a matter of law "in the light most favorable to the non-moving party." *Manecke v. Kurtz*, 222 N.C. App. 472, 474, 731 S.E.2d 217, 220 (2012). In reviewing the evidence, all inferences of fact are drawn in favor of the non-moving party. *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988). "[T]he trial court's conclusions of law are reviewed *de novo*." *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010).

**IV. Issues**

Plaintiff argues the trial court erred in granting Defendants' motion for summary judgment because a material factual dispute exists of who were parties to the contract. Plaintiff further contends the trial court erred in dismissing its crossclaim of unfair and deceptive trade practices under Chapter 75.

**V. Plaintiff's Claims based on the Construction Contract**

[1] Plaintiff argues the terms of the contract were ambiguous concerning the identity of the parties to the contract and the trial court erred in

## AC DEVS., LLC v. EDWARDS

[300 N.C. App. 1 (2025)]

refusing to admit extrinsic evidence before granting summary judgment on the relevant claims and crossclaim.

**A. Validity of Contract**

Plaintiff claims the trial court erred with respect to the motions for summary judgment and the crossclaim of indemnity because the contract is at least ambiguous concerning the parties to it and summary judgment is inappropriate. Defendants claim they were entitled to judgment as a matter of law because an essential element of the Plaintiff's claims, a valid contract, is nonexistent.

When the terms of the contract are unambiguous, the court interprets it as a matter of law and does not consider extrinsic evidence. *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (2010). A trial court's determination of whether the language of a contract is ambiguous is a question of law that an appellate court reviews *de novo*. *Gay v. Saber Healthcare Grp.*, 271 N.C. App. 1, 5, 842 S.E.2d 635, 639 (2020). "An ambiguity exists in a contract if the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. Thus, if there is *any* uncertainty as to what the agreement is between the parties, a contract is ambiguous." *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 267, 554 S.E.2d 863, 866-67 (2001) (internal quotations and citations omitted) (emphasis supplied).

If a contract is ambiguous, its interpretation is a question of fact and extrinsic evidence is necessary to resolve the ambiguity. *Crider* at 266-67, 554 S.E.2d at 866. "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001) (citation omitted).

There are details within the terms of the contract sufficient to find that the contract is ambiguous as to the parties to it. For instance, Paragraph 13 indicates that the contract was signed "on behalf of Contractor, Anderson Construction by Shawn Anderson." This comports with the inclusion of the license number for Shawn Anderson d/b/a Anderson Construction, whom Plaintiff contends was in fact a signatory to the contract. Similarly, the contract designates AC Developments as "Anderson Construction," but does not identify that company as "Contractor." Rather, Paragraph 13 lists "Contractor" as Anderson Construction by Shawn Anderson. Despite the inartful drafting, these terms are sufficiently ambiguous for a reasonable trier of fact to conclude the term

## AC DEVS., LLC v. EDWARDS

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Contractor refers in part to Anderson d/b/a Anderson Construction, who was licensed to perform the work at the time.

Further, Paragraph 13 includes Anderson's contractor's license number under the signatories section. This detail supports Plaintiff's claims and tends to show Anderson was made party to the contract, especially in light of the "fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Gay* at 7, 842 S.E.2d at 640. Plaintiff's assertion of parties to the contract is a reasonable way to give effect to the license number for Anderson Construction in Paragraph 13, whereas Defendant's interpretation of the contract does not explain why, if Plaintiff is the only contractor involved, the contract would include a license number which did not pertain to Plaintiff in Paragraph 13. The terms of the contract make it fairly susceptible of Plaintiff's or Defendants' interpretations and understandings, and a genuine issue of material fact exists regarding the identities of the parties to the contract.

In general, a contractor may recover for work done under a contract only up to the limitation on its contracting license, but a contractor who enters into a contract that exceeds its license limitation does not violate the licensing statutes until the value of the work performed exceeds its license limitation. *See Dellinger v. Michal*, 92 N.C. App. 744, 746, 375 S.E.2d 698, 699 (1989). When the cost of a construction development specified by a contract exceeds the limitation of the contractor's license, the contractor may increase the license limitation during the course of performing the contract and remain in compliance. *Id.* When a licensing defect is cured in this way, the contractor may enforce the contract to its full value. *Id.*

It is undisputed the value of the work performed was within Anderson's license limitation at the time Plaintiff received its unlimited license. Under the facts alleged in the complaint, Anderson performed all work on the project until Plaintiff received its license, at which point it took over.

If, as Plaintiff contends, Anderson was made party to the contract in addition to Plaintiff, it would be lawful for him to undertake a portion of the work within his license limitation until Plaintiff received its unlimited license and the contract would be enforceable. Because the enforceability of the contract depends on the identities of the parties to it, genuine issues of material fact exist, and summary judgment was improper.

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**B. Indemnity Crossclaim**

In light of our decision above, we also reverse the award of summary judgment on the indemnity crossclaim.

**VI. Unfair and Deceptive Trade Practices**

[2] Plaintiff argues the trial court erred in granting summary judgment on their unfair and deceptive trade practices claims under N.C. Gen. Stat. § 75-1.1 (2023). The trial court ruled this crossclaim was based upon the conduct constituting the claim of misrepresentation, for which it determined summary judgment should be granted. Plaintiff alleges error on the grounds it was not given the opportunity to discover evidence to support its position and the complaint, under Chapter 75, incorporated allegations beyond misrepresentation, so it was improper to rely solely on the disposition of the misrepresentation in dismissing the Chapter 75 crossclaim.

Plaintiff first argues it “would have moved for a continuance” to conduct discovery had it known the sufficiency of their evidence for this claim would be at issue in the summary judgment motion. While Plaintiff objected to the consideration of the contribution crossclaim on the grounds it was premature, it did not object with respect to the Chapter 75 crossclaims or move for additional time to conduct discovery.

[W]here there is no evidence that plaintiff sought discovery prior to the motions for summary judgment, no record of any objections to hearing the motions for summary judgment, and no action on the part of plaintiff to continue the hearing to allow additional time for pre-trial discovery, there is no error in proceeding with the summary judgment hearing.

*Sellers v. Morton*, 191 N.C. App. 75, 85, 661 S.E.2d 915, 923 (2008). It was not error for the trial court to proceed with the hearing because Plaintiff neither objected to hearing the motion for summary judgment nor requested a continuance to allow for additional time to conduct discovery.

Plaintiff next contends the trial court erred by relying on its disposition of the misrepresentation claim in ruling on the Chapter 75 claim, because there were additional allegations in the latter the court did not address. However, even considering these additional allegations, based on the facts alleged, there was insufficient evidence to support a claim under Chapter 75. “A mere breach of contract, even if intentional, is not an unfair or deceptive act under Chapter 75.” *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006).

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“To recover for unfair and deceptive trade practices, a party must show substantial aggravating circumstances attending the breach of contract.” *Id.* This can include conduct that is fraudulent or deceptive. *Poor v. Hill*, 138 N.C. App. 19, 28-29, 530 S.E.2d 838, 845 (2000). “[A] promissory misrepresentation may constitute fraud when it is made with the intent to deceive and when the promisor had no intent of complying at the time of making the misrepresentation . . . .” *Ausley v. Bishop*, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999). However, “[m]ere proof of nonperformance is not sufficient to establish the necessary fraudulent intent.” *Williams v. Williams*, 220 N.C. 806, 811, 18 S.E.2d 364, 367 (1942).

While Plaintiff argues the Chapter 75 claim includes allegations beyond misrepresentation, nothing in the record beyond Plaintiff’s assertion suggests the allegations against Defendants rise beyond breach of contract. The basis for the Chapter 75 claim is Defendants communicated to Plaintiff they would pay the amount owed for services, but these statements were knowingly false or made negligently or recklessly without regard for the truth.

The record contains no evidence suggesting Defendants’ statements to this effect were deceitful when made. Plaintiff’s position is further undercut by the series of payments completed by Defendants in the time leading up to the alleged breach, over and above the estimate specified by the contract. Plaintiff fails to produce any evidence from which a trier of fact could find and conclude Defendants’ representations were deceitful. The trial court’s grant of summary judgment on this claim and issue is affirmed.

**VII. Conclusion**

Anderson Construction, as an under-licensed contractor, could recover up to its limit, if Anderson was a party to the contract. Plaintiff could also have potentially cured the licensing defect prior to completion. The trial court erred by granting summary judgment in favor of Defendant for Plaintiff’s breach of contract claim.

Plaintiff fails to produce any evidence from which a trier of fact could find and conclude Defendants’ representations were deceitful. The order is affirmed in part, reversed in part, and remanded. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges COLLINS and GRIFFIN concur.

**CAMP CAREFREE, INC. v. ROCKINGHAM CNTY.**

[300 N.C. App. 9 (2025)]

CAMP CAREFREE, INC, MICRIS, LLC, BRANDON W. LEEBRICK AND AMY E. LEEBRICK, DONALD DOHM AND CHRISTINE DOHM, DAVID FORBES AND WENDY FORBES, MARY LEA ANDERSON, JEFFREY DARREN SCOTT, AND JILL N. MEIER, PLAINTIFFS

v.

ROCKINGHAM COUNTY, JULIE J. SANDERS, ELLEN J. WHITESSELL, LINDA J. CARMICHAEL, SUSAN J. MURRAY F/K/A SUSAN J. JONES, AND NC DEVELOPMENT HOLDINGS, LLC, DEFENDANTS

No. COA24-666

Filed 16 July 2025

**Zoning—amendments—legislative—standing to challenge—special damages not required**

Plaintiffs sufficiently alleged in their declaratory judgment action that they would be directly and negatively affected by a county's rezoning legislation (consisting of two amendments to the county's unified development ordinance, which changed the permitted use of property abutting or in close proximity to plaintiffs' properties from residential agriculture to highway commercial and which allowed various types of development, including electronic gaming operations, by right rather than by special use permit), including by: increased water contamination, traffic, safety concerns, noise, light, and litter. Therefore, the trial court erred by granting defendants' motion to dismiss for lack of subject matter jurisdiction based on a lack of standing.

Appeal by Plaintiffs from order entered 2 April 2024 by Judge Clayton D. Somers in Rockingham County Superior Court. Heard in the Court of Appeals 18 March 2025. Supplemental briefing ordered on 16 May 2025.

*Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Brian D. Gulden and Jonathan H. Dunlap, for Plaintiffs-Appellants.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by S. Wilson Quick, Jimmy C. Chang, and Pearson G. Cost, for Defendants-Appellees Julie J. Sanders, Ellen J. Whitesell, Linda J. Carmichael, Susan J. Murray, and NC Development Holdings, LLC; Rockingham County Attorney Clyde B. Albright and Frazier Hill & Fury, R.L.L.P., by William L. Hill, for Defendant-Appellee Rockingham County.*

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COLLINS, Judge.

This appeal arises from Rockingham County's adoption of two amendments to its Unified Development Ordinance ("UDO") which resulted in a 192.74-acre parcel of property ("Property") being rezoned to allow electronic gaming operations, among other uses, by right on the Property. Plaintiffs filed a complaint seeking a declaratory judgment that the amendments are "void and of no legal effect." Defendants moved to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and (6). The trial court granted Defendants' motions to dismiss for lack of subject matter jurisdiction based on a lack of standing; Plaintiffs appealed.

Plaintiffs argue that they made sufficient allegations to establish standing to bring this action and did not need to further plead special damages. Following this Court's recent opinion in *Gardner v. Richmond Cnty.*, 911 S.E.2d 761 (N.C. Ct. App. 2025), and the North Carolina Supreme Court decisions relied on and synthesized therein, we agree and reverse the trial court's order.

### I. Procedural History

Plaintiffs are citizens of and property owners in Rockingham County, North Carolina with properties either abutting or in close proximity to the Property. They commenced this action on 18 October 2023 under the Declaratory Judgment Act by filing a verified complaint challenging Defendant Rockingham County's adoption of two amendments to its UDO ("Rezoning Legislation"). The first amendment changed the zoning classification of the Property from Residential Agricultural to Highway Commercial ("Map Amendment"). The second amendment increased the allowable uses in the County's Highway Commercial district ("Text Amendment").

Defendant Rockingham County answered and moved to dismiss. On 8 January 2024, the remaining Defendants moved to dismiss. After a hearing, the trial court entered an order on 21 March 2024 dismissing Plaintiffs' complaint for lack of subject matter jurisdiction based on a lack of standing. Plaintiffs timely appealed.

### II. Factual Background

On 9 June 2023, Defendant NC Development Holdings, LLC submitted an application for the Map Amendment to the Rockingham County Department of Community Development, seeking to rezone the Property at issue, a 192.74-acre parcel in Stokesdale, Rockingham County, North

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Carolina, from Residential Agricultural to Highway Commercial. The owners of the Property—Defendants Julie J. Sanders, Ellen J. Whitesell, Linda J. Carmichael, and Susan J. Murray—joined the application.

Three days later, at its 12 June 2023 meeting, the Rockingham County Planning Board, at the request of County leadership, reviewed the proposed Text Amendment. The Text Amendment would allow all uses licensed by the State of North Carolina and State Entities to operate by right in the County’s Highway Commercial districts. As a result, the Text Amendment would permit electronic gaming operations by right in Highway Commercial districts, removing the requirement that they be permitted only as a special use. The Planning Board voted at that meeting to recommend the Text Amendment to the Rockingham County Board of Commissioners. Seven days later, on 19 June 2023, the Board of Commissioners unanimously approved the Text Amendment.

The Planning Board reviewed the Map Amendment application and voted on 10 July 2023 to recommend the Board of Commissioners deny it. On 21 August 2023, Plaintiffs, through counsel, wrote the Board of Commissioners alleging there had been procedural errors in the consideration and passage of the Text Amendment and the processing of the Map Amendment application, and stating reasons why the Map Amendment application should be rejected. Nonetheless, the Board of Commissioners considered and unanimously approved the Map Amendment application on 21 August 2023.

Under the Rockingham County UDO, the Residential Agricultural zoning district is

established in areas that are characterized by large lots, clustered subdivisions, agricultural uses and open lands. These areas may include prime farmland and unique topographical or environmental restrictions that are remote from existing developed areas.

....

[] The [Residential Agricultural] district carries forth the principles associated with the preservation and conservation of rural lands throughout the county where low density is desirable in order to protect environmentally sensitive areas, agricultural areas, and viewsheds.

In contrast, the Highway Commercial district

provides areas for more intensive regional highway-oriented business, office, service and civic uses. The

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district regulations are designed to protect and encourage the transitional character of the districts by permitting uses and building forms that are compatible with the surrounding area.

Prior to the approval of the Text Amendment, the UDO's Permitted Use Table allowed electronic gaming operations in a Highway Commercial district only after receiving a special use permit. Further, the Permitted Use Table did not list "State Licensed Uses" as a specific use. With the adoption of the Text Amendment, electronic gaming operations and State Licensed Uses are now allowed by right in a Highway Commercial district. Additional uses now permitted by right in a Highway Commercial district include dry cleaning facilities, crematories, fertilizer manufacturers, hotels, fairgrounds, hospitals, landfills for hazardous and industrial waste, and wastewater collection, treatment and disposal facilities. With the adoption of the Map Amendment, all of these uses are permitted by right on the Property.

**A. Facts specific to Plaintiffs' standing**

All Plaintiffs are citizens of and property owners in Rockingham County, North Carolina with properties either abutting or in close proximity to the Property. Furthermore, each Plaintiff alleged specific injuries as a result of the Rezoning Legislation.

**1. Camp Carefree**

Camp Carefree owns property located directly south of and adjacent to the Property. Since 1986, during the summer months, Camp Carefree has provided a free, one-week overnight camping experience for kids aged six and older with chronic illnesses, well siblings of sick children, and a week for children with a sick parent. Many of these children otherwise live protected lives and spend a good deal of their time in hospitals and doctor's offices. Camp Carefree provides these children with opportunities to play, learn, and have fun with others who deal with similar difficulties. Camp Carefree can accommodate 120 campers, counselors, medical personnel, and volunteers. Outside of the summer months, Camp Carefree rents out its facilities to churches, businesses, and community and family groups.

Rhonda Rodenbough, Camp Carefree's managing board member who resides on Camp Carefree's property, testified via affidavit that the Rezoning Legislation would negatively impact its property use by: "dramatically impact[ing] the peaceful and quiet enjoyment of Camp Carefree, Inc." by "impacting the physical and mental wellbeing of our

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campers who suffer from neurological disorders that are significantly affected by loud noises, light and over stimulation”; “dramatically impacting” the camp “in terms of visual intrusiveness, and noise and light trespass”; and “significant[ly] increas[ing]” traffic along the access roads to the camp.

**2. *Micris, LLC***

Micris, LLC owns property located less than 650 feet to the east of the Property. Michael J. Cusato, Jr., is the managing member of Micris and the owner and President of Kalo Food, LLC, the bakery that occupies the Micris property. The bakery specializes in delivering gluten-free foods to customers throughout Maryland, Virginia, and North Carolina.

Mr. Cusato testified via affidavit that the Rezoning Legislation would “dramatically and detrimentally impact [his] business” by causing “a significant increase in traffic” which would increase exposure to liability for Kalo Food’s trucks and drivers and increase light trespass.

**3. *Brandon and Amy Leebrick***

Brandon and Amy Leebrick own property located approximately 300 feet south of the Property. On their property, they operate a small farm, a registered homeschool for three of their four children, and a rental house. Mr. Leebrick testified via affidavit that the Rezoning Legislation threatened to: contaminate the private wells and natural springs on their property; “dramatically and detrimentally impact” their farm operations and opportunities, their ability to rent their rental home, and their ability to homeschool and educate their children safely; cause visual intrusiveness as well as noise and light trespass, as development on the Property would be within sight of their farm; increase traffic accidents and incidents involving driving under the influence of alcohol; and increase criminal activity and trespass on their property due to its proximity to the Property and the lack of any conditions that would require walls, fences, or other barriers.

**4. *Donald and Christine Dohm***

Donald and Christine Dohm own property located directly north of and adjacent to the Property and have lived there since 2005. Mrs. Dohm testified via affidavit that the Rezoning Legislation threatened to: significantly increase traffic, making it more difficult for them to enter and exit their neighborhood due to the required turns and u-turns among highway traffic; and “dramatically and detrimentally” impact their property in terms of visual intrusiveness, noise, and light trespass.

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**5. *David and Wendy Forbes***

David and Wendy Forbes have owned property located directly north and within 350 feet of the Property since 2019. Mr. Forbes testified via affidavit that the Rezoning Legislation would “dramatically and detrimentally impact [his] peaceful and quiet enjoyment of [his] residence” because it would increase traffic and criminal activity, overburden the local utilities, cause light and noise trespass, and cause visual intrusiveness.

**6. *Mary Anderson***

Mary Anderson has owned property located directly north and immediately adjacent to the Property since 2004. Her property has been in her family since 1986. Ms. Anderson testified via affidavit that the Rezoning Legislation threatened to: significantly increase traffic along Highway 220, “interfering with [her] ability to come and go from [her] property without increased danger”; result in her family’s loss of privacy and ability to enjoy the “peacefulness and safety of a rural community”; cause visual intrusiveness; and cause noise and light trespass.

**7. *Jeffery Scott***

Jeffery Scott owns property located directly north and adjacent to the Property and has lived there since 2019. Mr. Scott testified via affidavit that the Rezoning Legislation threatened to: significantly increase traffic; decrease his privacy and safety; cause noise, light, and well-water pollution; and decrease the safety of his children on the roads and at home.

**8. *Jill Meier***

Jill Meier owns property southwest of the Property. Prior to moving to Stokesdale, she had lived in New York and other states with entertainment districts and has “first-hand knowledge of the problems, including high traffic, lights, noise and other intrusions that come with large properties zoned as highway commercial.” She moved to Stokesdale and chose her property because she no longer wanted to live in or near a city—she wanted a small farm in a rural setting without big businesses, lights, noise, and excess traffic. Ms. Meier testified that the Rezoning Legislation threatened to significantly increase traffic on Simpson Road and increase the dangerous traffic conditions at the intersection of Simpson Road and U.S. Highway 220 which “is already a congested and dangerous intersection.”

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**III. Discussion**

The issue here is whether the trial court erred by concluding that Plaintiffs lacked standing to challenge the Rezoning Legislation.

**A. Standard of Review**

“Standing is properly challenged by a 12(b)(1) motion to dismiss, or 12(b)(6) motion to dismiss for a failure to state a claim upon which relief may be granted.” *Fairfield Harbour Prop. Owners Ass’n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72 (2011) (citation omitted). This Court reviews a trial court’s granting of a motion to dismiss for lack of standing de novo. *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625 (2009) (quotation marks and citations omitted). In our de novo review, “we view the allegations as true and the supporting record in the light most favorable to the non-moving party.” *Id.* (quotation marks and citations omitted). As standing is a question of “subject matter jurisdiction[,]” *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113 (2002), a court reviewing subject matter jurisdiction “may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint.” *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624 (2022).

**B. Analysis**

Plaintiffs argue that the trial court erred by dismissing their complaint for lack of standing because they “have set forth sufficient allegations for purposes of standing under the Declaratory Judgment Act” and “special damages are not required to establish standing in the legislative zoning context.” Defendants, on the other hand, argue that the trial court correctly dismissed “Plaintiffs’ challenges to the Map and Text Amendments because the Plaintiffs lack the special and distinct damages required for standing” and because “Plaintiffs’ various attempts to overturn this Court’s ‘special damages’ precedent fails.” Defendants’ arguments fail.

“Under our Supreme Court’s decision in *Committee to Elect Dan Forest*, a two-step analysis determines whether a plaintiff has standing to challenge a legislative zoning amendment.” *Gardner*, 911 S.E.2d at 766. “First, it must be determined whether an alleged statute confers a cause of action to a plaintiff.” *Id.* (citing *Comm. to Elect Dan Forest v. Employees Political Action Committee (EMPAC)*, 376 N.C. 558, 599 (2021)). “If a statutory cause of action is conferred, it must then be determined whether the plaintiff has satisfied and sufficiently alleged the statutory requirements in bringing a claim.” *Id.*

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As to the first step, our Supreme Court has long held that a suit to determine the validity of a zoning ordinance is a proper case for a declaratory judgment. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 66 (1986); *Blades v. City of Raleigh*, 280 N.C. 531, 544 (1972); *Woodard v. Carteret Cnty.*, 270 N.C. 55, 61 (1967). Here, Defendants do not contest that the Act confers a cause of action on Plaintiffs.

As to the second step, the Act provides:

Any person . . . whose rights, status or other legal relations are *affected by* a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2023) (emphasis added). Under the Act, so long as a plaintiff sufficiently alleges it was “affected by” a defendant’s decision to rezone property, the plaintiff “is within the class of persons upon whom the [Act] confers a cause of action,” and the plaintiff is “‘guarantee[d] standing to sue’ and seek a declaratory judgment to clarify its legal rights and relations.” *Gardner*, 911 S.E.2d at 766 (citing *Comm. to Elect Dan Forest*, 376 N.C. at 607). Indeed, our Supreme Court has stated, “The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.” *Godfrey*, 317 N.C. at 66-67 (quoting *Blades*, 280 N.C. at 544) (citing *Jackson v. Board of Adjustment*, 275 N.C. 155 (1969); *Zoppi v. City of Wilmington*, 273 N.C. 430 (1968); 3 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 35.01[1] (4th ed. 1986)).

The Act does not require a plaintiff to allege an “injury in fact” to have standing to challenge a statute or ordinance. *Gardner*, 911 S.E.2d at 765 (“[T]he North Carolina Constitution does not impose a requirement to allege an ‘injury in fact’ when challenging the validity of a statute, but instead that limit is imposed as ‘a rule of prudential self-restraint’ in cases challenging the constitutionality of government action to ensure our courts only address actual controversies.” (quoting *Comm. to Elect Dan Forest*, 376 N.C. at 608)). Furthermore, a plaintiff challenging a legislative zoning decision in a declaratory judgment action is not required to allege special damages in its complaint. *Id.* at 768 (“[C]hallenges to quasi-judicial zoning decisions require a pleading of special damages, but challenges to legislative zoning decisions do not.” (citing *Village*

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*Creek Prop. Owners' Ass'n Inc. v. Town of Edenton*, 135 N.C. App. 482, 486 n.4 (1991)).<sup>1</sup>

Here, Defendant Rockingham County's rezoning amendments were a legislative act decided by its Board of Commissioners. Because these amendments were "legislative, not quasi-judicial, Plaintiff[s] w[ere] *not* required to allege special damages within [their] complaint, separate and distinct from the general community." *Gardner*, 911 S.E.2d at 769. Accordingly, so long as Plaintiffs in this case sufficiently alleged that they were "affected by" Defendant Rockingham County's decision to rezone the Property, Plaintiffs have standing to seek a declaratory judgment to clarify their legal rights and relations. *See id.* at 766; *Godfrey*, 317 N.C. at 66-67.

Defendants' argument that "Plaintiffs lack the special and distinct damages required for standing" is precluded by this Court's opinion in *Gardner*, and the North Carolina Supreme Court decisions relied on and synthesized therein, which was issued after the trial court dismissed this action and the parties had submitted their briefs to this Court. Upon our invitation, the parties submitted supplemental briefs addressing the effect of *Gardner* on the issues on appeal. In their supplemental brief, Defendants abandon their argument that Plaintiffs were required to plead special damages and instead essentially argue that Plaintiffs' alleged "generic adverse effects" are insufficient to meet their burden under the Act. This argument was not properly preserved—appearing for the first time in Defendants' supplemental brief—and is nonetheless without merit.

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1. The Supreme Court in *Village Creek* noted:

We are aware of this Court's opinion in *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986), which states a party challenging a rezoning ordinance via a declaratory judgment action "must allege and show damages distinct from the rest of the community." *Id.* (citing *Heery [v. Highlands Zoning Bd. of Adjustment]*, 61 N.C. App. 612, 612, 300 S.E.2d 869, 869 (1983)). The North Carolina Supreme Court addressed the *Davis* opinion in *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 503-04 n. 4, 434 S.E.2d 604, 610 n. 4 (1993), and, without deciding the issue, noted that *Davis* "alludes to a requirement for 'special damages' distinct from those of the rest of the community to confer standing to challenge a rezoning." *Id.* The *Lancaster* court also noted, however, that the test for standing provided in *Davis* was taken from cases challenging standing in quasi-judicial, rather than legislative, actions. *Id.* We therefore do not read *Davis* as requiring a party challenging a legislative zoning decision in a declaratory judgment action to allege special damages in its complaint.

*Id.*

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In *Gardner*, several plaintiffs, including municipal plaintiffs the City of Hamlet and the Town of Dobbins Heights (“Town”), filed a verified complaint seeking a declaratory judgment that the Richmond County Board of Commissioners’ (“Board”) rezoning of a certain parcel of property was void. 911 S.E.2d. at 762-63.

Plaintiffs alleged that the Seaboard Coastline Railroad Company submitted a rezoning application to the Board seeking to rezone approximately 167 acres of property owned by Seaboard from “Rural-Residential” and “Agricultural Residential” to “Heavy Industrial.” *Id.* at 763. The complaint alleged that the rezoned property was located about two and a half miles from the Town’s corporate limits. *Id.* Located “less than 2,500 feet” from the rezoned property is the “Marks Creek Property,” a parcel that holds “a body of water that both the Town of Dobbins Heights and the City of Hamlet use as their primary source of drinking water.” *Id.*

Seaboard sought to rezone the property to allow an Ohio-based corporation to construct and operate a biochar production facility. *Id.* “This facility . . . would ‘cook[]’ untreated lumber and creosote-treated railroad ties through a pyrolysis process” to produce charcoal.” *Id.* The complaint alleged that “creosote is a known carcinogen, and the burning of carcinogens can create harmful toxins and air pollution that are detrimental to the health of humans and animals.” The “pyrolysis process” would also allegedly emit air pollutants. *Id.*

The Board voted to approve Seaboard’s rezoning application; the property was rezoned to Heavy Industrial. *Id.*

In its complaint, the Town alleged it had standing to challenge the rezoning because the “‘proposed biochar production facility plant will have a significant negative impact’ on the water supply and ‘general quality of life for the residents.’” *Id.* Defendant Richmond County’s motion to dismiss asserted the Town lacked standing to bring a declaratory judgment action because a declaratory judgment action could only be challenged “by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby.” *Id.* at 764. Defendant Richmond County also argued the Town must show special damages “distinct from the rest of the community.” *Id.*

The trial court denied the motion to dismiss the City of Hamlet’s complaint but granted the motion to dismiss the Town’s complaint for lack of standing. *Id.* On appeal, this Court reversed the trial court’s order because the Town’s “allegations assert standing to challenge

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Defendant's rezoning decision and it was not required to plead special damages." *Id.* at 765. This Court noted that Defendant Richmond County did not challenge, and thus conceded, that the Act "does confer a legal right and cause of action" on the Town. *Id.* at 766. The Court then explained, "Under the [Act], so long as [the Town] sufficiently alleged it was 'affected by' [d]efendant's decision to rezone the [p]roperty, [the Town] is within the class of persons upon whom the [Act] confers a cause of action, and [the Town] is 'guarantee[d] standing to sue' and seek a declaratory judgment to clarify its legal rights and relations." *Id.*

The Court reasoned and concluded:

[T]he proposed rezoning ordinance would [c]ompletely change the permitted uses of the [p]roperty at issue from primarily residential to wholly Heavy Industrial. . . . This rezoning would explicitly allow for the erection of [the] biochar production facility, an operation entirely different from residential land use.

In the complaint, [the Town] clearly alleges how the erection of this biochar facility would directly and negatively impact the community, such as the burning of carcinogens, releasing a number of "toxic and harmful air pollutants," potential contamination to local water supply, and "traffic from industry" that "would disproportionately affect the road network of" [the Town]. We note the only differences between the allegations of the municipal plaintiffs are that the City of Hamlet owns the public water supply system installed in Marks Creek, even though this system "serves over 10,000 people, including the residents of the City of Hamlet" and [the Town], and that there is a small difference between the proximity of each municipality's borders to the [p]roperty.

Plaintiff has satisfied the requirements to bring a claim under the DJA in sufficiently alleging it was "affected by" Defendant's rezoning ordinance.

*Id.* at 767.

Here, as in *Gardner*, the Rezoning Legislation completely changed the permitted uses of the Property. The Map Amendment changed the use of the Property from Residential Agriculture to Highway Commercial. While the purpose of the Residential Agriculture district is the "preservation and conservation of rural lands throughout the county where low density is desirable in order to protect environmentally sensitive

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areas, agricultural areas, and viewsheds,” the Highway Commercial district is “designed to protect and encourage the transitional character of the districts” and to provide “areas for more intensive regional highway-oriented business, office, service and civil use.” Furthermore, the Highway Commercial district allows for the development of industry that is not consistent with agricultural use—such as electronic gaming operations, dry-cleaning facilities, research laboratories, hotels, hospitals, multi-family apartments and condominiums, crematoriums, radio stations, and billboards.

The Text Amendment imposes a similar, categorical change on the use of the Property and on all properties zoned Highway Commercial. Prior to the adoption of the Text Amendment, the following uses were not permitted by right in Highway Commercial districts: electronic gaming operations, dry cleaning facilities, crematories, fertilizer manufacturers, hotels, fairgrounds, hospitals, landfills for hazardous and industrial waste, and wastewater collection, treatment and disposal facilities. After the Text Amendment, all these uses are now permitted by right in Highway Commercial districts, including on the Property. Additionally, there are now no development standards, temporary use restrictions, or special use permits required for these uses on the Property.

In this case, the rezoned property is even closer to Plaintiffs’ properties than it was to the Town’s property in *Gardner* where the Town’s corporate limits were about two and a half miles from the rezoned property. Here Plaintiffs’ properties are either abutting or in close proximity to the rezoned Property and “a plaintiff’s proximity to the rezoned property is a factor our Courts have considered.” *Morgan v. Nash County*, 224 N.C. App. 60, 67 (2012); see *Blades*, 280 N.C. at 544 (standing found where the plaintiffs were “owners of property in the adjoining area affected by the ordinance”); *Zoppi*, 273 N.C. at 431 (standing found where the plaintiffs owned property in a subdivision “adjoining or in close proximity” to the rezoned property).

And here, as in *Gardner*, each Plaintiff has clearly alleged how the Rezoning Legislation would directly and negatively affect them, with allegations including the following:

- a. Higher intensity uses on neighboring properties and in the area which are incompatible with the current uses;
- b. Water pollution from large scale development, non-agricultural, and higher intensity uses contaminating private wells and natural springs in the area, on plaintiffs’ properties, and, in particular, a lake on Camp Carefree’s property;

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- c. Increased traffic and safety issues around the Property, related to the permissible number of high-intensity uses and large-scale developments;
- d. The potential for increased criminal activity including trespassers from large-scale developments, high-intensity uses, and the probability of a vice-oriented tourist attraction;
- e. Increased traffic, noise, odor, glare, light trespass, litter, and parking from large-scale development and high-intensity uses;
- f. Decreased property values due to the proximity to the large-scale developments, high-intensity uses, the probability of a vice-oriented tourist attraction, as well as the increased noise, odor, light, litter, water pollution, and parking limitations;
- g. Decreased peace and quiet enjoyment of the surrounding properties, but most notably for Camp Carefree and the campers who suffer from neurological disorders that are significantly affected by loud noises, light, and overstimulation;
- h. Increases in the amount of paved impervious surfaces, creating drainage and erosion issues where there used to be healthy ecosystems and farmland.

As in *Gardner*, Plaintiffs in this case have satisfied the requirements to bring a claim under the Act by sufficiently alleging that they are “affected by” Defendant Rockingham County’s Rezoning Legislation.

Defendants assert that the *Gardner* court “emphasized” the standard set forth in *Taylor v. City of Raleigh* that “a party has standing to challenge a rezoning ordinance when they have ‘a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby.’” *Gardner*, 911 S.E.2d at 765 (quoting *Taylor v. City of Raleigh*, 290 N.C. 608, 620 (1976)). Far from emphasizing this standard, this Court in *Gardner* explained that that *Committee to Elect Dan Forest* “lays out a broader framework within which *Taylor* fits.” *Gardner*, 911 S.E.2d at 767.

In *Taylor*, the plaintiff landowners challenged a rezoning ordinance that would allow the defendant to construct new apartment buildings and townhomes. 290 N.C. at 610. Our Supreme Court held that “[t]he undisputed evidence discloses that the impact of the rezoning ordinance

## CAMP CAREFREE, INC. v. ROCKINGHAM CNTY.

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on any of the plaintiffs was minimal.” *Id.* at 620. In support of this holding, the Court noted that “[t]he property of [the] plaintiffs Dunn on Boxwood Drive is one-half mile or more from the northern (closest) boundary of the rezoned 39.89 acres and the property of the other plaintiffs is farther from said northern boundary.” *Id.* Additionally, “[p]rior to the bringing of this action neither [the] plaintiffs nor any of those who protested the rezoning of the entire 85-acre tract had attacked, by protest or by lawsuit, the rezoning of the 39.89 acres farthest from them.” *Id.* The rezoning amendment at issue also “did not, for the first time, authorize multi-family dwellings in the area; it merely increased the permissible types and units of dwellings.” *Id.* at 621. The *Taylor* Court concluded:

On this record we would be unwilling to hold that plaintiffs have established that they are persons aggrieved by the rezoning ordinance. . . . However, in the circumstances here involved, we do not base [our] decision solely on the ground [the] plaintiffs are not sufficiently directly and adversely affected by the rezoning ordinance to entitle them to attack it. Rather, we treat [the] plaintiffs’ tenuous standing as a circumstance in considering whether [the] plaintiffs’ belated attack on the rezoning ordinance is barred by laches.

*Id.* (internal citation omitted).

Just as the Court in *Gardner* determined, we too determine “the facts presented here, and the allegations in Plaintiff[s]’ complaint, taken as true and in the light most favorable to Plaintiff[s] are distinguishable from those present in *Taylor*.” *Gardner*, 911 S.E.2d. at 767. Here, unlike in *Taylor*, and as in *Gardner*, the proposed rezoning ordinances change the permitted uses of the Property, in this case by rezoning the Property from Residential Agricultural to Highway Commercial and vastly expand the uses permitted by right in a Highway Commercial district. Furthermore, unlike in *Taylor* where “[t]he undisputed evidence discloses that the impact of the rezoning ordinance on any of the plaintiffs was minimal[,]” 290 N.C. at 620, each Plaintiff in this case has clearly alleged how the Rezoning Legislation would directly and negatively affect them.

#### IV. Conclusion

For the foregoing reasons, the trial court’s order is reversed.

REVERSED.

Judges STROUD and ZACHARY concur.

**CUNNINGHAM v. BRAVO 4 AUTOWORKS LLC**

[300 N.C. App. 23 (2025)]

KIYA CUNNINGHAM, PLAINTIFF

v.

BRAVO 4 AUTOWORKS LLC, DEFENDANT

No. COA24-1008

Filed 16 July 2025

**1. Appeal and Error—Civil Procedure Rule 60—summary judgment—time for taking appeal not tolled—Appellate Rule 3(c)**

In a proceeding that originated in small claims court when plaintiff sought damages for allegedly improper repairs to her vehicle by defendant, plaintiff's 9 August 2024 notice of appeal was not timely as to an order granting summary judgment in favor of defendant entered on 13 July 2022. A motion for "Reconsideration" filed by plaintiff later on the day the summary judgment order was entered (giving unforeseen traffic as the reason she had not appeared at the summary judgment hearing) and treated by the court as a motion constituting a viable ground for relief pursuant to Civil Procedure Rule 60—which led to the court hearing plaintiff on defendant's summary judgment motion, but ultimately holding that plaintiff had no meritorious defense—did not toll the time for taking appeal from the summary judgment order pursuant to Appellate Rule 3(c).

**2. Civil Procedure—Rule 63—order entered by chief district court judge—no error**

The chief district court judge properly entered an order—denying plaintiff's motion to reconsider an order granting summary judgment in favor of defendant—pursuant to Civil Procedure Rule 63 (providing for the chief judge of a district to sign and ministerially enter an order where another district court judge made findings of fact and conclusions of law but did not enter a written order before leaving office). The chief district court judge listened to a recording of the hearing on plaintiff's motion conducted by a judge whose term ended before a written order was entered; concluded that the former judge had clearly stated her facts, reasoning, and conclusions on the record; and then prepared, signed, and ministerially entered an order containing the former judge's findings and fact and conclusions of law.

Appeal by plaintiff from order entered 13 July 2022 by Judge Paulina N. Havelka and order entered 11 July 2024 by Judge Roy H. Wiggins in Mecklenburg County District Court. Heard in the Court of Appeals 21 May 2025.

## CUNNINGHAM v. BRAVO 4 AUTOWORKS LLC

[300 N.C. App. 23 (2025)]

*Kiya Cunningham, Pro se, Plaintiff-Appellant.*

*James, McElroy & Diehl, P.A., by Alexandra B. Bachman, for Defendant-Appellee.*

COLLINS, Judge.

Plaintiff Kiya Cunningham appeals from an order granting Defendant Bravo 4 Autoworks LLC's motion for summary judgment and an order denying Plaintiff's motion to reconsider, entered pursuant to Rule 63 of the North Carolina Rules of Civil Procedure. Because Plaintiff's notice of appeal of the trial court's order granting Defendant's motion for summary judgment was untimely, we dismiss her appeal of that order. Because the trial court acted in accordance with Rule 63, we affirm the trial court's order denying Plaintiff's motion to reconsider.

### I. Background

On 22 July 2021, Plaintiff filed a *pro se* complaint against Defendant in small claims court in Mecklenburg County seeking damages for improper repairs to her vehicle. After a trial, judgment was entered in favor of Defendant and Plaintiff was ordered to pay the costs of the action. Plaintiff timely appealed the small claims judgment to the Mecklenburg County district court.

The claim was heard by an arbitrator, and an arbitration judgment was entered on 12 October 2021 in favor of Plaintiff. Then, on 8 November 2021, Plaintiff requested a trial de novo.

Defendant filed its Motion to Dismiss, Answer, and Affirmative Defenses on 1 December 2021. Defendant then served Plaintiff with Defendant's First Set of Requests for Admission on 10 December 2021. Plaintiff did not serve any responses to the requests for admission; on 19 January 2022, Defendant filed a notice to have the requests for admission deemed admitted.

On 8 March 2022, Defendant filed a motion for summary judgment. Defendant's motion was heard by district court Judge Paulina Havelka on 13 July 2022; Plaintiff was not present at the hearing. That same day, Judge Havelka granted Defendant's motion by written order ("Summary Judgment Order").

Plaintiff filed a motion to reconsider later that same day, alleging that she "[a]rrived at Court Hearing at 9:10 am on July 13, 2022 due to an accident on I-77 interstate as there was a longstanding traffic delay."

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A hearing on Plaintiff's motion was held on 27 September 2022. Judge Havelka found that "the unforeseen traffic that delayed [Plaintiff] on July 13, 2022 constitutes a viable ground for relief" pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, and thus Judge Havelka allowed Plaintiff to be heard on Defendant's motion for summary judgment. At the conclusion of the hearing, Judge Havelka found that Plaintiff "does not have a meritorious defense to Defendant's Motion for Summary Judgment" and denied Plaintiff's motion to reconsider. Judge Havelka ordered Defendant's counsel to draft a proposed order denying Plaintiff's motion.

The next day, 28 September 2022, Defendant's counsel emailed the proposed order denying Plaintiff's motion to reconsider to both Judge Havelka and Plaintiff. Plaintiff emailed Defendant's counsel and Judge Havelka on 4 October 2022 "Plaintiff's Objection to Defendant's Proposed Order for Plaintiff's Motion to Reconsideration." The following day, Plaintiff filed "Plaintiff's Motion to Withdraw Deemed Admissions or in the alternative for an Extension of Time to Respond to Defendant's First Set of Requests for Admission to Plaintiff []." ."

Nothing happened in the case for approximately a year and a half, until March 2024. In the meantime, Judge Havelka's judicial term expired on 31 December 2023, and the order denying Plaintiff's motion to reconsider was never entered.

On 22 March 2024, Plaintiff filed a "Motion to be Reviewed by the Chief District Court Judge for a Request to Schedule a Trial by Jury and/or if necessary, a Second Motion for Hearing for Assignment to a New Judge Due to the Former Presiding Judge Departure and Failure to Render a Ruling." Chief District Court Judge Roy Wiggins conducted a hearing on 30 May 2024; at the conclusion he "took the matter under advisement to review the audio recording of the Hearing on the Motion to Set Aside heard by Judge Havelka on September 27, 2022."

On 11 July 2024, Chief Judge Wiggins entered an order denying Plaintiff's motion to reconsider pursuant to Rule 63 ("Rule 63 Order"). Plaintiff filed a notice of appeal to this Court on 9 August 2024, appealing both the 13 July 2022 Summary Judgment Order and the 11 July 2024 Rule 63 Order.

## **II. Discussion**

### **A. Summary Judgment Order**

[1] We first address Plaintiff's notice of appeal of Judge Havelka's Summary Judgment Order.

## CUNNINGHAM v. BRAVO 4 AUTOWORKS LLC

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“A timely notice of appeal is required to confer jurisdiction upon this Court.” *Raymond v. Raymond*, 257 N.C. App. 700, 703 (2018) (citation omitted). Our appellate rules provide that, in civil actions, a party must file and serve a notice of appeal:

- (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
- (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that
- (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C. R. App. P. 3(c). While a timely Rule 59 motion tolls the time for taking appeal, it is well settled that Rule 59 does not apply to pre-trial rulings such as rulings on summary judgment motions. *Doe v. City of Charlotte*, 273 N.C. App. 10, 18-19 (2020).

It is also well settled that “[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.” *Wallis v. Cambron*, 194 N.C. App. 190, 193 (2008) (citing N.C. R. App. P. 3(c)). Rule 60 provides, “On motion and upon such terms as are just, the court may relieve a party” from a final order for various reasons, including “[m]istake, inadvertence, surprise, or excusable neglect[.]” N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2023). “To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense.” *Monaghan v. Schilling*, 197 N.C. App. 578, 584 (2009) (citation omitted).

Here, Judge Havelka entered the Summary Judgment Order on 13 July 2022. Plaintiff did not file a notice of appeal from that order within thirty days after the entry of that order. Rather, Plaintiff filed a motion for “Reconsideration,” alleging that she “[a]rrived at Court Hearing at 9:10 am on July 13, 2022 due to an accident on I-77 interstate as there was a longstanding traffic delay. Delay was due to unforeseen circumstances[.]”

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While Plaintiff's motion for reconsideration was not expressly made pursuant to any particular rule of Civil Procedure, her arguments indicate that she had moved the court to grant her relief from the Summary Judgment Order for excusable neglect under Rule 60(b)(1). *See Doe*, 273 N.C. App. at 16 (“[C]onfusion likely results from there being no mention of a ‘motion to reconsider’ in the North Carolina Rules of Civil Procedure. Thus, litigants seeking to have the trial court reconsider a ruling often search for wording in our procedural rules that permits their motion.”). In fact, during the 27 September 2022 hearing on Plaintiff's motion to reconsider, Judge Havelka found that Plaintiff's unforeseen traffic delays constituted a viable ground for relief pursuant to Rule 60 and thus allowed Plaintiff to be heard on Defendant's motion for summary judgment.

Accordingly, because Plaintiff failed to file a timely notice of appeal from the 13 July 2022 Summary Judgment Order, we do not have jurisdiction to review this order. We therefore dismiss Plaintiff's appeal of this order.

**B. Rule 63 Order**

[2] Plaintiff next argues that Chief Judge Wiggins erred by entering the Rule 63 Order. Specifically, Plaintiff contends, “Judge Wiggins made several findings of fact concerning the events of this case (Findings 2, 3, 4, 5, 6, 7, 9), which mischaracterized the evidence or were not supported by the evidence of this case.” Plaintiff's argument lacks merit.

“The North Carolina Rules of Civil Procedure are part of the General Statutes. Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation.” *In re E.D.H.*, 381 N.C. 395, 398 (2022) (citations omitted). “A question of statutory interpretation is ultimately a question of law” that is reviewed de novo on appeal. *Brown v. Flowe*, 349 N.C. 520, 523 (1998) (citation omitted); *Swauger v. Univ. of N.C. at Charlotte*, 259 N.C. App. 727, 728 (2018).

Civil Procedure Rule 63 provides,

If by reason of . . . expiration of term, . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:

. . . .

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- (2) In actions in the district court, by the chief judge of the district . . . .

If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge’s discretion, grant a new trial or hearing.

N.C. Gen. Stat. § 1A-1, Rule 63 (2023). Under Rule 63, if a district court judge “ma[kes] the findings of fact and conclusions of law that appear in the order before” leaving office and the chief district court judge, acting as the substitute judge, does “nothing more than put his signature on the order and enter it ministerially, the order is valid.” *In re E.D.H.*, 381 N.C. at 399.

Here, Judge Havelka presided over the hearing on Defendant’s motion for summary judgment and Plaintiff’s motion to reconsider. At the hearing on Plaintiff’s motion to reconsider, Judge Havelka heard arguments from both parties and “announced her Findings, Conclusions and Order in Open Court.” Judge Havelka asked Defendant’s counsel to draft the order and “confer with Plaintiff over its final form.” After Plaintiff objected to Defendant’s counsel’s proposed order, no final agreement was reached on the final form of the order. Judge Havelka’s judicial term expired on 31 December 2023, at which time no written order on Plaintiff’s motion to reconsider had been entered.

Upon Plaintiff’s 22 March 2024 motion to have the matter reviewed by the chief district court judge, Chief Judge Wiggins “took the matter under advisement” and reviewed the audio recording of the 27 September 2022 hearing on Plaintiff’s motion to reconsider. Chief Judge Wiggins “listened to the entire hearing” and was able to determine that “Judge Havelka made the following findings:”

- A. Judge Havelka found that it was in the interest of justice to deem Plaintiff’s tardiness to court as a basis to reopen the case under [Civil Procedure Rule] 60 but made additional findings that were contrary to re-opening the case.
- B. Judge Havelka subsequently found that there was no meritorious defense to the Summary Judgment Motion.
- C. Judge Havelka found that Requests for Admissions were filed in December and deemed admitted in

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January. They were sent to Plaintiff's address. All Notices of Hearings were sent to Plaintiff's address.

- D. Judge Havelka also found that Plaintiff's response to the Summary Judgment Motion was not timely filed or served as it was filed the day before the hearing and mailed to [Defendant's] [c]ounsel the day before the hearing[.]
- E. Judge Havelka stated in open court that the Motion to Reconsider is Denied.

Chief Judge Wiggins concluded that because he "was able to determine that Judge Havelka clearly stated her facts, reasoning, and conclusions on the record," and because he was able to determine that "Judge Havelka clearly stated her ruling on the record," Plaintiff's motion to reconsider should be denied.

Plaintiff does not challenge any of the findings A-E listed above. Rather, Plaintiff challenges several other findings, arguing that they "mischaracterize[] the evidence" by leaving out certain minor details. Contrary to Plaintiff's contentions, the challenged findings do not mischaracterize any of the evidence presented in this case, and Plaintiff makes no further argument as to how or why the challenged findings of fact were not supported by the evidence or how those findings are relevant to the issue of whether the Rule 63 Order was properly entered.

Chief Judge Wiggins' order was prepared and entered in conformity with Rule 63. Chief Judge Wiggins did not make any findings of fact or conclusions of law; Judge Havelka made such findings and conclusions after presiding over the hearing and before the expiration of her term. Chief Judge Wiggins reviewed the hearing in its entirety and did "nothing more than put his signature on the order and enter it ministerially." *Id.* Accordingly, Chief Judge Wiggins did not err by entering the Rule 63 Order.

### III. Conclusion

For the foregoing reasons, we dismiss Plaintiff's appeal of the trial court's Summary Judgment Order and affirm the trial court's Rule 63 Order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges TYSON and GRIFFIN concur.

**DENIS v. CHANDLER**

[300 N.C. App. 30 (2025)]

MILDRED DENIS, PLAINTIFF

v.

JAMINE CHANDLER, DEFENDANT

No. COA24-599

Filed 16 July 2025

**1. Child Custody and Support—retroactive support award—family health insurance premiums—calculation pursuant to child support guidelines**

In a proceeding for child support, the trial court’s award of retroactive child support from defendant to plaintiff was proper where plaintiff requested reimbursement for previous expenditures on premiums for a family health care plan; however, that portion of the trial court’s order was vacated, and the matter was remanded for recalculation of the amount of retroactive support because the trial court failed to calculate the parties’ children’s specific portion of the premiums, in contradiction of the child support guidelines established by the Conference of Chief District Court Judges pursuant to N.C.G.S. § 50-13.4(c1).

**2. Child Custody and Support—prospective support award—defendant’s gross income—imputation of defendant’s income—plaintiff’s income—support of other children—proper worksheet**

In a proceeding for child support, competent evidence supported the trial court’s findings of fact concerning: (1) the calculation of defendant’s monthly gross income, based on the court’s credibility determinations regarding defendant’s testimony, financial affidavit, and tax returns; (2) the imputation of defendant’s income, based on his past income, due to its determination that defendant’s most recent financial evidence was unreliable; (3) the calculation of plaintiff’s 2023 income, based upon her past income, where the parties’ evidence was conflicting on the 2023 income; and (4) the choice not to credit defendant for support paid for another biological child with a different woman, where the child support guidelines provided only that such payments “may” be considered and where defendant failed to show he consistently paid support for an extended time period. However, because the trial court failed to make findings of fact as to the number of nights the children spent with each parent between 2018 and 2021, the appellate court could not determine whether the trial court used the appropriate worksheet in calculating its award; accordingly, the child support order

**DENIS v. CHANDLER**

[300 N.C. App. 30 (2025)]

was vacated and the matter was remanded for the entry of additional factual findings.

**3. Divorce—equitable distribution award—affirmed in part—vacated and remanded in part**

In an equitable distribution matter, some portions of the trial court's award, which were supported by competent evidence, were affirmed, including the classification of \$8,996 gifted to plaintiff by her cousin as separate property, and the valuation of plaintiff's wedding rings. Additionally, the choice not to award a credit to defendant for (or to consider as a distributional factor) the parties' post-separation use of the marital home was an appropriate exercise of the trial court's discretion. However, the portion of the award setting aside an agreement by the parties (that \$48,000 would be given to defendant upon the sale of certain real estate) on grounds of undue influence and duress was reversed because, while the evidence showed that plaintiff felt external pressure to sign, the pressure did not rise to the level of overriding her free will. Finally, the court abused its discretion in ordering a deduction to the retroactive child support arrearage defendant owed to plaintiff from the sale of certain real estate, in violation of N.C.G.S. § 50-20(f) (equitable distribution awards to be made without regard to child support obligations); accordingly, that portion of the award was vacated and the matter was remanded for entry of an award in compliance with the statute.

Appeal by defendant from an order entered 14 February 2024 by Judge Damion McCullers in Wake County District Court. Heard in the Court of Appeals 28 January 2025.

*Davis Hartman & Wright, LLP, by R. Daniel Gibson, for plaintiff.*

*Smith Legal Solutions, by Katrina L. Smith, for defendant.*

FREEMAN, Judge.

Defendant appeals from a permanent child support and equitable distribution order entered 14 February 2024. On appeal, defendant argues the trial court erred by: (1) ordering defendant to pay retroactive child support; (2) entering a child support order that was not supported by competent evidence; (3) entering an equitable distribution judgment that was not supported by competent evidence; (4) abusing its discretion in failing to consider other distributive factors; and (5) ordering

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defendant's distributive award to offset his child support obligations. After careful consideration, we affirm in part, vacate in part, reverse in part, and remand.

**I. Factual and Procedural Background**

Plaintiff and defendant married on 14 August 2016, separated on 21 December 2017, and divorced on 6 December 2019. After their marriage in August 2016, the parties temporarily separated in April 2017 and reconciled prior to selling their first home in July 2017. The parties share two children in common, and each has a child from a previous relationship. Defendant has another child born after the parties' separation.

On the morning of 20 December 2017, defendant and plaintiff were closing on the purchase of their new home. Defendant had paid a \$60,341 deposit towards the purchase of the home, but just before the closing of the home, the parties' marital problems led to discussions of permanent separation.

That morning, defendant presented plaintiff with an agreement that stated plaintiff would give defendant \$48,000 from the sale of their new home in the event the parties separated or divorced. Plaintiff testified that while they were getting ready to leave for the closing of their new home, defendant gave her a document and said he would not go to closing unless she signed it at that moment. Plaintiff stated defendant had not mentioned anything about the document previously and she "had to sign it" or there was "no way" she "could close on the house[.]" Plaintiff testified that:

It was tense because the document he provided me was a note basically saying that, in the event that he and I were to split, that I would owe him 40-something-thousand dollars. And we argued a little bit. I told him. I said, "This is just proving to me that you had one foot in and one foot out of the marriage. So I'm going to sign because we—I'm not going to go and disappoint the children." And I signed it there, threw it at him in the bathroom, and then we left.

Plaintiff stated she "signed the note at the apartment," outside the presence of a notary, "and then [defendant] took [her] to the UPS Store to get it notarized." Sharon French, the Notary Public whose signature and notarization were on the document, testified she: (1) did not remember notarizing or signing the agreement; (2) recognized the last name Denis; (3) had discarded her notary journal; (4) did not know if the

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document was a copy or original; and (5) did not sign or notarize documents that had been previously signed before they were brought to her.

The trial court set aside this agreement on the grounds of undue influence or duress and made the following findings of fact and conclusions of law:<sup>1</sup>

45. On December 20, 2017, the morning of the closing of the sale of Granite, the Defendant presented a document to Plaintiff to sign which provided that \$48,000 would be returned to him out of the proceeds of the sale of Granite if the parties separated and divorced. This document was later identified as promissory note and is hereinafter referred to as “the document.”<sup>2</sup>

46. Prior to the closing, the Defendant had not mentioned anything about the document or that he was due anything extra due to supplying separate property money for the purchase of Granite.

47. The Plaintiff did not secure the advice of an attorney prior to signing the document, nor given the time of the closing, had the opportunity or time to do so.

48. All of this was a complete surprise to the Plaintiff and was done by the Defendant to force her to sign the document.

49. The document was signed by the parties at the apartment that they resided in during the transition from homes, and later that day, the signatures were notarized by Notary Public French, who worked at UPS store that the Defendant selected to get the document notarized at.

50. Notary French recognized her signature as the one on the document and that the UPS store, she worked at was very busy.

51. Notary French did not recognize either party, could not independently remember the notary incident or the signatures of the parties, could not produce the journal of notarial acts to confirm the notary event or confirm if

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1. The home closing at issue is referred to by the trial court as “Granite.”

2. All excerpts of the trial court’s order are restated verbatim.

**DENIS v. CHANDLER**

[300 N.C. App. 30 (2025)]

the document being submitted by the Defendant in court was the original or copy of, or even the document, that she may have notarized.

52. The document presented in court was not the original.

53. The Defendant told the Plaintiff that he would not appear at the closing or sign any documents for the same unless she signed the document.

54. The Plaintiff signed the document under duress or undue influence.

55. On September 25, 2020, the Plaintiff filed Notice of Concern Regarding Authenticity to put the Court and the Defendant on notice that Plaintiff had concerns about the authenticity of the document.

56. The Plaintiff testified that the document presented in court as the original document was not the version she signed and appeared to be copy.

57. The document presented in court by the Defendant as an original was copy.

58. The document was not lawfully notarized by Notary Public French.

59. Thereafter, the parties signed the documents necessary to close the sale on Granite. The parties signed said documents at different times. The Plaintiff signed the promissory note for the purchase of Granite. The Defendant did not sign the promissory note for the purchase of Granite, but his name was placed on the deed.

That night, the parties separated after a violent argument and, from their separation until 5 March 2022, plaintiff maintained exclusive possession of the new home. On 8 March 2018, plaintiff secured a domestic violence protective order (“DVPO”) against defendant. The trial court found as it related to plaintiff’s DVPO:

66. The Judge found that the Defendant had taken the “wedding rings” in the DVPO.

67. The Defendant denied that was true and that “many things in that order were not right.”

On 10 July 2019, plaintiff filed a complaint for divorce against defendant in Wake County, North Carolina, No. 19 CVD 9317. On 20 August

**DENIS v. CHANDLER**

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2019, defendant answered and subsequently counterclaimed for absolute divorce and equitable distribution. Plaintiff responded to these claims on 1 October 2019, but initiated a separate action for equitable distribution, post-separation support, alimony, and temporary and permanent child support on 2 October 2019 in Wake County, North Carolina, No. 19 CVD 13503. On 5 December 2019, plaintiff filed a motion in the cause seeking the same relief in the former case and, on 6 December 2019, a divorce judgment was entered.

On 2 June 2020 and 17 August 2020, the trial court entered initial and final pre-trial orders. Both parties filed motions to compel discovery, but defendant moved to dismiss plaintiff's duplicate claims; compel discovery in both cases; and later, filed a reply to plaintiff's motion to compel discovery. Plaintiff voluntarily dismissed her claims for temporary child support, post-separation support, and alimony before the matter came on for trial.

In September 2021, both parties filed motions for interim distribution, and on 2 December 2022, the trial court conducted hearings on interim distribution and permanent child custody in case number 18 CVD 8721. Prior to trial held on 8 December 2023 and 11 December 2023, the trial court consolidated duplicate claims into case No. 19 CVD 9317.

At trial, the court received evidence and other testimony regarding the parties' income and other financial information. Such facts are provided in the discussion section below as they become necessary for our analysis.

With regard to equitable distribution, the trial court received evidence regarding a \$8,996 payment made by the plaintiff's cousin, Yves Augustin, to plaintiff. Plaintiff testified Augustin gave her "a gift in the amount of \$8,996[.]" and provided a gift letter from Augustin stating the \$8,996 payment was: "a bona fide gift, and there [wa]s no obligation, expressed or implied, to repay this sum at any time."

However, defendant testified the \$8,996 payment was compensation for assisting Augustin in the sale of his home. Defendant provided invoices from Lumber Liquidators, bank statements, and credit card statements; two checks from Augustin dated 18 August 2017 and 10 October 2017 containing "Repair" and "House Repair" in the memo lines; and noted no additional payments from Augustin took place between the issuance of the checks and alleged signing of the gift letter. Defendant argued this evidence demonstrated he had incurred expenses to assist Augustin and Augustin compensated him for his help preparing Augustin's home for sale.

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The trial court entered an equitable distribution and permanent child support order on 14 February 2024. In relevant part, the trial court ordered:

2. The Defendant shall reimburse the Plaintiff for FMV of the separate property engagement ring and wedding band that he took from the Plaintiff in the incident resulting in the Defendant having DVPO in the amount of \$6500 and that amount shall be deducted from the sale proceeds of Granite before the marital portion of the sale of Granite is distributed.

3. The Plaintiff shall receive \$8996 as her separate property interest from the sale proceeds of Granite before the marital portion is distributed.

4. The Defendant shall pay Plaintiff as monthly child support the sum of \$596 per month on or before the 1st day of each month with the first payment, due and payable on February 1, 2024. The Defendant shall pay this child support obligation until the children graduate from high school or the attainment of the children of the age of 20 years, whichever comes first.

5. The Defendant shall repay his retroactive child support arrearage obligations to the Plaintiff in the amount of \$48,696.65 at the rate of \$54 per month to be paid along with his current child support obligation until the amount of the retroactive child support arrearage he owes the Plaintiff is paid in full.

Defendant timely appealed.

**II. Jurisdiction**

This Court has jurisdiction to review a final judgment of a district court. N.C.G.S. § 7A-27(b)(2) (2023). As the district court's permanent child support and equitable distribution order constitutes a final judgment, we have jurisdiction to review defendant's appeal.

**III. Standard of Review**

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Pegg v. Jones*, 187 N.C. App. 355, 358 (2007) (cleaned up). "[W]here matters are left to the discretion of

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the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777 (1985). Therefore, “[u]nder this standard of review, the trial court’s ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Biggs v. Greer*, 136 N.C. App. 294, 296–97 (2000) (cleaned up). “However, the trial court’s conclusions of law are reviewed de novo.” *Mugno v. Mugno*, 205 N.C. App. 273, 276 (2010) (cleaned up).

**IV. Discussion**

Defendant argues the trial court erred by: (1) ordering defendant to pay retroactive child support; (2) entering a child support order unsupported by competent evidence; (3) entering an equitable distribution judgment unsupported by competent evidence; (4) abusing its discretion in failing to consider other distributive factors; and (5) ordering defendant’s distributive award to offset his child support obligations.<sup>3</sup> We address each argument in turn.

**A. Retroactive Child Support**

[1] Defendant first argues that the trial court “reversibly erred by ordering defendant to pay retroactive child support.” Specifically, defendant contends “[p]laintiff did not assert a claim for retroactive child support” and the trial court’s “inclusion of \$129.00 as monthly credits in the retroactive support calculation for expenses” was in error. Though we disagree the trial court erred in awarding retroactive child support, we agree the trial court’s calculation of the retroactive support was erroneous.

Subsection 50-13.4(c) of our General Statutes, which governs the determination of child support payments, states: “[t]he court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section.” N.C.G.S. § 50-13.4(c) (2023). Subsection 50-13.4(c1) mandates the Conference of Chief District Court Judges to establish child support guidelines:

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3. Defendant’s brief also assigns error to factual findings 49, 50, 51, 58, 84, and 87. However, beyond mere conclusory statements and recitations of fact, defendant fails to present any legal argument or citations to authority that such findings were not supported by competent evidence. Accordingly, these issues are abandoned, and such findings are binding on appeal. See N.C. R. App. P. 28(b)(6) (2023) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”); *Langston v. Richardson*, 206 N.C. App. 216, 219 (2010) (“[A]ll the other findings to which [defendant] has not assigned error or argued are presumed to be supported by competent evidence and are binding on this Court.”).

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for the computation of child support obligations, *including retroactive support obligations*, of each parent as provided in Chapter 50 or elsewhere in the General Statutes and *shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate.*

N.C.G.S. § 50-13.4(c1) (2023) (emphasis added).

“Child support awarded for that period of time prior to the date on which a party files a complaint or motion for child support ‘is properly classified as retroactive child support.’” *Jonna v. Yaramada*, 273 N.C. App. 93, 101 (2020) (quoting *Respass v. Respass*, 232 N.C. App. 611, 628 (2014)). “Child support awarded, however, from the time a party files a complaint for child support to the date of trial is not retroactive child support but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial.” *Taylor v. Taylor*, 118 N.C. App. 356, 361 (1995) (cleaned up), *rev’d on other grounds*, 343 N.C. 50 (1996). Our precedent “require[s] that an award of retroactive child support be supported by evidence of plaintiff’s actual expenditures for the children during the period for which she seeks retroactive child support.” *Respass*, 232 N.C. App. at 629.

Therefore, as set forth in our child support guidelines, retroactive support may be determined through calculating “(a) . . . the amount of support that would have been required had the guidelines applied at the beginning of the time period for which support is being sought, or (b) based on the parent’s fair share of actual expenditures for the child’s care.” AOC-A-162, Rev. 1/23, Page 2 of 25 (2023). The guidelines further state:

When a child for whom support is being determined is covered by a family policy, only the health insurance premium *actually attributable* to that child is added. If this amount is not available or cannot be verified, the total cost of the premium is divided by the total number of persons covered by the policy and then multiplied by the number of covered children for whom support is being determined.

AOC-A-162, Rev. 1/23, Page 4 of 25 (2023) (emphasis added). The guidelines’ worksheet A also provides the formula to calculate a child’s portion, again, stating: “Health Insurance premium costs – child’s/children’s portion only (total premium ÷ [the number] of persons covered × [the number] of children subject to order = children’s portion.)” AOC-CV-627, Rev. 1/23, Worksheet A § 5(b) (2023) (cleaned up). “Failure to follow

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the guidelines constitutes reversible error.” *Rose v. Rose*, 108 N.C. App. 90, 93 (1992).

Here, defendant’s argument asserting plaintiff did not request or plead for retroactive support is unsupported by the record. Plaintiff’s complaints in both actions requested child support pursuant to N.C.G.S. § 50-13.4(c) and plaintiff’s counsel explicitly stated at trial, “we’re going to be presenting information for those periods of time, from 2018 to today,” and “[w]e’d like a reasonable amount of child support . . . retroactive back to that date.” Indeed, subsection 50-13.4(c) requires trial courts to “determine the amount of child support payments by applying the presumptive guidelines established in subsection (c1),” to which subsection (c1) explicitly sets forth the guidelines shall be established, “for the computation of child support obligations, *including retroactive support obligations*[.]” N.C.G.S. § 50-13.4(c), (c1) (2023) (emphasis added). Because plaintiff did seek reimbursement for previous expenditures, the trial court could properly award them. *See Respass*, 232 N.C. App. at 629.

However, defendant correctly asserts the trial court did not reimburse plaintiff for actual expenditures. Here, the trial court miscalculated its award and directly contradicted the guidelines because it did not calculate the children’s specific portion of health insurance costs. Though the record before us is voluminous, plaintiff’s pay stubs demonstrate the cost of insurance for herself *and* all of her children as \$129 per paycheck for 2023.<sup>4</sup> Further, all six child support worksheets in the record reflect a monthly credit to plaintiff in the same amount. Therefore, the trial court blanketly awarded plaintiff monthly credit for her *total* \$129 per paycheck in health insurance premiums, but did not determine, nor calculate, the amount “actually attributable” to the children in this action as called for by the guidelines. AOC-A-162, Rev. 1/23, Page 4 of 25 (2023).<sup>5</sup> Accordingly, we vacate that portion of the trial court’s order and remand for correct calculation of the children’s portion of health insurance premium costs for both retroactive and prospective child support in compliance with the guidelines.

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4. Plaintiff’s exhibit titled, “2023 Per Paycheck Contributions” lists “PPO (Cigna/UHC)” as \$129 under a column listed “Employee + Child(ren)[.]”

5. Plaintiff testified this amount included both the two children subject to this action, and her son from a previous relationship. Further, plaintiff’s employer wage affidavit also highlights this error where it states the total children’s portion (including plaintiff’s child from another relationship) being \$39.14 per pay period, and lists a separate amount for plaintiff’s portion of the health insurance premium.

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**B. Income**

[2] Next, defendant argues the trial court “reversibly erred by entering a prospective child support order that was not supported by competent evidence presented at the hearing.”<sup>6</sup> In this case the trial court specifically found:<sup>7</sup>

94. During the party’s relationship and their marriage, the Plaintiff has done business administrative work and has generally always been employed.

95. The Plaintiff is presently employed by CISCO as Project Manager and has been employed by CISCO since 2012.

96. In 2019, the Plaintiff secured second job working with Office Angels. She did contract business administrative work and received 1099 for the money she earned from that company. The Plaintiff secured this second job because the Defendant was paying little to no child support and she alone was supporting the children including paying for their private school tuition at Word of God Academy.

97. The amount of gross income that the Plaintiff earned and could earn for the purpose of calculating child support was and is as follows:

a. 2018, \$74,412 all from her CISCO job.

b. 2019, \$75,593.25, of which \$75,012 was from her CISCO job and \$581.25 was from her second job.

c. 2020, \$79,759, of which \$74,184 was from her CISCO job and \$5,575 was from her second job.

d. 2021, \$84,818.17, of which \$75,111 was from her CISCO job and \$9,707.17 was from her second job.

e. 2022, \$100,321.89, of which \$77,905 was from her CISCO job and \$22,416.89 was from her second job.

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6. Defendant also contends the trial court failed to use plaintiff’s current monthly gross income (\$2,940) to calculate prospective child support arrears; however, this is the figure the trial court used. *See Taylor*, 118 N.C. App. at 361 (cleaned up) (“Prospective child support represent[s] that period from the time a complaint seeking child support is filed to the date of trial.”). Accordingly, defendant’s argument lacks merit.

7. The challenged order contains some grammatical and substantive errors.

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f. 2023, \$100,321.89 of which \$77,905 was from her CISCO job and \$22,416.89 was from her second job.

78. The Plaintiff testified that it is very hard to keep up with her obligations as parent and work all the hours of the second job that she has had to do in recent years because the Defendant did not pay child support and that the amount of work that was reasonable and relative for the income that she need to earn to support the children would be consistent with the work and income that she did and received in 2021 where she earned \$10,000 from her second job.<sup>8</sup>

79. The Plaintiff always paid for the health, dental and eye insurance for the children through her work with CISCO and she paid the following amounts as follows:

- a. 2018, \$129 per month.
- b. 2019, \$129 per month.
- c. 2020, \$129 per month.
- d. 2021, \$129 per month.
- e. 2022, \$129 per month.
- f. 2023, \$129 per month.

80. The Defendant's earning income ability has been less stable than the Plaintiff's.

81. The Defendant testified that he made \$80,000 to \$90,000 per year in 2012 and 2013 from his music promotion business.

82. On May 29, 2018, the Defendant expressed in a loan application to purchase a work van for his business, that he earned salary of \$10,000 per month.

83. The Defendant testified and attempted to explain that the \$10,000 figure was for his gross income from his business and that he only netted \$4000 from the business. No

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8. No findings of fact or conclusions of law were omitted from this quote of the trial court's order, rather, the order states finding of fact 97, and then immediately after states finding of fact 78.

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proof of the expenses that the Defendant reference was submitted into evidence.

84. On February 12, 2020, the Defendant expressed in Financial Affidavit that his last year, 2019, adjusted gross income was \$52,265.74.

85. In that same financial affidavit, the Defendant expressed that his current gross income for 2020 was \$2940 per month.

86. The Defendant testified during their relationship, the Plaintiff was responsible for submitting their income to the tax return provider and that she made an error resulting in the Defendant having to pay penalty for the same. There was no such proof of the error or penalty that Defendant allegedly had to pay submitted into evidence.

87. The Defendant testified that after his separation from the Plaintiff, that his new tax provider made an error regarding the submission of his gross income which resulted in him providing wrong information in the financial affidavit that he signed. There was no evidence of this error or of an amended tax return submitted into evidence to substantiate this.

88. The Defendant present operates Chandler's Flooring, Inc primarily overseeing its 4 contract employees.

89. The Defendant was injured in 2020 which affects his ability to do some physical labor. However, there was no evidence submitted that Defendant cannot still operate his business overseeing his employees and earning income from his business.

90. The financial affidavit that the Defendant signed indicating his gross income was \$2940 per month was signed in the same year that he was injured.

91. The amount of income that the Defendant earned and could earn for the purpose of calculating child support was and is as follows:

- a. 2018, \$10,000 per month.
- b. 2019, \$4355.47 per month.
- c. 2020, \$2940 per month.

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d. 2021, \$2940 per month.

e. 2022, \$2940 per month.

f. 2023, \$2940 per month.

92. The Defendant has engaged in questionable title transfer practices to further his financial interests.

93. The Defendant has testified to facts contrary to the findings of the DVPO, and contrary to information in loan application and sworn financial statement.

94. The Defendant blamed the Plaintiff and his tax preparer for mistakes causing him financially without providing any supporting evidence of the same.

95. The Defendant refused to cooperate with the Plaintiff to refinance Granite to ensure that his separate debt judgment would be satisfied which also deprived his own children of a home.

96. The Defendant did not consistently or significantly pay the Plaintiff child support while paying \$1500 per month for a BMW and while he had another car, a Nissan 350Z car available to him.

97. The Defendant has been previously both physically and emotionally to the Plaintiff.

98. The Defendant's characterization of, and remarks about and attitude towards the Plaintiff, the mother of his two children, is not respectful and indicative of his desire to harm the Plaintiff.

99. The Defendant has held and still holds personal animus against the Defendant and his testimony was often not credible.

*a. Monthly Gross Income*

Defendant argues the trial court “did not explain how [d]efendant's gross income was calculated[,]” as related to his business expenses and that such finding was not supported by evidence at trial. Our review of child support orders is usually limited to determining whether the trial court abused its discretion. *White*, 312 N.C. at 777. However, “[i]n child support cases, determinations of gross income are conclusions of law reviewed de novo, rather than findings of fact,” therefore, “the

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trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors [under the guidelines].” *Thomas v. Burgett*, 265 N.C. App. 364, 367, 368 (2019) (cleaned up).

When the trial court does not make such findings, “this Court has no means of determining whether the order is adequately supported by competent evidence.” *Id.* (cleaned up). Further, “[i]t is not for this Court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal.” *Craven County v. Hageb*, 277 N.C. App. 586, 589 (2021) (cleaned up). Therefore, the trial court’s factual findings are binding on this Court when supported by competent evidence, “despite the existence of evidence that might support a contrary finding.” *Sergeef v. Sergeef*, 250 N.C. App. 404, 407 (2016) (cleaned up).

Under the guidelines, “[g]ross income from self-employment . . . is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation.” AOC-A-162, Rev. 1/23, Page 3 of 25 (2023). “Although the [g]uidelines do not define ordinary and necessary expenses, this Court has explained that such expenses include repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest.” *Thomas*, 265 N.C. App. at 367 (cleaned up).

In this case, the trial court relied on competent evidence to support its findings of fact related to defendant’s gross income, “despite the existence of evidence that might support a contrary finding.” *Sergeef*, 250 N.C. App. at 407. The trial court made “findings specific enough to indicate” to this Court that it took “due regard,” *Burgett*, 265 N.C. App. at 368, of the “gross receipts minus ordinary and necessary expenses,” AOC-A-162, Rev. 1/23, Page 3 of 25 (2023), where it found:

83. The Defendant testified and attempted to explain that the \$10,000 figure was for his gross income from his business and that he only netted \$4000 from the business. No proof of the expenses that the Defendant reference was submitted into evidence.

84. On February 12, 2020, the Defendant expressed in Financial Affidavit that his last year, 2019, adjusted gross income was \$52,265.74.

85. In that same financial affidavit, the Defendant expressed that his current gross income for 2020 was \$2940 per month.

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86. The Defendant testified during their relationship, the Plaintiff was responsible for submitting their income to the tax return provider and that she made an error resulting in the Defendant having to pay penalty for the same. There was no such proof of the error or penalty that Defendant allegedly had to pay submitted into evidence.

87. The Defendant testified that after his separation from the Plaintiff, that his new tax provider made an error regarding the submission of his gross income which resulted in him providing wrong information in the financial affidavit that he signed. There was no evidence of this error or of an amended tax return submitted into evidence to substantiate this.

...

92. The Defendant has engaged in questionable title transfer practices to further his financial interests.

93. The Defendant has testified to facts contrary to the findings of the DVPO, and contrary to information in loan application and sworn financial statement.

94. The Defendant blamed the Plaintiff and his tax preparer for mistakes causing him financially without providing any supporting evidence of the same.

...

99. The Defendant has held and still holds personal animus against the Defendant and his testimony was often not credible.

Defendant admits “tax returns and testimonial evidence were presented to show [d]efendant’s gross income from 2019–2022 tax years,” however, he contends no findings were made as to the trial court’s calculations regarding defendant’s business expenses and that “the evidence at trial did not support the [trial] court’s determination.”

In this case, the trial court’s findings of fact demonstrate it made credibility determinations regarding defendant’s testimony, financial affidavit, and tax returns. Specifically, the trial court’s factual findings note the discrepancies in defendant’s testimony and other evidence, or lack thereof. Defendant’s tax returns do not demonstrate expenses for “repairs, property management, leasing fees, real estate taxes, insurance, and mortgage interests” where defendant took standard deductions for

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each relevant tax year, and therefore, these tax returns do not list ordinary and necessary expenses. Similarly, the trial court stated in finding 83 that “[n]o proof of the expenses that [d]efendant reference[s] [were] submitted into evidence.” Consequently, defendant’s argument asks this Court to draw different conclusions on evidentiary issues the trial court has resolved based upon the evidence presented.

This Court does not judge witness credibility to determine whether we agree or disagree with a trial court’s factual findings. We simply review whether the trial court’s factual findings are supported by competent evidence and whether those findings support its conclusions. Though defendant urges this Court to rely on his preferred evidence, here, the trial court relied upon defendant’s financial affidavit to make unchallenged factual findings 83–87 and 92–94 regarding his credibility, and these findings support its gross income calculations. Accordingly, we affirm the trial court’s conclusion of defendant’s gross monthly income.

*b. Imputation of Defendant’s Income and Calculation of Plaintiff’s 2023 Income*

Next, defendant argues the trial court erred in imputing income to defendant because there was “no evidence that [d]efendant suppressed his income with the intent required for income imputation.” Additionally, defendant argues the trial court abused its discretion by relying on plaintiff’s past income to resolve conflicts in her 2023 income.

This Court explained in *Kaiser v. Kaiser*:

It is well established that child support obligations are ordinarily determined by a party’s actual income at the time the order is made or modified. Although this means the trial court must focus on the parties’ current income, past income often is relevant in determining current income. Indeed, this Court has expressly held that a trial court may permissibly utilize a parent’s income from prior years to calculate the parent’s gross monthly income for child support purposes. . . . What matters in these circumstances is the reason *why* the trial court examines past income; the court’s findings must show that the court used this evidence to accurately assess current monthly gross income.

259 N.C. App. 499, 505–06 (2018) (emphasis added) (cleaned up).

“[W]here the court finds that a party’s most recent pay stubs or most recently filed tax return are unreliable, the court can use past years’ income to fill in the gaps.” *Id.* at 505; *e.g., Diehl v. Diehl*, 177 N.C. App. 642,

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650 (2006). Further, this Court has vacated and remanded cases where the trial court made no specific findings to justify using past income. *E.g.*, *Eidson v. Kakouras*, 286 N.C. App. 388, 404 (2022). Therefore, “the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors [under the guidelines.]” *Thomas*, 265 N.C. App. at 368.

The trial court here did not err in relying on defendant’s past income, nor did it impute income, because its findings articulated that defendant’s most recent financial evidence was unreliable. *See Diehl*, 177 N.C. App. at 650. The trial court highlighted the unreliability of defendant’s evidence by finding defendant: (1) testified to figures without proof of expenses in factual finding 83; (2) contradicted information contained in other evidence he submitted in factual finding 93; and, (3) blamed plaintiff for mistakes in financial statements without further supporting evidence in factual finding 94. Similarly, the trial court found defendant’s “testimony was often not credible.” Therefore, the trial court made findings providing a permissible rationale for using defendant’s past income and did so with due regard to the guidelines.

Defendant’s argument that the trial court erred in relying on plaintiff’s past income to resolve conflicts in her 2023 income is also without merit because “[t]his Court has expressly held that a trial court may permissibly utilize a parent’s income from prior years to calculate the parent’s gross monthly income for child support purposes.” *Kaiser*, 259 N.C. App. at 505 (cleaned up). Here, the trial court grappled with plaintiff’s 2023 income by relying on her past income rather than accepting plaintiff’s testimony or defendant’s proffered explanation from plaintiff’s August 2022 to August 2023 bank account deposits. Further, the trial court’s factual findings are binding on this Court when supported by competent evidence, “despite the existence of evidence that might support a contrary finding.” *Sergeef*, 250 N.C. App. at 407. Plaintiff’s varying, monthly income was a sufficient reason why the trial court could “use past years’ income to fill in the gaps[,]” *Kaiser*, 259 N.C. App. at 505, and therefore, such past years’ income was competent evidence to support the trial court’s finding of fact 97 and 78.

*c. Credit for Biological Child*

Defendant also argues the trial court erred in calculating his child support obligation by failing to provide credit for support of a biological child that he shares with another woman. We disagree.

Under the guidelines, “[c]urrent child support payments actually made by a parent under any existing court order, separation agreement,

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or voluntary support arrangement are deducted from the parent's gross income" and "[t]he court *may* consider a voluntary support arrangement as an existing child support obligation when the supporting parent has consistently paid child support for a reasonable and extended period of time." AOC-A-162, Rev. 1/23, Page 4 of 25 (2023) (emphasis added). "The use of the word 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." *Brock & Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137 (2010) (cleaned up). Therefore, under the Guidelines, the trial court *may* exercise its discretion by providing a party with a credit for a voluntary support arrangement after a showing that the party "consistently paid child support for a reasonable and extended period of time." AOC-A-162, Rev. 1/23, Page 4 of 25 (2023). Further, "where matters are left to the discretion of the trial court," this Court's review "is limited to a determination of whether there was a clear abuse of discretion[.]" *White*, 312 N.C. at 777. "Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Biggs*, 136 N.C. App. at 296–97 (cleaned up).

Though unpublished, this Court's opinion in *Adams v. Lewis* noted where the party did not provide a court order or any "evidence of when he began paying or how regularly he paid support for his other child[.]" the party failed to present evidence that he had paid child support for his other child "consistently" or "for a reasonable and extended period of time."<sup>9</sup> No. COA15-205, 2016 WL 1320035, at \*7 (N.C. Ct. App. Apr. 5, 2016) (citations omitted). There, we held "the trial court did not abuse its discretion in failing to give plaintiff credit for his claimed voluntary payments of support to his other child." *Id.*

Here, the trial court could have chosen to exercise its discretion by providing defendant with a credit for a voluntary support arrangement only *after* a showing that defendant "consistently paid child support for a reasonable and extended period of time." AOC-A-162, Rev. 1/23, Page 4 of 25 (2023). Defendant failed to show he had consistently, and for an extended period of time, paid voluntary child support where his testimony demonstrated his payments "would vary . . . [paying] . . . \$50 here, \$100 there." Though defendant correctly asserts that this testimony was unchallenged, it failed to provide sufficient evidence of the consistency required for the trial court to exercise its discretion. In other words,

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9. "Although unpublished opinions do not have precedential value, an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point." *In re N.B.*, 289 N.C. App. 525, 534 n.4 (2023) (cleaned up).

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the trial court's discretionary decision to not provide defendant with a credit for another biological child could not have been "so arbitrary that it could not have been the result of a reasoned decision[.]" *Biggs*, 136 N.C. App. at 296–97, because defendant failed to make the requisite showings for such credit under the guidelines. Therefore, the trial court did not abuse its discretion by failing to provide credit for defendant's other biological child.

*d. Use of N.C. Worksheet B*

Defendant next contends the trial court "reversibly erred by failing to use N.C. Worksheet B to calculate defendant's child support obligations from 2018–2021."

The Guidelines provide that Worksheet A is to be used "when one parent . . . has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for 243 nights or more during the year"; the use of Worksheet B is appropriate when both "[p]arents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent." Guidelines, Ann. R. 5.

*Jonna v. Yaramada*, 273 N.C. App. 93, 122 (2020).

In other words "[a] parent does not have shared custody of a child when that parent has visitation rights [which] allow the child to spend less than 123 nights per year with the parent[,] and the other parent has primary physical custody of the child." AOC-CV-628, Side Two, Rev. 1/15 (2023). In *Jonna*, this Court vacated a child support order and remanded for the trial court to make additional factual findings as to the number of nights spent with the parent and to determine "whether the custodial arrangement [was] a situation involv[ing] a true sharing of expenses." 273 N.C. App. at 123 (cleaned up).

Here, the trial court made the following factual findings:

73. In the DVPO, the Plaintiff was awarded temporary custody of the parties' children and the Defendant having supervised visitation with them.

74. On July 12, 2018, the Defendant filed for custody of the children in case number 18CVD8721. On September 12,

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2018, the parties agreed to a Consent Order for Temporary Child Custody and/or Visitation which provided that the Plaintiff have primary physical custody of the children.

75. On December 2, 2022, after a trial on the merits, the court entered an Order on Permanent Custody which provided that Plaintiff have primary physical custody of the children.

Subsequently, the trial court stated in its conclusions of law, “[g]iven the court order[ed] visitation of the Defendant and the amount of time he visits the children, child support should be calculated based upon Schedule A.”

In reliance on an underlying order not before this Court, the trial court did not make specific factual findings or conclusions of law that determined the number of nights per year the children spent with each parent between 2018 and 2021.<sup>10</sup> Plaintiff testified that in “the last couple of months,” defendant visited the children “maybe a couple of times[,]” and “prior to that, a year[,] [a]nd then here and there.” Defendant testified during this time that he had visited with the children on alternating weekends during the school year; the children stayed with him Monday through Friday over summer break and alternating weekends; and the parties alternated custody over other school breaks.

However, because the trial court failed to make any findings as to the number of nights spent with each parent between 2018 and 2021, this Court cannot review whether the trial court used the correct worksheet to determine child support in that timeframe. Accordingly, we vacate and remand the child support order for the trial court to make additional factual findings as to the number of nights the children spent with each parent.

**C. Equitable Distribution**

**[3]** Defendant next argues the trial court erred because the equitable distribution judgment was not supported by competent evidence. Specifically, defendant challenges factual findings 43, 44, 46–48, 68, 72, 90, 90(a), and 93(a) as unsupported by competent evidence. Defendant further challenges the related conclusions of law 4, 5(a)–(d), and decretal provisions 2, 3, and 12. We address each argument in turn.

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10. Such order is not challenged on appeal, nor contained within our record.

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When entering an equitable distribution judgment, section 50–20 “requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property.” *Brackney v. Brackney*, 199 N.C. App. 375, 381 (2009); *see also* N.C.G.S. § 50–20 (2023). “Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.” *Hill v. Hill*, 244 N.C. App. 219, 223–24 (2015) (cleaned up). “Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law[,]” and reviewed *de novo*. *Roberts v. Kyle*, 291 N.C. App. 69, 75 (2023) (cleaned up). Therefore, “[t]he standard of review for a trial court’s classification of property during equitable distribution is whether competent evidence supports the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Roberts*, 291 N.C. App. at 74 (cleaned up).

**1. Classification of \$8,996**

Here, defendant argues the trial court erred in findings of fact 43, 44, and 93(a), conclusion of law 4, and decretal provision 3 because the classification of the \$8,996 check from Augustin as separate property and a gift to plaintiff was in error. We disagree.

Marital property is defined as “all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned.” N.C.G.S. § 50–20(b)(1) (2023). Separate property includes “all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage.” N.C.G.S. § 50–20(b)(2) (2023). A party who claims marital property by gift is separate property bears the burden of demonstrating the alleged donor intentionally transferred “ownership of the property without receiving any consideration in return.” *Burnett v. Burnett*, 122 N.C. App. 712, 714 (1996) (cleaned up).

Here, defendant contends the trial court erred by overlooking the evidence defendant presented at trial. However, “[t]his Court will not reweigh evidence.” *Jonna*, 273 N.C. App. at 121 (cleaned up). The trial court found that:

43. The Plaintiff’s cousin, Yves Augustin, had gifted \$8996 to the Plaintiff for the purpose of purchasing Granite.

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44. There was no gift-letter from the Defendant’s family which evidences the use of a loan he allegedly secured from them to purchase Granite.

Subsequently the trial court stated in its conclusions of law that: “[t]hat the \$8996 gifted by the Plaintiff’s cousin to help the Plaintiff buy Granite is the separate property of the Plaintiff.”

Though this Court reviews the trial court’s classification of the check *de novo*, we are nonetheless bound by the trial court’s findings if they are supported by competent evidence. At trial, plaintiff presented competent evidence when she testified that she had received the \$8,996 check from Augustin as a gift and admitted a gift letter which stated “there is no obligation, express[ ] . . . or implied, to repay this sum at any time.” Therefore, factual finding 43 is supported by both plaintiff’s testimony and by a gift letter from Augustin.

We agree with defendant that the trial court erroneously found in factual finding 44 that “[t]here was no gift-letter from the Defendant’s family which evidences the use of a loan he allegedly secured from them to purchase Granite.”<sup>11</sup> However, this finding had no substantive impact on the trial court’s reasoning or conclusions. Further, the trial court found in factual finding 43 that plaintiff had received the check from Augustin as a gift.

Defendant’s presentation of conflicting evidence does not change our precedent that conclusions of law are generally “upheld when they are supported by findings of fact.” *In re C.E.L.*, 171 N.C. App. 468, 479 (2005). In this case, the trial court did not err in finding the \$8,996 from Augustin to be a gift, where such finding was supported by competent evidence. Thus, the trial court did not err in concluding the \$8,996 gift from Augustin to be Plaintiff’s separate property.<sup>12</sup>

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11. This finding is peculiar because it implies that the absence of a gift letter must mean the check from Augustin was a gift. This logic is flawed. The absence of something does not necessarily mean the existence of something else—for example, if the check were a loan, there would not be a gift letter. Therefore, the trial court must be cautious and detailed in explaining its rationale when making its factual findings and abide by the competent evidence standard. *See Pegg*, 187 N.C. App. at 358.

12. Defendant alternatively argues the \$8,996 gift was converted to marital property when used towards the purchase of the parties’ new home, however, defendant never raised this theory or argument at the trial level. Accordingly, because defendant failed to raise this issue at the trial level, he has failed to preserve it for appellate review. N.C. R. App. P. 10(a)(1) (2023); *see also Wood v. Weldon*, 160 N.C. App. 697, 699 (2003) (“[T]he

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**2. Set Aside Agreement**

Defendant next argues the trial court erred in factual findings 46–48 and conclusion of law 5(a)–(d) because there was no evidence to set aside the parties’ \$48,000 agreement due to duress or undue influence.<sup>13</sup>

It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable de novo.

*Lee v. Lee*, 167 N.C. App. 250, 253 (2004) (cleaned up).

“What is designated by the trial court as a finding of fact . . . will be treated on review as a conclusion of law if essentially of that character.” *Wachacha v. Wachacha*, 38 N.C. App. 504, 507 (1978). Therefore, “[t]he label of fact put upon a conclusion of law will not defeat appellate review.” *Id.* (citation omitted). “[D]eterminations reached by application of legal principles[,]” like duress and undue influence, “are conclusion[s] of law.” *Onnipauper LLC v. Dunston*, 290 N.C. App. 486, 489 (2023) (cleaned up). Accordingly, the trial court’s purported factual finding that “Plaintiff signed the document under duress or undue influence[,]” is a conclusion of law which this Court reviews de novo. *See Lee*, 167 N.C. App. at 253.

“Undue influence is the fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.” *Howell v. Landry*, 96 N.C. App. 516, 526 (1989) (cleaned up). Similarly, “[d]uress exists”

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law does not permit parties to swap horses between courts in order to get a better mount, meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court.” (cleaned up)); *Cushman v. Cushman*, 244 N.C. App. 555, 562 (2016) (“Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” (cleaned up)).

13. Defendant alternatively argues the agreement was ratified by plaintiff, however, again, defendant never raised this theory or argument at the trial level. Accordingly, because defendant failed to raise this issue at the trial level, he has failed to preserve it for appellate review. N.C. R. App. P. 10(a)(1).

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when someone, “by the unlawful or wrongful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will[,]” and “[a]n act is wrongful if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.” *Id.* (cleaned up).

“Duress is the result of coercion. . . . Undue influence may exist where there is no misrepresentation or concealment of a fact and the pressure applied to procure the victim’s ostensible consent to the transaction falls short of duress.” *Link v. Link*, 278 N.C. 181, 191 (1971). Therefore, when “the court cannot find sufficient threat to constitute duress, it may still find the presence of undue influence.” *Copley v. Copley*, 128 N.C. App. 658, 664 (1998).

Relevant factors in determining if the victim was subject to undue influence and whether that person’s will was actually overcome include the age, physical and mental condition of the victim, whether the victim had independent advice, whether the transaction was fair, whether there was independent consideration for the transaction, the relationship with the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation.

*Howell*, 96 N.C. App. at 527 (cleaned up).

Because “[t]he relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable[,]” our Courts have refused to enforce separation agreements attained by duress. *Eubanks v. Eubanks*, 273 N.C. 189, 195–96 (1968). *See, e.g., Stegall v. Stegall*, 100 N.C. App. 398, 401 (1990); *see generally Link v. Link*, 278 N.C. 181 (1971); *Edwards v. Bowden*, 107 N.C. 58 (1890).

In *Copley*, for example, this Court set aside a party’s consent order for duress. 128 N.C. App. at 667. In that case, the plaintiff had changed locks and security codes to the marital residence; “closed all of the couples’ joint” bank accounts; and threatened to “disgrace” the defendant in court and “subject the minor children to custody proceedings in court” to obtain the defendant’s consent. *Id.* at 665 (cleaned up). The “[p]laintiff told [the] defendant that if she did not complete, sign, and notarize a document purporting to govern their separation, he would take her

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to court and expose the minor children to the facts surrounding their separation.” *Id.* At the time of the entry of the consent order, defendant was “under the influence of prescription medication” to help her with “uncontrollable bouts of crying and insomnia” and asserted she was “shocked and confused.” *Id.* at 665–66 (cleaned up).

This Court stated:

It is clear that defendant was in a vulnerable position—at the mercy of plaintiff, who determined defendant’s rights in regards to her children; that plaintiff engaged in subtle manipulation of defendant in that vulnerable position—threatening defendant’s relationship with her children if she did not sign the consent order and go along with his terms for the custody and support of the minor children, and the distribution of the marital property; and that defendant was thereby robbed of taking action of her own free will, preventing the giving of true consent.

*Id.* at 667.

Here, defendant argues the agreement was not attained by duress or undue influence because plaintiff testified that “she signed the agreement to avoid disappointing the children with a delayed home closing.” Further, defendant argues the trial court failed to weigh evidence of other factors. We agree.

Presuming, without deciding, that factual findings 46–48 are supported by competent evidence, the record before us does not support the conclusion that the agreement was signed by duress, nor undue influence. *See Lee*, 167 N.C. App. at 253. At the time of the signing, plaintiff demonstrated no physical or mental impairments, nor was she faced with an emergency. Though plaintiff testified defendant had surprised her with the agreement, surprise or shock alone does not rise to undue influence, let alone duress. *See Link*, 278 N.C. at 191. Further, plaintiff’s testimony reveals no coercion when she stated she ultimately signed the agreement to avoid “disappoint[ing] the children.”

Here, plaintiff’s testimony certainly demonstrates she felt external pressure and signed the agreement to avoid conflict with defendant, disapproval of her children, and delay in the closing of the parties’ home. However, the pressure applied in the present case does not rise to the level of overriding plaintiff’s ability to freely consent. Rather, plaintiff’s testimony reveals she understood the nature of the agreement and that she freely chose to sign the agreement after considering her familial obligations. Accordingly, we vacate and reverse that part of the alimony order.

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**3. Testimony and Valuation of Rings**

Next, defendant challenges the trial court's valuation of plaintiff's separate property in factual findings 68 and 72, and decretal provision 2. Specifically, defendant challenges the trial court's valuation of plaintiff's wedding rings, arguing such assessment was not supported by "a credible value assessment" and "based solely on [plaintiff's] unsubstantiated testimony."

"In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them, even if there is also evidence supporting a finding otherwise." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197 (1999). "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures." *Mishler v. Mishler*, 90 N.C. App. 72, 74 (1988).

In reviewing the evidence, this Court defers to the trial court's determination of witnesses' credibility and the weight to be given their testimony, *Leak v. Leak*, 129 N.C. App. 142, 150 (1998), because "[t]he fact finder has a right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it," *Sneed v. Johnston*, 293 N.C. App. 650, 656 (2024) (citations omitted).

It is well established that lay opinions as to the value of the property are admissible if the witness can show [they possess] knowledge of the property and some basis for [their] opinion. Further, the owners of property have generally been held to have both knowledge and basis for the testimony as to the value of their property.

*Finney v. Finney*, 225 N.C. App. 13, 16 (2013). "Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed only upon a showing that it is so arbitrary that it could not have been the result of a reasoned decision." *Brackney*, 199 N.C. App. at 381 (cleaned up).

Here, the trial court found in its factual findings:

68. The Plaintiff testified that the FMV of those rings is now \$6500. The Defendant testified that rings were fakes and that they were only worth \$1500, specifically expressing the Plaintiff was liar.

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69. The Defendant characterized that the Plaintiff was untrustworthy or liar on more than one occasion during his testimony.

70. *There was no credible evidence that the Plaintiff is liar or provided false or incorrect evidence during her testimony.*

71. Other than the Defendant's testimony, there was no evidence presented which indicated that any of the jewelry that the Defendant ever purchased for himself, or the Plaintiff was fake.

(emphasis added). Subsequently, the trial court determined in finding 72, “[t]he wedding rings, which constitute an engagement ring and wedding band have FMV of \$6500.”

Defendant's argument that the trial court relied upon plaintiff's testimony and affidavit in error is misplaced. Defendant does not challenge the trial court's credibility determinations made in factual findings 69–71, and therefore, such findings are binding on appeal. *See Leak*, 129 N.C. at 150 (This Court defers to the trial court's determination of witnesses' credibility and the weight to be given their testimony.). We afford great deference to the trial court's credibility determinations, and the trial court determined plaintiff's testimony credible as to the value of the parties' wedding rings.

As noted, this Court does not “second-guess values of marital and separate property where there is evidence to support the trial court's figures.” *Mishler*, 90 N.C. App. at 74. Here, plaintiff's testimony and affidavit support the trial court's \$6,500 figure where the trial court determined plaintiff's testimony as credible and she testified to the value of her own property, the wedding rings. *See Finney*, 225 N.C. App. at 16. (“[O]wners of property have generally been held to have both knowledge and basis for the testimony as to the value of their property.”). The trial court's value determination was not “so arbitrary that it could not have been the result of a reasoned decision[.]” *Brackney*, 199 N.C. App. at 381, and our review demonstrates the trial court's factual findings are supported by competent evidence. Accordingly, we affirm the trial court's valuation of the party's engagement ring and wedding bands.

#### ***4. Credit for Post-Separation Use***

Defendant argues the trial court abused its discretion by not awarding defendant a credit for the parties' post-separation use of the marital home, or alternatively, implementing this use as a distributional

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factor under subsection 50-20(c)(12) of our General Statutes. N.C.G.S. § 50-20(c)(12) (2023). We disagree.

Under subsection 50-20(c), the court must consider the factors listed in equal distribution including, “any other factor which the court finds to be just and proper.” N.C.G.S. § 50-20(c)(12) (2023). However, “the trial court *may*, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances,” and “treat use as a distributional factor under N.C.G.S. § 50-20(c)(12).” *Walter v. Walter*, 149 N.C. App. 723, 732 (2002) (emphasis added). “[T]he use of [the word] ‘may’ generally connotes permissive or discretionary action and does not mandate or compel a particular act.” *Brock & Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137 (2010) (citations omitted).

Our review is limited to whether there was a clear abuse of discretion. *White*, 312 N.C. at 777. Therefore, defendant’s argument is without merit because the trial court did not abuse its discretion where it was permitted to choose whether to treat use as a distributional factor under subsection 50-20(c)(12). It is not for this Court to “weigh the equities” in this case, nor “find that a credit or distributional factor would be appropriate under the circumstances” where the trial court has exercised its discretion not to do so. *Walter*, 149 N.C. App. at 732. Likewise, the trial court’s refusal to award defendant a credit for post-separation use of the marital home was not so “arbitrary that it could not have been the result of a reasoned decision,” *Biggs*, 136 N.C. App. at 296–97, where plaintiff was in exclusive possession of the marital home because she had obtained a domestic violence protective order against defendant. Therefore, the trial court did not abuse its discretion by refusing to consider the parties’ post-separation use of the marital home.

**5. *Distributive Award***

Finally, defendant challenges the portion of conclusion of law 20 italicized below:

That given the Defendant’s animus towards the Plaintiff and his poor record of voluntary child support payments in the past, *it is equitable, just, and right and consistent with the child support guidelines to deduct retroactive child support arrearage that the Defendant owes the Plaintiff from the sale of Granite, if the Defendant be entitled to any of the same.*

Under subsection 50-20(f), “[t]he court shall provide for an equitable distribution without regard for alimony for either party or support of

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the children of both parties.” N.C.G.S. § 50-20(f) (2023). Therefore, “[a]s a matter of sound public policy, child support obligations may not be offset by other obligations owed by one spouse to the other spouse,” *Brinkley v. Brinkley*, 135 N.C. App. 608, 612 (1999), and “direct contravention of N.C.G.S. § 50-20(f) . . . constitutes an abuse of discretion,” *Ward v. Ward*, No. COA01-892, 2002 WL 2004655, at \*2 (N.C. Ct. App. Sept. 3, 2002); see also *Wiencek-Adams v. Adams*, 331 N.C. 688, 691 (1992).

Here, the trial court directly contradicted the explicit language of subsection 50-20(f) by providing an equitable distribution *with* regard for the support of the children. This kind of distribution is in direct conflict with both subsection 50-20(f) and the underlying policy this Court describes in *Brinkley*. Therefore, the trial court abused its discretion when it ordered a deduction to the “retroactive child support arrearage that the Defendant owes the Plaintiff from the sale of Granite, if the Defendant be entitled to any of the same.” Accordingly, we vacate and remand the equitable distribution order to comply with subsection 50-20(f).

**V. Conclusion**

The trial court did not err in ordering defendant to pay retroactive child support as authorized by subsection 50-13.4(c). However, we vacate and remand that portion of the trial court’s order for recalculation of the children’s specific portion of health insurance premium costs.

Those portions of the trial court’s child support order supported by competent evidence—defendant’s gross monthly income and plaintiff’s past income—are affirmed. Similarly, we affirm the trial court’s decision not to award defendant credit for his other biological child.

However, the trial court erred in utilizing Worksheet A when it did not make the appropriate factual findings as to the number of nights spent with each parent between 2018 and 2021, and we therefore vacate and remand that portion of the order for the trial court to make additional factual findings.

Those portions of the trial court’s equitable distribution order supported by competent evidence—the classification of \$8,996.00 and the valuation of the rings—are affirmed. We also affirm the trial court’s decision not to award defendant credit for post-separation use.

However, the trial court erred in concluding the agreement should be set aside for duress or undue influence and we vacate and reverse that portion of the order. Further, the trial court erred in ordering defendant’s distributive award to offset his child support obligations in direct contradiction of N.C.G.S. § 50-20(f) (2023). Therefore, we vacate

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and remand the equitable distribution order for compliance with subsection 50-20(f).

AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED.

Judges TYSON and CARPENTER concur.

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CALVIN FRANK MORROW III, PLAINTIFF

v.

KERRY SUSAN VALLANT MORROW, DEFENDANT

No. COA25-20

Filed 16 July 2025

**1. Child Custody and Support—permanent custody order—best interests determination**

The trial court’s permanent custody order contained unchallenged findings of fact regarding each party’s parental fitness and ability to provide a stable environment that supported the court’s determination that the custody provisions set forth in the order were in the best interests of the children.

**2. Child Custody and Support—permanent custody order—custody schedule—exchange time—discretionary decision**

The trial court did not abuse its discretion by setting a custodial exchange time of 5:00 p.m. on Saturdays as part of the parties’ summer custody schedule—which took into account defendant’s work schedule—or in prioritizing the summer schedule over the custody order’s provision allowing additional vacation time. The court had broad discretion to establish a schedule that would work for all parties and that would be in the children’s best interest.

**3. Child Custody and Support—permanent custody order—Father’s Day visitation—discretionary decision**

The trial court did not abuse its discretion by setting a custody schedule that had different provisions for the Mother’s Day and Father’s Day weekends, where the two holidays fell during different schedules—the regular schedule and the summer schedule (which was evenly split between the parties), respectively—and, thus, the Father’s Day plan depended on the parties’ summer arrangement in

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any given year. Although the parties had previously stipulated to a shared custody arrangement, the trial court had broad discretion to establish a schedule that would work for all parties and that would be in the best interests of the children.

**4. Child Custody and Support—permanent custody order—custodial exchange—prohibition on recording other parent**

The trial court did not abuse its discretion by forbidding the parties from recording each other during custodial exchanges of their children, which the court included in its permanent custody order after noting the high level of conflict between the parties. Although plaintiff argued that the restriction violated the Federal Wiretap Act and North Carolina's Electronic Surveillance Act, trial courts have broad discretion over custody matters. Here, the restriction did not violate the wiretapping laws where it was put in place for the best interests of the children.

**5. Child Custody and Support—permanent custody order—international travel provision—not restricted to Hague Convention signatories**

The trial court did not abuse its discretion by setting a custody schedule that allowed one parent to travel internationally with the children but that did not restrict travel only to countries which were parties to the Hague Convention (which includes legal rights and procedures for the return of wrongfully removed or abducted children). Trial courts have broad discretion over custody matters and, here, the court took into account information from defendant that her family was from India (a country that is not a party to the Hague Convention), that many of her extended family still lived in India, and that the parties had taken the children to India previously.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by plaintiff from order entered 13 June 2024 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 12 June 2025.

*Connell & Gelb, PLLC, by Michelle D. Connell, for plaintiff-appellant.*

*Sydney J. Batch for defendant-appellee.*

FLOOD, Judge.

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Plaintiff Calvin Frank Morrow III appeals from the trial court's child custody order, granting joint physical and legal custody to Plaintiff and to Defendant, Kerry Susan Vallant Morrow. On appeal, Plaintiff argues the trial court erred by: first, failing to make an ultimate finding of fact that the child custody schedule it ordered was in the best interests of the minor children; second, failing to make findings of fact to support its decree that the parties must exchange child custody at 5:00 p.m. on Saturdays during the summer; third, granting Defendant custody for the weekend of Mother's Day holiday, but denying Plaintiff the same custody for the Father's Day holiday; fourth, forbidding either party from recording one another during custodial exchanges; and fifth, not restricting international travel with the children only to countries which are parties to the Hague Convention.<sup>1</sup> Upon review, we conclude the trial court made a finding that the custody order was in the best interests of the minor children and did not abuse its discretion in ordering the custody-related decrees.

**I. Factual and Procedural Background**

Plaintiff and Defendant married in 2009 and subsequently separated in 2022. Two minor children (the "children") were born from this marriage. On 11 February 2022, Plaintiff filed a complaint for divorce from bed and board, child custody, and temporary child custody; he later amended the complaint to include child support. Defendant filed her answer and counterclaims on 18 March 2022. On 31 March 2022, the parties subsequently entered into a consent order (the "Consent Order") for temporary child custody and temporary child support. In the Consent Order, the parties stipulated that it was in the best interests of the minor children for the parties to share joint legal and physical "(50-50)" custody

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1. "The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions." 22 U.S.C.A. § 9001 (a)(1). "The Hague Convention provides a mandatory remedy of return [of minor children] that is meant both to preserve the status quo with respect to child custody and to deter parents from crossing international boundaries in search of a more sympathetic court." *Obo v. Steven B.*, 201 N.C. App. 532, 533 (2009) (citation omitted); see also N.C.G.S. § 50A-302 (2023) ("[A] court of this State may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination.").

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of the children, and that Plaintiff would pay Defendant \$336 each month in child support.

The trial court held a hearing for child custody from 21–22 March 2024, and on 13 June 2024, the trial court entered a permanent order (the “Permanent Order”) for child custody, granting the parties joint physical and legal custody, and setting forth a detailed custody schedule. In the Permanent Order, the trial court set out certain times and restrictions for custodial exchanges, and decreed specific summertime custody arrangements.

Plaintiff timely appealed.

**II. Jurisdiction**

This Court has jurisdiction over a final judgment of a child custody order from a district court, pursuant to N.C.G.S. §§ 7A-27(b)(2) and 50-19.1 (2023).

**III. Standard of Review**

When a trial court sits without a jury, this Court reviews the trial court’s order to determine “whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Burger v. Smith*, 243 N.C. App. 233, 236 (2015) (citation omitted). “In a child custody case, the trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings.” *Id.* at 236 (citation omitted). “Unchallenged findings of fact are binding on appeal.” *Id.* at 236 (citation omitted).

“It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody.” *Pulliam v. Smith*, 348 N.C. 616, 624 (1998) (citation omitted). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *White v. White*, 312 N.C. 770, 777 (1985) (citation omitted). “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 777. “[T]rial courts have the duty to decide domestic disputes, guided always by the best interests of the child and judicial objectivity. To that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them.” *Lovallo v. Sabato*, 216 N.C. App. 281, 285 (2011) (citation omitted).

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Additionally, questions of statutory interpretation are reviewed de novo. *State v. Williams*, 911 S.E.2d 286, 294 (N.C. Ct. App. 2024) (citation omitted). “Where statutory language is clear and unambiguous, this Court eschews statutory construction in favor of giving the words their plain and definite meaning.” *Id.* at 295.

**IV. Analysis**

On appeal, Plaintiff argues that portions of the Permanent Order should be reversed and remanded for being unsupported by competent evidence. Specifically, Plaintiff contends the trial court erred by: (A) failing to make an ultimate finding of fact that the child custody schedule it ordered was in the best interests of the minor children; (B) failing to make findings of fact to support its decree that the parties must exchange child custody at 5:00 p.m. on Saturdays during the summer; (C) granting Defendant custody for the weekend of the Mother’s Day holiday, but denying Plaintiff the same custody for the Father’s Day holiday; (D) forbidding either party from recording one another during custodial exchanges; and (E) not restricting international travel with the children to only countries that are parties to the Hague Convention. We address each argument, in turn.

**A. Best Interests Determination**

[1] Plaintiff first argues the trial court erred by failing to find that the Permanent Order was in the best interests of the minor children. Plaintiff contends that although the trial court found in the Permanent Order that, previously, “the parties stipulated it is in the best interest of the minor children for the parties to permanently share joint legal and physical custody of the children[,] . . . [the trial court] never finds that the physical custodial schedule ordered is in the best interest of the children.” We disagree.

“An order for custody must include written findings of fact that . . . support the determination of what is in the best interest of the child.” N.C.G.S. § 50-13.2 (2023).

Here, the trial court’s unchallenged Finding of Fact 13 provides that “[e]ach party provides suitable housing and a safe environment for the minor children. In every angle, the parties are solid, reliable parents to the minor children.” Unchallenged Finding of Fact 14 provides that each party has “local family and often utilize[s] their own respective support system to help care for the minor children.” Unchallenged Finding of Fact 17 provides that, “[t]he parties are fit and proper persons to exercise joint legal and physical custody of the minor children as set out

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more fully herein[.]” and the trial court later concludes that, as a matter of law, “[t]he child custody provisions setout [sic] herein are in the best interests of the minor children.”

Collectively, these unchallenged, and thus binding, findings of fact support, and explicitly state that the trial court’s determination that the physical custodial schedule it ordered is in the best interests of the children. *See* N.C.G.S. § 50-13.2; *see also* *Burger*, 243 N.C. App. at 236. Accordingly, the trial court properly determined that the physical custodial schedule it ordered is in the best interests of the children.

**B. Child Custody Exchange**

**[2]** Plaintiff next argues “[t]here was no evidence nor any findings of fact to support the trial court’s decree that the parties must exchange child custody at 5:00 p.m. on Saturday[s] during the summer.” We disagree.

Under our standard of review, as set forth above, the trial court has broad discretion over child custody cases, and its order will be overturned only if the ruling “was so arbitrary that it could not have been the result of a reasoned decision.” *White*, 312 N.C. at 777; *see also* *Smith*, 348 N.C. at 624.

Here, the trial court ordered that, during the regular school calendar schedule (the “Regular Schedule”), the Martin Luther King holiday weekend, Memorial Day weekend, Labor Day weekend, and Mother’s Day weekend will begin “from release of school on Friday preceding the holiday or 5:00pm (whichever first occurs) until Monday at 5:00pm,” and explained that “[f]or the purposes of Summer, one (1) week shall be defined from Saturday at 5:00pm to the following Saturday at 5:00pm.” We refer to the summer schedule provisions in the Permanent Order as the “Summer Schedule.”

Plaintiff contends the decree of a Summer Schedule exchange time at 5:00 p.m. falls “right smack-dab in the middle of the weekend.” Before the trial court, Plaintiff requested that the Summer Schedule exchange time be 9:00 a.m., but when asked if 9:00 a.m. worked for Defendant, Defendant testified: “It does not. That has actually been a major issue for me, especially in the summertime. It’s created a big need for me to take a lot of time off because I’m supposed to be at work at 8:00 a.m.” Defendant mentioned that an earlier exchange time would be better for her. Defendant also testified she was requesting “alternating weeks during the summer so that [she] can have a way to . . . enroll the [minor children] in camps without having to . . . depend on the cooperation of [Plaintiff] because that hasn’t really been working out.”

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Further, Plaintiff argues the Permanent Order’s “Additional Vacation Weekend” decree runs contrary to the 5:00 p.m. Summer Schedule exchange time. The Additional Vacation Weekend provision provides:

Each party may designate one (1) weekend per year for special events to exercise custodial time with the minor children (when the party would otherwise be the non-custodial party based on the underlying custodial schedule), beginning on Friday at the recess of school (or, if school is not in session, at 5:00pm) and ending at the resumption of school (or, if school is not in session, at 8:30am on Monday) with sixty (60) days’ written notice to the other party[.]

The decree further states: “The Additional Vacation Weekend, however, *shall not conflict* with the Holiday Schedule or Summer [] Schedule specified in this order[.]” and thus, the trial court understood the Additional Vacation Weekend decrees ran contrary to the summer-time exchange, and explicitly gave priority to the set Summer Schedule.

Even if there is evidence in the Record that is contrary to a 5:00 p.m. decree as to a Summer Schedule exchange time, *see Burger*, 243 N.C. App. at 236, our review of the Record reveals nothing so arbitrary regarding the trial court’s decision to set a 5:00 p.m. Summer Schedule exchange time that it could not have been the result of a reasoned decision, and thus, we cannot say that the trial court abused its discretion, *see White*, 312 N.C. at 777. It is the trial court’s “duty to decide domestic disputes, guided always by the best interests of the child,” and “to that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them.” *Lovallo*, 216 N.C. App. at 285. Here, the trial court found the child custody Summer Schedule exchange special dates and timing to be in the children’s best interests; accordingly, we affirm this provision of the trial court’s order.

### **C. Father’s Day Visitation**

**[3]** Plaintiff next argues the trial court “erred by granting [Defendant] the weekend of Mother’s Day holiday but denying [Plaintiff] the same custody for the Father’s Day holiday.” We disagree.

The trial court ordered the following:

d. Mother’s Day: Defendant shall have custodial time with the minor children for Mother’s Day Weekend beginning

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the Friday preceding Mother's Day at 5:00pm until 5:00pm on Mother's Day Sunday.

e. Father's Day: Since the parties are evenly splitting Summer Break as noted in Paragraph 5 hereinbelow, Plaintiff shall celebrate Father's Day during whatever his regular summer weeks in a given year turn out to be – some summers, depending upon selection priority, he may end up having the minor children during Father's Day weekend and, on other summers, he may not have the minor children during Father's Day weekend. For scheduling and simplicity purposes, no additional carve-out shall be made for Father's Day.

Plaintiff testified regarding Mother's Day and Father's Day, stating: "I don't feel [they] should be completely balanced split holiday [*sic*] because it's significant to the mother more than the father and vice versa. So I would think the large part of the day should be with the mother on Mother's Day and with the Father on Father's Day." He further testified: "I think that whatever's for one parent should be the same for the other . . . . [I]f I have the kids on Father's Day for six hours, she should have the kids on Mother's Day for six hours, unless it's already her weekend."

When asked about these two holidays, Defendant testified:

Q. [W]ould you prefer that Father's Day and Mother's Day weekend be split – the actual day be split . . . or it be the entire weekend?

A. I'd prefer the entire weekend.

Q. And the entire weekend to him for Father's Day[?]

A. Same on the other side. Yeah.

Plaintiff argues in his brief that "[t]he order should be reversed and remanded to award both parents equal custodial time on Mother's and Father's Day – just as requested by the parties[.]" and that the order "should also be reversed because it embraces the tender years doctrine by ordering custodial provisions favorable to mother simply because she is a mother."

Although the parties each testified that they would like to share these holidays, the two holidays fall during different schedules: the Regular Schedule and the Summer Schedule. Moreover, the trial court was not bound by any stipulation on this specific matter. *See Thomas v. Poole*, 54 N.C. App. 239, 241 (1981) (citations omitted) ("Parties may

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establish by stipulation any material fact that has been in controversy between them. Where the stipulations of [the] plaintiff and [the] defendant have been entered of record . . . the parties are bound and cannot take a position inconsistent with the stipulations.”); *Smith v. Smith*, 387 N.C. 255, 259 (2025) (“While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision[.]” (citation omitted)); *Despathy v. Despathy*, 149 N.C. App. 660, 662 (2002) (“[A] stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury[.]” and “[j]udicial admissions are binding on the pleader as well as the court.” (citations and internal quotation marks omitted)); *Maddukuri v. Chintanippu*, 282 N.C. App. 119, 121–22 (2022) (explaining that there are stipulations of fact and stipulations for settlement, “some being mere admissions of fact relieving a party from the inconvenience of making proof, while others have all the characteristics of concessions of some rights as consideration for those secured[;] the courts have sometimes based the granting or denial of relief upon the nature of the stipulation” (citation omitted)).

While “[t]he effect of a stipulation by the parties withdraws a particular fact from the realm of dispute[.]” see *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678 (2004), such as here where the parties agreed to a shared custody agreement, the trial court had discretion on how to impose a shared custody arrangement in the best interests of the minor children, see *Lovallo*, 216 N.C. App. at 285. Here, the trial court explained: “I don’t typically give Father’s [D]ay a dedicated time in the summer when I’m splitting everything 50/50. It just makes the travel and the – – it just makes it much more difficult.” Because the trial court had broad discretion over the shared child custody arrangement, and split the summer evenly between the parties, we cannot say the trial court abused its discretion in maintaining an evenly-split summer, where Mother’s Day occurs during the Regular Schedule, and where Father’s Day may fall on a weekend during the Summer Schedule when Plaintiff does not have custody of the minor children. See *White*, 312 N.C. at 777; *Lovallo*, 216 N.C. App. at 285; *Smith*, 348 N.C. at 624. Accordingly, we affirm this provision of the trial court’s order.

**D. Recording During Custodial Exchanges**

[4] Plaintiff next argues the trial court erred “by forbidding either party from recording one another during custodial exchanges where no evidence was presented at trial about this issue and no findings of fact support the decree.” Relying on the federal wiretapping statute, 18 U.S.C. § 2511 of the Omnibus Crime Control and Safe Streets Act of

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1968 (the “Federal Wiretap Act”) and N.C.G.S. § 15A-287 (2023) of North Carolina’s Electronic Surveillance Act (the “Electronic Surveillance Act”), Plaintiff specifically contends he has “a legal right to record the custodial exchanges” that the trial court cannot prohibit. We disagree.

The Federal Wiretap Act provides, in relevant part:

It shall not be unlawful under this chapter [18 U.S.C. §§ 2510 et seq.] for a person not acting under color of law to intercept a wire, oral, or electronic communication where *such person is a party to the communication* or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added); *see also Planned Parenthood Fed’n of Am., Inc. v. Newman*, 51 F.4th 1125, 1135 (9th Cir. 2022) (“The Federal Wiretap Act generally prohibits any person from intentionally recording an oral communication. One exception to this broad prohibition is that a person may record a conversation in which he or she is a party unless the ‘communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.’” (citation omitted)).

North Carolina’s Electronic Surveillance Act, included under the Criminal Procedure Act’s subchapter on “Law Enforcement and Investigative Procedures,” provides, in relevant part:

Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if, *without the consent of at least one party to the communication*, the person:

(1) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.

N.C.G.S. § 15A-287(a)(1) (emphasis added). “North Carolina[’s Electronic Surveillance Act] is modeled after the Federal Wiretap[ Act.]” *State v. McGriff*, 151 N.C. App. 631, 638 (2002); *see also* N.C.G.S. § 15A-297 (2023) (“It is the intent of this Article to conform the requirements of all interceptions of wire, oral, or electronic communications conducted by investigative or law enforcement officers in this State to provisions of [the Federal Wiretap Act], except where the context indicates a purpose to provide safeguards even more protective of individual privacy

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and constitutional rights.”). In *Kroh v. Kroh*, this Court explained that “[w]hile our courts have not previously construed the Electronic Surveillance Act, we note the many similarities between the Electronic Surveillance Act and the [F]ederal [W]iretap[ Act]” and “[l]ike [the Electronic Surveillance Act], the [Federal Wiretap] Act prohibits persons from intentionally intercepting, or endeavoring to intercept, any oral communication.” 152 N.C. App. 347, 351 (2002). “Intercept’ means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.” N.C.G.S. § 15A-286(13) (2023).

The Federal Wiretap Act and the Electronic Surveillance Act have primarily been construed in law enforcement and investigative procedure contexts, *see, e.g., State v. Troy*, 198 N.C. App. 396, 399–400 (2009) (holding the State did not violate the Federal Wiretap Act nor the Electronic Surveillance Act by intercepting the defendant’s phone calls while he was at a detention facility); *State v. Price*, 170 N.C. App. 57, 66 (2005) (same); *Wright v. Town of Zebulon*, 202 N.C. App. 540, 545–46 (2010) (defining “willfully” under the Electronic Surveillance Act to mean to “act with a bad purpose or without justifiable excuse” where officers listened in on another officer’s patrol car conversations for “public safety” reasons), and civil suits brought by plaintiffs claiming defendants had violated these statutes, *see, e.g., Kinesis Advert., Inc. v. Hill*, 187 N.C. App. 1, 18 (2007) (holding that an employer accessing stored voicemails and e-mails of former employees’ work accounts did not violate the Federal Wiretap Act nor the Electronic Surveillance Act as the employer did not “intercept” those messages); *State v. McGriff*, 151 N.C. App. 631, 638–39 (2002) (holding a neighbor did not violate the Federal Wiretap Act nor the Electronic Surveillance Act by intercepting another’s phone call conversation when the neighbor’s phone reception accidentally picked it up).

In *Kroh*, a civil case brought by a husband against his wife for secretly recording him and their minor children, we considered whether, under the Federal Wiretap Act and the Electronic Surveillance Act, one spouse could secretly record the other in the family home, and whether a parent can vicariously consent to the recording of their minor children’s conversations. 152 N.C. App. at 351–52. We held: “[T]he Electronic Surveillance Act prohibits non-consensual recordings by one spouse of the other even within their family home[.]” *Id.* at 350. We further adopted the vicarious consent doctrine, “thereby permitting a custodial parent to vicariously consent to the *recording of a minor child’s conversations*, as long as the parent [] has a good faith, objectively reasonable belief that the interception of the conversations is necessary for

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the best interests of the child.” *Id.* at 352–53 (emphasis added) (citation omitted) (cleaned up). We reversed the trial court’s decision because we determined there was a genuine issue of material fact as to whether the wife’s purpose in recording her children’s conversation was for the safety of her children. *Id.* at 353.

Further, while this Court has not published a case addressing recording custodial exchanges, we have addressed this issue in an unpublished case; however, we did not discuss the Federal Wiretap Act or the Electronic Surveillance Act. *See Nesbeth v. Flynn*, 280 N.C. App. 561, \*9–10 (2021) (unpublished). In *Nesbeth*, we held the trial court did not abuse its discretion in decreeing that “during custodial exchanges, neither party shall photograph, video record, audio record or otherwise record the other party, the minor children, or an aspect of the exchange in any capacity” where the trial court found the “acts of videotaping were a significant source of contention between [the p]laintiff and [the d]efendant.” *Id.* at \*10 (cleaned up).

In the instant case, the vicarious consent doctrine is inapplicable, as Plaintiff argues the trial court cannot prohibit recording where Plaintiff has “a legal right to record[,]” pursuant to the Federal Wiretap Act and the Electronic Surveillance Act. *See Kroh*, 152 N.C. App. at 352–53. Plaintiff thus does not argue that he may consent to the recording of the minor children’s conversations, but rather argues he may consent to recording the custodial exchanges themselves, in which he is a direct participant. Assuming, *arguendo*, that the Federal Wiretap Act and the Electronic Surveillance Act apply in a child custody case, as Plaintiff argues, where one party consents to recording by conducting the recording himself, we nonetheless disagree with Plaintiff’s argument that this right cannot be properly restricted by the trial court.

North Carolina law requires a trial court to establish child custody orders that “shall include such terms . . . as will best promote the interest and welfare of the child.” N.C.G.S. § 50-13.2(b). As such, trial courts have broad discretion to enter orders with specific decrees in determining the best interests of the child. *See Falls v. Falls*, 52 N.C. App. 203, 209 (1981) (holding the trial court did not abuse its discretion in imposing a decree that visitation with the father would be conditioned on the consent of the children where there was evidence of considerable physical violence between the mother and the father which one or more of the children witnessed or in which one or more of the children participated, even though there was evidence that both the father and the mother were competent adults who loved their children); *Maxwell v. Maxwell*, 212 N.C. App. 614, 621 (2011) (affirming a trial court’s “authority to

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require [the p]laintiff to submit to a mental health evaluation [because of] the broad discretion granted to courts in child custody proceedings”); *Rawls v. Rawls*, 94 N.C. App. 670, 676–77 (1989) (holding the trial court did not abuse its discretion by requiring the defendant to consult a psychiatrist or a psychologist before awarding specific visitation rights).

Moreover, even when per se rights exist, a trial court may properly fashion child custody orders that limit such rights, when it would be in the child’s best interests. *See Woncik v. Woncik*, 82 N.C. App. 244, 250 (1986) (upholding a decree by the trial court that limited each parent’s speech by prohibiting them “to do or say anything either intended to, or likely to, discredit or diminish the other party in the eyes of the child”); N.C.G.S. § 50-13.2(b2) (providing that the trial court “may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system”); *see also Nesbeth v. Flynn*, 280 N.C. App. 561 at \*10 (discussed supra).

Here, we see nothing in the Federal Wiretap Act nor the Electronic Surveillance Act to indicate recording rights during custodial exchanges cannot be restricted by the trial court when such restrictions are in the best interests of the children. 18 U.S.C. § 2511(2)(d); N.C.G.S. § 15A-287(a)(1). The trial court found that this “is a high conflict custody case because the parties demonstrate an ongoing pattern of: a. distrust between them; b. difficulty cooperating in the care of the minor children; and c. disruptive custodial exchanges.” The trial court ordered the parties to “address one another courteously when they are in the presence of the children[,]” “act in every respect to nurture and encourage the respect and affection of the minor children for each of their parents[,]” and decreed that neither party shall “record the other party or the minor children during custodial exchanges[.]” Thus, in setting a prohibition on recording the custodial exchanges, the trial court took into consideration the need for the parties to be cordial and set certain provisions to further create courteous exchanges.

Accordingly, we hold the trial court did not abuse its discretion in preventing the parties from recording custodial exchanges where it found the exchanges were contentious and that prohibiting recording was in the best interests of the children. *See White*, 312 N.C. at 777; *Lovallo*, 216 N.C. App. at 285; *Smith*, 348 N.C. at 624; N.C.G.S. § 50-13.2.

**E. Restriction on International Travel**

[5] Plaintiff finally argues that the trial court erred “by not restricting international travel with the children only to countries which are parties

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to the Hague Convention.” Plaintiff is “concerned about the children traveling in countries that are not a member of the Hague Convention because such countries ‘don’t have a framework to quickly retrieve a child that ends up being abducted[,]’” and Plaintiff further notes that “India is not a party to the Hague Convention[,]” which is where Defendant’s family is from, and where some family members continue to live. We disagree with Plaintiff’s argument.

Here, Defendant testified that the parties had “already taken one of [their] children to India several years ago” and that she “grew up . . . traveling internationally quite a bit.” She explained that international travel was “a huge part of what’s made me who I am today and, you know, very enriching for children.” Additionally, the following relevant discussion took place:

Q. Is there any special significance for you to India in particular?

A. Yes. My family – my parents immigrated from India many years ago, and I have a very large family. I have [fifty] first cousins, and most of them live in India[.]

Q. Would you like for the Court to provide some mechanism that would allow for international travel without the consent of both parents?

A. Yes. Yes. I would.

Here, the trial court ordered:

14. International Travel. The parties may travel internationally with the minor children upon sixty [] days’ notice to the other party. The traveling parent shall provide the other parent [a] full itinerary for the trip, including the location of travel, the name of the hotel or other accommodations, the dates of travel and all adults traveling with the minor children. Both parties shall execute any documents necessary to keep the minor children’s passports active in order to accommodate international travel and shall exchange passports as needed upon request from the other parent.

Again, where the trial court has broad discretion over child custody cases, we conclude the trial court did not abuse its discretion by not restricting the minor children from visiting countries not a party to the Hague Convention, including India—the country from which Defendant

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hails. *See White*, 312 N.C. at 777; *Lovallo*, 216 N.C. App. at 285; *Smith*, 348 N.C. at 624; N.C.G.S. § 50-13.2. Accordingly, we affirm this provision of the trial court’s order.

**V. Conclusion**

Upon review, we conclude the trial court did not abuse its discretion in: ordering a 5:00 p.m. Summer Schedule exchange time; splitting the summer evenly, though Plaintiff may miss custodial time on Father’s Day; placing a “no recording” restriction on the custodial exchanges; and not restricting the minor children to visiting only Hague Convention countries, where their mother is from a non-Hague Convention country. We further conclude the trial court properly found its Permanent Order to be in the best interests of the minor children.

AFFIRMED.

Judge WOOD concurs.

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

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

I concur in the analysis with respect to international travel. However, I respectfully dissent from the decision to uphold the trial court’s custody order. In my view, the trial court deprived plaintiff of a true 50/50 split in custody in failing to treat Father’s Day and Mother’s Day equally for custodial purposes, and the failure to affect a 50/50 split, in addition to the disregard for the parties’ testimony that they wanted to share the holidays, amounts to an abuse of discretion. Further, although I express no view on whether plaintiff had a legal right to record custodial exchanges, I disagree with the analysis that the Federal Wiretap Act or the Electronic Surveillance Act control and authorize the trial court to make such a decree.

At the hearing, the trial court acknowledged that the parties had stipulated that it was in the children’s best interest for both plaintiff and defendant to have joint legal custody of the children, “and the only issue for the Court to determine was the parameters involving any tie-breaking issues[,]” including holidays and summers. Plaintiff testified his opinion that Father’s Day and Mother’s Day should not “be completely balanced

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split holiday because it's significant to the mother more than the father and vice versa. So I would think the large part of the day should be with the mother on Mother's Day and with the Father on Father's Day." Defendant agreed in her testimony, stating that she would prefer custody for the entire Mother's Day weekend, and "[s]ame on the other side" for Father's Day weekend. However, while the trial court ordered custody for defendant for the entire Mother's Day weekend, the trial court ordered no additional carve out for Father's Day, effectively treating it as part of the regular Summer Break schedule.

Although I do not fully agree with the plaintiff's argument that this imposes a quasi-tender years presumption, I do believe that the unequal division of custody between these holidays, with zero regard for the parties' testimony and stipulations, was error and prejudiced plaintiff, depriving him of the agreed-to 50/50 split and depriving him of an additional vacation weekend if he were compelled to use his additional vacation to celebrate Father's Day with his children, a decision that defendant would not have to make under this custody schedule. Further, although I recognize that the trial court has discretion over child custody cases, I believe the decision to allow the timing of the Summer schedule to override a carve out to maintain equality and a 50/50 split for custody including holidays, amounts to an abuse of discretion.

Regarding the recording during custodial exchanges, I do not believe the Federal Wiretap Act or the Electronic Surveillance Act are appropriate authorities to affirm the trial court's decree. However, as I believe the order should be vacated on other grounds, I do not express an opinion on what authority the trial court may have decreed under, nor whether that decree was lawful or unlawful.

Accordingly, I would vacate the order and remand for entry of a custody schedule with equal custody for Father's Day and Mother's Day that accurately reflects the stipulations and testimony of the parties.

**SMITH v. SCOTLAND CNTY.**

[300 N.C. App. 76 (2025)]

TEQUILLA SMITH, ADM. OF THE ESTATE OF

TYREK SMITH, DECEASED, PLAINTIFF

v.

SCOTLAND COUNTY AND

WAGRAM RECREATION CENTER, DEFENDANTS

No. COA24-833

Filed 16 July 2025

**Negligence—governmental immunity—operation and supervision of county recreation center—governmental function**

In a tort action brought against defendant county as a result of a man's death due to hyperthermia—which occurred following his participation in an “adult free play” basketball session in the unairconditioned gymnasium at a community recreation center owned and operated by defendant—the trial court properly allowed defendant's motion for summary judgment on the basis of governmental immunity. A weighing of the relevant factors revealed that defendant was engaged in a governmental (as opposed to a proprietary) function. First, as to legislative designation, the General Assembly had determined that the operation of a recreation center is a proper governmental function (N.C.G.S. §§ 160A-351, -353). Second, as to government exclusivity, while providing gymnasium space for recreation is not a function exclusively reserved to governmental entities, it is a traditional government activity. Third, as to fees and costs, defendant charged only a minimal fee for participation (which would be waived upon request) and the recreation center operated at a large financial loss to defendant.

Appeal by plaintiff from order entered 14 July 2024 by Judge Dawn M. Layton in Scotland County Superior Court. Heard in the Court of Appeals 25 February 2025.

*Coy E. Brewer, Jr., for plaintiff.*

*The Rogers Law Firm, PLLC, by Allen W. Rogers, for plaintiff.*

*Teague, Campbell, Dennis, & Gorham, LLP, by Jacob H. Wellman, for defendant.*

FREEMAN, Judge.

**SMITH v. SCOTLAND CNTY.**

[300 N.C. App. 76 (2025)]

Plaintiff appeals from an order granting defendant’s motion for summary judgment on her claim that the decedent died as a result of defendant’s negligence. On appeal, plaintiff argues that the trial court erred by granting defendant’s motion for summary judgment on the basis that defendant was entitled to governmental immunity. After careful review, we affirm the trial court’s order.

**I. Factual and Procedural Background**

Defendant owns and operates the Wagram Recreation Center (“Wagram Center”) as part of its parks and recreation programs.<sup>1</sup> Wagram Center consists of a gymnasium with a full-sized basketball court, a fitness room, and office and community spaces. In June 2021, Wagram Center was equipped with an air conditioning system. However, there was no air conditioning system in the gymnasium, which was equipped with ventilation fans.

Defendant offered yearly memberships to use the Wagram Center gymnasium and fitness room. Membership rates for residents of Scotland County ranged from \$4.00 per day to \$325.00 per year “for family members [i]n one household.” Fees for out-of-county residents ranged from \$7.00 per day to \$500 per year for a family. In 2020, defendant spent \$118,207.73 operating Wagram Center and earned \$12,016.87 from all of Wagram Center’s recreation programs. In 2021, defendant spent \$129,045.85 on Wagram Center’s operations and earned \$6,000.73 in revenue.

Defendant also offered recreation programs that did not require participants to purchase a Wagram Center membership. One of these was Adult Free Play basketball, which was held in the gymnasium. To participate in the Adult Free Play program, a participant “had to be a certain age, they had to have a physical photo ID, . . . they would have to sign a waiver, and it was a charge of \$2[.00]. If they didn’t have the \$2[.00], then [defendant] would waive it.”

The decedent, twenty-four-year-old Tyrek Smith, often played Adult Free Play basketball and had signed a liability waiver to do so in November 2020. On 10 June 2021, Smith worked the third shift, 11:45 p.m.

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1. Plaintiff named Scotland County and Wagram Recreation Center as separate defendants in her complaint. Scotland County denied that Wagram Center was an entity capable of suing and being sued. As litigation continued, neither party argued that Wagram Center was an entity separate from Scotland County, and it is not treated as a separate defendant on appeal by either party. Accordingly, there was a final judgment with respect to the only defendant in the action, Scotland County.

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to 7:45 a.m., at a Purdue chicken processing plant. After work on 11 June, Smith went to Wagram Center for Adult Free Play basketball around 11:45 a.m. That day, the Adult Free Play session was scheduled for 11:00 a.m. to 2:00 p.m. There was no air conditioning in the gymnasium during this session.

Smith started playing a pickup game of basketball with a few friends just after 11:45 am. Around 12:45 p.m., Smith laid down on the bleachers, as “it was his turn to sit down and wait[.]” Shortly after, one of his friends checked on Smith and “tried to get [Smith] to drink but he wouldn’t.” Thirty minutes later, Smith sat up “slumped over.” At some point after Smith sat down, he called his mother to tell her that he was coming home. Around 1:47 p.m., Smith fell to the floor. One of the free play participants went into the lobby and told the recreation assistant, “Somebody needs to call 911, somebody had passed out.” When the paramedics arrived around 2:00 p.m., they found Smith unconscious. Smith subsequently passed away. He died of hyperthermia, meaning his body temperature was greatly above normal. In November 2021, defendant installed an air conditioning system in the gymnasium.

On 1 June 2023, plaintiff, in her capacity as the personal representative of Smith’s estate, sued defendant, alleging that Smith’s death was caused by defendant’s negligent operation and supervision of the gymnasium. On 22 July 2024, defendant moved for summary judgment, arguing that (1) it was entitled to governmental immunity; (2) Smith signed a liability waiver; (3) there was no evidence that it acted negligently to cause Smith’s death; and (4) if it were negligent, then Smith was contributorily negligent. On 12 August 2024, the trial court granted defendant’s motion, concluding that there were “no genuine issues of material fact, and that [defendant] is entitled to judgment as a matter of law on the issue of governmental immunity.” Plaintiff timely appealed.

**II. Jurisdiction**

“[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a superior court[.]” N.C.G.S. § 7A-27(b)(1) (2023). Accordingly, we have jurisdiction to review plaintiff’s appeal.

**III. Standard of Review**

“The standard of review for a trial court’s ruling on a motion for summary judgment is *de novo*.” *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32 (2012) (cleaned up).

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## IV. Discussion

Plaintiff argues that the trial court erred by granting defendant's motion for summary judgment because defendant "operated Wagram Recreation Center in a proprietary capacity," so defendant did "not qualify for . . . governmental immunity[.]"

Summary judgment "shall be rendered . . . 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 judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). "All facts asserted by the adverse party are taken as true and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up).

The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim[.]

*Id.* (cleaned up).

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent a waiver of immunity." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53 (2004) (citation omitted). In other words, "[g]overnmental immunity does not . . . apply when the municipality engages in a proprietary function." *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199 (2012) (citation omitted).

A governmental function is one "which is discretionary, political, legislative, or public in nature and performed for the public good [o]n behalf of the State rather than for itself[.]" *Britt v. City of Wilmington*, 236 N.C. 446, 450 (1952). Generally, "[w]hen a municipality is acting [o]n behalf of the State in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign." *Id.* (cleaned up). However, when a municipality "engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Id.* at 451.

"In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct

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of the county or municipality arose from an activity that was governmental or proprietary in nature.” *Estate of Williams*, 366 N.C. at 199. Our Courts have applied a three-step analysis to determine whether an activity is governmental or proprietary in nature stating:

First, a court must consider whether the legislature has designated the activity as governmental or proprietary. Second, when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a government agency or instrumentality. Finally, when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.

*Bynum v. Wilson Cnty.*, 367 N.C. 355, 358–59 (2014) (citing *Estate of Williams*, 366 N.C. at 200–03 (2012) (cleaned up)). Thus, “[w]hen the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant.” *Estate of Williams*, 366 N.C. at 202.

We address each factor in turn.

**A. Legislative Designation**

We first examine the “threshold inquiry”: “whether, and to what degree, the legislature has addressed the issue.” *Meinck v. City of Gastonia*, 371 N.C. 497, 503 (2018) (citation omitted). “The creation and operation of public . . . recreation programs are legitimate and traditional functions of the government.” *Hickman ex rel. Womble v. Fuqua*, 108 N.C. App. 80, 84 (1992) (cleaned up). Our General Assembly has declared that:

[T]he public good and the general welfare of the citizens of this State require adequate recreation programs, that the creation, establishment, and operation of parks and recreation programs is a proper governmental function, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.

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N.C.G.S. § 160A-351 (2023); *see also id.* § 160A-353(4) (2023) (“each county . . . in this State shall have the authority to . . . [p]rovide, acquire, construct, equip, operate, and maintain . . . recreation centers, and recreation facilities[.]”). “‘Recreation’ means activities that are diversionary in character and aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural development and leisure time experiences.” *Id.* § 160A-352 (2023).

However, “not every nuanced action that could occur in a park or other recreation facility has been designated as governmental or proprietary in nature by the legislature.” *Estate of Williams*, 366 N.C. at 202. Accordingly, we must determine whether the “nuanced activity” here has been designated as governmental by the legislature.

Plaintiff argues that we should take a broad view of the “nuanced activities,” and asserts that they are: “operating a gymnasium; charging fees for the use of the gymnasium, including ‘free play’ activities; charging membership rates for its fitness room.” Defendant, on the other hand, maintains that we should only “look at the nuanced activity in which Mr. Smith was actually participating at the time of the incident to determine whether [defendant’s] operation of [Wagram Center] was governmental in nature.”

Binding precedent supports that we view the “nuanced activity” narrowly. *See Moffit v. City of Asheville*, 9 S.E. 695, 697 (N.C. 1889) (“The liability of cities and towns for the negligence of their officers or agents depends upon the nature of the power that the corporation is exercising *when the damage complained of is sustained.*” (emphasis added)). For example, in *Estate of Williams*, the defendant-county’s alleged tortious conduct occurred in a swimming area of a public park, and the swimming area could be rented out for private purposes. 366 N.C. at 196–97. Our Supreme Court only examined the defendant-county’s maintenance and operation of that specific portion of the park, not the county’s operation of the park as a whole. *Id.* at 201. Further, the plaintiff’s complaint specifically identified the county’s operation of the swimming area as the alleged tortious conduct. *Id.* at 196–97.

Here, plaintiff alleged in her complaint that defendant was negligent in “its operation, maintenance, supervision, and control of the Wagram Recreation Center, particularly in relationship to property upon which Tyrek Smith was harmed, injured, and died.” Plaintiff specifically alleged that the cause of Smith’s death was the lack of air conditioning in the gymnasium where Adult Free Play basketball took place. Additionally, there is no evidence in the record before us that Smith participated in

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any of the other recreation programs offered at Wagram Center. Because the alleged tortious conduct was defendant's operation of the Adult Free Play basketball program, which included operating the gymnasium where Adult Free Play basketball took place, we focus our analysis on that "nuanced activity" and not defendant's operation of Wagram Center as a whole.

Offering access to an indoor gymnasium for adults to play pick-up basketball is an activity that fosters entertainment and physical development, so Adult Free Play basketball may be a recreation program that the legislature has declared as a proper governmental activity. *See, e.g., Hickman*, 108 N.C. App. at 84 ("[W]e hold that when a municipality provides free sports instruction . . . , it is acting in a governmental capacity. Our holding is made even clearer in light of the General Assembly's pronouncement on the general subject [in N.C.G.S. § 160A-351]."). However, considering that the legislature has not expressly designated this activity as a governmental function, we will address the remaining factors.<sup>2</sup>

**B. Governmental Exclusivity**

We next examine whether the nuanced activity, Adult Free Play basketball, could "only be provided by a government agency or instrumentality." *Bynum*, 367 N.C. at 359 (citation omitted). If so, then the "activity is necessarily governmental[.]" *Id.* (citation omitted). Operating a gymnasium for pick-up basketball is not exclusively reserved for the government; it could be done by a public or private entity. Therefore, this factor is not dispositive of whether offering Adult Free Play basketball is a governmental function. But given that the distinction between exclusively governmental activities and activities that can be performed by public or private entities "lacks the utility it once had[.]" *Estate of Williams*, 366 N.C. at 204, as "it is increasingly difficult to identify services that can only be rendered by a governmental entity[.]" *id.* at 202, this factor has little weight in our analysis.

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2. Continuing this analysis is consistent with precedent. For example, our Supreme Court acknowledged that the defendant-city's activity, leasing buildings it owned in its downtown area to local artists, was authorized by the Urban Redevelopment Law, N.C.G.S. §§ 160A-500 to -526 (2017), and the Municipal Service District Act, N.C.G.S. §§ 160A-535 to -544 (2017). *Meinck*, 371 N.C. at 504-14 ("We conclude that these provisions of the Urban Redevelopment Law and the Municipal Service District Act are statutory indications that an urban redevelopment project undertaken in accordance with these statutes for the purpose of promoting the health, safety, and welfare of the inhabitants of the State of North Carolina is a governmental function." (cleaned up)). However, recognizing that a general activity being declared as governmental does not mean that the "specific activity at issue, in this case and under these circumstances, is a governmental function[.]" the Supreme Court addressed the two remaining factors. *Id.* at 513-14 (cleaned up).

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**C. Other Factors**

Finally, we examine “a number of additional factors,” such as “whether the service is traditionally provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.” *Bynum*, 367 N.C. at 359.

**1. Traditionally Provided by a Governmental Entity**

As discussed above, providing recreation programs for physical activity is traditionally a function of the government. *E.g.*, *Hickman*, 108 N.C. App. at 84 (holding that the defendant-county offering free tennis instruction for children was a traditional government function). Thus, this factor weighs in favor of Adult Free Play basketball being a governmental activity.

**2. Substantial Fee**

Whether a substantial fee is charged can indicate whether an activity was done for pecuniary gain. But the mere charging of a fee does not conclusively identify an undertaking as proprietary. Indeed, we have rejected the idea that “one of the major tests in labeling a government activity proprietary is whether a monetary fee is involved.” *McIver v. Smith*, 134 N.C. App. 583, 586 (1999). Thus, it is not whether a fee was charged that indicates whether an activity is a governmental function, but whether the fee transforms the activity from one done for the “common good” to one done “for pecuniary profit.” *Id.* at 587.

Instructive here is *Willet v. Chatham County Board of Education*, 176 N.C. App. 268 (2006). There, we held that a school board’s operation of a basketball team was a governmental function where the “admission fee of \$1.00 for students and \$2.00 for parents was hardly ‘substantial’ and there [was] no evidence in the record to show that the basketball admission charges generated enough revenue to pay for anything other than the school’s athletic program.” *Id.* at 271–72.

Here, defendant charged \$2.00 per session of the Adult Free Play basketball program. Given that this Court has held that a \$2.00 fee is “hardly substantial,” the low amount charged indicates that defendant’s operation of this program is a governmental function and not a proprietary one.<sup>3</sup> Moreover, defendant would waive the fee if a participant

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3. In her reply brief, plaintiff asserts that the true cost of Adult Free Play basketball “was more than \$2.00—patrons were required to sign a waiver of liability, purportedly signing away their right to be compensated for any injuries that may occur because of

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did not have money to pay for it. This further supports that the primary purpose in operating the program was advancing the common good, not generating revenue.

### ***3. Revenue Generated Versus Operating Costs***

Finally, we evaluate whether the fee did more than cover the cost of operation, cognizant that an activity still may be deemed proprietary even if the revenue generated falls short of covering operating costs. *See, e.g., Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 24 (1975) (“[T]he fact that the operation as a whole is nonprofitable is not determinative as to whether the activity will be classified as proprietary or governmental.”); *Glenn v. City of Raleigh*, 246 N.C. 469, 472, 477 (1952) (earning \$18,531.14 in net revenue from a public park after spending \$25,125.01 on maintenance expenses and \$18,870.95 on recreation expenses for the park was a “corporate benefit or pecuniary profit . . . to the [defendant-city] as to exclude the application of governmental immunity”).

For example, in *Koontz v. City of Winston-Salem*, our Supreme Court examined whether the defendant-city was entitled to governmental immunity when it contracted with the county in which the city was located to dispose of its garbage. 280 N.C. 513, 528 (1972). The General Assembly had authorized cities to

[S]ummarily remove, abate, or remedy . . . everything in the city limits, or within a mile of such limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and, if not paid, shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes.

*Id.* (omission in original) (quoting N.C.G.S. § 160-234). Under the contract with the county, however, “licensed private collectors picked up garbage in areas outside of the city limits and delivered it to the city’s landfill site.” *Id.* The defendant-city “received 9.39% of its cost for the landfill operations[,]” which was “over and beyond incidental income.” *Id.* at 529–30. But it was not only the revenue generated that made this activity proprietary:

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[defendant’s] operation of the gymnasium.” But plaintiff cites no legal authority to support that a signed liability waiver increases the cost of the fee charged, so we consider this argument abandoned. *See Fairfield v. WakeMed*, 261 N.C. App. 569, 575 (2018) (“Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. Therefore, we deem this issue to be abandoned.”).

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By use of the contract, . . . the [defendant-city] could extend its protection against accumulated garbage and refuse for more than one mile from its territorial limits. Also, the [defendant-city] avoided the possibility of having to collect the cost of removal of garbage pursuant to the statute; and, further, avoided the very real possibility of litigation to enforce the lien provided by the statute. *Thus, there were advantages under the contract with [the county] which inured to the [defendant-city's] special corporate benefit and thereby brought defendant within the often announced rule that a municipality acts in a proprietary capacity when it receives special corporate benefit or pecuniary profit.*

*Id.* (emphasis added) (cleaned up).<sup>4</sup> Therefore, the defendant-city was not entitled to governmental immunity for this undertaking. *Id.*

On the other hand, in *Meinck v. City of Gastonia*, the defendant-city rented out some of its downtown properties to a local artistic nonprofit to “sublease portions of the building to individual artists . . . to use as studios[.]” 371 N.C. at 498–99.

[T]he lease set [ ] rental rates for the . . . subtenants in a range of not more than \$90.00 to \$375.00 per month, of which 90% [was] paid to [the defendant-city]. Furthermore, [the defendant-city] receiv[ed] 15% of all sales or commissions under the lease, and subtenants [were] required to provide additional consideration in the form of volunteer time, with a minimum of fifteen hours per month.

*Id.* at 515. In one fiscal year, the defendant-city earned \$21,572.98 from the subleases but spent \$33,062.01—netting a loss of \$11,489.03, meaning the defendant-city earned back about 65% of what it spent on the undertaking. *Id.* The following fiscal year, the net loss was \$18,072.86, so it earned approximately 55% of what it spent on the activity that fiscal year. *Id.*

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4. We note the *Koontz* Court also discussed *Glenn v. City of Raleigh*, and stated, as plaintiff asserts here, that “the city received 11.7% of the cost of maintenance of its parks,” which was approximately \$158,000 for all of the city’s parks, but only examined the net revenue of the park where the alleged tortious conduct occurred. 280 N.C. at 527 (citing *Glenn*, 246 N.C. at 472). Since *Koontz*, however, our Supreme Court has instructed that we examine “nuanced activity” in which the municipality is engaged: not the entire recreation or parks program budget. *See Estate of Williams*, 366 N.C. at 202.

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Our Supreme Court concluded these revenues were not “ ‘substantial,’ particularly because such revenues were not even designed to ‘simply cover the operating costs of the service provider,’ nor did they do so in reality.” *Id.* (quoting *Estate of Williams*, 366 N.C. at 202–03). The Court also noted that the activity was of a “decidedly noncommercial nature” because “[a]rt occupies a unique role in our society and our state[.]” *Id.* at 516. Accordingly, the defendant-city was entitled to governmental immunity for that specific activity.

Here, the operation of Wagram Center in its entirety in 2020 netted a loss of \$106,190.86, meaning defendant earned back about 10% of what it spent to operate Wagram Center. The following year, Wagram Center netted a loss of \$123,045.12, meaning defendant earned back about 4.5% of the operational cost. We do not know precisely how much the fees from the Adult Free Play basketball program contributed to those revenues. Considering the low fee charged for that program compared to the higher fees charged for other activities, like annual memberships, the Adult Free Play basketball program could at best have generated a small fraction of Wagram Center’s annual revenue.

Even if we consider the revenue of Wagram Center as a whole, it is well below the proportion of the revenue earned in *Meinck*, which supports a determination that this is a governmental function. On the other hand, the proportional cost of operating Wagram Center is comparable to the cost of the waste disposal activity in *Koontz*, where our Supreme Court held that the defendant-city engaged in a proprietary activity. But unlike *Koontz*, where the contract gave the defendant-city advantages that it did not have under the statute, defendant here does not partner with another entity to give it such a benefit. Therefore, the total operating loss of Wagram Center indicates that defendant operated Wagram Center for the common good and not for its own pecuniary benefit, which supports the conclusion that defendant was entitled to governmental immunity.

**V. Conclusion**

Defendant’ operation of the Adult Free Play basketball program is authorized by the legislature and furthers its aim of offering recreation programs to citizens of this State. The small fee charged, which defendant waived at times, and the significant total operating loss for Wagram Center further demonstrate that defendant’s activity was done for the good of the public, not for its own pecuniary gain. Therefore, the trial court did not err by granting defendant’s motion for summary judgment

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on the basis that defendant was entitled to governmental immunity, and we affirm the trial court's summary judgment order.

AFFIRMED.

Chief Judge DILLON and Judge HAMPSON concur.

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STATE OF NORTH CAROLINA

v.

FRANK CATALDO

No. COA24-855

Filed 16 July 2025

**Criminal Law—post-conviction discovery—statutory sex offenses  
—records of past juvenile abuse allegations—not material**

The trial court properly denied defendant's motion for post-conviction discovery (filed after defendant's conviction of two counts of statutory sexual offense and one count of statutory rape) following the court's in camera review of department of social services (DSS) records concerning the victim's prior allegations of abuse (against persons other than defendant) and its determination that those records were not material to defendant's defense or sentence. Upon its own review, the Court of Appeals concluded that, in light of expert testimony and physical evidence that the victim had been sexually abused—as well as testimony from the victim and witnesses to whom she reported the abuse—while the details of one allegation contained in the DSS records could have been used by defendant to impeach the victim's credibility, there was no reasonable probability that the result at defendant's trial would have been different had the records been disclosed to the defense.

Appeal by Defendant from order entered 9 December 2022 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 9 April 2025.

*Attorney General Jeff Jackson, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.*

*Christopher J. Heaney for Defendant-Appellant.*

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COLLINS, Judge.

Defendant Frank Cataldo appeals from an order denying his motion for post-conviction discovery and asks this Court to review sealed records to determine whether the records are material and, if so, to grant Defendant a new trial. After a meticulous review of the sealed records, we determine that they are not material. Accordingly, the trial court did not err by denying Defendant's motion for post-conviction discovery.

**I. Background**

On 7 March 2011, a Rockingham County grand jury indicted Defendant on two counts of statutory sexual offense and two counts of statutory rape of a minor, T.B.<sup>1</sup> The case proceeded to a jury trial on 6 May 2013. At trial, Defendant sought to introduce evidence of T.B.'s prior allegations of sexual abuse under North Carolina Rule of Evidence 412. The trial court held an in camera hearing to determine the admissibility of the Rule 412 evidence and ultimately excluded the preferred evidence. During the cross-examination of the State's expert witness, Dr. Gina Abbruzzi Martin, Defendant sought to introduce evidence of T.B.'s excessive masturbation and prior allegations of sexual abuse. After another in camera hearing, the trial court allowed Defendant to elicit testimony from Dr. Martin that T.B.'s mother told her that T.B. engaged in excessive masturbation but excluded any evidence of T.B.'s prior allegations of sexual abuse.

The jury found Defendant guilty of two counts of statutory sexual offense and one count of statutory rape; it acquitted Defendant on the other charge of statutory rape. The trial court consolidated the statutory sexual offense convictions, and it sentenced Defendant to consecutive sentences of 240-297 months in prison for the statutory sexual offense convictions and 240-297 months in prison for the statutory rape conviction. Defendant gave notice of appeal in open court and argued on appeal that the trial court erred in excluding evidence of T.B.'s prior allegations of sexual abuse; this Court found no error on 3 June 2014. *See State v. Cataldo*, 234 N.C. App. 329 (2014) (unpublished) (*Cataldo I*).

On 7 July 2015, Defendant filed a motion for appropriate relief ("MAR") and a motion for post-conviction discovery, pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), in Rockingham County

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

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Superior Court; the trial court denied both motions by written order on 5 October 2016. Defendant filed a petition for writ of certiorari with this Court on 9 August 2017; we granted the petition. On 18 September 2018, this Court filed an unpublished opinion reversing the trial court's order denying Defendant's motion for post-conviction discovery and remanding the case to the trial court to conduct an in camera hearing "to determine whether the evidence was material, and whether its exclusion prejudiced [D]efendant's case." *State v. Cataldo*, 261 N.C. App. 538 (2018) (unpublished) (*Cataldo II*). This Court declined to address Defendant's MAR that was denied by the trial court. *Id.*

On 18 December 2018, the trial court ordered the State of North Carolina and Rockingham County Department of Social Services ("Rockingham DSS") to "make available to this [c]ourt the DSS records at issue, specifically records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009." It also ordered the State and Rockingham DSS to inform the trial court if they did not have the records and to disclose to the trial court the names of any agencies or counties that did have the records. Rockingham DSS reported to the trial court that it "did not respond to any abuse, neglect or dependency reports regarding [T.B.] in 2000-2001, 2008 or 2009." Rockingham DSS reported that "the Central Registry indicates that Guilford County Department of Social Services [Guilford DSS] responded to abuse and/or neglect reports on the victim child on or around these time periods." Rockingham DSS provided the trial court with copies of records in their possession regarding Guilford DSS's involvement with the family in 2001 and 2002.

On 18 February 2019, the trial court ordered Guilford DSS to "make available to this [c]ourt the DSS records at issue, specifically records regarding T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009." It ordered Rockingham DSS and Guilford DSS to inform the trial court if they did not have possession of the described records and to report the names of any agencies or counties that have possession of the described records. Rockingham DSS reported that it "did not respond to any abuse, neglect, or dependency reports regarding the victim child in 2000-2001, 2008, or 2009." Guilford DSS provided records to the trial court.

The trial court conducted an in camera review of the records provided by Guilford DSS and denied Defendant's motion for post-conviction discovery by written order entered 17 June 2019. The trial court concluded that Defendant was not entitled to T.B.'s records containing prior allegations of abuse and that, "in the context of the entire record, there

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is not a reasonable probability that the outcome of [D]efendant's trial would have been different had he been able to access these records." It further concluded that "T.B.'s prior allegations of abuse are not material to the defense." Defendant filed a petition for writ of certiorari with this Court on 29 May 2020, asking that we review the trial court's order denying his motion for post-conviction discovery. This Court allowed the petition "for purposes of reviewing [the trial court's] order denying [Defendant's] motion . . . upon the in camera review ordered by this Court in [*Cataldo II*]."

On appeal, this Court held that "[t]he trial court erred when it impermissibly narrowed the scope of its orders to Rockingham [DSS] and Guilford DSS to include only records regarding allegations of events during certain time periods and against certain persons." *State v. Cataldo*, 281 N.C. App. 425, 434 (2022) (*Cataldo III*). This Court reversed the trial court's order and remanded the case to the trial court with instructions to order Rockingham DSS and Guilford DSS "to produce T.B.'s social services records regarding prior claims of abuse." *Id.* (quotation marks and citation omitted).

On remand, the trial court ordered Rockingham DSS, Guilford DSS, and Davidson County Department of Social Services ("Davidson DSS") to provide all records pertaining to T.B. Davidson DSS did not have any records pertaining to T.B. At Defendant's request, the trial court also requested records from a forensic interview completed at the Help, Inc./Kaleidoscope Child Advocacy Center and conducted an in camera review of the records. The trial court entered an order on 9 December 2022 concluding that DSS's records discussing T.B.'s prior allegations "qualify as favorable evidence, because, while the records do not exculpate Defendant, the records potentially may have adversely affected T.B.'s credibility." However, the trial court further concluded that, "in the context of the entire record, there is not a reasonable probability that the outcome of Defendant's trial would have been different had he been allowed access to these records." The trial court concluded that T.B.'s records were favorable but not material to Defendant's defense or punishment, and it ultimately denied Defendant's motion for post-conviction discovery.

On 17 October 2023, Defendant filed a petition for writ of certiorari with this Court, asking that we review the trial court's order denying his motion for post-conviction discovery. This Court granted the petition on 11 April 2024.

## STATE v. CATALDO

[300 N.C. App. 87 (2025)]

**II. Discussion**

Defendant asks this Court to review all of the sealed records provided by various entities to determine whether the records are material.

On appeal from a trial court's denial of a defendant's request for disclosure of sealed records, this Court reviews the records to determine whether they contain "information that is favorable and material to defendant's guilt or punishment." *State v. McCoy*, 228 N.C. App. 488, 492 (2013) (brackets and citation omitted). "In doing so, we review the trial court's determination de novo." *Id.* (italics and citations omitted). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *State v. Williams*, 362 N.C. 628, 632-33 (2008) (quotation marks and citations omitted). "If the sealed record[s] contain evidence which is both favorable and material, defendant [is] constitutionally entitled to disclosure of this evidence." *McCoy*, 228 N.C. App. at 492 (citation omitted).

Favorable evidence "tends substantively to negate guilt [and] also . . . tends to impeach the credibility of a key witness for the prosecution." *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995) (citations omitted). Material evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ritchie*, 480 U.S. at 57 (citation omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* *Ritchie* only requires the trial court to disclose to the defendant evidence that is both favorable and material to the defendant's guilt or punishment. *Id.* at 58.

Here, the voluminous sealed records contain details on a single instance which potentially may have tended to impeach the credibility of T.B., a key witness for the prosecution. *See Love*, 57 F.3d at 1313. While this evidence was potentially favorable, there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[.]" and thus the records here are not material. *Ritchie*, 480 U.S. at 57 (citation omitted). The State presented ample evidence, including but not limited to physical evidence of sexual abuse and expert testimony about that sexual abuse, to support Defendant's convictions.

T.B. testified that Defendant began having sex with her in August 2010 and had sex with her "a lot of times" by putting his penis into her vagina. T.B. testified that Defendant would ejaculate "white stuff" in her mouth and onto the bed sheets. Defendant made her perform fellatio on him and he ejaculated "white stuff" into her mouth, and then

## STATE v. CATALDO

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he made her spit the “white stuff” out of her mouth onto a washcloth. Defendant would wash the washcloth and bedsheets after engaging in sex acts with T.B.

In January 2011, when T.B. was in the eighth grade, she attempted to tell her mother that she was having sex with Defendant by asking her mother “[i]f a 41-year-old man can have sex with a 13-year-old girl.” Defendant was 41 years old at the time. Her mother told her no and thought that T.B. had come up with the idea from a sex education class that she was taking at school. T.B. then told her school’s guidance counselor that she had been having sex with Defendant and was worried that she was pregnant. The counselor reported the allegations to Rockingham DSS. Ms. Jacqueline Strand with Rockingham DSS received the report and contacted the Eden Police Department.

Detective Ronnie Markham with the Eden Police Department testified that he and Ms. Strand met with T.B. on 14 January 2011, and T.B. told him that Defendant “has been doing things to [her]” and that he put his penis in her vagina and her mouth several times. T.B. was “upset and teary-eyed when she talked with” Detective Markham and Ms. Strand. Detective Markham and Ms. Strand met with T.B.’s mother and Defendant and told them about the sexual abuse allegations. T.B.’s mother replied that T.B. had a “mild disability” and some delays; Defendant responded that T.B. was probably having sex at school behind the building or in the hallways. Defendant also told Detective Markham that a physical exam of T.B. would “probably show that she had been having sex at school but not with him.” Defendant described T.B. and her mother as being “slow” and “retarded.”

On 31 January 2011, T.B. was forensically interviewed by Kimberly Madden at the Help, Inc./Kaleidoscope Child Advocacy Center. Madden testified at trial as “an expert in the area of forensic interviewing of children” and portions of the recorded forensic interview were admitted at trial for illustrative and corroborative purposes and published to the jury. Madden testified that T.B. was “developmentally delayed” and “functions on a much lower level than would an average 14-year-old child” but that “her communication ability, as far as talking about her experiences, was adequate for the interview.” Madden explained that T.B. had difficulty “accurately report[ing] time” such that she was not “sure of exact dates” but explained that this was due to T.B.’s developmental delays and that T.B.’s “ab[ility] to describe her experiences . . . was adequate for the purposes of the forensic interview.”

Madden’s written report of the forensic interview was also admitted into evidence. Madden’s report stated that T.B. “could respond to

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questions about her current circumstances, events within the last year, and . . . could differentiate between a truth and falsehood.” T.B. disclosed that she “[did not] want to tell” on Defendant because she “want[ed] him back in the house[,]” but then admitted that “[she] and [Defendant] did it.” T.B. disclosed that they had oral and vaginal sex multiple times and that it happened while her mother was working. T.B. said that she liked Defendant and that having sex with him made her feel “happy” and that she was sad Defendant was in jail.

On 18 February 2011, Dr. Martin conducted a medical physical examination of T.B. Dr. Martin noted that T.B. had “some developmental delay issues” and “seemed like she was younger than she was.” Dr. Martin noted that T.B. had a “transection defect” to her hymen and “a lot of swelling to her hymen.” Dr. Martin testified:

Well, she actually had a lot of swelling in her hymen, but it was still evident that there was what we would call in medical lingo a transection, which just means – if you think about that scrunchie as being circular, when you look at one edge of it at the bottom, there was actually a split in it. So there was basically a line or a hole kind of going through it to the vagina, to the vaginal wall . . .

Dr. Martin explained that this defect was “not something [T.B. would] be born with” and that “that would not be a hymen that somebody would be born with.” Dr. Martin opined that T.B.’s hymenal defect “is really indicative of vaginal penetration.” Dr. Martin further explained that T.B.’s hymenal injury, while impossible to date exactly, was “probably greater than a week old” and the “transection is consistent with a penetrating injury” as opposed to masturbation. Dr. Martin also testified about T.B.’s masturbation, which T.B.’s mother reported as occurring on a daily basis, and stated that “most children do masturbate to some extent, which is considered normal human behavior. But when a child starts masturbating daily or several times a week, it’s – often it’s indicative of some type of abuse.”

Dr. Martin’s Child Medical Evaluation Report was also submitted as evidence at the trial. The report states that Defendant has “engaged in oral sex and vaginal intercourse with [T.B.] since the Summer of 2010” and that T.B. had disclosed the sexual abuse to her mother, her teacher at school, a social worker, and a police officer. The report states that T.B. began having sex with Defendant in August 2010 and that Defendant “was helping her to know what to do when she got a boyfriend.” T.B. reported that she was “very sad that [Defendant] was in jail” and that “[s]he misses [Defendant] and he is the only one who can help her with

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her math homework.” T.B. told law enforcement and a social worker that “the sex made her happy” and “[s]he would like to run away with [Defendant] and have his baby.” She reported to her teacher that Defendant “would pull out and ejaculate on her stomach.” The report also states that T.B.’s mother found letters that T.B. had written stating that she would like to run away with Defendant and have his babies. T.B.’s mother reported that she “believed [the sexual abuse] occurred because she did recently find the letters” and she described Defendant and T.B. as “close.”

Dr. Martin conducted a limited interview of T.B. during the child medical exam. T.B. told Dr. Martin that she was sad Defendant was in jail, and she knew he was in jail because they “had sex.” T.B. said they “had sex” in January, after Christmas break, and that it happened on “a snow day with a 2 hour delay.” She described where her mother and siblings were when the sex occurred and explained that Defendant “pushed [her] face down on the bed” and “pulled his pants down and got on top of [her].” Defendant “put it in [her] hole” and “pulled his thing out [of her] so that white stuff wouldn’t get in [her].” She reported that this happened “20-30” times and that she never told anyone because “[Defendant] said it was our secret.”

Following her interview and physical examination of T.B., Dr. Martin made a diagnosis that “[t]here is a high likelihood that [T.B.] has been sexually abused by [Defendant]. [T.B.] is very ‘matter of fact’ when she tells of their sexual relationship. She reports that she loves him and that she is very upset that he is in jail. She has nothing to gain by telling her story and, in fact, she has in her mind experienced a significant loss.” Dr. Martin’s report further found that “[T.B.] is also very developmentally delayed and I’m not certain that she has the capacity to be dishonest or manipulative. The patient has physical findings suggestive of vaginal penetration. She had a large amount of hymenal edema during the exam, but she also appeared to have a transection of the hymen at 8 o’clock. . . .”

Given the paucity of favorable evidence in the sealed records and the ample evidence of Defendant’s guilt presented at trial, there is no reasonable probability that, had the evidence of T.B.’s prior allegations of sexual abuse been disclosed to Defendant, the result of the proceeding would have been different.

### III. Conclusion

In light of the evidence presented at trial, including the physical evidence of sexual abuse of T.B. and expert testimony about that

**STATE v. JACKSON**

[300 N.C. App. 95 (2025)]

sexual abuse, we determine that the sealed records are not material to Defendant, as there is not a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Ritchie*, 480 U.S. at 57 (citation omitted). For the foregoing reasons, the trial court did not err by denying Defendant’s motion for post-conviction discovery.

NO ERROR.

Judges HAMPSON and CARPENTER concur.

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STATE OF NORTH CAROLINA  
v.  
LAMONTE LAMOORE JACKSON

No. COA24-731

Filed 16 July 2025

**Sexual Offenders—reportable conviction—out-of-state adjudication—registration required in issuing state**

Defendant was required to register as a sex offender after moving to North Carolina where, pursuant to N.C.G.S. § 14-208.6(4)(b), his adjudication in Delaware as delinquent for rape in the first degree was a reportable offense because it was a final conviction for which Delaware law required him to register as a sex offender in that state. The rule of lenity did not apply because the language of section 14-208.6(4)(b) was unambiguous.

Appeal by defendant from order entered 9 November 2023 by Judge Tonia Cutchin in Guilford County Superior Court. Heard in the Court of Appeals 11 June 2025.

*Appellate Defender’s Office, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Aaron Thomas Johnson, for the defendant-appellant.*

*Attorney General Jeff Jackson, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.*

TYSON, Judge.

**STATE v. JACKSON**

[300 N.C. App. 95 (2025)]

Lamonte Lamoore Jackson (“Defendant”) appeals from a superior court’s order requiring him to register with the North Carolina sex offender registry. We affirm.

**I. Background**

Defendant, then thirteen or fourteen years old, engaged in sexual acts with his younger sister, then five or six years old, and was adjudicated as delinquent for rape in the first degree by the Kent County Family Court in Dover, Delaware, in April 2008. Even though Defendant was a juvenile, he was placed on Delaware’s sex offender registry per Delaware’s statutes on 30 July 2008.

Defendant subsequently moved to North Carolina and was notified in March 2022 to register with North Carolina’s sex offender registry. Defendant filed a Petition for Judicial Determination of Sex Offender Registration Requirement the same month.

At the hearing, Defendant argued his juvenile adjudication from Delaware, which required registration on Delaware’s sex offender registry, did not qualify as a “reportable conviction” under N.C. Gen. Stat. §§ 14-208.7 and 14-208.6(4)(b) (2023). The trial court found the crime Defendant had committed in Delaware was substantially similar to North Carolina’s first-degree statutory sexual offense, N.C. Gen. Stat. § 14-27.29 (2023). The court checked the requisite substantial similarity finding box on the “Petition and Order for Judicial Determination of Sex Offender Registration Requirement” form.

The trial court also checked a finding box labeled “Other.” Beside this box, the trial court found, “Defendant is also required to register in Delaware and would be required to register pursuant to N.C.G.S. 14-208.26.”

Defendant filed timely notice of appeal.

**II. Jurisdiction**

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

**III. Issue**

The issue is whether the trial court erred in finding Defendant was required to register in this state as a sex offender upon his change of residency to North Carolina for sexual offenses he committed in Delaware while a juvenile. N.C. Gen. Stat. §§ 14-208.6(4)(b) and 14-208.7(a) (2023).

## STATE v. JACKSON

[300 N.C. App. 95 (2025)]

**A. Standard of Review**

“Statutory interpretation properly begins with an examination of the plain words of the statute.” *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). “If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

“The maxim *ejusdem generis* . . . is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted.” *Meyer v. Walls*, 347 N.C. 97, 106, 489 S.E.2d 880, 885 (1997). “Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability.” *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Matters of statutory interpretation are reviewed *de novo*. *State v. Fritsche*, 385 N.C. 446, 449, 895 S.E.2d 347, 349 (2023).

**B. Analysis**

North Carolina requires an out-of-state person with a reportable conviction, who enters this state, to register as a sex offender within three business days of establishing residency or within fifteen days of being present in the State, whichever comes first. N.C. Gen. Stat. § 14-208.7(a) (2023).

N.C. Gen. Stat. § 14-208.6(4) (2023) provides a list of reportable convictions. Subsection (b) is contained in that list, and it has two parts. N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Under the second part of that subsection, an out-of-state conviction is reportable if it is “a final conviction in another state of an offense that requires registration under the sex offender registration statutes *of that state*.” N.C. Gen. Stat. § 14-208.6(4)(b) (2023) (emphasis supplied).

Defendant argues his Delaware juvenile adjudication does not qualify as a final conviction and asserts a juvenile adjudication is explicitly excluded from the definition of a criminal conviction in North Carolina. See N.C. Gen. Stat. § 7B-2412 (2023) (“An adjudication that a juvenile is delinquent . . . shall neither be considered [a] conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights.”). Defendant asserts he would not be required to register as a sex offender if he had committed the same offense in North Carolina.

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[300 N.C. App. 95 (2025)]

The State asserts the relevant factor for whether a “final conviction [committed] in another state” is a reportable conviction in North Carolina depends upon whether the adjudication qualifies as a reportable conviction and requires subsequent registration within the jurisdiction that issued it. N.C. Gen. Stat. § 14-208.6(4)(b) (2023).

While Defendant’s argument and the State’s response focus more on the first part of N.C. Gen. Stat. § 14-208.6(4)(b), the second part of the statute requires Defendant to register on North Carolina’s sex offender registry.

N.C. Gen. Stat. § 14-208.6(4)(b) provides “a final conviction in another state of an offense that *requires registration under the sex offender registration statutes of that state*” is a reportable conviction in North Carolina. *Id.* (emphasis supplied). This statutory text indicates the General Assembly designated the applicable law to be the law of the jurisdiction where the offense was adjudicated. *See id.* Here, the applicable law is that of the State of Delaware.

“When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.” *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). The plain text of the statute directs the application of Delaware law, as the statute specifies an out-of-state offense is a reportable conviction in North Carolina if the offense required registration under the “registration statutes of *that state*.” N.C. Gen. Stat. § 14-208.6(4)(b) (2023) (emphasis supplied).

Additionally, “a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed [ ] the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.” *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Defendant’s asserted construction and reading of the statute fails to give effect to the second subpart of § 14-208.6(4)(b), which specifies the relevant inquiry is whether the other state where the offense occurred requires registration according to the statutes of that state. *See* N.C. Gen. Stat. § 14-208.6(4)(b) (2023).

Delaware law applies in this case. Pursuant to Delaware’s Sex Offender Management and Public Safety statutes, the term “‘conviction’” includes “adjudications of delinquency.” 11 Del. C. § 4121(a)(2) (2024) (“‘Conviction’ and ‘convicted’ shall include, in addition to their ordinary meanings, adjudications of delinquency . . .”).

**STATE v. JACKSON**

[300 N.C. App. 95 (2025)]

Defendant claims Delaware law is unsettled on this point and its courts only sometimes consider an adjudication as a conviction, pointing to 10 Del. C. § 1002(a) (2024), which is codified in the Procedure subchapter of Delaware’s Family Court Chapter. That statute provides “no child shall be deemed a criminal by virtue of an allegation or adjudication of delinquency[.]” 10 Del. C. § 1002(a). Defendant argues it would be inappropriate to apply Delaware law without a firmer definition of “final conviction.”

Despite Defendant’s contentions, no ambiguity exists as to whether Defendant was required to register as a sex offender pursuant to Delaware law, even though he committed the offense as a juvenile. Defendant was adjudicated delinquent of first-degree rape of a minor in Delaware pursuant to then-effective 11 Del. C. § 773(a)(6) (2008). 11 Del. C. § 4123(c)(1) (2024) specifies if a “juvenile was at least 14 years old on the date of the sex offense, and was adjudicated delinquent” of certain enumerated offenses, including 11 Del. C. § 773, “the juvenile shall be immediately registered as a sex offender as prescribed by § 4120 of this title[.]” “If the juvenile does not fit the criteria set forth in paragraph c)(1) of this section above, the Family Court shall have the discretion to relieve the juvenile of registration and community notification requirements” if the court determines the “juvenile is not likely to pose a threat to public safety” and considers a list of statutory factors. 11 Del. C. § 4123(c)(2).

11 Del. C. § 4120(b)(1) (2024) generally requires sex offenders, as defined by § 4121(a)(4), to register, “unless pursuant to § 4123 of this title, the Family Court has not required a juvenile adjudicated delinquent of a sex offense to register.” 11 Del. C. § 4120(a) also provides “the definitions set forth in § 4121(a) of this title shall apply to this section.” Importantly, 11 Del. C. § 4121(a)(2) specifically provides “ ‘conviction’ ” shall include “adjudications of delinquency.”

Delaware’s Sex Offender Management and Public Safety statutes consider Defendant’s adjudication of delinquency to be a final conviction requiring registration. 11 Del. C. §§ 773(a)(6), 4120(a) and (b)(1), 4121(a)(2) and (a)(4), 4123(c)(1)-(2). While 10 Del. C. § 1002(a) bears on the criminal status of the delinquent, it does not speak to the status of and requirements arising from the resulting adjudication. Nothing in 10 Del. C. § 1002(a) prevents a delinquency adjudication from being treated as a final conviction requiring sex offender registration, which 11 Del. C. § 4121(a)(2) unmistakably requires in the context of sex offender registration. “Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation

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[300 N.C. App. 95 (2025)]

controls over the statute of more general applicability.” *Trustees of Rowan*, 313 N.C. at 238, 328 S.E.2d at 279.

Defendant has a “final conviction in another state,” Delaware, and “that state” required Defendant to register as a sex offender. N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Defendant has a reportable conviction and was required to register as a sex offender in North Carolina pursuant to the second subpart of N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Defendant’s argument is without merit and overruled.

**1. State v. Melton**

Defendant also contends it is inappropriate to rely upon Delaware law because our Supreme Court has rejected reliance on out-of-state frameworks that deviate materially from North Carolina’s laws. He cites *State v. Melton*, 371 N.C. 750, 758, 821 S.E.2d 424, 429 (2018), as support. In *Melton*, this Court relied upon precedents of other jurisdictions to determine whether the defendant had committed an overt act to support an attempted murder charge. *Id.* at 756-58, 821 S.E.2d at 428-29. Our Supreme Court rejected the analysis because those jurisdictions derived their law on attempted crimes from a statutory framework materially different from North Carolina’s attempt crimes. *Id.*

The present case is distinguishable from *Melton* because it involves applying a North Carolina statute, which specifically incorporates the law of other jurisdictions into our rules of decisions. The disparity between the law of North Carolina and another jurisdiction is irrelevant when our General Assembly chose to apply the law of the other jurisdiction under public safety. *See* N.C. Gen. Stat. § 14-208.6(4)(b) (2023).

**2. Rule of Lenity**

Finally, Defendant invokes the rule of lenity to argue the statute should be construed most favorably to him. The rule of lenity is only applicable to text that is ambiguous. “Our Supreme Court has declined to apply the rule of lenity to interpret a criminal statute when the statute only has one plausible reading that comports with the legislative purpose of enacting the statute.” *State v. Heavner*, 227 N.C. App. 139, 144, 741 S.E.2d 897, 902 (2013) (citations and internal quotations omitted).

“The rule of lenity is reserved for cases where, after seizing everything from which aid can be derived, the Court is left with an ambiguous statute.” *In re Pellicciotti*, 285 N.C. App. 451, 459, 878 S.E.2d 155, 162 (2022) (quotations omitted). Clarity and principles of statutory interpretation overwhelmingly support no ambiguity is present in N.C. Gen. Stat. § 14-208.6(4) (2023). The rule of lenity is inapplicable to this case. *Id.*

## STATE v. MOORE

[300 N.C. App. 101 (2025)]

## IV. Conclusion

The text of N.C. Gen. Stat. § 14-208.7(a) requires an individual “who is a State resident and who has a reportable conviction” to register as a sex offender. N.C. Gen. Stat. § 14-208.6(4) provides a list of reportable convictions, and the second part of subsection (b) requires Defendant to register on the sex offender registry in North Carolina. N.C. Gen. Stat. § 14-208.6(4)(b) (2023). *See* N.C. Gen. Stat. § 14-208.7(a) (2023); 11 Del. C. §§ 773(a)(6), 4120(a) and (b)(1), 4121(a)(2) and (a)(4), 4123(c)(1)-(2). Defendant’s argument is without merit. We affirm the trial court’s order requiring Defendant to register as an adult sex offender. *It is so ordered.*

AFFIRMED.

Judges ZACHARY and COLLINS concur.

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STATE OF NORTH CAROLINA  
v.  
RICHARD ALLEN MOORE

No. COA24-899

Filed 16 July 2025

**1. Evidence—Drug Recognition Expert—testimony regarding defendant’s impairment—reliability requirements—harmless error**

At a trial for charges of second-degree murder and felony death by vehicle arising from a fatal car collision, the trial court erred by allowing the State’s Drug Recognition Expert (DRE) to testify that, in his professional opinion, “multiple drug categories” contributed to defendant’s impairment during the crash. Under the most recent version of Evidence Rule 702, a certified DRE who is qualified to give expert testimony on the issue of impairment under subsection (a1) must still satisfy the reliability requirements of subsection (a) for giving expert testimony in general; here, those requirements were not satisfied where the DRE—testifying nearly two years after the crash and without having performed an actual DRE evaluation—based his opinion solely on evidence presented at trial and a review of defendant’s records. Nevertheless, the court’s error did not constitute prejudicial error where, absent the DRE’s testimony, the State still presented overwhelming evidence of defendant’s

## STATE v. MOORE

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impairment during the crash; thus, defendant was not entitled to a new trial.

**2. Evidence—Rule 404(b)—driving record—proof of malice for second-degree murder—similarity and temporal proximity**

At a trial for criminal charges arising from a fatal car crash, in which defendant was driving his car at nearly twice the legal speed limit before crashing head-on into the victim's car, the trial court did not err by admitting defendant's driving record—containing multiple speeding citations—as evidence of malice to prove second-degree murder pursuant to Evidence Rule 404(b), where the record showed that the court properly weighed considerations of similarity and temporal proximity in determining the evidence's probative value. First, the court limited temporal proximity by disregarding citations occurring more than five years before the crash. Second, although the court did not explicitly verbalize its Rule 404(b) similarity analysis, there was a clear similarity between defendant's prior speeding citations and his speeding during the crash.

Appeal by Defendant from judgment entered 1 May 2024 by Judge Martin B. McGee in Forsyth County Superior Court. Heard in the Court of Appeals 20 May 2025.

*Attorney General Jeff Jackson, by Assistant Attorney General Steven C. Wilson, for the State.*

*Drew Nelson for the Defendant.*

WOOD, Judge.

Richard Allen Moore (“Defendant”) appeals from the judgment entered following a jury verdict finding him guilty of second-degree murder and felony death by motor vehicle. On appeal, Defendant raises two issues, whether the trial court erred (1) by allowing the State's Drug Recognition Expert (“DRE”) to testify and (2) by allowing the State to introduce Defendant's driving record without a Rule 404(b) analysis. After careful review of the record, we find Defendant received a fair trial, free of prejudicial error.

### I. Factual and Procedural Background

On 28 April 2020, Defendant was driving northbound on North Liberty Street in Winston-Salem, North Carolina. The street consists of four lanes, two going each direction, with a turning lane separating the

**STATE v. MOORE**

[300 N.C. App. 101 (2025)]

inside lanes. Defendant was driving a Jeep and hauling a 3-wheel motorcycle on a homemade flat-bed trailer. Defendant was observed speeding at an estimated 60 to 70 miles per hour in a 35 mile per hour zone, as well as driving erratically by crossing into lanes on either side of his own.

Defendant's Jeep veered into the southbound lane, headed directly toward the Honda Pilot driven by Lisa Hathaway ("Hathaway"), and the two vehicles collided before Hathaway could take evasive action. Holly Hinson ("Hinson") was the front seat passenger in Hathaway's vehicle at the time of the collision.

While first responders attempted to treat Hinson, Defendant got out of his Jeep and walked to the curb. Witnesses described Defendant as "shaken" but not hurt. One witness reported Defendant stated, "I'm thinking I'm having a heart attack." Defendant did not say anything else and eventually was transported to Baptist Hospital. Hinson died at the scene from multiple blunt force injuries.

At the hospital Defendant received a comprehensive medical evaluation and was administered full alcohol and drug screenings. The evaluation found no head, neck, or chest injuries and no evidence of spinal trauma or cardiac distress. Defendant was reported to be "groggy." Initially, Defendant was so groggy that the physician could not complete a full review because "he wasn't fully with it." However, Defendant markedly improved over the next four hours and was able to stand up and move around. According to the treating physician, absent traumatic injury, Defendant's behavior was consistent with the use of impairing substances. Defendant's urine tested positive for amphetamines, benzodiazepines, and opiates. Defendant's blood was collected and sent to an independent laboratory for testing.

On 7 May 2020, Defendant was arrested on charges of felony death by vehicle, improper towing, driving while impaired, failure to maintain lane control, reckless driving to endanger, and a designated lane violation. On 24 January 2022, Defendant was indicted for felony death by vehicle, and on 15 August 2022, the indictment was amended to include second-degree murder. On 28 November 2022, Defendant's trial on the indicted charges commenced.

Multiple State's witnesses testified at trial. Dr. Iltifat Husain ("Dr. Husain") testified to the results of Defendant's medical evaluation at Baptist Hospital following the collision. Dr. Husain testified Defendant's toxicology tests were positive for amphetamines, benzodiazepines, and opiates. He also noted that benzodiazepines and opiates are "central nervous system depressant(s)" which "would just make you groggy

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and less responsive” and “kind of in a depressed state.” Dr. Husain noted that in his medical opinion, based on Defendant’s test results, his constricted pupils, clinical course of improvement over three or four hours, “there was almost certainly some sort of substance on board,” most likely opioids.

The State then tendered Corporal M.L. Dime (“Corp. Dime”) of the Winston-Salem police department as an expert in horizontal gaze nystagmus (“HGN”). Corp. Dime testified that Defendant’s eyes were droopy; he appeared lethargic; his pupils were constricted; his speech was slurred; and he confused details of the accident, stating he had been towing a golf cart rather than a motorcycle. Based on Corp. Dime’s education and training he believed his observations were consistent with the use of a narcotic analgesic and questioned Defendant whether he had been prescribed any medication. Defendant answered he had not. Corp. Dime noted Defendant’s pupils were constricted but did not note resting nystagmus or jerking of the eyes when attempting to stare straight ahead. Corp. Dime attempted to complete the HGN assessment but was unable to administer it to Defendant in the way it is intended to be administered, with Defendant standing with his feet together and arms at his side, because Defendant was restricted to the bed and was wearing a neck brace. Therefore, Corp. Dime conducted the HGN assessment of Defendant while Defendant was lying down. An HGN assessment has three components: smooth pursuit, maximum deviation, and onset of nystagmus prior to 45 degrees. Corp. Dime was unable to complete the tracking assessment to evaluate smooth pursuit because Defendant kept closing his eyes. He was able to note both maximum deviations and nystagmus prior to 45 degrees, and he testified that because HGN is a progressive test, when maximum deviations and nystagmus prior to 45 degrees are noted, a definite lack of smooth pursuit is indicated. Corp. Dime formed the opinion that “Defendant had consumed a sufficient amount of some impairing substance to appreciably affect his driving ability.”

Officer E.A. Cox (“Officer Cox”) of the Winston-Salem police department searched Defendant’s Jeep subsequent to the accident. He testified to finding a small plastic bag containing multiple units of three different types of pills during the search. The State placed the bag of pills into evidence.

Alexis Blankenship (“Blankenship”), a forensic chemist and employee for NMS labs in Winston-Salem, testified as a forensic chemistry expert. Blankenship confirmed the pills located during the search of Defendant’s Jeep were amphetamines, hydrocodone with acetaminophen, and flualprazolam, a benzodiazepine.

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William Schroeder (“Schroeder”), a forensic toxicologist and employee for NMS labs testified as an expert in forensic toxicology. Schroeder testified that Defendant’s blood tested positive for opiates and amphetamines, and borderline positive for benzodiazepines. However, he could not determine either the time of consumption or Defendant’s degree of impairment at the time of the collision from the test results.

Sergeant James R. Mitchell (“Sergeant Mitchell”) of the Winston-Salem police department testified as a crash reconstruction expert. Based on his calculations, Defendant was driving between 61.3 and 73 miles per hour in a 35 mile per hour zone just prior to the crash. Additionally, Sergeant Mitchell testified about traffic citations generally and how citations are reflected on an individual’s driving record before testifying to Defendant’s driving record, which documented the citations Defendant had received for accidents and infractions in the past. Defendant objected to the admission of his driving record and requested a Rule 404(b) analysis prior to the evidence being admitted; however, the trial court overruled his objection. Defendant had at least three previous speeding violations on his record.

Sergeant Preston Stringer (“Sergeant Stringer”) of the Forsyth County Sheriff’s Office testified as a Drug Recognition Expert (“DRE”) over Defendant’s objection. His testimony was based on his review of the records in the case and hearing the testimony and evidence presented at trial. He explained the effect each identified drug could have on a person and stated in his professional opinion “multiple drug categories [ ] were causing [Defendant’s] impairment.” Defendant objected to the testimony because Sergeant Stringer had not been called into the case until two years after the incident and his conclusions were based upon video evidence, reports, and testimony, not through live interaction with Defendant at the time of the incident as per DRE protocol.

At the close of the evidence, Defendant made a motion to dismiss for insufficient evidence to prove malice. The trial court denied the motion and sent the issues to the jury.

On 8 December 2022, the jury found Defendant guilty on both counts, felony death by motor vehicle and second-degree murder. After sentencing, Defendant entered oral notice of appeal in open court.

**II. Analysis**

Defendant asserts two arguments on appeal. First, Defendant contends the trial court erred in allowing the Drug-Recognition Expert to testify without determining whether the expert had satisfied the reliability

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provisions of N.C. Gen. Stat. § 8C-1, Rule 702(a). Second, Defendant contends the trial court erred by allowing the state to introduce Defendant's driving record without first conducting a similarity analysis under N.C. Gen. Stat. § 8C-1, Rule 404(b). We examine each issue in turn.

**A. Drug-Recognition Expert Testimony**

[1] Defendant's primary argument against the drug-recognition expert ("DRE") testimony is the trial court's alleged failure to satisfy the reliability provisions of N.C. Gen. Stat. § 8C-1, Rule 702(a). Defendant asserts additional arguments concerning the constitutionality of the testimony under the Due Process Clause of the United States Constitution, as well as the Law of the Land Clause of the North Carolina Constitution. Defendant did not raise either constitutional argument at trial and, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 815 (2005). Therefore, Defendant has failed to preserve the constitutional issues for review, and we restrict our review to the statutory issue addressed at the trial court.

Where the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*. 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. Younts*, 254 N.C. App. 581, 585, 803 S.E.2d 641, 645 (2017) (cleaned up). Defendant contends even when expert testimony is admissible based on N.C. Gen. Stat. § 8C-1, Rule 702(a1), the trial court is still required to qualify the expert based on the requirements of N.C. Gen. Stat. § 8C-1, Rule 702(a), notwithstanding the modifications made pursuant to 2017 N.C. Sess. Laws ch. 212, Part V, § 5.3, eff. June 28, 2017. This appears to be a case of first impression for this Court.

Our legislature has amended N.C. Gen. Stat. § 8C-1, Rule 702 multiple times over the last two decades. In 2006, the statute read in pertinent part:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert

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testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

N.C. Gen. Stat. § 8C-1, Rule 702 (2006).

In 2011, the statute was amended to ensure the reliability of expert testimony by adding the following three requirements:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

*(1) The testimony is based upon sufficient facts or data.*

*(2) The testimony is the product of reliable principles and methods.*

*(3) The witness has applied the principles and methods reliably to the facts of the case.*

N.C. Gen. Stat. § 8C-1, Rule 702 (2011); *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016).

Finally, the statute was most recently updated in 2017 to read:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

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(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.

(a1) *Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:*

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances, if the witness holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services.

N.C. Gen. Stat. § 8C-1, Rule 702 (2017) (emphasis added).

The State argues the 2017 inclusion of “notwithstanding any other provisions of law,” entirely eradicates the necessity for expert witnesses to meet the requirements of N.C. Gen. Stat. § 8C-1, Rule 702(a). Accordingly, the State contends since Sergeant Stringer possessed a current certification as a DRE, he was free to testify regardless of whether his testimony was based on fact or actually complied with his training as a DRE. We disagree.

“When the language of a statute is clear and without ambiguity, ‘there is no room for judicial construction,’ and the statute must be given effect in accordance with its plain and definite meaning.” *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). However, if a literal reading of the statutory language “yields absurd results . . . or contravenes clearly expressed legislative intent, ‘the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.’ ” *Id.* (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)); see also *Kaminsky v. Sebile*, 140 N.C. App. 71, 76, 535 S.E.2d 109, 112–13 (2000).

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*Aman v. Nicholson*, 288 N.C. App. 1, 10, 885 S.E.2d 100, 107–08 (2023) (quoting *Griffith v. North Carolina Dep’t of Correction*, 210 N.C. App. 544, 559, 709 S.E.2d 412, 423 (2011)). The contested language, “notwithstanding any other provisions of law,” when applied using plain language and basic grammar, would appear to allow testimony from a DRE “solely on the issue of impairment” without regard to all other rules of law, including not only the rules of reliability under 702(a), but also all other rules of evidence such as relevancy. This would be an absurd result and is inconsistent with the summary of the bill, which referred to the “technical correction” as “remov[ing] the preliminary requirements that the witness be qualified,” and does not comport with the pertinent case law which has consistently held DRE testimony is “determined to be reliable and based on sufficient facts and data.” SENATE BILL 582: Budget & Agency Technical Corrections, Gillenwater, L. and Etefagh, D., S. 582, 2017 Gen. Assemb., Additional Sess. (N.C. 2017); *State v. Fincher*, 259 N.C. App. 159, 164-65, 814 S.E.2d 606, 609-10 (2018).

Once categorized as “new scientific methods” admissible only “if the method was sufficiently reliable,” DRE and HGN testimony now are considered routine and regularly offered. *State v. Younts*, 254 N.C. App. 581, 585-86, 803 S.E.2d 641, 645 (2017). As a result, Rule 702 has undergone several amendments. Our Supreme Court has stated that “with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State.” *State v. Godwin*, 369 N.C. 604, 613, 800 S.E.2d 47, 53 (2017). After the 2011 amendment, our Court expanded on that ruling stating, “it is clear that the General Assembly has indicated its desire that Drug Recognition Evidence . . . be admitted, and that this type of evidence has already been determined to be reliable and based on sufficient facts and data.” *Fincher*, 259 N.C. App. at 164-65, 814 S.E.2d at 609-10. In *Younts*, this Court determined pursuant to N.C. Gen. Stat. § 8C-1, Rule 702 (2011), when testimony supports the trial court’s determinations that the expert’s testimony was “based on sufficient facts or data” and “applied the principles and methods,” then the amendment has “obviated the need for the State to prove that the . . . testing method is sufficiently reliable.” *Younts*, 254 N.C. App. at 591, 803 S.E.2d at 648.

Our case law makes clear that our Courts and the General Assembly have recognized that DRE and HGN testing are based on “sufficient facts or data” and have become sufficiently reliable, eliminating the need for continued review of the basic principles and methods under 702(a)(1) and (2). See *State v. Godwin*, 369 N.C. 604, 613, 800 S.E.2d 47, 53 (2017); *Younts*, 254 N.C. App. at 591, 803 S.E.2d at 648; N.C. Gen. Stat. § 8C-1, Rule

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702 (2017). It is beyond reason, however, to construe “notwithstanding any other provisions of law” to mean the legislature intended to allow testimony outside of the witness’ qualification or area of expertise as the State contends a plain reading of N.C. Gen. Stat. § 8C-1, Rule 702 (2017) would allow. Rule 702(a)-(i) contain nearly two dozen requirements to ensure that expert testimony is restricted based on the individual’s knowledge and areas of licensure or certification. Under Rule 702(a1)(b), witnesses are required to hold a current State Department of Health and Human Services (“DHHS”) issued Drug Recognition Expert certification. Further, DHHS outlines the requirements for DRE certification, and protocols for a DRE evaluation stating:

The DRE drug evaluation takes approximately one hour to complete. The DRE officer evaluates and assesses the person’s appearance and behavior . . . measures and records vital signs and makes precise observations of the person’s automatic responses and reactions . . . administers carefully designed psychophysical tests to evaluate the person’s judgment, information processing ability, coordination and various other characteristics. . . . The 12 steps of the Drug Evaluation Process include:

1. The Breath Alcohol Test
2. The Interview of the Arresting Officer
3. The Preliminary Examination
4. Examination of the Eyes
5. Divided Attention Psychophysical Tests
6. Examination of Vital Signs
7. Dark Room Examinations
8. Examination for Muscle Tone
9. Examination for Injection Sites
10. Suspect’s Statements and Other Observations
11. Opinions of the Evaluator
12. The Toxicological Examination

North Carolina Drug Evaluation & Classification Program, Drug Recognition Expert (DRE) Requirements.<sup>1</sup>

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1. DRUG EVALUATION AND CLASSIFICATION PROGRAMS DRUG RECOGNITION EXPERT (DRE) REQUIREMENTS <https://www.dph.ncdhhs.gov/programs/chronic-disease-and-injury/forensic-tests-alcohol#DrugEvaluationandClassificationProgramsDECP-588> (visited 5/28/25).

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The statute clearly requires the witness to be certified as a Drug Recognition Expert to testify; therefore, it follows that witness testimony must apply the certification principles and methods reliably to the facts of each case. In addition, in the same statute, the HGN test must be “administered in accordance” with the HGN training. Consequently, we hold N.C. Gen. Stat. § 8C-1, Rule 702(a)(3) must apply.

Sergeant Stringer testified that the evaluation was designed to be performed in a standardized and systematic manner with the twelve steps conducted in order, on a live person, shortly after arrest, and in a controlled environment consistent with DRE requirements. He further testified that he had “never [been] trained . . . [to perform an evaluation] in a way where you just relied on information that’s given to you by way of video.” Nonetheless, the trial court allowed Sergeant Stringer to express his expert opinion nearly two years after the incident and without having performed an actual DRE evaluation. Instead, Sergeant Stinger based his opinion only on evidence and testimony presented at trial and a review of Defendant’s records. This was error and the trial court should have sustained Defendant’s objection to Sergeant Stinger’s testimony as to his opinion on Defendant’s impairments pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a)(3).

While we conclude the trial court erred in allowing Sergeant Stringer’s testimony, Defendant bears the burden to prove prejudice. The evidentiary error must be prejudicial to warrant a new trial. *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009). “To show prejudicial error, a defendant must show that ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’” *State v. Neal*, 267 N.C. App. 442, 459, 833 S.E.2d 367, 379 (2019) (quoting N.C. Gen. Stat. § 15A-1443(a)). Otherwise, “[t]he admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result *likely* would have ensued had the evidence been excluded.” *Id.* (emphasis added).

Here, the State presented overwhelming evidence of Defendant’s impairment at trial, separate and apart from Sergeant Stringer’s DRE testimony. The uncontested testimony tended to show: witnesses observed Defendant driving his Jeep erratically before crossing lanes and hitting Hathaway’s car; just after the accident Defendant was observed to be groggy, and initially unable to comply with testing at the hospital; and the treating physician testified that Defendant was not “fully with it” and described his behavior consistent with the use of impairing substances. His toxicology tests at the hospital were positive for amphetamines, benzodiazepines, and opiates, and these same drugs

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were found in Defendant's vehicle after the collision. Corp. Dime, an HGN expert, testified that Defendant's eyes were droopy, he appeared lethargic, his pupils were constricted, his speech was slurred, and he confused details of the accident saying he had been towing a golf cart rather than a motorcycle. Corp. Dime testified he formed the opinion that "Defendant had consumed a sufficient amount of some impairing substance to appreciably effect his driving ability." Ample clear and convincing evidence exists to support any reasonable juror's determination of Defendant's impairment.

As Defendant is unable to prove any reasonable possibility that the outcome of the case would have been different absent the DRE testimony, we hold that despite the error of allowing the DRE testimony, it was nonprejudicial error.

**B. Rule 404(b)**

**[2]** When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

*State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

Defendant contends the trial court erred by admitting his driving record into evidence without first conducting a Rule 404(b) similarity analysis. This argument is without merit.

N.C. Gen. Stat. § 8C-1, Rule 404(b) states,

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2024). "Assessments of the probative value of evidence under Rule 404(b) must be guided by considerations of similarity and temporal proximity." *State v. Maready*, 362 N.C. 614, 624, 669 S.E.2d 564, 570 (2008).

North Carolina courts have long held that evidence of a defendant's prior traffic violations while not admissible to prove character can

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be relevant to establish the malice element of second-degree murder. *State v. Rollins*, 220 N.C. App. 443, 450, 725 S.E.2d 456, 462 (2012); *State v. Lloyd*, 187 N.C. App. 174, 179-80, 652 S.E.2d 299, 302 (2007).

[T]he State, in the present case, sought to establish the malice element of second-degree murder by showing that defendant committed an act evidencing a total disregard for human life—i.e., showing “wickedness of disposition,” “recklessness of consequences” or “a mind regardless of social duty and deliberately bent on mischief.” Evidence of defendant’s prior traffic violations—driving 75 mph in a 45 mph zone, 76 mph in a 45 mph zone, 70 mph in a 35 mph zone, and 70 mph in a 55 mph zone—was relevant to establish defendant’s “depraved heart” on the night he struck the victims’ vehicle while rounding a sharp curve at a speed at least 40 mph over the posted limit.

*State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 306–07 (2000) (citing *State v. Rich*, 132 N.C. App. 440, 450-51, 512 S.E.2d 441, 449 (1999)).

Regarding Defendant’s objection to the admission of his driving record, the court heard arguments from both parties. In support of its position, the State presented case law concerning the use of a defendant’s driving record with similar infractions to prove the malice component of second-degree murder citing to *State v. Locklear*, which held 404(b) “does not require that these prior incidents be exactly the same in order to have probative value.” *Locklear*, 159 N.C. App. 588, 595, 583 S.E.2d 726, 731 (2003). In *Locklear*, this Court ruled, a prior conviction for driving while impaired should have alerted the defendant to the hazards of driving while impaired. *Id.*

The record reflects the trial court weighed the considerations of similarity and temporal proximity. The trial court limited temporal proximity by disregarding citations prior to 2015. Although the trial court did not explicitly verbalize the similarity considerations at hand, clearly there is similarity between multiple citations for speeding and Defendant speeding at nearly twice the legal limit prior to hitting Hathaway’s vehicle, resulting in Hinson’s death. We conclude the trial court did not err in determining the cases to be sufficiently similar and admitting Defendant’s driving record.

### III. Conclusion

For the foregoing reasons, we conclude, based on the totality of the evidence, the trial court’s admission of DRE testimony was error but did

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not constitute prejudicial error. The trial court did not err in determining the admissibility of Defendant's driving record as evidence of malice to prove second-degree murder pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b). Thus, we hold Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge STROUD and Judge CARPENTER concur.

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YANG REAL ESTATE INVESTMENTS, LLC, PLAINTIFF  
v.  
AFFORDABLE MINI STORAGE OF NEWTON, LLC, DEFENDANT

No. COA24-1120

Filed 16 July 2025

**1. Civil Procedure—Rule 60(b) motion for relief—from voluntary dismissal with prejudice—done in good faith—excusable neglect**

In a legal dispute arising from a failed attempt to purchase a self-storage business and the land on which it sat, where the parties—a real estate investment company (plaintiff) and the self-storage business (defendant)—entered a settlement agreement that would allow the sale to proceed provided that plaintiff met certain requirements, including voluntarily dismissing with prejudice its breach of contract action against defendant, the trial court did not abuse its discretion by concluding—in an indicative order previously requested by the Court of Appeals—that, were an appeal not currently pending in the case, it would grant plaintiff's Rule 60(b) motion for relief from its voluntary dismissal with prejudice where, after the dismissal took effect, defendant refused to sell on the ground that plaintiff signed a new purchase agreement outside of the fourteen-day deadline prescribed in the settlement agreement. Plaintiff's voluntary dismissal constituted "excusable neglect" under Rule 60(b)(1) since, in filing for it, plaintiff was trying in good faith to fulfill its obligations under the settlement agreement; furthermore, because the fourteen-day deadline to sign a new contract was not a material term of the settlement agreement, defendant's refusal to go through with the sale arbitrarily deprived plaintiff of the benefit of their bargain.

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**2. Contracts—breach—settlement agreement—deadline to sign new contract to purchase a business—not a material term**

In a legal dispute arising from a failed attempt to purchase a self-storage business and the land on which it sat, where the parties—a real estate investment company (plaintiff) and the self-storage business (defendant)—entered a settlement agreement that would allow the sale to proceed provided that plaintiff met certain requirements, including signing a new purchase agreement within fourteen days of the settlement agreement’s execution, the trial court did not err by granting plaintiff’s motion to enforce the settlement agreement after defendant refused to sell on the ground that plaintiff signed a new purchase agreement two days after the fourteen-day deadline had passed. The fourteen-day deadline was not a material term of the settlement agreement, as evidenced by the fact that defendant had unilaterally chosen to allow plaintiff an extra day to meet the deadline since the fourteenth day landed on Labor Day. Thus, plaintiff’s breach of the settlement agreement was not a material breach, especially given that plaintiff had already performed its other obligations under the agreement.

Appeal by defendant from order entered 31 July 2023 and advisory order entered 9 July 2024 by Judge William A. Long in Catawba County Superior Court. Heard in the Court of Appeals 21 May 2025.

*Morgan Law, PLLC, by William E. Morgan, for Plaintiff-Appellee.*

*Davis Hartman & Wright, LLP, by R. Daniel Gibson, for Defendant-Appellant.*

COLLINS, Judge.

This appeal arises out of an agreement for the sale of a business and the real property on which it sits. Defendant Affordable Mini Storage of Newton, LLC appeals from the trial court’s order indicating it would grant Plaintiff Yang Real Estate Investments, LLC’s motion for relief under North Carolina Rule of Civil Procedure 60(b) were an appeal not pending before this Court and the trial court’s order granting Plaintiff’s motion to enforce the settlement agreement executed between the parties. For the following reasons, we affirm and remand.

**I. Background**

On or about 17 January 2021, Plaintiff and Defendant entered into a purchase agreement, under which Plaintiff would purchase from

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Defendant the self-storage business and the real property on which the business sits (“Business”) located in Newton, North Carolina. The purchase agreement stated that the closing date was to occur on 1 May 2020, provided that all of the conditions to closing, listed in the purchase agreement, were either satisfied or waived. Plaintiff did not waive any of the conditions prior to closing.

Closing did not occur on 1 May 2020. Throughout the next few months, Defendant “made improvements to the physical aspects of the Business and demanded a higher price for the Business.” Then, on 11 December 2020, Defendant informed Plaintiff that it did not “wish to move forward with the sale of the [Business] at this time.”

Plaintiff commenced this action on 23 June 2021 by filing a complaint alleging various claims, including breach of contract. On 20 September 2021, Defendant filed a Motion to Dismiss, Motion to Strike, Answer, and Affirmative Defenses.

On 22 August 2022, the parties conducted a mediated settlement conference, where they “agreed to resolve and settle the disputes between them.” The terms of the settlement agreement, signed by both parties on 22 August 2022, included the following:

1. Plaintiff shall be allowed to purchase the [Business] . . . for the sum of \$4.2 million. . . .
2. Plaintiff shall be on site and inspect the property within ten days of this agreement. . . .
3. Immediately upon confirmation of this agreement, Defendant shall be entitled to \$5,000.00 of the earnest money currently held by escrow agent John Fuller. . . .
4. Plaintiff shall file a voluntary dismissal with prejudice of the lawsuit by August 26, 2022.
5. At the conclusion of the inspection described above, Plaintiff shall either
  - a. Sign a new purchase agreement within fourteen days of this agreement to close its purchase of the [Business] for the sum of \$4.2 million on or before December 31, 2022. There shall be no extensions absent written agreement signed by all parties. Upon Plaintiff’s signing of the new purchase agreement, Defendant shall be entitled to the remaining \$20,000.00 earnest money . . . .

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- b. Accept the remaining \$20,000.00 in earnest money currently held by escrow agent John Fuller, at which point this matter shall be completed and closed. All parties shall be mutually released for all further obligations.

In accordance with the terms of this settlement agreement, Plaintiff filed a voluntary dismissal with prejudice on 23 August 2022. Plaintiff was on site for an inspection of the Business on 29 August 2022.

On 7 September 2022, sixteen days after the parties agreed to and signed the settlement agreement, Plaintiff signed a new purchase agreement and sent it to Defendant via email. Defendant's counsel responded:

I have spoken with my client. His position is that your clients had until close of business on Monday, September 5, 2022 (14 days from the date of the August 22, 2022 mediated settlement agreement) to sign a new purchase agreement. We chose to allow one additional day for your clients to sign and return the purchase agreement due to September 5, 2022 being a legal holiday.

Defendant's counsel continued that because Plaintiff had failed to sign a new purchase agreement before 6 September, "the parties must walk away from this dispute as provided in the mediated settlement agreement."

Plaintiff filed a Rule 60(b) motion for relief from the judgment voluntarily dismissing its claim with prejudice and a motion to enforce the settlement agreement—by requiring Defendant to sell the Business to Plaintiff—on 29 June 2023. Defendant filed a response on 20 July 2023, which included counter-motions for summary judgment to enforce the settlement agreement—by requiring Plaintiff to accept the \$20,000 in earnest money and to accept that "this litigation is closed and Defendant has been released from any obligation to Plaintiff"—and for attorney's fees.

The trial court, by written order entered 31 July 2023, granted Plaintiff's motion to enforce the settlement agreement and "reserved any ruling as it relates to any motion under Rule 60. . . ." On 30 August 2023, Defendant filed a Rule 60(b) motion for relief from the trial court's 31 July order to enforce the settlement agreement and appealed the order enforcing the settlement agreement to this Court.

On 15 February 2024, this Court directed the trial court "to conduct an evidentiary hearing, if necessary, on the Rule 60(b) Motions before it

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and indicate what action it would be inclined to take were an appeal not pending before the Court of Appeals.”

An evidentiary hearing was held on 6 March 2024, and on 9 July 2024, the trial court entered a written order indicating that it “would take the following actions were an appeal not pending before the Court of Appeals:”

1. The Defendant’s Rule 60(b) Motion is GRANTED;
2. The Plaintiff’s Rule 60(b) Motion seeking relief from and striking the Voluntary Dismissal with Prejudice filed by the Plaintiff on August 23, 2022, is GRANTED;
3. The Plaintiff’s Motion for Enforcement of Settlement Agreement is GRANTED;
4. The Defendant’s Motion for Summary Judgment for Enforcement of Settlement Agreement is DENIED and, to the extent necessary to enforce the terms of the Settlement requiring the Defendant to sell the Business to the Plaintiff, Summary Judgment is GRANTED to the Plaintiff;
5. The Defendant’s Motion for Attorney’s Fees is DENIED[.]

Defendant timely appealed from this indicative order.

## II. Discussion

### A. Plaintiff’s Rule 60(b) Motion

[1] Defendant first argues that the trial court erred by indicating that it would set aside Plaintiff’s voluntary dismissal under Rule 60(b). We disagree.

The main objective of Rule 60(b) is to “strike a proper balance between the conflicting principles of finality and relief from unjust judgments.” *Carter v. Clowers*, 102 N.C. App. 247, 254 (1991) (citation omitted). Generally, “a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion.” *Sink v. Easter*, 288 N.C. 183, 198 (1975) (citation omitted). Under an abuse of discretion standard, “we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Mark Grp. Int’l, Inc. v. Still*, 151 N.C. App. 565, 566 (2002) (citation omitted).

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Rule 60(b)(1) authorizes the trial court to relieve a party from a final judgment or order due to “[m]istake, inadvertence, surprise, or excusable neglect.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2023). “Although the decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court’s discretion, what constitutes ‘excusable neglect’ is a question of law which is fully reviewable on appeal.” *In re Hall*, 89 N.C. App. 685, 687 (1988) (citations omitted).

To grant relief from a final order on the grounds of excusable neglect under Rule 60(b)(1), “the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense.” *Monaghan v. Schilling*, 197 N.C. App. 578, 584 (2009) (citation omitted). “While there is no clear dividing line as to what falls within the confines of excusable neglect . . . , what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.” *Croom v. Hedrick*, 188 N.C. App. 262, 267 (2008) (citation omitted).

Relief under Rule 60(b)(1) depends upon “the intention of the party seeking relief.” *T.H. v. SHL Health Two, Inc.*, 293 N.C. App. 462, 466 (2024). “The relevant intention, however, is not the intended outcome of an action; the relevant intention is the intended action.” *Id.* at 466-67. (emphasis and citation omitted). “Generally, this Court will not find excusable neglect where the party establishes merely that he was ignorant of the judicial process or misunderstood the nature of the action against him, even when the party has little education.” *Grier v. Guy*, 224 N.C. App. 256, 259 (2012) (citation omitted). Rather, to get relief under Rule 60(b)(1) for excusable neglect, “the material question is whether Plaintiff deliberately took the action for which Plaintiff requests relief.” *T.H.*, 293 N.C. App. at 467 (citation omitted).

Here, the trial court found that the requirement that Plaintiff sign a new purchase agreement within fourteen days was not a material term to the settlement agreement; thus, Defendant’s “refusal to sign the new purchase agreement after receiving the signed purchase agreement from [] Plaintiff was arbitrary . . . .” The trial court therefore concluded,

7. By refusing to execute the purchase agreement and close on the sale of the Business, [] Defendant deprived [] Plaintiff of the benefit of the bargain of the Settlement.
8. To deprive [] Plaintiff of the benefit of the bargain on the sole basis of Plaintiff’s returning the executed

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purchase agreement one day later than contemplated in the Settlement would be unjust.

We agree with the trial court.

Plaintiff filed for a voluntary dismissal with prejudice pursuant to the terms of the settlement agreement, which had been signed by both parties. In doing so, Plaintiff was acting under the assumption that once it filed for a voluntary dismissal with prejudice and performed the other requirements listed in the settlement agreement, Plaintiff and Defendant would close on the sale of the Business. In filing for a voluntary dismissal, Plaintiff was not “ignorant of the judicial process,” and in no way did Plaintiff misunderstand the nature of the action or the consequences that would result. *Grier*, 224 N.C. App. at 259 (citation omitted). Plaintiff’s intention was deliberate and obvious; Plaintiff intentionally filed for a voluntary dismissal with prejudice because doing so was an enumerated term of the settlement agreement. This constitutes excusable neglect.

Defendant argues that the voluntary dismissal is not excusable neglect because although Plaintiff intended to dismiss its claims, Plaintiff “simply did not appreciate the consequences of the dismissal.” (quoting *T.H.*, 293 N.C. App. at 467 (citation omitted)). This mischaracterizes Plaintiff’s action. There is no evidence suggesting Plaintiff did not realize that by dismissing its claim with prejudice, the action would be terminated. To the contrary, Plaintiff accepted this consequence. Plaintiff acted in good faith when it attempted to fulfill its obligations under the settlement agreement; Defendant deprived Plaintiff of the benefit of the bargain by refusing to go through with the sale.

Accordingly, the trial court did not err by indicating that it would grant Plaintiff relief from its voluntary dismissal with prejudice under Rule 60(b)(1). In light of this conclusion, we need not address Defendant’s remaining arguments as to why the trial court erred by indicating that it would grant Plaintiff’s Rule 60(b) motion under Rules 60(b)(4) and 60(b)(6).

## **B. Plaintiff’s Motion to Enforce the Settlement Agreement**

**[2]** Defendant next argues that the trial court erred by granting Plaintiff’s motion to enforce the settlement agreement and denying Defendant’s motion to enforce the settlement agreement. Defendant specifically argues that the plain language of the settlement agreement does not support the trial court’s conclusion that the fourteen-day deadline for Plaintiff to sign a new purchase agreement is not a material term of the settlement agreement.

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“A motion to enforce a settlement agreement is treated as a motion for summary judgment for purposes of appellate review.” *Williams v. Habul*, 219 N.C. App. 281, 288 (2012) (quotation marks and citations omitted). Summary judgment shall be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). The moving party bears “the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695 (2009) (citation omitted). “On appeal, this Court must review the entire record, viewing the evidence in the light most favorable to the non-moving party.” *Williams*, 219 N.C. App. at 289 (citation omitted).

“Questions relating to the construction and effect of a settlement agreement are resolved by employing the same rules that govern the interpretation of contracts generally.” *Id.* at 292. (citation omitted). An appellate court is to “interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law.” *Buettel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631 (1999) (citation omitted).

“The general rule governing bilateral contracts requires that if either party to the contract commits a material breach of the contract, the other party should be excused from the obligation to perform further.” *Coleman v. Shirlen*, 53 N.C. App. 573, 577-78 (1981) (citation omitted). “Whether a breach is material or immaterial is ordinarily a question of fact.” *McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 198 (2003) (citations omitted). “When reviewing a trial court’s determination that a party has materially breached a contract, the appellate courts are bound by the trial judge’s findings of fact if there is some evidence to support them, even though the evidence might sustain findings to the contrary.” *Id.* (quotation marks and citation omitted). A material breach is “one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform.” *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 220 (2015) (citation omitted).

Here, the settlement agreement, on its face, constitutes a complete and enforceable contract for the sale of the Business. Its terms include the identity of the buyer (Yang Real Estate Investments, LLC), the identity of the seller (Affordable Mini Storage of Newton, LLC), the purchase price (\$4.2 million), and the identity of the real property to be sold (“the real property and business of the Defendant described in

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the pleadings”), and also the closing date (on or before 31 December 2022). *See Hurdle v. White*, 34 N.C. App. 644, 648 (1977) (holding that the material terms of an agreement to sell land include the seller, the buyer, the purchase price, and a description of the land that is the subject of the transaction).

The date by which Plaintiff was required to sign the new purchase agreement is not a material term of the settlement agreement. The trial court found that, under the settlement agreement, “Plaintiff and Defendant would enter into a new purchase agreement, drafted by counsel for [] Defendant, to be signed by [] Plaintiff within fourteen (14) days of the date of mediation (which would set that date as September 5, 2022, also the Labor Day Holiday)[.]” Closing on the sale of the Business, however, was to take place “on or before December 31, 2022 (which was 131 days after the mediation).” Defendant unilaterally “chose to allow [Plaintiff] one additional day,” or until 6 September 2022, to sign and return the new purchase agreement; this action indicates that Defendant did not consider the fourteen-day deadline material. Plaintiff signed the new purchase agreement and sent it to Defendant on 7 September 2022. Although a breach, it does not “substantially defeat[] the purpose of the agreement or go[] to the very heart of the agreement.” *Supplee*, 239 N.C. App. at 220 (citation omitted). All essential terms of the parties’ contract remained intact, and Plaintiff’s intention to fulfill the terms of the settlement agreement and purchase the Business from Defendant remained clear. This is particularly true given the fact that Plaintiff had already voluntarily dismissed its claim with prejudice and traveled to the Business to conduct its inspection.

Defendant argues that Plaintiff presented “no evidence” in support of its motion to enforce the settlement agreement. Plaintiff, however, submitted the settlement agreement, which had been signed by both parties, as evidence to the trial court, and Plaintiff’s voluntary dismissal with prejudice was a matter of record on file with the trial court. It is unclear what additional evidence Defendant believes that Plaintiff should have provided. Furthermore, there is no dispute over the facts of this case; rather, the dispositive question is whether Plaintiff’s delay in executing the new purchase agreement constitutes a material breach, thus excusing Defendant from its obligations under the contract. As discussed above, we hold that Plaintiff’s breach is not material.

Accordingly, the trial court did not err by granting Plaintiff’s motion to enforce the settlement agreement.

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### **III. Conclusion**

For the foregoing reasons, we conclude that the trial court did not abuse its discretion by indicating that it would grant Plaintiff relief from its voluntary dismissal with prejudice under Rule 60(b). The trial court did not err by granting Plaintiff's motion to enforce the settlement agreement and denying Defendant's motion to enforce the settlement agreement. We affirm the trial court's 31 July 2023 order and remand to the trial court to enter a final order consistent with its 9 July 2024 indicative order.

AFFIRMED AND REMANDED.

Judges TYSON and GRIFFIN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JULY 2025)

CASON v. GALLOWAY No. 23-1169	Mecklenburg (19CVD7011)	Reversed
HILL v. SWATI, LLC No. 24-879	Buncombe (21CVS004739)	Affirmed
IN RE A.J.W. No. 24-725	Haywood (23JA000011) (23JA000012)	Affirmed
IN RE D.H. No. 24-995	Wake (23JA003306-910)	Affirmed
IN RE T.T.R.K. No. 24-461	Burke (21JT101) (21JT102)	Affirmed in Part and Remanded in Part for Correction of Clerical Error.
STATE v. AMMERMAN No. 24-456	Davie (18CR051624-290) (18CR051625-290) (18CR051627-290) (18CR051628-290)	No Error.
STATE v. DAVIS No. 24-871	Randolph (21CRS050668)	No Error
STATE v. GAUSE No. 24-578	New Hanover (21CRS056024) (21CRS056025)	No Error
STATE v. GUPTON No. 23-661	Guilford (14CR024727-400) (14CR091914-400)	Affirmed
STATE v. HUCKABEE No. 24-730	New Hanover (20CR053666-640) (20CR053667-640)	No Error
STATE v. LEDWELL No. 23-1134	Robeson (18CRS55963) (20CRS606)	No error and no prejudicial error
STATE v. LESTER No. 23-115-2	Wake (19CRS223407)	No Error

STATE v. MONK No. 24-446	Carteret (21CR052674-150 (21CR052675-150) (21CR052680-150)	No Prejudicial Error
STATE v. PRICE No. 24-878	Forsyth (22CRS053931) (23CRS000605)	No Error
STATE v. SIMMONS No. 23-778	Brunswick (18CRS53199)	NO ERROR IN PART; VACATED IN PART.
STATE v. SMITH No. 23-747	Pitt (20CRS51422-24) (20CRS51426) (21CRS1139)	VACATED AND REMANDED IN PART, NO ERROR IN PART
US LBM OPERATING CO. 2009, LLC v. AC DEVS.,LLC No. 24-823	Henderson (23CVS000862)	Affirmed in Part; Reversed in Part; and Remanded
WALLER v. WALLER No. 24-986	Pitt (21CVD002861-730)	Reversed and Remanded
WALSH v. WALSH No. 24-869	Granville (22CVD000674)	Affirmed in Part; Reversed in Part; and Remanded.
ZP NO. 335, LLC v. W. CAROLINA UNIV. No. 24-736	Jackson (23CVS000548-490)	Affirmed in Part and Reversed in Part



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