300 N.C. App.—No. 3 Pages 242-332

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 16, 2026

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 20 AUGUST 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADVERSE POSSESSION

Statutory period—tacking—land falling outside the deed's description—minority rule adopted in North Carolina—In a dispute between adjacent property owners over plaintiffs' use of a forty-one-foot tract of land on defendants' property, which the prior owner of plaintiffs' property had maintained and used for years but which was not mentioned in the prior owner's deed, the trial court properly denied summary judgment to plaintiffs on their adverse possession claim where plaintiffs failed to satisfy the twenty-year statutory period required for claims without color of title. Since the disputed tract was not mentioned in plaintiffs' deed—which mirrored word-for-word the prior owner's deed—they lacked the privity of estate or connection of title needed to tack their possession to that of the prior owner. Further, plaintiffs failed to demonstrate that the prior owner of their property actually conveyed to them her interest in the disputed tract—a requirement under the minority rule followed in North Carolina for tacking possession of land falling outside a deed's description. **Gonzalez v. Marfione, 268.**

to obtain non-ferrous metals (pursuant to N.C.G.S. § 14-159.4) was facially valid and sufficient to put defendant on notice of the crime charged because it clearly described the conduct giving rise to the charge and specifically identified the vehicle alleged to have been injured by stating its year, make, model, and color; although the indictment did not include the value of the property damage, such value was not an essential element of the offense. **State v. Council, 304.**

JUVENILES

Delinquency—disposition—continuing DSS custody of juvenile—trial court's jurisdiction—statutorily required finding—proper exercise of discretion— In an appeal filed by the department of social services (DSS) in a delinquency matter involving a juvenile who brought a knife to school, the trial court's disposition order continuing the juvenile's custody with DSS was vacated and the matter was remanded. Although the trial court did have subject matter jurisdiction to require DSS to maintain custody of the juvenile—since the juvenile had not yet reached eighteen years of age and because the court did not automatically terminate its jurisdiction by entering the disposition order—it failed to include one of the findings required by N.C.G.S. § 7B-2506(1)(c) indicating that it was contrary to the juvenile's best interest to remain in his home. On the other hand, there was no merit to DSS's argument regarding the lack of competent evidence showing that the juvenile's parents could not make appropriate arrangements to meet the juvenile's needs pursuant to N.C.G.S. § 7B-2501(d); under that statutory provision, the court possessed discretion to consider whether the parents could make appropriate home arrangements but was not required to make that consideration determinative in its disposition. **In re D.H., 288.**

MEDICAL MALPRACTICE

Legislative cap on noneconomic damages—enacted before property right vested—no violation of right to jury trial—In a medical malpractice case where plaintiff sought and was awarded only noneconomic, actual damages based on the ordinary (rather than gross) negligence of her obstetrician and his clinic—for the pain and suffering plaintiff experienced when her pregnancy ended with an emergency c-section following fetal demise in her 44th week of gestation—the trial court's application of N.C.G.S. § 90-21.19(a) (the Legislative Cap) to reduce the jury's award of $7.5 million to $656,730 was affirmed. In a matter of first impression, the Court of Appeals rejected plaintiff's contention that the Legislative Cap was unconstitutional as applied to her—violating her right to a jury trial under Article I, § 25 of the North Carolina Constitution—because plaintiff's cause of action did not become a vested property right until after the Legislative Cap was enacted in 2011 and the General Assembly generally has the power to determine when a remedy is legally cognizable without impairing the right to jury trial. **Mohebali v. Hayes, 293.**

MORTGAGES AND DEEDS OF TRUST

Erroneous legal description—possible latent ambiguity—resolved by subsequent recordation of corrected deed of trust—Where a deed of trust recorded on 19 June 2006 misidentified the condominium unit in the legal description of the subject property, but was rerecorded on 21 May 2007 with a corrected legal description, the trial court properly entered summary judgment in favor of plaintiff, the bank to which the deed of trust was assigned by assignment executed on 18 July

2014 and recorded on 25 August 2014. The appellate court rejected arguments by the defendants—who later purchased the condominium unit under the belief that there were no outstanding liens, being unaware that fraudulent satisfactions of the 21 May 2007 deed of trust had been recorded—that the initial deed of trust was void due to the incorrect legal description and that the subsequent rerecordation was of no consequence. Any ambiguity in the initial deed of trust was, at most, latent and, thus, the initial deed of trust created a valid lien encumbering the subject property. Moreover, any potential ambiguity in the initial deed of trust was resolved by the 21 May 2007 rerecordation, restoring its superiority over any subsequently acquired interest in the subject property, including that of defendants. **Deutsche Bank Nat'l Tr. Co. v. Gaydos, 242.**

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.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2006-EQ1 ASSET-BACKED CERTIFICATES, SERIES 2006-EQ1; 2006 MASTER ASSET-BACKED SECURITIES TRUST 2006-HE5 MORTGAGE PASS THROUGH CERTIFICATES, SERIES HE5, BY AND THROUGH U.S. BANK, NATIONAL ASSOCIATION, IN ITS CAPACITY AS TRUSTEE UNDER POOLING AND SERVICING AGREEMENT DATED AS OF DECEMBER 1, 2006, PLAINTIFFS

v.

CYRIL N. GAYDOS; KARINA C. GAYDOS; MEHA BHUPENDRA SHAH; FENIL HIREN KUMAR SHAH; GAYDOS & FAMILY 14716 VIA SORRENTO CONDOMINIUM, INC.; U.S. BANK, NATIONAL ASSOCIATION S/I/I PINNACLE BANK S/B/M BANK OF NORTH CAROLINA; PINNACLE BANK S/B/M BANK OF NORTH CAROLINA; MILTON XAVIER EARQUHART A/K/A MILTON XAVIER; JOHN DOES #1-10; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SOLELY AS NOMINEE FOR BANK OF NORTH CAROLINA AND ITS SUCCESSORS AND ASSIGNS, DEFENDANTS

No. COA23-1077

Filed 20 August 2025

1. Mortgages and Deeds of Trust—erroneous legal description—possible latent ambiguity—resolved by subsequent recordation of corrected deed of trust

Where a deed of trust recorded on 19 June 2006 misidentified the condominium unit in the legal description of the subject property, but was rerecorded on 21 May 2007 with a corrected legal description, the trial court properly entered summary judgment in favor of plaintiff, the bank to which the deed of trust was assigned by assignment executed on 18 July 2014 and recorded on 25 August 2014. The appellate court rejected arguments by the defendants—who later purchased the condominium unit under the belief that there were no outstanding liens, being unaware that fraudulent satisfactions of the 21 May 2007 deed of trust had been recorded—that the initial deed of trust was void due to the incorrect legal description and that the subsequent rerecordation was of no consequence. Any ambiguity in the initial deed of trust was, at most, latent and, thus, the initial deed of trust created a valid lien encumbering the subject property. Moreover, any potential ambiguity in the initial deed of trust was resolved by the 21 May 2007 rerecordation, restoring its superiority over any subsequently acquired interest in the subject property, including that of defendants.

2. Equity—two innocent parties—fraudulent satisfaction scheme by third party—equities balanced—prior mortgage superior

The Court of Appeals rejected defendants' equitable argument that, as innocent third-party purchasers for value of a condominium

unit (which was subject to a deed of trust of which defendants were unaware, as the result of the recordation of fraudulent satisfactions), plaintiff (the bank holding the deed of trust) was in the best position to discover the recordation of the fraudulent satisfactions and thus should bear any loss as between the parties. Where two innocent parties are victims of the fraudulent satisfaction scheme of a third party, the equities are balanced and the lien of the prior mortgage (here, plaintiff's deed of trust), being first in order of time, is superior.

Appeal by defendants Meha Bhupendra Shah, Fenil Hiren Kumar Shah, and U.S. Bank, National Association s/i/i Pinnacle Bank s/b/m Bank of North Carolina from order entered 26 October 2021 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 2 April 2024.

Alexander Ricks PLLC, by Ryan P. Hoffman, Benjamin F. Leighton, and David Q. McAdams, for defendants-appellants Meha Bhupendra Shah, Fenil Hiren Kumar Shah, and U.S. Bank, National Association s/i/i Pinnacle Bank s/b/m Bank of North Carolina.

McGuireWoods LLP, by Scott I. Perle, Bradley R. Kutrow, and Dylan M. Bensinger, for plaintiff-appellee Deutsche Bank National Trust Company.

No briefs filed by remaining parties.

STROUD, Judge.

Defendants, Meha Bhupendra and Fenil Hiren Kumar Shah, along with U.S. Bank, National Association s/i/i Pinnacle Bank s/b/m Bank of North Carolina (collectively the "Shah Defendants"), appeal from an order granting summary judgment to Plaintiff Deutsche Bank National Trust Company ("Deutsche Bank") on its declaratory judgment claim to restore a fraudulently extinguished deed of trust and giving Deutsche Bank priority to subsequent interests following the entry of final judgment disposing of all remaining claims. On appeal, the Shah Defendants argue the trial court erred in granting summary judgment because the deed of trust had a fatal patent ambiguity and failed to encumber the property at issue. After careful review, we affirm the trial court's entry of summary judgment in favor of Deutsche Bank.

I. Background

The subject property at issue is a condominium located at 14716 Via Sorrento Drive in Charlotte, North Carolina, Tax Parcel ID: 223-545-47, known as Unit 7104 of Belle Vista Condominiums (hereafter the "subject property").

On 5 April 2018, Deutsche Bank[1] initiated this action by filing summonses and a complaint alleging that Defendants, Cyril N. and Karina C. Gaydos, Gaydos & Family 14716 Via Sorrento Condominium, Inc., Xavier Milton Earquhart a/k/a Milton Xavier, and John Does #1-10 (collectively the "Gaydos/Earquhart Defendants") successfully conspired to file a fraudulent satisfaction of a deed of trust for the subject property held by Deutsche Bank. Deutsche Bank sought monetary damages from the Gaydos/Earquhart Defendants and a declaratory judgment against all named defendants, including the Shahs, who were innocent subsequent purchasers for value of the subject property. In the declaratory judgment claim, Deutsche Bank sought to restore the fraudulently extinguished deed of trust and to have its interest named superior to that held by the Shahs' mortgagee. An amended complaint was filed on 4 May 2018, adding Defendant, Mortgage Electronic Registration Systems, Inc. ("MERS"), as a party.

On 10 February 2020, the Shah Defendants filed their answer with a motion to dismiss, and Deutsche Bank voluntarily dismissed its claims against the individual Gaydos defendants (the "Gaydoses"), MERS, and John Does #1-10. The following day, Deutsche Bank obtained an entry of default as to the remaining Gaydos/Earquhart Defendants based on their failure to plead or otherwise defend against the action. The Shah Defendants then moved for summary judgment on 25 June 2020, and Deutsche Bank did the same on 5 August 2020.

The trial court heard the parties' pending dispositive motions on 19 July 2021 and entered an "Order on Motions to Dismiss and Motions for Summary Judgment" on 26 October 2021, which denied the Shah Defendants' motions to dismiss and granted summary judgment in favor of Deutsche Bank on its claim for declaratory relief against the Shah Defendants, ordering Deutsche Bank's deed of trust is superior in

1. Deutsche Bank was joined by its co-plaintiff, 2006 Master Asset-Backed Securities Trust 2006-HE5 Mortgage Pass Through Certificates, Series HE5, by and through U.S. Bank National Association in its capacity as Trustee under Pooling and Servicing Agreement dated as of December 1, 2006. Deutsche Bank's co-plaintiff ultimately dismissed its claims and is therefore omitted from discussion in this opinion.

time and priority over the Shah Defendants' interest in the subject property and any subsequent liens or interests granted by the Shahs. Deutsche Bank then moved for, and received, a "Final Default Judgment" against the defaulted Gaydos/Earquhart Defendants on 5 April 2022.

The Shah Defendants appealed from the summary judgment order following entry of the default judgment. By unpublished opinion filed on 21 March 2023, this Court dismissed the Shah Defendants' first appeal as interlocutory because the purported final default judgment and the other orders contained in the record only resolved Deutsche Bank's claims for declaratory relief and did not resolve its claims for monetary relief against the Gaydos/Earquhart Defendants. *See Deutsche Bank Nat'l Trust Co. v. Gaydos*, 288 N.C. App. 191, 884 S.E.2d 78, 2023 WL 257731, *2 (2023) (unpublished).

Following the dismissal of the appeal, on 4 May 2023, Deutsche Bank and the Shah Defendants filed a stipulation of voluntary dismissal under North Carolina General Statute Section 1A-1, Rule 41(a)(1)(ii), thus dismissing Deutsche Bank's "claims for monetary relief against the remaining Gaydos/Earquhart Defendants and any remaining claims *other than* those previously resolved in [Deutsche Bank's] favor by [the trial court's summary judgment and default judgment o]rders dated 26 October 2021 and 5 April 2022." (Emphasis in original.) On the same day, Deutsche Bank and the Shah Defendants also filed a joint motion for entry of final judgment in accordance with the declaratory relief granted in the summary judgment and default judgment orders previously entered.

The trial court heard the parties' motion for entry of final judgment on 17 July 2023 and granted the motion based on its determination that all claims had been adjudicated between the 26 October 2021 summary judgment order, the 5 April 2022 default judgment order, and the 4 May 2023 stipulation of voluntary dismissal of all remaining claims. On 6 September 2023, the trial court entered a "Final Judgment" in accordance with the 26 October 2021 summary judgment order and the 5 April 2022 default judgment order and dismissed all remaining claims.

The Shah Defendants have now appealed, again, from the trial court's 26 October 2021 summary judgment order, noting that final judgment was entered on 6 September 2023.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows

that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023) (providing summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law").

"Likewise, whether the language of a contract is ambiguous is a question of law to be reviewed de novo." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680, 821 S.E.2d 360, 366 (2018); *see also Bank of America, N.A. v. Schmitt*, 263 N.C. App. 19, 22, 823 S.E.2d 396, 398 (2018) ("The construction of the terms of a deed, including the question of the property the deed is intended to cover, has historically been a question of law for the court[.]"). "When reviewing a matter de novo, this Court considers the matter anew and freely substitutes its own judgment for that of the lower courts." *Upchurch v. Harp Builders, Inc.*, 385 N.C. 816, 818, 898 S.E.2d 713, 715 (2024) (citations and quotation marks omitted).

III. Analysis

[1] On appeal, the Shah Defendants argue the trial court erred as a matter of law in determining the Gaydos deed of trust held by Deutsche Bank was a valid and enforceable lien and had priority over their interest in the subject property. The Shah Defendants thus contend the trial court erred in entering summary judgment in favor of Deutsche Bank on its claim for declaratory relief.

The material facts relevant for summary judgment are not in dispute. The Gaydoses entered a contract with a condominium developer to buy the subject property in March 2006. Documents executed in anticipation of the purchase—including the purchase contract with addendums, an appraisal, a HUD Settlement Statement, and an adjustable-rate note—make it clear the Gaydoses were purchasing the subject property, Unit 7104. When the purchase closed on 16 June 2006, the condominium developer executed a general warranty deed intending to convey the subject property to the Gaydoses (the "initial Gaydos vesting deed"), and the Gaydoses executed a note secured by a deed of trust in favor of its mortgagee, Deutsche Bank's predecessor-in-interest, EquiFirst Corporation (the "Gaydos deed of trust").[2] The initial Gaydos vesting

2. A second note and deed of trust were also executed by the Gaydoses to accomplish the condominium purchase. The second deed of trust is not at issue because it was assigned to Deutsche Bank's co-plaintiff, who dismissed its claims.

deed and the Gaydos deed of trust were recorded in the Mecklenburg County Register of Deeds on 19 June 2006.

The initial Gaydos vesting deed and the Gaydos deed of trust, as recorded in June 2006, correctly listed the address and the tax parcel number for the subject property throughout the documents; and the initial Gaydos vesting deed included a brief description at the top of the document identifying the subject property as "Unit 7104, Bldg 7 of Belle Vista Condominium, Phase V." However, the legal description of the subject property in the initial Gaydos vesting deed and attached to the Gaydos deed of trust incorrectly listed "Unit No. 7301, Building 7 of Belle Vista Condominium, Phase V" instead of identifying "Unit 7104." Unit 7301 is a separate property within the same condominium complex as the subject property but has a different address and different tax parcel number from the subject property.

Public records show that within one year of the Gaydoses' purchase of the subject property, on 21 May 2007, a second general warranty deed (the "second Gaydos vesting deed") was recorded that correctly identified Unit 7104 in the legal description and explained that "the purpose of this deed is to convey the correct property." Along with the recording of the second Gaydos vesting deed, the Gaydos deed of trust was rerecorded on 21 May 2007 with a correction in the attached legal description to identify Unit 7104. The Gaydos deed of trust was later assigned to Deutsche Bank by an assignment executed on 18 July 2014 and recorded on 25 August 2014.

After the Gaydoses filed for bankruptcy in July 2013, in May 2014, the condominium owners' association obtained relief from the bankruptcy stay to foreclose on the subject property due to unpaid assessments. The owners' association ultimately acquired title to the subject property by foreclosure deed executed and recorded on 13 March 2015 and, within approximately two months, conveyed the subject property to Gaydos & Family 14716 Via Sorrento Condominium, Inc. ("Gaydos & Family"), a business entity associated with the Gaydoses, by non-warranty deeds recorded in April and May 2015. In the same time frame as Gaydos & Family acquired title to the subject property, fraudulent satisfactions of the Gaydos deed of trust were recorded as part of a scheme allegedly orchestrated by the Gaydos/Earquhart Defendants.

Just two months later, on 7 July 2015, the Shahs purchased the subject property from Gaydos & Family and took title by general warranty deed (the "Shah vesting deed") under the belief that there were no outstanding liens. In connection with the purchase, the Shahs executed a

note secured by deed of trust for the subject property in favor of their mortgagee (the "Shah deed of trust"). The Shah vesting deed and the Shah deed of trust were recorded on 8 July 2015.

A. Validity of Deutsche Bank's Interest

The Shah Defendants first challenge the validity of Deutsche Bank's interest in the subject property, arguing that the Gaydos deed of trust never encumbered the subject property because (1) the Gaydos deed of trust as initially recorded was patently ambiguous and void as a result of the incorrect unit number in the attached legal description, and (2) efforts to correct and rerecord the Gaydos deed of trust were of no consequence. We disagree.

"In order to be valid, a deed or deed of trust must contain a legal description of the land 'sufficient to identify it' or refer 'to something extrinsic by which the land may be identified with certainty.' " *MTGLQ Inv'rs, L.P. v. Curnin*, 263 N.C. App. 193, 195, 823 S.E.2d 409, 411 (2018) (quoting *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 349 (1976)). "The entire deed should be considered when determining the identity of the land conveyed." *Id.* "The courts seek to sustain a deed if possible on the assumption that the parties intended to convey and receive land or they would never have been involved in the first place." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 462, 490 S.E.2d 593, 597 (1997) (citation and quotation marks omitted).

"When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous." *Overton*, 289 N.C. at 294, 221 S.E.2d at 349. As the Court in *Overton* explained, "[a] patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances *referred to in the instrument*, is unable to derive *therefrom* the intention of the parties as to what land was to be conveyed." *Id.* (emphasis in original) (citation, quotation marks, and parenthesis omitted). "Patent ambiguities arise when the uncertainty as to the meaning of a contract is so great as to prevent the giving of any legal remedy, direct or indirect." *Thomco Realty, Inc. v. Helms*, 107 N.C. App. 224, 227-28, 418 S.E.2d 834, 836 (1992) (citation and quotation marks omitted).

On the other hand, "[a] description is latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *Bradshaw v. McElroy*, 62 N.C. App. 515, 516, 302 S.E.2d 908, 910 (1983) (citation and quotation

marks omitted). "Latent ambiguities arise when there is confusion as to how to apply the words of an instrument to the object or subject which they describe. While an instrument containing a latent ambiguity is still enforceable (if extrinsic evidence exists to clarify the ambiguity), a patently ambiguous instrument is void." *Thomco Realty, Inc.*, 107 N.C. App. at 227, 418 S.E.2d at 836.

In arguing the Gaydos deed of trust is patently ambiguous, the Shah Defendants rely on *Overton*, in which the Court reviewed a deed purporting to convey a Chowan County tract of land described only as "a certain tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing, by estimation, Three Hundred and Nineteen Acres." *Overton*, 289 N.C. at 291, 221 S.E.2d at 348. Upon review, the Court in *Overton* explained: "[a]ll that the deed tells us about the land is that it is 'pocosin land,' i.e., swamp land, in Chowan County, it adjoins the lands of the late Henderson Luton and contains, by estimation, 319 acres[,]" *id.* at 294, 221 S.E.2d at 349 (emphasis omitted); "[i]t is a matter of common knowledge there are numerous, extensive tracts of pocosin land in Chowan County[,]" *id.* at 294, 221 S.E.2d at 349-50; and there were three separate recorded deeds conveying large tracts of Chowan County land to Henderson Luton, with each tract having one or more boundaries running along or through pocosin land, *see id.* at 294-95, 221 S.E.2d at 350. Because the deed left the reader in doubt as to the exact area and boundaries of the land intended to be conveyed and "refer[red] to nothing extrinsic to which one may turn in order to identify with certainty the land intended to be conveyed[,]" the Court held the deed was patently ambiguous and void. *Id.* at 294, 221 S.E.2d at 349.

Unlike in *Overton*, "[i]n the present case, the location and/or boundaries of the [property identified in the deed of trust] are not in dispute." *Schmitt*, 263 N.C. App. at 22, 823 S.E.2d at 398. The Gaydos deed of trust appears on its face to clearly identify the property to be encumbered. The ambiguity is revealed upon application of the legal description when it becomes evident that two separate condominium units are identified—the subject property by tax parcel number and address, and Unit 7301. The Shah Defendants assert that "[i]t is entirely unclear what property is being . . . encumbered given the conflicting descriptions" and "[f]rom the face of the [initial Gaydos vesting deed] and the [Gaydos deed of trust], it is just as plausible that the parties sought to convey and encumber Unit 7301 as it is that they sought to convey and encumber the [subject property]." The Shah Defendants contend there is nothing extrinsic referenced in the recorded documents to clarify the ambiguity and thus conclude that "under the *Overton* framework, . . . the legal

descriptions in the [initial Gaydos vesting deed and the Gaydos deed of trust] are patently ambiguous and, as such, are void."

On the other hand, Deutsche Bank contends any ambiguity is, at most, a latent ambiguity, and the inclusion of the street address and tax parcel number for the subject property are "refer[ences] to extrinsic data which describe the [s]ubject [p]roperty with certainty" and resolve the ambiguity. Deutsche Bank relies on *Schmitt*, 263 N.C. App. at 23, 823 S.E.2d at 399, as an example of this Court prioritizing tax parcel numbers and the street address in an inconsistent legal description. Deutsche Bank also relies on *In re Thompson*, 253 N.C. App. 46, 799 S.E.2d 658 (2017) ("*Thompson*"), and *In re Reed*, 233 N.C. App. 598, 758 S.E.2d 902, 2014 WL 1464183 (2014) (unpublished) ("*Reed*"), to argue "ambiguities caused by scrivener's errors in legal descriptions were latent rather than patent ambiguities and did not void the deeds of trust at issue" where the tax parcel numbers included in the deeds of trust resolved the ambiguity created by the errors. Upon review of those cases, we agree with the Shah Defendants this case is distinguishable.

In *Schmitt*, this Court discussed whether a deed of trust that referenced two separate tracts of property encumbered either tract individually, or both tracts, where the deed of trust included a legal description of one tract, the address for a second tract, and the parcel numbers for both tracts. *Schmitt*, 263 N.C. App. at 22-23, 823 S.E.2d at 398. Upon review of the entire deed to discern the parties' intent, this Court determined as a matter of law the deed evinced an intent to encumber both properties and was sufficient to do so where the "descriptions *did not conflict* . . . but rather identif[ied] the entirety of [both tracts] as the property encumbered by the deed of trust." *Id.* at 24, 823 S.E.2d at 399 (emphasis added) (citation, quotation marks, and brackets omitted). Thus, in *Schmitt*, the Court did not give the tax parcel number or address priority over a conflicting description. *See id.* There is no contention in this case the Gaydos deed of trust was intended to encumber both properties identified in the attached legal description, and, in contrast to *Schmitt*, the identification of both the subject property by tax parcel number and address and the identification of Unit 7301 are in conflict.

Similarly, in *Thompson* and *Reed*, the tax parcel numbers, and the address in *Thompson*, were not prioritized over a conflicting description of another existing property. In both *Thompson* and *Reed*, the deeds of trust at issue contained what this Court held to be scriveners' errors in the description of the encumbered property. *Thompson*, 253 N.C. App. at 52, 700 S.E.2d at 663; *Reed*, 2014 WL 1464183, at *4. In *Thompson*, the error was the identification of a plat number in a non-existent "Section

II-C" instead of an existing "Section III-C," 253 N.C. App. at 49, 799 S.E.2d at 661, and in *Reed*, the error was the misspelling of Navajo in the street address as "Navahjo[,]" 2014 WL 1464183, at *4. In both cases, the errors in the deeds of trust resulted in the identification of property that did not exist, and this Court determined based on information included and referenced within the four corners of the deeds of trust, including tax parcel numbers, the intent of the parties was clear and the deeds of trust contained a description of land sufficient to identify the encumbered property despite the scriveners' errors. *Thompson*, 253 N.C. App. at 52-53, 700 S.E.2d at 663-64; *Reed*, 2014 WL 1464183, at *4. Here, even if the inclusion of Unit 7301 was merely a scrivener's error, it is an existing condominium within the same complex as the subject property, and the identification of both Unit 7301 and the subject property in the legal description attached to the Gaydos deed of trust are in conflict. Since the subject property is identified in the attached legal description only by tax parcel number and address, the tax parcel number and address are part of the conflicting descriptions and do not provide clarity.

Although we agree with the Shah Defendants *Schmitt*, *Thompson*, and *Reed* are distinguishable, and including the subject property's tax parcel number and address in the attached legal description is not enough on its own to resolve the ambiguity created by the inclusion of Unit 7301, we disagree the conflicting descriptions in the attached legal description create a patent ambiguity in this case that results in a void deed of trust.

The legal description attached to the Gaydos deed of trust is not considered in isolation when determining whether the subject property is sufficiently identified to create a valid lien on the property; it must be considered within the context of the entire deed of trust. *See MTGLQ Inv'rs, L.P.*, 263 N.C. App. at 195, 823 S.E.2d at 411. Apart from the conflicting identifications in the attached legal description, the Gaydos deed of trust, including the attached adjustable-rate rider and the attached condominium rider, consistently identify the subject property by address and tax parcel number, reinforcing the intent to encumber the subject property and indicating the inclusion of Unit 7301 in the attached legal description was wrong. Moreover, the attached legal description also references the loan number for the note secured by the Gaydos deed of trust and the initial Gaydos vesting deed recorded simultaneously with the Gaydos deed of trust. Documents executed in connection with the loan and included in the record, including the note, clearly identify the subject property. And although the initial Gaydos vesting deed included a single reference to Unit 7301 in the legal description, the deed also correctly identified Unit 7104 in a brief description at the top

of the deed, corresponding to the tax parcel number and address provided throughout the deed and demonstrating the intent to convey the subject property. We are satisfied from our review of the Gaydos deed of trust, and the documents referenced therein the intent to encumber the subject property is clear.

And perhaps most important, the Gaydos deed of trust was corrected to identify Unit 7104 in the attached legal description and rerecorded on 21 May 2007, within one year of its initial recording. Assuming the Gaydos deed of trust was ambiguous as initially recorded, any ambiguity was resolved by the rerecording of the deed of trust with the corrected legal description.

Although the Shah Defendants acknowledge North Carolina General Statute Section 47-36.1 provides "a process for correcting errors in recorded documents[,]" they assert curative efforts to correct the Gaydos deed of trust were ineffective because a legal description cannot be changed *via* North Carolina General Statute Section 47-36.1. In support of their contention a legal description cannot be changed *via* North Carolina General Statute Section 47-36.1, the Shah Defendants cite to the statute and *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990). But neither the statute nor *Green* stand for such a broad rule.

When the Gaydos deed of trust was corrected and rerecorded on 21 May 2007, North Carolina General Statute Section 47-36.1 stated that:

> [A]n obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded.

N.C. Gen. Stat. § 47-36.1 (2007).

In *Green*, this Court reviewed a joinder agreement rerecorded under North Carolina General Statute Section 47-36.1 in an attempt to correct

the omission of a six-acre tract the defendants had admitted was "inadvertently left out." 96 N.C. App. at 658, 386 S.E.2d at 759. Although the trial court found the rerecorded joinder agreement was sufficient to incorporate the additional six-acre tract, this Court reversed the trial court, holding the rerecorded joinder agreement that added to the description of property and enlarged the property was "not the correction of an obvious typographical or clerical error." *Id.*

In contrast to *Green*, the rerecorded deed here does not add to the legal description or enlarge the property to be encumbered. Here, the rerecorded Gaydos deed of trust corrected the unit number in the attached legal description by crossing out "7301" and replacing it with "7104[,]" thus aligning the unit number with the subject property already identified by tax parcel number and address throughout the Gaydos deed of trust. In compliance with North Carolina General Statute Section 47-36.1, the rerecorded Gaydos deed of trust includes a statement of explanation stating that "THIS DEED OF TRUST IS BEING RE-RECORDED TO CORRECT THE UNIT NUMBER ON THE EXHIBIT 'A' LEGAL DESCRIPTION[,]" and the correction in the legal description is clearly marked and initialed by the closing attorney. We are satisfied the correction of the unit number in the legal description attached to the Gaydos deed of trust was a correction of "an obvious typographical or other minor error" and complied with North Carolina General Statute Section 47-36.1 (2007).[3]

Having determined the intent to encumber the subject property is clear from the Gaydos deed of trust and documents referenced therein, and the rerecorded Gaydos deed of trust was sufficient to correct the incorrect listing of the Unit 7301 in the attached legal description, we hold the Gaydos deed of trust was not void as patently ambiguous, and the Gaydos deed of trust was a valid lien encumbering the subject property.

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3. We note that the statutes governing corrections of errors in recorded instruments have been amended several times since the rerecording of the Gaydos deed of trust, and our holding may be different if limitations adopted in the amendments applied to the instant case. *See* N.C. Gen. Stat. § 47-36.2(a)(4) (2023) (defining an "obvious description error" to exclude "any error in the legal description that operates to convey any interest in real property that the grantor, trustor, mortgagor, or assignor owned at the time of conveyance but did not intend to convey"). But amendments to North Carolina General Statute Section 47-36.1, and the more recently enacted North Carolina General Statute Section 47-36.2, do not apply retroactively, *see* 2017 N.C. Sess. Laws 2017-110, sec. 5, and the amendments have consistently provided that "[n]othing in this section invalidates or otherwise alters the legal effect of any instrument of correction authorized by statute in effect on the date the instrument was registered." N.C. Gen. Stat. § 47-36.1(a) (2023).

B. Equity

[2] The Shah Defendants alternatively argue, even if the Gaydos deed of trust was a valid lien encumbering the subject property, the Shahs were innocent third-party purchasers for value, and Deutsche Bank was in the best position to discover the recordation of the fraudulent satisfactions of the security instrument and should bear any loss between the parties. The Shah Defendants rely on "the equitable principle that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss." *Johnson v. Schultz*, 364 N.C. 90, 93, 691 S.E.2d 701, 704 (2010) (citation omitted). In *Johnson*, the Court addressed "how North Carolina law allocates the risk of loss between a buyer and a seller when the closing attorney in a residential real estate transaction embezzles the sales proceeds." *Id.* at 91, 691 S.E.2d at 703. The Court held that

> after considering the procedures customarily used for residential real estate closings and applying long-standing principles of equity, we hold that buyers must bear the loss caused by the misconduct of their own retained attorney. We stress that it is the buyer alone in most residential real estate transactions who is legally deemed to repose confidence in the closing attorney through the existence of the attorney-client relationship.

Id. at 96, 691 S.E.2d at 705-06.

Unlike *Johnson*, this case does not involve loss in a real estate transaction between the parties, Deutsche Bank and the Shah Defendants. In fact, there is no indication Deutsche Bank ever had dealings with the Shahs before filing this case. As detailed above, the record shows Deutsche Bank was assigned the Gaydos deed of trust in July 2014, over eight years after the Gaydoses executed the deed of trust in favor of Deutsche Bank's predecessor-in-interest after the Gaydoses had entered bankruptcy. Within months of the assignment to Deutsche Bank, the condominium owners' association foreclosed on the subject property, the owners' association conveyed the property to Gaydos & Family, fraudulent satisfactions of the Gaydos deed of trust were filed, and the Shahs purchased the property from Gaydos & Family unaware the satisfactions were fraudulent.

In circumstances in this case, where two innocent parties are victims of a fraudulent satisfaction scheme of a third-party, our Courts have acknowledged a different long-standing rule in North Carolina:

> As between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior.

Household Realty Corp. v. Lambeth, 188 N.C. App. 545, 549, 656 S.E.2d 336, 339-40 (2008) (quoting *Union Cent. Life Ins. Co. v. Cates*, 193 N.C. 456, 462, 137 S.E. 324, 327 (1927) (citation and ellipses omitted)).

> The discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value. The owner of a mortgage, however, will lose priority over an innocent purchaser if the mortgagee is negligent with respect to the release of the mortgage.

Id. at 551, 656 S.E.2d at 340 (citation and quotation marks omitted).

Nothing in the record tends to show Deutsche Bank was involved in, aware of, enabling, or negligent regarding the fraudulent satisfactions filed to extinguish the Gaydos deed of trust. Even on appeal, the Shah Defendants merely speculate that Deutsche Bank "had the superior ability to discover and guard against the fraud and commercial relationship with a party who *may have been* involved in the underlying fraudulent scheme." (Emphasis added.).

Applying the rule from *Household Realty Corp.*, we hold the trial court correctly restored the fraudulently satisfied Gaydos deed of trust held by Deutsche Bank to its superior position in priority over the interests acquired by, or granted by, the Shahs as a subsequent innocent purchaser for value. *See id.* The Shah Defendants' equity argument is overruled.

IV. Conclusion

The Gaydos deed of trust, recorded on 19 June 2006 and rerecorded on 21 May 2007, created a valid lien encumbering the subject property. The Gaydos deed of trust was properly restored to its superior priority over any subsequently acquired interests in the subject property after fraudulent satisfactions were filed to extinguish the Gaydos deed of

trust. We affirm the trial court's entry of summary judgment in favor of Deutsche Bank, the holder of the Gaydos deed of trust.

AFFIRMED.

Judges TYSON and GORE concur.

FARMERS & MERCHANTS BANK, PLAINTIFF
v.
JEFFREY WAYNE HENLEY AND WIFE, BEVERLY HENLEY, DEFENDANTS

No. COA24-651

Filed 20 August 2025

1. Easements—express—void for vagueness—lack of specific location or purpose

In an action to quite title and for declaratory judgment, the trial court properly granted plaintiff's motion for judgment on the pleadings based on its conclusion that a purported easement across the subject property was void and of no effect. Despite defendants' argument, the same specificity requirements applied whether the purported easement constituted an express easement in gross or an express easement appurtenant. Here, where the purported easement used indefinite and ambiguous language by granting access to "not more than two (2.0) acres" of an 81.99-acre property without specifying the exact location or purpose, the easement could not be ascertained with reasonable certainty.

2. Declaratory Judgments—easement rights—void for vagueness—counterclaim properly dismissed

In a dispute involving a purported easement across the subject property, the trial court properly dismissed defendants' counterclaim seeking a declaratory judgment to define their rights and benefits from the purported express easement, where the court had properly concluded that the easement was void and of no effect for failure to specify a location or purpose.

3. Collateral Estoppel and Res Judicata—issue preclusion—validity of deed of trust—previously raised and rejected—affirmative defenses properly dismissed

In an action to quiet title, the trial court properly dismissed defendants' affirmative defenses—laches and unclean hands—where

defendants' basis for challenging the validity of plaintiff's deed of trust of the subject property had been previously raised and rejected in plaintiff's prior action (a power of sale foreclosure proceeding). Although defendants had alleged in the prior action that the deed of trust was unenforceable due to "material alterations" and asserted in the current action that "fraud" had occurred, defendants' allegations in both actions relied upon the same set of facts; therefore, their affirmative defenses were barred by collateral estoppel.

Appeal by Defendants from order entered 16 February 2024 by Judge Matthew B. Smith in Cabarrus County Superior Court. Heard in the Court of Appeals 26 February 2025.

Mills Law, P.A. by William L. Mills, III, for Defendant-Appellants.

Offit Kurman, P.A., by Robert B. McNeill and Zipporah B. Edwards, for Plaintiff-Appellee.

CARPENTER, Judge.

Jeffrey Wayne Henley ("Defendant-Jeffrey") and Beverly Henley (collectively, "Defendants") appeal from the trial court's 16 February 2024 order (the "Order") granting the motion for judgment on the pleadings filed by Farmers & Merchants Bank ("Plaintiff") and dismissing Defendants' counterclaim and affirmative defenses. On appeal, Defendants argue the trial court erred by granting Plaintiff's motion for judgment on the pleadings and dismissing their counterclaim and affirmative defenses. After careful review, we affirm the Order.

I. Factual & Procedural Background

On 23 September 1998, Defendant-Jeffrey obtained approximately 3.5 acres of land in Cabarrus County, North Carolina from Timothy Alan Hurst. Four months later, on 11 January 1999, Defendant-Jeffrey obtained an additional 3.58 acres from Hurst. Then, on 9 April 1999, Hurst purported to grant Defendant-Jeffrey an easement (the "Purported Easement") of "not more than two (2.00) acres" over Hurst's remaining 81.99 acres of land. The description of the Purported Easement appears in the easement deed as follows:

> This is an easement for JEFFREY WAYNE HENLEY for the total of not more than two (2.00) acres from the parcel owned by TIMOTHY ALAN HURST, single, of Cabarrus County, State of North Carolina, the parcel being identified

> by "Parcel Identification Number 5508-01-6168-000, S/W side Morehead Road (SR 1300), 81.99 Acres, Township #2, 02 41 01300 in the property description block of Account #3658425, NBH Number 5508-03.
>
> This easement is granted for the sum of Ten (ten) (10) dollars and other valuable consideration, in hand paid and received, and accepted as value received.

In 2006, Defendants and Hurst entered into an agreement to collectively sell the 3.5 acres Defendants purchased from Hurst in 1998 and approximately 72 acres owned by Hurst (collectively, the "Property") to Cramer Mountain Development Company, LLC ("Cramer"). Agents for Defendants, Hurst, and Cramer executed special warranty deeds for the Property to an entity, Moorehead I, LLC ("Moorehead"), who provided Defendants and Hurst with a promissory note secured by a deed of trust against the Property ("Defendants' Deed of Trust"). Thereafter, Moorehead obtained a loan from Plaintiff evidenced by a promissory note and secured by the Property through a deed of trust ("Plaintiff's Deed of Trust"). On 13 March 2007, both deeds of trust were recorded against the Property.

On 1 June 2009, after Moorehead defaulted on its loan obligations, Plaintiff initiated a power of sale foreclosure proceeding against Moorehead. Plaintiff voluntarily dismissed the action without prejudice on 14 July 2009. Thereafter, Plaintiff initiated a second power of sale foreclosure proceeding on 7 December 2010 (the "Prior Action"). On 24 March 2011, following an order authorizing foreclosure, Defendants moved to intervene and for relief from judgment, which was granted by the assistant clerk of superior court. When Plaintiff appealed the intervention order to superior court, Defendants responded with an affidavit prepared by a forensic document examiner identifying certain "alterations" in Defendants' Deed of Trust. After the appeal was dismissed as interlocutory, Plaintiff noticed the foreclosure for re-hearing. Defendants filed another affidavit prepared by a different forensic document examiner, identifying "handwritten alterations of the page numbers, document number, and recording time" on Plaintiff's Deed of Trust. Eventually, after continued litigation, the trial court entered an order authorizing foreclosure on 10 October 2017.

On 20 October 2017, Defendants appealed to this Court arguing the foreclosure was unauthorized because Plaintiff's Deed of Trust had been "materially altered." Put simply, Defendants challenged the validity of Plaintiff's Deed of Trust. This Court affirmed the trial court's order

authorizing foreclosure.[1] In doing so, we determined the modifications to Plaintiff's Deed of Trust did not constitute "material alterations" and that Defendants "produced no evidence that the text or substance of [Plaintiff's Deed of Trust] was altered, nor is there evidence that [Plaintiff] was involved with the alterations."

After acquiring title to the Property on 18 August 2020, Plaintiff filed a complaint (the "Complaint") against Defendants on 19 April 2023 seeking to quiet title and obtain a declaratory judgment that no easement existed across any portion of the Property (the "Current Action"). Plaintiff attached its deed to the Property and Defendants' easement deed as exhibits to its Complaint. On 11 July 2023, Defendants answered the Complaint, asserting a counterclaim and two affirmative defenses. Specifically, Defendants asserted the affirmative defenses of laches and unclean hands, and in their counterclaim, requested that the trial court "define the rights and benefits [Defendants] enjoy under the easement." Defendants set forth nineteen factual allegations in support of their challenges to the Complaint. In sum, Defendants alleged Plaintiff's Deed of Trust was procured by an alleged "fraud." On 11 December 2023, Plaintiff moved for judgment on the pleadings, arguing the Purported Easement was void for vagueness and that Defendants' affirmative defenses and counterclaim were barred by the doctrines of res judicata and collateral estoppel.

On 16 February 2024, following a hearing, the trial court entered the Order, concluding the Purported Easement was "void and of no effect." The trial court further declared that "no easement exists across any portion of the Property for Defendants' benefit." Finally, the trial court dismissed Defendants' affirmative defenses and counterclaim with prejudice. On 7 March 2023, Defendants filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues are whether the trial court erred by granting Plaintiff's motion for judgment on the pleadings and dismissing Defendants' affirmative defenses and counterclaim.

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1. The events giving rise to the foreclosure action under Plaintiff's Deed of Trust can be found in more detail in a previous opinion of this Court. *See In re Moorehead I, LLC*, 267 N.C. App. 690, 833 S.E.2d 254 (2019) (unpublished), *disc. rev. denied*, 374 N.C. 434, 841 S.E.2d 533 (2020).

IV. Analysis

A. Rule 12(c)

[1] First, Defendants assert the trial court erred by granting Plaintiff's motion for judgment on the pleadings because the Purported Easement is valid despite its lack of specificity as to location and purpose. Plaintiff, on the other hand, argues the Purported Easement is void because it is patently ambiguous. We agree with Plaintiff.

1. Standard of Review

"This Court reviews a trial court's order granting a motion for judgment on the pleadings de novo." *Sauls v. Barbour*, 273 N.C. App. 325, 332, 848 S.E.2d 292, 299 (2020) (citing *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005)). " 'Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Under Rule 12(c), " '[a]fter the pleadings are closed but within such time as to not delay the trial, any party may move for judgment on the pleadings.' " *Reese v. Brooklyn Vill., LLC*, 209 N.C. App. 636, 641, 707 S.E.2d 249, 253 (2011) (alteration in original) (quoting N.C. Gen. Stat. § 1A-1, Rule 12(c) (2009)). "The purpose of Rule 12(c) is 'to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit.' " *Id.* at 641, 707 S.E.2d at 253 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). The trial court "should grant the motion when a complaint does not allege 'facts sufficient to state a cause of action or pleads facts which deny the right to any relief.' " *Id.* at 641, 707 S.E.2d at 253 (quoting *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988)). In other words, judgment on the pleadings is proper "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 460, 261 S.E.2d 260, 261 (1980).

In ruling on a 12(c) motion, the trial court views the facts and permissible inferences in the light most favorable to the non-moving party, treating the well-pleaded factual allegations as true. *Terrell v. Laws. Mut. Liab. Ins. Co. of N.C.*, 131 N.C. App. 655, 659, 507 S.E.2d 923, 926 (1998) (citations omitted). The trial court considers only the pleadings, including any attached exhibits. *Id.* at 660, 507 S.E.2d at 926.

2. Easements

"An easement is a non-possessory right to make limited use of land owned by another without taking a part thereof." *Lester v. Galambos*, 258 N.C. App. 28, 33, 811 S.E.2d 661, 664–65 (2018) (citing *Adelman v. Gantt*, 251 N.C. App. 372, 377, 795 S.E.2d 798, 803 (2016)). Easements exist in two forms, appurtenant or in gross, *see Hinman v. Cornett*, 290 N.C. App. 30, 36, 891 S.E.2d at 572, 579 (2023) (citing *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963)), and may be created in a variety of ways, including by express grant, *Tanglewood Prop. Owners' Ass'n, Inc. v. Isenhour*, 254 N.C. App. 823, 830, 803 S.E.2d 453, 459 (2017).

"An easement appurtenant is a right to use the land of another, i.e., the servient estate, granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate." *Brown v. Weaver-Rogers Assocs., Inc.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998) (citing Webster, *Real Estate Law in North Carolina* §§ 15–3, 15–4 (1994)). An easement appurtenant is "created for the purpose of benefitting particular land." *Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 825–26 (2006) (quotation marks and citations omitted). Conversely, an easement in gross does not benefit any dominant estate, but is a "personal license granted to use the land of another[.]" *See Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324.

Express easements "must be 'sufficiently certain to permit the identification and location of the easement with reasonable certainty.' " *Wiggins v. Short*, 122 N.C. App. 322, 327, 469 S.E.2d 571, 575 (1996) (quoting *Adams v. Severt*, 40 N.C. App. 247, 249, 252 S.E.2d 276, 278 (1979)). In other words, "[w]hen an easement is created by deed . . . the description thereof 'must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers[.]' " *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984) (quoting *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942)). No specific language is needed but " '[t]here must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.' " *Id.* at 270, 316 S.E.2d at 249 (emphasis omitted) (quoting *Thompson*, 221 N.C. at 180, 19 S.E.2d at 485).

Although the validity of an express easement does not turn on whether the description sufficiently states a purpose, courts typically look to the "*nature of the right* and the intention of the parties creating [the easement]" to determine whether a particular easement is appurtenant or in gross. *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 325

(emphasis added and citations omitted); *Shingleton*, 260 N.C. at 455, 133 S.E.2d at 186 ("Whether an easement is appurtenant or in gross is controlled mainly by the nature of the right and the intention of the parties creating it, and must be determined by the fair interpretation of the grant [] creating the easement . . . ." (quotation marks and citation omitted)). Further, the easement's stated purpose aides in defining its scope. *See Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786–87 (1995). For this reason, the purpose of the easement " 'should be set forth precisely.' " *Id.* at 864, 463 S.E.2d at 786 (quoting I Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15–9 (4th ed. 1994)).

Ultimately, an express easement will be void for vagueness when "there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances *referred to in the instrument*—is yet unable to derive therefrom the intention of the parties as to *what land was to be conveyed*." *Allen*, 311 N.C. at 249, 316 S.E.2d at 270 (second emphasis added) (citing *Thompson*, 221 N.C. at 180, 19 S.E.2d at 485).

3. Discussion

Defendants assert the Purported Easement is an easement in gross because it does not benefit a dominant estate but grants Defendants a personal right to use up to two acres of Hurst's land. Defendants further argue, without citation to authority, that an express easement in gross need not sufficiently describe the easement to be valid. For the reasons outlined below, we conclude Defendants' Purported Easement, regardless of whether it is in gross or appurtenant, is void for vagueness.

As an initial matter, we reject Defendants' contention that express easements in gross are not subject to the same specificity requirements as express easements appurtenant. Easement deeds are, at bottom, contracts, *Lovin v. Crisp*, 36 N.C. App. 185, 188, 243 S.E.2d 406, 409 (1987), and contracts concerning real property must include a description of the land—the subject matter of the contract—to satisfy the statute of frauds, *see In re Thompson*, 253 N.C. App. 46, 49–50, 799 S.E.2d 658, 662 (2017); N.C. Gen. Stat. § 22-2 (2023). Moreover, easements in gross are disfavored and are less common than easements appurtenant. *See Gibbs v. Wright*, 17 N.C. App. 495, 498, 195 S.E.2d 40, 42–43 (1973) (explaining easements in gross are "not favored" and that easements "will never be presumed as personal when it may fairly be construed as appurtenant to some other estate"). As a result, our body of case law addressing the sufficiency of deeds granting express easements in gross is limited, unlike our case law addressing the sufficiency of deeds purporting to

grant easements appurtenant. *See*, *e.g.*, *Brown*, 131 N.C. App. at 124, 505 S.E.2d at 325. Nevertheless, our precedent concerning specificity does not distinguish between types of express easements, and we discern no reason to depart from these rules in this context. In our view, it would defy logic to apply a less-exacting specificity standard to an express easement in gross when easements in gross are disfavored. *See Shingleton*, 260 N.C. at 455, 133 S.E.2d at 186. Therefore, express easements, whether in gross or appurtenant, must describe the easement with sufficient certainty to be valid. *See Wiggins*, 122 N.C. App. at 327, 469 S.E.2d at 575.

Turning to the facts, Hurst purported to grant Defendant-Jeffrey an easement of "not more than two (2.0) acres" over Hurst's remaining 81.99 acres of land. The deed language of "*not more* than two (2.0) acres" is indefinite and ambiguous concerning the size and location of the Purported Easement. Although the deed uses the term "easement" and mentions the purported servient estate—Hurst's 81.99 acres of land—the deed wholly fails to indicate which two acres of Hurst's land are subject to the Purported Easement. By its terms, the easement deed seemingly grants Defendants an unfettered right to use up to any two of the 81.99 acres that constituted Hurst's land at the time of the conveyance. The description lacks sufficient specificity with respect to the Purported Easement's size and location.

Additionally, because the easement deed does not state a purpose, it is unclear what type of easement the parties intended to convey. *See Brown*, 131 N.C. App. at 123, 505 S.E.2d at 325. Even assuming the Purported Easement is an easement in gross, as Defendants suggest on appeal, the description of the Purported Easement is ambiguous because the easement cannot be ascertained with reasonable certainty. *See Wiggins*, 122 N.C. App. at 327, 469 S.E.2d at 575. Therefore, the deed is void because it is so uncertain "as to what land was to be conveyed." *See Allen*, 311 N.C. at 249, 316 S.E.2d at 270. Accordingly, the trial court did not err by granting Plaintiff's motion for judgment on the pleadings where the pleadings disclosed that no valid easement existed.

B. Counterclaim & Affirmative Defenses

Next, Defendants assert the trial court erred by dismissing their counterclaim and affirmative defenses. We disagree.

1. Declaratory Judgment

[2] Defendants assert the trial court erred by dismissing their counterclaim for declaratory judgment. This argument is without merit. In the Complaint, Plaintiff requested that the trial court declare that "no

easement exists across any portion of the Property for Defendants' benefit, [and] that the Purported Easement is void and of no effect[.]" In response, Defendants requested that the trial court "define the rights and benefits [Defendants] enjoy under the [e]asement[]" and called upon the trial court to "[f]ind that Defendants have and enjoy rights under the easement."

By declaring in the Order that "no easement exists across any portion of the Property for Defendants' benefit," the trial court resolved the parties' competing demands for declaratory judgment. The trial court determined the Purported Easement was void and of no effect and that Defendants, as a result, did not enjoy any rights under the Purported Easement. Therefore, the trial court's dismissal of Defendants' counterclaim for declaratory judgment was proper.

2. Laches and Unclean Hands

[3] Defendants also assert the trial court erred by dismissing their affirmative defenses of laches and unclean hands based on the doctrines of res judicata and collateral estoppel.

Before analyzing the merits of Defendants' argument, we first determine which doctrine applies to this case: res judicata or collateral estoppel. "Under the doctrine of *res judicata*, or claim preclusion, 'a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996) (quoting *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). "A final judgment generally is one which ends the litigation on the merits." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013) (quotation marks and citations omitted). "Under the companion doctrine of collateral estoppel . . . or 'issue preclusion,' the determination of an issue" in a prior action "precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted).

The primary difference between the two doctrines is res judicata precludes a party "from bringing a subsequent action based on the '*same claim*' as that litigated in an earlier action," while collateral estoppel "precludes the subsequent adjudication of a previously determined *issue*, even if the subsequent action is based on an entirely different claim." *Id.* at 15, 591 S.E.2d at 880 (emphasis added) (citation omitted). Though distinct, both doctrines "advance the twin policy goals of

'protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.' " *Id*. at 15–16, 691 S.E.2d at 880 (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)).

The two actions relevant here are: the Prior Action—Plaintiff's 7 December 2010 power of sale foreclosure proceeding; and the Current Action—Plaintiff's 19 April 2023 quiet title and declaratory judgment action. In the Prior Action, Defendants submitted an affidavit to the trial court prepared by a forensic document examiner in support of their contention that the page numbers, document number, and recording time for Plaintiff's Deed of Trust had been previously altered. On 10 October 2017, the trial court, having considered Defendants' affidavit and corresponding arguments, authorized foreclosure. Thereafter, Defendants appealed to this Court, arguing that Plaintiff's Deed of Trust was unenforceable due to "material alterations." Specifically, on appeal, Defendants contended the alterations "raised questions as to the validity of [Plaintiff's] Deed of Trust[.]"

In the Current Action, Defendants alleged Plaintiff's Deed of Trust was invalid due to "fraud." Because our preclusion analysis concerns a particular issue—the validity of Plaintiff's Deed of Trust—not an entire claim, issue preclusion is the applicable doctrine in the instant case. *See Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880.

Here, Defendants asserted two affirmative defenses: laches and unclean hands. "The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88–89, 712 S.E.2d 221, 230 (2011) (quotation marks and citation omitted). Put simply, the doctrine of laches operates as a bar where the plaintiff has delayed seeking relief. *See Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 506, 688 S.E.2d 717, 726 (2009). To establish laches the asserting party must show:

> (1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and must have worked to the disadvantage, injury or prejudice of the party asserting the defense; [and] (3) the delay of time has resulted in some change in the condition of the property or in the relations of the parties; however, the mere passage of time is insufficient to support a finding of laches.

Town of Cameron v. Woodell, 150 N.C. App. 174, 177, 563 S.E.2d 198, 201 (2002) (citation omitted). " 'The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands.' " *Collier v. Bryant*, 216 N.C. App. 419, 430, 719 S.E.2d 70, 79 (2011) (quoting *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985)).

In support of their affirmative defenses, Defendants, once again, dispute the validity of Plaintiff's Deed of Trust. Although Defendants alleged "fraud" instead of "material alterations," the factual allegations reveal that Defendants' primary contention is not meaningfully different from that raised and rejected in the Prior Action. Specifically, Defendants alleged the following, in pertinent part, in their answer to the Complaint:

> 26. As a part of the fraud a deed of trust encumbering the Property was recorded on March 13, 2007 by a paralegal working for the attorney representing the Plaintiff naming that attorney as trustee and the defendants as beneficiary at 4:24 PM as document number 8880 Deed Book 7393 page 19.
>
> 27. The same day the deed of trust at the root of the Plaintiff's title naming the Plaintiff as beneficiary was recorded 4:25 PM as document number 8881 Deed Book 7393 page 20.
>
> 28. The paralegal returned to the office of the attorney with copies of the deeds of trust showing the recording as described in paragraphs 26 and 27.
>
> 29. The defendants are informed and believe that the attorney then contacted Fletcher L. Hartsell, Jr. who was then a licensed attorney practicing in Concord, NC and requested that he ask the Register of Deeds to *reverse the order of recording of the two deeds of trust.*
>
> 30. The defendants are informed and believe that early on the morning of March 14, 2027 (sic) Fletcher L. Hartsell, Jr. visited the then Register of Deeds for Cabarrus County, Linda F. McAbee in her office and prevailed upon her to *alter the deeds of trust* so that they appear in the public record as shown in Exhibits A and B hereto attached.

Defendants' allegations rely upon the same set of facts as those giving rise to their "material alteration" argument. Like the Prior Action, Defendants contend Plaintiff's Deed of Trust is invalid due to suspicious

behavior regarding how and when the parties' competing deeds of trusts were recorded. Indeed, Defendants contended that "Plaintiff now seeks to gain the final full measure of benefit from the fraud by depriving [Defendants] of the rights and benefits they enjoy under the Easement." This issue, however, was previously raised and rejected by a trial court and this Court in the Prior Action, resulting in a final judgment. *See Duncan*, 366 N.C. at 545, 742 S.E.2d at 801. In the Prior Action, Defendants produced affidavits referencing the alterations made in both deeds of trust. The trial court nevertheless authorized foreclosure, implicitly rejecting Defendants' contention that Plaintiff's Deed of Trust was invalid on the merits.

Accordingly, Defendants' affirmative defenses, predicated upon the same assertion, are barred by the doctrine of issue preclusion. *See Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880. Thus, the trial court did not err by dismissing Defendants' affirmative defenses.

V. Conclusion

The trial court did not err by granting Plaintiff's motion for judgment on the pleadings and dismissing Defendants' affirmative defenses and counterclaim. Accordingly, we affirm the Order.

AFFIRMED.

Judges ARROWOOD and STADING concur.

DENISE GONZALEZ AND EVAN DREW, PLAINTIFFS
v.
SEAN MARFIONE AND KELLY MARFIONE, DEFENDANTS

No. COA24-921

Filed 20 August 2025

Adverse Possession—statutory period—tacking—land falling outside the deed's description—minority rule adopted in North Carolina

In a dispute between adjacent property owners over plaintiffs' use of a forty-one-foot tract of land on defendants' property, which the prior owner of plaintiffs' property had maintained and used for years but which was not mentioned in the prior owner's deed, the trial court properly denied summary judgment to plaintiffs on their adverse possession claim where plaintiffs failed to satisfy the twenty-year statutory period required for claims without color of title. Since the disputed tract was not mentioned in plaintiffs' deed—which mirrored word-for-word the prior owner's deed—they lacked the privity of estate or connection of title needed to tack their possession to that of the prior owner. Further, plaintiffs failed to demonstrate that the prior owner of their property actually conveyed to them her interest in the disputed tract—a requirement under the minority rule followed in North Carolina for tacking possession of land falling outside a deed's description.

Judge MURRY dissenting.

Appeal by plaintiffs from orders entered 18 July 2023 by Judge Marvin Pope, and 11 October 2023 by Judge Steve Warren, in Henderson County Superior Court. Heard in the Court of Appeals 22 May 2025.

Roberts & Stevens, PA, by David Hawisher, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, for defendants-appellees.

FLOOD, Judge.

Plaintiffs Denise Gonzalez and Evan Drew appeal from the trial court's orders denying Plaintiffs' motion for partial summary judgment,

and granting Defendants Sean and Kelly Marfione's motion for summary judgment, on Plaintiffs' claim for adverse possession. On appeal, Plaintiffs argue the trial court erred because "privity of possession" supports tacking Plaintiffs' possession of a disputed forty-one-foot tract of land to the prior owner's possession of that tract for purposes of adverse possession. Upon review, we conclude Plaintiffs have failed to demonstrate they met the required twenty-year statutory period to support their claim for adverse possession. We therefore affirm the trial court's orders.

I. Factual and Procedural Background

Plaintiffs and Defendants own adjacent properties, 388 Jubilation Drive and 300 Jubilation Drive, respectively, in Hendersonville, North Carolina. On 25 April 2001, Kenneth and Annie Walden (the "Waldens"), who at that time owned both properties, conveyed 388 Jubilation Drive via deed to Randall and Ann Marie Buhrmaster (the "Buhrmasters").[1] In "late 2001[,]" the Buhrmasters began using a forty-one-foot tract of land (the "Disputed Tract"), adjacent to their property and located at 300 Jubilation Drive, which they believed they had purchased from the Waldens for "about a thousand dollars[,]" but "nobody could find a record" of the transaction. The Buhrmasters cleared the Disputed Tract, "put up a trampoline[,]" "installed a fence[,]" and added a garden and "firepit area" within the Disputed Tract.

The Buhrmasters continued to use the Disputed Tract without objection from their neighbors until, on 11 April 2016, Ann Marie Buhrmaster (hereinafter "Buhrmaster")—who by then had been widowed and moved to Florida—conveyed 388 Jubilation Drive to Gonzalez. On 21 February 2018, Gonzalez executed a new deed adding Drew to the deed as joint tenants with rights of survivorship (the 2016 and 2018 deeds are hereinafter collectively referred to as "Plaintiffs' Deed"). Plaintiffs' Deed did not include or refer to the Disputed Tract; rather, Plaintiffs' Deed "mirror[ed] word-for-word the deed [the] Buhrmaster[s] received" from the Waldens in 2001, which likewise did not include or refer to the Disputed Tract. At the time Buhrmaster conveyed the deed to Plaintiffs, there was no "document . . . that would reflect the land transfer" of the Disputed Tract, and Plaintiffs and Buhrmaster did not discuss the

1. While not salient to the tacking issue on appeal, as background, on 15 April 2002, the Waldens conveyed 300 Jubilation Drive to Larry Walden; on 7 June 2005, Larry and Melissa Walden conveyed the property to David and Jane Johnson; and on 25 April 2019, David and Jane Johnson conveyed the property to Defendants.

Disputed Tract. Plaintiffs continued to maintain and use the Disputed Tract largely as the Buhrmasters had.

On 30 March 2022, Plaintiffs commenced the underlying action, seeking, among other claims, adverse possession of the Disputed Tract. Plaintiffs alleged, in relevant part, adverse possession following a "continuous and uninterrupted . . . period [of use of the Disputed Tract] in excess of [twenty] years collectively" between Plaintiffs and Buhrmaster. On 28 April 2023 and 10 July 2023, Plaintiffs and Defendants, respectively, filed motions for summary judgment as to Plaintiffs' adverse possession claim. Plaintiffs argued privity existed between themselves and Buhrmaster sufficient to support tacking, and provided as supporting evidence Buhrmaster's affidavit, submitted 22 November 2022, expressing her "desire to convey to [Plaintiffs] all my rights and use associated with my adverse possession of" the Disputed Tract. Defendants argued Plaintiffs failed to demonstrate the statutory period of possession required for a claim of adverse possession, specifically arguing Plaintiffs lacked the privity necessary to "tack" subsequent adverse possession periods onto one another.

On 29 June and 9 October 2023, the trial court held hearings on Plaintiffs' and Defendants' motions, respectively. In an order entered 18 July 2023, the trial court denied Plaintiffs' motion for partial summary judgment as to adverse possession; in an order entered 11 October 2023, the trial court granted Defendants' motion for summary judgment.[2] On 5 December 2023, Plaintiffs filed a "voluntary dismissal without prejudice" as to their remaining pending claims. Plaintiffs timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear this appeal from the final judgment of a superior court, pursuant to N.C.G.S. § 7A-27(b) (2023). Here, because Plaintiffs filed a "voluntary dismissal without prejudice" as to their remaining pending claims, "[a]ll claims and judgments are final with respect to all the parties, and there is nothing left for the trial court to determine." *See Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 508 (2004).

III. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that

2. The trial court granted Plaintiffs' partial motion for summary judgment as to a claim of easement by prescription; this portion of the order is not at issue on appeal.

there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (citation and internal quotation marks omitted).

> A genuine issue is an issue that is supported by substantial evidence, and an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.
>
> The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

James H.Q. Davis Tr. v. JHD Props., LLC, 387 N.C. 19, 23 (2025) (citations omitted) (cleaned up). "Under a *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re S.W.*, 914 S.E.2d 457, 461 (N.C. Ct. App. 2025) (citation omitted).

IV. Analysis

On appeal, Plaintiffs argue that the trial court erred because "privity of possession" supports tacking Plaintiffs' possession of the Disputed Tract to Buhrmaster's possession of the Disputed Tract for purposes of adverse possession. We disagree.

A. Adverse Possession, Privity, and Tacking

Under North Carolina law, real property may be claimed through adverse possession under color of title for a statutory period of seven years, or under claim of right without color of title for a period of twenty years. N.C.G.S. §§ 1-38(a), 1-40 (2023); *see also Newkirk v. Porter*, 237 N.C. 115, 119 (1953). "In either case, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous, and hostile to the true owner's title and to all persons for the full statutory period." *Newkirk*, 237 N.C. at 119; *see also Hinman v. Cornett*, 386 N.C. 62, 65 (2024) ("Adverse possession under claim of right without color of title requires actual, open, notorious, continuous, and hostile possession for a period of at least twenty years."). "[I]n order that title may be ripened thereby, such possession must be shown to

have been continuous and uninterrupted for the full statutory period." *Newkirk*, 237 N.C. at 119. The reason for the continuity requirement is "that if the possession of the adverse claimant be broken, the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession." *Id.* at 119.

"[I]n order to fulfil the requirements as to continuity of possession," however, "it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists." *Id.* at 119; *see also Dickinson v. Pake*, 284 N.C. 576, 585 (1974) ("Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."). North Carolina law permits tacking in numerous contexts; for example, tacking is permitted in the context of prescriptive easements, *see*, *e.g.*, *Rathburn v. Hawkins*, 56 N.C. App. 82, 85–86 (1982) (providing that the plaintiffs could "tack the possession of their predecessor in title . . . to their own use, as long as the offer[ed] proof at trial that the requirements to establish prescriptive use also existed in their predecessor"), and in the context of landlord-tenant relationships, *see*, *e.g.*, *Alexander v. Gibbon*, 118 N.C. 796, 801 (1896) (providing that a tenant's possession may be tacked to a landlord's possession for purposes of title by adverse possession).

Although "[t]here is no definition of the word 'privity' which can be applied in all cases[,]"

> [t]he ground of privity is property . . . and it relates to persons in their relation to property, [but] does not relate to any question, claim or right independent of property. [W]hether the privity be one of estate, contract, blood, or law, it has no personal basis as a mere matter of sentiment, but rests on some actual mutual or successive relationship to the same right of property.

Masters v. Dunstan, 256 N.C. 520, 524–25 (1962) (citation omitted). In the context of adverse possession, the two types of privity often at issue are "privity of possession," defined as "[p]rivity between parties in successive possession of real property," and "privity of estate," defined as "[a] mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant." *See Privity*, Black's Law Dictionary (12th ed. 2024); *see generally* 2 C.J.S. *Adverse Possession* § 157 (2025) (providing that the two types of privity often at

issue in the context of tacking are "privity of possession" and "privity of estate").

Our Supreme Court, in *Vanderbilt v. Chapman*, explained that, in general, "privity of possession" suffices to tack subsequent possessions:

> [I]n case of successive occupants, there must be some recognized connection between them. This connection may be effected by deed or will or other writing, or it may be shown by parol. It is said that there must be a privity between the successive occupants, but this does not at all mean that there must be a privity of title. . . . The privity referred to is only that of possession, and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves.

172 N.C. 809, 812 (1916); *see also Lancaster v. Maple St. Homeowners Ass'n*, 156 N.C. App. 429, 438 (2003) ("[T]he privity connection is made out [to permit tacking] if an adverse possessor transfers his possession to another by deed or will or even by parol transfer." (citation omitted)). The Court explained that once privity of possession has been established, a "claimant or subsequent holder" of real property may "avail himself to the adverse occupation of his predecessors[.]" *Vanderbilt*, 172 N.C. at 812; *see also* James A. Webster, Jr., 2 *Webster's Real Estate Law In North Carolina* § 14.09 (Michael B. Kent, Jr., James B. McLaughlin, Jr. & Patrick K. Hetrick, eds., 6th ed. 2024) (hereinafter "Webster's") ("This 'privity' or relational connection of possessions serves to blend successive possessions and makes them one continuous holding under one continuous claim although by two or more persons.").

Where parties seek to tack successive possessions for purposes of adverse possession, privity is established when the deed includes the disputed land: "[A] grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title, may tack his grantor's possession of such land to that of his own for the purpose of establishing adverse possession for the requisite statutory period." *Newkirk*, 237 N.C. at 119–20 (citing *Vanderbilt*, 172 N.C. at 812). The Court's decision under *Vanderbilt*, however, is less clear on the issue of tacking where the deed does not include the disputed land in the deed's description. *See Webster's* § 14.09 ("A more difficult question involves the case where an owner possesses beyond the described boundaries of his property. . . . The tough question is whether a grantee of the true owner

who takes possession beyond the true boundary can tack his grantor's possession to the property beyond the true boundary onto his own to perfect a claim of title to the land beyond the true boundary under the doctrine of adverse possession"). In a series of decisions subsequent to *Vanderbilt*, our appellate courts, when considering the issue of tacking beyond the described boundaries of the property, have specifically required privity of estate to tack subsequent possessions.

B. Tacking Possessions of Property Not Contained in the Deed

1. North Carolina Supreme Court Precedent

In *Ramsey v. Ramsey*, the plaintiff and the defendant owned adjacent tracts of land, both fenced in, except for "a small triangular tract outside" of their fences, on which a spring was located, but which was located on the "plaintiff's side of the dividing line" of their properties. 229 N.C. 270, 271 (1948). The defendant claimed ownership of the triangular section of land via "adverse possession for [twenty] years and also adverse possession under color." *Id.* at 271. On appeal to our Supreme Court, the Court dismissed the defendant's adverse possession claim for twenty years, concluding the defendant's possession of the triangular tract of land had "not continued for the requisite period and is therefore unavailing." *Id.* at 272–73. The Court then addressed whether the defendant could tack his possession of the triangular tract of land to that of the previous owner, and held that the defendant could not tack his possession:

> It is true there is evidence tending to show that his predecessor in title used the spring as he used it. But his deed did not convey or purport to convey the spring or the triangular tract upon which it is located. The description contained in [the] defendant's deed does not embrace it.

Id. at 273. The Court held that, because the deed did not describe, and therefore did not convey, the triangular tract of land, "*there is no privity* between [the defendant] and his predecessors in title as to this land which lies outside the boundary of the land conveyed by them." *Id.* at 273 (emphasis added). Because no privity existed between the defendant and his predecessors, the Court concluded the defendant was "not permitted to tack their possession, even if adverse within the meaning of the law, to his possession so as to show adverse possession for the requisite statutory period." *Id.* at 273.

Our Supreme Court in *Newkirk* applied the same rule set out in *Ramsey*, providing: "[T]he rule with us is that a deed does not of

itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith[.]" 237 N.C. at 120. The Court provided that "this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed." *Id.* at 120. The Court explained that the failure of the deed to describe the disputed area, "[n]othing else appearing, . . . raises the inference that the grantee claimed it independently and began a holding which was adverse to the grantor as well as to other persons." *Id.* at 120.

Next, in *Burns v. Crump*, the defendants claimed adverse possession of a one-tenth acre tract of land that was contained in the plaintiff's deed, but not contained in the defendant's deed, arguing the defendants possessed the land "under color[,]" and their predecessors in title possessed the land in dispute "continuously for more than twenty years." 245 N.C. 360, 360–61 (1957). The Court dismissed the defendants' color of title argument, explaining: "A deed which is color of title is such only for the land designated and described therein. Hence, the law with respect to color of title is not applicable to lands not embraced in the description in such deed." *Id.* at 362–63 (internal citations omitted). Turning next to the issue of tacking, the Court clarified: "A grantee in a deed is not entitled to tack the adverse possession of his predecessors in title as to a parcel of land not contained within the description in his deed, unless privity exists between the parties." *Id.* at 363. The Court, in describing the requisite privity, provided that "[s]everal successive possessions cannot be tacked for the purpose of showing a continuous adverse possession where there is no *privity of estate or connection of title* between the several occupants[.]" *Id.* at 364 (emphasis added) (citation omitted). The Court concluded that "[n]o privity exists, under our decisions, between the defendants and their predecessors in title as to the disputed area on the facts disclosed by the record on this appeal." *Id.* at 363–64.

Our decisions in *Ramsey*, *Newkirk*, and *Burns* express and clarify the rule that successive possessions of disputed land falling outside the description of a deed cannot be tacked, unless the party seeking adverse possession can establish "privity of estate or connection of title" so as to support tacking. *See Burns*, 245 N.C. at 364; *Newkirk*, 237 N.C. at 120; *Ramsey*, 229 N.C. at 272–73. Without this requisite privity, "*there is no privity* between [the party claiming adverse possession through tacking] and his predecessors in title as to [] land which lies outside the boundary of the land conveyed by them." *See Ramsey*, 229 N.C. at 273 (emphasis added).

2. Further Development of the Law Concerning Tacking

This Court in two recent decisions has applied the rule set forth above, acknowledging that North Carolina has adopted a minority position on this issue. In *Cole v. Bonaparte's Retreat Prop. Owners' Ass'n*, the plaintiffs filed a complaint for adverse possession of a parcel of land, located adjacent to the property the plaintiffs had purchased, and owned by the property owners' association. 259 N.C. App. 27, 32–33 (2018). Both the prior owner and the plaintiffs believed the disputed parcel belonged to the principal property, although the deed conveyed by the prior owner to the plaintiffs "excluded from the property description" the disputed parcel. *Id.* at 31. On appeal to this Court, we explained: "Courts in most other states allow tacking when a grantor adversely possessing property beyond the bounds of a parcel he owns by deed conveys the parcel described by deed to a grantee who continues adversely possessing the same extraneous property." *Id.* at 34–35. We provided, however, that "the North Carolina Supreme Court has repeatedly departed from the majority rule." *Id.* at 35. We concluded that the plaintiffs "lack[ed] the necessary privity to tack their adverse possession of [the disputed property] to that of [the previous owner]" where it was undisputed that the deed conveyed from the prior owner to the plaintiffs failed to include the disputed parcel in the description. *Id.* at 36–37.

This Court, in *Lackey v. City of Burlington*, also acknowledged that "[w]hile it appears the general rule applied in other states is to permit such tacking of possession to establish adverse possession, North Carolina has adopted a minority position." 287 N.C. App. 151, 157 (2022). We provided that "[u]nder North Carolina law, a party may *only* tack their possession on to that of a prior owner where the prior owner *actually conveys* their interest in the allegedly adversely possessed property." *Id.* at 157 (emphases added). We further explained: "If ownership is passed through a deed that does not include the allegedly adversely possessed property, the new owner may not tack the prior possession on to their own because, under North Carolina law, privity through a deed does not extend beyond the property described therein." *Id.* at 157 (citation and internal quotation marks omitted).

In light of our binding precedent,[3] we next proceed to discuss its application to the facts of the case *sub judice*.

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3. Contemporary secondary sources further acknowledge that North Carolina has adopted this minority rule. *See Webster's* § 14.09 ("North Carolina has adopted a minority position on this issue, however, and allows tacking only where the grantor actually

C. Privity Regarding the Disputed Tract

Here, Plaintiffs cannot tack their possession of the Disputed Tract to that of Buhrmaster's possession of the Disputed Tract because Plaintiffs' Deed contained no reference to the Disputed Tract, and as such, Plaintiffs have not established the requisite privity required under North Carolina law to support tacking. *See Burns*, 245 N.C. at 363–64; *Newkirk*, 237 N.C. at 120; *Ramsey*, 229 N.C. at 272–73; *Cole*, 259 N.C. App. at 35–37; *Lackey*, 287 N.C. App. at 157.

The facts in this case are similar to those in *Ramsey*, *Burns*, and *Cole*, where in each case, one party sought to tack possessions of land contained outside the description of the deed for purposes of adverse possession. *See Ramsey*, 229 N.C. at 271; *Burns*, 245 N.C. at 360; *Cole*, 259 N.C. App. at 32–33; *see also Lackey*, 287 N.C. App. at 157. Just as in those cases, where our appellate courts concluded that privity between the parties did not exist to support tacking because the deed did not include the description of the land in dispute, so here do we conclude Plaintiffs failed to establish the privity required to support tacking of Plaintiffs' possession to Buhrmaster's possession because Plaintiffs' Deed did not include a description of the Disputed Tract. *See Ramsey*, 229 N.C. at 272–73; *Burns*, 245 N.C. at 363–64; *Cole*, 259 N.C. App. at 35–37. Plaintiffs' Deed did not include or refer to the Disputed Tract; rather, the deed "mirror[ed] word-for-word the deed [the] Buhrmaster[s] received" from the Waldens in 2001, which likewise did not include or refer to the Disputed Tract. Further, at the time Buhrmaster conveyed the deed to Plaintiffs, there was no "document . . . that would reflect the land transfer" of the Disputed Tract, and Plaintiffs and Buhrmaster did not discuss the Disputed Tract. Finally, Buhrmaster's affidavit expressing her "desire to convey to [Plaintiffs] all my rights and use associated with my adverse possession of" the Disputed Tract is immaterial to the issue of privity in this case, because Plaintiffs' ownership was

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conveys his interest in the adversely possessed property."); *see also* 3 Am. Jur. 2d *Adverse Possession* § 74 (updated May 2025) ("Am. Jur. 2d") (citing to *Lackey* in explaining that "[s]ince privity through a deed does not extend beyond the property described therein, possession generally cannot be tacked to make out title by adverse possession where the deed by which the last occupant claims title does not include the land in dispute."). Am. Jur. 2d further provides that the "general rule is that a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor[,]" even if "the grantee enters into possession of the land not described and uses it in connection with the land that was conveyed." Am. Jur. 2d § 74 (citing *Burns*). Although Am. Jur. 2d explains the specific instances in which the "general rule" has been held to apply, it only cites to cases from jurisdictions other than North Carolina–precisely because North Carolina has adopted the minority rule. *See* Am. Jur. 2d § 74.

"passed through a deed" that did not include the Disputed Tract, meaning Plaintiffs could "not tack the prior possession on to their own[.]"[4] *See Lackey*, 287 N.C. App. at 157.

As our Supreme Court in *Burns* explained, and as this Court reinforced in *Lackey*, "privity of estate or connection of title" is required to support tacking for purposes of adverse possession, and because Plaintiffs failed to demonstrate that Buhrmaster "actually convey[ed her] interest in" the Disputed Tract, Plaintiffs may not tack their possession of the Disputed Tract to that of Buhrmaster's possession. *See Burns*, 245 N.C. at 364; *Lackey*, 287 N.C. App. at 157. Accordingly, there is no genuine issue of material fact as to possession of the Disputed Tract, and Defendants are entitled to judgment as a matter of law. *See In re Will of Jones*, 362 N.C. at 573.

As stated, North Carolina's rule is a minority position; it is, however, "elementary that we are bound by the rulings of our Supreme Court," *see Cole*, 259 N.C. App. at 36 (citation omitted), and "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court[,]" *see In re M.A.C.*, 291 N.C. App. 35, 39 (2023) (citation omitted). We are bound by precedent and therefore affirm the trial court's orders.

V. Conclusion

Upon review, we conclude Plaintiffs have failed to demonstrate they met the required twenty-year statutory period to support their claim for adverse possession of the Disputed Tract. We therefore affirm the trial court's orders.

AFFIRMED.

Judge STADING concurs.

Judge MURRY dissents in separate opinion.

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4. Buhrmaster's affidavit, having been made more than six years following her transfer of 388 Jubilation Drive to Plaintiffs, further demonstrates Plaintiffs' ownership of the Disputed Tract was not "effected by deed or will or other writing, or . . . shown by parol[,]" where the affidavit does not demonstrate an agreement or discussion between Buhrmaster and Plaintiffs, or an oral statement by Buhrmaster. *See Vanderbilt*, 172 N.C. at 812; *see generally Parol Evidence Rule*, Black's Law Dictionary (12th ed. 2024) (providing that an "agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing"); *Parol*, Black's Law Dictionary (12th ed. 2024) ("An oral statement or declaration.").

MURRY, Judge, dissenting.

Plaintiffs appeal the trial court's summary judgment for their Defendant neighbors regarding a disputed 41-foot strip of land that Plaintiffs claim to adversely possess under North Carolina's statutory and common law. *See* N.C.G.S. § 1-40 (2023). Because I read our Supreme Court's precedent as both an express and implied recognition of tacking through privity of possession, I respectfully dissent.

This Court's sparse precedent on this specific issue leads me towards a different conclusion of applicable law than that reached by my colleagues in the majority. As I understand our Supreme Court's precedent, the summary-judgment movants—here, Plaintiffs—"carry the burden of establishing" their "entitle[ment] to judgment as a matter of law." *Bernick v. Jurden*, 306 N.C. 435, 440 (1982) (quoting N.C. R. Civ. P. 56(c)). I believe that Plaintiffs meet the common-law element of continuity required for adverse possession under N.C.G.S § 1-40 by making out a *prima facie* claim for privity of possession with Ms. Buhrmaster necessary to tack their occupancy onto hers. N.C.G.S. § 1-40. Thus, I would hold that the trial court erred in granting summary judgment for Defendants.

I. Privities Distinguished

Our State has long recognized the statutory and common-law right to adversely possess another's property after an extended period of uninterrupted occupation.[1] *See*, *e.g.*, Act of Jan. 19, 1792, ch. XV, 1791 N.C. Sess. Laws 11 (barring title claims by State against "continu[ous] possession of any lands . . . under . . . colourable title[ ] for . . . twenty-one years"); *Gilchrist v. McLaughlin*, 7 Ired. 310, 314–15 (1847) (establishing at least "actual, open, and exclusive" adverse-possession elements at common law). Today, a more modern claimant may adversely possess disputed land after 7 years if she occupies it "under color of title," N.C.G.S. § 1-38(a), and after 20 years if she does so per se, *id.* § 1-40. Ordinarily, the adverse possessor must occupy the land "continuous[ly]" over the specified period—*i.e.*, an "uninterrupted" stretch of time. *Dickinson v. Pake*, 284 N.C. 576, 581 (1974). But a more recent adverse possessor

1. Indeed, North Carolina was the first state of the then-nascent Union to do so in 1715. *See* Act of Jan. 19, 1716, ch. XXVII, 1715 N.C. Sess. Laws 32 [hereinafter Old Titles of Land Act]; Charles C. Callahan, *Adverse Possession* 50–51 (1961) (describing contemporaneous legal reaction to nation's first adverse-possession statute).

may "tack" her occupational period onto a preexisting possession if she can show "privity with [the] prior adverse user[ ]" and thus "aggregate the prescriptive period." *Id.* at 585 (citing 1 James A. Webster, Jr., *Real Estate Law in North Carolina* § 289 (1st ed. 1971) [hereinafter *Webster*]). Faced with scant caselaw and unclear dicta on this point, our Supreme Court should take this opportunity to clarify what sort of non-title privity may enable this periodic tacking.[2]

"Privity" lacks a precise "definition . . . appli[cable] in all cases," *Masters v. Dunstan*, 256 N.C. 520, 524 (1962), but means at least a "connection or relationship between two parties" that have a "legally recognized interest in the same subject matter," *Privity*, *Black's Law Dictionary* (12th ed. 2024) [hereinafter *Black's Law*]. In the context of adverse possession, this "successive relationship[ ] to the same rights of property" falls into one of two overarching categories: (1) "privity of estate" or (2) "privity of possession." 2 C.J.S. *Adverse Possession* § 157, Westlaw (database updated July 2025); *Barrett v. Brewer*, 153 N.C. 547, 549 (1910) ("To constitute *color* of title there must be a paper title to give color to the adverse possession, whereas a *claim* of title may be constituted wholly by parol." (emphases added)). These two privities distinguish between the *legal right to* and the *actual possession of* certain property. *Privity*, *Black's Law*. This distinction is crucial to Plaintiffs' claim.

A. Privity of Estate Distinguished

The more commonly analyzed privity of estate (*i.e.*, privity of title) enables tacking where the claimant asserts continuity under color of title. *Price v. Tomrich Corp.*, 275 N.C. 385, 392 (1969); *see Privity*, *Black's Law* (synonymizing "privity of estate" with "privity of title" (italicization omitted)). As N.C.G.S. § 1-38 recognizes, a privity-of-estate assertion "shortens the relevant time period for adverse[-]possession claims from [twenty] to seven years." 1 N.C. Index 4th *Adverse Possession* § 16, Westlaw (database updated July 2025). An adverse possessor may present a "valid deed" for her claimed property that "serve[s] as color of title." *Hensley v. Ramsey*, 283 N.C. 714, 733 (1973) (citing *Price*, 275 N.C.

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2. Because the issue of tacking requires highly specific fact patterns and highly motivated litigants to even present an addressable question of law, the lack of more recent North Carolina cases on this point is not surprising. *Accord Cole v. Bonaparte's Retreat Prop. Owners' Ass'n*, 259 N.C. App. 27, 36 n.2 (2018) (first citing *Ramsey v. Ramsey*, 229 N.C. 270 (1948); then citing *Newkirk v. Porter*, 237 N.C. 115 (1953); and then citing *Burns v. Crump*, 245 N.C. 360 (1957)) (acknowledging "paucity of more contemporary decisions from either . . . [c]ourt applying the tacking[-]privity rule.")).

at 392). This faster route to adverse possession than with privity of possession implies somewhat stricter requirements as a corollary, which our Supreme Court best explicated in *Ramsey v. Ramsey*, 229 N.C. 270 (1948), and *Burns v. Crump*, 245 N.C. 360 (1957).[3]

In *Ramsey*, the plaintiff sued an unrelated defendant neighbor to title of a "small triangular tract" containing a natural-water spring that they both used. *Ramsey*, 229 N.C. at 271. The tract fell inside the plaintiff's property as described in the metes and bounds of his deed, but outside those of the defendant's deed. *See id.* at 271–72. At trial and on appeal, the defendant claimed both "adverse possession for 20 years and . . . under color" of title. *Id.* at 271. He claimed to "use[ ] th[at] spring for general purposes . . . and . . . kept . . . [it] in usable condition for more than 50 years" prior to suit. *Id.* After discarding the privity-of-possession claim on non-exclusivity grounds, *see id.* at 272, the Court dismissed the defendant's privity-of-title claim because "his deed did not . . . purport to convey the spring or the triangular tract upon which it is located." *Id.* at 273. It reasoned that—like Plaintiffs here—the defendant lacked estate "privity between him and his predecessors in title as to [ ] his land" because the disputed property "lie[d] outside the boundary . . . conveyed." *Id.*

Burns reaffirmed *Ramsey*'s acknowledgement that a grantee cannot "tack the adverse possession of his predecessors in title as to a parcel" not "descri[bed] in his deed[ ] *unless* privity exists between the[m]."[4] *Burns*, 245 N.C. at 363 (emphasis added) (citing *Ramsey*, 229 N.C. at 273). For the same purpose as in *Ramsey*, the *Burns* defendants adduced at trial a deed to a "45-acre tract of land [that] d[id] not

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3. For the (unsuccessful) sake of brevity, I forgo in-depth discussion of *Newkirk* but briefly note its alignment with both *Ramsey* and *Burns* (collectively, "*NRB*") in this context. The majority's *Newkirk* synopsis confirms "that a deed does not *of itself* create privity between the grantor and the grantee." (Emphasis added; quoting *Newkirk*, 237 N.C. at 120.) But I respectfully disagree with the majority's over-preclusive conclusion drawn from this principle and instead read *Newkirk* as simply recognizing that at least a privity-*of-estate* claimant "may tack his grantor's possession . . . to that of his own . . . [to] establish[ ] adverse possession." *Newkirk*, 237 N.C. at 119–20 (citing *Vanderbilt v. Chapman*, 172 N.C. 809, 812 (1916)).

4. *Ramsey* is the first of several 1950s tacking cases in which our Supreme Court acknowledged and reaffirmed *Vanderbilt*'s title–possession distinction. *See* 1 Am. Jur. 1st *Adverse Possession* § 155 (1936); *accord*, *e.g.*, *Locklear v. Oxendine*, 233 N.C. 710, 715 (1951) (distinguishing "color of title . . . [a]s *one* of the methods by which title may be shown" (emphasis added)); *Newkirk*, 237 N.C. at 121 (citing 1 Am. Jur. 1st §§ 153, 156); *Burns*, 245 N.C. at 364 (characterizing at least *Ramsey*, *Locklear*, and *Newkirk* as "in accord with the view expressed in 1 Am. Jur. 1st §§ 151–56").

cover the disputed area" between them and the plaintiff. *Id.* at 362. In response, the *Burns* Court characterized *Ramsey* as "in accord with the views expressed in 1 Am. Jur. 1st pp. 880–82," a contemporaneous common-law treatise recognizing that:

> A continuous adverse possession for the full statutory period may be accomplished by a parol understanding, under which the premises are delivered by a written conveyance. *It is not material that, in the sale, the land claimed by adverse possession is not described in that conveyance.*
>
> A deed does not *of itself* create privity as to land not described in the deed. This rule is limited to *only* where the deed itself is relied on *solely* to create privity, and there is *no* circumstance showing an intent to transfer any property beyond the calls of the deed.

1 Am. Jur. 1st *Adverse Possession* §§ 155–56 (1936) [hereinafter Am. Jur. 1st] (citation modified; emphases added). Much like its *Ramsey* predecessor, the *Burns* Court reaffirmed these principles by rejecting the defendants' adverse-possession claim because a deed offered as "color of title is such only for the land designated and described therein." *Burns*, 245 N.C. at 362.

Read through the prism of *Vanderbilt v. Chapman*, 172 N.C. 809 (1916) (discussed below), *Burns* and *Ramsey* articulate the blackletter rule that an adverse-possession claimant must offer an instrument documenting her right to certain realty if, *but only if*, she bases her tacking claim on privity of estate. But neither case precludes the possibility of a claim based on privity of possession. Because it rests upon a deed's actual language, privity of estate remains the most recognizably enforceable (and practically sound) means of tacking possessory periods onto one another in North Carolina. *E.g.*, *Walls v. Grohman*, 315 N.C. 239, 249 (1985) (relying on deed language to permit adverse possession "founded on a mistake"). But it is not the only means.

B. Privity of Possession Recognized

Our state's common law has always recognized privity of possession in principle, even if our modern courts have dodged the core question in practice. *Contrast Ramsey*, 229 N.C. at 273 (reaffirming *Vanderbilt*, 172 N.C. at 812), *with*, *e.g.*, *Lancaster v. Maple St. HOA*, 156 N.C. App. 429, 439 (distinguishing plaintiffs' cited caselaw from "tacking issues . . . between joint tenants . . . against each other"), *aff'd per curiam mem.*,

357 N.C. 571 (2003). Two distinct adverse possessors in North Carolina need only "agree upon the succession of one to the other" "[t]o warrant tacking in the case of voluntary transfer," Restatement (First) of Property § 464 cmt. b (A.L.I. 1944)—*i.e.*, "by parol transfer," *Lancaster*, 156 N.C. App. at 438 (quoting 1 *Webster* § 14-09 (5th ed. 1999)). A grantor need not record within the deed's four corners her intent to convey adversely possessed property; the grantee may instead rely on "word-of-mouth . . . evidence . . . not memorialized in the contract itself." Bryan A. Garner, *Garner's Modern English Usage* 804 (5th ed. 2022) [hereinafter Garner, *Modern English*] (defining "parol").

When assessing a parol transfer's possible intent, our courts "may consider all the surrounding circumstances" of the deed's execution to "ascertain[ ] and give[ ] effect" to "the intention of the parties." 9 N.C. Index 4th *Deeds* § 34. Because a "deed . . . is an executed contract," *Vettori v. Fay*, 262 N.C. 481, 483 (1964) (per curiam), we construe it by "ascertain[ing] the parties' intentions in light of all the relevant circumstances." 6 N.C. Index 4th *Contracts* § 76. Relevant circumstances here include "the situation of the parties[ ] and objects to be accomplished," as well as the "manner in which the[y] . . . carried out the [agreement's] terms . . . since its execution." *Id.* Thus, I believe that the parties' objective conduct before and after the 2016 conveyance of the 388 parcel to Ms. Gonzalez directly informs Plaintiffs' privity-of-possession assertion.

1. Cole v. Bonaparte's Retreat

Both the majority and Defendants here understandably overextend *Cole v. Bonaparte's Retreat Prop. Owners' Ass'n*, 259 N.C. App. 27 (2018), to deny "that privity merely by parol transfer [i]s acceptable" in North Carolina. Because *Cole* "conflicts with several decisions of the Supreme Court," *State v. Wilkerson*, 232 N.C. App. 482, 487 (2014), and misreads those "binding precedent[s]," *State v. Davis*, 198 N.C. App. 443, 449 (2009), I do not believe that *In re Civil Penalty*'s precedential command applies to *Cole*.[5] *See In re Civil Penalty*, 324 N.C. 373, 384 (1989); Bryan A. Garner et al., *The Law of Judicial Precedent* 306 (2016) (acknowledging permissible "reexamin[ation of] normal[ ] . . . precedent when the reasoning or theory of . . . prior [panel] authority is clearly

5. Albeit in the opposite direction, the *Cole* Court itself acknowledges the rationale I outline here. The *NRB* cases do "reflect that[,] in North Carolina, privity *through a deed* does not extend beyond the property [it] describe[s]." *Cole*, 259 N.C. App. at 36 (emphasis added). And *In re Civil Penalty*, 324 N.C. 373 (1989), certainly "compel[s us] to apply [*NRB*'s] rule" here. *Id.* I merely believe that *Vanderbilt* renders that "rule" inapposite.

irreconcilable with the reasoning or theory of intervening higher authority." (quotation omitted)).

In *Cole*, this Court partially affirmed a summary judgment for the defendant HOA that challenged the plaintiffs' adverse-possession claim. *Id.* at 44. In 2000, the plaintiffs purchased one "Lot 18" under the defendant's HOA jurisdiction from a prior grantor, who himself had purchased the lot from the original developer in 1981. *Id.* at 31. Both the prior grantor and the plaintiffs "mistakenly believed Lot 18 was a waterfront lot" because of the latter's improvements to an intervening "Parcel A" over the years. *Id.* The plaintiffs sued, arguing that both they and the original grantor intended Lot 18 as waterfront property even though Lot 18's deed excluded the disputed Parcel A from its property description. *Id.*

Because the plaintiffs' "deed . . . did not convey any possessory interest in Parcel A" on its face, the *Cole* Court reasoned that they could "not rely on it *alone* to establish privity for tacking their adverse possession of Parcel A to" the original grantor's own. *Id.* at 37 (emphasis added). Neither do Plaintiffs here assert only "privity through a deed." *Id.* at 36. They expressly disclaim that in favor of privity created by " 'physical possession . . . passe[d]' from one person to another 'by mutual consent.' " (Quoting *Vanderbilt*, 172 N.C. at 812–13.) Because the *Cole* Court precluded privity to property "beyond the bounds of a parcel" as recognized "in most other states," I would hold that it omitted *Vanderbilt* and thus misread its progeny in asserting that "the North Carolina Supreme Court has repeatedly departed from the majority rule" of parol-evidenced tacking. *Cole*, 259 N.C. App. at 35–36; *see, e.g.*, *State v. Davis*, 198 N.C. App. at 449 (declining to follow inapposite prior Court panel holding for "fail[ing] to follow binding precedent" already set by Supreme Court).

2. Vanderbilt v. Chapman

Vanderbilt v. Chapman articulates North Carolina's common-law distinction between privities of estate and possession. In *Vanderbilt*, our Supreme Court reversed a jury verdict that the plaintiff owned an entire 465-acre tract in Buncombe County (Vanderbilt tract) because of the defendants' failure to adversely possess 169 acres of it. *Vanderbilt*, 172 N.C. at 809. Both the Vanderbilt tract and the defendants' adjacent tract (Chapman tract) derived from a single State land grant in 1796 that the original grantee then subdivided. *See id.* at 809–10. Through an unbroken series of conveyances, the plaintiff held proper paper title to the Vanderbilt tract since that initial grant. *Id.* The Chapman tract's prior owner conveyed his portion to the defendants in 1914 to settle the estate

of his father, who had passed away roughly 11 years prior. *Id.* at 811. The plaintiff sued to quiet title in response, alleging that the defendants lacked the color of title necessary "to show . . . continuity of possession" with the 11-year "occupation of the . . . son." *Id.* at 814–15.

Reversing and remanding the jury verdict for a new trial, the *Vanderbilt* Court held that the defendants' occupational tacking to their predecessor "d[id] not at all . . . [require] a privity of title" between them. *Id.* at 812. It distinguished the defendants' "ownership asserted [a]s one dependent on adverse *physical* possession," where "[t]he privity referred to [wa]s *only* that of possession." *Id.* (emphases added). Much like Plaintiffs here, the *Vanderbilt* defendants argued on appeal for privity of possession that they established by "hold[ing] the[ir] property under or for another . . . and under an . . . arrangement recognized as valid between themselves." *Id.*

Reading it in the context of *Vanderbilt*, *Ramsey*, and *Burns*, I believe that *Cole* unduly confined North Carolina's privity claims to a particular deed's text and thus contradicts *Burns*'s express adoption of 1 Am. Jur. 1st described above. To hold otherwise abrogates extant caselaw, which acknowledges that "privity between the successive occupants . . . *does not at all* mean that there must be a privity *of title*." *Vanderbilt*, 172 N.C. at 812 (emphases added) (collecting 16 analogous privity-of-possession cases across 10 different state courts of last resort).[6] The North Carolina Supreme Court decisions bind this lower court's consideration of Plaintiffs' claim here regardless of their filing dates. *See Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 366 (2014) ("[W]e cannot overrule our Supreme Court's opinions . . . simply because the rule they recite is old . . . .").

3. Cumulus Broadcasting v. Shim

Turning forward to Plaintiffs' claim, I find the relatively modern Tennessee case of *Cumulus Broad., Inc. v. Shim*, 226 S.W.3d 366 (Tenn. 2007), particularly instructive.[7] In *Cumulus*, the plaintiff broadcaster

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6. *Vanderbilt* reaffirms the same adverse-possession principles discussed in its predecessor cases. *See, e.g.*, *Atwell v. Shook*, 133 N.C. 387, 394 (1903) ("For . . . 'tacking[,]' . . . there must be some privity, either of estate or possession, between the successive occupants."); *Bond v. Beverly*, 152 N.C. 56, 63 (1910) ("The attempted conveyances . . . , though we may treat the[ ] [deeds] as void, clearly establish the privity . . . ."); *Barrett v. Brewer*, 153 N.C. 547, 552 (1910) ("To show privity of possession, the later occupant . . . *must obtain his possession* either by purchase or descent . . . .").

7. Given that "[t]he legislature of North Carolina . . . passed" the Old Titles of Land Act essentially construed here by the Tennessee Supreme Court "while Tennessee was"

sought to quiet title to an adversely possessed highway-access road lying along a disputed property boundary with its defendant neighbor. *Id.* at 372. The plaintiff acquired the northern parcel in 1982 from its predecessor-in-interest following a series of prior conveyances. *Id.* at 370–71. The defendant similarly acquired the adjacent southern parcel in 1994. *Id.* at 370. After discovering in 2000 "a portion of the access road . . . on [his] property," the defendant built a fence across the road that blocked the plaintiff's vehicle access to its northern parcel. *Id.* at 371–72 (first alteration in original). The plaintiff initiated its lawsuit the next year in 2001. *Id.* at 372. After a chancery court granted the plaintiff summary judgment on its adverse-possession claim, the defendant appealed to the Tennessee Supreme Court. *Id.* 372–73.

On appeal, the defendant argued in relevant part that the plaintiff could not establish continuous adverse possession for the required 20-year period under Tennessee's common law. *Id.* at 373; *cf.* N.C.G.S. § 1-40 ("20 years"). In discussing the continuity element of adverse possession, the *Cumulus* Court acknowledged that title vests "[w]hen an adverse possessor holds the land for a period of twenty years, even absent any assurance or color of title." *Cumulus*, 226 S.W.3d at 377. This 20-year period may occur through "[s]uccessive possessions, or tacking, . . . if there is no hiatus" between the multiple occupations. *Id.* In rejecting the defendant's argument, the Court reasoned that tacking requires only that "the adverse possessor intended to and actually did turn over possession of . . . [the] land." *Id.* (alterations in original) (quoting 10 *Thompson on Real Property* § 87.14 (2d ed. 1994)). This modern affirmation of Tennessee's common-law tacking principle aligns with its parent state's historical recognition of the same. Thus, we should acknowledge that Plaintiffs may similarly pursue their privity-of-possession claim as a matter of North Carolina law.

C. Facts at Hand

1. 2001–2016

The parties here acknowledge Ms. Buhrmaster's lawful ownership of the 388 parcel and her adverse possession of the disputed strip, both commencing in 2001. The 388 parcel's deed did not reference this

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still geographically "a part of [our] state," I pause to note that Court's atypical persuasiveness regarding the principles of adverse possession. *Patton's Lessee v. Easton*, 1 Wheat 476, 479–81 (1816) (drawing upon 1715 act's North Carolinian caselaw to interpret analogous Tennessee statute), *abrogated by Gray v. Darby's Lessee*, Mart. & Yer. 396 (Tenn. 1825), *as recognized in Green v. Neal's Lessee*, 6 Pet. 291, 295 (1832).

lappage, thus making its possession by the Buhrmasters adverse from the start. Over the next 15 years, the Buhrmasters held out the strip as their own through activities such as "clear[ing] and landscap[ing]" it. *Cole*, 259 N.C. App. at 30. Neither of Plaintiffs' predecessors-in-interest, the Waldens nor the Johnsons, questioned the active occupation of the strip overlaying the 300 parcel up through Ms. Buhrmaster's 2016 conveyance to Defendants. Plaintiffs' predecessors-in-interest, the Johnsons, also parol evidenced Ms. Buhrmaster's adverse possession "before . . . the [deed] was signed," Garner, *Modern English* 804, when they acknowledged the Buhrmasters' doctrinal "right to exclude," *see* 24 N.C. Index 4th *Property* § 1, by planting a tree line along Plaintiffs' soon-to-be side of the strip. Thus, I would hold that Ms. Buhrmaster adversely possessed the strip for at least the 15 years between 25 April 2001 and 11 April 2016 as a matter of law.

2. 2016–2022

As noted above, I believe that Plaintiffs have adduced evidence sufficient to raise a "genuine issue . . . [of] material fact" as to whether they can meet the 20-year adverse-possession period by tacking their 6-year occupancy between 2016 and 30 March 2022, their date of suit. N.C. R. Civ. P. 56(c). Defendants acknowledge that Ms. Buhrmaster and Plaintiffs at least occupied the disputed strip over that period, so this case hinges on the continuity of those two occupancies. To this latter end, Ms. Buhrmaster attested to her "desire to convey to Denise Gonzalez all [her] rights and use associated with [the] adverse possession of the" disputed strip. Ms. Buhrmaster further documented her "desire [to] transfer . . . the said area of adverse possession . . . from 2001 until . . . 2016," at which point she "sold the property . . . to Denise Gonzalez" before "mov[ing] to Florida."

Defendants point out that Ms. Buhrmaster "did not . . . verbal[ly] convers[e] with Plaintiffs about her adverse possession" of the strip. But Ms. Buhrmaster demonstrated "the objects and motives of the parties to the[ir] deed," 9 N.C. Index 4th *Deeds* § 34, by leaving on the "41-foot strip . . . the sculpture," "trampoline," and "gardens" she installed for Defendants' apparent later use. Circumstantial evidence of this sort still suffices for summary-judgment consideration. *See* N.C. R. Civ. P. 56(e) ("[A]ffidavits shall be made on personal knowledge . . . [and] set forth . . . facts as would be admissible in evidence . . . ."); *State v. Parker*, 354 N.C. 268, 279 (2001) ("[T]he law does not distinguish between the weight . . . [of] direct and circumstantial evidence . . . .").

True enough, Ms. Buhrmaster "did not proclaim her intent until [6] years after the transfer" of the 388 parcel to Defendants. But that

length of time does not speak to Plaintiffs' claim of adverse possession at summary judgment. It instead speaks to Ms. Buhrmaster's "credibility [as] a witness," which can only "be resolved by the fact finder" *qua* jury at trial. *State Farm Life Ins. Co. v. Allison*, 128 N.C. App. 74, 77 (1997). Read in accordance with the precedent as described above, the filings evidence a *prima facie* capability to tack Defendants' 6-year occupation of the disputed strip onto Ms. Buhrmaster's previous 15 years. Based on these considerations, I believe that the parties raise a "genuine issue . . . [of] material fact" that merit reversal of the trial court's summary judgment for Defendants. N.C. R. Civ. P. 56(c).

II. Conclusion

For the above reasons, I would hold that the trial court erred by granting summary judgment for Defendants and would thus reverse and remand for further proceedings consistent with the principles articulated here. I respectfully dissent.

IN THE MATTER OF D.H., A JUVENILE

No. COA24-972

Filed 20 August 2025

Juveniles—delinquency—disposition—continuing DSS custody of juvenile—trial court's jurisdiction—statutorily required finding—proper exercise of discretion

In an appeal filed by the department of social services (DSS) in a delinquency matter involving a juvenile who brought a knife to school, the trial court's disposition order continuing the juvenile's custody with DSS was vacated and the matter was remanded. Although the trial court did have subject matter jurisdiction to require DSS to maintain custody of the juvenile—since the juvenile had not yet reached eighteen years of age and because the court did not automatically terminate its jurisdiction by entering the disposition order—it failed to include one of the findings required by N.C.G.S. § 7B-2506(1)(c) indicating that it was contrary to the juvenile's best interest to remain in his home. On the other hand, there was no merit to DSS's argument regarding the lack of competent evidence showing that the juvenile's parents could not make appropriate arrangements to meet the juvenile's needs pursuant to N.C.G.S. § 7B-2501(d); under that statutory provision, the court

possessed discretion to consider whether the parents could make appropriate home arrangements but was not required to make that consideration determinative in its disposition.

Appeal by Cumberland County Department of Social Services from order entered 4 June 2024 by Judge Toni King in Cumberland County District Court. Heard in the Court of Appeals 10 April 2025.

Dawn M. Oxendine, for appellant-Cumberland County Department of Social Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellee.

Attorney General Jeff Jackson, by Assistant Attorney General Megan Elizabeth Shook, for the State-appellee.

GORE, Judge.

Cumberland County Department of Social Services ("CCDSS") appeals the trial court's disposition order that continued the delinquent juvenile's custody with CCDSS. CCDSS argues the trial court lacked subject matter jurisdiction to enter the order, that the trial court failed to include findings to support continued custody with CCDSS pursuant to N.C.G.S. § 7B-2506(1)(c), and that the trial court lacked competent evidence to determine his parents would not be able to make appropriate arrangements to meet the juvenile's needs. Upon review of the briefs and the record, we vacate and remand.

I.

A petition was filed with the District Court, Cumberland County, after the juvenile had brought a knife to school. The juvenile was charged with a misdemeanor for using, threatening to use, or displaying a firearm or other deadly weapon and was pre-adjudicated to secure custody in a detention facility. The juvenile orders entered after each secure custody hearing prior to adjudication included findings that the juvenile's home was not an appropriate placement, and that the juvenile was a flight risk having run away from his mother's home multiple times. The trial court also found that the juvenile was aggressive towards his mother when he became angry and younger siblings were present in the home.

CCDSS received notice that it may be given non-secure custody of the juvenile because his home was not an appropriate placement for him.

The juvenile was adjudicated delinquent after entering an admission to the weapon charge. The juvenile was placed in nonsecure custody with CCDSS but remained in detention until the disposition hearing or placement. The trial court continued secure custody pending disposition and continued nonsecure custody with CCDSS. On 6 May 2024, the disposition hearing occurred, and the trial court entered a Level 1 Disposition requiring the juvenile to serve five days in detention and thereafter be released to CCDSS for it to maintain physical and legal custody. The trial court also set a nonsecure and permanency planning hearing for 3 June 2024. Upon the juvenile's release from detention, CCDSS assumed nonsecure custody. The juvenile ran away from CCDSS but returned two days later and was placed in a psychiatric hold at a medical center. CCDSS timely filed an appeal of the Disposition Order.

II.

CCDSS appeals of right pursuant to N.C.G.S. § 7B-2602(4). CCDSS argues the trial court lacked subject matter jurisdiction to order the juvenile's continued custody with CCDSS. Additionally, CCDSS argues even if the trial court had jurisdiction, they failed to include findings as required by N.C.G.S. § 7B-2506(1)(c) to continue custody with CCDSS. CCDSS also argues the trial court lacked competent evidence tending to show the parents were unable to provide "alternative arrangements to meet the juvenile's needs." We review a subject matter jurisdiction challenge de novo. *In re K.U.-S.G.*, 208 N.C. App. 128, 131 (2010). We also review de novo whether the trial court followed a statutory mandate. *In re G.C.*, 230 N.C. App. 511, 515–16 (2013).

CCDSS argues the trial court's jurisdiction "terminated when it entered its disposition order." We disagree. CCDSS relies on *In re K.C.* to demonstrate that any further orders entered after termination of jurisdiction are void. However, in *In re K.C.*, the trial court entered an order summarily dismissing the juvenile petitions and this resulted in the "simultaneous termination of its jurisdiction." 292 N.C. App. 231, 242–43 (2024). The facts in *In re K.C.* differ from the present case. Subject matter jurisdiction is initiated by the filing of the juvenile petition and does not cease until the trial court terminates jurisdiction or the juvenile reaches 18 years of age. N.C.G.S. § 7B-1601(b) (2023). Disposition orders are not automatic terminations of subject matter jurisdiction. *See* N.C.G.S. § 7B-2508 (2023) (providing different levels of disposition and articulating the court's authority to consider various disposition alternatives, as discussed in N.C.G.S. § 7B-2506 (2023)).

In the present case, the trial court entered a Level 1 Disposition after adjudicating the juvenile delinquent. The trial court also entered

an Order to continue nonsecure custody of the juvenile with CCDSS. Within the Disposition Order, the trial court determined CCDSS would maintain legal and physical custody of the juvenile and set a date for a PPH and nonsecure hearing. The Disposition Order findings were in accordance with what is allowed under a Level 1 Disposition.

N.C.G.S. § 7B-2508(c) states,

> Level 1—Community Disposition.—A court exercising jurisdiction over a juvenile who has been adjudicated delinquent . . . may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (13) and (16) of G.S. 7B-2506.

Section 7B-2506(1)(c) provides for juveniles who require more supervision and care to be placed in the custody of the department of social services in the county where the juvenile resides. The trial court must include "a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest." N.C.G.S. § 7B-2506(1)(c) (2023). Further, the trial court is required to have review hearings for this placement "in accordance with N.C.G.S. § 7B-906.1." *Id*. These requirements not only suggest subject matter jurisdiction is ongoing but also mandate the trial court's duty to oversee the juvenile's placement by referencing section 7B-906.1. Therefore, the trial court had subject matter jurisdiction to require CCDSS to maintain legal and physical custody of the juvenile because it had not terminated its jurisdiction, and because the juvenile was not 18 years of age.

Next, CCDSS argues the trial court did not make the proper finding as required in section 7B-2506(1)(c) to place a juvenile in the custody of CCDSS. As previously stated, the trial court is required to include a finding that it is contrary to the juvenile's best interest to remain in his home. § 7B-2506(1)(c). The trial court included the following findings in the Disposition Order:

1. That the juvenile shall be placed on a Level 1 Disposition.
2. That the juvenile shall serve 5 days in detention. Upon . . . serving the five days, the Department shall continue to maintain legal and physical custody of the juvenile pursuant to 7B-906.1.
3. That the Department continues to hold placement reviews.

4. That the Department as well as the juvenile's attorney shall receive a copy of the Comprehensive Clinical Assessment and Psychological Assessment once they are returned, and that the Department shall take the appropriate steps to find appropriate placement.
5. That the PPH and Nonsecure hearing shall be scheduled for June 3, 2024, at 8:30 AM.
6. That the Department shall contact whoever is the evaluator if they need the psychological evaluation expedited.

The trial court complied with most of the statutory requirements within section 7B-2506(1)(c), but it did not include the required finding that it is contrary to the juvenile's best interest to remain in the home. *See* § 7B-2506(1)(c). The trial court included the finding on an Order for Nonsecure Custody entered 24 June 2024, but that does not cure what is missing in the Disposition Order. As in *In re K.T.L.*, the trial court must include a finding pursuant to section 7B-2506(1)(c) that it is contrary to the best interest of the juvenile to remain in the home. 177 N.C. App. 365, 373 (2006). Accordingly, we must remand to the trial court for it to properly include the finding required in section 7B-2506(1)(c).

CCDSS also argues the trial court lacked competent evidence that the juvenile's parents could not make appropriate arrangements to meet his needs. CCDSS relies on N.C.G.S. § 7B-2501(d) that states,

> the court may dismiss the case, or continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative, or through some other plan approved by the court.

N.C.G.S. § 7B-2501(d) (2023). CCDSS points to *In re Ferrell* and asserts that the trial court did not afford the parents an opportunity as provided in section 7B-2501(d). We remanded *In re Ferrell* because the trial court awarded custody to the father and failed to include "appropriate findings of fact" to support its decision to place the juvenile in the father's custody. 162 N.C. App. 175, 177 (2004). Additionally, there was no evidence in the record to support the trial court's decision. *Id.* While we agree that there must be appropriate findings of fact, the basis for that decision was rooted in section 7B-2501(c). *Id.* at 176–77. There are mandatory findings pursuant to section 7B-2501(c) that the trial court

must include in the disposition order when selecting a disposition. *See* N.C.G.S. § 7B-2501(c) (2023); *In re N.M.*, 290 N.C. App. 482, 485 (2023). But CCDSS is not seeking review of that statutory section.

Here, CCDSS argues there is no competent evidence the parents were unable to make appropriate arrangements pursuant to section 7B-2501(d). That section provides discretion for the court to decide whether to dismiss or continue the case, but it is not a mandatory requirement. *See* § 7B-2501(d). Accordingly, the trial court possesses discretion to consider whether the parents could make appropriate home arrangements but is not required to make that consideration determinative in the disposition. This argument is without merit.

III.

For the foregoing reasons, we affirm the trial court's subject matter jurisdiction to enter the Disposition Order, and we vacate and remand to the trial court to correct the Disposition Order to include the statutorily-required finding pursuant to section 7B-2506(1)(c).

VACATE AND REMAND.

Chief Judge DILLON and Judge TYSON concur.

ALLISON SWEENEY MOHEBALI, PLAINTIFF
v.
JOHN DAVID HAYES, M.D., AND
HARVEST MOON WOMEN'S HEALTH, PLLC, DEFENDANTS

No. COA24-454

Filed 20 August 2025

Medical Malpractice—legislative cap on noneconomic damages—enacted before property right vested—no violation of right to jury trial

In a medical malpractice case where plaintiff sought and was awarded only noneconomic, actual damages based on the ordinary (rather than gross) negligence of her obstetrician and his clinic—for the pain and suffering plaintiff experienced when her pregnancy ended with an emergency c-section following fetal demise in her 44th week of gestation—the trial court's application of N.C.G.S. § 90-21.19(a) (the Legislative Cap) to reduce the jury's award of $7.5

million to $656,730 was affirmed. In a matter of first impression, the Court of Appeals rejected plaintiff's contention that the Legislative Cap was unconstitutional as applied to her—violating her right to a jury trial under Article I, § 25 of the North Carolina Constitution—because plaintiff's cause of action did not become a vested property right until after the Legislative Cap was enacted in 2011 and the General Assembly generally has the power to determine when a remedy is legally cognizable without impairing the right to jury trial.

Appeal by plaintiff from judgment entered 8 December 2023 by Judge Steven R. Warren in Buncombe County Superior Court Heard in the Court of Appeals 26 February 2025.

Ballew Puryear PLLC, by Matthew D. Ballew and Zachary R. Kaplan, and Ward and Smith P.A., by Jeremy Wilson, Alexander C. Dale, Taylor Rodney Marks, W. Ellis Boyle, and Joseph T. Knott, III, for plaintiff-appellant.

John David Hayes, MD, Pro Se for defendants-appellees.

No brief filed for defendants-appellees.

Nelson Mullins Riley & Scarborough, LLP, by D. Martin Warf, court-assigned amicus curiae counsel.

Shook, Hardy & Bacon L.L.P., by Caroline M. Gieser, for amici curiae American Property Casualty Insurance Association, Chamber of Commerce of the United States of America, and American Tort Reform Association.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Robert E. Harrington, Erik R. Zimmerman, and Caroline H. Reinwald, for amici curiae North Carolina Medical Society, The Charlotte Mecklenburg Hospital Authority d/b/a Atrium Health, Wake Forest University Baptist Medical Center d/b/a Atrium Health Wake Forest Baptist, CarolinaEast Health System, Duke University Health System, Inc., University Health Systems of Eastern Carolina, Inc. d/b/a ECU Health, North Carolina Chapter of the American Society for Healthcare Risk Management, Inc., NCHA, Inc., d/b/a North Carolina Healthcare Association, North Carolina Health Care Facilities Association, Novant Health, Inc., University of North Carolina Health Care System, and WakeMed.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey and Aislinn R. Klos, for amici curiae North Carolina Chamber Legal Institute, North Carolina Association of Defense Attorneys, North Carolina Farm Bureau Federation, Inc., North Carolina Home Builders Association, and North Carolina Retail Merchants Association.

Higgins Benjamin, PLLC, by Robert Neal Hunter, Jr., and Jeanette K. Doran, for amici curiae North Carolina Institute for Constitutional Law and League for Civil Engagement, Inc.

DILLON, Chief Judge.

Plaintiff Allison Sweeney Mohebali brought this medical malpractice action against her obstetrician, John David Hayes, and his medical clinic, Harvest Moon Women's Health, PLLC, (collectively, "Defendants") for *ordinary* negligence arising from his care of Plaintiff during her pregnancy. Plaintiff's pregnancy ended with an emergency c-section following fetal demise in Plaintiff's 44th week of gestation, well past the normal 40-week gestation period.

The issue in this appeal concerns whether a legislative cap imposed by the trial judge on Plaintiff's noneconomic damages awarded by the jury violates Plaintiff's right to a jury trial under Article I, Section 25 of our North Carolina Constitution.

I. Background

Defendants did not answer Plaintiff's complaint and otherwise did not provide any defense at trial or in this appeal. Plaintiff's allegations in her complaint were, therefore, deemed admitted by Defendants. *See* N.C. R. Civ. P. 8(d) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading.").

Prior to trial, the trial court granted partial summary judgment for Plaintiff, concluding that Plaintiff was entitled to judgment as a matter of law as to Defendants' *liability* for negligence. Accordingly, the only issue presented at trial was damages.

Plaintiff's allegations in her complaint and her evidence offered at the summary judgment hearing and at trial tend to show as follows:

Plaintiff became pregnant in late 2018 and desired to give birth in her home. She put herself in the care of Dr. Hayes, who specialized

in home deliveries. Dr. Hayes assured Plaintiff "he would be able to immediately transfer [her] to a physician specializing in high-risk pregnancies or to the hospital if medical risks arose[.]"

Plaintiff's due date was 7 July 2019, based on a gestation period of 40 weeks. However, when Plaintiff did not naturally go into labor by her due date, Dr. Hayes told her to be patient. Over the next few weeks, Plaintiff and her husband raised concerns with Dr. Hayes about the prolonged pregnancy, but Dr. Hayes assured them there was nothing to worry about.

The risk of harm or death to the baby and harm to the mother rises precipitously after 42 weeks of gestation. At no time, however, did Dr. Hayes explain the risks to Plaintiff of carrying a baby well past the due date.

At the end of July, after Plaintiff reached 43 weeks, she was experiencing fever and intense pain, was not thinking clearly, and was having urinary incontinence. She asked Dr. Hayes if she should go to the hospital. Dr. Hayes, though, told Plaintiff he was not concerned and he would make sure she gave birth at home.

On the 1st of August, when Plaintiff's gestation period reached 43 weeks and 4 days and her condition was worsening, Dr. Hayes spent ten hours at Plaintiff's home. Plaintiff told Dr. Hayes she thought she should go to the hospital, as she was feeling ill and experiencing urinary incontinence and confusion. But he counseled her not to go and that inducing labor would not be the correct approach. He checked the baby's heartbeat, which was steady. He told her he would return the next day.

The next morning, when the gestation period reached 43 weeks and 5 days, Dr. Hayes arrived at Plaintiff's home. He was unable to detect the baby's heartbeat. He directed Plaintiff to his office where he confirmed Plaintiff's baby had died. Plaintiff was transported to a hospital, where the death of her baby was confirmed. Plaintiff had a c-section performed, and her deceased baby was removed from her body.

Unknown to Plaintiff, four years prior, in 2015, Dr. Hayes had entered a consent order with the North Carolina Medical Board in which he admitted to violating the applicable standard in his care of four patients, each resulting in the death of a baby. In that 2015 Consent Order, Dr. Hayes agreed he would refer any patient experiencing a high-risk pregnancy, including any patient reaching 42 weeks of gestation, to a maternal fetal medicine specialist for consultation, specifically that:

> Dr. Hayes shall refer all high risk pregnancy patients to a maternal fetal medicine specialist for a consultation. For purposes of this consent order, "high risk" is defined as a patient having . . . gestational age less than 36 weeks *or greater than 42 weeks* . . . .

(Emphasis added.)

Also unknown to Plaintiff, in July 2019, when she was in her 42nd week of gestation and in Dr. Hayes's care, Dr. Hayes entered *another* consent order with the Medical Board in which he admitted failing to comply with the 2015 Consent Order by failing to refer high-risk pregnancies on two occasions and where he agreed to no longer provide any obstetrical/gynecological services, effective 1 September 2019.

In sum, Dr. Hayes was in knowing violation of his 2015 Consent Order by failing to refer Plaintiff to another doctor once her gestation period reached 42 weeks. He instead chose to continue his care of Plaintiff for another twelve days, resulting in the death of Plaintiff's baby. Also, as a result of Dr. Hayes's actions, Plaintiff suffered physical and emotional harms, some of which are permanent in nature.

In her complaint and at trial, Plaintiff sought recovery *only* for her noneconomic, actual damages (e.g., pain and suffering) and *not* for her economic, actual damages (e.g., hospital bills) or for punitive damages. Based on Plaintiff's evidence, the jury awarded Plaintiff $7,500,000.00 in actual, noneconomic damages. The trial court reduced the jury's award to $656,730.00 pursuant to N.C.G.S. § 90-21.19(a), which caps awards for noneconomic damages caused by ordinary negligence in the medical malpractice context. Section 90-21.19(a) states in pertinent part:

> Except as otherwise provided in subsection (b) of this section, in any medical malpractice action in which the plaintiff is entitled to an award of noneconomic damages, the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed [$656,730.00]. Judgment shall not be entered against any defendant for noneconomic damages in excess of [$656,730.00] for all claims brought by all parties arising out of the same professional services.

N.C.G.S. § 90-21.19(a) (hereinafter the "Legislative Cap").[1] Plaintiff appeals.

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1. The Legislative Cap was enacted in 2011, capping noneconomic damages in medical malpractice actions to $500,000.00 for that year. Pursuant to the law, the Cap resets

II. Analysis

The Legislative Cap, enacted by our General Assembly in 2011, provides a ceiling on the amount a plaintiff injured by medical malpractice may recover for noneconomic damages (e.g., pain and suffering), notwithstanding a jury's finding that said damages suffered were higher. *See id.*

On appeal, Plaintiff argues the Legislative Cap is unconstitutional, violating her right to a jury trial under Article I, section 25 of our North Carolina Constitution. Plaintiff makes no other legal arguments in this appeal challenging the trial court's application of the Legislative Cap reducing the jury's verdict. Defendants have provided no brief in this appeal. However, due to the importance of the issue raised, we have accepted amicus briefs to argue for and against Plaintiff's position.

We note, pursuant to subsection (b) of the Legislative Cap statute, the cap on damages does *not* apply to certain verdicts in medical malpractice actions; for instance, the cap does not apply where the "trier of fact" finds both that the plaintiff suffered a *permanent* injury and that said permanent injury was suffered as a result of the defendant's *gross* negligence. N.C.G.S. § 90-21.19(b). We further note that in this matter, however, Plaintiff, through her counsel, has made no argument the Legislative Cap should not apply in her case based on this exception provided in subsection (b). Plaintiff, through her counsel, does allege she suffered "permanent injury"; her evidence, including an expert opinion, tends to show she suffers "permanent injury"; and the jury was instructed on "permanent injury" as an element of Plaintiff's noneconomic damages. However, Plaintiff, through her counsel, has made no allegation nor made any argument that Dr. Hayes's acts in caring for her well past 42 weeks of gestation in knowing violation of the 2015 Consent Order rose to the level of *gross* negligence as a legal theory to avoid the application of the Legislative Cap to the jury's verdict. Further, Plaintiff, through her counsel, has made no claim that she is entitled to punitive damages based on Dr. Hayes's actions. *See* N.C.G.S. § 90-21.19(c)(2) (stating the Legislative Cap does not affect award of punitive damages under Section 1D-15); N.C.G.S. § 1D-15(a)(3) (stating punitive damages are available where the defendant's acts are "willful or wanton").

It appears Plaintiff's evidence was sufficient to bring the matter within subsection (b) of the Legislative Cap statute. Had Plaintiff,

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every three years based on the change in the consumer price index. The maximum allowable damages for this present matter under the Cap is $656,730.00.

through her counsel, preserved and made arguments and the jury had found that Plaintiff had suffered permanent injury due to gross negligence by Dr. Hayes, the trial court would not have had the authority under the Legislative Cap statute to reduce the jury's award.

Plaintiff, through her counsel, though, chose to proceed solely with a claim for noneconomic damages based on *ordinary* negligence, thereby putting at issue the constitutionality of the Legislative Cap. Therefore, the only question properly before us is whether the Legislative Cap violates Article I, Section 25 of our North Carolina Constitution, which provides:

> In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

N.C. Const. art. I, § 25.

The issue presented appears to be one of first impression in North Carolina. However, other states have grappled with whether a legislative cap on noneconomic damages violates the right to a jury trial under their respective state constitutions.

Many state supreme courts have recognized the authority of their respective legislatures to enact such caps as not violative of the right to a jury trial in common law actions. *See*, *e.g.*, *Pulliam v. Coastal Emergency Servs. of Richmond*, *Inc.*, 509 S.E.2d 307 (Va. 1999); *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys.*, *Inc.*, 663 N.W.2d 43 (2003) (Neb. 2003); *Phillips v. Mirac*, *Inc.*, 685 N.W.2d 174 (Mich. 2004); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *English v. New England Med. Ctr.*, *Inc.*, 541 N.E.2d 329 (Mass. 1989); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004).

Other state supreme courts, however, have held their respective legislatures lack the authority to cap a plaintiff's actual damages found by a jury, as violative of a state constitutional right to a jury trial in common law actions. *See*, *e.g.*, *Atlanta Oculoplastic Surgery*, *P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012); *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

The briefs representing each side have presented compelling arguments supporting their respective positions, many of which were

litigated in the above cases in other states. And we invite our Supreme Court to weigh in on this issue. However, as the case is currently before our Court, we must decide the issue presented.

Our Supreme Court has recently reiterated an appellate court's role when considering the constitutionality of a statute enacted by our General Assembly:

> In reviewing the constitutionality of this statute, we must presume that it is constitutional. Furthermore, we may strike it down only if it violates the express constitutional text and its unconstitutionality is demonstrated beyond a reasonable doubt. Every constitutional inquiry examines the text of the relevant provision, the historical context in which the people of North Carolina enacted it, and this Court's precedents interpreting it.

State v. Chambers, 387 N.C. 521, 525 (2025) (cleaned up).

Based on our review of opinions from our Supreme Court, as explained below, we conclude the Legislative Cap is not unconstitutional in this case. We so hold because Plaintiff's cause of action against Defendants did not become a vested property right until after the Legislative Cap was enacted in 2011 *and* as our General Assembly generally has the power to determine when a remedy is legally cognizable without impairing the right to a jury trial.

In 1904, in holding that our General Assembly lacked the authority to enact legislation which limited a particular plaintiff's remedy for libel to special damages only, recognized "the right to recover actual or compensatory damages is property[,]" but also that this property right does not vest in the injured party until "the commission of the wrong." *Osburn v. Leach*, 135 N.C. 628, 633 (1904). In this holding, though, the Court did not rely on the right to a jury trial under our state constitution, but rather on a different section in Article I—now codified as Section 18—providing that "every person for an injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law[.]" *Id.* at 631.

In 1983, our Supreme Court recognized our General Assembly's authority under Article I, Section 18 of our state constitution "to define the circumstances under which a remedy is legally cognizable" and can supplant the common law so long as any change does not affect a *vested* property right in a cause of action.

> The "remedy" constitutionally guaranteed "for an injury done" is qualified by the words "by due course of law." This means that the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not. The General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.
>
> Furthermore, since plaintiff's cause of action had not accrued at the time this legislation was passed, no vested right is involved. No person has a vested right in a continuance of the common or statute law. A right cannot be considered a vested right unless it is something more than such a mere expectancy as may be based upon an anticipated continuance of the present general law. We conclude, therefore, that the statute does not violate Article I, section 18, of our state's constitution.

Lamb v. Wedgewood S. Corp., 308 N.C. 419, 444–45 (1983) (internal marks and citations omitted).

More recently, in 2004, our Supreme Court reiterated that "[v]ested rights of action are property, just as tangible things are property. A right to sue for an injury is a right of action; it is a thing in action, and it is property." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176 (2004). In this decision, the Court recognized our General Assembly's authority to enact a cap on *punitive* damages, a type of non-compensatory damage. *Rhyne*, 358 N.C. at 190. In so holding, the Court reiterated that it "gives acts of the General Assembly great deference, [that] a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute" and that "there is a strong presumption that [a] statute [ ] is constitutional." *Id.* at 167–68.

The Court in *Rhyne* also reasoned that, though punitive damages hold "an established place in North Carolina common law[,]" our General Assembly has the power to modify or repeal aspects of our common law:

> [I]t is well settled that North Carolina common law may be modified or repealed by the General Assembly, except

> for any parts of the common law which are incorporated in our Constitution.
>
> The legislative branch of government is without question the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter. The General Assembly is the "policy-making agency" because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws. This Court has continually acknowledged that, unlike the judiciary, the General Assembly is well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time[.] *Included in the General Assembly's preeminent role in modifying the common law on the basis of policy concerns is its power to define the circumstances under which a remedy is legally cognizable and those under which it is not.*

Id. at 169–70 (internal marks and citations omitted) (emphasis added).[2]

Of significance in the present case, the Supreme Court in *Rhyne* cited with approval many cases from other jurisdictions holding that a legislature could limit remedies in causes of action. For instance, the Court cited with approval the cases referenced above from Virginia, West Virginia, Nebraska, Alaska, Idaho, and Utah, noting the holding in a Virginia case was "that a ceiling on medical malpractice damages 'was a proper exercise of legislative power' and therefore did not violate the [state constitution]." *Id.* at 169 (quoting *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 532 (Va. 1989)). The Virginia Supreme Court reasoned that

> at the time the Constitution was adopted, the jury's sole function was to resolve disputed facts, that this continues to be a jury's sole function, and that the jury's fact-finding

2. In *Rhyne*, our Supreme Court did differentiate punitive damages and compensable damages, whether economic or non-economic. Specifically, the Court reiterated that a plaintiff's property interest in compensatory damages, whether economic or non-economic, vests upon the commission of the wrong, but that a plaintiff has no vested property interest in a punitive damage award until judgment is entered. 358 N.C. at 177–78.

> function extends to the assessment of damages. . . . The medical malpractice cap . . . does nothing more than establish the outer limits of a remedy; remedy is a matter of law and not of fact; and a trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function. Hence, we concluded, the cap does not infringe upon the right to a jury trial.

Pulliam, 509 S.E.2d at 312.

Our Supreme Court in *Rhyne* then recognized our General Assembly "has similarly modified other portions of our common law without violating the North Carolina Constitution[,]" including "limit[ing] liability by enacting statutes of repose[.]" *Rhyne*, 358 N.C. at 171. And in that vein, the Court agreed with the quote from the Nebraska and Idaho cases that, since the legislative branch could enact a statute of repose, it could limit remedies:

> Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that *the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine*.

Id. at 171 (quoting *Gourley*, 663 N.W.2d at 76–77, from Nebraska, and *Kirkland*, 4 P.3d at 1122, from Idaho) (emphasis added).

In 2021, our Court weighed in, specifically in the context of an action seeking compensatory damages alleging nuisance under the Right to Farm Act, stating that our "General Assembly has modified the common law and statutory cause of actions for nuisance claims and relevant defenses. As with many other caps on compensation and remedies enacted in other areas of civil tort law, HB 467 did not impair nor abolish the right to a jury trial." *Rural Empowerment Ass'n for Cmty. Help v. State*, 281 N.C. App. 52, 65 (2021).

And just last year, in 2024, our Supreme Court, recognizing "[w]here there is a right, there is a remedy[,]" held that a plaintiff is not constitutionally entitled to a "complete remedy—that is, the remedy that is necessary to make the plaintiff whole again." *Washington v. Cline*, 385 N.C. 824, 825, 828 (2024).

In sum, guided by the above cases from our Supreme Court and our Court, we conclude the Legislative Cap is constitutional as applied to

those malpractice claims based on "wrongs" which did not occur prior to the enactment of the Legislative Cap. In this case, Plaintiff did not have a property right in her claims against Defendants until 2019, years after the Legislative Cap was enacted, and the Legislature has the power to "define the circumstances under which a remedy is legally cognizable" without impairing the right to a jury trial. *Rural Empowerment*, 281 N.C. App. at 65. Therefore, we conclude the Legislative Cap imposed by the trial court reducing the jury's award did not violate Plaintiff's right to a jury trial.

AFFIRMED.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
LEON COUNCIL

No. COA25-78

Filed 20 August 2025

Indictment and Information—indictment—sufficiency—felony injury to property—property value not an essential element

An indictment charging defendant with felony injury to property to obtain non-ferrous metals (pursuant to N.C.G.S. § 14-159.4) was facially valid and sufficient to put defendant on notice of the crime charged because it clearly described the conduct giving rise to the charge and specifically identified the vehicle alleged to have been injured by stating its year, make, model, and color; although the indictment did not include the value of the property damage, such value was not an essential element of the offense.

Appeal by Defendant from Judgments entered 14 November 2023 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 20 May 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Tirrill Moore, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Leon Council (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Felony Larceny and Felony Injury to Property to Obtain Non-Ferrous Metals. The Record before us, including evidence presented at trial, tends to reflect the following:

On the evening of 25 July 2021, Calvin Tinnen observed an alert on his phone informing him movement had been detected at one of his businesses. Tinnen viewed the security camera from the location in question on his phone and saw someone tampering with one of the trucks on the property. Tinnen called and reported the incident to the Durham City Police Department. Shortly after receiving the phone call, Corporal J. Dodd of the Durham Police Department arrived at Tinnen's business and observed a vehicle leaving the property. The car got within one foot of the patrol car, and Corporal Dodd shined a spotlight into the car. Corporal Dodd recognized the driver "as somebody that I had dealt with before."

While the vehicle was leaving the property, Officer Kevin Watt of the Durham Police Department arrived in another patrol car. Both officers activated their emergency lights and attempted to pursue the vehicle. When the vehicle failed to stop, the officers terminated their pursuit in accordance with Department policy. Having noted the fleeing vehicle's license plate, the officers ran the license plate number through the database. Records indicated the vehicle was registered to Defendant. Corporal Dodd identified Defendant, pictured in his driver's license, as the person he saw driving the vehicle as it left the scene. Corporal Dodd later returned to Tinnen's property and reported a 1996 GMC Sierra had its catalytic converter and oxygen sensor removed.

On 25 October 2021, Defendant was indicted for Felony Larceny and Felony Injury to Property to Obtain Non-Ferrous Metals. Relevant to this appeal, the indictment for Injury to Property read as follows:

> [T]he jurors for the State upon their oath present that on or about the date of the offense shown, and in the county named above, the defendant named above unlawfully, willfully, and feloniously did cut, mutilate, deface, and otherwise injure a red 1996 GMC Sierra, the personal property of Calvin Tinnen, for the purpose of obtaining non-ferrous metals.

This matter came on for trial on 13 November 2023. At the close of the State's evidence, Defendant moved to dismiss the Felony Injury to Property charge on the basis that the indictment failed to allege an essential element of the offense, specifically the value of the property damage. The trial court denied the Motion. On 14 November 2023, the jury returned verdicts finding Defendant guilty of both charges. The trial court sentenced Defendant to 16 to 29 months of imprisonment for each offense to be served consecutively. Defendant timely gave oral notice of appeal in open court.

Issue

The sole issue on appeal is whether the trial court erred by denying Defendant's Motion to Dismiss based on insufficiency of the indictment.

Analysis

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). Here, Defendant contends the trial court erred in denying his Motion to Dismiss because the indictment was insufficient to charge him with Felony Injury to Property to Obtain Non-Ferrous Metals.

"[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). "A valid indictment, among other things, serves to 'identify the offense' being charged with certainty, to 'enable the accused to prepare for trial' and to 'enable the court, upon conviction, to pronounce the sentence.' " *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (quoting *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978)). Further, indictments "protect the accused from being jeopardized by the State more than once for the same crime." *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted).

North Carolina law requires indictments to include a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct

which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2023). "Thus, an indictment must allege 'all the essential elements of the offense endeavored to be charged.' " *State v. Mostafavi*, 370 N.C. 681, 685, 811 S.E.2d 138, 141 (2018) (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (citation omitted)).

When reviewing the sufficiency of an indictment, a trial court must determine whether the indictment contains three elements: "(1) The offense is charged in a plain, intelligible, and explicit manner; (2) The offense is charged properly so as to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court . . . to pronounce sentence according to the rights of the case." *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 411-12 (1993) (quoting *State v. Reavis*, 19 N.C. App. 497, 498, 199 S.E.2d 139, 140 (1973)). "[A]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977).

Defendant contests the sufficiency of the indictment on the charge of Felony Injury to Property to Obtain Non-Ferrous Metals. As to that charge, the indictment read:

> [T]he jurors for the State upon their oath present that on or about the date of the offense shown, and in the county named above, the defendant named above unlawfully, willfully, and feloniously did cut, mutilate, deface, and otherwise injure a red 1996 GMC Sierra, the personal property of Calvin Tinnen, for the purpose of obtaining non-ferrous metals.

Defendant specifically contends the State needed to allege the value of the property damage for the indictment to be valid. We disagree.

Which elements of this offense are essential and must be included in an indictment is a matter of first impression before this Court. Our statutes set out this offense, in pertinent part, as follows:

> (b) Prohibited Act.--It is unlawful for a person to willfully and wantonly cut, mutilate, deface, or otherwise injure any personal or real property of another, including any fixtures or improvements, for the purpose of obtaining nonferrous metals in any amount.
>
> (c) Punishment.--Violations of this section are punishable as follows:

> (1) Default.--If the direct injury is to property, and the amount of loss in value to the property, the amount of repairs necessary to return the property to its condition before the act, or the property loss (including fixtures or improvements) is less than one thousand dollars ($1,000), a violation shall be punishable as a Class 1 misdemeanor. If the applicable amount is one thousand dollars ($1,000) or more, but less than ten thousand dollars ($10,000), a violation shall be punishable as a Class H felony. If the applicable amount is ten thousand dollars ($10,000) or more, a violation shall be deemed an aggravated offense and shall be punishable as a Class F felony.

N.C. Gen. Stat. § 14-159.4(b)-(c)(1) (2023).

Although none of our courts have previously addressed this particular statute, our Supreme Court has considered a similar statute and issue in *State v. Mostafavi*, 370 N.C. 681, 811 S.E.2d 138 (2018). We find it instructive.

In *Mostafavi*, the defendant challenged the sufficiency of the indictment charging him with Obtaining Property by False Pretenses where he had allegedly stolen items from another's home and sold them to a pawn shop. *Id.* at 682-83, 811 S.E.2d at 139. The relevant statute in that case provided:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony . . . If the value of the money, goods, property, services, chose in action, or other thing of value is one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the value of the money, goods, property, services, chose in action, or other thing of value is less than one hundred thousand dollars ($100,000), a violation of this section is a Class H felony.

N.C. Gen. Stat. § 14-100(a) (2023).

The indictment in that case did not allege the amount of money the defendant had allegedly obtained; however, it did charge that the defendant "through false pretenses, knowingly and designedly obtained 'United States Currency from Cash Now Pawn' by conveying specifically referenced personal property, which he represented as his own." *Mostafavi*, 370 N.C. at 685, 811 S.E.2d at 141. The indictment described the personal property used to obtain money, referring to particular items, including the brands of those items. *Id.* Upon review, our Supreme Court concluded "the indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that is the subject of the accusation." *Id.* at 686, 811 S.E.2d at 141. The Court noted the indictment clearly identified the pawned objects such that there could be no confusion as to the transactions at issue. *Id.* at 687, 811 S.E.2d at 142. Thus, the Supreme Court concluded, "by tracking the language of N.C.G.S. § 14-100(a) and clearly identifying 'the conduct which is the subject of the accusation,' the indictment is facially valid[.]" *Id.* at 687, 811 S.E.2d at 142 (quoting N.C. Gen. Stat. § 15A-924(a)(5)).

Mostafavi is analogous to the case at hand. Defendant here, as in *Mostafavi*, challenges the sufficiency of the indictment for failure to allege the monetary value involved. The Supreme Court in *Mostafavi* noted the indictment satisfied notice principles because it referred to specific items that clearly identified the transaction that was the subject of the underlying offense. *Id.* That information was sufficient to provide the defendant reasonable notice of the conduct and transactions at issue, allowing him to prepare an adequate defense and mitigate double jeopardy concerns. *Id.* The indictment there referred to specific items, including the brands of those items. *Id.* at 685, 811 S.E.2d at 141. Similarly, the indictment in this case clearly identified the subject of the charge by naming the specific vehicle involved, including the year, make, model, and color. Further, the statutes for the respective offenses exhibit similar structures. Each sets out the elements of the respective offenses at the outset but go on to delineate the level of the offense based on the value of property or loss at issue. *Compare* N.C. Gen. Stat. § 14-159.4(c)(1) ("If the [applicable amount] is less than one thousand dollars ($1,000), a violation shall be punishable as a Class 1 misdemeanor. If the applicable amount is one thousand dollars ($1,000) or more, but less than ten thousand dollars ($10,000), a violation shall be punishable as a Class H felony. . . .") and N.C. Gen. Stat. § 14-100(a) ("If the value of the money, goods, . . . or other thing of value is one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the value of the money, goods, . . . or other thing of value is

less than one hundred thousand dollars ($100,000), a violation of this section is a Class H felony.").

Following the reasoning of *Mostafavi*, we conclude the present indictment is sufficient to charge Felony Injury to Property to Obtain Non-Ferrous Metals despite the omission of the value of the damage to the property at issue because the indictment contains a specific description of the crime charged, and its description of the property allegedly damaged tracks the language of the underlying statute. Defendant had reasonable notice, based on this information, to inform him of the offense charged, enable him to prepare a defense, and protect him against any risk of double jeopardy—as well as preparing a defense for the amount of property loss or repair costs if that were, in fact, at issue.

Thus, the indictment is facially valid. Therefore, the trial court did not err by denying Defendant's Motion to Dismiss. Consequently, the trial court did not err in entering the Judgment against Defendant upon the jury's verdict.[1]

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment.

NO ERROR.

Chief Judge DILLON and Judge ARROWOOD concur.

1. Additionally, we note that "[h]ad defendant 'need[ed] more information to mount his preferred defense,' he could have requested a bill of particulars under N.C.G.S. § 15A-925." *Mostafavi*, 370 N.C. at 685-86, 811 S.E.2d at 141 (quoting *State v. Spivey*, 368 N.C. 739, 743, 782 S.E.2d 872, 874-75 (2016)) (alterations in original). Under our statutes, a defendant may file a motion for a bill of particulars and "request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading," if the defendant alleges he "cannot adequately prepare or conduct his defense without such information." N.C. Gen. Stat. § 15A-925(b) (2023). "If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars." N.C. Gen. Stat. § 15A-925(c) (2023).

STATE OF NORTH CAROLINA
v.
KENNETH WILLIAM McCALL, DEFENDANT

No. COA24-779

Filed 20 August 2025

Evidence—self-defense claim—testimony about defendant's pre-arrest silence—Fifth Amendment—not implicated

In a prosecution that resulted in defendant being convicted of attempted murder and two counts of discharging a firearm into an occupied vehicle causing serious injury—brought after defendant shot his second cousin as the cousin sat in his truck and where defendant claimed he acted in self-defense after the cousin pointed a rifle at defendant—the trial court did not err in admitting testimony from defendant's nephew about defendant's failure, in the immediate aftermath of the shooting, to mention the cousin pointing a rifle at defendant. The prosecutor's use of defendant's pre-arrest silence on that point had no significance to defendant's Fifth Amendment right against self-incrimination because defendant's silence was unrelated to law enforcement. Moreover, even had the testimony's admission been erroneous, defendant could not show prejudice where the evidence of defendant's guilt—he failed to render aid to his cousin and instead fled the scene; the cousin's arm was on the truck's steering wheel when he was shot; and none of the persons interviewed about the shooting reported defendant mentioning that he had acted in self-defense—was overwhelming.

Appeal by Defendant from judgment entered 17 November 2022 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 11 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Benjamin T. Spangler, for the State.

Jarvis John Edgerton, IV, for Defendant.

GRIFFIN, Judge.

Defendant Kenneth William McCall appeals from the trial court's judgment entered after a jury convicted him of one count of attempted murder and two counts of discharging a firearm into an occupied vehicle

causing serious injury. Defendant contends the trial court plainly erred by allowing the State to question a witness about Defendant's pre-arrest silence. We hold the trial court did not err.

I. Factual and Procedural Background

This case arises from a shooting in western North Carolina between Defendant and his second-cousin, William McCall. Evidence presented at trial tended to show the following:

William lived in Pinhook, North Carolina, where he helped maintain Pinhook Campground and RV Park. On 23 October 2020, while driving past the campground, William noticed pigs on the property. He subsequently shot and killed one of the pigs because of previous issues with the pigs destroying the campground property. William then put his rifle in the bed of his truck and started leaving the campground.

As he was leaving, he noticed Defendant's vehicle "pretty much blocking the road" while Defendant and Defendant's partner, Lynn, were standing outside of the vehicle. Defendant approached William and chastised him for killing the pig. William, while sitting in the driver's seat of his truck, heard two gunshots and realized he had been shot in his arm and chest. William then fled the campground and drove to his stepfather's house a short distance away. His stepfather drove him to the nearby McCall's grocery where they called for emergency assistance. Emergency personnel transported William to the hospital where he was placed into a medically induced coma.

After the shooting, Defendant traveled approximately forty minutes to his brother's house, because he "figured [he] would have to make bond." Defendant talked to his brother, Curtis McCall, and nephew, Jonathan McCall, at his brother's house, but he did not speak much about the shooting. Officers with the Transylvania County Sheriff's Department then arrived at Curtis's house and arrested Defendant.

Investigating officer Detective Sergeant Brandon Elders, who is trained in trajectory analysis, determined the bullet went through William's arm prior to entering his chest through the "back side around the triceps area." After reviewing body-camera footage, Detective Elders also concluded William's "left arm would have been somewhere on the steering wheel."

On 21 March 2021, Defendant was indicted by a Jackson County grand jury on one count of intimidating a witness, one count of attempted murder, and two counts of discharging a firearm into an

occupied vehicle causing serious injury. Defendant's matter came on for trial in Jackson County Superior Court on 7 November 2022.

At trial, Defendant claimed he shot William in self-defense after William pointed a rifle at him. The State elicited testimony from Jonathan McCall that Defendant did not mention William aiming his rifle at Defendant prior to the shooting:

> Q: Okay. At any time that you're talking with [Defendant] with your father there and/or Chester there, did [Defendant] state that [William] had pointed a gun at him and that's why he shot him?
>
> A: I don't -- I don't remember that if he said it.
>
> Q: You don't think he said that or you don't remember - -
>
> A: I don't remember that being said.
>
> Q: Okay. Do you feel like if that had been something that had been told to you, that you would remember him saying that?
>
> A: I guess. I guess I would, yes. Because, I mean, like I said, we was all nervous, and [Defendant] was a nervous wreck, and he wouldn't give - - I don't know what him and - - what him and my dad had discussed before I got there, but like I said, all I knew was that a pig had been shot and that [William] had been shot and that he had shot him twice.
>
> Q: Okay. But at least while you're there, you don't recall [Defendant] saying, "I shot him in self-defense," or, "I shot him because he pointed a gun at me"?
>
> A: I do not remember that, no.

Defendant later testified at trial. He stated he shot William after William drove up to him and pointed a rifle at him. After hearing all the evidence, the jury found Defendant guilty of one count of attempted murder and two counts of discharging a firearm into an occupied vehicle causing serious injury. The jury did not find Defendant guilty of intimidating a witness.

Defendant filed a petition for writ of certiorari, which we granted by order on 12 September 2023.

II. Analysis

Defendant contends the trial court plainly erred by allowing evidence of his pre-arrest silence regarding self-defense in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, Defendant argues the State should not have been allowed to elicit testimony from Defendant's nephew, Jonathan, about Defendant's failure to mention William aiming a rifle at him in the immediate aftermath of the shooting. Defendant characterizes this testimony as impeachment evidence improperly tendered to the jury before Defendant testified on his own behalf.

In seeking to persuade us that the admission of the challenged portion of Jonathan's testimony constituted plain error, Defendant begins by arguing that an error occurred when the "impeachment evidence" was tendered to the jury before Defendant testified. Defendant relies on *State v. Mendoza*, 206 N.C. App. 391, 698 S.E.2d 170 (2010) and *State v. Boston*, 191 N.C. App. 637, 663 S.E.2d 886 (2008) in support of this argument. In Defendant's view, it was error for the trial court to allow the "impeachment evidence" prior to Defendant testifying. We disagree.

"An issue that was neither preserved by an objection lodged at trial nor deemed to have been preserved by rule or law despite the absence of such an objection can be made the basis of an issue on appeal if the judicial action in question is argued to amount to plain error." *State v. Caballero*, 383 N.C. 464, 473, 880 S.E.2d 661, 667–68 (2022) (citing N.C. R. App. P. 10(a)(4)). Since Defendant did not object to the admission of the challenged portion of Jonathan's testimony at trial, we only review for plain error. *Id.*

Plain error is error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings" and is to be "applied cautiously and only in the exceptional case." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation modified). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, and must show "prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty," *Id.* (cleaned up). "[T]he analysis is whether, without [the contested] evidence, the jury probably would have reached a *different* result." *State v. Reber*, 386 N.C. 153, 160, 900 S.E.2d 781, 788 (2024).

The United States Constitution guarantees that all people are protected from being "compelled in any criminal case to be a witness

against himself[.]" U.S. Const. amend. V. North Carolina courts have " 'consistently held that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent.' " *State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012) (quoting *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983)). However, such protection is generally only afforded against government actors—not civilians. *See Miranda. v. Arizona*, 384 U.S. 436, 461 (1966) (holding "the privilege appl[ies] to informal compulsion exertion by law-enforcement officers during in-custody questioning").

North Carolina courts have not directly addressed whether a prosecutor's use of a defendant's pre-arrest silence unrelated to law enforcement implicates the Fifth Amendment, but the United States Supreme Court has determined that it does not violate a defendant's Fifth Amendment rights when a prosecutor uses the defendant's non-custodial silence in its case in chief absent invocation of those rights. *See Salinas v. Texas*, 570 U.S. 178, 186 (2013) (holding "the prosecution's use of the defendant's noncustodial silence did not violate the Fifth Amendment" where there was no evidence that the defendant's failure to assert the privilege was involuntary). Moreover, "even if a defendant's pre-arrest silence is protected by the Fifth Amendment, impeachment by use of silence does not violate the Fifth Amendment where the defendant testifies at trial." *Boston*, 191 N.C. App. at 649, 663 S.E.2d at 894 (citing *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980)).

"The main purpose of impeachment [evidence] is to discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony." *Mendoza*, 206 N.C. App. at 397, 698 S.E.2d at 175 (citation modified). " 'Impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial.' " *State v. Abbitt*, 73 N.C. App. 679, 682, 327 S.E.2d 590, 592 (1985) (quoting *Jenkins*, 447 U.S. at 238). Pre-arrest silence, however, has "no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer." *State v. Taylor*, 244 N.C. App. 293, 298, 780 S.E.2d 222, 225 (2015).

In *State v. Boston*, we held the trial court erred by allowing testimony about the defendant's refusal to speak with law enforcement prior to her arrest. 191 N.C. App. at 652, 663 S.E.2d at 896. There, the defendant challenged testimony about her refusal to speak with law enforcement after the crime but before arrest. *Id.* at 646–47, 663 S.E.2d at 893. After surveying extra-jurisdictional precedent, we determined the defendant's refusal to attend an interview with law enforcement

amounted to an invocation of the Fifth Amendment, and therefore the State could not use it as substantive evidence of her guilt. *Id.* at 648–52, 663 S.E.2d at 896. As such, we held "proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest." *Id.* at 651, 663 S.E.2d at 896.

In *State v. Mendoza*, we held the trial court erred by admitting a state trooper's testimony of the defendant's pre-arrest silence. 206 N.C. App. at 392, 698 S.E.2d at 172. At trial, the defendant denied that cocaine found in his car after an accident belonged to him, but rather to a passenger; a claim he did not make to law enforcement at the time of the accident. *Id.* at 394, 698 S.E.2d at 173. The state trooper testified the defendant did not provide an explanation for possessing the cocaine prior to his arrest. *Id.* at 396–97, 698 S.E.2d at 174–75. We held this testimony amounted to "commentary on [the] defendant's pre-arrest silence" and was "squarely" within the holding of *Boston*. *Id.* at 397, 698 S.E.2d at 175. As such, we held introduction of the testimony violated the defendant's Fifth Amendment right against self-incrimination. *Id.* at 398, 698 S.E.2d at 176.

In contrast, in *State v. Taylor*, we determined "[p]re-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer." 244 N.C. App. at 298, 780 S.E.2d at 225. There, a detective testified she was unable to get in touch with the defendant during her investigation of the crime he was on trial for. *Id.* at 295–97, 780 S.E.2d at 224–25. Distinguishing the facts from those in *Boston* and *Mendoza*, we held the trial court did not err by allowing the testimony. *Id.* at 297–98, 780 S.E.2d at 225.

Here, because of the complete lack of involvement by law enforcement at the time of silence, the facts do not fit within the holdings of *Boston* or *Mendoza*. While Defendant is correct that Jonathan's testimony was allowed prior to Defendant testifying, and therefore could only be used as substantive evidence of Defendant's guilt and not to impeach him, we disagree that the testimony implicated Defendant's right against self-incrimination. *See Mendoza*, 206 N.C. App. at 392, 698 S.E.2d at 172 ("Since defendant had not yet testified at the time the State presented the evidence, we conclude that this testimony could not have been used for impeachment, but was improperly admitted as substantive evidence of defendant's guilt.").

The United States Supreme Court has held that the Fifth Amendment right against self-incrimination "generally is not self-executing" and that

a witness who desires its protection "must claim it." *Salinas*, 570 U.S. at 181 (citation and internal marks omitted). Unlike in *State v. Boston*, Defendant here did not invoke his Fifth Amendment right to silence; nor could he have as no government actor was present when the silence at issue occurred. The context of the challenged testimony reinforces this point. The testimony related to whether Defendant stated to a family member, and not a law enforcement officer like in *Mendoza*, that he acted in self-defense. Additionally, that conversation did not implicate whether Defendant was willing to discuss this with law enforcement as the testimony in *Boston* did. Specifically, the testimony referenced conversation between family members occurring before law enforcement arrived to arrest Defendant, before law enforcement took Defendant into custody, and before law enforcement questioned Defendant. Although similar to *Boston* in that the challenged testimony came from a civilian witness, the conversation here did not touch on law enforcement at all while the conversation there specifically implicated the defendant's willingness to talk with law enforcement.

Accordingly, Defendant's pre-arrest silence in this context has no significance to his Fifth Amendment right against self-incrimination, or implication of that right, because there is no indication that law enforcement played any role whatsoever in Defendant's silence. *See Jenkins*, 447 U.S. at 240 ("In this case, no governmental action induced [the defendant] to remain silent before arrest."). Therefore, consistent with our holdings in *Taylor*, *Boston*, and *Mendoza*, we hold the State may use evidence of a defendant's pre-arrest silence as substantive evidence of the defendant's guilt if that silence does not implicate a defendant's willingness to speak with law enforcement and that silence occurs without any influence from the government.

Here, even if the trial court erred by allowing Jonathan's testimony, Defendant cannot show prejudice. Defendant has not demonstrated a reasonable probability that had the testimony in question not been admitted, Defendant would have been acquitted. *See Reber*, 386 N.C. at 158, 900 S.E.2d at 786 ("[T]he defendant must show that the error had a 'probable impact' on the outcome, meaning that 'absent the error, the jury probably would have returned a different verdict.' " (citation omitted)). The State presented overwhelming evidence of Defendant's guilt. The record reflects Defendant failed to render aid or report the shooting to 911 following the incident and fled the scene and county to his brother's house, thirty-to-forty minutes away. Furthermore, Detective Elders testified about his interviews with Curtis McCall, Jonathan McCall, and

Chester Chappell, none of whom mentioned anything about William McCall pointing a gun at Defendant or the shooting being in self-defense.

Detective Elders also testified his training in trajectory analysis allowed him to conclude that, at the time the bullet hit William's left arm, the "left arm would have been somewhere on the steering wheel." Moreover, Detective Elders testified that the first time he was made aware Defendant was claiming self-defense was nearly five months after the shooting. Thus, even if the trial court had excluded Jonathan's testimony about the conversations held in the immediate aftermath of the shooting, the jury still heard testimony that Defendant did not claim self-defense until months after the fact. This testimony, in conjunction with Detective Elder's analysis, provides ample basis for the jury to discount Defendant's version of events in which he shot William while William was pointing a rifle at him.

Given the strength of the State's evidence, we cannot hold there was a reasonable probability that had the testimony in question not been admitted, Defendant would have been acquitted. Accordingly, we hold that even if the trial court erred in allowing Jonathan's testimony, it was not prejudicial error.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err by allowing the challenged testimony.

NO ERROR.

Judges STADING and FREEMAN concur.

WYMAN v. BARBER

[300 N.C. App. 319 (2025)]

KRISTIN BLACK WYMAN, INDIVIDUALLY, JOE WYMAN, DANIEL ROBERT BLACK, INDIVIDUALLY, SHERILL BLACK, KRISTIN BLACK WYMAN, CO-EXECUTOR OF THE ESTATE OF MARY CAMERON BLACK, DANIEL ROBERT BLACK, CO-EXECUTOR OF THE ESTATE OF MARY CAMERON BLACK, PLAINTIFFS
v.
DEREK S. BARBER, DEFENDANT

No. COA25-41

Filed 20 August 2025

1. Deeds—reformation—mutual mistake—description of property—no genuine issue of material fact

The trial court properly granted summary judgment to plaintiffs in their action for reformation of contract and property deed where there were no genuine issues of material fact that a mutual mistake had occurred regarding the size of the property being conveyed. Although the same parcel identification number that referred to both an eight-acre parcel and a seven-acre parcel was used in the legal description of the property at issue, the evidence clearly showed that both parties understood that only the eight-acre parcel (which included a house) was being conveyed. Defendant did not present any evidence to the contrary and, further, a statement defendant's closing attorney made in an email to plaintiffs' attorney that defendant was "agreeable to correcting the situation" constituted an acknowledgement of the mistake.

2. Appeal and Error—joinder of necessary party—reformation of deed action—failure to raise issue—waiver

In an action for reformation of contract and property deed due to mutual mistake, where defendants failed to raise the issue of joinder of a necessary party at trial, the issue was waived and could not be raised for the first time on appeal.

3. Deeds—reformation—denial of motion to continue—exclusion of untimely affidavits—no abuse of discretion

In an action for reformation of contract and property deed, the trial court did not abuse its discretion by denying defendant's motion to continue a hearing on plaintiffs' motion for summary judgment and by excluding defendant's affidavits in opposition to plaintiffs' motion. Defendant was not entitled to a continuance pursuant to Civil Procedure Rule 56(f) because he was not seeking discovery when he filed and served two affidavits the Friday before the hearing—defendant had seven months to seek discovery and

produce evidence in opposition to plaintiffs' motion but failed to do so. Further, defendant's affidavits were not timely filed as required by Civil Procedure Rule 6(d), and defendant produced no explanation for his delayed filing.

Appeal by Defendant from judgment entered 1 October 2024 by Judge Regina M. Joe in Moore County Superior Court. Heard in the Court of Appeals 21 May 2025.

Clarke Phifer PLLC, by Stanley W. West, for Plaintiffs-Appellees.

Chris Kremer for Defendant-Appellant.

GRIFFIN, Judge.

Defendant Derek S. Barber appeals from the trial court's order granting Plaintiffs the Estate of Mary C. Black's Motion for Summary Judgment. Defendant contends the trial court erred by: (1) granting Plaintiffs' Motion because genuine issues of material fact exist; (2) failing to join a necessary party; and (3) denying Defendant's Motion to Continue. We affirm the trial court's order.

I. Factual and Procedural Background

In 2003, Mary C. Black acquired by deed two parcels of land located on the north and south side of Roseland Road in Aberdeen, North Carolina.[1] Black owned eight acres on the north side and seven acres on the south side. The eight-acre parcel included a house. Both the eight-acre and seven-acre parcels are associated with the same parcel identification number, 00046723. In 2009, Black purchased three additional acres on the south side, immediately adjacent to the seven-acre parcel.[2] The parcel identification number for the three-acre parcel is 20090102. After Black passed away, Plaintiffs acquired ownership of the eight, seven, and three-acre parcels.

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1. Moore County GIS, https://gis.moorecountync.gov/maps/interactive.htm (last visited Aug. 12, 2025); Moore County Property Records Search, https://icare.moorecountync.gov/careprd/Datalets/Datalet.aspx?mode=&UseSearch=no&pin=00046723&jur=063&taxyr=2025 (last visited Aug.12, 2025); Moore County Register of Deeds, https://rod.moorecountync.gov/RealEstate/SearchDetail.aspx (last visited Aug. 12, 2025).

2. Moore County Property Records Search, https://icare.moorecountync.gov/careprd/Datalets/Datalet.aspx?mode=&UseSearch=no&pin=20090102&jur=063&taxyr=2025 (last visited Aug. 12, 2025); Moore County Register of Deeds, https://rod.moorecountync.gov/RealEstate/SearchDetail.aspx (last visited Aug. 12, 2025).

In 2022, Plaintiffs decided to sell the seven-acre and three-acre parcels located on the south side as one tract of land encompassing ten acres total. Plaintiffs decided to sell the eight-acre parcel on the north side, including the house, separately. On 6 June 2022, Leasa Haselden, a licensed real estate agent in North Carolina, listed the ten-acre tract for sale. On 10 July 2022, Haselden listed the house and eight-acre parcel for sale.

On 9 June 2022, the ten-acre tract went under contract for purchase. While the ten-acre tract was under contract, Defendant's fiancé, Jeanna Mathias, contacted Haselden regarding the house and eight-acre parcel listed for sale. After expressing interest in the house and eight-acres, Plaintiffs and Defendant authorized Haselden to act as a dual agent for both parties. Defendant made an offer to purchase the property for a sum of $305,000.00 and Plaintiffs accepted the offer. On 6 August 2022, Plaintiffs and Defendant executed the offer to purchase and contract agreement.

In the contract, signed by the parties, the legal description of the property included the parcel identification number, 00046723. This is the parcel identification number which includes both the eight-acre and seven-acre parcels. The contract did not specify that only the eight-acre parcel, including the house, on the north side was being sold, or that the eight-acre and seven-acre parcels would need to have separate parcel identification numbers as a result.

When Defendant applied for the loan to purchase the house and eight acres, the mortgage company, Movement Mortgage, required an appraisal. The mortgage company only assessed the house and eight-acre parcel on the north side. On 4 September 2022, Defendant received a copy of the appraisal which included the house and eight-acre parcel.

On 25 August 2022, Plaintiffs and Defendant closed on the property by deed at the Moore County Register of Deeds. The deed was prepared without a title search and included the same parcel number as the contract. The legal description of the property included a non-certified plat map of the eight-acre parcel on the north side and the seven-acre parcel on the south side. On 19 October 2022, the deed was recorded. The deed conveyed both the eight-acre and seven-acre parcels to Defendant.

Less than a year after closing, Haselden realized the contract and deed improperly described the property purchased by Defendant and included the parcel identification number that included both the eight-acre and seven-acre parcels. When the error was discovered, Haselden had a conversation with Mathias that a correction deed would need to be signed. Defendant's closing attorney, Raymond Gatti, stated in an e-mail to

Plaintiffs' attorney that Defendant was "agreeable to correcting the situation" and to "please send [the] proposed correction documents[.]"

In June 2023, Defendant became unresponsive to both Haselden and Gatti in their attempts to have the correction deed signed. As a result, on 22 February 2024, Plaintiffs filed a complaint requesting the court order reformation of the contract and property deed. On 31 May 2024, Defendant filed an answer to Plaintiffs' complaint.

On 28 August 2024, Plaintiffs filed a Motion for Summary Judgment asserting there were no genuine issues of material fact as to Plaintiffs' claim for reformation of contract and deed. Plaintiffs asserted both parties understood the sale was only intended to include the house and eight-acre parcel on the north side of Roseland Road and no property on the south side. Plaintiffs requested the contract and deed be reformed due to mutual mistake of fact. Plaintiffs' Motion included affidavits from Haselden, the Parties' real estate agent; Michael Chad Smith, a Senior Loan Officer with Movement Mortgage; and Stanley W. West, Plaintiffs' trial counsel. On 20 September 2024, at 4:56 PM and 4:57 PM, Defendant filed two affidavits from Mathias in opposition to Plaintiffs' Motion. That same day, Plaintiffs were served with Defendant's affidavits after close of business. This was the last business day before the hearing on Plaintiffs' Motion.

On 23 September 2024, Plaintiffs' Motion came for hearing in Moore County Superior Court. Prior to the hearing, Defendant moved to continue, and the trial court denied Defendant's Motion. On 1 October 2024, the trial court entered an order granting Plaintiffs' Motion. In the summary judgment order, the court stated Defendant's affidavits "were not timely filed or served and were therefore excluded from consideration." Defendant timely appeals from the trial court's order.

II. Analysis

Defendant contends the trial court erred by: (1) granting Plaintiffs' Motion because genuine issues of material fact exist; (2) failing to join a necessary party; and (3) denying Defendant's Motion to Continue. We affirm the trial court's order.

A. Summary Judgment

[1] Defendant argues genuine issues of material fact exist regarding Plaintiffs' claim of mutual mistake. We disagree.

We review a trial court's ruling on a summary judgment motion de novo. *General Fidelity Ins. Co. v. WFT, Inc.*, 269 N.C. App. 181, 185,

837 S.E.2d 551, 556 (2020). Summary judgment is appropriate when "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." N.C. R. Civ. P. 56(c) (2023). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "Generally, this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law." *Id.* (citation modified).

"Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004). A trial court's decision should be affirmed on appeal "if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996).

Here, Plaintiffs asserted a reformation claim on grounds of mutual mistake and later moved for summary judgment regarding the same. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (citation and internal marks omitted). "Where a legal instrument does not express the true intentions of the parties due to mutual mistake or the mistake of the draftsman, reformation is available." *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 248, 768 S.E.2d 604, 611 (2015).

"A mutual mistake is one that is shared by both parties to the contract, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Id.* at 248–49, 768 S.E.2d at 611 (citation and internal marks omitted). "A party seeking reformation on the ground of mutual mistake must prove the parties agreed upon a material stipulation to be included in the written instrument, the stipulation was omitted by the parties' mistake, and because of the mistake, the written instrument does not express the parties' intention." *Id.* at 249, 768 S.E.2d at 611 (citation modified). The moving

party "must prove the existence of the mutual mistake by 'clear, cogent and convincing evidence.' " *Id.* (quoting *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981)).

Here, the evidence viewed in the light most favorable to Defendant shows existence of mutual mistake in the contract and deed. The mistake occurred when the legal description of the property in the contract only included the parcel identification number associated with the eight-acre and seven-acre parcels of land without any additional information. The contract failed to specify that only the house and eight-acre parcel on the north side were being sold. Based on the inaccurate information provided in the contract, the deed was prepared and recorded.

The record evidence viewed in the light most favorable to Defendant shows Plaintiffs did not intend to convey any land on the south side to Defendant, and Defendant understood he was only purchasing the house and eight-acre parcel on the north side. Plaintiffs listed the ten-acre tract and the eight-acre parcel—including the house—separately, and the properties had separate listing sheets. Defendant's fiancé, Mathias, contacted Haselden specifically about the house and eight-acres, and Haselden informed Defendant and Mathias at the showing that the ten-acre tract on the south side was under contract. Defendant offered to purchase the property for $305,000.00, and the house and eight-acre parcel was the only property appraised by the mortgage company. Moreover, the house and eight-acre parcel appraised for $307,000.00, an amount within close range of Defendant's offer.

Additionally, when the mistake of the property conveyance was discovered, Defendant's closing attorney stated in an email Defendant was "agreeable to correcting the situation." Thus, through Defendant's own admission, by and through his legal counsel, Defendant was aware of and acknowledged the mistake. *See Dunkley v. Shoemate*, 350 N.C. 573, 577, 515 S.E.2d 442, 444 (1999) ("North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency, and two factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent." (citation and internal marks omitted)). Here, the evidence supports Defendant and his closing attorney were in an attorney-client relationship and Defendant's closing attorney was acting as Defendant's agent when he sent the email.

Despite Defendant's contention that "there is nothing in the record from [Defendant] supporting an inference that there was a post-closing

attorney-client relationship[,]" "the relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract." *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325 (1985).

Although we recognize an attorney-client relationship generally terminates once a case has been resolved,[3] and for a closing-attorney that would typically mean at closing, the record reflects Defendant and his attorney were still in communication about an error that occurred at closing. Additionally, by the plain language of the email, Defendant authorized his closing attorney to convey the message that he was "agreeable to correcting the situation." Moreover, if Defendant wanted to dispute the validity of his attorney's statement, Defendant could have produced evidence to the contrary. Instead, Defendant only challenged the duration of the attorney-client relationship. We hold their attorney-client relationship was still intact at the time the email was sent.

Defendant also contends that if there was any mistake at all, Plaintiffs made the mistake. Specifically, Defendant argues Plaintiffs were the ones who included a single-parcel identification number which encompassed both the eight-acre and seven-acre parcels of land in the contract and deed. The deed also included a plat map of the eight acres on the north side and seven acres on the south side.

Despite Defendant's contention, this Court has held "[n]egligence on the part of one party which induces the mistake does not preclude a finding of mutual mistake." *Dillard*, 126 N.C. App. at 798–99, 487 S.E.2d at 159 (holding mutual mistake where the defendant mistakenly listed the incorrect street number on his insurance policy, but the evidence showed "both parties believed they were contracting to insure a house owned by [the] defendant and [the] defendant did not own the 4321 Sudbury Road residence"); *Wells Fargo Bank*, 239 N.C. App. at 240–41, 768 S.E.2d at 606 (ordering reformation due to mutual mistake where the deed of trust prepared by Wachovia Bank (now Wells Fargo Bank, N.A.) listed the correct street address for the defendants' home, "but mistakenly referenced the book and page number and tax parcel ID of the adjacent, undeveloped lots").

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3. "Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded." N.C. Rules of Prof'l Conduct r.1.16 cmt. 1 (N.C. State Bar 2025); "If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved." N.C. Rules of Prof'l Conduct r.1.3 cmt. 4 (N.C. State Bar 2025).

In *Wells Fargo*, this Court relied on our holding in *Dillard* and held a party seeking reformation "need not allege or prove that the mutual mistake was a reasonable or neglect-free mistake." *Id.* at 249, 768 S.E.2d at 611. Moreover, "[e]ven if the mistake resulted from that party's failure to exercise reasonable diligence, reformation is available if there is clear, cogent, and convincing evidence that the mistake was a mutual one and that it prevents the instrument from embodying the parties' actual, original agreement." *Id.* (citing *Dillard*, 126 N.C. App. at 798–99, 487 S.E.2d at 159). There, we held the evidence was sufficient to support a finding of mutual mistake because "Wells Fargo presented uncontested evidence that the deed of trust include[d] the correct property address of the developed property"; "[t]he appraisal conducted during the loan origination process was performed on the developed property"; the defendants "applied the vast majority of the loan to pay off their existing mortgage on that developed property"; and the defendants "did not forecast any evidence at trial tending to show that the deed of trust was intended to reference the undeveloped, empty lots." *Id.* at 249–50, 768 S.E.2d at 611–12.

Here, like in *Dillard* and *Wells Fargo*, for the reasons stated above, Plaintiffs presented sufficient evidence to support mutual mistake despite any drafting error on behalf of Plaintiffs. Moreover, Defendant did not present any evidence tending to show he understood he was acquiring both the eight acres on the north side, and the seven acres on the south side.

Thus, considering all the evidence presented in the light most favorable to Defendant, we hold Plaintiffs presented "clear, cogent and convincing evidence" to support the existence of mutual mistake. *See Hice*, 301 N.C. at 651, 273 S.E.2d at 270.

B. Joinder

[2] Next, Defendant contends the trial court reversibly erred by granting Plaintiffs' Motion because a necessary party was not joined. Specifically, Defendant argues Defendant's lender, Movement Mortgage, LLC, has a vested interest in securing its substantial purchase money mortgage and the legal description in its deed of trust is the same as that in Defendant's deed.

Despite Defendant's argument, Defendant did not raise the issue of necessary joinder at trial.

This Court has long recognized "where a theory argued on appeal is not raised before the trial court, the argument is deemed waived on appeal." *Welch v. Welch*, 288 N.C. App. 627, 629–30, 886 S.E.2d 921, 922–23

(2023) (citation and internal marks omitted). *See Bennett v. Hospice & Palliative Care Ctr. of Alamance Caswell*, 246 N.C. App. 191, 195 n.1, 783 S.E.2d 260, 263 n.1 (2016) ("[I]ssues or theories of a case not raised at the trial level will not be entertained for the first time on appeal.").

Rule 12(h)(2) of the North Carolina Rules of Civil Procedure provides that "a defense of failure to join a necessary party . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." *M.E. v. T.J.*, 380 N.C. 539, 563, 869 S.E.2d 624, 639 (2022); N.C. R. Civ. P. 12(h)(2) (2023). While the defense of lack of subject-matter jurisdiction may be raised at any time and for the first time on appeal, " 'failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding.' " *Id.* (quoting *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 574, 344 S.E.2d 789, 793 (1986) (citation omitted)). Accordingly, " 'the defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal.' " *Id.* (quoting *Phillips v. Orange Cnty. Health Dept.*, 237 N.C. App. 249, 255, 765 S.E.2d 811, 816 (2014)).

Thus, because Defendant failed to raise the issue of necessary joinder at trial, it is waived and cannot be raised and addressed for the first time on appeal.

C. Motion to Continue

[3] Defendant contends the trial court abused its discretion by denying Defendant's Motion to Continue and excluding Defendant's affidavits submitted 20 September 2024.

Our review of the denial of a motion to continue "is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001) (citation omitted). "A trial court abuses its discretion when its ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re Custodial Law Enf't Recording Sought by Greensboro*, 383 N.C. 261, 268, 881 S.E.2d 96, 101 (2022) (citation and internal marks omitted). Moreover, "a denial of a motion to continue is only grounds for a new trial when [the] defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *In re L.A.J.*, 381 N.C. 147, 149, 871 S.E.2d 697, 699 (2022).

Here, Defendant filed and served two affidavits in opposition to Plaintiffs' Motion at 4:56 PM and 4:57 PM the Friday before the hearing. Three days later, on the morning of the hearing, Defendant moved

to continue, and the trial court denied Defendant's Motion. Defendant argues his Motion should have been granted pursuant to Rule 56(f) of the North Carolina Rules of Civil Procedure. We disagree.

Rule 56(f) provides the following:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. R. Civ. P. 56(f) (2023).

The rule "permits the opposing party to move for additional time to obtain affidavits or complete discovery essential to justify his opposition." *Am. Travel Corp. v. Cent. Carolina Bank & Tr. Co.*, 57 N.C. App. 437, 441, 291 S.E.2d 892, 895 (1982). "Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979).

Here, the record supports a finding that Defendant was not seeking discovery and had not sought discovery of any information in the months prior to the hearing. Plaintiffs filed their complaint on 22 February 2024 and moved for summary judgment on 28 August 2024. Plaintiffs' Motion came on for hearing 23 September 2024. Thus, Defendant had seven months to seek discovery and produce evidence in opposition to Plaintiffs' complaint and Motion and failed to do so. Instead, Defendant waited until the Friday before the summary judgment hearing on Monday to file affidavits in opposition to Plaintiffs' Motion. Additionally, Defendant untimely served his affidavits.

Rule 6(d) of the North Carolina Rules of Civil Procedure provides the following:

> [O]pposing affidavits shall be served at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering

> the untimely served affidavit, or take such other action as the ends of justice require.

N.C. R. Civ. P. 6(d) (2023).

Under Rule 6, Saturdays and Sundays are excluded in the time computation of service of papers. N.C. R. Civ. P. 6(a) (2023). In other words, opposing affidavits need to be served at least two business days prior to the hearing. *Id*. Defendant served his opposing affidavits on Friday, and the summary judgment hearing was scheduled for Monday. Thus, Defendant failed to timely serve his affidavits.

While it is true Rule 6(d) gives the trial court discretion to allow the late filing of affidavits, this Court has held "absent a showing of excusable neglect, the trial court does not abuse its discretion when it refuses to accept late affidavits." *Rockingham Square Shopping Ctr., Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 641, 279 S.E.2d 918, 924 (1981) (holding the trial court did not err by excluding the plaintiffs' untimely affidavits because the plaintiffs "had notice of the summary judgment hearing nearly four months in advance" and "offered no explanation for their delay in presenting opposing affidavits").

Here, Defendant had several months to seek discovery and produce information in opposition to Plaintiffs' complaint and Motion and failed to timely do so. Additionally, Defendant offered no explanation for his delay in filing and presenting the opposing affidavits.

As a result, we hold the trial court did not err by denying Defendant's Motion to Continue and excluding Defendant's affidavits.

III. Conclusion

We hold the trial court properly granted Plaintiffs' Motion for Summary Judgment; did not err by failing to join a necessary party; and properly denied Defendant's Motion to Continue.

AFFIRMED.

Judges TYSON and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 20 August 2025)

BARBER v. DRIGGERS No. 24-840	Lee (23CV001251-520)	Affirmed
BARD v. RAMPEL No. 24-970	Orange (19CVD000301-670)	Affirmed and Remanded
CHOTO ENTERS., INC. v. H&G LOGISTICS, INC. No. 24-854	Wake (23CVS000425-910)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
CONDREY v. WILLIAMS No. 25-89	Avery (24CVD000158-050)	Affirmed
FRENCH v. KUMAR No. 25-33	Mecklenburg (23CV036777-590)	Affirmed
GREEN v. BRANCH No. 24-797	Durham (16CVD000111)	Affirmed
HEDGEPETH v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. No. 24-1020	Swain (22CVS000065-860)	Affirmed
IN RE I.E.R.S. No. 24-777	Surry (23JT000067)	Affirmed
IN RE S.S.L. No. 25-66	Guilford (22JT000051-400)	Affirmed.
IN RE SMITH No. 24-859	New Hanover (23E000732-640) (23E000733-640)	Affirmed
IN RE T.J. No. 25-68	Forsyth (23JT000066-330)	Affirmed
IN RE V.H. No. 24-832	Cumberland (23JA000321)	Affirmed
LEI v. GEICO GEN. INS. CO. No. 25-157	Mecklenburg (24CV015331-590)	Affirmed.

MURDOCK v. CITY OF GREENSBORO No. 24-1077	N.C. Industrial Commission (TA-031621)	Affirmed.
OKINUS, INC. v. TEASLEY No. 25-114	Durham (22CVD003421-310)	Affirmed.
PRITCHETT v. DUDEK No. 24-1065	Wake (22CVS014297-910)	Affirmed
STATE v. BACKUS No. 24-1129	Caswell (19CRS050157) (19CRS050508)	AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.
STATE v. BROWN No. 24-991	Durham (23CRS296185)	No Error
STATE v. BROWN No. 24-989	Randolph (20CRS052564)	Vacated and Remanded
STATE v. BROWN No. 24-734	Watauga (24CR227440)	Dismissed
STATE v. CAMP No. 24-1122	Lincoln (22CRS000920) (22CRS359088)	Affirmed
STATE v. JOHNSON No. 24-758	Wake (21CR202218-910) (21CR202220-910) (21CR202221-910) (21CR202222-910) (21CR202223-910) (21CR202224-910)	No Error
STATE v. JOHNSON No. 24-451	Richmond (21CRS51870-72)	No Error
STATE v. LESTER No. 24-926	Wake (20CR211301-910)	APPEAL DISMISSED
STATE v. REAVES No. 24-153	Craven (19CRS53427-29) (20CRS589) (22CRS571)	Affirmed
STATE v. REECE No. 24-1087	Watauga (23CRS000360) (23CRS347581) (23CRS347608)	Affirmed

STATE v. RUSSELL No. 25-126	Cabarrus (24CR000141-120)	No Error
STATE v. SAIEED No. 24-1080	Guilford (21CRS087234) (21CRS087236) (21CRS087237) (22CRS065217)	No Error
STATE v. SHUMATE No. 24-674	McDowell (21CRS050306)	No Error
STATE v. SMITH No. 23-1114	Robeson (17CR052317-770)	No Error
STATE v. STEWART No. 24-968	Stokes (23CRS482695) (24CRS216626)	Affirmed.
STATE v. TRAPP No. 24-846	Rowan (23CRS000813) (23CRS285749)	Affirmed
STATE v. WALKER No. 24-732	Stokes (97CR004409-840) (97CR004410-840) (97CR004411-840)	Affirmed
STATE v. WASHINGTON No. 24-1125	Sampson (15CRS052339) (15CRS052346)	Dismissed
STATE v. WOODS No. 24-916	Watauga (23CRS437306)	Affirmed
STEPHENS v. COAKLEY No. 24-729	Forsyth (22CVD002639-330)	Dismissed

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