300 N.C. App.—No. 4 Pages 333-501

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 6, 2026

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

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

Former Chief Judges

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

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL JR.
WILLIS P. WHICHARD[1]
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS JR.
CLARENCE E. HORTON JR.
ROBERT H. EDMUNDS JR.
JAMES C. FULLER
RALPH A. WALKER
ALBERT S. THOMAS JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN IV
SANFORD L. STEELMAN JR.
MARTHA GEER
LINDA STEPHENS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER JR.
WANDA G. BRYANT
PHIL BERGER JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK
RICHARD D. DIETZ
LUCY INMAN
DARREN JACKSON
ALLISON J. RIGGS
HUNTER MURPHY
CAROLYN J. THOMPSON

[1] Died 18 November 2025.

Clerk

EUGENE H. SOAR

Assistant Clerk

Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director

Jonathan Harris

Director

David Alan Lagos

Assistant Director

Michael W. Rodgers

Staff Attorneys

Lauren T. Ennis

Caroline Koo Lindsey

Ross D. Wilfley

Hannah R. Murphy

J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director

Ryan S. Boyce

Assistant Director

Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen

Niccolle C. Hernandez

Jennifer C. Sikes

COURT OF APPEALS

CASES REPORTED

FILED 3 SEPTEMBER 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory order—partial summary judgment—legal title not in dispute—substantial right not shown—In a dispute over the terms of a lease to purchase agreement of a residential property, the appellate court dismissed for lack of appellate jurisdiction defendant's appeal from the trial court's order granting partial summary judgment to plaintiff (and ordering defendant to comply with specific performance by closing on the sale of the property and conveying title to plaintiff). Where the case involved only the interpretation of the contract terms and did not involve a question regarding to whom title to the property belonged, defendant failed to demonstrate a substantial right requiring immediate review. **Bolden v. V & A Invs., LLC, 346.**

APPEAL AND ERROR—Continued

Possession of a firearm by a felon—constitutional claim—not raised at trial—no exceptional circumstances—In a prosecution on charges including first-degree murder, arising from the robbery of a convenience store, where defendant failed to raise his constitutional claim at trial and did not demonstrate any exceptional circumstances justifying suspension of the appellate rules, the appellate court dismissed defendant's argument as unpreserved. **State v. Scott, 476.**

ASSAULT

Assault with deadly weapon with intent to kill inflicting serious injury—hands and feet as deadly weapons—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State presented substantial evidence from which a jury could infer that defendant used his hands and feet as deadly weapons in the context of the assault. Specifically, defendant punched and stomped on the victim's face for several minutes as the victim lay motionless and defenseless on the ground, which left the victim with severe injuries. **State v. Powell, 445.**

Assault with deadly weapon with intent to kill inflicting serious injury—no instruction on lesser-included offenses—new trial—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) arising from an assault defendant committed while intoxicated, defendant was prejudiced by the trial court's failure to give requested instructions to the jury on lesser-included offenses that were supported by the evidence. Viewing the evidence in the light most favorable to defendant, where defendant's intoxication could have created reasonable doubt about his ability to form the specific intent to kill the victim—a necessary element of AWDWIKISI, a specific intent crime to which voluntary intoxication is a valid defense—there was a reasonable possibility that at least one juror could have decided to convict defendant of the lesser-included offense of assault with a deadly weapon inflicting serious injury, a general intent crime; notably, the jury requested definitions of "intent to kill" and "specific intent" after deliberations began. Defendant's conviction was vacated and the matter was remanded for a new trial. **State v. Powell, 445.**

Assault with deadly weapon with intent to kill inflicting serious injury—specific intent required—sufficiency of evidence—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State presented substantial evidence from which a jury could infer that defendant had the specific intent to kill the victim during the assault, a necessary element of the charge, where defendant continued to violently attack the victim while he lay defenseless on the ground for several minutes. Contrary to defendant's argument, the State was not required to prove that defendant's intent to kill was formed only after premeditation and deliberation. Further, whether defendant's intoxication prevented defendant from forming a specific intent to kill was a question for the jury to resolve. **State v. Powell, 445.**

CHILD CUSTODY AND SUPPORT

Best interest of child—sole custody to grandparent—challenged by nonparent caretaker—findings of fact—In a child custody matter involving the daughter of two habitual drug users (defendants) and a nonparent (plaintiff) who became the child's principal caretaker shortly after the child tested positive for methadone at birth, the trial court's order awarding permanent custody to the child's grandmother (intervenor)—while granting visitation to defendants but not to plaintiff—was affirmed where the court's findings of fact supported its conclusion that giving intervenor sole custody was in the child's best interest. Notably, the court's findings acknowledged plaintiff's role as the child's primary caretaker during a difficult time—stating at one point that plaintiff saved the child's life—while also explaining how the child's exposure to conflicting parenting styles, the child's assimilation back into her nuclear family, and the continuing animosity between the parties in this case negatively affected the child, therefore justifying the court's decision not to grant custody or visitation to plaintiff. **Adams v. Dillon, 333.**

Permanent custody—awarded to grandparent—challenged by nonparent caretaker—findings of fact—sufficiency of evidence—In a child custody matter involving the daughter of two habitual drug users (defendants) and a nonparent (plaintiff) who became the child's principal caretaker shortly after the child tested positive for methadone at birth, the trial court's order awarding permanent custody to the child's grandmother (intervenor)—while granting visitation to defendants but not to plaintiff—was affirmed where competent evidence supported the court's factual findings, including that: although intervenor had abused alcohol years earlier, there was no definitive evidence of continued alcohol abuse since then; the child had spent no more than eight months in plaintiff's sole care; and plaintiff's and intervenor's parenting styles were "diametrically opposed" to each other, with plaintiff's parenting style having negatively affected the child. Furthermore, in accordance with N.C.G.S. § 50-13.2(a) and Civil Procedure Rule 52(a)(1), the trial court made sufficient findings addressing all relevant factors pertaining to the best interest of the child. **Adams v. Dillon, 333.**

Permanent custody—awarded to grandparent—grandparent's discretion to extend parents' visitation—no delegation of trial court's judicial function— In a child custody matter involving the daughter of two habitual drug users (defendants) and a nonparent (plaintiff) who became the child's principal caretaker shortly after the child tested positive for methadone at birth, the trial court's order awarding permanent custody to the child's grandmother (intervenor)—while granting visitation to defendants but not to plaintiff—was affirmed because the court had not improperly delegated a judicial function to intervenor by granting her the discretion to increase defendants' visitation if they remained in a "safe and sober state." This case was distinguishable from a similar custody case in which the trial court failed to define and establish the time, place, and conditions for the parents' visitation; here, the court established a minimum amount of visitation time for defendants to see their child and defined the conditions under which visitation could be extended. **Adams v. Dillon, 333.**

CIVIL PROCEDURE

Voluntary dismissal—Rule 41(a)(1) savings provision—relation back—statute of repose not a bar—In an action alleging legal malpractice and negligence, where plaintiff took a voluntary dismissal of its complaint pursuant to Civil Procedure Rule 41(a)(1) and refiled its complaint within one year of the dismissal, the claim was not barred by the four-year statute of repose (N.C.G.S. § 1-15(c)) even though the refiled complaint was filed more than four years after defendants' last act of negligence (assuming without deciding that the trial court correctly calculated the date of the last negligent act). Where plaintiff's initial complaint was filed within the applicable statute of limitations and statute of repose, the same claim alleged in the refiled complaint related back, pursuant to the savings provision of Rule 41, to the date of the initial complaint and therefore remained a viable claim. However, where the refiled complaint included a new claim for gross negligence, that claim did not relate back to the initial filing date and therefore was properly dismissed as being barred by the statute of repose. **Puma Biotechnology, Inc. v. Hedrick Gardner Kincheloe & Garofalo, L.L.P., 397.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Bellwether cases—not precluding plaintiff's claim—no evidence to support Industrial Commission's decision—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim under the doctrines of collateral estoppel and the "law of the case." However, plaintiff's case was not among those consolidated, and there was no indication that the common evidence in the Bellwether Cases was part of the record in hers. Since plaintiff did not have the benefit of even the common evidence from the Bellwether Cases, there was no evidence at all in the record upon which the Commission could base its decision. **Huffstetler v. Cont'l Tire the Ams., 384.**

Bellwether cases—worker's compensation—not precluding plaintiff's claim—right to present specific evidence—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim under the doctrines of collateral estoppel and the "law of the case." First, plaintiff's case was not among those consolidated, and there was no indication that the common evidence in the Bellwether Cases was part of the record in her case. Second, even if an agreement between defendant and plaintiff that the Bellwether Cases "include[d] findings of fact which would be common to [plaintiff's] claim" amounted to a binding stipulation, plaintiff would still be in the same position as the consolidated case plaintiffs, whose claims the appellate court had held were not precluded by *Hinson* and who were therefore entitled to present evidence specific to their cases. **Gilbert v. Cont'l Tire the Ams., 381.**

Collateral estoppel—issue preclusion—parties not in privity—issues not litigated—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim on the basis of collateral estoppel. Plaintiff was not so identified in interest as to establish privity with the Bellwether plaintiffs since the Bellwether plaintiffs had no legal interest in plaintiff's claim. Moreover, plaintiff's issues were not identical to those resolved in the Bellwether Cases as plaintiff's husband, unlike any of the Bellwether plaintiffs, suffered from lung cancer and plaintiff was prepared to offer exposure evidence specific to her husband in his work as a pipefitter and welder. **Funderburk v. Cont'l Tire the Ams., 353.**

Res judicata—claim preclusion—no privity—claim not adjudicated—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim on the basis of res judicata. Plaintiff was not so identified in interest as to establish privity with the Bellwether plaintiffs since the Bellwether plaintiffs had no legal interest in plaintiff's claim. Moreover, plaintiff's claim was not one that was or should have been adjudicated in the Bellwether Cases. **Funderburk v. Cont'l Tire the Ams., 353.**

CONSTITUTIONAL LAW

Possession of a firearm by a felon statute—right to bear arms—as-applied state constitutional challenge—no violation—Defendant's arguments that North Carolina's possession of a firearm by a felon statute (N.C.G.S. § 14-415.1) violated his right to bear arms under the federal constitution and his facial challenge under the state constitution were precluded by prior decisions of the Court of Appeals. Defendant's as-applied state constitutional challenge to the statute was unavailing where two of the five factors set forth in *State v. Britt*, 363 N.C. 546 (2009), weighed strongly against a conclusion that the statute as applied to defendant was an unreasonable regulation not fairly related to the preservation of public peace and safety. Although defendant's prior criminal record showed no intrinsically violent convictions for several decades and his firearm possession prior to the instant case appeared responsible and lawful, after the convictions at issue in this appeal—in a plea arrangement with the State—defendant pled guilty to two counts of first-degree burglary and one count of robbery with a dangerous weapon arising from the same incident. **State v. Watkins, 490.**

CRIMINAL LAW

Motion for continuance—degenerative eye condition—denial—no abuse of discretion—no due process violation—In a prosecution on charges including first-degree murder, the trial court did not err or abuse its discretion in denying defendant's motion to continue his trial—which alleged that defendant's keratoconus, a degenerative condition affecting his eyesight, impaired his ability to read and, thus, to communicate with his counsel and to prepare for and participate in a trial—where defendant argued that the trial judge erred in relying on his own knowledge of keratoconus (from which the judge also suffered) rather than upon the medical evidence defendant presented. At the motion hearing, the judge explicitly stated that he was not substituting his own experience for evidence presented, and defendant raised no objection to the judge's participation in his trial. Moreover, defendant neither identified any specific finding of fact by the judge that supported his appellate position nor explained how the denial of his motion prejudiced his defense. To the extent defendant's argument concerned his ability to participate in his trial, the appellate court noted that defendant had declined a corrective surgery offered prior to the filing of his motion and had been provided several accommodations during trial. **State v. Scott, 476.**

EVIDENCE

Hearsay exception—statements against penal interest—declarant's unavailability—trustworthiness of statement—In a prosecution for charges including first-degree murder, the trial court did not abuse its discretion by excluding testimony from defendant's father that defendant's friend—who was also implicated in the charged crimes—had denied defendant's involvement in the murder, where the testimony did not fall under the exception to the rule against hearsay for statements made against the speaker's penal interest (Evidence Rule 804(b)(3)). First, the friend could not be deemed "unavailable" for purposes of Rule 804(b)(3) since, according to the record, his absence resulted from defendant helping him to flee to Mexico, after which defendant made no good-faith effort to procure the friend's attendance at trial. Second, there was insufficient evidence corroborating the trustworthiness of the friend's statement, especially where: it was allegedly made two years before trial; defendant's father, himself an interested witness, did not mention this statement when he first spoke with law enforcement; and the State presented ample evidence at trial of defendant's involvement in the murder. **State v. Quiterio-Morrison, 462.**

Prior convictions—probative value versus prejudicial effect—no abuse of discretion—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury arising from an assault that was captured on video surveillance, the trial court did not abuse its discretion by allowing the State to cross-examine defendant about two prior convictions—for financial fraud in 1994 and for assaulting a government official in 2010—that were offered to impeach defendant's credibility pursuant to Evidence Rule 609. Even if the prejudicial effects of the prior convictions outweighed their probative value, defendant could not show prejudice; given the evidence of defendant's guilt, there was no reasonable possibility that the jury would have reached a different result absent the prior convictions. **State v. Powell, 445.**

Rule 404(b)—prior arrests for breaking and entering—identification of defendant—plain error analysis—In a prosecution for charges including felonious possession of stolen goods and multiple counts of breaking and entering—arising from the theft of a weed eater, a leaf blower, and other equipment from a community college campus—the trial court did not plainly err by allowing a detective to testify about running defendant's record and noticing his prior arrests for breaking and entering. The testimony—though inadmissible to prove defendant's propensity to commit the crimes at issue—was admissible under Evidence Rule 404(b) for the purpose of explaining how the detective correctly identified defendant when securing the warrants for his arrest for the crimes connected to the missing equipment. Furthermore, even if the testimony's admission had been improper, it did not have a probable impact on the outcome of defendant's trial where the State had presented other sufficient evidence of his guilt. **State v. Clark, 432.**

Solicitation of murder—evidence of a different murder solicitation—danger of unfair prejudice—curative instruction—other evidence of defendant's guilt—In a prosecution for first-degree sexual offense with a child, indecent liberties with a child, and solicitation of murder, where the latter charge arose after defendant offered to pay his jail cellmate to murder the victim involved in the sexual offense charges, the trial court neither abused its discretion by declining to grant a mistrial ex mero motu nor prejudicially erred by admitting a recorded conversation between the cellmate and a detective during which the cellmate informed the detective that defendant had also solicited the murder of a woman unrelated to the case. Although the reference to the second murder solicitation was prejudicial, the decision to admit the recording was neither arbitrary nor manifestly unsupported by reason where the court: determined—after holding a hearing, reviewing the entire recording in camera, and speaking extensively with the parties—that the recording's probative value outweighed the danger of unfair prejudice; gave a curative instruction for the jury to disregard any mention of the other woman defendant wanted murdered; and properly admitted other overwhelming evidence of defendant's guilt of the charged crimes. **State v. Eanes, 438.**

HOMICIDE

Felony murder—predicate felony—robbery with a firearm—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of first-degree murder under a felony murder theory, where the State presented substantial evidence that defendant participated in the predicate felony of robbery with a firearm. Specifically, the evidence showed that: defendant's phone was used to challenge the victim to a fight at defendant's house; the victim was shot with defendant's gun; the victim's body, car, and cell phone were taken to the house of defendant's cousin, which defendant had visited shortly after the shooting; and defendant told his friend to get rid of the victim's car, which was later found at defendant's cousin's house. Taken together, a jury could have found that defendant was involved in taking the victim's car and cell phone while he was either using or in the possession of a firearm. Further, the absence of evidence showing an agreement between defendant and his friend to steal from the victim was irrelevant, since, for felony murder based on armed robbery, the intent to take property can be formed before or after the killing. **State v. Quiterio-Morrison, 462.**

JURY

Deadlocked jury—Allen instruction—written rather than oral—no reversible error—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not commit reversible error by sending a written *Allen* instruction (encouraging the jury to continue deliberations while emphasizing that each individual juror should not abandon their honest convictions) to the deadlocked jury in the jury room rather than giving the instruction in open court. The decision to give an *Allen* instruction is discretionary and, here, the trial court's direct statements to the jury encouraging them to continue deliberating did not rise to the level of reversible error. Therefore, even if there was any error in giving the *Allen* instruction in writing, it likewise did not constitute reversible error. **State v. Powell, 445.**

Deadlocked jury—instructions to continue deliberating—no plain error—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not commit plain error by instructing the jury to continue its deliberations after the court was informed that the jury had reached an impasse. Although it was unclear whether the jury viewed the court's statements as a directive to deliver a verdict quickly or simply as a statement that if they did not, they would recess and continue the following day, there was strong evidence of defendant's guilt and therefore no reasonable possibility that the jury would have reached a different result absent the court's statements. **State v. Powell, 445.**

Questions after deliberations began—pattern instruction on intent—no plain error—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, there was no reversible error in the trial court's unchallenged instruction to the jury after deliberations began, in which the trial court responded to the jury's request for definitions of "intent to kill" and "specific intent" by giving the pattern jury instruction on intent generally. Even if the court erred, defendant could not show that the jury probably would have reached a different verdict if a more detailed instruction had been given, where there was clear evidence from which the jury could infer that defendant acted with specific intent. **State v. Powell, 445.**

PRIVACY

Invasion of privacy—security camera aimed at neighboring property—intrusion upon seclusion—sufficiency of evidence—In a case arising from a dispute between neighbors, in which plaintiffs sought an injunction to compel defendants to remove a six-foot-tall fence between the parties' properties, the trial court's order denying plaintiffs' motions for directed verdict and judgment notwithstanding the verdict on defendants' invasion of privacy counterclaim was affirmed. There was more than a scintilla of evidence that plaintiffs' installation of a motion-activated security camera aimed directly at defendants' backyard constituted an intrusion upon another's solitude or seclusion that could be considered highly offensive to an objectively reasonable person; therefore, the evidence was sufficient to send to the jury the issue of whether the intrusion was in fact highly offensive. **Nichols v. Calhoun, 386.**

SEARCH AND SEIZURE

Search warrant—supporting affidavit—probable cause—sufficient facts—In a prosecution on charges including robbery with a dangerous weapon, first-degree burglary, and second-degree kidnapping, the trial court properly denied defendant's motion to suppress evidence—a handgun wrapped in a rag stashed under the hood of defendant's car—where the supporting affidavit accompanying the search warrant application for defendant's vehicle alleged facts sufficient to establish probable cause that defendant's vehicle might contain evidence related to criminal conduct. Specifically, the affidavit alleged that, just before defendant's fellow perpetrators entered the home where the robbery, burglary, and kidnapping occurred, witnesses saw them get out of a car linked to another person with whom defendant had engaged in other criminal activity. **State v. Watkins, 490.**

WORKERS' COMPENSATION

Asbestos-related claims—bellwether case status—no special preclusive effect—not binding on other plaintiffs—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), even though the Bellwether Cases included evidence of general issues common to all claims, the status of those cases did not exert any special preclusive effect or render their outcomes binding on the remaining consolidated cases. **Funderburk v. Cont'l Tire the Ams., 353.**

Asbestos-related claims—bellwether cases—law of the case—not binding on other cases, plaintiffs, issues, or claims—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—became the "law of the case" for plaintiff's claim (a consolidated case but not one of the Bellwether Cases). Plaintiff's case had not been litigated or appealed; she was not a party in the Bellwether cases; and her claim, while related to the Bellwether Cases, was distinct from the claims in those cases. **Funderburk v. Cont'l Tire the Ams., 353.**

Consent order—bellwether cases—stipulation only as to common issues—no waiver of right to present evidence specific to plaintiff's case—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases)—where the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019), affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—a consent order entered into by the consolidated case parties (including plaintiff) to facilitate the transfer of the cases to a single deputy commissioner was not a stipulation by plaintiff that the deputy commissioner's ruling on the question of exposure in the Bellwether Cases would bind plaintiff. Rather, the consent order merely noted the intent of the parties that the Bellwether Cases would litigate the issue of exposure as to theories and evidence common to all plaintiffs, with the non-Bellwether-Case plaintiffs retaining the ability to present any exposure evidence specific to their own cases in further proceedings. **Funderburk v. Cont'l Tire the Ams., 353.**

Due process violation—bellwether cases—plaintiff's specific evidence and claim—In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—precluded the claims of plaintiffs in other consolidated cases. Accordingly, the Commission's dismissal of plaintiff's claim (one of the consolidated cases, but not a Bellwether Case) violated her right to due process as it left plaintiff without the opportunity to prove, by the presentation of her specific evidence, that her husband's lung cancer was the result of his particular job duties. **Funderburk v. Cont'l Tire the Ams., 353.**

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.

MERIDITH ADAMS, Plaintiff
v.
DAVID DILLON and BRITTANY DILLON, Defendants
v.
KIMBERLY TRAVIS, Intervenor

No. COA24-999

Filed 3 September 2025

1. Child Custody and Support—permanent custody—awarded to grandparent—challenged by nonparent caretaker—findings of fact—sufficiency of evidence

In a child custody matter involving the daughter of two habitual drug users (defendants) and a nonparent (plaintiff) who became the child's principal caretaker shortly after the child tested positive for methadone at birth, the trial court's order awarding permanent custody to the child's grandmother (intervenor)—while granting visitation to defendants but not to plaintiff—was affirmed where competent evidence supported the court's factual findings, including that: although intervenor had abused alcohol years earlier, there was no definitive evidence of continued alcohol abuse since then; the child had spent no more than eight months in plaintiff's sole care; and plaintiff's and intervenor's parenting styles were "diametrically opposed" to each other, with plaintiff's parenting style having negatively affected the child. Furthermore, in accordance with N.C.G.S. § 50-13.2(a) and Civil Procedure Rule 52(a)(1), the trial court made sufficient findings addressing all relevant factors pertaining to the best interest of the child.

2. Child Custody and Support—permanent custody—awarded to grandparent—grandparent's discretion to extend parents' visitation—no delegation of trial court's judicial function

In a child custody matter involving the daughter of two habitual drug users (defendants) and a nonparent (plaintiff) who became the child's principal caretaker shortly after the child tested positive for methadone at birth, the trial court's order awarding permanent custody to the child's grandmother (intervenor)—while granting visitation to defendants but not to plaintiff—was affirmed because the court had not improperly delegated a judicial function to intervenor by granting her the discretion to increase defendants' visitation if they remained in a "safe and sober state." This case was distinguishable from a similar custody case in which the trial court failed to define and establish the time, place, and conditions for the parents' visitation; here, the court established a minimum amount of visitation time for defendants to see their child and defined the conditions under which visitation could be extended.

3. Child Custody and Support—best interest of child—sole custody to grandparent—challenged by nonparent caretaker—findings of fact

In a child custody matter involving the daughter of two habitual drug users (defendants) and a nonparent (plaintiff) who became the child's principal caretaker shortly after the child tested positive for methadone at birth, the trial court's order awarding permanent custody to the child's grandmother (intervenor)—while granting visitation to defendants but not to plaintiff—was affirmed where the court's findings of fact supported its conclusion that giving intervenor sole custody was in the child's best interest. Notably, the court's findings acknowledged plaintiff's role as the child's primary caretaker during a difficult time—stating at one point that plaintiff saved the child's life—while also explaining how the child's exposure to conflicting parenting styles, the child's assimilation back into her nuclear family, and the continuing animosity between the parties in this case negatively affected the child, therefore justifying the court's decision not to grant custody or visitation to plaintiff.

Appeal by defendant from judgment entered 12 February 2024 by Judge Wesley Barkley in Burke County District Court. Heard in the Court of Appeals 14 August 2025.

Wesley E. Starnes, PC, by Wesley E. Starnes, for the plaintiff-appellant.

No brief filed on behalf of the defendant-appellees, David Dillon, and Brittany Dillon, and intervenor-appellee, Kimberly Travis.

TYSON, Judge.

Meridith Adams ("Plaintiff") appeals from a child custody order entered 12 February 2024 awarding full custody of the minor child ("B.D.") to Kimberly Travis ("Intervenor"). We affirm.

I. Background

B.D. was born to David and Brittany Dillon ("Defendants") 21 August 2018. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Defendants are parents to three other children, none of which reside with them. Defendants were known drug users, and B.D. tested positive for methadone in her bloodstream at birth. Plaintiff began caring for B.D. and spending substantial time with her shortly after her birth. By November 2018, Plaintiff was caring for B.D. most weekdays, including her staying with Plaintiff overnights.

Around B.D.'s first birthday, Defendants began to use drugs more heavily, which resulted in a higher demand for childcare by Plaintiff. Defendants ultimately gave over all parental duties to Plaintiff and only saw B.D. every other weekend. At this point, Intervenor, B.D.'s maternal grandmother, moved to intervene and gain custody of B.D.

A Temporary Custody hearing was held 31 July 2020, which resulted in an Interim Custody Order for a non-party, B.D.'s maternal great-aunt, to have custody of B.D., with Plaintiff having visitation. A Temporary Custody order was entered on 5 November 2020 giving custody of B.D. to Intervenor and visitation every other weekend and Wednesday to Plaintiff. The issue of permanent custody was heard between August 2022 and November 2023.

Concerns over Intervenor's history of alcohol abuse were raised before the trial court, resulting in Intervenor completing a Substance Abuse Assessment on 4 August 2020. The assessment found and concluded Intervenor had abused alcohol in the past and suffered from a binge drinking pattern, which had subsided as of January 2020. Plaintiff contended Intervenor was currently abusing alcohol as the child custody order was pending. Plaintiff offered into evidence a voicemail Intervenor had left for her on 8 November 2020, while Intervenor had temporary custody of B.D., which allegedly proved her continued alcohol abuse.

At the end of trial, the court ordered and awarded permanent custody of B.D. to Intervenor without visitation with Plaintiff on 12 February 2024. Plaintiff appeals.

II. Jurisdiction

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

III. Issues

The issues on appeal are: (1) whether the evidence at trial supported several of the trial court's findings of fact; (2) whether the trial court delegated a judicial function to Intervenor by allowing the trial court to increase Defendant-Parents' visitation with B.D. if they maintained their sobriety; and, (3) whether the trial court's findings support its conclusions of law.

IV. Findings of Fact

[1] Plaintiff argues several of the trial courts' findings of fact were not supported by substantial evidence. We disagree.

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254.

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "[A]n error of law is an abuse of discretion." *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2, 846 S.E.2d 634, 638 n.2 (2020); *Sen Li v. Zhou*, 252 N.C. App. 22, 26, 797 S.E.2d 520, 523 (2017) ("An error of law is by definition an abuse of discretion." (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 382 (1990)).

B. Analysis

North Carolina law and precedents require trial courts to adjudicate and make findings to resolve all material issues raised by the evidence and to explain how those issues relate to the child's welfare and best interests in their custody orders. *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013) ("Although a custody order need not, and should not, include findings as to each piece of evidence presented at trial, it must resolve the material, disputed issues raised by the evidence."). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Hall v. Hall*, 188 N.C. App. 527, 532, 655 S.E.2d 901, 905 (2008) (citation omitted).

Our General Statutes mandate: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023). Under Rule 52, the trial court's adjudication and findings of fact must contain the "specific ultimate facts sufficient for an appellate court to determine that the judgment is adequately supported by competent evidence." *Williamson v. Williamson*, 140 N.C. App. 362, 363-64, 536 S.E.2d 337, 338 (2000) (internal marks omitted).

"[V]erbatim recitations of the testimony" do not qualify as findings of fact "because they do not reflect a conscious choice between the conflicting versions of the incident in question." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195, n.1 (1984).

"The trial court is given broad discretion in child custody and support matters" and the court's "order will be upheld if substantial competent evidence supports the findings of fact." *Meehan v. Lawrence*, 166 N.C. App. 369, 375, 602 S.E.2d 21, 25 (2004) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gavia v. Gavia*, 289 N.C. App. 491, 493, 890 S.E.2d 531, 534-35 (2023) (*quoting Shipman*, 357 N.C. at 474, 586 S.E.2d at 253). Whether the "findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citing *Hall*, 188 N.C. App. at 530, 655 S.E.2d at 904).

1. Intervenor's Alcohol Abuse

Plaintiff first argues Finding of Fact 29 is not supported by competent evidence because competent evidence was presented at trial indicating Intervenor had used alcohol while caring for B.D. Finding of Fact 29 states:

> The Court will find that Ms. Travis, in the past, has abused alcohol, including up to and until October 2019, when she required hospitalization for alcohol concentration in excess of .27. However, the Court finds that there has been no evidence of continued abuse of alcohol or other substances by Ms. Travis while the child has been placed with her or in any way that has impeded the child's care.

Plaintiff points to an admitted voicemail Intervenor had left on 8 November 2020, and Plaintiff argues Intervenor was intoxicated because her speech sounded slurred. Plaintiff also points to a conversation Intervenor had with the Department of Social Services ("DSS") on 14 May 2020, wherein Intervenor reportedly stated she "does not drink much but . . . [had] ended up on a bender." While this purported statement by Intervenor was included in DSS records admitted into evidence, Intervenor was not questioned about this statement before the trial court.

Intervenor testified and was questioned extensively about how she had abused alcohol in the past and her current alcohol use. She testified to the following:

> Q. Okay. Do you drink alcohol?
>
> A. I do not.
>
> Q. When's the last time you consumed alcohol?
>
> A. Probably four years ago.
>
> Q. Okay. There was a recording that was previously played in this case. It was a voicemail left on Ms. Adams' phone. Do you recall that voicemail?
>
> A. I do.
>
> Q. You heard the play -- you heard it played in court.
>
> A. I did.
>
> Q. Was that you on the voicemail?
>
> A. It was.
>
> Q. Had you consumed any alcohol that day?
>
> A. No. I had not.
>
> Q. Okay. Do you – I think there was an allegation that your words, your speech was perhaps slurred during that. Did you -- did you hear the message?
>
> A. I did.
>
> Q. Were you under the influence of any impairing substances?
>
> A. No. I was just heartbroken.
>
> Q. Had you had any impairing substances prior to or after that?
>
> A. No.

Intervenor also completed a substance abuse assessment on 4 August 2020. The assessment included the following description:

> Client is a 56-year-old Caucasian female with 2 biological children. Client has worked full-time plus a PRN position as a respiratory therapist for the past 16 years. Client

> had planned to have her almost 2-year-old granddaughter move in with her on 8/31/2020 with FMLA to make the transition before this DSS case started. Client reported that the grandchildren live with an aunt for temporary custody while the custody case is being decided . . . . Client reported having a brief period of alcohol abuse, which became a severe disorder with a binge drinking pattern of use every 4-5 weeks during her 50s. Client reported last use of alcohol to have been in Jan., 2020. Client reported she made up her mind to give it up due to not wanting any of the consequences and getting the shakes from it scared her; she also wanted to be healthy to care for and spend time with her grandchildren. Client reported only ever missing one day of work due to alcohol abuse. Client reported having a strong support system at her church and also at work. Client reported having attended both AA and Beyond Recovery meetings in the past. . . . Client endorsed no triggers for alcohol use since Jan., 2020. Should client experience any difficult stressors in the future, she is recommended to make effective use of her support system, including attending AA/Beyond Recovery Meetings as appropriate.

Our Supreme Court has held: "The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). "The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " *Id.* (first quoting *Montgomery v. Montgomery*, 32 N. C. App. 154, 158, 231 S.E.2d 26, 29 (1977); then citing *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967)).

Plaintiff cites *McKinney v. McKinney* and argues this Court should reject findings of fact holding "no evidence" existed to support a finding when some evidence was presented. 253 N.C. App. 473, 478, 799 S.E.2d 280, 284 (2017). In *McKinney*, the district court found father in civil contempt for failing to comply with the custody order between him and mother. *Id.* at 477, 799 S.E.2d at 284. Their child, Max, had run away to live with father for one month. *Id.* The district court found Max had run away from mother's house on his own because "[f]ather lives a wealthy lifestyle and Max likes the way he lives when he is with him." *Id.* at 478, 799 S.E.2d at 284. "The district court further found that [f]ather never told Max to run away from [m]other; and [f]ather 'enticed' Max to stay with him because of [f]ather's lifestyle." *Id.*

On appeal, father contested the portions of the district court's order finding " '[t]here was *no evidence* presented that the Defendant [f]ather instructed [Max] that he had to abide by the [custody orders]' " and " '[t]here was *no evidence* presented that the Defendant Father secured transportation after August 13, 2014, and told the child to get in the car or plane.' " *Id.* This Court found those findings were not supported by the evidence because "[f]ather stated several times during his testimony that he told Max that Max needed to go back home to [m]other" and "[f]ather did state that he was willing to provide transportation but that Max was simply not willing to go." *Id.* While the district court was free to find no credible evidence was presented, the district court erred by holding "no evidence" existed. *Id.*

Here, both parties presented conflicting evidence regarding whether Intervenor sounded intoxicated on the voicemail. No definitive proof tended to show Intervenor was intoxicated on the day she left the voicemail for Plaintiff or when the purported "bender" in the DSS records had occurred. Intervenor testified she had not used alcohol in years. The Substance Abuse Assessment found Intervenor had displayed no alcoholic tendencies at the time it was completed in 2020. Intervenor and other witnesses testified her voice sounded like she was crying on the voicemail, not like she was intoxicated. These facts differ from *McKinney* because, although conflicting evidence was presented about the exact date Intervenor stopped abusing alcohol, no direct evidence existed indicating Intervenor had continued to consume alcohol after she received treatment at the end of 2019. *Id.*

The trial court is in the best position to hear the testimonies and evidence, determine credibility, and weigh the evidence. *Efstathiadis v. Efstathiadis*, 296 N.C. App. 605, 608-09, 909 S.E.2d 737, 741 (2024) ("It is within the trial court's purview to weigh the evidence and consider credibility, including 'contrary evidence,' not this Court's."). "Credibility of the witnesses is for the trial judge to determine, *id.*, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary." *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) (citing *Crosby*, 272 N.C. 235, 158 S.E.2d 77). The trial court's finding regarding Intervenor's history of alcohol abuse was supported by competent evidence and is binding on appeal. *Id.*; *Efstathiadis*, 296 N.C. App. at 608-09, 909 S.E.2d at 741.

2. Length of Time B.D. was in Plaintiff's Care

Plaintiff next contends Findings of Fact 17, 22, 23, 24, 25, and 27 are not supported by competent evidence and asserts B.D. was in her care for longer than eight months. Presuming Plaintiff was in B.D.'s life and cared for B.D. for a longer period of time, the trial court could not definitively conclude B.D. was in the sole care of Plaintiff for more than eight months, due to the unorganized nature of B.D.'s childcare schedule and Plaintiff's lack of documentation. The trial court was in the best possible position to adjudicate, weigh, and resolve the evidence concerning who was caring for B.D. and for how long. We defer to the trial court's findings and supported conclusions, absent clear proof to the contrary. *Id.* Plaintiff's argument is overruled.

3. Parenting Styles of Plaintiff and Intervenor

Plaintiff argues Findings of Fact 34 and 35 are not supported by competent evidence because "the record is devoid of any evidence of confusion of B.D. concerning discipline" or that Plaintiff's parenting style, which the trial court found "diametrically opposed [to Intervenor's] parenting style," had caused potty training or behavioral issues.

Evidence was presented at trial tending to show B.D. "constantly ha[d] accidents," "thr[e]w fits," spit in someone's face, and smeared feces on the wall after returning from visits with Plaintiff. Plaintiff also testified about a time Plaintiff and Intervenor had disagreed over how to handle correcting B.D. after she had wet her pants. The trial court was in the best possible position to adjudicate, weigh, and resolve the evidence concerning whether Plaintiff and Intervenor had opposing parenting styles that had negatively affected B.D. The trial court's findings were supported by competent evidence. *Id.* Plaintiff's arguments are overruled.

4. Other Issues Raised by Evidence

Plaintiff argues the trial court erred by failing to adjudicate and resolve certain inconsistencies in the evidence presented at trial. More specifically, Plaintiff asserts the trial court failed to address: (1) Intervenor's reluctance to acknowledge her attention deficit hyperactivity and anxiety disorders and prior hallucinations; (2) evidence concerning Intervenor's alcohol abuse, including her inability to remember certain details; (3) Intervenor's purported inability to recognize substance abuse issues in the Defendant-Parents; (4) the reason Defendant-Parents had moved to change B.D.'s placement from Plaintiff to B.D.'s great aunt was because there was a six-week period where they could not visit B.D., which Intervenor purports was due to the COVID-19 pandemic lockdown; and, (5) Defendant-Parents' mental health conditions. Plaintiff argues the trial court's failure to address these issues fails to comply with N.C. Gen. Stat. § 50-13.2(a) (2023), which requires the trial court to "consider all relevant factors" and "include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child" when awarding custody. *See also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023).

The trial court made findings based on competent evidence regarding these factors, even if the trial court's findings were contrary to Plaintiff's interpretation of the extensive evidence presented at trial. The trial court repeatedly acknowledged Defendant-Parents' drug abuse, and the trial court also acknowledged Intervenor's prior alcohol abuse. The trial court's decree gave Intervenor the ability to request any drug screen at ninety-day intervals and allows Intervenor to inspect the home monthly, which will allow her to confirm whether Defendant-Parents are maintaining sobriety.

The trial court repeatedly acknowledged Defendant-Parents' past shortcomings, but also found Defendant-Parents "have made significant strides in improving their situation," "have stable jobs," "have not tested positive for any illegal substances in excess of one year," have not had "any criminal charges or DVPOs filed within the past year," and their home "does meet minimum standards" to have a child in their home.

The trial court made findings indicating Plaintiff had brought B.D. to DSS when custody was transferred to B.D.'s great aunt. Although the trial court mentioned a six-week period where Defendant-Mother had no contact with B.D., the trial court did not find it was based on any malfeasance by Plaintiff, even if the trial court did not explicitly reference the COVID-19 pandemic. Instead, the trial court repeatedly found Plaintiff had maintained a good relationship with Defendant-Mother and Intervenor for a long period of time and "these parties continued to get along to the extent the Court required to continue visitation."

While Plaintiff may have desired the trial court to make additional findings about the evidence presented at trial or to reach opposite conclusions about the evidence presented, the trial court made sufficient findings about Intervenor's alcohol abuse based upon competent evidence. *See Efstathiadis*, 296 N.C. App. at 608-09, 909 S.E.2d at 741; *Woncik*, 82 N.C. App. at 248, 346 S.E.2d at 279; *Carpenter*, 225 N.C. App. at 273, 737 S.E.2d at 787.

V. Trial Court's Responsibility to Decide Custody

[2] Plaintiff argues the trial court erred as a matter of law by delegating a judicial function to Intervenor. Plaintiff asserts the trial court effectively delegated a judicial function to Intervenor because the trial court's decree granted Defendant-Parents a minimum amount of visitation with B.D., with Intervenor's discretion to "increase visitation with the Defendant[-]Parents if [Intervenor] deems the parties are in a safe and sober state."

Plaintiff cites *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971), to support her argument. "When the custody of a child is awarded by the court, it is the exercise of a judicial function." *Id.* at 552, 179 S.E.2d at 849 (citing N.C. Gen. Stat. § 50-13.2 (2023)). This Court explained:

> To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.
>
> When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child. If the court finds that the parent has by conduct forfeited the right or if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; but the court may not delegate this authority to the custodian. On the other hand, if the court does not find that the parent has by conduct forfeited the right of visitation and does not find that the exercise of the right would be detrimental to the best interest and welfare of the child, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised.

Id.

Here, the trial court did not delegate a judicial function by allowing visitation between B.D. and Defendant-Parents. Unlike in *In re Custody* *of Stancil*, where the trial court "fail[ed] to include in the custody order a provision defining and establishing the time, place[,] and conditions under which such visitation rights might be exercised," the trial court established a minimum amount of time for visitation between B.D. and Defendant-Parents with the opportunity to extend if Defendant-Parents remained appropriate and sober. *Id.* at 553, 179 S.E.2d at 849. Defendant-Parents are the biological parents of B.D., and their parental rights have not been terminated. Plaintiff's argument is overruled.

VI. Findings Support the Conclusions of Law

[3] Plaintiff argues the trial court's findings of fact about Plaintiff do not support its conclusion to award custody of B.D. to Intervenor and visitation to Defendant-Parents. Plaintiff cites *Aguilar v. Mayen* to support her assertion. 293 N.C. App. 474, 901 S.E.2d 662 (2024).

The Court in *Aguilar* held a trial court's decision to grant sole custody to Mother instead of joint custody between Mother and Father was not supported by adequate findings of fact:

> Although substantial evidence supports the trial court's finding that Mariana was well cared for by Mother, the trial court further found that Father and Brittany also took good care of Mariana. In other words, the trial court found that Mother, Father, and Brittany *all* provided good care for Mariana: '[T]he minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months.' This finding of fact does not explain why it is in Mariana's best interests that Mother be granted sole custody of Mariana. We do not express an opinion on whether sole or joint custody is appropriate or even on which party is the best-suited to exercise sole custody if the trial court sees fit to order sole custody. We do, however, hold that the trial court's finding that all parties provided adequate care for Mariana, in the absence of other findings, does not support its conclusion that Mother should be granted sole custody.

Id. at 482, 901 S.E.2d at 668.

Here, the facts differ from the facts in *Aguilar*. The trial court made the following finding of fact regarding why sole custody should be provided to Intervenor over Plaintiff:

> 39. As to Plaintiff, Ms. Adams, the Court finds that she stepped up during the child's most important time of need when she

> was born until about eight months old, she was the primary care provider. She has developed a very detailed relationship with the child, there is no question that she loves the child very much, however, the Court finds that her very appropriate style of parenting is diametrically opposed to the parenting styles not only of the biological Defendant[-]Parents but as well as Intervenor, Ms. Travis, and her lack of contact with any of [B.D.]'s siblings, not by choice, but by the facts of this case, and the continued animosity that has existed and that will continue to exist between the parties in this courtroom indicates that a continued contact with Plaintiff, Ms. Adams, would not be in the best interest of this child. The Court recognizes that ceasing visitation in one single day would not be in the best interest of any party, however, the Court orders that a gradual disengagement begin and indicate[s] that continued contact continues a conflict that's been evident in the child's behavior. Therefore, the Court grants disconnect visitation of every other weekend throughout the month of December, not to include the Wednesday visitation. This does not prevent any contact allowed by the Intervenor. This Court would make findings in the records that Ms. Adams has saved this child's life at a time when the child needed her to step in, but the Court views that in a role as a very dedicated foster style parent.

The trial court made detailed and supported findings of fact indicating why such a sole placement is in B.D.'s best interest. These findings expressly acknowledge Plaintiff "saved this child's life at a time when the child needed her to step in", but also adequately explains the conflicts and confusion to the child over differing parenting styles, B.D.'s assimilation and relationship with her nuclear family, and supports the trial court's decision to grant sole custody of B.D. to Intervenor, her maternal grandmother, and visitation with her parents. *See id.*; N.C. Gen. Stat. § 50-13.5(j) (2023). Plaintiff's argument is without merit.

VII. Conclusion

The trial court made detailed findings of fact that are supported by an adjudication and resolution of conflicting and competent evidence. The trial court's conclusions of law are supported by its findings of fact. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

TYESHA BOLDEN, Plaintiff
v.
V & A INVESTMENTS, LLC, Defendant

No. COA24-906

Filed 3 September 2025

Appeal and Error—interlocutory order—partial summary judgment—legal title not in dispute—substantial right not shown

In a dispute over the terms of a lease to purchase agreement of a residential property, the appellate court dismissed for lack of appellate jurisdiction defendant's appeal from the trial court's order granting partial summary judgment to plaintiff (and ordering defendant to comply with specific performance by closing on the sale of the property and conveying title to plaintiff). Where the case involved only the interpretation of the contract terms and did not involve a question regarding to whom title to the property belonged, defendant failed to demonstrate a substantial right requiring immediate review.

Appeal by Defendant from Order entered 11 April 2024 by Judge Tonia Cutchin in Iredell County Superior Court. Heard in the Court of Appeals 22 April 2025.

Eisele Vogel Dixon PLLC, by Kathleen L. Vogel, for Plaintiff-Appellee.

BridgehouseLaw LLP, by Stephen D. Koehler, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

V & A Investments, LLC (Defendant) appeals from an Order granting Tyesha Bolden's (Plaintiff) Motion for Partial Summary Judgment. The Record before us tends to reflect the following:

On 5 July 2019, Defendant executed a Lease to Purchase Agreement (Lease) with Plaintiff for a residential property located in Mooresville, North Carolina. The Lease provided Plaintiff would lease the property for a term of 24 months beginning 5 August 2019, at a rate of $4,500 per month; $1,200 of each monthly payment would be credited towards Plaintiff's purchase of the property.

The Lease allowed Plaintiff to "occupy the home as [Plaintiff's] primary or secondary" residence and to "utilize the home as a short-term rental property." The Lease provided that, in the event of a breach of the Lease by Plaintiff, she would forfeit her right to purchase the property:

> In the event of breach or default of this Lease by [Plaintiff], [Plaintiff] agrees to forfeit all money that [Plaintiff] has invested towards the purchase of the property, including each monthly credit towards the purchase of the property; money spent on maintenance, repairs, alterations, improvements and upkeep of the property; and the Due Diligence Fee and Earnest Money Deposit made under the Purchase Agreement. . . . Any termination of this Lease by [Defendant] due to breach of the lease by [Plaintiff] shall also terminate any and all rights [Plaintiff] may have under the Purchase Agreement[.]

In the event of a breach of the Lease by Defendant, the Lease provided Defendant would return all money Plaintiff had paid toward purchase of the property:

> In the event of breach or default of this Lease by [Defendant], [Defendant] agrees to reimburse all money that [Plaintiff] has invested toward the purchase of the property, including each monthly credit towards the purchase price of the property; money spent on maintenance, repairs alterations, improvements and upkeep of the property; and the Due Diligence Fee and Earnest Money Deposit made under the Purchase Agreement.

The parties contemporaneously executed an Offer to Purchase and Contract (Purchase Agreement). The Purchase Agreement listed the purchase price at $1,075,000 and provided Plaintiff must pay: a $1,000 due diligence fee; a $24,000 earnest money deposit; $1,200 each month, credited from Plaintiff's $4,500 monthly rent payment as outlined in the Lease; and a $1,021,200 cash payment at closing. Plaintiff was also required to obtain a loan commitment prior to closing. The Purchase Agreement contained a breach and default provision identical to the breach and default provision in the Lease.

On 2 February 2021, the parties executed a Contract Extension Addendum which extended the lease term by 12 months, with a new expiration date set for 5 August 2022.

On 9 November 2021, Defendant received an email from the Iredell County Sheriff's Office, notifying Defendant that commercial events were allegedly being hosted at the property. On 10 November 2021, Defendant sent Plaintiff a letter notifying her it was terminating her Lease. Defendant alleged Plaintiff was "using [the] property as a full-time rental," and as an "event venue[,]" which, according to Defendant, was "wholly unauthorized by the Lease terms." Following Plaintiff's receipt of the letter, Plaintiff sent Defendant a check for the December 2021 rent; Defendant subsequently accepted and cashed the check.

Plaintiff continued paying rent to Defendant, and Defendant never attempted to eject Plaintiff from the property. In May 2022, in accordance with the parties' agreement, Plaintiff secured financing for the purchase of the property, selected a closing attorney, and notified Defendant that she had scheduled a closing on the sale of the property for 17 June 2022. On 12 June 2022, Plaintiff sent Defendant proof of her financial ability to purchase the property. Defendant did not attend the scheduled closing.

On 4 August 2022, Plaintiff filed a Complaint alleging Breach of Contract, Unfair and Deceptive Trade Practices, and Unjust Enrichment in response to Defendant's failure to attend the closing. Plaintiff alleged she had fully cooperated with the parties' agreement, and Defendant had breached their agreement by refusing to close on the sale and convey title to the property to Plaintiff. In its Answer filed 17 October 2022, Defendant moved to dismiss Plaintiff's Complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim.

On 13 March 2024, Plaintiff filed a Motion for Partial Summary Judgment, alleging no genuine issues exist as to any material fact in her claim for Breach of Contract and requesting the trial court order Defendant to close on the sale and transfer her the title to the property. During the 28 March 2024 hearing on Plaintiff's Motion, Defendant requested the trial court to deny Plaintiff's Motion because the parties' agreement barred Plaintiff's requested remedy of specific performance. At the conclusion of the hearing, the trial court granted Plaintiff's Motion and ordered Defendant to "comply with the remedy of specific performance[.]" Defendant requested the trial court to certify its Order as a final judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). The trial court denied this Motion. The trial court entered its written order granting Plaintiff's Motion on 11 April 2024. On 6 May 2024, Defendant timely filed Notice of Appeal.

Appellate Jurisdiction

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."

Embler v. Embler, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Generally, there is no right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, a party may appeal an interlocutory order if either: (1) the trial court certifies there is no just reason to delay appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) if delaying the appeal would affect a substantial right. *Id.* (citations omitted). Here, the trial court denied Defendant's request to certify the Order pursuant to Rule 54(b); thus, we consider whether the Order affects a substantial right.

" 'A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002) (quotation marks and citation omitted). The burden is on the appellant to establish that "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (citations and quotation marks omitted).

We have consistently held an order granting partial summary judgment is interlocutory because it does not resolve all the issues in the case. *See, e.g.*, *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (" 'A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.' " (quoting *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)). Nonetheless, Defendant contends the order at issue affects a substantial right because it "is an interlocutory order concerning title [to property]" and thus is immediately appealable. We disagree.

In support of its argument, Defendant cites *Watson v. Millers Creek Lumber Co., Inc.*, 178 N.C. App. 552, 554, 631 S.E.2d 839, 840-41 (2006) (" '[I]nterlocutory orders concerning title . . . must be immediately appealed as vital preliminary issues involving substantial rights adversely affected.' " (quoting *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005))). In *Watson*, the plaintiffs entered into an installment land contract with the defendant, Millers Creek Lumber Company, which provided Millers Creek would convey the land to the plaintiffs upon the plaintiffs' full payment of the purchase price. *Id.* at 553, 631 S.E.2d at 840. Although the plaintiffs complied with the terms of the contract, Millers Creek instead conveyed the land to a third party. *Id.* The plaintiffs filed a complaint against Millers Creek and the third party to whom Millers Creek had conveyed the deed. *Id.* The third party subsequently filed a motion for summary judgment. *Id.* at 554, 631 S.E.2d at 840. The trial court granted the motion and dismissed the action against the third party; the plaintiffs appealed. *Id.* Because Millers Creek elected not to participate in the appeal, the plaintiffs' appeal was interlocutory. *See Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381 ("A final judgment is one which disposes of the cause as to *all the parties*, leaving nothing to be judicially determined between them in the trial court." (emphasis added) (citations omitted)). Nonetheless, citing *Stagecoach Village*, the Court allowed the appeal because Millers Creek "stipulated that title to the disputed property rest[ed] in either plaintiffs or [the third party] and their liability, if any, 'cannot be determined until a final decision is entered on appeal[.]' " *Id.* at 554-55, 631 S.E.2d at 840-41.

This Court in *FMB*, *Inc. v. Creech* addressed a similar argument, and we find its analysis instructive. There, the plaintiff relied on *Stagecoach Village* to argue the interlocutory order at issue was immediately appealable because it concerned title to property. *FMB*, *Inc. v. Creech*, 198 N.C. App. 177, 180, 679 S.E.2d, 410, 412 (2009). This Court first noted "*Stagecoach Village* and the cases upon which it bases its analysis deal solely with issues of condemnation and the involuntary taking of a private citizen's property by the State of North Carolina[ ]" and concluded its analysis was "inapplicable to the instant case as it does not concern condemnation proceedings." *Id.*

The Court next observed *Watson* was—at the time—the only published opinion which "extended the substantial right exception found in *Stagecoach Village* to an issue outside the area of condemnation." *Id.* at 181, 679 S.E.2d at 412 (citation omitted). In concluding *Watson* was distinguishable from the facts before it, the Court noted there was no stipulation as to the validity of the appeal in the case at bar, "which was a key factor in the determination in *Watson* that the order was immediately appealable." *Id.* at 181, 679 S.E.2d at 413. Additionally, there was no dispute as to who held legal title to the property. *Id.* Rather, the issue before the Court in *Creech* was "whether there was a valid option to sell the property to plaintiff[.]" *Id.*

Here, as in *Creech*, there is no stipulation as to the validity of the appeal nor a question of to whom title to the property belongs. *See id.* The issue presented to the trial court in this case was whether Defendant had breached its agreement with Plaintiff by failing to convey the title to the property to Plaintiff and involves only the interpretation of the contract terms contained in the parties' agreements. Further, this case does not concern condemnation proceedings; thus, the rule in *Stagecoach*

Village—and in turn, *Watson*—is "inapplicable to the instant case[.]" *Id.* at 180, 679 S.E.2d at 412.

Moreover, since this Court's decision in *Creech*, our Supreme Court has also limited the holding in *Stagecoach Village* to proceedings "in the context of condemnation cases." *Stanford v. Paris*, 364 N.C. 306, 312, 698 S.E.2d 37, 41 (2010). "[I]n condemnation cases, after a hearing pursuant to N.C.G.S. § 136-108, appeal of an issue affecting title to land or area taken by the State is mandatory and the interlocutory appeal must be taken immediately." *Id.* at 312, 698 S.E.2d at 41. N.C. Gen. Stat. § 136-108 provides that in condemnation hearings the trial court must decide all issues *other than damages*. Consequently, orders rendered in such hearings are interlocutory because they do not resolve all the issues in the case. *See Embler*, 143 N.C. App. at 164, 545 S.E.2d at 261. However, immediate appeal is *mandatory* in such cases—even though the order rendered is interlocutory—because it would be futile to "proceed[ ] with a damages trial when questions linger about *what land is being taken and to whom that land belongs*." *N.C. Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) (emphasis added) (citing *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967)).

In the case *sub judice*, there is no question of what land is being taken and to whom that land belongs. Thus, the reasons for allowing immediate appeal of an interlocutory order affecting title to property as contemplated by *Stagecoach Village* and its corresponding caselaw are not implicated here. *See id.* "The circumstances in which we have extended the substantial right exception found in *Stagecoach Village* outside the area of condemnation are very limited." *Lester v. Galambos*, 247 N.C. App. 245, 2016 WL 1565631, *2 (2016) (unpublished) (citations omitted). Indeed, we have identified only two such cases since our decision in *Watson*, and they are likewise distinguishable. In *Phoenix Ltd. P'ship of Raleigh v. Simpson*, this Court concluded a substantial right was affected where the trial court ordered the defendants to convey property to the plaintiff. 201 N.C. App. 493, 688 S.E.2d 717 (2009). There, as in *Watson* and unlike the case at bar, the defendants had sold the disputed property to a third party despite having contracted to sell the property to the plaintiff; as such, the question of to whom title to the property belonged remained open. *See id.* at 497, 688 S.E.2d at 721; *Watson*, 178 N.C. App. at 553, 631 S.E.2d at 840. And in *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 716 S.E.2d 67 (2011), which concerned "an action to set aside a deed due to fraud and undue influence[,]" *id.* at 284, 716 S.E.2d at 70, we also allowed the defendant's interlocutory appeal because it concerned title to property. *Id.* at 288, 716 S.E.2d at 72 (citing *Watson*, 178 N.C. App. at 554, 631 S.E.2d at 840-41).

Again, unlike these cases concerning competing or fraudulently conveyed deeds—as in *Watson*, *Simpson*, and *Bodie Island*—no dispute exists here as to who holds legal title to the property. Additionally, although the trial court's Order grants specific performance in favor of Plaintiff, the issue resolved by the Order involves only interpretation of a contractual agreement between the parties—not a title dispute.

Defendant did not present any other grounds for appellate review, and it is not our duty "to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]" *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254 (citations omitted). Thus, Defendant has not demonstrated any substantial right would be lost absent immediate appeal. Therefore, we are without jurisdiction to review this matter on immediate appeal. Consequently, we must dismiss Defendant's appeal.

Conclusion

Accordingly, for the foregoing reasons, we dismiss the appeal for lack of appellate jurisdiction.

DISMISSED.

Judges STROUD and TYSON concur.

DEBRA GAIL M. FUNDERBURK, Widow and Administratrix of the Estate of MARION RALPH FUNDERBURK, Deceased Employee, Plaintiff
v.
CONTINENTAL TIRE THE AMERICAS, Employer, self-insured, and GENERAL TIRE, INC./GENCORP, INC., Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA24-192

Filed 3 September 2025

1. Workers' Compensation—asbestos-related claims—bellwether case status—no special preclusive effect—not binding on other plaintiffs

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), even though the Bellwether Cases included evidence of general issues common to all claims, the status of those cases did not exert any special preclusive effect or render their outcomes binding on the remaining consolidated cases.

2. Workers' Compensation—asbestos-related claims—bellwether cases—law of the case—not binding on other cases, plaintiffs, issues, or claims

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—became the "law of the case" for plaintiff's claim (a consolidated case but not one of the Bellwether Cases). Plaintiff's case had not been litigated or appealed; she was not a party in the Bellwether cases; and her claim, while related to the Bellwether Cases, was distinct from the claims in those cases.

3. Collateral Estoppel and Res Judicata—collateral estoppel—issue preclusion—parties not in privity—issues not litigated

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim on the basis of collateral estoppel. Plaintiff was not so identified in interest as to establish privity with the Bellwether plaintiffs since the Bellwether plaintiffs had no legal interest in plaintiff's claim. Moreover, plaintiff's issues were not identical to those resolved in the Bellwether Cases as plaintiff's husband, unlike any of the Bellwether plaintiffs, suffered from lung cancer and plaintiff was prepared to offer exposure evidence specific to her husband in his work as a pipefitter and welder.

4. Collateral Estoppel and Res Judicata—res judicata—claim preclusion—no privity—claim not adjudicated

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim on the basis of res judicata. Plaintiff was not so identified in interest as to establish privity with the Bellwether plaintiffs since the Bellwether plaintiffs had no legal interest in plaintiff's claim. Moreover, plaintiff's claim was not one that was or should have been adjudicated in the Bellwether Cases.

5. Workers' Compensation—consent order—bellwether cases—stipulation only as to common issues—no waiver of right to present evidence specific to plaintiff's case

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases)—where the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019), affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—a consent order entered into by the consolidated case parties (including plaintiff) to facilitate the transfer of the cases to a single deputy commissioner was not a stipulation by plaintiff that the deputy commissioner's ruling on the question of exposure in the Bellwether Cases would bind plaintiff. Rather, the consent order merely noted the intent of the parties that the Bellwether Cases would litigate the issue of exposure as to theories and evidence common to all plaintiffs, with the non-Bellwether-Case plaintiffs retaining the ability to present any exposure evidence specific to their own cases in further proceedings.

6. Workers' Compensation—due process violation—bellwether cases—plaintiff's specific evidence and claim

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—precluded the claims of plaintiffs in other consolidated cases. Accordingly, the Commission's dismissal of plaintiff's claim (one of the consolidated cases, but not a Bellwether Case) violated her right to due process as it left plaintiff without the opportunity to prove, by the presentation of her specific evidence, that her husband's lung cancer was the result of his particular job duties.

Chief Judge DILLON dissenting.

Appeal by Plaintiff from Opinion and Award entered 13 November 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2024.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Fox Rothschild LLP, by Jeri L. Whitfield, Kip David Nelson, and Patrick M. Kane, for Defendant-Appellee Continental Tire the Americas.

Mullen Holland & Cooper, P.A., by John H. Russell, Jr., for Defendant-Appellee Liberty Mutual Insurance Company.

HAMPSON, Judge.

Factual and Procedural Background

Debra Gail M. Funderburk (Plaintiff) appeals from the Opinion and Award of the North Carolina Industrial Commission (the Commission) dismissing her workers' compensation claim on behalf of the estate of Marion R. Funderburk (Decedent). Plaintiff's claim alleges Decedent suffered from his exposure to asbestos during his employment with Continental Tire the Americas (Defendant). Decedent was diagnosed with and died of lung cancer. The Commission dismissed the case, concluding Plaintiff's claim was barred by Commission orders in five "bellwether" cases in which the Commission found that claimants had failed to meet their burden of showing the asbestos level in the factory was sufficient to cause their alleged asbestos-related diseases. Plaintiff appeals from the dismissal of her claim.

The Record tends to show the following:

Defendant and its predecessor operated a tire manufacturing factory in Charlotte from the 1960s until 2006. Beginning in 2008, more than 150 former employees brought workers' compensation claims alleging they each developed one or more compensable asbestos-related diseases caused by prolonged exposure to asbestos in the factory. Each claimant was represented by the same counsel, and the cases were consolidated for hearing before the Industrial Commission (the Consolidated Cases).

Due to the number of claimants and the common issues among them, the parties agreed to a "bellwether" procedure. In 2010, prior to the filing of Plaintiff's individual claim in 2014, the parties agreed that six representative cases (the Bellwether Cases) would be tried first. As described in the Opinion and Award resolving the Bellwether Cases, the parties agreed all evidence regarding general issues common to all claims was to be part of the record for all Consolidated Cases "to the extent the evidence was applicable to each Plaintiff's issues." Fully resolving the Bellwether Cases, including any appeals, before litigating the remaining cases was intended to ensure "the parties would be in a better position to evaluate the remaining claims." "The remaining [Consolidated Cases] could then be potentially resolved, or they could proceed to abbreviated hearings for the introduction of evidence regarding their individual medical and employment information." This agreement, entered into while the case was assigned to Deputy Commissioner George Glenn II, was not at that time memorialized in a written order.

Deputy Commissioner Stephen Gheen substituted for Deputy Commissioner Glenn prior to any evidence being taken. The Bellwether Cases were tried in a consolidated manner before Deputy Commissioner

Gheen over thirty-eight hearing days beginning 14 February 2011 and concluding 18 February 2013. During these hearings, the parties presented evidence specific to the Bellwether Cases as well as evidence relating to issues common to all Consolidated Cases, including common theories of asbestos exposure. The parties did not present evidence specific to any of the non-Bellwether plaintiffs.

On 1 July 2011, while the Bellwether Cases were being heard, Plaintiff's counsel moved that an additional six cases be consolidated and set for hearing. That motion argued the Commission "indicated that the cases will be tried in groups of six or more" and that "[i]t would now be appropriate to schedule the hearings for the second group of claimants." Defendant opposed the motion and moved to consolidate all of the pending cases for the purpose of addressing liability issues and to stay further trials pending appeal of the Bellwether Cases. Defendant argued the motion was at odds with the bellwether arrangement: the parties had agreed to fully resolve the Bellwether Cases before proceeding on the others because there was common evidence which could be used in all cases, and the resolution of the Bellwether cases would put the parties in a better position to resolve most cases without further hearings. Any case with "special issues" could then be tried on the special issues only. On 25 August 2011, Deputy Commissioner Gheen denied the plaintiffs' motion to consolidate six additional cases for hearing.

On 29 September 2011, Deputy Commissioner Gheen held a hearing on Defendant's motion to consolidate and conferenced with counsel for the parties. During the hearing, the Deputy Commissioner proposed a plan to consolidate the non-Bellwether cases for hearing. Following the resolution of the Bellwether Cases, the parties would appear before the Deputy Commissioner and present additional evidence in the cases that could not be resolved upon only the evidence introduced in the Bellwether Cases. Again, no order was entered concerning the bellwether procedure. The Deputy Commissioner granted Defendant's motion and consolidated the Bellwether Cases with the other 146 cases. The only order entered appearing to concern this plan was entered by Deputy Commissioner Gheen on 29 November 2011. That order recognized that the Bellwether Cases had been consolidated with the 146 other claims and ordered that "the common testimony taken and developed during the course of [the evidentiary hearings in the Bellwether Cases] will be admissible in all consolidated claims."

One of the Bellwether Plaintiffs voluntarily dismissed their claims during the hearing period, leaving five Bellwether Cases for the Commission to resolve.

Decedent was diagnosed with lung cancer in 2012 and died on 2 January 2013. On 4 March 2014, following the evidentiary hearings in the Bellwether Cases but before the Deputy Commissioner's Opinion and Award resolving those cases, Plaintiff initiated this case by filing a Form 18B Claim by Employee, Representative, or Dependent for Benefits for Lung Disease. The filing asserted a claim for asbestosis, lung cancer, and death as a result of Decedent's employment with Defendant.

After most of the evidence had been presented in the Bellwether Cases, Deputy Commissioner Gheen resigned from the Commission, and the Consolidated Cases were assigned to Deputy Commissioner James C. Gillen on 15 April 2015. On 26 October 2016 the parties, including Plaintiff, entered into a consent order stipulating that no parties objected to the case being decided by Deputy Commissioner Gillen despite the majority of evidence having been originally heard by Deputy Commissioner Gheen.

On 19 December 2016, Deputy Commissioner Gillen entered an order denying the claims of the Bellwether Plaintiffs. Those plaintiffs appealed to the Full Commission, which on 25 January 2018 by Opinion and Award upheld the deputy commissioner's denial of the claims in the five Bellwether Cases.

In its Opinion and Award, the Full Commission made findings specific to each of the Bellwether Plaintiffs, as well as findings common to all claims, which ostensibly included all Consolidated Plaintiffs.[1] It found, based on the common evidence, the Consolidated Plaintiffs had not shown they were "exposed to asbestos in such form and quantity and used with such frequency as to cause or significantly contribute to the development of asbestosis." It found they were not exposed to levels of asbestos significant enough to support a claim from damaged pipe insulation in the facility or through working with talc, asbestos-containing gaskets, or asbestos-containing brakes. Two of the Bellwether Plaintiffs had asserted claims for colon and tonsil cancer, and the Commission found generally that working at Defendant's facility did not place employees at an increased risk of developing tonsil or colon cancer.

The Industrial Commission also made individual conclusions of law specific to each of the five Bellwether Plaintiffs. For each Bellwether Plaintiff, it denied their claims based on its determination that plaintiff had not shown they were "exposed to asbestos in any such form and

1. The Opinion and Award captions these as "Findings of Fact Common to All Claims Captioned in Exhibit 1." This Exhibit lists all Consolidated Plaintiffs, including Plaintiff.

quantity, and used with such frequency, as to cause asbestosis or any asbestos-related condition," and that they had not shown that they actually contracted asbestosis or any asbestos-related condition.

The Bellwether Plaintiffs appealed, and this Court affirmed the Opinion and Award of the Full Commission. *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144, 832 S.E.2d 519 (2019). We held the Full Commission did not err in:

> (1) Determining Plaintiffs failed to prove a causal connection between employment at the factory and asbestosis; (2) its determination, based upon the facts presented, that Plaintiffs failed to prove that either colon cancer or tonsil cancer were occupational diseases pursuant to N.C.G.S. § 97-53(13); or (3) its unchallenged determination that Plaintiffs were not last injuriously exposed to the hazards of asbestosis at the factory. Further, we hold that the Commission's findings and ultimate findings are supported by competent evidence, and its conclusions and rulings are supported by the findings.

267 N.C. App. at 202-03, 832 S.E.2d at 558.

Following the resolution of the Bellwether Cases on appeal, Defendant moved to dismiss the asbestos-related claims of the remaining 139 Consolidated Plaintiffs. 125 of the Consolidated Plaintiffs voluntarily dismissed their claims, leaving 14 pending claims. These cases were transferred to Deputy Commissioner Erin F. Taylor for disposition of Defendant's Motion to Dismiss. Deputy Commissioner Taylor held a hearing on that Motion at which the parties were not permitted to present additional evidence. The Deputy Commissioner entered an order on 6 July 2022 granting Defendant's motion with respect to all claims for asbestosis but denying it with respect to lung cancer, mesothelioma, and other asbestos-related diseases. Defendant appealed to the Full Commission, and the parties filed a joint motion to consolidate the cases for that appeal. The Commission ordered the cases to be heard concurrently, but did not consolidate them.

On 13 November 2023, the Full Commission entered an Opinion and Award dismissing all of Plaintiff's claims, holding they were precluded by the results of the Bellwether Cases. It simultaneously dismissed the asbestos-related claims of the other remaining Consolidated Plaintiffs. In all, thirteen plaintiffs appealed to this Court, including two plaintiffs with related cases which were not among the Consolidated

Plaintiffs but whose claims were similarly dismissed by the Commission. Our Court consolidated the appeals for hearing.

Issue

Did the Industrial Commission err in holding Plaintiff's claims were precluded by its decision in the Bellwether Cases and dismissing her case?

Analysis

Our review of an Opinion and Award from the Industrial Commission is limited to determining whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *Braham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). We review the Commission's conclusions of law de novo. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000). Under de novo review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

The Industrial Commission held Plaintiff's claims were precluded by its findings in the Bellwether Cases as affirmed by this Court on appeal:

> The Full Commission concludes that the issue Plaintiff Funderburk wishes to pursue (i.e., asbestosis) was decided by the Court of Appeals' September 3, 2019, opinion. In *Hinson*, the Court specifically held that asbestos exposures at Defendant's tire factory did not exceed background levels to which the general public was exposed, and therefore Plaintiffs could not prove an increased risk of contracting asbestosis or any asbestos-related disease during any period of employment at the facility. *Hinson*, 267 N.C. App. at 197, 832 S.E.2d at 554. The Court also held that Plaintiffs failed to prove a causal connection between employment at the factory and asbestosis or asbestos-related disease. *Id.* at 204, 832 S.E.2d at 559. None of the parties to the Bellwether cases appealed the September 3, 2019, opinion, and therefore, these holdings became the law of the case, which the Full Commission is without authority to revisit.

The Commission held Plaintiff was both collaterally estopped from pursuing her claim and that our holding in *Hinson* became the "law of the case," preventing her from showing liability. On appeal, Plaintiff argues she cannot be bound by the decisions in the Bellwether Cases because she was not a party to those cases and because her claims are distinct from those asserted in those cases. She emphasizes that, in the Bellwether Cases, evidence was introduced as to theories of causation common to all plaintiffs and information specific to the Bellwether Plaintiffs' individual claims, but the remaining Consolidated Plaintiffs had no opportunity to introduce evidence specific to their own claims and should be allowed to introduce such evidence. Defendant argues our decision in *Hinson* forecloses Plaintiff's claims, as do the common law doctrines of claim and issue preclusion.

Defendant's argument and the holding of the Opinion and Award are based in framing the bellwether procedure employed in this case as one that controls the outcome in all the Consolidated Cases, or at least places Plaintiff in privity with the Bellwether Plaintiffs such that her claims are precluded under common law doctrines of preclusion. Because Defendant argues any preclusion stems from the relationship between Plaintiff's case and the Bellwether Cases,[2] we address that posture for context before individually addressing collateral estoppel and the doctrine of law of the case. We note that during the pendency of the Bellwether Cases no order was entered describing their relationship to the remaining Consolidated Cases, and in particular no order was entered implying decisions made in the Bellwether Cases would bind the remaining plaintiffs. The extent of written orders concerning the trial plan appears to be the 29 November 2011 Order entered by Deputy Commissioner Gheen, who heard the bulk of the evidence but resigned from the Commission before ruling on the cases. This Order provides only that the "common testimony" presented in the Bellwether Cases will be admissible in all Consolidated Cases, and does not address preclusion or the effect of any case on the others.

In the absence of a clarifying written order, we look first to the concept of bellwether cases generally to inform our analysis of whether the Bellwether Cases have a preclusive effect, and then with that context address common law doctrines of preclusion.

I. <u>Bellwether Cases</u>

[1] "Bellwether" cases are sometimes used to streamline mass tort litigation involving numerous plaintiffs that cannot be resolved in a single

2. Defendant states in its brief: "Continental is not saying that it is absolved from all liability henceforth and forever. Instead, Continental's position is that the result of the bellwether trial in *this* consolidated proceeding, upheld by this Court, binds *these* Plaintiffs and precludes *them* from pursuing claims against Continental for asbestos-related diseases." (emphasis in original)

class-action suit. A small, ideally representative, sample is chosen from a larger group of cases. These bellwether cases are heard and resolved first, with the intent to educate the parties to the non-bellwether cases as to the value of those claims and enable quicker resolution of those cases. *See Aabbott v. E.I. DuPont de Nemours and Co.*, 54 F.4th 912, 919 n.3 (6th Cir. 2022) (citing Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2343 (2008) (explaining the "twin goals" of bellwether trials are to be "informative indicators of future trends [in other cases] and catalysts for an ultimate resolution")); *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 628 F.3d 157, 159, n.1 (5th Cir. 2010) (" 'Bellwether' trials typically are used to assess whether a class should be certified or to assess a claim's value for settlement purposes[.]"). The bellwether cases provide the remaining plaintiffs with a better understanding of their likelihood of success, and encourage the parties to resolve their cases out of court: "If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of such cases as reflected by the jury verdicts." *In re Chevron*, 109 F.3d 1016, 1019 (5th Cir. 1997).

Defendant argues the bellwether procedure goes beyond information-gathering, such that resolving the Bellwether Cases was not only intended to educate the parties and facilitate resolution of the remaining cases, but also "to establish law that would be binding on the parties in the non-bellwether cases."

As bellwether cases are primarily applicable to mass tort litigation outside of the class action context, their use appears to be relatively rare. The parties have not cited, and we are not aware of, any caselaw from North Carolina courts addressing the use of bellwether cases. The procedure is more commonly used in the federal courts, particularly when multi-district litigation is consolidated before a single district court for hearing. *See, e.g., Aabott*, 54 F.4th 912. We therefore find it instructional to look to the use of bellwether cases in other jurisdictions, especially in federal decisions cited by the parties. Although these opinions are not binding on our decision in this case, they are useful in defining the concept of "bellwether cases" and understanding the intent of the parties and Industrial Commission in their use of that phrase. As we discuss below, our review of this caselaw reveals a clear understanding of bellwether cases as exploratory litigation intending to provide information to the remaining parties to assist in resolving their claims, not as decisions that bind those parties by their results. In rare cases a trial court may prospectively implement a "binding bellwether" scheme, but the restrictions and stringent requirements placed on such a scheme underscore that bellwether cases in general are not understood to have preclusive effect. In arguing otherwise, Defendant misstates the holdings of several cases.

For example, to support its claim that "the very purpose of the bellwether procedure was to establish law that would be binding on the parties in the non-bellwether cases," Defendant cites a case from the California Court of Appeals, *St. Paul Fire & Marine Ins. Co. v. Amerisource Bergen Corp.*, 295 Cal. Rptr. 3d 400 (Cal. Ct. App. 2022). However, that case does not address the preclusion of claims or issues in mass tort litigation based on the results of bellwether cases. Instead, the appellate court in *St. Paul* affirmed a stay imposed by the trial court, holding it was warranted due to pending litigation in West Virginia addressing similar issue with a significant overlap of parties. 295 Cal. Rptr. 3d at 413.

It is clear from the text of the opinion that the appellate court in that case does not infer preclusive effect to bellwether cases as a result of their bellwether status. While the West Virginia cases may have had preclusive effect over certain identical claims in California, that preclusion did not stem from the bellwether relationship but from traditional doctrines of claim and issue preclusion in cases with identical parties. *Id.* As the court noted, for certain claims "differences in the parties limit the res judicata effect of the WV coverage proceedings for parties here who are absent there[.]" *Id.* Where the parties were not identical, the West Virginia cases would provide useful information: "[t]he bellwether effect remains the same under such circumstances; the West Virginia case can serve to educate the parties (whether or not the same) and the trial court about the issues and how to streamline the litigation here." *Id.* The court emphasizes the exploratory nature of bellwether litigation: "Employing a bellwether case in a complex matter like this can serve to winnow and sharpen not only discovery, but claims, defenses, calendaring decisions, motion practice, arguments, hearings or trial, adjudication, indeed every aspect of the litigation process—to the benefit of the parties, the court, and the public alike." 295 Cal. Rptr. 3d at 411-412. This function is served even though bellwether cases do not bind later litigation: "The WV coverage action provides a bellwether litigation model for the parties to adhere to—or depart from—as they choose; *the same is true for the court in its adjudicative choices*, as justice requires." 295 Cal. Rptr. 3d at 413 (emphasis added). This case does not recognize any special preclusive effect of bellwether cases.

Defendant argues "rulings from a bellwether case are appropriately applied to remaining cases," citing *In re Lipitor Mktg., Sales Pracs.*

& Prods. Liab. Litig., 892 F.3d 624 (4th Cir. 2018). In that case, the plaintiffs in bellwether cases attempted to introduce testimony from three expert witnesses regarding a causal link between the medication Lipitor and diabetes. 892 F.3d at 630. The trial court ruled the testimony of all three experts in the bellwether cases was inadmissible and granted summary judgment to the defendant in those cases because the remaining evidence did not establish a genuine issue of material fact as to causation. 892 F.3d at 647. The trial court then entered a series of show cause orders "asking whether any plaintiff in the MDL[3] could submit evidence (expert or otherwise) that would enable her claim to survive summary judgment given the court's prior rulings." *Id.* at 630. No plaintiff was able to introduce evidence sufficient to show causation. *Id.* at 631. The Fourth Circuit affirmed the trial court's grant of summary judgment to the defendant in the MDL cases. *Id.* at 649.

This process followed by the trial court in *Lipitor* does not demonstrate that bellwether cases have preclusive effect and, in fact, represents exactly the process *Plaintiff* argues should be followed in this case. The bellwether plaintiffs in *Lipitor* introduced common evidence, which was insufficient to prove liability. The remaining plaintiffs, understanding from the outcome of the bellwether cases that their common evidence was insufficient, were then given an opportunity to introduce additional evidence, including evidence specific to their claims. The court evaluated that evidence, determined it did not raise an issue of genuine material fact, and appropriately granted summary judgment based on that determination. The outcome of the bellwether cases did not control the outcome of the remaining cases, though it informed the litigation process.

Like in *Lipitor*, the parties understand as a result of the Bellwether Cases that the common evidence in this case is insufficient to support a claim. Accordingly, 125 of the plaintiffs in the remaining Consolidated Cases voluntarily dismissed their claims, implying that their cases relied on the common evidence to show liability. This left only Plaintiff and those other claimants similarly situated, whose cases presumably involve additional theories of causation and liability. Unlike in *Lipitor*, Plaintiff has not been given an opportunity to present additional evidence supporting these theories and had her case discharged on Defendant's Motion to Dismiss—based on preclusion, and not the merit of her evidence.

---

3. In "multi-district litigation," related claims are consolidated in a single district for pretrial proceedings to streamline litigation. 28 U.S.C. § 1407 (2024).

Defendant also cites *Bay v. Anadarko E&P Onshore LLC*, 73 F.4th 1207 (10th Cir. 2023) to support its contention that rulings in a bellwether case are binding on other plaintiffs. This case is wholly irrelevant to that argument: *Bay* is an appeal by the *bellwether plaintiffs* in a mass trespass action by landowners against the oil and gas company holding the mineral rights to their land. 73 F.4th at 1209. The opinion affirms the district court's judgment as a matter of law in only the individual bellwether case on appeal before the court. 73 F.4th at 1210. The other plaintiffs in the putative class were not party to the appeal, and no issue of preclusive effect of the decision over the other cases is raised by the parties or addressed in the opinion.

Finally, the case Defendant uses to define the term "bellwether" illustrates that the existence of a bellwether case may potentially have some binding effect on other cases, but requires specific actions by the trial court in order to assure all parties due process—actions which were not taken in this case. *In re Chevron U.S.A., Inc.*, like the other cases cited by Defendant, at no point holds a case at issue is bound by the result of a bellwether case. Instead, it addresses the trial court's plan for hearing a group of tort claims on interlocutory appeal prior to those cases being heard. 109 F.3d 1016, 1019 (5th Cir. 1997). In *Chevron*, over 3,000 plaintiffs filed claims against the defendant for contaminating their property. 109 F.3d at 1017. The district court approved of a trial plan by which a bellwether group of 30 cases, 15 selected by the plaintiff and 15 selected by the defendant, would be heard in a single trial. *Id.* The trial would focus on the individual claims and "the existence or nonexistence of liability on the part of Chevron. . . . Thus, a unitary trial on the issues of general liability or causation as well as the individual causation and damage issues of the selected plaintiff shall occur." *Id.* at 1019.

The Fifth Circuit in *Chevron* rejected the trial court's plan and promulgated a list of requirements for a bellwether trial to have preclusive effect, proposing a special "binding bellwether" trial that is "conceptually separate from issue preclusion because the initial court running the bellwether determines its preclusive effect *in advance* of any subsequent litigation." *Du Pont*, 54 F.4th at 927-28 (emphasis added) (citing Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. Rev. 439, 453–54, 456–57 (2013)). In order to create this special "binding bellwether" scheme, the trial court *before* hearing the bellwether cases should identify the common issues to be resolved as well as variables that could exist between different claims in the litigation such as "time, proximity, and contamination levels of exposure to any pollutants that may be present[.]" 109 F.3d 1016, 1019. It should also explain how the verdicts in the bellwether cases are "supposed to resolve liability for the remaining . . . plaintiffs." *Id.* Most importantly, the trial court must find the bellwether cases are a statistically representative sampling of all the plaintiffs' claims:

> [B]efore a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried, it must, prior to any extrapolation, find that the cases are representative of the larger group of cases or claims from which they are selected. Typically, such a finding must be based on competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from the trials of the whole.

Id. at 1020. Additionally, the intent of the parties to be bound by the bellwether cases must be clear from the proceedings: "Generally, such a procedure requires that the parties 'clearly memorialize' an agreement to be bound in future trials, no matter the result, to avoid certain due process concerns." *Du Pont*, 54 F.4th at 928 n. 8 (citing *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000)).[4]

As the court in *Chevron* saw fit to place such significant procedural requirements on the trial court in order that a bellwether case could have preclusive effect, it is clear that bellwether cases are not understood to have that effect by default. And, without implying that this "binding bellwether" procedure is valid in our courts, we note that none of the *Chevron* guidelines exist in this case. With no order entered in this case, we cannot determine the Bellwether Cases are a representative sample of the Consolidated Cases, and cannot discern the variables impacting liability that may differ from case to case. No order was entered indicating the parties agreed to be bound or that the Industrial

---

4. We note as well that, even given these safeguards, another panel of the same federal circuit court noted skepticism concerning the validity of such a binding bellwether scheme: "While the majority opinion . . . contains language generally looking with favor on the use of bellwether verdicts when shown to be statistically representative, this language is plainly *dicta*, certainly insofar as it might suggest that representative bellwether verdicts could properly be used to determine *individual* causation and damages for other plaintiffs." *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 318 (5th Cir. 1998). The court in *Cimino* also notes that such a plan raises concerns related to the Seventh Amendment right to trial by jury, which the *Chevron* court does not address. 151 F.3d at 319.

Commission understood the purpose of the bellwether plan to bind the non-Bellwether Plaintiffs: the only order entered allowed the common evidence to be admissible in all cases.

Our review of the record and transcript indicate neither the parties nor the Industrial Commission when consolidating these cases understood the Bellwether Cases to bind the Consolidated Plaintiffs such that dismissal of their cases would be appropriate if the claims of the Bellwether Plaintiffs were denied. When discussing the bellwether plan with the parties in conference, Deputy Commissioner Gheen anticipated additional hearings following the Bellwether Cases, stating "I want to come back in here as soon as we get a decision," and proposing locations for taking additional testimony. As both Deputy Commissioner Gillen and the Industrial Commission noted in their Opinions and Awards in the Bellwether Cases, after the Bellwether Cases were heard "[t]he remaining claims would then be in a better position to be resolved, or they could proceed to abbreviated hearings for the introduction of evidence regarding their individual medical and employment information." Defendant has not identified any statement in the Record, including the transcripts and the Commission's orders during the pendency and resolution of the Bellwether Cases, that indicates the parties intended to be bound or that the Commission understood its decision to be binding.

The status of certain of the Consolidated Cases as bellwether cases did not lend them the special preclusive effect Defendant asserts. We next look to traditional common law doctrines of preclusion, which the Opinion and Award of the Industrial Commission relied on in dismissing Plaintiff's case.

II. Law of the case

[2] The Industrial Commission held our holding in *Hinson* became the law of the case that it was without authority to revisit:

> The Full Commission concludes that the issue Plaintiff Funderburk wishes to pursue (i.e., asbestosis) was decided by the Court of Appeals' September 3, 2019 opinion. . . . None of the parties to the Bellwether cases appealed the September 3, 2019, opinion, and therefore these holdings became the law of the case, which the Full Commission is without authority to revisit.

Under the "law of the case" doctrine, "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.* 113 N.C. App. 415, 417, 438 S.E.3d 751, 753 (1994). Both questions of law and issues of fact addressed by the appellate court become the law of the case. *Poindexter v. First Nat'l Bank of Winston-Salem*, 247 N.C. 606, 618, 101 S.E.2d 682, 691 (1958). For example, in *Weston* the plaintiff alleged his employer discriminated against him based on race. 113 N.C. App. at 416, 438 S.E.2d 752. The trial court found the employer's actions were not taken on account of race, and on appeal this Court affirmed the trial court's ruling, holding there was sufficient evidence to support that finding. *Id.* On a subsequent appeal in the same case, the plaintiff argued the Civil Rights Act of 1991 retroactively entitled him to relief from judgment, but we held he could not relitigate the issue of racial discrimination because an appellate court had already ruled on that question, making it the law of the case. *Id.*

Only questions that were actually decided by the appellate court bind the parties: "the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case." *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956). Statements in appellate opinions "on points arising outside of the case and not embodied in the determination made by the court" are *obiter dicta* and do not determine the law of the case. *Id.*

The purpose of this doctrine is to prevent the parties from relitigating issues that have already been resolved in their case. *Royster v. McNamara*, 218 N.C. App. 520, 530, 723 S.E.2d 122, 129 (2012). This promotes consistency and judicial economy within a case as it moves between our courts, and the doctrine is limited to subsequent proceedings in the same action: "Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the *same case*." *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (emphasis added).

But Plaintiff's case was not before this Court when we resolved the appeal of the Bellwether Cases in *Hinson*. Although Defendant cites numerous opinions addressing the doctrine of "law of the case," none apply it outside the case in which the appellate ruling was made or to a party who was not party to the appellate decision. *See, e.g.*, *Freedman v. Payne*, 252 N.C. App. 282, 800 S.E.2d 686 (2017); *Arizona v. California*, 460 U.S. 605, 75 L. Ed. 2d 318 (1983); *State ex rel. Regan v. Wasco, LLC*, 269 N.C. App. 292, 837 S.E.2d 565 (2020). At the time of our decision in *Hinson*, Plaintiff's case was still pending before the Industrial Commission. There was no notice of appeal filed, nor was there a judgment from which to appeal, and we therefore lacked jurisdiction entirely over Plaintiff's case. *See Crowell Constructors, Inc. v. Strate ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) ("Since the record does not contain a notice of appeal in compliance with Rule 3, the Court of Appeals had no jurisdiction of the appeal.") Accordingly, our ruling in *Hinson* could not become the law of this case.

Defendant argues that because the cases were consolidated for trial, Plaintiff was party to the appeal in *Hinson*. This argument misunderstands the nature of consolidation. "When cases are consolidated for trial, although it becomes necessary to make only one record, the cases remain separate suits and retain their distinctiveness throughout the trial and appellate proceedings." *Kanoy v. Hinshaw*, 273 N.C. 418, 424, 160 S.E.2d 296, 301 (1968) When a court consolidates multiple actions for judgment, "the actions [do] not become one action. They remain[] separate suits." *Pack v. Newman*, 232 N.C. 397, 400-01, 61 S.E.2d 90, 92 (1950). "Consolidated cases remain distinct as to parties, pleading and judgment and . . . there must be separate verdicts, judgments, or decrees." *TOG Properties, LLC v. Pugh*, 276 N.C. App. 422, 426, 857 S.E.2d 535, 539 (2021) (citing *Hall v. Hall*, 584 U.S. 59, 200 L. Ed. 2d 399 (2018)). The fact that there was a joint hearing does not render Plaintiff a party to an appeal when no order or judgment was made in Plaintiff's case and Plaintiff did not notice an appeal.

We acknowledge this Court's decision in *Hinson* purported to treat all Consolidated Plaintiffs as appellants due to the Opinion and Award addressing "common issues." *Hinson*, 267 N.C. App. at 151 n.8, 832 S.E.2d at 528 n.8. However, appeal from that decision of the Industrial Commission was only available to the five Bellwether Plaintiffs, and only those five appealed to this Court. We were without jurisdiction to decide issues applicable to other parties, including Plaintiff. Our remit in *Hinson*, as always, was to adjudicate the case before us—in that case, to review the Industrial Commission's determinations of causation and liability as to the Bellwether Plaintiffs. Any language purporting to extend our holding beyond what was necessary to resolve those issues is therefore dicta: "Language in an opinion not necessary to a decision is obiter dictum and later decisions are not bound thereby." *Trs. Of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985).

Additionally, the differences between Plaintiff's claims and those asserted in the Bellwether Cases demonstrate there is insufficient identity of issue to support the preclusion Defendant seeks. An appellate court's ruling on a question "governs the question" in subsequent proceedings. *Weston*, 113 N.C. App. at 417, 438 S.E.3d at 751. It does not govern related but distinct questions or foreclose related but distinct claims. The issue ruled upon in the appellate court must be the same as that precluded in the subsequent hearing.

The Industrial Commission ruled only on theories of causation common to all the Consolidated Plaintiffs and on issues specific to the Bellwether Plaintiffs. Let us assume the trials of the Consolidated Cases were bifurcated such that the Industrial Commission, by ruling in the Bellwether Cases, also ruled on an issue presented in all of the Consolidated Cases. At most, the Commission found the common evidence did not *on its own* show any employees had been exposed to sufficient levels of asbestos to cause asbestosis. It never heard evidence relating to additional theories of causation specific to other plaintiffs or additional illnesses that may be caused by lower levels of exposure. It can be inferred that Plaintiff and the other remaining claimants, because they did not voluntarily dismiss their cases upon learning the common evidence was insufficient on its own to carry a claim, wish to introduce additional evidence that raises issues not yet addressed by the Commission. The Opinion and Award did not address those issues and cannot preclude the remaining plaintiffs from asserting them. We note that we cannot know what issues these may be, because the remaining plaintiffs were prevented from introducing evidence specific to their claims when the Commission allowed Defendant's Motion to Dismiss. Even assuming the findings relating to the common evidence bind all the Consolidated Plaintiffs, they must be allowed to present additional evidence to distinguish their claims, rather than having their cases dismissed with no opportunity to assert their specific issues.

III. <u>Collateral Estoppel</u>

[3] In addition to the doctrine of law of the case, the Industrial Commission held it was bound by collateral estoppel. Collateral estoppel, often referred to as "issue preclusion," "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). Accordingly, "parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Id.* "Law of the case" and collateral estoppel are similar, but they "differ in one key respect: [collateral estoppel] prevents re-litigation in a *future* lawsuit, while the law-of-the-case doctrine prevents re-litigation of an issue in the *same* lawsuit." *Fish v. Stetina*, 913 S.E.2d 236, 242 (2025).

A party seeking to establish collateral estoppel must show: (1) the earlier suit resulted in a final judgment on the merits; (2) the issue in question was identical to an issue actually litigated and necessary to the judgment; and (3) that both the plaintiff and defendant were either parties to the earlier suit or were in privity with the parties. *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986).

"To determine whether collateral estoppel applies in the present cases, it must first be decided whether the parties in these suits and those in the former . . . litigation are the same, or stand in privity to the parties in the former litigation." *King*, 284 N.C. at 357, 200 S.E.2d at 805. Because Plaintiff was not a party to the Bellwether Cases, we must determine if she was in privity with those plaintiffs. In general, "privity involves a person so identified in interest with another that he represents the same legal right." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996). To be in privity, the interests of two parties must be so intertwined that the estopped party "was fully protected in the first trial" because his "interest has been legally represented." *Cnty. of Rutherford By & Through Child Support Enf't Agency ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 76, 394 S.E.2d 263, 266 (1990) (citing 46 Am. Jur. 2d *Judgments* § 686). Accordingly, privity "rests on some actual mutual or successive relationship to the same right of property." *Masters v. Dunstan*, 256 N.C. 520, 525, 124 S.E.2d 574, 577 (1962) (citing 72 C.J.S. *Privities*, 956-958). Privity requires "absolute identity of interest," *id.*, and cannot be established "from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same set of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." *Tucker*, 344 N.C. 411, 47, 474 S.E.2d 127, 130 (1996) (citing 47 Am. Jur. 2d *Judgments* § 663 (1995)).

Here, Plaintiff was not so identified in interest as to establish privity with the Bellwether Plaintiffs. Their legal interest rested in their workers' compensation claims; Plaintiff's rested in her own, stemming from her husband's alleged exposure and injuries. Each plaintiff's goal in this case was to prove their individual injuries arose out of and in the course of their employment: the Bellwether Plaintiffs have no legal interest in Plaintiff's individual claim. While there is factual overlap between the claims, the interests are not identical. This difference in legal interest would remain even if the evidence underlying each claim were identical.[5] However,

5. *See*, *e.g.*, *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 367 S.E.2d 335 (1988) (holding as widow was not a party to husband's claim for lifetime disability benefits she was not collaterally estopped from litigating the issue of total permanent disability in claim for death benefits).

examination of the actual issues in each case further emphasizes the distinction between the Plaintiff's claims and those of the Bellwether Plaintiffs and the legal interests represented by each.

In addition to privity, collateral estoppel requires the precluded issue to be identical to an issue actually litigated and necessary to the previous judgment. *Hall*, 318 N.C. at 429, 349 S.E.2d at 557. As Plaintiff was prevented from presenting evidence to develop her claim, we cannot know exactly the facts she asserts to establish her husband suffered illness as a result of his employment. But her Form 18B alleges he suffered from lung cancer, unlike any of the Bellwether Plaintiffs. The Industrial Commission's findings do not address lung cancer because they are limited to the illnesses presented by the Bellwether Plaintiffs, primarily asbestosis. While the Commission found plaintiffs were not exposed to asbestos in sufficient amounts to contribute to asbestosis, it additionally noted other illnesses, such as mesothelioma, "generally form at a lower dose" than asbestosis. Additionally, Plaintiff asserts she was prepared to offer evidence as to additional theories of exposure specific to Decedent in his individual role as a pipefitter and welder and therefore never presented by the Bellwether Plaintiffs. Even if the Industrial Commission had held, as Defendant seems to assert, that there was insufficient asbestos in the factory to cause *any* illness to *any* employee, this was neither litigated in the Bellwether Cases nor necessary to resolve them. The issues in Plaintiff's case are different from those in the Bellwether cases. Because there is no privity and no identity of issues, collateral estoppel is inappropriate.[6]

IV. <u>Res judicata</u>

[4] Defendant also argues *res judicata* bars Plaintiff's claims. Under *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." *Perryman*

6. If Plaintiff, or any of the remaining consolidated plaintiffs, presents *no* additional evidence beyond the common evidence introduced in the Bellwether Cases and no arguments specific to her claim, her claims may be precluded under collateral estoppel. With no specific evidence, her only interest would be in showing the common evidence demonstrated employees were at a higher risk of illness. As this interest was legally represented by the Bellwether Plaintiffs, it may then be the case that (1) they and Plaintiff were in privity because they represent the same legal right, and (2) an identical issue was actually litigated. This satisfies the requirements for invoking collateral estoppel. However, without an opportunity for Plaintiff to provide additional evidence, it is impossible to determine that such identity of issue exists.

v. Town of Summerfield, 899 S.E.2d 884, 893 (2024). Where collateral estoppel prevents relitigation of issues actually litigated and necessary to the outcome of the prior action, *res judicata* prevents the assertion of claims that were or could have been asserted in a prior action between the parties or those in privity with them. *Hall* at 428, 349 S.E.2d at 556. Like collateral estoppel, *res judicata* requires a final judgment on the merits and identity of parties. *Id*. Rather than identity of issue, *res judicata* applies when the case represents "a second action upon the same claim or demand."

As discussed above, Plaintiff was neither party to the Bellwether Cases nor in privity with the Bellwether Plaintiffs. Nor is her claim one that was or should have been adjudicated in those cases: her claim is a separate workers' compensation claim for a different employee entirely than those in the Bellwether Cases. Plaintiff's case is not barred by the doctrine of claim preclusion.

V. Consent Order

[5] Defendant argues Plaintiff in the 26 October 2016 Consent Order stipulated to litigating the issue of exposure in the bellwether trial. This misrepresents the purpose of the Consent Order, which was entered into by the parties to facilitate the transfer of the case from Deputy Commissioner Gheen, who had heard the evidence presented in the consolidated cases, to Deputy Commissioner Gillen. After the cases were transferred to Deputy Commissioner Gillen, this Court published its opinion in *Bentley v. Jonathan Piner Construction* which held, as a matter of first impression, the Workers' Compensation Act does not permit one Deputy Commissioner to consider the evidence in a case and another to render an Opinion and Award. 249 N.C. App. 466, 471, 790 S.E.2d 379, 382 (2016).[7]

Accordingly, in order to avoid rehearing evidence presented over the course of two years of hearings, the parties consented to the transfer to Deputy Commissioner Gillen and stipulated they did not object under *Bentley*:

> All parties stipulate to the transfer of these cases from Deputy Commissioner Gheen to Deputy Commissioner Gillen. No party requests any rehearing. The parties stipulate that all parties have had a full opportunity to be heard

7. This opinion was superseded by our later decision in that case. 254 N.C. App. 362, 802 S.E.2d 161 (2017).

> on the issues now pending before the Commission, and stipulate that review of the transcripts and the evidentiary record by Deputy Commissioner Gillen provides him with the evidence he needs to make a complete determination of the matters in dispute. The parties consent, agree and stipulate to Deputy Commissioner Gillen's issuance of Findings of Fact and Conclusions of Law in an Opinion and Award based upon the transcripts of the testimony and matters in the record consistent with the law and rules of evidence.

The parties thereby agreed no additional presentation of evidence was required for Deputy Commissioner Gillen to issue decisions in the Bellwether Cases.

Defendant attempts to transform this agreement into a stipulation that Deputy Commissioner Gillen decide the question of exposure as to all plaintiffs even though none besides the Bellwether Plaintiffs had had an opportunity to present evidence specific to their own case. To support this, Defendant cites a portion of the Order that summarized the procedural posture thus far:

> While still assigned to Deputy Commissioner Glenn, these cases were postured so that there would be an "initial six" cases to be tried together as bellwether cases, with evidence common to all one hundred and forty-four cases also presented. The claims were set for hearing, in part, to litigate the issue of exposure and to take common evidence relating to the nature and extent of any asbestos exposure to employee-plaintiffs working in the facility.

Without more, we cannot read this portion of the Consent Order as constituting a stipulation allowing the Deputy Commissioner to decide whether or not any plaintiff was exposed to asbestos. "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision." *Moore v. Richard W. Farms, Inc.*, 113 N.C. App. 137, 141, 437 S.E.2d 529 (1993). This provision could be interpreted in multiple ways, most likely as noting the intent of the parties to "litigate the issue of exposure" by providing evidence relating to theories of exposure common to all plaintiffs.

This interpretation is all the more likely given the placement of the language identified by Defendant: within the section of the Order discussing the history of the case and the process of the evidentiary hearings that had already occurred. This section does not address rulings by the Deputy Commissioner or the effects thereof, nor does it recite stipulations of the parties.

Later, in a separate section of the Order, the parties enumerate their stipulations, all of which relate to the transfer of the case to Deputy Commissioner Gillen. In this section, the parties stipulate "all parties have had a full opportunity to be heard on the issues now pending before the Commission." In the context of the Order, the meaning of this statement is clear: the parties would not submit further evidence or arguments regarding the Bellwether Cases or theories of causation common to all Consolidated Plaintiffs—the "issues now pending before the Commission." Defendant's suggested meaning, that each of the 144 plaintiffs were implicitly waiving the right to present any evidence specific to their own case, strains credulity. At no point does the Order state that the non-Bellwether Plaintiffs intended to be bound by the results of the Bellwether Cases. We will not assign such significant meaning to language that is, at best, ambiguous, and found in an unrelated Order.

VI. Due Process

[6] Plaintiff additionally argues the Industrial Commission's dismissal of her claim violates her right to due process.

> "Due process" has a dual significance, as it pertains to procedure and substantive law. As to procedure it means "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause."

State v. Smith, 265 N.C. 173, 180, 143 S.E.2d 293, 299 (1965).

The dismissal of Plaintiff's case left her without opportunity to be heard. Under our Workers Compensation Act the burden rests on the employee seeking benefits to prove that his disease "was incident to or the result of the *particular* employment in which [he] was engaged." *Booker v. Duke Medical*, 297 N.C. 458, 475 (1979). *See also Holley v. ACTS, Inc.*, 357 N.C. 228, 231 (2003). More specifically, a plaintiff's "evidentiary burden" in this regard is "to establish that his employment exposed him to a greater risk of contracting his disease relative to the general public." *Chambers v. Transit*, 360 N.C. 609, 614 (2006). Plaintiff was given no opportunity to meet this burden.

Prior to the Opinion and Award in the Bellwether Cases, the parties presented evidence as to common theories of causation and specific evidence related to the claims of the Bellwether Plaintiffs. Evidence specific to Plaintiff's claim, as with all other non-Bellwether plaintiffs, was never heard.

While Defendant now argues the purpose of the bellwether process was to bind the individual plaintiffs, this is not supported by the law or record. And we observe that engaging in exploratory, rather than binding, bellwether litigation *was* extremely effective at streamlining this mass tort action. Faced with an untenable number of claims to litigate before the Industrial Commission, the parties agreed on a plan to expedite the process. A handful of bellwether cases would proceed first, with the parties presenting both evidence specific to those cases and relating to theories of asbestos exposure common to all claims. The goal of this process, as in bellwether litigation generally, was to educate the parties as to the value of the pending claims and encourage their resolution. This process was a success. The Industrial Commission held the evidence produced by the Bellwether Plaintiffs was insufficient to support their claims. Understanding from this that they could not rely on the common evidence regarding asbestos exposure to make their cases, 125 of the remaining claimants—the vast majority—voluntarily dismissed their claims. This left only a handful of claimants, including Plaintiff, who believed the evidence specific to their cases separated their claims from the others and made them worth pursuing even though the common evidence was insufficient to support a claim. These claimants have not yet had an opportunity to present this evidence to the Industrial Commission. None of the doctrines identified by Defendant preclude their claims, and due process demands they have their day in court.

Thus, Plaintiff's claim is not precluded by the prior Bellwether Claims. Therefore, Plaintiff is entitled to an opportunity to present additional evidence, if any, in support of her claim. Consequently, the Full Commission erred in dismissing Plaintiff's claim on this basis.

Conclusion

For the foregoing reasons, the Opinion and Award of the Industrial Commission is reversed and this matter is remanded to the Industrial Commission for further proceedings in which the Commission shall allow the parties to produce additional evidence as to their claims and defenses.

REVERSED AND REMANDED.

Judge WOOD concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

Plaintiff brought this workers' compensation matter, alleging that decedent Mr. Funderburk contracted asbestosis and lung cancer from exposure to asbestos while employed by Defendant. The Full Commission dismissed Plaintiff's claims based on our opinion in *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019). The Full Commission determined that, based on the "law of the case" doctrine, Plaintiff is barred by our decision in *Hinson* to pursue any claim based on alleged exposure to asbestos as the factory.

The majority holds that Plaintiff is not barred by *Hinson* to pursue her claims. I agree, however, with the Commission based on the reasoning below that our holding in *Hinson* bars Plaintiff's claims for *any* asbestos-related diseases. Therefore, my vote is to affirm the Commission's order dismissing Plaintiff's claims.

Approximately 150 individuals who had worked at Continental Tire's Charlotte factory filed workers compensation claims seeking benefits for asbestos-related illnesses. All claimants are/were represented by the same counsel. *Most* of these matters, including Plaintiff's claim, were consolidated before the Commission.

As some factual and legal issues were thought to be common to all consolidated cases, the parties in those cases agreed that six of the matters would be tried first. Accordingly, counsel for the claimants selected six cases – referred to in the record before us as the "bellwether" cases – to be tried together first, while the remaining consolidated cases (including the case before us) would be stayed pending the conclusion of the bellwether cases. (The number of bellwether cases was ultimately reduced to five, as one bellwether claimant voluntarily dismissed his claim.)

Under this bellwether procedure, the parties in all the consolidated cases agreed that they would jointly offer evidence common to all; e.g., evidence regarding asbestos levels at the factory relative to asbestos levels experienced in the general public. And *each* bellwether claimant would then offer evidence specific to his exposure to asbestos in the factory and his own medical condition.

Under this approach, the Commission would *first* make findings as to the asbestos levels at the factory; that is, whether the Commission determined that one working at the factory had greater risk to asbestos exposure than the risk to exposure in the general public. The Commission, *next*, would consider the evidence offered by each bellwether plaintiff unique to him to determine whether the bellwether claimant had shown he suffered from an asbestos-related disease and that said disease was caused by his employment at the factory.

After 38 days of hearings held over a two-year period and ending in February 2013, a deputy commissioner entered an order denying the claims of the bellwether claimants. Several years later, in January 2018, the Full Commission upheld the deputy commissioner's denial of the claims of the five bellwether cases.

The following year, in September 2019, our Court affirmed the Commission's decision and reasoning in the bellwether cases. *See Hinson v. Cont'l Tire the Americas*, 267 N.C. App. 144, 203-04 (2019).

The issue in this appeal is whether Plaintiff's claims are barred by the result in the bellwether cases as affirmed by our Court in *Hinson*.

In these matters, each claimant sought an award based on a disease or diseases suffered due to exposure to asbestos while working at the factory.

Our Supreme Court has held that under our Workers Compensation Act the burden rests on the employee seeking benefits to prove that his disease "was incident to or the result of the *particular* employment in which [he] was engaged." *Booker v. Duke Medical*, 297 N.C. 458, 475 (1979). *See also Holley v. ACTS, Inc.*, 357 N.C. 228, 231 (2003). And a plaintiff's "evidentiary burden" in this regard is "to establish that his employment exposed him to a greater risk of contracting his disease relative to the general public." *Chambers v. Transit*, 360 N.C. 609, 614 (2006).

In the bellwether matters, the Full Commission recognized that *all* consolidated claimants, including Plaintiff, were parties for purposes of its findings and conclusions regarding the issues common to all claims.

On appeal, we expressly stated we were treating all consolidated claimants, including Plaintiff, as appellants with respect to our review of the issues common to all consolidated cases (as all consolidated claimants were parties to the orders being appealed). *Hinson*, 267 N.C. App. at 151 n.8 ("Because the 'common issues' sections of the 25 January 2018 opinions and awards apply to all Consolidated Plaintiffs, we treat them as appellants as well."). And we stated that a further hearing for any non-bellwether claimant among the consolidated claimants would only be necessary if it was first found that asbestos levels at the factory were sufficient to cause or contribute to *any* "alleged asbestos-related disease":

> *The "Bellwether Cases" Approach*
>
> As noted above, in the ordinary case—because it is the plaintiffs' burden to prove they suffered from compensable occupational diseases—the Commission would *first* determine whether the plaintiffs had met their burden of proving they suffered from an occupational disease. If the plaintiffs failed to meet that burden, the Commission could deny their claims without making any further determinations such as compensability and liability.
>
> Pursuant to the bellwether cases approach, review of the medical evidence for the alleged asbestos-related diseases for all Consolidated Plaintiffs will only be necessary *if* Plaintiffs first prove that working in the factory exposed them to asbestos, in a form and in quantities, that could have caused the alleged asbestosis; or caused—*or significantly contributed to—the development of other alleged asbestos-related diseases*.

Id. at 171-72 (internal citations and marks omitted) (emphasis added).

Interpreting the Full Commission's bellwether orders, we then stated the Commission determined in those orders that "employment in the factory did not expose [any of the consolidated] Plaintiffs to airborne asbestos of a kind and in amounts sufficient to cause or contribute to asbestosis." *Id.* at 172. This statement could be construed as only barring asbestosis claims. However, we added a footnote to the word "asbestosis", which states:

> "*I.e.*, that any alleged asbestos-related disease could not have 'arisen out of' employment with Defendant[,]"

Id. n.15 (emphasis added).

"I.e." in the footnote is an abbreviation for the Latin phrase "id est", meaning "that is" or "in other words, and is used to further define the word to which it refers. *See, e.g.*, *Edwards Lifescience v. Cook*, 582 F.3d 1322, 1335 (Fed. Cir. 2009) (stating that "use of 'i.e.' signals an intent to define the word to which it refers").

Accordingly, the sentence in the main text should rightly be read as holding that asbestos levels at Defendant's factory were not sufficient to cause or contribute to *any* asbestos-related disease alleged by any of the consolidated plaintiffs, including Plaintiff. In sum, I conclude *Hinson* affirmed a determination that the consolidated Plaintiffs failed to meet their burden to show employment at the factory exposed anyone to asbestos sufficient to cause any asbestos-related disease.

Indeed, in *Hinson*, we noted that all consolidated claimants, including Plaintiff, conceded that the "Commission [had] made findings and conclusions regarding the amount of exposure Plaintiffs had to asbestos and whether the level was sufficient to cause a disease," *id.* at 173, and that "[t]he Commission specifically and repeatedly determined that Plaintiffs were not exposed to asbestos in such form and quantity, and used with such frequency, as to cause asbestosis *or any asbestos-related condition*." *Id.* at 173-74 (internal marks omitted) (emphasis added).

It may be that the Commission orders reviewed by the *Hinson* panel could be interpreted more narrowly, as merely deciding that the consolidated plaintiffs failed to prove asbestos at Defendant's factory could have caused certain specific diseases alleged by the bellwether plaintiffs, including asbestosis. However, none of the consolidated plaintiffs, including Plaintiff, appealed our decision in *Hinson* or sought our Court to clarify or modify that decision. Accordingly, our interpretation of the Commission's bellwether orders in *Hinson* became the law of the case and, therefore, binding on all the consolidated plaintiffs. I, therefore, conclude the Full Commission did not err in dismissing Plaintiff's claim. *See*, *e.g.*, *Crowell v. State ex rel. Cobey*, 342 N.C. 838, 842 (1996) (issues which become the "law of the case" are binding in subsequent proceedings in the matter). In so concluding, I note that had the Commission believed Plaintiff's evidence concerning the level of asbestos at the factory, Continental Tire would have been bound by the findings concerning that issue in Plaintiff's case. *See Moore v. Humphrey*, 247 N.C. 423, 430 (1958).

KAREN DENISE BLUE GILBERT, Administrator of the Estate of GILBERT BILLY LARSON BLUE, Deceased Employee, Plaintiff
v.
CONTINENTAL TIRE THE AMERICAS, Employer, self-insured, and GENERAL TIRE, INC./GENCORP., INC.; Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA24-477

Filed 3 September 2025

Collateral Estoppel and Res Judicata—bellwether cases—worker's compensation—not precluding plaintiff's claim—right to present specific evidence

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim under the doctrines of collateral estoppel and the "law of the case." First, plaintiff's case was not among those consolidated, and there was no indication that the common evidence in the Bellwether Cases was part of the record in her case. Second, even if an agreement between defendant and plaintiff that the Bellwether Cases "include[d] findings of fact which would be common to [plaintiff's] claim" amounted to a binding stipulation, plaintiff would still be in the same position as the consolidated case plaintiffs, whose claims the appellate court had held were not precluded by *Hinson* and who were therefore entitled to present evidence specific to their cases.

Chief Judge DILLON concurring in result only.

Appeal by Plaintiff from the Opinion and Award entered 13 November 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2024.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Fox Rothschild LLP, by Kip David Nelson and Patrick M. Kane, for Defendant-Appellee Continental Tire the Americas.

Mullen Holland & Cooper, P.A., by John H. Russell, Jr., for Defendant-Appellee Liberty Mutual Insurance Company.

HAMPSON, Judge.

This case is one of approximately 150 workers' compensation claims by or on behalf of former employees filed against Continental Tire the Americas (Defendant) alleging illness stemming from exposure to asbestos while working in Defendant's tire manufacturing facility. Most of those cases—though not this case—were consolidated for hearing (the Consolidated Cases) before the North Carolina Industrial Commission (the Commission). From among those, six cases were chosen to serve as "bellwether" cases (the Bellwether Cases), which would proceed first and present both evidence specific to the claims of the Bellwether Plaintiffs as well as evidence of exposure common to all claims. This common evidence would then be part of the record in all of the remaining cases. A fuller discussion of the procedural background may be found in our opinion in *Funderburk v. Continental Tire the Americas*, 300 N.C. App. 353, 921 S.E.2d 823 (No. COA 24-192, 2025), issued simultaneously with this opinion.

The Industrial Commission found the common evidence presented in the Bellwether Cases was insufficient to support a finding that employees were "exposed to asbestos in any such form and quantity, and used with such frequency, as to cause asbestosis or any asbestos-related condition." We affirmed the Opinion and Award of the Industrial Commission. *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144, 832 S.E.2d 519 (2019).

Following our opinion in *Hinson*, Defendant moved to dismiss the asbestos-related claims of the remaining 139 Consolidated Plaintiffs. 125 of the Consolidated Plaintiffs voluntarily dismissed their claims, leaving 14 pending claims. On 13 November 2023, the Full Commission entered Opinions and Awards dismissing the remaining claims, including Plaintiff's claim in this case, holding their claims were barred by the Opinions and Awards in the Bellwether Cases under both collateral estoppel and the doctrine of "law of the case." Plaintiff and twelve other former employees appealed, and we consolidated the thirteen appeals for hearing.

We address the Industrial Commission's holding in our opinion in *Funderburk* and, for the same reasons, hold it erred in holding Plaintiff's claim in this case was precluded under either collateral estoppel or the "law of the case." We held the plaintiff in *Funderburk* and other similarly-situated plaintiffs must be allowed to present evidence specific to their claims, as the common evidence alone could not show whether the plaintiffs were subject to more specific theories of exposure or illness.

We note additionally that, as Plaintiff was not among the Consolidated Plaintiffs, there is no indication in the Record that the common evidence introduced in the Bellwether Cases was part of the evidentiary record in Plaintiff's case. Defendant, however, identifies an agreement it entered into with Plaintiff, in which Defendant agreed not to object to the disbursement of third-party settlement funds in exchange for certain concessions should Defendant be required to make workers' compensation payments to Plaintiff. Part of this document states:

> WHEREAS the bellwether cases are currently pending on appeal and include findings of facts which would be common to this claim.

Defendant argues this amounts to a binding stipulation to be bound by the results in the Bellwether Cases, such that dismissal of her claim is appropriate.

Assuming this statement in a compromise agreement—unrelated to consolidation of cases or evidentiary questions—constitutes a stipulation by Plaintiff, this stipulation would, at most, put Plaintiff in a position similar to that of the plaintiff in *Funderburk*. The applicable findings in the Bellwether Cases are limited to finding the common evidence was insufficient to show causation. There has been no finding regarding more specific evidence or theories provided by Plaintiff, because Plaintiff has not had an opportunity to present such evidence. Plaintiff must be allowed to present evidence specific to her claim.

Thus, Plaintiff's claim is not precluded by the prior Bellwether Claims. Therefore, Plaintiff is entitled to present additional evidence, if any, in support of his claim. Consequently, the full Commission erred in dismissing Plaintiff's claim on the bases of collateral estoppel and the law of the case.

For the foregoing reasons, the Opinion and Award of the Industrial Commission is reversed and this matter is remanded to the Industrial Commission for further proceedings in which the Commission shall allow the parties to produce additional evidence as to their claims and defenses.

REVERSED AND REMANDED.

Judge WOOD concurs.

Chief Judge DILLON concurs in result only.

WILLIAM WESLEY HUFFSTETLER, Employee, Plaintiff
v.
CONTINENTAL TIRE THE AMERICAS, Employer, self-insured, and GENERAL TIRE, INC./GENCORP., INC.; Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA24-488

Filed 3 September 2025

Collateral Estoppel and Res Judicata—bellwether cases—not precluding plaintiff's claim—no evidence to support Industrial Commission's decision

In a consolidated worker's compensation case alleging asbestos exposure in defendant's manufacturing plant, in which the claims of six out of approximately 150 plaintiffs were selected to be tried first as representative cases (the Bellwether Cases), the Industrial Commission erred in concluding that the holding of *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144 (2019)—which affirmed the Commission's opinion and award rejecting worker's compensation claims in the Bellwether Cases—barred plaintiff's claim under the doctrines of collateral estoppel and the "law of the case." However, plaintiff's case was not among those consolidated, and there was no indication that the common evidence in the Bellwether Cases was part of the record in hers. Since plaintiff did not have the benefit of even the common evidence from the Bellwether Cases, there was no evidence at all in the record upon which the Commission could base its decision.

Chief Judge DILLON concurring in result only.

Appeal by plaintiff from the Opinion and Award entered 13 November 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2024.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Fox Rothschild LLP, by Jeri L. Whitfield, Kip David Nelson and Patrick M. Kane, for Defendant-Appellee Continental Tire the Americas.

Mullen Holland & Cooper, P.A., by John H. Russell, Jr., for Defendant-Appellee Liberty Mutual Insurance Company.

HAMPSON, Judge.

This case is one of approximately 150 workers' compensation claims by or on behalf of former employees filed against Continental Tire the Americas (Defendant) alleging illness stemming from exposure to asbestos while working in Defendant's tire manufacturing facility. Most of those cases—though not this case—were consolidated for hearing (the Consolidated Cases) before the North Carolina Industrial Commission (the Commission). From among those, six cases were chosen to serve as "bellwether" cases (the Bellwether Cases), which would proceed first and present both evidence specific to the claims of the Bellwether Plaintiffs as well as evidence of exposure common to all claims. This common evidence would then be part of the record in all of the remaining cases. A fuller discussion of the procedural background may be found in our opinion in *Funderburk v. Continental Tire the Americas*, 300 N.C. App. 353, 921 S.E.2d 823 (No. COA 24-192, 2025), issued simultaneously with this opinion.

The Industrial Commission found the common evidence presented in the Bellwether Cases was insufficient to support a finding that employees were "exposed to asbestos in any such form and quantity, and used with such frequency, as to cause asbestosis or any asbestos-related condition." We affirmed the Opinion and Award of the Industrial Commission. *Hinson v. Continental Tire the Americas*, 267 N.C. App. 144, 832 S.E.2d 519 (2019).

Following our opinion in *Hinson*, Defendant moved to dismiss the asbestos-related claims of the remaining 139 Consolidated Plaintiffs. 125 of the Consolidated Plaintiffs voluntarily dismissed their claims, leaving 14 pending claims. On 13 November 2023, the Full Commission entered Opinions and Awards dismissing the remaining claims, including Plaintiff's claim in this case, holding their claims were barred by the Opinions and Awards in the Bellwether Cases under both collateral estoppel and the doctrine of "law of the case." Plaintiff and twelve other former employees appealed, and we consolidated the thirteen appeals for hearing.

We address the Industrial Commission's holding in our opinion in *Funderburk* and, for the same reasons, hold it erred in holding Plaintiff's claim in this case was precluded under either collateral estoppel or the "law of the case." We held the plaintiff in *Funderburk* and other similarly-situated plaintiffs must be allowed to present evidence specific to their claims, as the common evidence alone could not show whether the plaintiffs were subject to more specific theories of exposure or illness.

We note additionally that, as Plaintiff was not among the Consolidated Plaintiffs, there is no indication in the Record that the common evidence introduced in the Bellwether Cases was part of the evidentiary record in Plaintiff's case. Plaintiff in this case does not even have the benefit of the common evidence, and therefore there appears to be *no* evidence in the record upon which the Industrial Commission could base its decision.

Thus, Plaintiff's claim is not precluded by the prior Bellwether Claims. Therefore, Plaintiff is entitled to present additional evidence, if any, in support of his claim. Consequently, the full Commission erred in dismissing Plaintiff's claim on the bases of collateral estoppel and the law of the case.

For the foregoing reasons, the Opinion and Award of the Industrial Commission is reversed and this matter is remanded to the Industrial Commission for further proceedings in which the Commission shall allow the parties to produce additional evidence as to their claims and defenses.

REVERSED AND REMANDED.

Judge WOOD concurs.

Chief Judge DILLON concurs in result only.

PAUL A. NICHOLS AND SPOUSE KATHLEEN M. NICHOLS, PLAINTIFFS
v.
CAMERON C. CALHOUN AND SPOUSE PAMELA M. CALHOUN, DEFENDANTS
v.
AVILA HOMEOWNERS ASSOCIATION, INC., ADDITIONAL DEFENDANT

No. COA24-905

Filed 3 September 2025

Privacy—invasion of privacy—security camera aimed at neighboring property—intrusion upon seclusion—sufficiency of evidence

In a case arising from a dispute between neighbors, in which plaintiffs sought an injunction to compel defendants to remove a six-foot-tall fence between the parties' properties, the trial court's order denying plaintiffs' motions for directed verdict and judgment notwithstanding the verdict on defendants' invasion of privacy counterclaim was affirmed. There was more than a scintilla of evidence that plaintiffs' installation of a motion-activated security camera aimed directly at defendants' backyard constituted an intrusion upon another's solitude or seclusion that could be considered highly offensive to an objectively reasonable person; therefore, the evidence was sufficient to send to the jury the issue of whether the intrusion was in fact highly offensive.

Appeal by Plaintiffs from judgment entered 8 May 2024 by Judge George F. Jones in Pender County Superior Court. Heard in the Court of Appeals 20 May 2025.

Ennis, Baynard, Morton, Medlin & Brown, PLLC, by B. Danforth Morton and Maynard M. Brown, for Plaintiffs-Appellants.

Equitas Law Partners, LLP, by Thomas S. Babel and Lieth O. Khatib, for Defendants-Appellees.

CARPENTER, Judge.

Paul A. Nichols ("Plaintiff-Paul") and Kathleen M. Nichols ("Plaintiff-Kathleen") (collectively, "Plaintiffs") appeal from judgment entered after a jury found them liable to Cameron C. Calhoun ("Defendant-Cameron") and Pamela M. Calhoun ("Defendant-Pamela") (collectively, "Defendants") for invasion of privacy. On appeal, Plaintiffs argue the trial court erred by denying their motions for directed verdict and judgment notwithstanding the verdict ("JNOV") on Defendants' counterclaim for invasion of privacy. After careful review, we affirm.

I. Factual & Procedural Background

This case arises from a conflict between neighbors. At the time of these events, Plaintiffs and Defendants lived next-door to one another in Avila, a subdivision in Pender County, North Carolina. Defendants moved into Avila in 2015 and Plaintiffs moved in at the end of 2017. Defendants' home was located on Lot 2 off Avila Avenue—one of two lots in Avila situated along the Intracoastal Waterway (the "Waterway"). Plaintiffs' home was located on Lot 4 off Avila Avenue—the lot next to Defendants. Plaintiffs' enclosed side porch faced east towards Defendants' home and the Waterway, while the front porch of Defendants' home faced west in the direction of Plaintiffs' side porch. Defendants considered the area between their front door and the boundary line between the parties' lots to be their backyard—a space that Plaintiff-Kathleen once referred to as a "fishbowl."

After Plaintiffs moved into the neighborhood, the parties became friends. They ate dinners together, went boating together, and Defendants' children would often play at Plaintiffs' house. In 2019, Defendants installed a four-foot-tall picket metal fence (the "Old Fence") along the boundary line between the parties' lots. Plaintiffs did not object to the installation of the Old Fence because it did not obstruct their view of the Waterway.

Beginning in May 2020, the parties experienced a falling out. Problems first arose when Plaintiff-Kathleen became upset with Defendant-Pamela for sharing, with two other Avila residents, a before-and-after video of Plaintiffs' basement, which Defendant-Pamela recorded with her phone. Plaintiff-Kathleen had previously hired Defendant-Pamela to organize Plaintiffs' basement and Defendant-Pamela shared the video, in her view, to attract prospective clients. According to Plaintiffs, however, the video included footage of a section of Plaintiffs' basement that Defendant-Pamela was not hired to organize; a section Plaintiffs colloquially referred to as their "store." Plaintiffs' "store" included a stockpile of canned goods, toilet paper, paper towels, and other groceries. Plaintiffs were concerned, due to the COVID-19 pandemic, that people would see the video and break into their home to steal items from their "store."

Defendant-Pamela assured Plaintiff-Kathleen that she had not shown the video to anyone other than the two Avila residents and apologized to Plaintiff-Kathleen "over and over." Defendant-Pamela also told Plaintiff-Kathleen that she did not send the video to anyone and provided Plaintiff-Kathleen with verification that Defendant-Pamela had not texted, emailed, or otherwise sent the video to the two Avila residents. Despite these efforts, Plaintiff-Kathleen seemed unconvinced that Defendant-Pamela did not send the video to anyone, so Defendant-Cameron provided Plaintiffs with a copy of Defendants' phone records. Nevertheless, Plaintiffs remained unsatisfied and asked Defendant-Cameron to provide Plaintiffs with Defendants' Apple ID's because the phone records Defendants provided, according to Plaintiffs, did not "show iPhone to iPhone transmissions." Defendant-Cameron refused.

Following the conflict concerning the video, Defendants became upset with Plaintiffs when they observed their young daughter playing a board game with Plaintiffs under the Old Fence. Plaintiffs were under the impression that Defendants gave their daughter permission to come out and play. Defendants, however, maintained they did not, and believed their daughter was missing. When Defendant-Cameron located his daughter, he approached the Old Fence, instructed his daughter to go inside their home, and confronted Plaintiffs. The conversation became heated, ending when Plaintiff-Paul "corral[led]" Plaintiff-Kathleen to escort her back inside Plaintiffs' home. Thereafter, Plaintiff-Paul sent an email to Defendant-Cameron stating Plaintiffs were "willing to endure litigation to get [to the] truth" about the basement video.

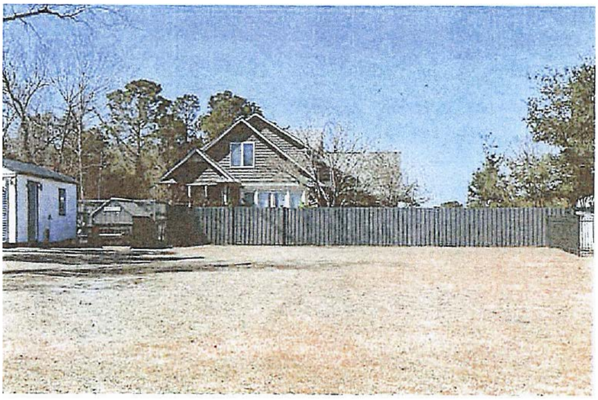
Throughout the summer of 2020, the parties' relationship continued to deteriorate. At one point, Plaintiff-Kathleen texted Defendant-Pamela, stating that her husband, Defendant-Cameron, was a "douchebag." Additionally, Plaintiff-Paul and Defendant-Cameron exchanged several messages in which Plaintiff-Paul complained about Defendants' chickens and asked Defendants to contain the chickens to Defendants' backyard. According to Defendant-Cameron, Plaintiffs never complained about Defendants' chickens prior to the parties' falling out.

Tensions culminated when, on 1 September 2020, Defendants replaced the Old Fence with a six-foot-tall wood privacy fence (the "New Fence"). While the New Fence was being installed, Plaintiff-Paul contacted the president of the home owners association ("HOA") because he believed the New Fence violated the HOA covenants. Plaintiff-Paul also called Defendant-Cameron to ask him to stop installing the New Fence, but Defendant-Cameron declined. Plaintiffs' primary concern was that the New Fence obstructed their view of the Waterway.

On 1 February 2021, Plaintiffs filed a complaint against Defendants in Pender County Superior Court, alleging the New Fence was a "spite fence" and requesting an injunction compelling Defendants to remove the New Fence. On 5 April 2021, Defendants filed an answer and counterclaim, claiming Plaintiffs were also in violation of the HOA covenants for erecting a greenhouse. Thereafter, Defendants filed a proposal with Avila's Architectural Control Committee ("ACC") seeking approval of the already-installed New Fence. On 10 July 2021, the ACC approved the New Fence with the stipulation that it be painted. Plaintiffs, along with a few other Avila residents, appealed the ACC's decision. While the fence appeal was pending, Defendant-Cameron arranged to have the New Fence painted. On 18 October 2021, the HOA notified Plaintiffs that the New Fence would be painted on 19 October 2021, and that the painters would need to access Plaintiffs' lot. Plaintiff-Paul responded to the HOA notice, stating he did not want the New Fence to be painted or for the painters to enter Plaintiffs' lot.

Shortly after this exchange, Plaintiffs installed a security camera inside their side porch. The camera was located atop a sliding glass door, above the New Fence line, facing due east towards Defendants' home.

Although Defendants' backyard was within the camera's field of view, Plaintiffs claimed they only installed the camera to monitor activity on their side of the New Fence. According to Plaintiffs, the camera "had the ability to record," but Plaintiffs did not record any footage because they did not know "how to put the SD card in." Nonetheless, due to the camera being activated by motion and connected to Wi-Fi, Plaintiffs were able to view, through their phones, livestream footage of any movement captured by the camera. Plaintiffs maintained, however, that they never used the camera to "spy" on Defendants.



Defendant-Cameron first noticed a "ring of red lights" coming from Plaintiffs' side porch while tending to his chickens one evening in October 2021. The next morning, Defendant-Cameron noticed the camera and observed that it was "fac[ing] right at the front door of [his] house." Defendant-Cameron informed Defendant-Pamela of the camera's presence while they were hosting a birthday party for their daughter in their backyard. Because of the camera, Defendants moved the party to a different area of their lot so they could "enjoy a little bit of privacy while [they] were out in the [back]yard."

After the birthday party, Defendants stopped using their backyard altogether because they felt "very uncomfortable" and were fearful that Plaintiffs were "spying" on them. Defendants believed Plaintiffs installed the camera for "the sole purpose" of surveilling Defendants' movements while they were in their backyard. Specifically, Defendant-Cameron testified that he felt his "privacy had been violated." Then, in December 2021, Plaintiffs complied with their attorney's advice to take down the camera. On 3 January 2022, the HOA reversed the decision regarding the New Fence, determining the New Fence violated the HOA covenants.

On 7 October 2022, Plaintiffs filed an amended complaint asserting private nuisance claims and requesting damages and injunctive relief. Specifically, Plaintiffs asserted the New Fence and several storage containers located on Defendants' lot constituted "spite fences." Plaintiffs alleged they were entitled to damages and an injunction requiring Defendants to remove the New Fence and storage containers. On 20 November 2022, Defendants filed an answer and second amended counterclaim asserting several causes of action, including invasion of privacy.

The case proceeded to trial on 16 January 2024. At the close of all the evidence, Plaintiffs moved for a directed verdict concerning all of Defendants' counterclaims. The trial court denied Plaintiffs' motion as to invasion of privacy. On 30 January 2024, the jury returned a verdict favorable to Defendants. The jury found that the New Fence and storage containers were not "spite fences," and that Plaintiffs were liable to Defendants for their invasion of privacy counterclaim. The trial court entered judgment accordingly on 8 May 2024. Thereafter, Plaintiffs filed a motion for JNOV, or, alternatively a new trial, which the trial court denied by order entered 13 May 2024. On 6 June 2024, Plaintiffs filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(4) (2023).

III. Issue

The issue is whether the trial court erred by denying Plaintiffs' motions for directed verdict and JNOV on Defendants' invasion of privacy counterclaim.

IV. Analysis

Plaintiffs argue they were entitled to a directed verdict or JNOV on Defendants' invasion of privacy counterclaim because the evidence was insufficient to establish an intrusion that could be considered highly offensive to a reasonable person. We disagree.

A. Standard of Review

"The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical." *Springs v. City of Charlotte*, 209 N.C. App. 271, 274, 704 S.E.2d 319, 322–23 (2011) (internal quotation marks and citation omitted). Both motions "present[] the question of whether, as a matter of law, the evidence offered by the [non-moving party], when considered in the light most favorable to the [non-moving party], is sufficient to be submitted to the jury." *Roberts v. William N. & Kate B. Reynolds Mem'l Park*, 281 N.C. 48, 53, 187 S.E.2d 721, 724 (1972); *see Vanguard Pai Lung, LLC v. Moody*, 387 N.C. 376, 379, 912 S.E.2d 788, 791 (2025). Thus, our review of the trial court's denial of Plaintiffs' motions is de novo. *Denson v. Richmond Cnty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003). "When reviewing a matter de novo, this Court 'considers the matter anew and freely substitutes its own judgment' for that of the lower [tribunal]." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422, 894 S.E.2d 709, 712 (2023) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

A motion for directed verdict and a motion for JNOV occur at different points during a jury trial. A motion for directed verdict, which is made "at the close of the evidence offered by an opponent," N.C. Gen. Stat. § 1A-1, Rule 50(a) (2023), "test[s] the legal sufficiency of the evidence to take the case to the jury[,]" *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). On the other hand, a motion for JNOV, made after the jury has returned a verdict, "test[s] the legal sufficiency of the evidence on which the jury relied" and allows the trial court to "enter a judgment contrary to the jury's verdict if . . . the evidence presented does not support that verdict." *Vanguard Pai Lun, LLC*, 387 N.C. at 379, 912 S.E.2d at 791 (citing *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 719–20, 693 S.E.2d 640, 643 (2009)). Of note, "[t]he legal standard applied to a JNOV motion is quite demanding and the motion should be granted 'cautiously and sparingly.' " *Id.* at 379, 912 S.E.2d at 791 (quoting *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985)). Indeed, "[a] court may enter JNOV only if 'it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon *any view* of the facts which the evidence reasonably tends to establish.' " *Id.* at 379, 912 S.E.2d at 792 (emphasis added) (quoting *Scarborough*, 363 N.C. at 720, 693 S.E.2d at 643 (cleaned up)).

Ultimately, "[a] motion for either directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009) (internal quotation marks and citations omitted). "A scintilla of evidence is defined as very slight evidence" and the party moving for directed verdict or JNOV "bears a heavy burden under North Carolina law." *Maldjian v. Bloomquist*, 275 N.C. App. 103, 110, 853 S.E.2d 753, 760 (2020) (internal quotation marks and citation omitted).

B. Intrusion Upon Seclusion

There are four distinct invasion of privacy actions: " '(1) appropriation, for the defendant's advantage of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye.' " *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 28–29, 588 S.E.2d 20, 27 (2003) (quoting *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984)).[1]

The privacy tort of intrusion upon seclusion—the basis of Defendants' counterclaim—is actionable in North Carolina, and "is defined as 'the intentional intrusion physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person.' " *Maynard v. Crook*, 289 N.C. App. 357, 363, 890 S.E.2d 164, 170 (2023) (quoting *Toomer v. Garrett*, 155 N.C. App. 462, 479, 574 S.E.2d 76, 90 (2002)) (alteration in original). Clear examples of an intrusion upon seclusion include, but are not necessarily limited to: " 'physically invading a person's home or other private place, eavesdropping by wiretapping

1. North Carolina does not recognize invasion of privacy actions for: public disclosure of private facts, *see Hall v. Post*, 323 N.C. 259, 265, 372 S.E.2d 711, 714 (1988); or placing plaintiff in a false light, *see Renwick*, 310 N.C. at 322, 312 S.E.2d at 411.

or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.' " *Broughton*, 161 N.C. App. at 29, 588 S.E.2d at 27–28 (quoting *Burgess v. Busby*, 142 N.C. App. 393, 405–06, 544 S.E.2d 4, 11 (2001)).

In the instant case, Plaintiffs assert the trial court erred by denying their motions for directed verdict and JNOV on Defendant's counterclaim for invasion of privacy because the act of installing a camera does not constitute an intrusion that would be highly offensive to a reasonable person. Effectively, Plaintiffs contend the trial court should have determined—as a matter of law—that the evidence was insufficient to establish a highly-offensive intrusion. Plaintiffs' argument merits a brief discussion of a trial court's initial inquiry regarding the "highly offensive" element before submitting a claim of intrusion upon seclusion to the jury.

C. Highly Offensive Intrusion

Since officially recognizing the privacy tort of intrusion upon seclusion in 1996, *see Miller v. Brooks*, 123 N.C. App. 20, 27, 472 S.E.2d 350, 354 (1996), our courts have analyzed the sufficiency of the evidence for intrusion upon seclusion claims at various procedural stages, including motions to dismiss for failure to state a claim, *see*, *e.g.*, *Maynard*, 289 N.C. App. at 363, 890 S.E.2d at 170, and motions for summary judgment, *see*, *e.g.*, *Broughton*, 161 N.C. App. at 29, 588 S.E.2d at 27. In the context of a motion for directed verdict or motion for JNOV, we have yet to analyze the sufficiency of the evidence for a claim of intrusion upon seclusion.

In *Miller v. Brooks*, this Court determined that the plaintiff's evidence was sufficient to survive the defendant's motion for summary judgment because "[a] jury *could* conclude that [the] invasions would be highly offensive to a reasonable person." 123 N.C. App. at 26–27, 472 S.E.2d at 354 (emphasis added). Conversely, in *Smith v. Jack Eckerd Corp.*, we held that "[a]lthough the incident may have been offensive to the plaintiff, . . . under the circumstances the intrusion would not be so highly offensive to the reasonable person as to constitute an invasion of privacy action." 101 N.C. App. 566, 569, 400 S.E.2d 99, 100 (1991). These cases illustrate the trial court must preliminarily assess the offensiveness of the intrusion before submitting an intrusion upon seclusion claim to the jury.

The tort claim of intentional infliction of emotional distress ("IIED"), like intrusion upon seclusion, involves a preliminary evidentiary assessment by the trial court. To establish a claim for IIED, a plaintiff must show, among other things, that the defendant's conduct was "extreme and outrageous." *Moschos v. Moschos*, 287 N.C. App. 162, 166, 882 S.E.2d 401, 404 (2022) (citations omitted). If the trial court initially determines the conduct in question "*may* reasonably be so regarded, then it is for the jury to decide whether, under the facts of a particular case, [the] defendant's conduct . . . was *in fact* extreme and outrageous." *Glenn v. Johnson*, 247 N.C. App. 660, 668, 787 S.E.2d 65, 72 (2016) (citation omitted and emphasis added). By making this initial determination, the trial court limits the jury's consideration to only those IIED claims where the conduct "*may* be reasonably [] regarded" as "extreme and outrageous." *Id.* at 668, 787 S.E.2d at 72 (citation omitted).

Similarly, for an intrusion upon seclusion claim, the trial court considers whether the alleged intrusion *could be* considered highly offensive to a reasonable person. *See Miller*, 123 N.C. App. at 26–27, 472 S.E.2d at 354. If a reasonable person *may* regard the intrusion as highly offensive, then it is for the jury to decide "whether the conduct complained of is, *in fact* sufficiently [highly offensive] to result in liability." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 16, 437 S.E.2d 519, 527–28 (1993) (citation omitted and emphasis added). As questions of objective reasonableness are ordinarily for the jury to decide, the jury is best positioned to determine whether a reasonable person would find an alleged intrusion to be "highly offensive." *See Hall*, 323 N.C. at 276, 372 S.E.2d at 721 (Frye, J., concurring in result) (stating "offensiveness" in the context of public disclosure of private facts "is a jury determination" because "as in negligence cases, a reasonable person standard generally requires a jury determination").

Thus, for an intrusion upon seclusion claim to survive a motion for directed verdict, the evidence, when viewed in the light most favorable to the non-moving party, must show that a reasonable person *could* find the intrusion to be highly offensive. The question is not whether the trial court or the plaintiff subjectively finds the conduct to be highly offensive, but whether an objectively reasonable juror *could* conclude that it is. *See Miller*, 123 N.C. App. at 26–27, 472 S.E.2d at 354 (emphasis added).

D. Discussion

Here, there was more than a scintilla of evidence showing Plaintiffs intruded upon Defendants' solitude or seclusion in a way that could be considered highly offensive to a reasonable person. *See Shelton*, 197 N.C. App. at 410, 677 S.E.2d at 491. In the midst of an ongoing dispute between neighbors, Plaintiffs placed a security camera atop a sliding glass door within their side porch pointed directly towards Defendants' backyard and home. Plaintiffs did not angle the camera down or off to the side. Instead, the lens was level, clearing the height of the New Fence, and Plaintiffs admitted that Defendants' backyard was within the camera's field of view. Further, the camera was activated by motion, and Plaintiffs testified that when the camera was triggered, they were capable of viewing what was happening through the camera lens in real-time on their phones. Granted, Plaintiffs testified that they never recorded any footage and never used the camera to "spy" on Defendants. Nevertheless, the camera's location and viewing features provided Plaintiffs with the means and the opportunity to surveil Defendants within the supposed privacy of their own backyard. Whether these facts establish a highly offensive intrusion was for the jury to decide. *See Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 664 (1997) (explaining "[i]t is the jury's function to weigh the evidence and to determine the credibility of the witnesses").

When viewed in the light most favorable to Defendants, the evidence was sufficient to establish an intrusion that could be considered highly offensive to a reasonable person. Considering *where* the camera was installed—facing Defendant's backyard, above the New Fence line; *when* the camera was installed—during an ongoing neighborly dispute; and *how* the camera functioned—displaying footage in real-time when triggered by motion; a reasonable jury could conclude that Plaintiffs' camera was a highly offensive intrusion upon Defendants' seclusion. *See Miller*, 123 N.C. App. at 26–27, 472 S.E.2d at 354. Thus, it was for the jury to decide whether the intrusion was, *in fact*, highly offensive. *See Bryant*, 113 N.C. App. at 16, 437 S.E.2d at 527. Accordingly, the trial court properly denied Plaintiffs' motions for directed verdict and JNOV on Defendants' invasion of privacy counterclaim.

V. Conclusion

Because Plaintiffs' intrusion could be considered highly offensive to a reasonable person, the evidence was sufficient to send Defendants' invasion of privacy counterclaim to the jury. Moreover, the evidence supported the jury's verdict. Thus, the trial court did not err by denying Plaintiffs' motions for directed verdict and JNOV. Accordingly, we affirm.

AFFIRMED.

Judges STROUD and WOOD concur.

PUMA BIOTECHNOLOGY, INC., Plaintiff
v.
HEDRICK GARDNER KINCHELOE & GAROFALO, L.L.P. and
DAVID L. LEVY, Defendants

No. COA24-722

Filed 3 September 2025

Civil Procedure—voluntary dismissal—Rule 41(a)(1) savings provision—relation back—statute of repose not a bar

In an action alleging legal malpractice and negligence, where plaintiff took a voluntary dismissal of its complaint pursuant to Civil Procedure Rule 41(a)(1) and refiled its complaint within one year of the dismissal, the claim was not barred by the four-year statute of repose (N.C.G.S. § 1-15(c)) even though the refiled complaint was filed more than four years after defendants' last act of negligence (assuming without deciding that the trial court correctly calculated the date of the last negligent act). Where plaintiff's initial complaint was filed within the applicable statute of limitations and statute of repose, the same claim alleged in the refiled complaint related back, pursuant to the savings provision of Rule 41, to the date of the initial complaint and therefore remained a viable claim. However, where the refiled complaint included a new claim for gross negligence, that claim did not relate back to the initial filing date and therefore was properly dismissed as being barred by the statute of repose.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 20 March 2024 by Judge Edwin G. Wilson Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2025 in session at Elon University School of Law in the City of Greensboro pursuant to N.C. Gen. Stat. § 7A-19(a).

Pishko Kalarities, P.A., by David C. Pishko, for Puma Biotechnology, Inc., Plaintiff-Appellant.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan, Allison O. Mullins, Stephen M. Russell, Jr. and Hillary M. Kies, for Hedrick Gardner Kincheloe & Garofalo, L.L.P., Defendant-Appellee; and Parker Poe Adams & Bernstein LLP, by Chip Holmes, Jason R. Benton, and Carolina B. Barrineau, for David L. Levy, Defendant-Appellee.

John Taylor Law Firm, PLLC, by John R. Taylor, for The North Carolina Advocates for Justice, Amicus Curiae for Plaintiff-Appellant.

Ellis & Winters LLP, by Leslie C. Packer, Dixie T. Wells, and Suraj Vege, for NC Chamber Legal Institute and North Carolina Association of Defense Attorneys, Amici Curiae for Defendants-Appellees.

WOOD, Judge.

This appeal stems from a legal malpractice action filed by Puma Biotechnology, Inc. ("Plaintiff") against Hedrick Gardner Kincheloe & Garofalo, L.L.P. ("HG LLP") and David L. Levy ("Levy") (collectively "Defendants"). Levy was a partner at HG LLP and represented Plaintiff in the underlying defamation case, which is the basis of the legal malpractice action on appeal.

I. Factual and Procedural Background

On 24 January 2018, Defendants were hired to represent Plaintiff, who was a defendant in a defamation lawsuit ("Defamation Case") filed in the United States District Court for the Eastern District of North Carolina against Plaintiff by Fredric Eshelman ("Eshelman") on 16 February 2016. Defendants replaced the prior attorneys, Wilkinson Walsh + Eskovitz, LLP ("Wilkinson Walsh"). Eshelman alleged Plaintiff had defamed him by publishing certain information to their shareholders during a proxy contest. HG LLP assigned Levy to work on the Defamation Case. The lead attorney from Wilkinson Walsh updated Levy on strategy, provided insight on Eshelman's attorneys, and advised that Alan Auerbach, Chief Executive Officer, President, and Chairman of the Board of Directors of Puma ("Auerbach"), was a very active client, who needed to be kept up-to-date and involved.

On 20 February 2019, Levy signed a pretrial order containing 146 stipulations of fact of which Plaintiff contends many were not true or were not relevant to the issues of the case. Levy did not consult with Auerbach prior to entering the stipulations. The trial court subsequently entered the pretrial order, establishing the truth of the stipulations for the purpose of the trial. Defendants did not review the stipulations with Auerbach prior to trial, and on cross-examination Auerbach attempted to deny the truth of the statements and stipulations, damaging his credibility as a witness. Levy also did not make a motion for judgment as a matter of law at the conclusion of evidence. The jury returned verdicts in favor of Eshelman. In total, Eshelman was awarded $26,334,646.58 in compensatory and punitive damages and pre-judgment interest.

After the verdict, Latham & Watkins was hired "to take over the lead role in filing post-trial motions and appealing the verdict." On 22 April 2019, Plaintiff moved for a new trial or alternatively a reduction in damages. At this time, Levy submitted an affidavit with this motion explaining "his agreement to the various stipulations in the Pretrial Order. Among other things, he stated that he understood the topic headings contained in the stipulations were included for 'organizational purposes' and not as factual stipulations." A second non-party attorney working with Levy on the case also submitted a similar affidavit.

On 8 July 2019, the trial court granted Defendants' motion to withdraw as counsel for Plaintiff. On 2 March 2020, the trial court entered an order denying Plaintiff's motion for a new trial. The matter was appealed to the United States Court of Appeals for the Fourth Circuit which upheld the judgment on the issue of liability but set aside the award of damages as excessive. Plaintiff ultimately paid Eshelman $16 million dollars to settle the defamation suit.

On 17 September 2020, Plaintiff filed a complaint (hereinafter "Initial Complaint") against Defendants in Mecklenburg County Superior Court alleging legal malpractice and negligent representation during the Defamation Case. On 24 August 2022, Plaintiff filed a notice of voluntary dismissal of the Initial Complaint, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. On 6 June 2023, Plaintiff refiled its complaint against Defendants (hereinafter "Refiled Complaint") alleging legal malpractice and negligence and a new claim of gross negligence.

Defendants filed separate motions to dismiss on 22 August 2023, both alleging, among other things, the Refiled Complaint was barred by the four-year statute of repose contained in N.C. Gen. Stat. § 1-15(c). HG LLP asserted four grounds for dismissal under North Carolina Rules of Civil Procedure 12(b)(6), 12(b)(7), 19, and 41(a). Levy also asserted four grounds for dismissal under North Carolina Rules of Civil Procedure 9, 12(b)(6), 12(b)(7), 19, and 41(a).

On 20 February 2024, arguments were presented to the trial court by all parties. The trial court considered two main questions, "(1) What was the last act [by] Defendants that gave rise to the cause of action? and (2) Was the action filed within the four-year Statute of Repose?" On 20 March 2024, the trial court filed a written order dismissing Plaintiff's

Refiled Complaint with prejudice under Rule 12(b)(6) because it "was not brought within the statute of repose[.]" Plaintiff filed notice of appeal on 28 March 2024.

II. Analysis

Plaintiff contends the trial court erred in granting Defendants' motion to dismiss the Refiled Complaint because the savings provision of Rule 41(a)(1) of the North Carolina Rules of Civil Procedure allows a claim to be refiled within one year of its voluntary dismissal, and this one-year time period is not cut short by the four-year statute of repose contained in N.C. Gen. Stat. § 1-15(c). Thus, Plaintiff contends it properly alleged a sufficient cause of action in the Refiled Complaint that should not have been dismissed as time barred.

Additionally, Plaintiff argues the trial court incorrectly concluded Defendants' "last act of negligence was on or before 22 April 2019" because Defendants had not officially withdrawn as counsel until 8 July 2019, leaving opportunity up until that date for Defendants to correct their negligent actions.

A. Standard of Review

We review a trial court's order granting a Rule 12(b)(6) motion to dismiss to determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 291, 826 S.E.2d 746, 756 (2019) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)).

"[T]he complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *Locklear v. Lanuti*, 176 N.C. App. 380, 383, 626 S.E.2d 711, 714 (2006) (cleaned up) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)). "On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013).

"A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d

784, 786 (1994). However, "[a] 12(b)(6) dismissal based on the statute of repose would only be appropriate if the complaint otherwise alleges facts *conclusively* showing that it was not filed within the applicable statute of repose[]" as "a plaintiff has no burden at the pleading stage to allege facts showing that its complaint was filed within the applicable statute of repose." *Gaston Cnty. Bd. of Educ. v. Shelco, LLC*, 285 N.C. App. 80, 84, 877 S.E.2d 316, 319-20 (2022).

While our legislature does not define the four-year outer limit from the date of the "last act of the defendant giving rise to the cause of action" within N.C. Gen. Stat. § 1-15(c) as a statute of repose, our Courts have consistently defined it as such. *Hargett*, 337 N.C. at 652, 447 S.E.2d at 786; *Black v. Littlejohn*, 312 N.C. 626, 632, 325 S.E.2d 469, 474-75 (1985) ("The majority of the jurisdictions with malpractice statutes of limitations provide some absolute statutory outer limit similar to that contained in our statute [N.C. Gen. Stat. § 1-15(c)]. This outer limit is more precisely referred to as a period of repose."). Regardless of whether prior cases have referred to this four-year outer limit as a statute of repose, we shall treat and refer to it as such.

B. Last Act of Negligence

We first address the date of the "last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c). Plaintiff contends the trial court erred in granting Defendants' motion to dismiss because 8 July 2019, the date Defendants' motion to withdraw as counsel for Plaintiff in the Defamation Case was granted, is the correct date from which the "last act of the defendant giving rise to the cause of action[]" accrues. N.C. Gen. Stat. § 1-15(c). The statute for professional malpractice cases states, in relevant part:

> (c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to *accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action*: . . . Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from *the last act of the defendant giving rise to the cause of action* . . . .

N.C. Gen. Stat. § 1-15(c) (emphasis added).

When determining the last act of alleged negligence, we may also consider when the last omission of an act by a defendant has occurred that may give rise to a cause of action. *Carle v. Wyrick, Robbins, Yates & Ponton, LLP*, 225 N.C. App. 656, 661-62, 738 S.E.2d 766, 770-71 (2013). To determine the last act or omission by a defendant, this Court looks to "factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied." *Id.* at 661, 738 S.E.2d at 771.

In North Carolina, statutes of repose are not considered to be an affirmative defense, but rather a condition precedent. Unlike statutes of limitation which *are* listed as an affirmative defense and must be affirmatively pleaded, conditions precedent do *not* need to be specially pleaded by the defendant. N.C. Gen. Stat. § 1A-1, Rule 8(c); *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 862 (2006); *Gaston Cnty.*, 285 N.C. App. at 85, 877 S.E.2d at 320. The plaintiff has the burden to prove that their action is not barred by the statute of repose, *but* because it is not an affirmative defense, it does not need to be specially pleaded by the defendant. *Whittaker*, 176 N.C. App. at 187, 625 S.E.2d at 862.

This Court in *Whittaker* clarified that the statute of repose is a condition precedent, thus a defendant does not waive their right to raise the issue when not specially pleaded. *Id.* Furthermore, this Court more recently emphasized in *Gaston* that the statute of repose is not listed as an affirmative defense under Rule 8 of the North Carolina Rules of Civil Procedure but is instead governed by Rule 9(c) as a condition precedent. *Gaston Cnty.*, 285 N.C. App. at 85, 877 S.E. at 320.

In determining whether it is appropriate to grant a 12(b)(6) motion to dismiss based on the statute of repose, our Court has expressed

> it is generally inappropriate to grant a defendant's Rule 12(b)(6) motion to dismiss a complaint merely because it failed to *allege* facts showing that it was filed within the applicable statute of repose. A Rule 12(b)(6) dismissal based on the statute of repose would only be appropriate if the complaint otherwise alleges facts *conclusively* showing that it was not filed within the applicable statute of repose.

Id. at 84, 877 S.E.2d at 319-20. In *Gaston*, this Court deemed granting a 12(b)(6) motion inappropriate because the plaintiff did not "allege both the dates when any Defendant performed its last 'specific last act' and the 'substantial completion of the improvement[.]' " *Id.* at 84, 877

S.E.2d at 320. "[B]ased on our jurisprudence, a plaintiff has no burden at the pleading stage to allege facts showing that its complaint was filed within the applicable statute of repose." *Id.* at 84, 877 S.E.2d at 319. Similarly, *sub judice*, Plaintiff did not allege a specific last act of negligence by Defendants, but it does allege a timeline of events that leaves open the door to conjecture as to what facts *could* have been alleged or do exist that *would* conclusively determine the last act of negligence by Defendants.

Here, Plaintiff alleges the following relevant facts in its Refiled Complaint. Plaintiff was represented by three law firms over the life of the Defamation Case. Wilkinson Walsh first represented Plaintiff, then Defendant HG LLP, and lastly Latham & Watkins. Plaintiff hired Defendant HG LLP to replace Wilkinson Walsh in the Defamation Case on or about 24 January 2018 prior to trial. Plaintiff acknowledges transition of lead representation from Defendants to Latham & Watkins by stating in its Refiled Complaint, "[a]fter the verdict [was returned 15 March 2019], [Plaintiff] engaged Latham & Watkins to take over the lead role in filing post-trial motions and appealing the verdict." On 22 April 2019, Plaintiff moved for a new trial and Levy "submitted an affidavit explaining his agreement to the various stipulations" in support of the motion. Plaintiff makes no mention of what occurred between the filing of the affidavit and the granting of the motion to withdraw on 8 July 2019.

As the trial court points out, "[t]he complaint is fairly silent as to what Defendants did or did not do during the intervening period between late April and the formal conclusion of Defendants' representation in July" when their motion to withdraw as counsel was officially granted. As stated above, "statutes of repose are conditions precedent and [] the plaintiff has the burden at trial of proving that the claim is brought within the applicable statute of repose." *Richland Run Homeowners Ass'n, Inc. v. CHC Durham Corp.*, 123 N.C. App. 345, 352, 473 S.E.2d 649, 654 (1996) (Greene, J., dissenting), *rev'd*, 346 N.C. 170 (1997) (reversing for reasons consistent with Judge Greene's dissent). However, assuming, without deciding, the trial court correctly determined that the date of the last negligent act of Defendants was 22 April 2019, we focus our attention on whether the matter is time-barred by the statute of repose.

C. Statute of Repose and the Savings Provision of Rule 41

This case poses a question of law that has not been explicitly answered by our Courts. We are tasked with determining how the four-year statute of repose, contained in N.C. Gen. Stat. § 1-15(c), and the one-year time period contained in the savings provision of Rule 41(a)(1) interact. Plaintiff contends its Refiled Complaint is not barred by the statute of repose because it was filed within one year of its voluntary dismissal of the Initial Complaint pursuant to the savings provision of Rule 41(a)(1). In contrast, Defendants contend the savings provision does not allow a claim to be filed after the statute of repose has expired, even if refiled within one year after the filing of a voluntary dismissal pursuant to Rule 41(a)(1). N.C. Gen. Stat. § 1A-1, Rule 41(a)(1).

First, we summarize the relevant dates and issue presented. On 17 September 2020, Plaintiff filed its Initial Complaint. On 24 August 2022, Plaintiff voluntarily dismissed the Initial Complaint pursuant to Rule 41(a)(1). On 6 June 2023, Plaintiff filed the Refiled Complaint. Based on the trial court's determination of 22 April 2019 as the last date of purported negligence, the three-year statute of limitations expired on 22 April 2022 and the four-year statute of repose expired on 22 April 2023. Thus, Defendants contend because the Refiled Complaint was filed after 22 April 2023, it is fully barred by the four-year statute of repose, notwithstanding Plaintiff asserting the savings provision of Rule 41(a)(1) provided a full year from 24 August 2022, the date the voluntary dismissal of the Initial Complaint was filed, to refile a complaint, even though that one-year period extended past the four-year statute of repose.

We begin our analysis by discussing each statute separately to provide a clear background of how each operates before we discuss their interaction.

1. Rule 41(a)(1) Savings Provision and Relation Back

The savings provision of Rule 41(a)(1) states,

> [i]f an action commenced *within the time prescribed therefor*, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced *within one year after such dismissal* unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

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

This Court and our Supreme Court have applied the Rule 41(a)(1) savings provision consistently, allowing a timely-filed initial complaint to be voluntarily dismissed and then subsequently refiled within one year of its voluntary dismissal. When this one-year period after voluntary dismissal exceeds the applicable statute of limitations, our Courts have held the refiled complaint relates back to the commencement of the initial complaint, thus avoiding the expiration of the statute of limitations. *Sweet v. Boggs*, 134 N.C. App. 173, 175, 516 S.E.2d 888, 890 (1999) ("[W]hen a claim is voluntarily dismissed without prejudice by a plaintiff, the plaintiff may reinstitute the claim within one year. The second claim will relate back and avoid the bar of the statute of limitations."); *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 365, 344 S.E.2d 302, 304 (1986) ("When a party properly takes a first voluntary dismissal of an action filed within the statute of limitations, that party then has one year to refile the same action even though the refiling may be beyond the general statute of limitations."). Our Courts have explicitly discussed the savings provision's application against statutes of limitations, but it has never explicitly stated whether Rule 41(a)(1) is applied in the same manner when the one year period exceeds the time period of a statute of repose. Thus, we further examine how our Courts have applied and discussed Rule 41(a)(1) to guide our analysis.

a. Relation Back

Under Rule 41(a)(1), "a new action based on the same claim may be commenced within one year after such dismissal" and "the refiled claim will relate back to the [date of the] original filing for purposes of tolling the statute of limitations." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1); *Williams v. Lynch*, 225 N.C. App. 522, 526, 741 S.E.2d 373, 375 (2013). Although this Court in *Spoor v. Barth* primarily focused on *which* claims the relation-back provision applies to in a refiled complaint, the holding is relevant *sub judice* because this Court makes it clear Rule 41(a)(1)'s relation-back provision is applied to the refiled claim by *interposing* the filing date of the original complaint to the refiled complaint. *Spoor v. Barth*, 257 N.C. App. 721, 727-31, 811 S.E.2d 609, 614-16 (2018). When interposing the date of an initial complaint to a refiled complaint, the refiled complaint stands as if it had commenced on the same date as the initial complaint. Thus, when an initial complaint is timely filed within the applicable "time prescribed therefor," the refiled complaint is likewise deemed to be timely filed. *Id.* Consequently, a common sense application of our jurisprudence to the relation-back component of Rule 41(a)(1) allows a properly refiled claim to avoid both a statute of limitations and a statute of repose. The commencement date of the action is deemed to be the same as the initial complaint. *See Sweet*, 134 N.C. App. at 175, 516 S.E.2d at 890; *see Spoor*, 257 N.C. App. at 727-31, 811 S.E.2d at 614-16.

b. Relation Back – Amended Complaints

To help provide guidance on our Court's treatment of the relation back of a claim in general, we consider the relation back of amended complaints. Our Supreme Court long ago established how Rule 15(c), the statute allowing a party to file an amended complaint, and its relation-back component and statutes of repose interact. *See generally Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 364 S.E.2d 380 (1988). In *Pyco Supply Co.*, our Supreme Court reversed this Court's holding that Rule 15(c) was inapplicable when the amendment was "filed beyond a statutory period when that time restriction is deemed a statute of repose." *Id.* at 440, 364 S.E.2d at 383. Our Supreme Court stated,

> We can discern from our Rules of Civil Procedure and the case law of this State no such exception [was] intended for Rule 15(c). We hold that the determination of whether a claim asserted in an amended pleading relates back *does not hinge on whether a time restriction is deemed a statute of limitation or repose*. Rather, the proper test is whether the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences which formed the basis of the amended pleading. If the original pleading gave such notice, the claim survives by relating back in time *without regard to whether the time restraint attempting to cut its life short is a statute of repose or limitation.*

Id. at 440-41, 364 S.E.2d at 383 (emphasis added).

While a refiled complaint and an amended complaint are separate and distinct, our Supreme Court explicitly acknowledged "whether a time restriction is deemed a statute of limitation or repose[]" was *not* intended to be a determining factor. *Id.* In this context, *Pyco* offers valuable guidance for how our courts may interpret other relation-back provisions.

We acknowledge "notice is not the determinative inquiry for relation back under Rule 41[]" as it is for the relation back of an amended complaint. *Gantt v. City of Hickory*, 290 N.C. App. 279, 285, 892 S.E.2d 223, 228 (2023). We discuss amended complaints as guidance for how our Courts have considered the interaction of relation-back provisions and statutes of limitation and statutes of repose, *not* for guidance on the substance of which claims can be related back.

c. Allowed Causes of Action in Refiled Complaint

The savings provision of Rule 41(a)(1) applies only when "a new action based on the *same claim* may be commenced within one year after such dismissal . . . ." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (emphasis added). "Rule 41(a)(1)'s relation-back provision applies only to claims in a subsequent complaint that were included in the voluntarily dismissed complaint." *Spoor*, 257 N.C. App. at 727, 811 S.E.2d at 613.

> Our courts have required the "strictest factual identity between the original" claim, and the "new" action, which must be based upon the "same claim," as the original action. Further, both claims must be "substantially the same, involving the same parties, the same cause of action, and the same right." If the actions are "fundamentally different," or not "based on the same claims," the new action is not considered a "continuation of the original action," and Rule 41(a) may not be invoked.

Brannock v. Brannock, 135 N.C. App. 635, 639-40, 523 S.E.2d 110, 113 (1999) (cleaned up).

2. Malpractice Statutes of Limitation and Statutes of Repose

N.C. Gen. Stat. § 1-15(c) is the statute governing professional malpractice. The statute states, in relevant part, "nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action *be commenced more than four years from the last act of the defendant giving rise to the cause of action*." N.C. Gen. Stat. § 1-15(c) (emphasis added). The four-year outer limit contained in N.C. Gen. Stat. § 1-15(c) is a statute of repose, thus professional malpractice cases have a three-year statute of limitations and a four-year statute of repose. *Hargett*, 337 N.C. at 652, 447 S.E.2d at 786; *Black*, 312 N.C. at 632, 325 S.E.2d at 474-75 ("The majority of the jurisdictions with malpractice statutes of limitations provide some absolute statutory outer limit similar to that contained in our statute [N.C. Gen. Stat. § 1-15(c)]. This outer limit is more precisely referred to as a period of repose.").

Articulating the difference between the statute of limitations and the statute of repose in legal malpractice claims under this statute, our Supreme Court explained:

> Unlike statutes of limitations, which run from the time a cause of action accrues, statutes of repose . . . create time

> limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant. *A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained.*
>
> Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for a cause of action to be recognized. *If the action is not brought within the specified period, the plaintiff literally has no cause of action.* The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.

Hargett, 337 N.C. at 654-55, 447 S.E.2d at 787 (emphasis added) (cleaned up).

3. Interaction of Rule 41(a)(1) and N.C. Gen. Stat. § 1-15(c)

When reading the savings provision of Rule 41(a)(1) and the statute of repose, a seeming conflict presents. While the savings provision allows parties to refile a claim within one year of a voluntary dismissal, a conflict in the application of both statutes may appear to arise when the one-year period extends past the expiration of the applicable statute of repose, because generally the "unyielding and absolute" barrier of a statute of repose would preclude a claim filed past its expiration. However, a plain reading of the applicable statutes allows them to be read and applied harmoniously.

a. Statutory Interpretation

The plain language interpretation of Rule 41(a)(1) does not conflict with the "unyielding and absolute" nature of a statute of repose. When read in context, the phrase "a new action based on the same claim may be commenced" refers back to the filing of the original complaint. That original complaint must have been "commenced within the time prescribed therefor," in other words, timely filed. The legislature did not intend for the timeliness of the "new action based on the same claim" to be judged independently. Rather, the statute places the relevant time bar on the filing of the initial action.

Moreover, nothing in the plain language of Rule 41(a)(1) suggests that its application is limited or curtailed by a statute of limitations or statute of repose. The legislature specifically stated: "a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). This language demonstrates the legislature's intent that the one-year period following a voluntary dismissal may only be shortened by a stipulation filed under subsection (ii), not by external statutory time bars.

Our colleague's concurring and dissenting opinion relies upon a flawed plain language reading of N.C. Gen. Stat. § 1-15(c) and Rule 41(a)(1) purporting to harmonize how the statutes interact and perception of how they should be applied. "Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjust. of Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). However, our colleague's flawed analysis does the opposite. Asserting to apply the statutes in harmony, his interpretation of the statute of repose *cuts short* the one-year time period to refile a complaint after a voluntary dismissal, as is explicitly allowed in Rule 41(a)(1).

"A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (quoting *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 278, 576 S.E.2d 681, 686 (2003) (cleaned up).

In *State v. Daw*, upon which our colleague relies, the Supreme Court found this Court had "violated the basic tenets of statutory construction by ignoring the plain and definite language" of North Carolina's *habeas corpus* statutes. *State v. Daw*, 386 N.C. 468, 476, 904 S.E.2d 765, 772 (2024). "By interpreting what has no need of interpretation and going elsewhere in search of conjecture in order to restrict or eliminate the applicability," this Court "judicially rewrote" the relevant chapter. *Daw*, 386 N.C. at 476-77, 904 S.E.2d at 772 (cleaned up). However, we are not attempting to "silently establish[] a 'general rule' subject to exceptions" for either Rule 41(a)(1) nor N.C. Gen. Stat. § 1-15(c) to create harmony. *Daw*, 386 N.C. at 477, 904 S.E.2d at 772. Rather, we conclude the Rule 41(a)(1) savings provision, because of its relation-back component, does not function as an exception to the statute of repose and both statutes can apply without conflict.

A more applicable case to guide our statutory interpretation is *Cohane v. Home Missioners of America*, where our Supreme Court reviewed whether a Rule 12(b)(6) motion was properly granted, as is the task before us now. *Cohane v. Home Missioners of Am.*, 387 N.C. 1, 911 S.E.2d 43 (2025). In its statutory interpretation analysis, the Court in *Cohane* stated, "[w]hen called to interpret a statute, legislative intent is the guiding star. We first look to the plain language, as the actual words of the legislature are the clearest manifestation of its intent." *Id.* at 7-8, 911 S.E.2d at 48 (cleaned up). Further, "[o]ur primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning *unless* the context requires otherwise." *Id.* at 8, 911 S.E.2d at 48 (emphasis added). Thus, "words and phrases are interpreted in their statutory context . . . ." *Id.* The operation and context of how each statute is applied is key to our present analysis.

Looking at the plain language of N.C. Gen. Stat. § 1-15(c), our colleague focuses on the legislature's use of the word "shall," in "that in no event *shall* an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]" N.C. Gen. Stat. § 1-15(c). "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Easton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365, 777 S.E.2d 733, 737 (2015) (cleaned up). In contrast to the use of "shall" in N.C. Gen. Stat. § 1-15(c), Rule 41(a)(1) uses the word "may," in that "a new action based on the same claim *may* be commenced within one year." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (emphasis added). Our colleague would apply the use of "shall" to create the unyielding and absolute bar of a statute of repose that prohibits an action that "may" be commenced more than four years after the last act.

We do not disagree with this general plain language application of the words "shall" and "may" when considering an initially-filed complaint. Our colleague's interpretation fails to acknowledge the operation of Rule 41(a)(1)'s relation-back component to the initial filing and the proper commencement date that should first be considered *before* determining whether the statute of repose bars the claim. To assert the statute of repose would bar a timely refiled complaint after a Rule 41(a)(1) voluntary dismissal "disregards the statutes' plain language and *fundamentally misunderstands their operation.*" *Daw*, 386 N.C. at 478, 904 S.E.2d at 773 (emphasis added).

Our plain language reading of Rule 41(a)(1) does not conflict with the statute of repose's "unyielding and absolute" time bar because, when considering the context, a "new action based on the same claim" that "may be commenced" is related back to the commencement of the initial complaint. The initial complaint must have been "commenced within the time prescribed therefor," meaning it must have been timely filed. The legislature did not intend for the filing date of the "new action based on the same claim" to be considered for the purposes of whether an action is time barred, but for the hurdle to be placed on the date of the initial claim that the statute requires to have been "commenced within the time prescribed therefor."

Further, the plain language of Rule 41(a)(1) makes no statement to support the contention that its application is cut short by a statute of limitations or statute of repose. The legislature chose to use the language "a new action based on the same claim may be commenced within one year after such dismissal *unless a stipulation filed under (ii) of this subsection shall specify a shorter time*." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). Based upon this language, the legislature intended this one year time period after dismissal to be shortened only when the indicated subsection and stipulation provides for a shorter time.

4. Analogous Caselaw

We consider two additional cases for guidance on how Rule 41(a)(1) and the statute of repose of N.C. Gen. Stat. § 1-15(c) may interact to resolve our present issue. *See generally Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991); *Williams*, 225 N.C. App. 522, 741 S.E.2d 373.

Before proceeding, we address our colleague's abhorrence towards *Bockweg* and *Williams* as guidance. While the Court in *Bockweg* never uses the *word* "repose" and the Court in *Williams* only uses the *word* "repose" once in a parenthetical, asserting neither case can be used to help understand the interplay between Rule 41(a)(1) and N.C. Gen. Stat. § 1-15(c) is absurd. Nothing supports the contention that in order to use the analogous cases, *Bockweg* and *Williams*, as guidance to help solve the issue presented, the *word* "repose" must be *explicitly stated*. To do so would also conclude no statute of "repose" exists under N.C. Gen. Stat. § 1-15(c). As discussed earlier, N.C. Gen. Stat. § 1-15(c) is devoid of the *word* "repose."

Our Courts drew the inference that our legislature created a statute of repose, not just a statute of limitations, when enacting "in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[,]" in N.C. Gen. Stat. § 1-15(c). N.C. Gen. Stat. § 1-15(c); *Hargett*, 337 N.C. at 652, 447 S.E.2d at

786; *Black*, 312 N.C. at 632, 325 S.E.2d at 474-75. Just as our Courts have inferred the four-year outer limit in N.C. Gen. Stat. § 1-15(c) is a statute of repose, we can also infer from analogous cases applying the same statute. N.C. Gen. Stat. § 1-15(c) does not contain the *word* “repose.” We can infer our Courts were cognizant of the relevant three-year statute of limitations and four-year statute of repose when determining whether a claim was time barred under N.C. Gen. Stat. § 1-15(c), thus even when a case does not explicitly state a claim is *not* time barred by *both* the statute of limitations and the statute of repose, reasonable inferences from the facts and timeline of a case allow us to come to this conclusion.

a. *Bockweg v. Anderson*

Our Supreme Court considered our present issue in *Bockweg v. Anderson*.[1] In *Bockweg*, plaintiffs filed a diversity action in the United States District Court for the Middle District of North Carolina. *Bockweg*, 328 N.C. at 437, 402 S.E.2d at 628. On 2 November 1987, the plaintiff stipulated to a voluntary dismissal pursuant to Rule 41(a)(1) as to one of the claims. *Id.*

On 18 October 1988, plaintiff refiled suit against the same defendants on the voluntarily dismissed medical malpractice claim in Forsyth County Superior Court, within one year of the voluntary dismissal in federal court “but more than *four years* from the date care was last rendered to plaintiff-wife.” *Id.* (emphasis added). The trial court granted the defendants’ motion to dismiss “on the grounds that the suit was outside the applicable statute of limitations, [N.C. Gen. Stat.] § 1-15(c).” *Id.* at 437-38, 402 S.E.2d at 628.

As here, plaintiffs in *Bockweg* sought to apply the savings provision of Rule 41(a)(1) to refile a claim after the *four-year statute of repose*[2] contained in N.C. Gen. Stat. § 1-15(c) had expired. *Id.* at 438, 402 S.E.2d at 628. While the Court in *Bockweg* heavily discussed and focused on the movement of the refiled complaint from federal to state court and its effect on the savings provision’s applicability, the holding

1. Although *Bockweg v. Anderson* dates to 1991, both the savings provision of Rule 41(a)(1) and N.C. Gen. Stat. § 1-15(c) remain unchanged.

2. While the *word* “repose” is not used explicitly in this case, the plaintiff’s refiled their claim “more than four years from the date care was last rendered to plaintiff-wife.” This refiling took place after the expiration of the statute of repose, not just the expiration of the statute of limitations, because the statute of repose expired four years from the last act of negligence, and the last act in this case is the date care was last rendered.

ultimately reversed the trial court's dismissal and allowed the plaintiff, who had voluntarily dismissed a timely filed action, to refile the action by invoking the one-year savings provision of Rule 41(a)(1), even after the four-year statute of repose had passed. *Id.* at 450, 402 S.E.2d at 635. *Bockweg* remains binding precedent.

Our colleague would discredit *Bockweg* by asserting "it offers no guidance on the statute of *repose*," and by failing to recognize the refiling that is considered to be *outside the statute of limitations* of N.C. Gen. Stat. § 1-15(c) could mean *any time* after the appropriate three year period has passed, not just the time period between the statute of limitations, year three, and the statute of repose, in year four. Thus, a claim refiled outside of the statute of limitations has the ability to also be filed outside of the statute of repose even though not explicitly stated it was filed outside of both, as was the case in *Bockweg*.

b. *Williams v. Lynch*

More recently, this Court in *Williams v. Lynch* addressed issues nearly identical to those here. In *Williams*, the plaintiff had timely filed the first complaint under the same statute herein within the three-year statute of limitations, voluntarily dismissed the claim pursuant to Rule 41(a)(1), and refiled within the one-year limit provided by the savings provision of Rule 41(a)(1), and *after the four-year statute of repose* provided by N.C. Gen. Stat. § 1-15(c). *Williams*, 225 N.C. App. at 523-26, 741 S.E.2d at 374-76.

While the overarching issue in *Williams* focused on the substance and nature of a claim that could be refiled under the savings provision and after the three-year statute of limitations, this Court reasoned the "claim in the second complaint related back under Rule 41(a)(1) to the filing of the negligence claim in the first complaint[]" and "[s]ince there [was] no dispute that the first complaint was timely filed, the trial court erred in granting [defendant's] motion to dismiss on statute of limitations grounds as to the 'Professional Malpractice' claim." *Id.* at 529, 741 S.E.2d at 377.

A refiled claim, which may otherwise exceed the statute of limitations or statute of repose, can survive under the savings provision of Rule 41(a)(1) because the refiled claim will relate back to the original filing date. *Id.* at 526, 741 S.E.2d at 375. Therefore, the refiled complaint in *Williams* was considered to have commenced at the time of the initial timely-filed complaint and did not exceed the bar of the statute of limitations or repose. *Id.* at 528-29, 741 S.E.2d at 377. Examining all relevant dates, this Court has held the savings provision of Rule 41(a)(1) allows a claim of the same nature to be refiled *after* the four-year statute of repose in N.C. Gen. Stat. § 1-15(c) has expired. *See id.* at 529, 741 S.E.2d at 377. The refiled claim relates back to the timely filing date of the initial complaint. *Id.*

While the Court in *Williams* does not explicitly state it is considering a three-year statute of limitations or a four-year statute of repose, clearly a "Professional Malpractice" claim is at issue and the Court cites cases referencing the same applicable professional malpractice statute, N.C. Gen. Stat. § 1-15(c). *Id.* at 528-29, 741 S.E.2d at 377. In *Williams*, the facts logically allow us to conclude the last act of negligence by the defendants was 13 April 2004, as it is the last stated negligent act by defendants in the facts before the plaintiff filed the original claim. *Id.* at 525, 741 S.E.2d at 375. That date, along with the date of the original filing, voluntary dismissal, and refiling dates, demonstrates that the original claim was filed before the expiration of the statute of limitations and the refiled claim was filed within one year from the voluntary dismissal, but after the four year statute of repose. This Court permitted the savings provision of Rule 41(a)(1) to allow a refiled claim of the same nature *sub judice* to proceed *after* the four-year statute of repose in N.C. Gen. Stat. § 1-15(c) has expired because the refiled claim related back to the timely-filed initial complaint. *See id.* at 529, 741 S.E.2d at 377.

c. Dissent Cases Distinguished

Our colleague denies the guidance available from *Bockweg* and *Williams* but does not cite any case analogous to the case at hand. Only one case in our colleague's analysis addresses both Rule 41(a)(1) and a statute of limitations or statute of repose. The case at hand presents the opportunity to distinguish and discuss the various cases cited by our colleague and how each can offer guidance, even though they may not explicitly use certain words.

Christie v. Hartley Const., Inc. discusses differences between a statute of limitations and a statute of repose. *Christie* discusses a purported statute of repose contained in N.C. Gen. Stat. § 1-50(a)(5) when applied to a construction case. While offering insight into application of a similar statute of repose and the differences between a statute of repose and a statute of limitations, this case does not address how a statute of repose may *interact* with a voluntarily-dismissed claim that has been refiled or the application of Rule 41(a)(1). *See generally Christie v. Hartley Const., Inc.*, 367 N.C. 534, 766 S.E.2d 283 (2014). There was not a refiled complaint in this case.

Hargett v. Holland further discusses differences between statutes of limitations and statutes of repose. While *Hargett* does involve the relevant statute, N.C. Gen. Stat. § 1-15(c), it too does *not* involve a timely voluntarily dismissed claim that has been refiled and the application of Rule 41(a)(1). *See generally Hargett*, 337 N.C. 651, 447 S.E.2d 784. *Hargett* offers valuable guidance on the distinctions between a statute of limitation and a statute of repose and we quoted it above for this reason. Our colleague's analysis fails in its application when it quotes *Hargett* in support of its notion that a claim is not maintainable when filed after the expiration of the statute of repose *no matter what*.

The Court in *Hargett* addresses a claim: (1) that has not been voluntarily dismissed; (2) not been refiled; (3) discusses primarily the "last act" date of the defendants; and (4) was "filed more than 13 years after" what was determined to be the "last act" of defendants. *Id.* The initial complaint in *Hargett* was not timely filed, in stark contrast to the timely-filed initial complaint *sub judice*. Unlike *Hargett*, Defendants here cannot claim shock, surprise, or lack of knowledge of the pending claims to be prejudiced when they presented affidavits in support of Plaintiff in the underlying action.

The Court in *Black v. Littlejohn* asserts "repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue . . . ." *Black*, 312 N.C. at 633, 325 S.E.2d at 475. We agree and cite this case for the same reasons we cited and analyzed *Hargett*. *Black* primarily focuses on the "one year from discovery rule" contained in N.C. Gen. Stat. § 1-15(c), and how it operates to determine the proper "last act" date of the defendant. *Id.* However, *Black* does not consider a voluntarily dismissed and timely refiled claim or Rule 41(a)(1) *at all*. *See generally id.* It is easily distinguishable from this case and is of limited guidance on the interaction of the relevant statutes.

Monson v. Paramount Homes, Inc. states, "[w]hile equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240, 515 S.E.2d 445, 449 (1999). Rather than involving a voluntarily dismissed timely claim, *Monson* involves the issue of when the statute of repose would begin to run when subsequent repairs have been made to a construction project. *See generally id.* Specifically, it asked whether subsequent repairs would qualify as the "last act." This Court ultimately decided they did not. *Id.* at 242, 515 S.E.2d at 450. Allowing subsequent repairs to be a "last act" to extend or restart a statute of repose each time a repair was made could create a potential infinite period of time and, would discourage a party from making repairs for fear of extending the statute of repose. *Id.* at 241, 515 S.E.2d at 450. The facts of *Monson* are clearly distinguishable from the case *sub judice* making it poor support for our colleague's analysis. In the case *sub judice*, there are no "repairs" at issue to create a potential infinite period of time for a claim to be brought. Rather, this case revolves around a voluntarily dismissed timely claim that has been refiled under Rule 41(a)(1), an issue which *Monson* does not even remotely consider. Rule 41(a)(1) only allows a timely and voluntarily dismissed claim to be refiled within *one year* after being voluntarily dismissed. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). A logical application of the statutes does not create an infinite period of time for the filing of claims.

The plaintiff in *Goodman v. Holmes & McLaurin Attorneys at Law* attempted to apply N.C. Gen. Stat. § 1-50(e) to their legal malpractice claim. N.C. Gen. Stat. § 1-50(e) states the statute of repose "shall not be asserted as a defense by any person who shall have been guilty of fraud . . . or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence." N.C. Gen. Stat. § 1-50(e); *Goodman v. Holmes & McLaurin Att'ys at Law*, 192 N.C. App. 467, 474, 665 S.E.2d 526, 531-32 (2008) (cleaned up). This Court determined N.C. Gen. Stat. § 1-15(c) contained no comparable exception to prohibit a defendant from raising the issue of statute of repose and stated we have "consistently refused to apply equitable doctrines to estop a defendant from asserting a statute of repose defense in the legal malpractice context . . . ." *Goodman*, 192 N.C. App. at 474-75, 665 S.E.2d at 532. *Goodman* is distinguishable from the issues here because the claim there was brought seven years after the last act date, making it clearly barred by the statute of repose. *Goodman* provides no insight into the interactions of Rule 41(a)(1) and the statute of repose. It only provides background to how the statute of repose has been applied standing alone.

The facts in *Brisson v. Kathy A. Santoriello, M.D., P.A.* at first glance appear to be similar to those *sub judice*, but, after reviewing the relevant dates in the case, it is easily distinguishable. *See generally Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000). The date of the "last act" in *Brisson* was 27 July 1994. *Id.* at 591-94, 528 S.E.2d at 569-71. The plaintiff there filed its initial suit on 3 June 1997. *Id.* at 591, 528 S.E.2d at 569. On 22 August 1997, defendant filed a motion to dismiss pursuant to Rule 9(j) and 12(b)(6). *Id.* On 30 September 1997, plaintiff filed a motion to amend its initial complaint or, in the alternative, to voluntarily dismiss its initial complaint pursuant to Rule 41(a)(1). *Id.* at 592, 528 S.E.2d at 569. The trial court denied their motion to amend its complaint, so on 6 October 1997 plaintiff voluntarily dismissed its initial complaint and refiled it on 9 October 1997 with the Rule 9(j) certification now included. On 20 October 1997, defendants filed a motion for judgment on the pleadings arguing the refiled claim was barred by the applicable "statutes of limitations and repose." *Id.* at 592, 528 S.E.2d at 570. The Court was tasked with determining whether the refiled complaint could relate back to the date of the initial complaint, even though the Rule 9(j) certification was not attached to the initial complaint, which ultimately the Court determined it could.

This case offers excellent history into the purpose and application of Rule 41(a)(1); however, a major distinguishing factor between *Brisson*, and *Bockweg*, *Williams*, and the case *sub judice* is that the statute of repose could not truly have been a factor because the refiled complaint was filed after the statute of *limitations* had expired but *before* the statute of repose had expired. *Bockweg*, *Williams*, and our present case all involve a refiled claim being filed after the statute of repose has passed.

Our colleague emphasizes *Brisson* uses the language "statute of limitations" when discussing the application of Rule 41(a)(1) and implies every statement the Court makes involving the application must *only* apply to statutes of limitation, not statutes of repose. However, although there was never a true question in *Brisson* of whether the statute of repose had been violated as no filing date therein ever exceeded four years from the last act, the Court offered an analysis into Rule 41(a)(1)'s application suggesting it is meant to "salvage" refiled voluntarily dismissed claims even when refiled after the statute of repose expiration date:

> [t]he purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, *for whatever reason*, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. *The only limitations are that the dismissal not be done in bad faith* and that it be done prior to a trial court's ruling dismissing plaintiff's claim or

> otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.

Id. at 597, 528 S.E.2d at 573 (emphasis added). Additionally, the Court stated, "on 6 October 1997, plaintiffs voluntarily dismissed this action and, thus, were granted one year within which to refile." *Id.* at 594, 528 S.E.2d at 571. Looking carefully at relevant dates, the statute of repose would have expired on 27 July 1998. *Id.* Thus, the Court's language alludes to the scenario that plaintiffs would have been able to refile any time up until 6 October 1998. This language suggests the one-year period to refile a claim after a voluntary dismissal *is not* cut short by a statute of repose.

5. Application of the Statutes Together

Based upon our analysis of both statutes, we conclude the Rule 41(a)(1) savings provision, because of its relation-back component, does not function as an exception to the statute of repose and both statutes can apply without conflict. Rule 41(a)(1) must first be applied to determine the appropriate commencement date, then using the appropriate commencement date, we can consider whether a claim is time barred by either the statute of limitations or the statute of repose.

When applying Rule 41(a)(1) as the first step and *then* considering N.C. Gen. Stat. § 1-15(c) as the second step, it is clear a refiled complaint, under a very specific set of circumstances, can proceed even when the date it is refiled falls more than four years after the last date of negligence.

D. Application to *Puma*

The trial court determined Defendants' last date of negligence giving rise to the cause of action is 22 April 2019, even though the trial court did not grant Defendants' motion to withdraw as counsel for Plaintiff until 8 July 2019. On 17 September 2020, Plaintiff filed its Initial Complaint. On 24 August 2022, Plaintiff voluntarily dismissed the Initial Complaint pursuant to Rule 41(a)(1). Plaintiff filed the Refiled Complaint on 6 June 2023. Based on the trial court's finding of 22 April 2019 as the last date of negligence, notwithstanding Defendant remained counsel of record for Plaintiffs, the three-year statute of limitations ended on 22 April 2022, and the four-year statute of repose ended on 22 April 2023. It is undisputed Plaintiff's Initial Complaint was timely filed within both the applicable statute of limitations and statute of repose.

Plaintiff's Initial Complaint asserts only one cause of action, that Defendants were "negligent in their representation" of Plaintiff in connection with the Defamation Case. However, in its Refiled Complaint, Plaintiff asserts two causes of action (1) legal malpractice and negligence, and (2) gross negligence. Because "the relation-back provision in Rule 41(a)(1) *only applies* to those claims in the second complaint, that were included in the [timely] voluntarily-dismissed first complaint[,]" only Plaintiff's claim of legal malpractice and negligence remains viable as it was asserted in both the timely Initial Complaint and the Refiled Complaint. *Williams*, 225 N.C. App. at 526, 528-29, 741 S.E.2d at 376-77 (emphasis added) (noting "[i]t is immaterial that the first complaint identified the claim as a negligence claim and the second complaint identified the claim as a professional malpractice claim" because "claims 'arising out of the performance of or failure to perform professional services' based on negligence . . . are in the nature of 'malpractice' claims."). Notwithstanding the fact Plaintiff's claim for gross negligence arises out of the same events as its claim for legal malpractice and negligence, "binding precedent requires that we look *only* at whether the claims in the second complaint were included in the first complaint." *Williams*, 225 N.C. App. at 523, 741 S.E.2d at 374 (emphasis added). Therefore, the cause of action for gross negligence cannot relate back to the date of the initial complaint.

Thus, we conclude Plaintiff's claim for legal malpractice and negligence in its Refiled Complaint relates back under Rule 41(a)(1) to the filing of its Initial Complaint, but its claim for gross negligence does not and was properly dismissed.

III. Conclusion

Because the savings provision of Rule 41(a)(1) of the North Carolina Rules of Civil Procedure allows a timely-filed claim to be refiled within one year of its voluntary dismissal and this one year time period is not cut short by the four-year statute of repose contained in N.C. Gen. Stat. § 1-15(c), the trial court erred in granting Defendants' motion to dismiss the Refiled Complaint. We hold Plaintiff's cause of action for legal malpractice and negligence is not barred by the applicable statute of repose and reverse the trial court's dismissal of the claim. Presuming the trial court correctly determined the last act of negligence date, even though the trial court did not grant Defendants' motion to withdraw as counsel for Plaintiff until 8 July 2019, Plaintiff's cause of action for gross negligence is barred by the statute of repose and was properly dismissed. We affirm in part, reverse in part, and remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge TYSON concurs.

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

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

I concur with the majority's determination of the date of defendants' last act, but I write separately to address the interplay between the statute of repose and the savings provision. As neither this Court nor our Supreme Court have addressed whether the savings provision provides an exception to the statute of repose, this Court must engage in meaningful statutory interpretation to answer the question posed in this case. Because the statute of repose explicitly states, "*in no event shall* an action be commenced more than four years from the last act of the defendant giving rise to the cause of action," N.C.G.S. § 1-15(c) (2023) (emphasis added), the savings provision states, "a *new* action based on the same claim *may* be commenced within one year after such dismissal," N.C.G.S. § 1A-1, Rule 41 (a)(1) (2023) (emphasis added), and the savings provision does not provide an exception to the statute of repose. Accordingly, I respectfully dissent from the majority's reversal of the trial court's order granting defendants' motion to dismiss.

I. Discussion

Plaintiff contends the trial court erred in granting defendants' motion to dismiss on the grounds that plaintiff's refiled complaint was untimely under Rule 41(a)(1). In other words, the issue presented on appeal is whether Rule 41(a)(1)'s savings provision creates an exception to the statute of repose.

A. Statutes of Limitations and Repose

Though our precedent does not address the precise question raised in this appeal—whether the savings provision can defeat the statute of repose for professional malpractice claims—it is unquestionable that: (1) the savings provision applies to statutes of limitations, and (2) statutes of limitations are not equivalent to statutes of repose. Our jurisprudence addressing *both* statutes of limitations and statutes of repose has highlighted that "these statutes exhibit significant differences in both form and function that have not always proved clear in practice." *Christie v. Hartley Const., Inc.*, 367 N.C. 534, 538 (2014).

Statutes of limitations provide a limitation period that begins "when the plaintiff's cause of action accrues, typically when the plaintiff is injured or discovers he or she has been injured." *Id.* (cleaned up). Therefore, statutes of limitations function "to prevent the problems inherent in litigating claims in which evidence has been lost, memories have faded, and witnesses have disappeared[.]" *Id.* (cleaned up). These statutes "function as affirmative defenses," are "subject to equitable defenses," and "are procedural, not substantive" legislative tools to "determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury." *Id.*

In contrast, statutes of repose begin "to run automatically" from a "defendant's last act or omission that at some later point gives rise to the plaintiff's cause of action" because these statutes "are intended to mitigate the risk of inherently uncertain and potentially limitless legal exposure." *Id.* at 539. "[S]tatutes of repose give potential defendants a degree of certainty and control over their legal exposure," and therefore "function as unyielding and absolute barriers to litigation, are substantive in nature, and are not subject to equitable doctrines." *Id.*

Our Supreme Court's opinion in *Hargett v. Holland* details the distinction between the statute of limitation and the statute of repose for professional malpractice claims like the one at issue in this case. 337 N.C. 651, 654–55 (1994). There, our Supreme Court explained:

> Unlike statutes of limitations, which run from the time a cause of action accrues, statutes of repose . . . create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant. *A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained.*
>
> Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for a cause of action to be recognized. *If the action is not*

> *brought within the specified period, the plaintiff literally has no cause of action.* The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.

Hargett, 337 N.C. at 654–55 (1994) (emphasis added) (cleaned up).

Further, the Court restated its holding from *Black v. Littlejohn*, declaring:

> [t]he period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether an injury has resulted. . . . *Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue*, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.

Id. at 655 (emphasis added) (quoting *Black v. Littlejohn*, 312 N.C. 626, 633 (1985)). "Regardless of when plaintiff's claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim." *Id.*

Therefore, "[w]hile equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240 (1999) (cleaned up). Discussing the statute of repose that governs improvements to real property, we have explained the absurdity in "allow[ing] the statute of repose to toll or start running anew each time a repair is made" because the result "would subject a defendant to potential open-ended liability for an indefinite period of time, *defeating the very purpose of statutes of repose* such as N.C. Gen. Stat. § 1–50(5)." *Id.* (emphasis added) (cleaned up).

In *Goodman v. Holms & McLaurin Attorneys at Law*, this Court explained our appellate courts refuse to "apply principles of equity to the bar imposed by the statute of repose" in section 1-15(c). 192 N.C. App. 467, 476 (2008). In that case, the plaintiff urged this Court to apply case law which dealt with a different statute of repose, and we refused to apply that line of cases because subsection 1-15(c) "contains *no comparable exception* to its four year statute of repose." *Id.* at 474 (emphasis added). *Cf.* N.C.G.S. § 1–50(a)(5), (e) (2023). The plaintiff further relied on *Duke Univ. v. Stainback*, 320 N.C. 337 (1987), and this Court noted such reliance was "misplaced" because the Supreme Court in *Duke* "was not presented with a statute of repose issue, and the statute of repose was not addressed in the opinion." *Id.* at 475. Accordingly, this Court held the trial court did not err in dismissing plaintiff's professional negligence claim as barred by the statute of repose when the plaintiff brought his professional malpractice action against the defendant "nearly seven years after" the defendant's last act.[1] *Id.* at 475. This Court noted,

> it is for the legislature, and not the courts, to establish statutes of limitations, statutes of repose, and any exceptions to those rules. *It is not the role of the courts to create exceptions to the laws established by the legislature where the intent of the legislature is made manifestly clear on the face of the statute.*

Id. at 475–76 (emphasis added) (cleaned up).

B. Rule 41(a)(1) Savings Provision

Rule 41(a) of our Rules of Civil Procedure governs voluntary dismissal in civil lawsuits and allows a plaintiff to voluntarily dismiss a case without prejudice through (1) notice, (2) stipulation, or (3) order of the court. *See generally* N.C.G.S. § 1A-1, Rule 41 (a)(1)(i)–(a)(2) (2023). It is undisputed plaintiff in the present case voluntarily dismissed its initial complaint and complied with Rule 41(a).

Our precedent firmly establishes "Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d)[.]" *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593 (2000) (cleaned up). This is because "the effect of a judgment of voluntary dismissal is to leave the plaintiff exactly where he or she was before the action was commenced." *Id.* (cleaned up). In other words, "[a]fter a plaintiff takes a Rule 41(a) dismissal, there is nothing

1. The underlying professional malpractice claim in *Goodman* is based upon defendant-attorney's filing of a "voluntary dismissal without prejudice, without the knowledge or consent of the plaintiff." 192 N.C. App. 467 at 469. Therefore, this Court's opinion in *Goodman* briefly references Rule 41(a)(1)'s savings provision, however, it is not discussed for the application of Rule 41(a)(1) and the statute of repose as demonstrated here. Rather, references to Rule 41(a)(1) in that case are to determine defendant-attorney's last act of negligence. *Id.* at 476.

the defendant can do to fan the ashes of that action into life, and the court has no role to play." *Id.* (cleaned up).

However, Rule 41(a)(1) also provides:

> If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced *within one year after such dismissal* unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C.G.S. § 1A-1, Rule 41 (a)(1) (2023). Put simply, the above-italicized portion of Rule 41(a)(1)—referred to by our jurisprudence as the Rule 41(a)(1) savings provision—allows an "action [that] was originally commenced within the period of the applicable statute of *limitations*" to possibly be "recommenced within one year after the dismissal, even though the base period may have expired in the interim." *Brisson*, 351 N.C. at 594 (emphasis added). Therefore, a party may "dismiss an action that originally was filed within the statute of *limitations* and then refile the action after the statute of *limitations* ordinarily would have expired." *Id.* (emphasis added) (cleaned up).

C. Repose and Relation Back Precedent

I agree with the majority's summation that our Courts have "never explicitly stated whether Rule 41(a)(1) is applied in the same manner when the one year period exceeds the time period of a statute of repose." However, the majority also reasons that because of the savings provision's relationship with *the statute of limitation*, "a common sense application of our jurisprudence to the relation-back component of Rule 41(a)(1) allows a properly refiled claim to avoid both a statute of limitations and a statute of repose." Therefore, "[t]he commencement date of the action is deemed to be the same as the initial complaint." This is not a commonsense application of our jurisprudence. *See Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 283 (2007) ("Under North Carolina law, a plaintiff may refile within one year a lawsuit that was previously voluntarily dismissed, and the refiled case *will relate back* to the original filing *for purposes of tolling the statute of limitations*[.]"(emphasis added)).

Previously, our Courts have used the phrase "statute of repose" to encompass both statutes of repose *and* statutes of limitations and interchangeably used the words "repose" and "limitations." *See Christie*, 367 N.C. at 538 (citations omitted). But our Supreme Court recently reinforced "important distinctions" to consider when analyzing or applying a statute of limitation versus a statute of repose. *See McKinney v. Goins*, 387 N.C. 35, 48 n.7 (2025); *see also Zander v. Orange Cnty.*, 376 N.C. 513, 520 (2020) ("The term statute of repose is used to distinguish ordinary statutes of limitation from those that begin to run at a time unrelated to the traditional accrual of the cause of action." (cleaned up)); *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 11 (2018) ("Unlike statutes of limitations, which run from the time a cause of action accrues, statutes of repose . . . create time limitations which are not measured from the date of injury." (cleaned up)). This Court has clearly recognized that such generalization of these statutes is no longer appropriate. *See Gaston Cnty. Bd. of Educ. v. Shelco, LLC*, 285 N.C. App. 80, 85 (2022) ("We note that, as our Supreme Court has explained, statutes of *limitations* and statutes of *repose* are different: where statutes of limitations are clearly procedural, affecting the remedy directly and not the right to recover, the statute of repose . . . acts as a condition precedent to the action itself." (cleaned up)).

The majority contends "[t]his case presents the opportunity to distinguish and discuss the cited cases to show how each can be used for guidance even though they may not explicitly use certain words." However, the majority's application of case law fails to meaningfully distinguish between statutes of repose and limitations and erroneously equates the relationship between the statute of limitation and the savings provision to the relationship between the statute of repose and the savings provision.[2] This is like comparing apples to oranges—"a statute of limitations is not the same as a statute of repose." *McKinney*, 387 N.C. at 48 n.7.

For example, *Sweet v. Boggs*, 134 N.C. App. 173 (1999), and *Spoor v. Barth*, 257 N.C. App. 721 (2018), cannot stand for the proposition that "the relation-back component of Rule 41(a)(1) allows a properly refiled claim to avoid" *both* "a statute of limitations and a statute of repose" because "[t]he commencement date of the action is deemed to be the same as initial complaint" where such cases do not address the statute

2. Further, this application and reasoning negates the majority's claim that it treats the "four-year outer limit [of section 1.15(c)] as a statute of repose" regardless of whether our jurisprudence has referenced to that section as a statute of repose. Because the majority has oversimplified our precedent, application of the statute of limitation and the statute of repose produces the same result when applied to the savings provision. Distillation of our jurisprudence requires a more meticulous methodology than the majority applies.

of repose *whatsoever*.[3] Because the majority primarily relies on case law that does not meaningfully engage with the statute of repose—this case law does not quote or define the language of the statute of repose, apply the statute of repose, or make a holding related to the statute of repose—the majority repeatedly asks its readers to ignore the settled principle that "a statute of limitations is not the same as a statute of repose." *McKinney*, 387 N.C. at 48 n.7.

D. "Analogous" Case Law

The majority further alleges that my analysis fails to cite any case analogous to *Bockweg v. Anderson*, 328 N.C. 436 (1991), and *Williams v. Lynch*, 225 N.C. App. 522 (2013). The majority's contention appears to once again imply the statute of limitation should be substituted for the statute of repose. *Bockweg* and *Williams*, "can be used to help understand the interplay between Rule 41(a)(1) and N.C. Gen. Stat. § 1-15(c)," as it relates to section 1-15(c)'s statute of *limitation*, but the statute of limitation is not at issue in the present case. *See also Goodman*, 192 N.C. App. at 475.

As neither *Bockweg*, *Williams*, nor any other case, address the interplay between the two statutes at issue *in this case*—with the word "repose" appearing only once in an inapposite parenthetical in *Williams* and being entirely absent in *Bockweg*—these cases fail to resolve any application between the savings provision and the statute of *repose*.[4]

---

3. The statute of repose is not discussed in these cases because the relation-back principle applies to *toll* statutes *of limitations*. *See Losing*, 185 N.C. App. at 283. Statutes of repose *do not toll*, because such statutes *are substantiative and cannot toll*. *See Monson*, 133 N.C. App. at 240.

4. Specifically, the majority accuses me of asserting that to use "*Bockweg* and *Williams*, as guidance to help solve the issue presented in the case at hand, the *word* 'repose' must be *explicitly stated*," and because of this, I must "also conclude no statute of 'repose' exists under N.C. Gen. Stat. § 1-15(c)." This strawman argument is nonsensical. First, though this should be glaringly obvious, the problem with relying on these cases is not the absence of a "magic word"—it is the absence of any meaningful analysis regarding the issue presented in this appeal. If these cases addressed the four-year bar imposed by subsection 1-15(c) using any other term than repose, I would look to them for guidance. They do not. Second, as previously discussed, the majority reads our jurisprudence related to statutes of *limitations* and the savings provision, like *Bockweg* and *Williams*, to infer identical analyses to the statute of repose. This reading *erases* the "important distinction" between the statutes. *See Goins*, 387 N.C. at 48 n.7; *see also Goodman*, 192 N.C. App. at 475 (noting that, in a case analyzing the statute of repose, the plaintiff's "reliance" on a case addressing the statute of limitation was "misplaced" because "[t]he Court" in the plaintiff's cited case "was not presented with a statute of repose issue, and the statute of repose was not addressed in the opinion.").

Our Supreme Court in *Bockweg* explicitly stated the issue in that case was “the effect of plaintiffs’ voluntary dismissal under the Federal Rules in a federal court sitting in diversity applying North Carolina law on a subsequent refiling *outside the statute of limitations* in state court.” 328 N.C. at 442 (emphasis added). The Court held “that a plaintiff who stipulates to a voluntary dismissal, without prejudice, of a timely filed action in a federal court sitting in diversity jurisdiction and applying North Carolina substantive law, and refiles the action in a North Carolina state court, may invoke the one-year savings provision in N.C.G.S. § 1A–1, Rule 41.” *Id.* at 450. As this holding is limited to the Court’s interpretation of the statute of limitation, it offers no guidance on the statute of *repose*.

Similarly, in *Williams*, this Court did not discuss the statute of repose or its relationship to the Rule 41 savings provision. Rather, this Court only discussed voluntary dismissal and the application of Rule 41(a)(1)’s relation-back provision. *See Spoor v. Barth*, 257 N.C. App. 721 (2018) (citing *Williams* for the issue of timeliness under Rule 41). The sole mention of the statute of repose is in reference to a separate case’s holding that “fraud does not constitute professional malpractice for purposes of N.C. Gen. Stat. § 1-15(c)’s statutes of limitations and repose.” *Williams*, 225 N.C. App. at 529 (citing *Sharp v. Teague*, 113 N.C. App. 589, 592 (1994)). As this case did not address the statute of repose, it has no bearing on the issue presented in this case.

The majority reads *Bockweg* and *Williams* as guidance that “resolve our present issue.” They do not. Because neither case addresses the statute of repose or its interplay with the savings provision, they offer no guidance on the present issue.

Similarly, the majority relies on our Supreme Court’s opinion in *Pyco Supply Co. v. Am. Centennial Ins.*, 321 N.C. 435, 440–41 (1988), “[t]o help provide guidance on our Court’s treatment of the relation-back of a claim in general.” While our Supreme Court stated in *Pyco* that “whether a time restriction is deemed a statute of limitation or repose” was not a determinative factor for relation back of a claim asserted in an *amended* complaint, *id.*, *Pyco* does not offer “valuable guidance” for the case at hand because plaintiff *refiled* its complaint. Although the majority acknowledges “a refiled complaint and an amended complaint are separate and distinct,” it nevertheless attempts to supplant one distinct legal concept for another. Because our Supreme Court’s holding in *Pyco* is narrow and only relates to amended complaints, it does not offer meaningful guidance on the issue presented in this case. *See* 321 N.C.

at 440 ("We hold that the determination of whether a claim asserted in an amended pleading relates back does not hinge on whether a time restriction is deemed a statute of limitation or repose.").

The majority's attempt to diminish important legal distinctions in our jurisprudence by reframing my dissent as an issue of rigid semantics is perplexing at best, and disingenuous at worst, where the crux of the present case relies on statutory interpretation. Though novel or complex legal issues require us to look critically at our precedent to glean guidance from analogous or instructive contexts where necessary, such novelty or complexity does not allow for our Courts to blatantly pervert precedent and insert dispositive legal terms into statutes. Here, the plain language of the statutes speaks for itself. "It is not the role of the courts to create exceptions to the laws established by the legislature where the intent of the legislature is made manifestly clear on the face of the statute." *Goodman*, 192 N.C. App. at 475–76 (cleaned up).

E. Statutory Interpretation

The majority holds Rule 41(a)(1) is an exception to the statute of repose, and therefore, its "plain language reading of Rule 41(a)(1) does not conflict with the statute of repose's 'unyielding and absolute' time bar because, when considering the context, of a 'new action based on the same claim' that 'may be commenced' is related back to the commencement of the initial complaint." Far from adhering to the plain language of these statutes, the majority's holding judicially amends them to fit into its twisted reading of inapposite case law.

> In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute. Moreover, we are guided by the structure of the statute and certain canons of statutory construction. Courts also ascertain legislative intent from the policy objectives behind a statute's passage and the consequences which would follow from a construction one way or another. *A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.* An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute.

Elec. Supply Co. of Durham v. Swain Elec. Co., 328 N.C. 651, 656 (1991) (emphasis added) (cleaned up). Put simply, "[s]tatutes dealing with the same subject matter must be construed in *pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjust. of Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427 (1993).

"In statutory interpretation, we take the statute as we find it . . . because a law is the best expositor of itself." *N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc.*, 291 N.C. App. 188, 193 (2023) (cleaned up). "It should go without saying that we may not interpret what has no need of interpretation and, when the words have a definite and precise meaning, we cannot go elsewhere in search of conjecture in order to restrict or extend the meaning." *State v. Daw*, 386 N.C. 468, 476 (2024) (cleaned up).[5] Contrary to the majority's "reasoning," a judge does *not* have the constitutional authority to judicially rewrite a valid law passed by our legislature based on what he or she feels is "commonsense."

"The statutes of limitations and repose for professional malpractice claims . . . are set out in N.C.[G.][S.] § 1-15(c)[.]" *Carle v. Wyrick, Robbins, Yates & Ponton, LLP*, 225 N.C. App. 656, 659 (2013). Specifically, subsection (c) declares:

> Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that *in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action*[.]

N.C.G.S. § 1-15(c) (2023) (emphasis added).

"It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365 (2015) (cleaned up). Therefore, the statute of repose can reasonably be read as "*an unyielding and absolute barrier*," *Hargett*, 337 N.C. at 655 (emphasis added) (cleaned up), where it precisely states, "*in no event shall an action be commenced*," N.C.G.S. § 1-15(c).

5. The majority's apparent implication that *Daw* is not instructive here because it was a criminal matter is puzzling. Barring the rule of lenity, the process of statutory construction does not change based on the nature of the case. The majority's choice to ignore *Daw* and other instructive cases regarding statutory interpretation, *in an opinion regarding statutory interpretation*, and to focus instead on cases that do not address the statute of repose's interplay with the savings provision, is bizarre to say the least.

The savings provision provides that if "an action commenced within the time prescribed therefore, . . . is dismissed without prejudice under this subsection, a *new action* based on the same claim *may be commenced* within one year after such dismissal[.]" N.C.G.S. § 1A-1, Rule 41(a)(1) (emphasis added). Because the savings provision allows "a new action" to "be commenced," *id.*, and because the statute of repose provides that "in no event shall an action *be commenced* more than four years from the last act of the defendant," N.C.G.S. § 1-15(c), a party cannot use the savings provision to evade the statute of repose's "unyielding and absolute barrier," *Hargett*, 337 N.C. at 655 (cleaned up), by commencing a new action after the repose period has expired.

The statutes *could* be read, as the majority describes, such that the purpose of the statute of repose is frustrated by the savings provision. However, such reading would require us to presuppose that the savings provision was intended to resurrect claims barred by the statute of repose—not just claims otherwise barred by the statute of limitation. This reading, regardless of whether the majority thinks it comports with their "commonsense," directly contradicts the bedrock "presum[ption] that the means employed by the Legislature to express *its will* are adequate to the purpose and do express *that will* correctly." *Daw*, 386 N.C. at 476 (emphasis added) (citation omitted); *see also Bd. of Educ. of Onslow Cnty. v. Bd. of Cnty. Comm'rs of Onslow Cnty.*, 240 N.C. 118, 126 (1954) ("An unnecessary implication arising from one section, inconsistent with the express terms of another on the same subject, yields to the expressed intent, and the two sections are not repugnant." (citations omitted)).

The majority's reading requires us to presume the legislature either intended: (1) the statute of repose to read "in no event, *except for those circumstances provided in Rule 41(a)(1)*, shall an action be commenced more than four years from the last act of the defendant," or (2) the savings provision to read "a[n] *new* action may be [re]commenced within one year." Such an interpretation runs afoul of the basic tenet that "a legislature says in a statute what it means and means in a statute what it says there," *Daw*, 386 N.C. at 478, and fails to uphold "our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used," *Lunsford v. Mills*, 367 N.C. 618, 623 (2014).

Rather than judicially rewriting either of these statutes, I would read the statute of repose's plain language as creating an imperative and unequivocal boundary to *all* actions "commenced more than four years from the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c). Because the savings provision permissively allows "a new action" to be "commenced," any such action is subject to the statute of repose.

This reading aligns with our precedent distinguishing the statute of limitation and the statute of repose because "[w]hile equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose." *Monson*, 133 N.C. App. at 240.[6] Imagine a plaintiff initially files on the last day of the three-year statute of limitation for this type of claim, takes a voluntary dismissal two years later before the case is resolved, then refiles on the last day of the one-year extension. It will now have been two years past the statute of repose. The majority's interpretation would allow for the case to proceed and "subject a defendant to potential open-ended liability for an indefinite period of time, *defeating the very purpose of statutes of repose*[.]" *Id.* (emphasis added); *see also Christie*, 367 N.C. at 539 ("[S]tatutes of repose give potential defendants a degree of certainty and control over their legal exposure . . . . Statutes of repose function as unyielding and absolute barriers to litigation." (cleaned up)).

Reading the statute of repose to bar all actions commenced four years from the defendant's last act, and the savings provision to apply to the "commence[ment]" of a "*new* action based on the same claim," gives proper effect to the statutes' plain language. Bending the statute of repose to yield to the Rule 41(a)(1) savings provision requires this Court to erase the General Assembly's mandate that "*in no event shall* an action be commenced more than four years from the last act of the defendant giving rise to the cause of action," N.C.G.S. § 1-15(c) (emphasis added), and erodes our clear precedent that the statute of repose is

6. The majority's conclusion that the savings provision "must first be applied to determine the appropriate commencement date, then using the appropriate commencement date, we can consider whether a claim is time barred by either the statute of limitations or the statute of repose[,]" again confuses the statute of limitation with the statute of repose. *See Black*, 312 N.C. at 633 (describing statutes of repose as substantive, condition precedents, that "prevents a plaintiff's right of action even before his cause of action may accrue . . . ."). *Cf. Christie*, 367 N.C. at 538 (describing statutes of *limitations* as "affirmative defenses," "subject to equitable defenses," and "are procedural, not substantive" legislative tools to "determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury."). The majority's conclusion evades the plain language of the savings provision, which allows a party to "commence[ ]" a "new action," N.C.G.S. § 1A-1, Rule 41(a)(1), and the plain language of the statute of repose, which forbids the commencement of any new action after the repose period has expired, *id.* § 1-15(c).

"an unyielding and absolute barrier." *Hargett*, 337 N.C. at 655 (cleaned up). If the legislature wishes to subject the statute of repose to the savings provision, it may amend either provision to do so—this Court may not.

Because plaintiff's second complaint alleged the last date of negligence by defendants to be no later than 22 April 2019, I concur in the majority's determination that "the three-year statute of limitations ended on 22 April 2022, and the four-year statute of repose ended on 22 April 2023." However, as the savings provision does not provide an exception to the statute of repose's unyielding and absolute barrier, plaintiff's second complaint was wholly barred by the statute of repose.

II. Conclusion

When a statute's "words have definite and precise meaning" our appellate courts "may not interpret what has no need of interpretation." *Daw*, 386 N.C. at 476 (cleaned up). Because the savings provision is not an exception to the statute of repose, I would affirm the trial court's order granting defendants' motion to dismiss.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ALLEN PAUL CLARK, Defendant

No. COA25-13

Filed 3 September 2025

Evidence—Rule 404(b)—prior arrests for breaking and entering—identification of defendant—plain error analysis

In a prosecution for charges including felonious possession of stolen goods and multiple counts of breaking and entering—arising from the theft of a weed eater, a leaf blower, and other equipment from a community college campus—the trial court did not plainly err by allowing a detective to testify about running defendant's record and noticing his prior arrests for breaking and entering. The testimony—though inadmissible to prove defendant's propensity to commit the crimes at issue—was admissible under Evidence Rule 404(b) for the purpose of explaining how the detective correctly identified defendant when securing the warrants for his arrest for the crimes connected to the missing equipment. Furthermore, even if the testimony's admission had been improper, it did not have a probable impact on the outcome of defendant's trial where the State had presented other sufficient evidence of his guilt.

Appeal by Defendant from judgments entered 14 June 2024 by Judge Timothy W. Wilson in Wilson County Superior Court. Heard in the Court of Appeals 12 August 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Joseph P. Vellon, for the State.

N.C. Prisoner Legal Services, Inc., by Molly S. Petrey, for Defendant.

GRIFFIN, Judge.

Defendant Christopher Allen Paul Clark appeals from the trial court's judgments entered after a jury found him guilty of felonious possession of stolen goods and attaining status of habitual felon in violation of sections 14-71.1 and 14.7.1 of the North Carolina General Statutes. Defendant contends the trial court plainly erred by allowing the State to present evidence of Defendant's prior arrests for breaking and entering in violation of Rule 404(b) of the North Carolina Rules of Evidence. We hold the trial court did not err.

I. Factual and Procedural Background

This case involves Defendant's conviction for felonious possession of stolen goods. Evidence presented at trial tended to show the following:

In the summer of 2023, employees of a commercial landscaping company working at Wilson Community College noticed much of their equipment, including a Red Max weed-eater and a Red Max leaf blower, missing from the grounds where they stored the equipment. After notifying the college, employees set up trail cameras facing the entry and exit routes onto the grounds. The cameras captured a male and female entering the premises in a red pickup truck on multiple occasions throughout the summer of 2023. A college employee identified Defendant and Alexandria Reagan, an associate of Defendant, as the individuals captured on camera.

Aubrey Pearson, Wilson Community College Chief of Police, suspected the individuals responsible for the thefts lived close to the college. Chief Pearson noticed that one house in the area had numerous pieces of lawncare equipment sitting around it in a disorderly manner, and the occupant had placed a black sheet covering other items in a ditch. He also noticed a red pickup truck in the driveway matching the one captured by the trail cameras. Chief Pearson then determined the truck belonged to Defendant.

Defendant was arrested on 11 July 2023. While arresting Defendant, law enforcement discovered and seized two pieces of equipment matching those that had been stolen from the college grounds in the bed of his pickup truck—the Red Max weed-eater and Red Max leaf blower.

On 5 September 2023, a grand jury returned indictments against Defendant for multiple counts of breaking and entering, multiple counts of larceny after breaking and entering, and one count of possessing stolen goods, and for obtaining habitual felon status. Defendant's matter was called for trial in Wilson County Superior Court on 3 June 2024. The jury returned a verdict finding Defendant guilty of felonious possession of stolen goods.

After returning the verdict for the felonious possession of stolen goods, the trial court moved into the habitual felon status phase of the trial. During the testimony of an assistant clerk with the Wilson County Clerk's office, Defendant spontaneously engaged in a colloquy with the trial judge to express his dissatisfaction with his appointed counsel, during which the trial court asked him to take a seat and cease talking numerous times. After Defendant referred to his counsel as a "f****** jerk," the trial judge removed Defendant from the courtroom and entered an order finding him in criminal contempt of court. The jury then returned a verdict finding Defendant guilty of obtaining habitual felon status.

Defendant timely appeals from the judgment entered upon the jury's verdict finding him guilty of felonious possession of stolen goods.

II. Jurisdiction

Defendant timely appeals from his convictions for obtaining habitual felon status and possessing stolen goods. However, Defendant failed to properly notice appeal from the trial court's order finding him in criminal contempt. In recognition of this deficiency, Defendant filed a petition for writ of certiorari seeking review of the trial's court contempt order.

We may issue the writ of certiorari "in appropriate circumstances [] to permit review of the judgments and orders of the trial tribunal[] when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Although the decision to do so it is within our sound discretion, we will issue the writ if a defendant shows

" 'merit or that error was probably committed below' " and if there are " 'extraordinary circumstances' to justify it." *Cryan v. Nat'l Council of Young Men's Christian Assocs. of U.S.*, 384 N.C. 569, 572–74, 887 S.E.2d 848, 851 (2023) (quotations omitted).

Defendant has failed to show either probable error or that this is an "extraordinary circumstance" warranting the writ of certiorari. As such, we deny Defendant's petition for writ of certiorari and will not review the trial court's order finding him in direct criminal contempt of court.

III. Analysis

Defendant alleges the trial court plainly erred by allowing the State to present evidence of Defendant's prior arrests for breaking and entering in violation of Rule 404(b) of the North Carolina Rules of Evidence. Specifically, Defendant argues the trial court erroneously permitted testimony given by Chief Pearson regarding Defendant's prior arrest record because it was offered as evidence of Defendant's character. Defendant contends the trial court allowed the jury to assume Defendant likely committed the present crime since he committed similar crimes in the past. Because Defendant failed to object to the challenged testimony at trial, we review for plain error.

This Court reviews unpreserved evidentiary challenges for plain error. N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Our Supreme Court clarified the plain error standard in *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024). For this Court to hold a trial court plainly erred, the defendant must satisfy a three-factor test. *Id.* The defendant must demonstrate that, first, a "fundamental error occurred at trial." *Id.* (citing *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). Second, "that the error had a 'probable impact' on the outcome, meaning that 'absent the error, the jury probably would have returned a different verdict.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334). Third, "that the error is an 'exceptional case' that warrants plain error review, typically by showing that the error seriously affects 'the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

Defendant contends Chief Pearson's testimony regarding Defendant's prior criminal charges was impermissible because it was offered to prove the character of the Defendant and constitutes plain error. We disagree.

Defendant challenges the following statements made at trial:

> Q: What day did you take out warrants for [] Defendant for possession of stolen goods?

> A: July 10th I secured warrants for three felony break-ins for both individual [sic], Alexandria Reagan and [Defendant].
>
> Q: When you drove past 2233 Banks Lane you saw [] Defendant's red truck that was registered to him?
>
> A: Yes, I did.
>
> Q: Did you also have an opportunity to review photographs of him in the police department computer system?
>
> A: Yes, I did, through C.J. Leads, I ran his record, sure did.
>
> Q: So what did you do after you took out the warrants for possession of stolen goods?
>
> A: There were B&E's for break-ins. At that time I secured the warrants. Of course the Community College closes at 10:30. I went home. That night, July 11th, they arrested [Defendant].

Under section 404(b) of the North Carolina Rules of Evidence, evidence of prior crimes "may . . . be admissible for other purposes, such as proof of . . . identity[.]" N.C. R. Evid. 404(b) (2023). Rule 404(b) "is a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject but to *one exception*[.]" *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990)) (emphasis in original). Evidence of prior crimes should be excluded "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.*

Here, the testimony was not offered to show Defendant's propensity to commit the crime of possessing stolen goods. Rather, review of the record shows it was admitted for the purpose of allowing Chief Pearson to explain how he correctly identified Defendant when securing the warrants for Defendant's arrest. *See State v. Szucs*, 207 N.C. App. 694, 700, 701 S.E.2d 362, 367 (2010) (holding an officer's testimony that he identified the defendant through mugshots did not rise to plain error). Additionally, the challenged testimony is a single sentence, insignificant considering the additional evidence the State presented, which we discuss below. Chief Pearson's testimony, "while inadvisable, was insignificant within the larger context of [the State's evidence] and no further details of [D]efendant's criminal history were elicited or disclosed." *Id.* at 700, 701 S.E.2d at 367.

Bearing in mind Rule 404(b)'s explicit authorization that evidence of "other crimes, wrongs, or acts" may be admissible for the purpose of showing identity, N.C. R. Evid. 404(b), we hold the challenged testimony does not rise to the level of plain error.

However, even if the trial court's admission of Chief Pearson's testimony was error, the testimony does not rise to the level of plain error due to the strength of the State's evidence. Chief Person's testimony regarding Defendant's prior arrests did not have a " 'probable impact' on the outcome" because the State presented other sufficient evidence of Defendant's guilt. *Reber*, 386 N.C. at 158, 900 S.E.2d at 786 (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334). Specifically, the State presented video evidence showing a man and a woman entering and exiting the premises where the equipment was stolen while driving a red truck matching Defendant's vehicle. Alexandria Reagan also admitted to being on the property in question during the time frame of the larceny and tampering with the community college's security equipment—a fact lending credence to Defendant's guilt when considered alongside the trail cam footage of both a male and female on the property. Moreover, officers found equipment matching the exact makes and models of the stolen equipment in the bed of Defendant's red truck.

While circumstantial, this evidence is more than sufficient to support the jury finding Defendant possessed stolen goods. *See State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) ("[T]he law does not distinguish between the weight given to direct and circumstantial evidence[.]" (citation omitted)). As such, we cannot say the testimony in question had a probable impact on the jury's verdict.

Accordingly, Defendant has failed to meet his burden of showing plain error.

IV. Conclusion

For the aforementioned reasons, we hold the trial court did not err in admitting Rule 404(b) evidence of Defendant's identity.

NO ERROR.

Judges GORE and STADING concur.

STATE OF NORTH CAROLINA
v.
SCOTTIE THOMAS EANES

No. COA24-1130

Filed 3 September 2025

Evidence—solicitation of murder—evidence of a different murder solicitation—danger of unfair prejudice—curative instruction —other evidence of defendant's guilt

In a prosecution for first-degree sexual offense with a child, indecent liberties with a child, and solicitation of murder, where the latter charge arose after defendant offered to pay his jail cellmate to murder the victim involved in the sexual offense charges, the trial court neither abused its discretion by declining to grant a mistrial ex mero motu nor prejudicially erred by admitting a recorded conversation between the cellmate and a detective during which the cellmate informed the detective that defendant had also solicited the murder of a woman unrelated to the case. Although the reference to the second murder solicitation was prejudicial, the decision to admit the recording was neither arbitrary nor manifestly unsupported by reason where the court: determined—after holding a hearing, reviewing the entire recording in camera, and speaking extensively with the parties—that the recording's probative value outweighed the danger of unfair prejudice; gave a curative instruction for the jury to disregard any mention of the other woman defendant wanted murdered; and properly admitted other overwhelming evidence of defendant's guilt of the charged crimes.

Appeal by defendant from judgment entered 7 December 2023 by Judge David L. Hall in Rockingham County Superior Court. Heard in the Court of Appeals 14 August 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Justin I. Eason, for the State.

Appellate Defender's Office, by Glenn Gerding, and Assistant Appellate Defender Wyatt B. Osborn, for the defendant-appellant.

TYSON, Judge.

Scottie Thomas Eanes ("Defendant") appeals from judgments entered after a jury found him guilty of first-degree sexual offense with a child, two counts of indecent liberties with a child, and solicitation of murder. We discern no prejudicial error.

I. Background

Abbey and her older sister, Mary, attended preschool with Ben and Valery, Defendant's two youngest children. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of all minors). Valery and Mary were the same age, and Ben and Abbey were the same age. The four children befriended one another, and the two families arranged visits and playdates, which spanned across three or four years. During that time, Abbey and Mary slept over at Defendant's house "a few times."

When Abbey was seven or eight years old, she and her sister were invited for dinner and to sleepover at Defendant's house. After dinner, Abbey saw Defendant playing a card game on the computer. Abbey asked Defendant about the game. Defendant put Abbey on his lap and explained the game to her. When the card game was over, Defendant moved Abbey from his lap to the floor and began to tickle her while she was lying on her back. Defendant spread Abbey's legs and, through her clothes, rubbed his facial hair on her inner thigh and near her genital area. Defendant told Abbey not to tell anyone.

Defendant took Abbey into his bedroom, shut the door, and told her he had a "toy" for her. He put Abbey on the bed and placed a vibrator on her vaginal area outside of her clothes. Defendant told Abbey not to tell anyone about the toy because it belonged to his wife, and he explained his wife would be upset if she learned someone else had played with it.

Defendant then put away the vibrator and asked Abbey to go with him to the bathroom. Defendant had Abbey sit on her knees. He blindfolded her and told her to stick out her tongue. Defendant placed his penis on her tongue. Defendant zipped his pants and took off Abbey's blindfold. They left the bathroom, and Abbey fell asleep in Ben's room.

Abbey's parents picked up the girls the next day. Abbey did not tell anyone about her encounters with Defendant. Abbey and Mary spent the night at Defendant's house one other time. On that occasion, Defendant gave Abbey cough syrup, even though she was not coughing or sick. Abbey quickly fell asleep on the living room couch in her clothes. Abbey woke up without any pants on, and she did not remember removing them.

The next day, Abbey and Mary told their parents Defendant had given Abbey cough syrup. An argument between Abbey's parents and the

Eanes family ensued, ending the relationship between the two families. Abbey remained silent regarding her prior encounters with Defendant for some time.

During the 2019-2020 school year, when Abbey was sixteen to seventeen years old, Abbey's family hosted a Venezuelan exchange student named "Ann." Abbey and Ann became very close. Abbey confided in Ann she had been molested by Defendant, but asked Ann not to tell anyone. Ann honored Abbey's request, and Abbey remained silent about her experience until 2022, when she told her parents and asserted Defendant had "molested [her] when [she] was a child." Abbey's family contacted the Eden Police Department, and Detective Stepps investigated the allegation.

Defendant was arrested on 28 November 2022 and charged with one count of first-degree sexual offense and two counts of taking indecent liberties with a child. While awaiting trial, Defendant shared a jail cell with William Crowe ("Crowe"). Crowe was being held on a fentanyl-related illegal drug charge and could not raise and post his $250,000 bond. Soon after the two men met, Crowe sent a message to law enforcement officers and the district attorney's office asking to talk about Defendant.

The investigation was turned over to Eden Police Detective Thomas Burns ("Detective Burns"), who provided Crowe with a recording device. Crowe used the device to record a conversation between Defendant and himself during which Defendant solicited Abbey's murder.

Based on this recording, Defendant was charged with soliciting first-degree murder. The solicitation charge was joined for trial with the three pending sexual assault charges. Defendant's jury trial began on 4 December 2023.

At trial, Abbey's sister, Mary, and their mother corroborated Abbey's testimony. Ann, the Venezuelan exchange student, testified Abbey had told her in 2019 or 2020 "about a tickling game and [sex] toys that were involved and that she was molested by [Defendant]."

Beth, Defendant's oldest daughter, testified Defendant had molested her when she was around six or seven years old. She testified Defendant had molested her in a similar manner to how he had molested Abbey. Defendant had blindfolded Beth and made her "perform oral sex on him."

Jail mate Crowe testified Defendant told him "about some young girl that he – well, he put his penis in her mouth and ejaculated on her face and he said that that's why he was in the cell." Crowe further testified Defendant had "approached [Crowe] about taking care of [Abbey] so his charge would not be there." Crowe clarified the phrase "take care of" was a euphemism for murder, and he testified Defendant offered to pay Crowe $10,000 for Abbey's murder. To corroborate this assertion, the State sought to introduce a recorded conversation between Crowe and Detective Burns. Defendant objected to the admittance of the recording because, during the conversation while Crowe was discussing the solicitation of Abbey's murder, he was also discussing Defendant's solicitation of the murder of another woman, Jamie Bullins ("Bullins"). Defendant claimed the admission of evidence of a different solicitation of murder "would be way more prejudicial than valuable." The trial court excused the jury and discussed the admissibility of the recording with counsel.

After hearing arguments from the State and from Defendant, the court concluded:

> If the media cannot be redacted, then the probative value of hearing this defendant's voice and having – or what is purported to be this defendant's voice – having the jury determine whether the circumstances are such that they believe that these words were uttered by the defendant and whether or not the defendant meant to be true. And all of the elements of the crime of solicitation to commit murder are, of course, of paramount importance. It's essentially one of the strongest pieces of evidence that could be adduced or produced in any type of prosecution.
>
> Thus, if it cannot be redacted, then the probative value outweighs the risk of unfair prejudice. I put on the record that the risk of prejudice is enormous if you are talking about killing another person unrelated to these events.
>
> However, in this context it is not unfairly prejudicial with a strong limiting instruction.

The court recessed for the day and reviewed the recording *in camera* to ensure it had reached the proper outcome. The next day, outside the presence of the jury, the court ruled:

> With respect to [the recording], I've examined it. The content is relevant. The mention of Ms. Bullins is prejudicial and is irrelevant. But it is inextricably intertwined, at least at one point, with the evidence pertaining to alleged Victim [Abbey], that being what this witness alleges was the price of the alleged murder.

> In order to resolve and in weighing the probative value against the risk of unfair prejudice, the only remedy and a remedy I am satisfied with is to give a limiting instruction to the jury with respect to [the recording] before it is offered that they may hear about a subject named Bullins.
>
> . . .
>
> [T]hat satisfies me after extensive thought and preparation as to the [Rule] 403 concern.

The trial court issued the following curative instruction before the recording was played to the jury:

> You will hear mention in this [recording] of another subject, another person, last name of Bullins. When you hear that name, completely put it out of your mind. That person has nothing to do with the matters before you so put it out of your mind. Just take a mental [E]xacto knife and just cut that part out of the presentation and don't give it any thought and certainly don't give it any consideration during your deliberations.

Following Crowe's testimony and the introduction of the recording, Defendant demanded to testify on his own behalf. During cross-examination, Defendant admitted he had: (1) an affair with Bullins in 2021; (2) a prior conviction for contributing to the delinquency of a minor; (3) previously pled guilty to a felony charge of indecent liberties with a child for molesting his daughter, Beth, and was then questioned about details surrounding the molestation, including the presence of Defendant's semen found in Beth's hair, though Defendant testified the semen was "from the dirty clothes pile"; and, (4) been convicted of a felony for being a sex offender present on school property. Defendant testified Abbey, Abbey's family, and Crowe were all lying, and he asserted the Eden Police Department had been "against" him for "twenty-some years." The jury found Defendant to be guilty of all four charges.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat § 7A-27(b)(1) (2023).

III. Mistrial *Ex Mero Motu*

Defendant contends the trial court abused its discretion by failing to grant a mistrial *ex mero motu* after admitting the recorded conversation between Crowe and Detective Burns into evidence. Defendant argues the prejudicial value of the recording substantially outweighed any probative value.

A. Standard of Review

"The decision to grant a mistrial is within the trial court's discretion." *State v. Jaynes*, 342 N.C. 249, 280, 464 S.E.2d 448, 467 (1995). "This is particularly true where, as here, [D]efendant has not moved for a mistrial." *Id.* "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *State v. Black*, 197 N.C. App. 731, 733, 678 S.E.2d 689, 691 (2009) (quotation marks omitted) (quoting *Clark v. Sanger Clinic*, 175 N.C. App. 76, 84, 623 S.E.2d 293, 299 (2005)).

B. Analysis

Courts must determine the relevance of a piece of evidence and then weigh the probative value of a proffered piece of evidence against its prejudicial effect to determine its admissibility. N.C. Gen. Stat. § 8-C1, Rules 401, 403. Jurors are presumed to follow the court's curative instructions unless the evidence at issue is so prejudicial the jury cannot put it out of their minds. *State v. McNeill*, 371 N.C. 198, 249, 813 S.E.2d 797, 829 (2018). Curative instructions are generally presumed to cure the effects of prejudicial evidence. *See State v. Crisp*, 297 N.C. App. 400, 411, 910 S.E.2d 726, 737 (2024).

The "nature of the evidence and the particular circumstances of the individual case" are relevant to the determination of whether an instruction to the jury can cure the prejudicial effects of incompetent evidence. *State v. Hunt*, 287 N.C. 360, 375, 215 S.E.2d 40, 49 (1975). The relevant "particular circumstances" include the timing and clarity of the curative instruction and the presence of other evidence of the defendant's guilt. *See id.* at 376, 215 S.E.2d at 50 (determining whether the evidence had "found secure lodgment in the minds of the jurors," and whether the curative instructions were "specific as to the content of the challenged questions"); and *State v. Freeland*, 316 N.C. 13, 20, 340 S.E.2d 35, 39 (1986) (considering "very strong evidence of defendant's guilt" beyond the evidence in question).

While trial courts have broad discretion to weigh the probative value with the prejudicial effect of evidence, a mistrial may be required if the evidence introduced makes or renders a fair and impartial verdict impossible. *Jaynes*, 342 N.C. at 280, 464 S.E.2d at 467. To declare a mistrial because of the introduction of prejudicial evidence, the prejudice must have been so great that it "could not be cured by a curative instruction." *Crisp*, 297 N.C. App. at 410, 910 S.E.2d at 736.

The trial court expressly acknowledged the evidence of Defendant's solicitation of another murder was "prejudicial and [ ] irrelevant" to this case, but also acknowledged "it [wa]s inextricably intertwined, at least at one point, with the evidence." The court excused the jury and held a hearing to review and determine the admissibility of the recording. The trial court also reviewed the entirety of the recording *in camera*. After engaging in substantial dialogue with both parties, the court concluded any prejudicial effects of the recording did not substantially outweigh the probative value, so long as a curative instruction was issued.

The curative instruction was timely and specific. *See Hunt*, 287 N.C. at 376, 215 S.E.2d at 50. The jury was instructed specifically to disregard mentions of Bullins before the recording was played. There is no evidence to indicate the jury was incapable of following the court's instructions. Finally, other substantial evidence had been introduced to support Defendant's guilt independent of the recording. *Freeland*, 316 N.C. at 20, 340 S.E.2d at 39.

Defendant contends his decision to testify was induced by the introduction of the recorded conversation and, despite the curative instruction, the recording unfairly prejudiced the jury against his case. Defendant made his own decision to testify. While the jury may not have looked favorably upon Defendant's three prior sexual offenses, a "defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives." *Harrison v. U.S.*, 392 U.S. 219, 222, 20 L. Ed. 2d 1047, 1051 (1968). "[T]hat waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason on the strength of the lawful evidence adduced against him." *Id*.

The trial court's decision to admit the recording, prefaced with a curative instruction for the jury to disregard any mention of Bullins, rested within its discretion. *Id*. The trial court's decision not to grant a mistrial *ex mero motu* was not so manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *Jaynes*, 342 N.C. at 280, 464 S.E.2d at 467. The trial court's decision was well within its discretion. Other overwhelming evidence of Defendant's guilt was also properly admitted. *Freeland*, 316 N.C. 1at 20, 340 S.E.2d at 39. Defendant's argument is overruled.

IV. Conclusion

The trial court did not prejudicially err by admitting the recording with the prior curative instruction or by failing to grant a mistrial *ex mero motu*. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR.

Judges ARROWOOD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
JAMES RONDELL POWELL, Defendant

No. COA24-556

Filed 3 September 2025

1. **Assault—assault with deadly weapon with intent to kill inflicting serious injury—hands and feet as deadly weapons**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State presented substantial evidence from which a jury could infer that defendant used his hands and feet as deadly weapons in the context of the assault. Specifically, defendant punched and stomped on the victim's face for several minutes as the victim lay motionless and defenseless on the ground, which left the victim with severe injuries.

2. **Assault—assault with deadly weapon with intent to kill inflicting serious injury—specific intent required—sufficiency of evidence**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State presented substantial evidence from which a jury could infer that defendant had the specific intent to kill the victim during the assault, a necessary element of the charge, where defendant continued to violently attack the victim while he lay defenseless on the ground for several minutes. Contrary to defendant's argument, the State was not required to prove that defendant's intent to kill was formed only after premeditation and deliberation. Further, whether defendant's intoxication prevented defendant from forming a specific intent to kill was a question for the jury to resolve.

3. **Evidence—prior convictions—probative value versus prejudicial effect—no abuse of discretion**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury arising from an assault that was captured on video surveillance, the trial court did not abuse its discretion by allowing the State to cross-examine defendant about two prior convictions—for financial fraud in 1994 and for assaulting a government official in 2010—that were offered to impeach defendant's credibility pursuant to Evidence Rule 609. Even if the prejudicial effects of the prior convictions outweighed their probative value, defendant could not show prejudice; given the evidence of defendant's guilt, there was no reasonable possibility that the jury would have reached a different result absent the prior convictions.

4. Jury—questions after deliberations began—pattern instruction on intent—no plain error

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, there was no reversible error in the trial court's unchallenged instruction to the jury after deliberations began, in which the trial court responded to the jury's request for definitions of "intent to kill" and "specific intent" by giving the pattern jury instruction on intent generally. Even if the court erred, defendant could not show that the jury probably would have reached a different verdict if a more detailed instruction had been given, where there was clear evidence from which the jury could infer that defendant acted with specific intent.

5. Jury—deadlocked jury—instructions to continue deliberating—no plain error

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not commit plain error by instructing the jury to continue its deliberations after the court was informed that the jury had reached an impasse. Although it was unclear whether the jury viewed the court's statements as a directive to deliver a verdict quickly or simply as a statement that if they did not, they would recess and continue the following day, there was strong evidence of defendant's guilt and therefore no reasonable possibility that the jury would have reached a different result absent the court's statements.

6. Jury—deadlocked jury—Allen instruction—written rather than oral—no reversible error

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not commit reversible error by sending a written *Allen* instruction (encouraging the jury to continue deliberations while emphasizing that each individual juror should not abandon their honest convictions) to the deadlocked jury in the jury room rather than giving the instruction in open court. The decision to give an *Allen* instruction is discretionary and, here, the trial court's direct statements to the jury encouraging them to continue deliberating did not rise to the level of reversible error. Therefore, even if there was any error in giving the *Allen* instruction in writing, it likewise did not constitute reversible error.

7. Assault—assault with deadly weapon with intent to kill inflicting serious injury—no instruction on lesser-included offenses—new trial

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) arising from an assault defendant committed while intoxicated, defendant was prejudiced by the trial court's failure to give requested instructions to the jury on lesser-included offenses that were supported by the evidence. Viewing the evidence in the light most favorable to defendant, where defendant's intoxication could have created reasonable doubt about his ability to form the specific intent to kill the victim—a necessary element of AWDWIKISI, a specific intent crime to which voluntary intoxication is a valid defense—there was a reasonable possibility that at least one juror could have decided to convict defendant of the lesser-included offense of assault with a deadly weapon inflicting serious injury, a general intent crime; notably, the jury requested definitions of "intent to kill" and "specific intent" after deliberations began. Defendant's conviction was vacated and the matter was remanded for a new trial.

Judge WOOD concurring with separate opinion.

Appeal by defendant from judgment entered 5 September 2023 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 26 February 2025.

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

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for the defendant-appellant.

DILLON, Chief Judge.

Defendant James Rondell Powell was convicted of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). On appeal, he assigns five errors, including the trial court's failure to instruct the jury on lesser-included offenses. As explained below, we vacate the judgment and remand for a new trial on the following reasoning: "Specific intent to kill" is a necessary element of AWDWIKISI, but not for certain lesser-included offenses on which the jury was not instructed; the trial court denied Defendant's request that the jury be instructed on said lesser-included offenses; *and* there is a reasonable possibility that the evidence of Defendant's intoxication during the assault, when viewed in the light most favorable to Defendant, was sufficient to create reasonable doubt in the mind of at least one juror that Defendant, indeed, had the "specific intent to kill" Victim.

I. Background

The facts of this case are largely undisputed, as much of the encounter was captured on video surveillance with gaps filled in by eye-witness testimony.

Defendant, who was 58 years old at the time of the alleged assault, resided in an apartment where he lived with and cared for his elderly mother, who was suffering from Alzheimer's disease. For two months in early 2021, Defendant allowed John Horton ("Victim") to reside in their apartment, until a dispute occurred between them. For one week after Victim was forced to leave, Victim continually harassed Defendant by beating on the door, yelling at and threatening Defendant, and threatening to hurt Defendant's mother. Defendant responded by avoiding Victim.

On the evening of 27 March 2021, Defendant, who was intoxicated, exited his apartment to smoke a cigarette and saw Victim in the backyard where surveillance cameras were pointed. Defendant avoided Victim by walking to the parking lot and began smoking. Victim, however, approached Defendant, threatening Defendant and Defendant's mother. Eventually, Victim threw the first punch, striking Defendant in his face. Defendant then engaged Victim in a fight, and they tumbled to the ground.

Defendant gained control and began punching Victim in the face until Victim lay unresponsive on the concrete. Defendant then began stomping Victim in the face. A passerby observed the altercation and pulled Defendant away from Victim, but Defendant returned to attack the incapacitated Victim. Shortly after, a neighbor approached Defendant and Victim and witnessed the continued attack. The neighbor attempted to pull Defendant off Victim approximately three different times, at one point telling Defendant, "you['re] going to kill him," to which Defendant responded that he "wanted to."

Officers eventually arrived to find Victim lying face down in a puddle of blood and Defendant walking around "hollering and screaming" with the odor of alcohol on his breath. As a result of Victim's injuries, Victim stayed at a trauma center for four months, has lost his vision, and can no longer care for himself.

Defendant was charged with AWDWIKISI. The trial court denied Defendant's request to present lesser-included offenses to the jury. The jury convicted Defendant of the charge, and the trial court sentenced him accordingly. Defendant appeals.

II. Analysis

Defendant brings several arguments on appeal, which we address in turn.

A. Motion to Dismiss

[1] Defendant argues the trial court erred in denying his motion to dismiss based on the insufficiency of the evidence. We review whether there was sufficient evidence to send the matter to the jury *de novo*. *State v. Golder*, 374 N.C. 238, 249-50 (2020).

Defendant contends there was not sufficient evidence from which the jury could infer that his hands and feet were used in the fight as a "deadly weapon." *See State v. Meadows*, 272 N.C. 327, 331 (1968) (holding that the use of a "deadly weapon" during the assault is an essential element of AWDWIKISI).

Our Supreme Court has instructed that "bodily appendages such as a defendant's hands and arms can, depending upon the manner in which and the circumstances under which they are used, constitute deadly weapons[.]" *State v. Steen*, 376 N.C. 469, 485 (2020).

Here, the video evidence shows Victim essentially laying defenseless on concrete at some point during the fight. As Victim lay defenseless, Defendant repeatedly kicked and punched Victim in the head over the course of several minutes. Evidence shows Victim suffered severe injuries due to Defendant's assault.

We conclude this evidence, when viewed in the light most favorable to the State, was sufficient for the jury to infer that Defendant's hands and feet were deadly weapons in the context of his assault of Victim, as he lay defenseless. *See id.* at 485 (stating the question of whether hands and arms are deadly weapons is for the jury).

[2] Defendant further contends there was not sufficient evidence to prove the intent element, i.e., he had the requisite intent to kill Victim during the assault. *See Meadows*, 272 N.C. at 331 ("intent to kill" is an element of AWDWIKISI).

The State must prove that Defendant had the *specific* intent to kill Victim during the assault; that is, it is not enough for the evidence to show that Defendant merely intended to strike the blows which could cause death, as one of the elements of AWDWIKISI is that the assault "not result[ ] in death." *Id. See also State v. Daniel*, 333 N.C. 756, 762-63 (1993) (a defendant's evidence that he did not have the ability to form the specific intent to kill held relevant to defend against a charge of AWDWIKISI); *State v. Parks*, 290 N.C. 748, 754 (1976) (holding that "a specific intent to kill was a necessary element in the proof of [AWDWIKISI]").

Defendant, though, contends the State had the additional burden of showing, not only a specific intent to kill, but also that this intent was formed *only after premeditation and deliberation*. We disagree that the State had this additional burden in proving AWDWIKISI. A specific intent to kill may be formed in a defendant's mind without premeditation and deliberation, for instance, in response to some sudden provocation. *See State v. Rainey*, 154 N.C. App. 282, 287 (2002). And our Supreme Court has never held that the "intent to kill" must be formed after premeditation and deliberation to sustain a conviction of AWDWIKISI.

We note Defendant's argument concerning the evidence before the jury that he was intoxicated and our precedent from our Supreme Court recognizing voluntary intoxication as a defense to specific intent crimes. *See, e.g., State v. Baldwin*, 330 N.C. 446, 462 (1992) (holding that "voluntary intoxication may only be considered a defense to specific intent crimes").

However, we conclude that the evidence, when viewed in the light most favorable to the State, was sufficient for the jury to reasonably infer that Defendant had the specific intent to kill Victim during the assault. Specifically, we note the violent nature and extent of Defendant's attack as Victim lay helpless and the statement made by Defendant to a neighbor passing by that he "wanted to" kill Victim. It was for the jury to determine whether Defendant's intoxication rose to the level as to impair Defendant's ability to commit a specific intent crime.

B. Evidence of Prior Convictions

[3] Defendant next argues the trial court erred by allowing the State to question him during cross-examination concerning two prior convictions — namely, a 1994 conviction for financial fraud and a 2010 conviction for assaulting a government official. The State offered these prior convictions to impeach Defendant's credibility pursuant to Rule 609 of our Rules of Evidence, which allows convictions over ten years old to be used only if "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effects." N.C.G.S. § 8C-1, Rule 609(b) (2023).

Defendant's conviction for fraud is probative to demonstrate to the jury that Defendant's testimony may not be trustworthy. And his conviction for assault is probative to rebut Defendant's testimony that he had acted in self-defense and was not looking for a fight. We review the trial court's weighing of the probative value with the prejudicial effect for an abuse of discretion. *See State v. Harris*, 140 N.C. App. 208, 216-17 (2000).

Here, we cannot say the trial court abused its discretion in allowing evidence of Defendant's prior convictions under Rule 609 during the State's cross-examination of Defendant. Further, we conclude that, even if there was error in allowing evidence of Defendant's prior convictions, Defendant has failed to show prejudice. Specifically, based on the video evidence and the evidence of the extent of Victim's injuries, we conclude there is no reasonable possibility that the jury would have acquitted Defendant had they not heard the evidence of these prior convictions.

C. Trial Court Errors After Jury Began Deliberating

[4] Defendant argues the trial court made a series of errors after the jury began deliberating. Defendant contends that, in response to the jury's inquiry on the meaning of "specific intent," the trial court erroneously only defined "intent." He contends that, after the jury informed the trial court it was hopelessly deadlocked, the trial court inappropriately made statements tending to coerce the jury into reaching a verdict, thereby depriving Defendant of his constitutional right to a unanimous jury verdict. And Defendant contends the trial court erroneously failed to give an *Allen* charge in open court, opting instead to send written instructions into the jury room.[1]

---

1. An *Allen* charge, named for *Allen v. United States*, 164 U.S. 492, 501 (1896), also known as a "dynamite charge," is an instruction that may be given to a deadlocked or "hung"

The jury returned a verdict within two hours of the start of deliberations. Concerning this time period, the record shows as follows:

At 4:00 pm, on the fourth day of trial, the jury began deliberating.

At 4:30 pm, the jury asked the trial court to define "intent to kill" and "specific intent," whereupon the trial court gave a pattern jury instruction on intent generally.

At approximately 5:00 pm, the jury notified the trial court in writing that it was a "hung jury." The jurors then returned to the courtroom, whereupon the following exchange occurred:

> [THE COURT] Okay. So let me ask, without telling me how you're voting or anything, how far apart are you?
>
> [FOREPERSON] Ten/two.
>
> [THE COURT] Ten/two. All right. You don't think, if I gave you another hour to deliberate, you could come up with a verdict?
>
> [FOREPERSON] I don't think so.
>
> [THE COURT] What if I let you go home and sleep and relax and come back tomorrow, do you think that would help?
>
> [FOREPERSON] Just based off of what people have said, I don't think so, but - -
>
> [THE COURT] Okay. So what I need to do, I've got to give you an instruction, **because we've got four days invested in this case**. So I've got to give you an instruction in this case. So I've got to give you an instruction and tell you to give your best efforts to try to settle it. And **I'm going to give you, like, 30 minutes** - -
>
> [FOREPERSON] Okay.
>
> [THE COURT] - - And then have you come back in.
>
> [FOREPERSON] Okay.

---

jury which encourages the jury to continue deliberating and attempt to reach a verdict, *while also emphasizing* that each individual member should not abandon their honest convictions. *See also State v. Alston*, 294 N.C. 577, 592–93 (1978) (recognizing that a trial court cannot give an instruction which has the effect of coercing a deadlocked jury to reach a verdict).

(Emphasis added.) Before the jury retired to continue deliberating, the trial court attempted to locate the *Allen* charge and conducted a bench conference with the attorneys. The jury then returned to the jury room to continue deliberating without the trial court giving an *Allen* charge in open court.

At about 5:15 pm, after the jury had exited the courtroom, the trial court conducted another bench conference with the trial attorneys, after which the court instructed the bailiff to take a printed copy of the pattern *Allen* charge instruction to the jury:

> [THE COURT] All right. So I'm sending to the jury - - they are in the jury room - - 101.40, failure for the jury to reach a verdict, and give them 30 minutes. It's 5:15, and I'm going to bring them back in 30 minutes.
>
> **Thirty – tell them 30 minutes**. We'll break for 30 minutes.
>
> [THE BAILIFF] Okay.

(Emphasis added.)

Approximately thirty minutes later, at 5:45 pm, the jury returned to the courtroom and announced that they had agreed on a verdict of guilty.

Regarding Defendant's argument concerning the trial court's instruction on "intent," we review any error by the court for plain error, as Defendant failed to object at trial. To prevail on plain error review, Defendant bears the burden to show "the jury *probably would have* returned a different result." *State v. Reber*, 386 N.C. 153, 160 (2024) (emphasis in original).

Here, assuming the trial court erred, we conclude, Defendant has failed to show the jury probably would have reached a different verdict had the trial court provided a more detailed instruction on "specific intent." As discussed above, there was clear evidence offered by the State from which the jury could infer that Defendant acted with specific intent.

[5] Regarding Defendant's contention that the trial court erred by making statements which could be viewed as coercing the jury to reach a verdict, we hold Defendant has failed to show reversible error for the reasoning below.

A trial court's affirmative action in coercing a jury verdict implicates a defendant's constitutional right to a unanimous jury verdict. *See* N.C. Const. art. I § 24; *State v. Patterson*, 332 N.C. 409, 415 (1992) ("It is well settled that Article I, Section 24 of the Constitution of North Carolina prohibits the trial court from coercing a jury to return a verdict.").

In determining our appropriate standard of review on this issue, we note Defendant made no objection at trial to the trial court's conduct/statements of which Defendant now complains on appeal to have been coercive. For instance, Defendant did not object when the trial court reminded the jury they had four days invested in the trial or when the trial court instructed the bailiff to inform the jury that they had thirty minutes.

Though our Supreme Court has held that *certain* Article I, Section 24 violations are automatically preserved for *prejudicial* error review on appeal, *see*, *e.g.*, *State v. Wilson*, 363 N.C. 478, 484 (2009), the Court later explained arguments under Article I, Section 24 based on an alleged coerced verdict is subject to only *plain* error review where the defendant fails to object to the coercive statements at trial. *State v. Wilson*, 363 N.C. 478, 484 (2009). Therefore, we review Defendant's contention regarding the trial court's allegedly coercive statements for plain error.

After reviewing the State's evidence and the statements made by the trial court, we cannot say the jury probably would have reached a different verdict had the trial court not made the statements. It is not clear from the context whether the jury viewed the trial court's statements as a directive to reach a quick verdict or simply as a statement they would recess and pick up the next day after giving them thirty more minutes to deliberate that day. Further, there was strong evidence supporting the jury's verdict, including footage of Defendant's assault, such that we cannot say the jury was probably coerced by the trial court's conduct.

[6] Defendant further contends the trial court should have given an *Allen* charge in open court rather than giving the instructions to the bailiff to give to the jury.

By enacting N.C.G.S. § 15A-1235, our General Assembly has provided criteria for a trial court to follow when giving an *Allen* charge. But whether to give the charge is within the trial court's sound discretion. *State v. Aikens*, 342 N.C. 567, 578 (1996). Though when a trial court chooses to give the charge, it must give all of the charges as set forth in N.C.G.S. § 15A-1235. *Id.* And the trial court must give the charge in open court.

Our Supreme Court has emphasized the purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors struggling to reach a unanimous decision. *State v. Evans*, 346 N.C. 221, 227 (1997). *See also State v. Easterling*, 300 N.C. 594, 609 (1980).

Here, however, as we are holding the trial court did not commit *reversible* error in its conduct and statements to the jury of which Defendant complains on appeal, it would not be reversible error for the trial court to fail to mitigate its coercive conduct by not giving an *Allen* charge either in open court or otherwise. Therefore, in this case, we hold that any error committed by the trial court in giving the *Allen* charge in writing was not reversible error.

D. Lesser Included Offenses

[7] Defendant argues that the trial court erred by not instructing the jury on lesser-included offenses.

As Defendant requested the instructions be given, we review for prejudicial error. That is, we must determine whether the trial court erred and then whether there was a reasonable possibility of a different outcome had the trial court given an instruction on at least one of the lesser-included offenses. *See State v. Helms*, 322 N.C. 315, 319 (1988).

As stated in the previous section, our Supreme Court recognizes AWDWIKISI, the crime for which Defendant was convicted, as a specific intent crime, where the specific intent applies only to the "intent to kill" element. As AWDWIKISI is a specific intent crime, voluntary intoxication is a valid defense. *See State v. Baldwin*, 330 N.C. 446, 462 (1992) (holding that "voluntary intoxication may only be considered a defense to specific intent crimes").

Many "assault" crimes, however, are "general intent" crimes. *See, e.g.*, *State v. Johnson*, 379 N.C. 629, 630 (2021). For instance, assault with a deadly weapon inflicting serious injury (but with no intent to kill) ("AWDWISI") is not a specific intent crime. *State v. Arnett*, 276 N.C. App. 106, 110 (2021). Voluntary intoxication is not available as a defense to any such general intent crime. *Baldwin*, 330 N.C. at 462. Therefore, if there was evidence tending to show Defendant was voluntarily intoxicated to the extent he could not have formed a specific intent to kill, he would be entitled to an instruction on lesser included offenses.

In reviewing a trial court's refusal to grant a defendant's request to instruct on lesser-included offenses such as AWDWISI, "we must view the evidence in the light most favorable to [D]efendant." *State v. Barlowe*, 337 N.C. 371, 378 (1994).

Here, there was evidence that Defendant was intoxicated during his assault of Victim. We conclude there is a reasonable possibility the evidence of Defendant's intoxication, when viewed in the light most favorable to Defendant, created reasonable doubt that Defendant had the specific intent to kill Victim. Therefore, Defendant's burden was merely to show the evidence was sufficient *to establish reasonable doubt* that he was able to form specific intent, as the burden was on the State at trial to show specific intent existed.

This holding is based in part on testimony from the first officer on the scene, who stated Defendant "had been drinking heavily because there was a strong odor of alcohol about his breath . . . like I said, he was walking around talking, irate, hollering, screaming, pretty much." Also, portions of the video of the assault shows Defendant at times was walking around erratically. Further, Defendant testified that, though he remembered how the fight started with Victim threatening him and his mother and throwing the first punch, he had very little memory once he gained the upper hand on Victim during the fight when he was shown video of his assault. He further testified he *thought* he was striking Victim on the shoulder blade as Defendant lay on the ground, though physical evidence shows he did strike Victim repeatedly on the head as well.

Of course, when viewed *in the light most favorable to the State*, the evidence demonstrates Defendant knew exactly what he was doing, and alcohol did not impair Defendant's ability to form the specific intent to kill Victim. The evidence, when viewed through this lens, supported the trial court's decision to deny Defendant's motion to dismiss the specific intent crime. However, it is our duty to view the evidence *in the light most favorable to Defendant* when considering whether Defendant was entitled to an instruction on a lesser-included offense and allow the jury to assign weight to the evidence.

Here, viewing the evidence in the light most favorable to Defendant, we conclude Defendant was entitled to an instruction allowing the jury to decide whether it unanimously believed, beyond a reasonable doubt, that Defendant specifically intended to kill Victim. That is, there was a reasonable possibility that at least one juror could have decided to convict Defendant of a lesser included offense instead of the one charge presented to them. In so concluding, we note that shortly after beginning its deliberations the jury asked the judge for further instruction on the meaning of "intent to kill" and later reported that two jurors *still* had reasonable doubt on convicting Defendant of the specific intent crime.

III. Conclusion

The jury's verdict convicting Defendant of AWDWIKISI, a specific intent crime, is supported by the evidence when viewed in the light most favorable to the State. However, when viewed in the light most favorable to Defendant, the evidence of Defendant's intoxication during the assault was sufficient to create reasonable doubt that Defendant acted with specific intent to kill Victim. Therefore, Defendant was entitled to his requested instruction on AWDWISI, a general intent crime and a lesser-included offense of AWDWIKISI. Accordingly, we vacate Defendant's conviction and remand for a new trial.

VACATED AND REMANDED FOR A NEW TRIAL.

Judge COLLINS concurs.

Judge WOOD concurs with separate opinion.

WOOD, Judge, concurring but writing separately.

Although I agree with the result reached by the majority, I would hold the trial court committed prejudicial error in its response to the jury's report that it was deadlocked. The majority holds the failure to give the *Allen* charge in open court and any comments the trial court made during the consideration of the jury's deadlock did not rise to the level of plain error. I disagree with both their standard of review and their outcome.

The majority correctly acknowledges that there is both a constitutional right implicated by any coercive comments the trial court made as well as a statutory rule impacted by the trial court's failure to instruct the jury in open court.

A trial court's coercion of a jury verdict implicates a defendant's Article I, Section 24 right under the Constitution of North Carolina to a unanimous jury verdict. *See* N.C. Const. art. I, § 24; *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992). However, as the majority states,

> [t]hough our Supreme Court has held that *certain* Article I, section 24 violations are automatically preserved for *prejudicial* error review on appeal, *see, e.g.*, *State v. Wilson*, 363 N.C. 478, 484 (2009), the Court later explained arguments under Article I, section 24 based on an alleged coerced verdict is subject to only *plain* error review where the defendant fails to object to the coercive statements at trial. *State v. Wilson*, 363 N.C. 478, 484 (2009).

Because Defendant failed to object to the trial court's statements during the consideration of an *Allen* charge, the constitutional standard of review is plain error. "This exacting standard demands that even if error exists under step one, a defendant must still demonstrate that a jury probably would have reached a different result, which requires a showing that the outcome is significantly more likely than not. *State v. Gillard*, 386 N.C. 797, 820, 909 S.E.2d 226, 251 (2024) (cleaned up). Reviewing the trial court's comments to the jury during the *Allen* discussion in isolation, I agree with the majority's determination that the exacting standard of plain error cannot be met.

However, there is still a statutory rule with which we must contend. "[W]hen a trial court is alleged to have violated a mandatory statute, the issue is preserved as a matter of law, but when a trial court is alleged to have violated a permissive statute, we review for plain error if the issue has not been preserved." *State v. May*, 368 N.C. 112, 119, 772 S.E.2d 458, 463 (2015). The majority focuses solely on N.C. Gen. Stat. § 15A-1235, a permissive statute which elucidates the process a trial court *may* take when a jury is deadlocked. As the majority correctly explains, "[i]t is generally not mandatory for a trial court to give a deadlocked jury an *Allen*-type charge; rather, whether to give the instruction is within the trial court's sound discretion. *State v. Aikens*, 342 N.C. 567, 578 (1995)." However, once the trial court within its discretion elects to give an *Allen* charge, the manner in which it handles the additional instructions is statutorily mandated by N.C. Gen. Stat. § 15A-1234. N.C. Gen. Stat. § 15A-1234 states:

> (a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:
>
> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.
>
> (b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.
>
> (c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the

> jury. Otherwise, the allowance of additional argument is within the discretion of the judge.
>
> (d) All additional instructions must be given in open court and must be made a part of the record.

N.C. Gen. Stat. § 15A-1234 (2024).

In the case *sub judice* the jury notified the trial court they were deadlocked. The trial court summoned the jury to the courtroom to discuss their inquiry concerning the deadlock. The trial court informed the parties it was going to give the pattern instruction 101.40, the *Allen* charge, and gave the parties an opportunity to be heard. Finally, the additional instructions were included as part of the record. However, the trial court did not comply with the first section of N.C. Gen. Stat. § 15A-1234(d), "all additional instructions *must be given in open court*." N.C. Gen. Stat. § 15A-1234(d) (2024) (emphasis added). Instead, the trial court printed the instructions and requested the bailiff take the paper to the jury room. Because the trial court clearly violated a mandatory statute, the issue is preserved as a matter of law, and we now consider whether the error was prejudicial. *See State v. May*, 368 N.C. 112, 119, 772 S.E.2d 458, 463 (2015).

Prejudicial error is "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2024).

In evaluating a trial court's failure to follow a similar statute regarding instructions for the jury, N.C. Gen. Stat. § 15A-1233, our Supreme Court has stated,

> Our jury system is designed to ensure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy.

State v. Robinson, 160 N.C. App. 564, 567, 586 S.E.2d 534, 536 (2003) (quoting *State v. Ashe*, 314 N.C. 28, 36, 331 S.E.2d 652, 657 (1985)). The Court went on to recognize

> we cannot know whether the jury foreman truly understood the answers provided to him by the trial court or whether he conveyed them correctly to the other jurors. Further, it is impossible to know whether the other jurors themselves understood the instructions provided to them by the foreman when deliberating and deciding their verdict. If all twelve jurors had been summoned to the courtroom as required by the statute and case law, there would be no question whether all twelve were conveyed the same answers in the same manner. We hold that it was reversible error by the trial court to not summon the full jury into the courtroom before answering their questions.

Id. at 569, 586 S.E.2d at 537. While the issue of conversing outside the presence of the full jury is not exactly the same as providing instructions outside the presence of the trial court, the same fundamental concerns impacting a unanimous verdict are raised. Our courts consistently require jury instructions to be provided in open court to ensure unanimity and clarity, and when the trial court chooses to give one of the *Allen* instructions, it is then required to give all four *Allen* charges based on similar concerns. N.C. Gen. Stat. § 15A-1234 (2024). *See also State v. Aikens*, 342 N.C. 567, 579, 467 S.E.2d 99, 106 (1996).

Additionally, the instruction at issue is a controversial one. An *Allen* charge is commonly known as a "shotgun charge" as the State referred to it during trial or a "dynamite charge" because of the serious thrust of the directive to holdout jurors which can be seen as pressure for them to cave to the majority, creating a majority vote rather than a unanimous vote as require by law. *State v. Lamb*, 44 N.C. App. 251, 253-54, 261 S.E.2d 130, 131 (1979). Providing such an instruction via the bailiff with no assurance that it was accurately delivered and accurately understood by all twelve jurors is prejudicial error.

The trial court further compounded the prejudicial effect of this error with its statements to the jury that the majority recognizes "could be viewed as coercing a verdict." As noted *supra*, the statements alone do not reach the level of plain error; however, they do carry weight in the evaluation of whether the trial court's error in failing to give the *Allen* charge in open court was prejudicial. Our Supreme Court has "condemned coercive instructions, noting that they may suggest to holdout jurors that they should surrender their well-founded convictions . . . in deference to the views of the majority, resulting in a majority verdict instead of one that is in fact unanimous." *State v. May*, 368 N.C. 112, 117, 772 S.E.2d 458, 462 (2015) (cleaned up). Our courts have consistently held a trial court commits error when it makes comments about the time and expense of a trial or the fact that another jury would have to be called to retry the case. *State v. Lamb*, 44 N.C. App. 251, 260, 261 S.E.2d 130, 135 (1979); *State v. Lipfird*, 302 N.C. 391, 392, 276 S.E.2d 161, 162 (1981); *State v. Pate*, 187 N.C. App. 442, 448, 653 S.E.2d 212, 216 (2007). In this case, the trial court stated, "I've got to give you an instruction, because we've got four days invested in this case. So I've got to give you an instruction and tell you to give your best efforts to try and settle it. And I'm going to give you, like 30 minutes." Thirty-two minutes later the trial court reconvened, and the jury presented it with a verdict.

Because it is unclear whether the jurors actually received and understood the instructions in the *Allen* charge, in particular the instruction supporting holdout jurors, "[n]o juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict," and in light of the trial court's coercive statements which put further pressure on jurors, I believe the error here was prejudicial.

The trial court clearly violated a statutory mandate by failing to give the *Allen* charge to the jury in open court and compounded the prejudice of that error by providing a potentially coercive instruction without ensuring that all jurors understood their mandate. Therefore, I believe that in addition to the instructional error noted by the majority, the trial court also made a prejudicial error which requires reversal on the issue of the *Allen* charge.

STATE OF NORTH CAROLINA
v.
DAMIEN ALEJANDRO QUITERIO-MORRISON

No. COA24-955

Filed 3 September 2025

1. Evidence—hearsay exception—statements against penal interest—declarant's unavailability—trustworthiness of statement

In a prosecution for charges including first-degree murder, the trial court did not abuse its discretion by excluding testimony from defendant's father that defendant's friend—who was also implicated in the charged crimes—had denied defendant's involvement in the murder, where the testimony did not fall under the exception to the rule against hearsay for statements made against the speaker's penal interest (Evidence Rule 804(b)(3)). First, the friend could not be deemed "unavailable" for purposes of Rule 804(b)(3) since, according to the record, his absence resulted from defendant helping him to flee to Mexico, after which defendant made no good-faith effort to procure the friend's attendance at trial. Second, there was insufficient evidence corroborating the trustworthiness of the friend's statement, especially where: it was allegedly made two years before trial; defendant's father, himself an interested witness, did not mention this statement when he first spoke with law enforcement; and the State presented ample evidence at trial of defendant's involvement in the murder.

2. Homicide—felony murder—predicate felony—robbery with a firearm—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of first-degree murder under a felony murder theory, where the State presented substantial evidence that defendant participated in the predicate felony of robbery with a firearm. Specifically, the evidence showed that: defendant's phone was used to challenge the victim to a fight at defendant's house; the victim was shot with defendant's gun; the victim's body, car, and cell phone were taken to the house of defendant's cousin, which defendant had visited shortly after the shooting; and defendant told his friend to get rid of the victim's car, which was later found at defendant's cousin's house. Taken together, a jury could have found that defendant was involved in taking the victim's car and cell phone while he was either using or in the possession of a firearm. Further, the absence of evidence showing an agreement between defendant and his friend to steal from the victim was irrelevant, since, for felony murder based on armed robbery, the intent to take property can be formed before or after the killing.

Appeal by Defendant from Judgments entered 1 February 2024 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 22 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General J. Joy Strickland, for the State.

J. Clark Fischer for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Damien Alejandro Quiterio-Morrison (Defendant) appeals from Judgments entered pursuant to jury verdicts finding him guilty of First-Degree Murder and Concealing Unnatural Death by Secretly Burying a Dead Human Body. The Record before us, including evidence presented at trial, tends to reflect the following:

On 5 July 2022, Defendant was indicted for First-Degree Murder and Concealing Unnatural Death by Secretly Burying a Dead Human Body. The case came on for trial on 22 January 2024. At trial, the State's evidence tended to show that on the evening of 21 May 2021, Isaiah Mitchell and his girlfriend Evelyn Avila-Noyola went to a bar in Winston-Salem. Upon walking in, Avila-Noyola recognized Kevin Patricio Cisneros,[1] Kael Quiterio,[2] and Defendant. Mitchell and Avila-Noyola had been in a relationship for seven years; however, they separated for a six-month period between June 2020 and December 2020. During that time, Avila-Noyola had a romantic relationship with Cisneros.

The three men "kept looking at" Mitchell and Avila-Noyola. Mitchell "got irritated and kind of buck[ed] at [the men] and said, 'what are you looking at.' " The men were "giggling" and talking amongst themselves. Mitchell drove himself and Avila-Noyola home around 1:00 a.m. After

1. Cisneros is referred to in the parties' briefs as "Kevin Patricio," "Kevin Cisneros," and "Kevin Patricio Cisneros."

2. Quiterio is Defendant's cousin.

arriving home, Avila-Noyola received a call from Defendant's number. Mitchell answered the phone. Avila-Noyola testified Mitchell was "very irritated" and he and the person on the other end of the line were "kind of having a verbal altercation." Mitchell left with his phone, Avila-Noyola's phone, and the keys to his car—a silver Dodge Charger.[3] Avila-Noyola drove to the home of Mitchell's aunt to see if she could contact Mitchell. Their attempts at contacting Mitchell were unsuccessful.

In the morning, Avila-Noyola still had not heard from Mitchell. Avila-Noyola, some of her friends, and some of Mitchell's family members went to Defendant's and Cisneros' homes to try to find out what had happened. Two vehicles were parked outside of Defendant's home, but no one answered the door. At Cisneros' home, Cisneros said he didn't know where Mitchell was and asserted Mitchell had "never showed up."

Avila-Noyola and Mitchell's family went back to Defendant's home. They "stood out there for the majority of the day[,]" but Defendant never came in or out of the house. The family then reported Mitchell missing. Defendant called Avila-Noyola later that evening; Defendant stated Mitchell "never showed up" and suggested Mitchell "might've got in a car accident."

Outside Defendant's house, officers investigating Mitchell's disappearance found two 45-caliber bullet casings, a pair of earrings Mitchell wore on the night in question, and observed bloodstains on the driveway. Bloodstains containing Mitchell's DNA were also found in Defendant's bedroom and laundry room.

Avila-Noyola's phone was found broken on the street outside Defendant's home. Snapchat messages sent between Avila-Noyola's and Defendant's accounts showed Avila-Noyola's account saying: "[D]on't be a bitch slide." Defendant's account responded with his home address.

Laura Smith, one of Defendant's neighbors, testified she had heard two gunshots around 2:00 a.m. on the morning of 22 May 2021. She went to her window and saw a Dodge Charger and someone wearing a white shirt with a neon or glow-in-the-dark emblem and "a ball cap[ ]" walking behind the car. Smith "heard a car door" and three more gunshots. She testified the person she saw walking near the car was not Defendant.

Edgar Santamaria, Defendant's cousin, testified Defendant and Cisneros showed up at his house around 2:00 a.m. Defendant had a

3. Avila-Noyola owned the car, but it was primarily driven by Mitchell.

black eye. Santamaria testified: "I don't recall who told me. But one of them just confessed that they had killed a guy."

The State presented GPS data obtained from Defendant's, Cisneros', and Mitchell's cell phones, tracking their movements on the night in question. The data obtained from Mitchell's cell phone showed it in the area of Defendant's house around 2:08 a.m. Mitchell's phone traveled from Defendant's house to Santamaria's house around fifteen minutes later, at the same time as Defendant and Cisneros. Around 6:00 a.m., Cisneros' and Defendant's phones traveled west, but Mitchell's phone remained at Santamaria's address. Around 9:54 a.m., Mitchell's phone "lost connection with the network for some reason." No data was available from Mitchell's phone after that, and Mitchell's phone was never found.

Defendant's and Cisneros' phones traveled to the area of a "horse track" in Yadkin County. Defendant and Cisneros remained at the horse track for approximately thirty minutes before "return[ing] to the area of Winston-Salem to the area of [Defendant's] house and then they split up."

Defendant remained at home for approximately thirty minutes before going to a landfill around 8:30 a.m. Later in the day, Defendant "went to play a soccer game and also went to the Dollar General." Video footage obtained from the Dollar General showed Defendant buying "a container of purple power degreaser and a container of bleach." A 9-millimeter gun belonging to Defendant was found near the soccer field. The shell casings found outside Defendant's house did not correspond to the gun found near the soccer field, but they did match one of the two other guns Defendant owned.

Defendant went "back to the area of Winston-Salem and ultimately to the area around his house." An officer preparing a search warrant outside Defendant's house observed Defendant's truck "start to turn on [the street] before veering" away and leaving the area. Defendant drove to his mother's house instead.

Video footage obtained from security cameras outside the home of Defendant's mother showed that around 4:32 p.m. on 23 May 2021, Defendant's truck was parked outside his mother's home and something was being burned behind it. Around 4:46 p.m., Defendant's mother took a bag and placed it in a trashcan outside. One of Defendant's sisters later provided the bag to the police—it contained a pair of white sneakers which had been burnt. Around 5:32 p.m., Cisneros and his father are shown on the security camera footage, and "people start hugging." Detective Ognosky, the lead detective on the case, testified: "It appears they are saying goodbye to each other." The men got into a car driven by Defendant's mother. Detective Ognosky explained this was "the last time anyone has seen [Cisneros] since this incident happened."

On or about 24 May 2021, Defendant's truck was found abandoned on the side of the road with the keys in it. Mitchell's vehicle was later found less than two miles away from Santamaria's house.

At the close of the State's evidence, defense counsel made a Motion to Dismiss on the basis there was insufficient evidence to support each charge and also asserted a variance existed between the crimes alleged in the indictments and the crimes for which the State presented evidence. The trial court denied this Motion.

Defendant testified on his own behalf. Defendant's testimony largely corroborated the State's order of events, but he disputed the extent of his involvement in Mitchell's murder. Defendant testified he was with Cisneros at the same bar as Avila-Noyola and Mitchell on the night in question. Cisneros wore a pair of white sneakers borrowed from Defendant. Defendant drove home from the bar with Cisneros shortly before 2:00 a.m. Cisneros allegedly used Defendant's phone to text someone during the drive. Defendant explained he would often let Cisneros use his phone to contact women, including Avila-Noyola, because Cisneros "had a girlfriend that lived with him at his house. And due to that, and him cheating, he did not want her to find that out. So he texted her through my accounts."

After arriving at Defendant's house, Cisneros allegedly told Defendant he had invited someone "to fight." Defendant testified he told Cisneros this was not a good idea and he would take Cisneros home instead. Cisneros agreed, but as the men were getting into Defendant's truck to leave, Mitchell arrived. Cisneros was already in the truck with the door closed; Defendant was standing outside on the driver's side of the vehicle. Mitchell punched Defendant in the face. The two men continued to fight until Defendant "heard two gunshots[.]" Defendant testified he saw Cisneros standing "five to six feet" away holding a gun.

The men left Mitchell's body outside and went back into the house. Defendant testified Cisneros said he was going to Santamaria's house to "hide and to think about his next move." Mitchell's body was allegedly already no longer outside when Defendant followed "a minute" to "a minute and a half" after. Cisneros left in Mitchell's car. Defendant followed in his truck.

Defendant testified he arrived at Santamaria's house first, woke Santamaria up, and told Santamaria "not [to] ask any questions . . . but

[Cisneros] did kill someone[.]" After Cisneros arrived, Defendant asked him "why he brought the body to Edgar Santamaria's house." Cisneros responded "he didn't," that it was Defendant who had brought the body. Defendant went outside and discovered Mitchell's body in the bed of his truck. Defendant denied assisting Cisneros in placing Mitchell's body in the truck. He testified he did not know Cisneros had placed the body there because the truck is lifted so that its bed is six feet high, whereas Defendant is only five-foot-five.[4]

Defendant testified he felt "horrible because now I felt directly involved in this murder." Defendant further testified he was upset Cisneros had put Mitchell's body in his truck because Defendant "took a lot of pride" in his vehicle and it "was a clear disrespect for [his] vehicle." Defendant gave Cisneros the keys to his truck and told Cisneros "he needed to do whatever he needed to do that I'm not going to be involved in this any further."

Defendant went back inside Santamaria's house and fell asleep on the couch. Two to three hours later, Cisneros woke Defendant up and told Defendant "we're going to go get rid of this body." Defendant testified that when he expressed reluctance, Cisneros became more "aggressive." Defendant testified he was scared that he "was going to be shot next." The two men then left Santamaria's house; Defendant led with Cisneros following behind. The men drove to the horse track where Cisneros dug a ditch. Defendant remained in his truck until Cisneros signaled him to bring Mitchell's body. Defendant turned his truck around and "pull[ed] the body off of the bed of the truck." Defendant testified: "I actually by myself, I grabbed [Mitchell] by his clothes and dragged him off the vehicle." Cisneros backfilled the ditch.

The men left and Defendant drove "straight home." Defendant then went to the landfill to get rid of "household items." Defendant called Cisneros eight times while there. During one of those phone calls, Defendant told Cisneros to "hurry up and move [Mitchell's] car from [in front of Santamaria's house]." Defendant then returned home. Later that afternoon, Defendant went to go play soccer to "relieve" his "stress." After that, Defendant purchased bleach and degreaser to clean his truck. Consistent with the State's evidence, Defendant testified he saw police outside his house when he went to return home, so he drove to his mother's home instead.

4. Defendant testified Cisneros is only "an inch or two taller" than himself. Mitchell was described as "Close to 6 feet tall."

The next day, Cisneros allegedly tried to convince Defendant to lie to the police about what had happened and tell them Defendant had driven Cisneros straight home from the bar. Defendant refused, fearing "if I was to tell that story that they there [sic] going to say that I had all guilt on me, that I was the only one there[.]" Later that day, Defendant met Cisneros and Cisneros' mother at a Goodwill, and Cisneros again tried to convince Defendant to lie to the police. According to Defendant, Cisneros' mother "pointed out" that if Defendant didn't "want to talk to police at any point then it's probably best if we [Defendant and Cisneros] go to Mexico." Defendant returned to his mother's home and asked his father to bring him a change of clothes and the shoes Cisneros had borrowed from him. Defendant testified he burned the shoes because there was blood on them, and he was worried the police "would be able to get DNA to prove that they are my shoes."

Defendant agreed to go to Mexico with Cisneros later that day. He testified he did not tell either of his parents he was going to Mexico; he allegedly told his father he was "going out of state" and told his mother he was "going to Texas." Defendant's mother drove Defendant and Cisneros to Texas. The men then took a taxi to the border and crossed into Mexico. In September, Defendant learned there was a warrant out for his arrest. Defendant retained a lawyer and flew back to North Carolina to turn himself in.

Outside the presence of the jury, defense counsel presented testimony from Giovanni Quiterio-Olmedo, Defendant's father, regarding a conversation which took place between Quiterio-Olmedo and Cisneros shortly after the events at issue. On *voir dire*, Quiterio-Olmedo testified Cisneros told him Defendant was "not involved":

> [Defense Counsel]: Did you ask . . . where [Defendant] was?
>
> [Quiterio-Olmedo]: So it's – first of all [Cisneros] started telling me . . . kept saying that [Defendant] was not involved, I did it, I did it because [Mitchell] was choking [Defendant].
>
> . . . .
>
> [The State]: And [Cisneros] told you [Defendant] was not involved, I did it because [Mitchell] was choking him?
>
> [Quiterio-Olmedo]: Yes.
>
> . . . .

> [The State]: So [Cisneros] had committed a murder?
>
> [Quiterio-Olmedo]: That's what he confessed to me in my house.

Defense counsel sought to admit this testimony under Rule 804(b)(3) of the North Carolina Rules of Evidence. The trial court determined the testimony was not admissible because Cisneros was not unavailable as a witness and there was insufficient evidence of corroborating circumstances as to the trustworthiness of the statement.

At the close of all evidence, defense counsel renewed the Motion to Dismiss. The trial court denied the renewed Motion.

On 1 February 2024, the jury returned verdicts finding Defendant guilty of First-Degree Murder on the basis of felony murder and guilty of Concealing Unnatural Death by Secretly Burying a Dead Human Body. That same day, the trial court entered Judgments in accordance with the verdicts. On 6 February 2024, Defendant timely provided Notice of Appeal.

Issues

The issues on appeal are whether the trial court erred by: (I) excluding Giovanni Quitero-Olmedo's testimony that Kevin Patricio Cisneros told him Defendant was "not involved"; and (II) denying Defendant's Motions to Dismiss.

Analysis

I. Hearsay

[1] Defendant argues the trial court incorrectly determined Cisneros' statement was not admissible under Rule 804(b)(3). Specifically, Defendant argues Cisneros was "unavailable" as a witness for the purposes of Rule 804 and there was evidence of corroborating circumstances indicating the trustworthiness of Cisneros' statement to support its admission under Rule 804(b)(3).

Under Rule 804(b)(3), if a declarant is unavailable as a witness, his statement may nevertheless be admissible at trial if "at the time of its making . . . [the statement] so far tended to subject him to civil or criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (2023). However, "[a] statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* We review a trial court's decision whether to admit a statement under Rule 804(b)(3) for abuse of discretion. *See State v. Dewberry*, 166 N.C. App. 177, 183, 600 S.E.2d 866, 870 (2004).

Here, the trial court concluded Cisneros' statement was inadmissible both because: 1) he was not "unavailable" as a witness, and 2) there was insufficient evidence of corroborating circumstances clearly indicating the trustworthiness of the statement for the purposes of Rule 804(b)(3). " 'Unavailability as a witness' includes situations in which the declarant . . . [i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a) (2023). "To review a trial court's determination that a witness is unavailable, our Court considers 'whether the trial court's findings of fact related to the witness' unavailability were supported by the evidence and, in turn, supported its conclusions of law.' " *State v. Allen*, 265 N.C. App. 480, 484, 828 S.E.2d 562, 566 (2019) (quoting *State v. Clonts*, 254 N.C. App. 95, 114, 802 S.E.2d 531, 545 (2017)).

In the case *sub judice*, the trial court determined Cisneros was not "unavailable" as a witness for the purposes of Rule 804(b)(3) because Cisneros' "absence [was] due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying." The trial court found Cisneros' absence was due to Defendant and his family helping Cisneros flee to Mexico.

Defendant argues "nothing in the record supports a conclusion that [he] had any role in Cisneros' non-attendance at trial." However, the Record shows Defendant and Cisneros agreed to go to Mexico together, Defendant and Cisneros said goodbye to each other's families together at the home of Defendant's mother, Defendant's mother drove Defendant and Cisneros to Texas, the men entered Mexico together, and the men stayed together in Mexico City until Defendant left to live elsewhere in Mexico. Thus, contrary to Defendant's assertion, the evidence tended to show both Defendant and his family were involved in transporting Cisneros out of the country. Therefore, the trial court's Finding that Cisneros' absence was due to Defendant's actions is supported by the Record.

Defendant additionally asks us to consider this Court's decision in *State v. Allen*. In *Allen*, this Court affirmed the trial court's conclusion that the State's witness was unavailable for the purposes of Rule 804. The State's evidence its witness was unavailable included that it had subpoenaed the witness and, despite the witness agreeing to appear in court and testify against the defendant, the witness had been missing for approximately ten days at the time of the evidentiary hearing. *Allen*, 265 N.C. App. at 484-87, 828 S.E.2d at 566-68. This Court held this was sufficient evidence the State had "utilized reasonable means and made a good faith effort to obtain the witness' presence at trial." *Id.* at 488, 828 S.E.2d at 568.

Defendant contends Cisneros could "obviously" not be subpoenaed because Cisneros was out of the country,[5] and his unavailability was "thus even greater than the missing" witness in *Allen*. Defendant argues the "federal government" made "diligent efforts" to find Cisneros but was unsuccessful; therefore, according to Defendant, Cisneros, like the witness in *Allen*, was unavailable for the purposes of Rule 804. We disagree.

Regardless of any efforts taken by the State or "federal government" to extradite Cisneros from Mexico, the burden is on Defendant—as proponent of Cisneros' statement—to show *he* has been unable to procure Cisneros' attendance. *See* N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2023) (a witness is unavailable if he is "absent from the hearing and *the proponent of his statement has been unable to procure his attendance* . . . by process or other reasonable means." (emphasis added)). To the extent Defendant relies on the State or "federal government's" efforts to locate Cisneros, it is insufficient to meet his burden of proving Cisneros' unavailability under Rule 804. Defendant argues "If the State, with the assistance of the bountiful resources of the federal government could not bring Cisneros to justice, obviously Defendant had no means either to serve or enforce compulsory process." Indeed, Defendant essentially concedes he failed to exercise any efforts of his own to secure Cisneros' attendance at trial, simply because the State's efforts had been unsuccessful.

Although the proponent of a statement under Rule 804 is not required to "exhaust all conceivable means" in the effort to secure a witness' presence at trial, *see State v. Bailey*, 163 N.C. App. 84, 90, 592 S.E.2d 738, 743 (2004), it is relevant whether "there were other methods available" to the proponent in securing the declarant's presence at trial. *See Clonts*, 254 N.C. App. at 124, 802 S.E.2d at 550 (citing *State v. Nobles*, 357 N.C. 433, 437-38, 584 S.E.2d 765, 770 (2003)). Here, no evidence details any efforts Defendant took to secure Cisneros' presence at trial, other than pointing to the State's or "federal government's" unsuccessful attempts to contact Cisneros—even though Defendant knew where in Mexico Cisneros had fled to, knew where in Mexico Cisneros had family,

5. However, in arguing he had taken steps to secure Cisneros' presence at trial, defense counsel told the trial court that it had "sent a subpoena" to Cisneros.

had stayed in Mexico with Cisneros for some time, and has a close relationship with Cisneros' family in North Carolina. Thus, Defendant has not shown he made a good-faith effort to secure Cisneros' testimony or attendance at trial. *See State v. Harris*, 338 N.C. 211, 223 n.1, 449 S.E.2d 462, 468 n.1 (1994) ("[T]o take advantage of the hearsay exceptions under Rule 804(b), the proponent must, under Rule 804(a)(5), show at least a good-faith, genuine, and bona fide effort to procure the declarant's attendance . . . ." (quoting 32B Am. Jur. 2d *Federal Rules of Evidence* § 265 (1982)) (second citation omitted)). Therefore, Defendant has not met his burden of proving Cisneros was unavailable for the purposes of Rule 804.

Even assuming, *arguendo*, Cisneros was unavailable to testify for the purposes of Rule 804, the trial court further found Cisneros' statement would not be admissible under Rule 804(b)(3) because there were insufficient corroborating circumstances as to the trustworthiness of the statement. *See* N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (2023) ("A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.").

" 'The determination of whether the trustworthiness of the statement is indicated by corroborating circumstances is a preliminary matter to be decided by the trial judge.' " *Dewberry*, 166 N.C. App. at 181, 600 S.E.2d at 869 (quoting *State v. Wardrett*, 145 N.C. App. 409, 415, 551 S.E.2d 214, 218 (2001)). "The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness." *Id.* at 182, 600 S.E.2d at 870 (quoting *State v. Haywood*, 295 N.C. 709, 730, 249 S.E.2d 429, 442 (1978)).

Defendant argues the trial court erroneously failed to inquire into Cisneros' "motivation to speak truthfully" to Quiterio-Olmedo. In support of his argument, Defendant asks us to consider our Supreme Court's decision in S*tate v. Sargeant*, 365 N.C. 58, 707 S.E.2d 192 (2011). However, unlike the case at bar, the Court's analysis in *Sargeant* concerned Rule 804(b)(5)—the residual hearsay exception for an unavailable witness. *See id.*; *see also State v. Triplett*, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986) (explaining the trial court must consider "the declarant's motivation to speak the truth or otherwise[ ]" for the purposes of Rules 803(24) and 804(b)(5)). By contrast, under Rule 804(b)(3), "[b]road discretion must be given the trial judge in determining the reliability of the declaration and the declarant by consideration of such factors as spontaneity, relationship between the accused and the declarant, existence of corroborative evidence, whether or not the declaration had been subsequently repudiated and whether or not the declaration was in fact against the penal interest s [sic] of the declarant." *Dewberry*, 166 N.C. App. at 182, 600 S.E.2d at 869-70 (emphasis removed) (quoting *Wardrett*, 145 N.C. App. at 415, 551 S.E.2d at 218-19).

Here, in concluding insufficient evidence corroborated Cisneros' alleged statement, the trial court made the following Findings of Fact: Quiterio-Olmedo was an "interested witness"—i.e., Defendant's father; Quiterio-Olmedo did not provide this information to the police when he first spoke to them two years prior, despite having an interest in doing so; over two years had passed since the statement was first allegedly made; and the statement was inconsistent with the other testimony in the case.

Defendant argues the trial court's Findings "fall far short" of allowing the conclusion Cisneros' statement lacked corroborating circumstances. Defendant contends the trial court's Finding that the statement was inconsistent with the other testimony in the case is unsupported. We disagree. The evidence adduced at trial tended to show Defendant's phone and Snapchat account were used to invite Mitchell to fight; Mitchell was told to come to Defendant's address, not Cisneros'; Defendant testified Mitchell was shot with "My bullets in my pistol[ ]"; and Defendant moved and disposed of Mitchell's body. Thus, there was ample evidence contradicting Cisneros' alleged statement. Moreover, Quiterio-Olmedo also made inconsistent statements on *voir dire* about his actions the day Defendant and Cisneros fled to Mexico and what information he had previously given to law enforcement. *See Wardrett*, 145 N.C. App. at 415-16, 551 S.E.2d at 219 (noting elements of witness' testimony undermined his credibility, such as being unable to remember when and under what circumstances the statement at issue was allegedly made).

The trial court's additional Findings—that Quiterio-Olmedo was an interested witness, Quiterio-Olmedo did not provide the statement to law enforcement, and that the statement was allegedly made by Cisneros over two years ago—are likewise supported by competent evidence. These Findings support the trial court's Conclusion there were insufficient independent, non-hearsay indications of trustworthiness to support admitting the statement at trial. Thus, in light of all the evidence, Defendant has failed to show the trial court abused its discretion in concluding the statement was not admissible under Rule 804(b)(3). Therefore, the trial court did not err in excluding this portion of Quiterio-Olmedo's testimony.

II. Motions to Dismiss

[2] Defendant contends the trial court erred in denying his Motions to Dismiss the charge of First-Degree Murder. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

"When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 456 (citation omitted). Moreover, "the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Id.* at 379, 526 S.E.2d at 455 (citing *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982)).

On appeal, Defendant challenges the denial of his Motions to Dismiss solely with respect to the charge of First-Degree Murder on the basis of felony murder.[6] "A murder which shall be . . . committed in the perpetration or attempted perpetration of any . . . robbery . . .

6. Defendant also does not pursue his argument asserting a variance in the indictments.

shall be deemed to be murder in the first degree." N.C. Gen. Stat. § 14-17 (2023). Defendant argues there was insufficient evidence he committed the predicate felony—robbery with a firearm—to be found culpable of felony murder. Our statutes provide that "[a]ny person . . . who, having in possession or with the use or threatened use of any firearms, . . . unlawfully takes or attempts to take personal property from another" is guilty of robbery with a firearm. *Id.* § 14-87(a) (2023).

Defendant argues there was no evidence of an "agreement" between himself and Cisneros to steal from Mitchell, nor evidence he had "advance knowledge" Cisneros would take Mitchell's car or phone, nor any evidence he encouraged Cisneros to do so. However, presuming this is true, there is nonetheless sufficient evidence Defendant committed robbery with a firearm in the chain of events after Mitchell's murder. *See State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992) ("The evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events." (citations omitted)).

Here, the evidence taken in the light most favorable to the State tends to show Defendant's phone and Snapchat account were used to invite Mitchell to Defendant's house to fight; Mitchell was shot with Defendant's gun; Defendant and Cisneros both went to Santamaria's house shortly after Mitchell was shot; Mitchell's body, the car he was driving, and cell phone were taken to Santamaria's house; the last known location of Mitchell's phone was Santamaria's house; Defendant directed Cisneros to get rid of Mitchell's car; and Mitchell's car was found near Santamaria's house. The jury could have found from this evidence that Defendant was involved in taking Mitchell's car and cell phone while he was in possession of or with the use of a firearm. *See* N.C. Gen. Stat. § 14-87(a) (2023).

Moreover, "Felony murder based on armed robbery does not depend on whether the intent to commit the taking of property was formed before or after the killing." *State v. Coleman*, 161 N.C. App. 224, 231-32, 587 S.E.2d 889, 894 (2003) (citing *Handy*, 331 N.C. at 529, 419 S.E.2d at 552). Thus, whether Defendant's intent to take Mitchell's property was formed before or after the shooting took place is irrelevant to our analysis. *See id.* Therefore, there was substantial evidence tending to show Defendant committed robbery with a firearm. Consequently, the trial court properly denied Defendant's Motions to Dismiss. In turn, the trial court did not err in entering Judgments on the verdicts.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgments of the trial court.

NO ERROR.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
SHALOME SCOTT, Defendant

No. COA24-376

Filed 3 September 2025

1. **Criminal Law—motion for continuance—degenerative eye condition—denial—no abuse of discretion—no due process violation**

In a prosecution on charges including first-degree murder, the trial court did not err or abuse its discretion in denying defendant's motion to continue his trial—which alleged that defendant's keratoconus, a degenerative condition affecting his eyesight, impaired his ability to read and, thus, to communicate with his counsel and to prepare for and participate in a trial—where defendant argued that the trial judge erred in relying on his own knowledge of keratoconus (from which the judge also suffered) rather than upon the medical evidence defendant presented. At the motion hearing, the judge explicitly stated that he was not substituting his own experience for evidence presented, and defendant raised no objection to the judge's participation in his trial. Moreover, defendant neither identified any specific finding of fact by the judge that supported his appellate position nor explained how the denial of his motion prejudiced his defense. To the extent defendant's argument concerned his ability to participate in his trial, the appellate court noted that defendant had declined a corrective surgery offered prior to the filing of his motion and had been provided several accommodations during trial.

2. **Appeal and Error—possession of a firearm by a felon—constitutional claim—not raised at trial—no exceptional circumstances**

In a prosecution on charges including first-degree murder, arising from the robbery of a convenience store, where defendant failed to raise his constitutional claim at trial and did not demonstrate any exceptional circumstances justifying suspension of the appellate rules, the appellate court dismissed defendant's argument as unpreserved.

Appeal by defendant from judgment entered 2 June 2023 by Judge Matt Osman in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 February 2025.

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

Anne Bleyman for defendant-appellant.

STROUD, Judge.

Defendant Shalome Scott appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree murder and possession of a firearm by a felon. On appeal, Defendant argues that the trial court abused its discretion by denying his motion for a continuance and that his conviction for possession of a firearm by a felon is unconstitutional. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

I. Factual Background and Procedural History

On 12 January 2017, Charlotte-Mecklenburg Police ("CMPD") responded to a 911 call about a gunshot victim at a barber shop in a strip mall. The victim was pronounced dead at the scene and officers found about $300 in cash near his body. At trial, the evidence showed that the victim was Massaquoi Kotay, a father of four from Liberia, who had opened a convenience store next to the barber shop just six months earlier. The State's evidence showed that—after rushing into the barber shop and asking for help—the victim died from gunshot wounds to his chest and abdomen.

Defendant testified that on the date of the offense, he was attacked by three individuals while they were "discussing drugs" and he fled from his vehicle, with a gun, into the woods to escape his assailants. In the process of fleeing from his unknown assailants, Defendant encountered *another* person, and despite his degenerative eye condition[1] and fear for his life from the three unknown assailants, Defendant followed that person to the convenience store owned by the victim because Defendant wanted to buy cigarettes.

Defendant testified that he was "scared" because of the ambush he had just narrowly escaped, and because of his degenerative eye condition, he could not identify an unknown third person in the store based on the person's voice. According to Defendant, he assumed that the unknown person, whom he claimed he could not see due to his eye condition, was one of the unknown assailants Defendant had just escaped. Fearing for his life, Defendant shot and killed the unknown person he could not see. That unknown person was the victim.

Security footage from a nearby business showed two men, one wearing a black hoodie, and the other wearing a red sweatshirt, approaching the convenience store on the date of the offense; Defendant admitted at trial that he was the man in the black hoodie. A few minutes later, the security footage showed Defendant and the other individual running away from the strip mall, with the other individual holding what appeared to be a four-or-six pack ring, used to hold four or six beers, with *one* can remaining in it. CMPD law enforcement officers located an unopened beer can, still cold to touch, outside of the convenience store when police responded to the 911 call.

The State presented eyewitness testimony from an employee of a tire store near the strip mall where the shooting occurred. The tire store employee testified that he heard multiple gunshots and saw two figures running away from the strip mall, toward a nearby residence.[2] The tire store employee testified that, during the weekend after the shooting, he was at the residence—the same residence he had seen the individuals running toward after the shooting—when Defendant, whom the tire store employee knew as "Castro"[3] told him *he* had shot the victim in the convenience store.

---

1. As will be discussed at great length below, Defendant suffers from a degenerative eye condition known as keratoconus.

2. There is a discrepancy in the record as to the spelling of the address at the center of CMPD's investigation into the shooting. In some instances, it is spelled "Aaron Taylor Lane," in others, "Erin Taylor Lane." For purposes of this opinion, we refer to the location as "the residence."

3. Data extracted from Defendant's cell phone using Cellebrite technology established that the phone's owner was "Castro Cartega." The State also presented evidence

The following Monday, 16 January 2017, the tire store employee contacted a law enforcement officer with CMPD and asked to speak to a detective. He informed law enforcement about the nearby residence, Defendant's identity, and the alleged culprit responsible for the shooting. At trial, Defendant admitted that he had met the tire store employee previously and had been at the residence *after* the shooting occurred.

The State also presented evidence extracted from Defendant's cell phone using Cellebrite. Notably, on the date of the murder, Defendant downloaded a file onto his phone named "homicide investigating standard operating procedures 1999.pdf." In the days following the shooting, Defendant searched for "CMPD warrant inquiry," "update on north charlotte business owner killed," "evidence to prove murder[,]" and news articles about business owners who had been killed. Defendant also searched for his own name on the CMPD warrant webpage.

On 23 January 2017, Defendant was indicted upon a true bill of indictment by a Mecklenburg County Grand Jury for robbery with a firearm, possession of a firearm by a felon, and first-degree murder. The trial was calendared to begin on 15 May 2023, when, on 5 May 2023, Defendant filed a motion to continue trial because Defendant suffered from keratoconus, a degenerative condition affecting his eyesight. In the motion, Defendant asserted that he "was 21 years old at the time of these offenses and he had keratoconus, a severe eye condition[,]" where "the cornea which is the clear, dome shaped front of the eye[,] gets thinner and gradually bulges outward into a cone shape. A cone shaped cornea causes blurred vision."

On 9 May 2023, Judge McKnight held a preliminary hearing on Defendant's motion to continue. Although Judge McKnight was not scheduled to be the trial judge for the case and he deferred the ruling on the motion to the trial judge, he entered an order including findings of fact regarding the procedural history of the case and Defendant's motion to continue. This order also included these findings:

> That on or about [17 May] 2021, [D]efendant previously appeared before Superior Court Judge Lou Trosch where the issue of his eyesight was first raised and [D]efendant at

---

that, in a jail phone call, Defendant identified himself as "Castro." The eyewitness had previously identified Defendant as the individual he knew as "Castro" in a witness lineup, and at trial, the eyewitness identified Defendant as the individual who had introduced himself to the eyewitness as "Castro." Defendant presents no argument that he *is not* Castro, therefore, the evidence indicates Defendant, Shalome Scott, used the alias "Castro."

> that time refused surgical repair. [D]efendant was advised by the [c]ourt at that time, that based on his decision not to receive surgery to repair his eye condition this would not later be a basis for continuance.
>
> Defense counsel has advised that based on medical advancements in the surgical procedure [D]efendant now seeks surgical repair.

Judge McKnight's order also made a "recommendation" that a "pre-trial evidentiary 'accommodations' hearing be conducted to determine" the extent of the impairment of Defendant's eyesight; whether he would be able to participate in the trial "with reasonable accommodations"; and what accommodations may be necessary. Judge McKnight's order also stated that

> Defense counsel should be prepared to present evidence concerning [D]efendant's current visual condition and/or restrictions via any of the following nonexclusive means; optometrist or ophthalmologist medical reports/diagnosis, treatment recommendations, observations, in-camera or in-court testimony of the defendant, direct medical testimony or any other witness or evidence relative to his alleged sight impairment.

This information was "to be provided to the trial judge to assist the [c]ourt in making a determination if an impairment exists, the nature and extent of an impairment, and what if any, reasonably accommodations can be made to allow the defendant to participate in his defense." However, the order noted that the trial judge "is not bound" by the recommendations and the decision on the motion to continue would be in the trial court's discretion.

At the start of the trial, the trial court heard Defendant's motion to continue. Defendant presented as evidence a report from Dr. Kenneth C. Mathys, Ophthalmologist, who saw Defendant on 10 May 2023. This report states a "primary diagnosis" of "keratoconus of both eyes" and a "reason for visit" of "blurred vision." The "Progress Notes" describe Defendant's condition as follows:

> Advanced KCN OU
>
> Too advanced for CXL
>
> Pt is incarcerated and does not know when he will get out.

> Not a candidate for PK while incarcerated[4]
> Could consider a scleral lens fit. I am not sure if this would be possible while incarcerated. Would need access to sterile saline and a mirror as well as a clean environment for lens storage and removal/replacement.

Defendant's motion to continue alleged that due to keratoconus, Defendant had "severe blurred vision which causes him to be unable to see clearly within three feet[,]" he could "only read documents when he places them within an inch of his eyes[,]" and the "broad effects of keratoconus make[ ] it extremely difficult for counsel to communicate with [Defendant] and for [Defendant] to comprehend legal issues in this case." Defendant contended that he "need[ed] surgery in order to correct his vision[,] [and] [h]e had previously been considered for surgery but he was apprehensive because it would require a cornea transplant and the surgeon would have cut his eye out and actually stitched the transplant cornea in its place." Defendant also asserted that, "[b]ased upon information and belief, the surgery [to correct keratoconus] is different now [than it was in 2021]." Finally, Defendant argued that he "cannot proceed to trial with blurred vision [that] would cause him to have difficulty seeing the court, witnesses, jurors and all exhibits that will be admitted into evidence."

The matter came on for trial 15 May 2023 in Superior Court, Mecklenburg County. The trial court first addressed Defendant's motion for a continuance filed ten days earlier, with the State arguing that:

> [t]he last time this matter was presented to a [c]ourt was back in 2021 before the Honorable Judge Trosch. At that time[,] previous counsel made representations about accommodations being made, under the Americans [w]ith Disabilities Act, that they wished to proceed with that as opposed to [D]efendant choosing to have new surgery.
>
> . . . .
>
> We've been preparing for this matter for months, and no issue regarding vision has been raised. [Defense counsel] did file the motion to continue based on visual impairment[,] [i]t would be the State's position that accommodations

---

4. KCN means keratoconus. OU means "oculus uterque," or both eyes. CXL means Corneal Cross-linking. PK means Penetrating Keratoplasty and is more commonly referred to as a corneal transplant. Pt means patient, referring to Defendant.

> which we requested have been made and are currently set up in the courtroom, pointing one camera at the jury box, and what I would define as high-def 4K, and one at the witness box with a monitor in front of [D]efendant, allowing him to have that less than a few feet in front of his face to visually see them.

In response, Defense counsel argued that

> I'm not asking the [c]ourt to continue this matter forever. Certainly I'm not doing that, but I would tell the [c]ourt that [Defendant]'s condition of keratoconus . . . it's in both eyes, and he has blurred vision.
>
> . . . .
>
> [A doctor] indicated in his report that [Defendant] doesn't know when he's going to get out, and he's not a candidate for [surgery] while . . . incarcerated.
>
> . . . .
>
> [The doctor] said, I'm not sure if this would be possible while incarcerated. We'd need access to sterile saline and a mirror, as well as a clean environment for lens storage and removal/replacement. Your honor, I think that would be appropriate to consider his evaluation for that lens. I would contend to you that certainly the accommodations [under the ADA] I would contend would not be sufficient.

The trial court denied Defendant's motion for a continuance, and the trial proceeded as scheduled. On 2 June 2023, Defendant was found guilty of first-degree murder and possession of a firearm by a felon. Pursuant to the guilty verdicts, Defendant was sentenced to life imprisonment without the possibility of parole for first-degree murder, and seventeen to thirty months imprisonment for possession of a firearm by a felon.[5] From this judgment, Defendant entered oral notice of appeal in open court.

II. Discussion

On appeal, Defendant contends that "the trial court denied [Defendant] his constitutional protections and erred by improperly relying on its own personal experience when failing to continue the trial."

5. The State dismissed Defendant's indictment for robbery with a firearm.

He also argues that his "conviction for possession of a firearm by a felon violates his rights."

A. Denial of Motion to Continue

[1] In most cases, we review the trial court's denial of a motion to continue for abuse of discretion. *See State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984) ("A motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion."). However, when "a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *Id.* at 112, 310 S.E.2d at 323.

We first note that Defendant's motion to continue did state a constitutional basis for the motion. His motion to continue asserted that proceeding to trial with his blurred vision "would result in ineffective assistance of counsel and the denial of due process under the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution." He requested that trial be continued "until after [Defendant] has surgery and his vision has improved." However, in his brief on appeal, in the "Statement of Standards of Review," Defendant argues that our standard of review for the trial court's ruling on the motion to continue is abuse of discretion. He does not substantively address a constitutional argument except to the extent he seeks to rely on cases addressing mental incapacity to stand trial.

Although Defendant's brief mentions his constitutional arguments, his brief does not address a *de novo* review of the trial court's ruling as a constitutional issue. Instead, his argument focuses mainly on the trial court's "findings of fact." He specifically argues that "the trial judge's denial of the motion to continue was a gross abuse of discretion." "The ruling on the continuance motion should have been based on the evidence presented and the interests of justice. Instead, the ruling was based, in large part, on the judge's own personal experiences." We therefore address the argument as Defendant has presented it and review for abuse of discretion.

Defendant argues that "the majority of the specific findings of fact denying [Defendant]'s request for a continuance were based upon the trial judge's own knowledge instead of the medical evidence presented." We first note that the trial court did not enter a written order denying the motion to continue and did not make "specific findings of fact." Although the trial court noted some facts in rendering the ruling on the motion to continue, Defendant has not identified any specific "fact" he contends was not supported by the evidence or is factually incorrect. Instead, his argument is that the trial court erred by relying on his own knowledge of keratoconus based on his own experience and medical treatment.

In the parts of the trial judge's comments Defendant discusses in his brief, the trial court notes his own knowledge of keratoconus. In fact, the trial judge informed counsel for Defendant and the State by an email *before trial* he suffered from the same condition as Defendant. Before hearing the motion to continue, the trial court noted:

> THE COURT: And before I hear from Mr. Butler, I have reviewed the defense's motion to continue. Just so y'all know where I come from, I read the motion to continue. I read the amendment to the motion to continue. I just reviewed the State's objection that was handed up, and most importantly, I've read Judge McKnight's order and recommendation. I also sent counsel an email on Friday. I trust everyone received that. Is that accurate?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: I thought it was important to do that because I am in a fairly unique position as it relates to the issue in this case, and I think that -- in the interest of full disclosure, I think it's important to note, and in order to build a competent and relevant record, as I have the specific eye condition that [Defendant] has. I've had two surgical interventions for those, including two corneal transplants, so I'm certainly not going to substitute my own experience or my own expertise to the extent I have any, although I suspect there's not a single other judge in the state who's similarly situated to hear this particular issue. This literally is a luck of the draw, and I was not assigned to this case because of my background. I found out I was assigned to this case, and then subsequently found out about these issues, because to my knowledge no one in the courthouse knew this about me, but here we are. So I want to make it clear that while I have that experience, I won't substitute my own experience for evidence that's presented, any expertise and things of that nature. But I'm

> also in a unique position in order to evaluate the assertions of the defense in terms of what [Defendant] can or cannot view, in terms of whether accommodations are or are not appropriate[.]

The trial court fully informed both Defendant and the State even before the trial date he had the same medical condition as Defendant. The trial court certainly had no obligation to divulge his own personal medical information to the parties in this public forum, but in an abundance of caution, the trial court made sure that both parties were aware of his unusual experience with the same condition. Defendant did not raise any objection to the trial court's participation in this trial, although he had full opportunity to do so.

In his comments during the hearing, the trial court demonstrated that he relied on the evidence presented, specifically Dr. Mathys's report. Defendant did not present any additional evidence to assist the trial court in understanding Dr. Mathys's report, but thanks to his knowledge of the condition, the trial court could interpret Dr. Mathys's cryptic medical abbreviations. For example, the trial court noted:

> Well, let me just -- I just want to note a couple things real quick in the doctor's report. You know, first it says too advanced for CXL. For the uninitiated, CXL is corneal cross-linking. Corneal cross-linking is something that you use to prevent keratoconus from getting worse. It is not a treatment to make it better, typically. PK is penetrating keratoplasty, which is the fancy term for transplant. So I'm just noting those things, and of course, scleral lens. There are other contacts such as the hybrid lenses that I wear that aren't sclerals, but sclerals are typically for people that have really messed up pre-surgical corneas.

Defendant did not contend the trial court's interpretation of the report's abbreviations was incorrect, either to the trial court or on appeal. While Defendant is correct to observe that the trial court noted his own experience with keratoconus when considering the motion, that experience simply allowed the trial court to read Dr. Mathys's report without consulting a medical dictionary. Defendant makes no showing on appeal as to *how* the trial court judge's own experience with keratoconus affected his decision—let alone was the basis for—the denial of Defendant's motion. Moreover, Defendant makes no showing as to how the denial of the motion for a continuance prejudiced his ability to prepare his defense during the six years after his indictment—beyond the mere fact that Defendant could not see the proceedings of his trial with perfect vision.[6]

Our Supreme Court has held that to establish a constitutional violation pursuant to a denial of a motion for a continuance, a criminal defendant must show he did not have enough time to adequately prepare a defense due to the denial of the motion. *State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976) (holding that the defendant "fail[ed] to show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense" and thereby the trial court correctly denied the defendant's motion for a continuance). To demonstrate the amount of time to prepare a defense was *constitutionally* inadequate, the defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). Here, Defendant fails to carry this burden.

As the State astutely notes in its appellate brief, "Defendant's argument for a continuance was not based on an inability to prepare for trial, but Defendant's difficulty seeing items *at trial*." (Emphasis in original.) At the hearing on Defendant's motion for a continuance, his defense counsel argued that:

> It's really important to me, not only that, but for him to be able to write stuff down to let me know what he is thinking as the trial goes on, and help me evaluate the testimony. Certainly, I've discussed the discovery with him, but I would tell the Court that discovery is certainly different than what is presented at every trial I've ever done. I know what the discovery says, but when it comes in to evidence, it's a whole different ballgame.

Because Defendant is contending that his ability to see *during* the trial was the basis for his need for continuance, Defendant seeks to rely on cases addressing a defendant's mental incapacity to stand trial. For example, he argues that "[t]his Court has considered whether a motion to continue should have been allowed . . . [so] a defendant's competency to stand trial could be evaluated," citing to *State v. Robinson*, where this

---

6. We note that Defendant's defense at trial, in no small part, relied on his argument that he was unable to see the victim. If anything, the trial court's accommodations to assist Defendant's vision at trial would only bolster the credibility of Defendant's testimony regarding his poor vision.

Court stated that "the evidence does not support the trial court's determination that [the] defendant was competent to proceed with trial at the time of his competency hearing" so "the trial court abused its discretion in denying defendant's motion to continue the proceedings until defendant" competency to stand trial could be evaluated and determined." 221 N.C. App. 509, 516, 729 S.E.2d 88, 95 (2012). Defendant argues that the trial court should have allowed "the continuance to see if any medical intervention could have improved the situation."

The State points out that Defendant's argument is misguided because the statutes and cases like *Robinson* that address incapacity to stand trial deal with a defendant's "mental illness or defect," not physical conditions such as vision. *See* N.C. Gen. Stat. § 15A-1001(a) (2023) ("No person may be tried, convicted, sentenced, or punished for a crime when *by reason of mental illness or defect* he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as 'incapacity to proceed.' " (emphasis added)). Defendant has not cited, nor have we been able to find, any case that has applied the statutes or cases addressing mental "incapacity to proceed" to a defendant's physical condition, including vision. We agree with the State that *Robinson* and other cases addressing mental incapacity to stand trial are inapposite here.

As noted above, Defendant was diagnosed with a "degenerative eye condition of keratoconus," a physical condition that impacts an individual's ability to see. Defendant's keratoconus was a long-standing condition; based on his own testimony, he suffered from this condition since at least 2017 and his vision even then was so poor he could not see well enough to identify the unknown person whom he shot in the store. During the discussion of the motion to continue, Defendant's counsel acknowledged Defendant had been offered corrective surgery in 2021 to assist his vision. In 2021, the trial court had warned Defendant that if he did not pursue surgery punctually, he would not be allowed to assert his condition, and the need for surgery to alleviate the condition, as a basis for a continuance later—precisely what Defendant tried to do here, nearly three years after the warning in 2021.

At the hearing on the motion for a continuance, defense counsel asserted that the surgery available to Defendant in 2024 was *different* from the surgery available in 2021. But Dr. Mathys's report provided no information about any different sort of procedure that may have been available to Defendant, and Defendant did not present any evidence of a different type of procedure or how the procedure had changed since 2021:

> [DEFENSE COUNSEL]: It's my understanding for [Defendant] is that he has some concern about the transplant surgery, but he has resolved that, and it's my understanding that there is a new method of that type of surgery.
>
> THE COURT: I'd love to hear about that myself.
>
> [DEFENSE COUNSEL]: Well, I reached out to [the doctor]. Haven't been able to talk to him yet. I started that effort as soon as I received the report, and left messages for him on Wednesday and Thursday, and I haven't heard from him.

Finally, "[w]hether [D]efendant [wa]s denied due process must be determined under the circumstances of [this] case[,]" *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977), and we note that the trial court made several accommodations to assist Defendant's vision during his defense, including providing two high-definition cameras pointed at the witness stand and the jury box that transmitted the picture to monitors a few feet in front of Defendant. The trial itself was held in a smaller courtroom, where "distances . . . were significantly less than they are in other courtrooms[,]" and the State also provided Defendant with a "nearfield monocular" which magnified documents up to six times, so that Defendant could see the documents presented. And on appeal, Defendant does not contend that the trial court's accommodations of his visual impairment were insufficient, nor did Defendant request any accommodation during the trial that was not provided.

Therefore, after "review by examination of the particular circumstances as presented by the record[,]" *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988), we conclude that the trial court did not abuse its discretion in denying Defendant's motion for a continuance. Nor on *de novo* review of Defendant's claim to a constitutional right to a continuance, did it deprive Defendant of due process protections by denying his motion for continuance and allowing trial to proceed as scheduled, nearly six years after the offense charged, and nearly three years *after* Defendant had previously asserted his need for corrective surgery. Defendant has not demonstrated "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *Covington*, 317 N.C. at 130, 343 S.E.2d at 526.

B. Felon in Possession of a Firearm

[2] Next, Defendant argues that his "conviction for possession of a firearm by a felon violates his rights." First, we note that Defendant did not raise this constitutional claim before the trial court and concedes on appeal that "[n]o specific constitutional arguments were made for setting aside the possession by a felon conviction."

Our appellate rules require that, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). On this issue, our Supreme Court is clear, "constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citation omitted). While Rule 2 of the North Carolina Rules of Appellate Procedure allows for suspension of preservation requirements in "exceptional circumstances[,]" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008), Defendant does not demonstrate any exceptional circumstances justifying suspension of our appellate rules. Therefore, we dismiss Defendant's constitutional argument as unpreserved.

III. Conclusion

We conclude that the trial court did not abuse its discretion by denying Defendant's motion for a continuance and that Defendant's constitutional argument regarding possession by a felon is unpreserved. We conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges ARROWOOD and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
RUSSELL LEE WATKINS, DEFENDANT

No. COA24-1056

Filed 3 September 2025

1. Search and Seizure—search warrant—supporting affidavit—probable cause—sufficient facts

In a prosecution on charges including robbery with a dangerous weapon, first-degree burglary, and second-degree kidnapping, the trial court properly denied defendant's motion to suppress evidence—a handgun wrapped in a rag stashed under the hood of defendant's car—where the supporting affidavit accompanying the search warrant application for defendant's vehicle alleged facts sufficient to establish probable cause that defendant's vehicle might contain evidence related to criminal conduct. Specifically, the affidavit alleged that, just before defendant's fellow perpetrators entered the home where the robbery, burglary, and kidnapping occurred, witnesses saw them get out of a car linked to another person with whom defendant had engaged in other criminal activity.

2. Constitutional Law—possession of a firearm by a felon statute—right to bear arms—as-applied state constitutional challenge—no violation

Defendant's arguments that North Carolina's possession of a firearm by a felon statute (N.C.G.S. § 14-415.1) violated his right to bear arms under the federal constitution and his facial challenge under the state constitution were precluded by prior decisions of the Court of Appeals. Defendant's as-applied state constitutional challenge to the statute was unavailing where two of the five factors set forth in *State v. Britt*, 363 N.C. 546 (2009), weighed strongly against a conclusion that the statute as applied to defendant was an unreasonable regulation not fairly related to the preservation of public peace and safety. Although defendant's prior criminal record showed no intrinsically violent convictions for several decades and his firearm possession prior to the instant case appeared responsible and lawful, after the convictions at issue in this appeal—in a plea arrangement with the State—defendant pled guilty to two counts of first-degree burglary and one count of robbery with a dangerous weapon arising from the same incident.

Appeal by Defendant from judgment entered 17 January 2024 by Judge Claire V. Hill in Wake County Superior Court. Heard in the Court of Appeals 10 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Attorney W. Michael Spivey, for the Defendant-Appellant.

MURRY, Judge.

Russell L. Watkins (Defendant) appeals the trial court's denial of his (1) motion to suppress evidence seized from his Honda and (2) motion to dismiss on the grounds that N.C.G.S. § 14-415.1 is unconstitutional both *prima facie* and as-applied to his conviction for possession of a firearm by a felon. For the reasons below, this Court holds that the trial court did not err in reaching either decision.

I. Background

Born in 1977, Defendant had intermittent run-ins with the law throughout his life. After incurring several convictions as a minor in 1993, Defendant was convicted of three state cocaine-trafficking felonies in 1998 and a similar federal trafficking felony in 2012. Outside of this latter federal crime and a 2011 misdemeanor conviction for resisting arrest, Defendant largely avoided controversy until 2018.

On 17 December 2018, two of Defendant's friends, Jahmez Jackson and Zelix Johnson, robbed the house of their mutual acquaintance and her husband; the couple and her little sister were present at the time. Once inside, the armed and masked assailants zip-tied the residents and dragged them into their kitchen so that they could freely raid the house. Throughout the robbery, one of the assailants stayed "on the phone with someone who appeared to be telling them to hurry up" and "get out." Over the course of 15 minutes, they robbed the house of several thousands of dollars in both cash and portable valuables, most notably a "distinctive gold ring." Witnesses saw both Jackson and Johnson enter and flee the scene in "an old, dark[-]green Toyota Camry."

The husband soon freed himself after the assailants left, and his wife called the police. Once on the scene, investigators found a leftover trash bag in the house with Defendant's fingerprint. The victims also gave them a picture of the stolen ring that they then sent out to local pawn shops. One of the shops contacted Raleigh Police Senior Detective

Brad Winston, who obtained a court order for Defendant's cell phone records after watching a security-camera video of him selling the ring. Those records confirmed several calls between Jackson and Defendant at the time of the robbery. Upon pulling Defendant's broader criminal record, Detective Winston discovered a "recent police report involving him . . . from [four] days prior to the" robbery. This report documented an accusation that Defendant and one "Jasmine E. Elliott slashed the tires on a victim's car and fled the scene in her gray Honda Crosstour." (Quotation modified.) Detective Winston later confirmed through DMV records that Elliott and Defendant respectively owned the Toyota and Honda in question. He soon sought and obtained a warrant to search the Honda, where he discovered a handgun wrapped in a rag stashed under the hood.

Based in part on this search and other witnessed evidence, a grand jury indicted Defendant on 5 February 2019 for conspiracy to commit first-degree burglary, completed first-degree burglary (collectively, "burglary charges"), second-degree kidnapping, obtaining property by false pretenses (OPFP), robbery with a dangerous weapon, and possession of a firearm by a felon (POFBF)—all felonies. N.C.G.S. § 14-2.4(a) (2023) (conspiracy); *id.* § 14-39(b) (kidnapping); *id.* § 14-51 (burglary); *id.* § 14-100(a) (OPFP); *id.* § 14-87(a) (robbery); *id.* § 14-415.1(a) (POFBF).[1] Prior to the November 2023 trial, Defendant moved to suppress evidence seized from the Honda on the grounds that Detective Winston's application affidavit relied on "stale" information that did not reasonably supply probable cause necessary under the Federal and State Constitutions. Defendant also moved pretrial to dismiss the POFBF charge, arguing that it violated both Constitutions' individual right to bear arms. The trial court denied both motions and permitted the case to proceed to trial.

At trial, a jury found Defendant guilty of the OPFP and POFBF charges but deadlocked on the remainder. At the 17 January 2024 sentencing hearing, Defendant entered into an agreement to plead guilty to the robbery and burglary charges in exchange for the State not pursuing the remaining deadlocked charges (as well as a habitual-felon-status charge). Prior to entering the State's custody, Defendant timely appealed as to the OPFP and POFBF charges at issue here.

---

1. This opinion relies in part on subsequent amendments to N.C.G.S. § 14 415.1 in our analysis. Thus, we briefly pause to note that the General Assembly has substantially modified §§ 14-51, -415.1 through recent legislation set to take effect on 1 October 2025. *See* Act of July 9, 2025, S.L. 2025-71, secs. 8(a), 10(a) (to be codified at N.C.G.S. ch. 14).

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal of his convictions because even though he "entered a plea of guilty," he is still "entitled to appeal as a matter of right the issue of whether his . . . sentence is supported by evidence introduced at the trial." N.C.G.S. § 15A-1444(a1) (2023). More specifically, he may appeal any "order finally denying a motion to suppress evidence," even if having first "ple[d] . . . guilty." *Id.* § 15A-979(b).

III. Analysis

On appeal, Defendant argues that the trial court erred (1) by denying his motion to suppress evidence because police investigators lacked any probable cause to seize evidence from his Honda and (2) by denying his motion to dismiss the POFBF charge based on a statute that violated the Federal and State Constitutions. For the reasons below, this Court holds that the trial court did not err in either respect.

A. Probable Cause

[1] First, Defendant argues the search warrant lacked sufficient facts to show probable cause to suspect that he had incriminating evidence in his car. We disagree. In assessing a motion-to-suppress denial, we review "whether competent evidence supports the trial court's findings of fact" that, in turn, must "support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68 (2011). We review those conclusions *de novo* but leave the findings undisturbed absent an abuse of discretion by the trial court in reaching them. *See id.* at 168.

The Federal and State Constitutions permit law enforcement to search a private citizen's effects only "upon probable cause," U.S. Const. amend. IV, cl. 2, documented in a warrant "particularly described and supported by evidence." N.C. Const. art. I, § 20, cl. 3.[2] An application for a search warrant must specify "the facts and circumstances establishing probable cause" that incriminating evidence is "in the possession of the individuals to be searched." N.C.G.S. § 15A-244(3) (2023). Our Supreme Court defines probable cause as "a reasonable ground to believe that the proposed search will reveal" this evidence in a manner that "aid[s] in

---

2. Because North Carolina's Warrants Clause affords at least the same probable-cause protections as does its federal counterpart in this context, Defendant's outcome remains the same regardless of the particular Constitution scrutinized here. *See State v. Allman*, 369 N.C. 292, 293 (2016) ("[T]he probable[-]cause analysis under the federal and state [C]onstitutions is identical.").

the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128–29 (1972). Our appellate courts more generally assess this reasonability by a "totality of the circumstances" that, taken together, "yield a fair probability" that the executing officer "will find contraband or evidence of a crime at the place to be searched." *State v. Allman*, 369 N.C. 292, 294 (2016). We "defer[ ] to the magistrate's determination," *id.*, when concluding whether the supporting "affidavits . . . establish a nexus between the objects sought and the place to be searched," *State v. McCoy*, 100 N.C. App. 574, 576 (1990) (first citing *Campbell*, 282 N.C. at 129; and then citing Wayne A. LaFave, *Search and Seizure* § 3.1(b) n.26 (2d ed. 1987)).

Defendant misreads *State v. Lewis*, 372 N.C. 576 (2019), to suggest that the affidavit lacks "[ ]sufficient facts to show probable cause for the . . . search warrant" of his car. In *Lewis*, our Supreme Court tossed out a defendant's conviction based on the source affidavit's failure to document *any* "information whatsoever concerning the" relevant car searched. *Id.* at 589. Much like Defendant here, the *Lewis* defendant committed multiple crimes with an accomplice between two different cars (there, a dark-blue Nissan Titan and a dark-gray Kia Optima). *See id.* at 577–78. The arresting detective confirmed that the "defendant owned the Kia Optima and . . . also drove [the Nissan Titan] on occasion." *Id.* at 678. But the investigating detective stated in the affidavit only that the "defendant drove away from the first robbery in *a* Nissan Titan and fled the scene of the second robbery in *a* Kia Optima." *Id.* at 579 (citation modified; emphases added). Unlike with Defendant here, the *Lewis* affidavit contained no specific link between the defendant and either *the* Nissan or *the* Kia to be searched upon its approval. *See id.*

Here, Defendant's own concessions on appeal demonstrate the probability that his Honda might "contain any evidence related to a crime." The search warrant application specifies that witnesses saw Jackson and Johnson "get out of an old, dark[-]green Toyota Camry" and "mask up before going into the residence" to rob the victims. The application also references a predated police investigation into Defendant that suspected him of slashing a third-party's car tires before "fle[eing] the scene in . . . a Honda" he ultimately owned. Detective Winston confirmed that only Elliott owned the Toyota, further supporting the inference that Defendant used his own car for this latter criminal purpose. Defendant thus exhibited a "nexus between [the incriminating] vehicle and" his actions in a similar manner as did the *Lewis* defendant. *State v. McKinney*, 368 N.C. 161, 166 (2015); *see Lewis*, 372 N.C. at 589. Based on these considerations, this Court holds that the trial court did not err by denying Defendant's motion to suppress evidence seized from the search of his Honda.

B. Firearm Possession

[2] Second, Defendant argues that § 14-415.1 violates his federal and state constitutional rights to bear arms both facially and as applied to his conduct here. Because this Court's recent decisions preclude our consideration of Defendant's *prima facie* claims and as-applied federal claim,[3] we address only his as-applied state constitutional claim here. *See State v. Nanes*, 912 S.E.2d 202, 207–10 (N.C. Ct. App. 2025); *State v. Ducker*, 917 S.E.2d 266, 269–73 (N.C. Ct. App. 2025), *temp. stay allowed*, 915 S.E.2d 37 (N.C. 2025). And reviewing this latter constitutional claim *de novo*, we also agree with the trial court's denial of Defendant's motion to dismiss on this particular ground.

The North Carolina Constitution recognizes and protects its citizens' respective individual rights to bear arms for self-defense, subject to concealed-carry regulations not at issue here.[4] N.C. Const. art I., § 30 (constitutionalizing right); *State v. Kerner*, 181 N.C. 574, 575 (1921) (recognizing as individual right). Federal courts have generally interpreted the Second Amendment to afford a greater degree of self-defense protection than found in the plain text of our analogous Operative Clause. *Cf. State v. Tirado*, 387 N.C. 104, 105 (2025) ("lockstep[ping] . . . lesser rights" of state Cruel and Unusual Punishments Clause to heightened protections of federal Eighth Amendment). Because it is "layered in far more complicated ways than is the federal Constitution," Jason Mazzone, *History, Tradition, and Federalism*, 47 Harv. J.L. & Pub. Pol'y 659, 668

3. Defendant filed his brief with this panel on 16 December 2024. Since then, two other panels of this Court have upheld both the federal and state *prima facie* constitutionality of § 14-415.1. *See State v. Nanes*, 912 S.E.2d 202 (N.C. Ct. App. 2025) (affirming constitutionality); *State v. Ducker*, 917 S.E.2d 266 (N.C. Ct. App.) (reaffirming under *stare decisis*), *temp. stay allowed*, 915 S.E.2d 37 (N.C. 2025). The *Ducker* Court further held that § 14 415.1 categorically "regulates conduct outside the Second Amendment's protections." *Ducker*, 917 S.E.2d at 273 (citing *In re Civil Penalty*, 324 N.C. 373, 384 (1989)). Because this Court is "bound by prior decisions" of past panels no matter their recency, we uphold outright the trial court's denial of Defendant's motion to dismiss on at least those three constitutional bases. *Id.* at 8.

4. In no way does this opinion disturb the Operative Clause's right (and its sole qualification), which predate North Carolina itself. *Compare* Provincial Carol. Const. of 1669 § 116 ("All inhabitants . . . of Carolina . . . shall be bound to bear arms . . . ."), *and* N.C. Declaration of Rights of 1776 § XVII ("[T]he people have a right to bear arms for the defence of the state . . . ."), *with* N.C. Const. of 1868 ("[T]he right of the people to keep and bear arms shall not be infringed . . . ."). *See generally* Robert S. Rankin, *The Government and Administration of North Carolina* 18 (W. Brooke Graves ed., Am. Commonw. Ser. 1955).

(2024) (quotation omitted), our state courts cannot "diminish [ou]r [C]onstitution by interpreting" the scope of its fundamental right to bear arms "in reflexive imitation of the federal courts[ ]," Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018).[5]

To assess as-applied challenges under our state's Operative Clause, we instead weigh a defendant's conduct among the five factors set forth in *State v. Britt*, 363 N.C. 546 (2009), and clarified in *State v. Johnston*, 224 N.C. App. 282, 298–304 (2012), *aff'd per curiam mem.*, 367 N.C. 164 (2013):

> (1) Degree of "violence or the threat of violence" "involved" in the felony convictions responsible for the POFBF conviction at issue on appeal;
>
> (2) Overall "length of time" between the felony and POFBF convictions;
>
> (3) Defendant's history of general "law[-]abiding conduct" prior to the POFBF conviction;
>
> (4) Defendant's "history of responsible, lawful firearm possession" over any "time period when [his] possession of firearms was" lawful; and
>
> (5) Defendant's "assiduous and proactive compliance with" § 14-415.1 and its subsequent amendments.

Johnston, 224 N.C. App. at 301 (first quoting *State v. Whitaker*, 201 N.C. App. 190, 205 (2009), *aff'd on other grounds*, 364 N.C. 404 (2010); then citing N.C.G.S. § 14-415.1; and then citing Act of July 15, 2004, S.L. 2004-186, sec. 14.1, § 14-415.1(a), 2004 N.C. Sess. Laws 737, 737 [hereinafter 2004 Amendment]). "[N]one of the [Britt] factors listed above is determinative" when conducting this "relatively straightforward" analysis of "constitutional determination." *State v. Baysden*, 217 N.C. App. 20, 26 (2011), *aff'd by an equally divided court*, 366 N.C. 370 (2013).

They instead "follow logically from" our Supreme Court's heightened standard of review in the Operative Clause context, which "seeks to answer" "the pivotal question . . . [of] whether the statute, as applied to defendant, is 'an unreasonable regulation[ ] not fairly related to the

---

5. This Court regularly distinguishes between state and federal constitutional provisions—even when doing so may result in the same outcome for a particular litigant. *E.g.*, *Durham Cnty. DSS v. Wallace*, 295 N.C. App. 440, 450 (2024) ("The adjacent [state] Responsibility Clause expresses what the federal First Amendment only implies . . . ." (citing N.C. Const. art. I, § 14, cls. 1, 3)).

preservation of public peace and safety.' " *Whitaker*, 201 N.C. App. at 210 (Elmore, J., concurring in part, concurring in result in part, and dissenting in part) (quoting *Britt*, 363 N.C. at 550). We note that the *Britt* Court and its progeny, *e.g.*, *id.* at 205 (majority op.); *Nanes*, 912 S.E.2d at 210; *Ducker*, 917 S.E.2d at 273–75, focused their analyses on the 2004 Amendment's abrogation of a felon's statutory "right . . . to . . . possess[ ] . . . a firearm within his own home," sec. 14.1, 2004 N.C. Sess. Laws at 737. Given the general applicability of these cases' principles, though, we see no analytical distinction between the 2004 Amendment and the subsequent 2010 and 2011 amendments to § 14-415.1. *See* Act of July 20, 2010, S.L. 2010-108, sec. 3, § 14-415.1(d)–(e), 2010 N.C. Sess. Laws 414, 417 [hereinafter 2010 Amendment] (exempting nonviolent felons from home-possession abrogation); Act of June 23, 2011, S.L. 2011-268, sec. 13, § 14-415.1(d), 2011 N.C. Sess. Laws 1002, 1008–09 (clarifying language of 2010 exemption procedure). Taken together, the *Britt* factors support the constitutional application of § 14-415.1 to Defendant's conduct.

First, the jury convicted Defendant of only OPFP after deadlocking on the other charges. Absent additional facts, cocaine possession alone does not imply a significant degree of violence for our purposes. *See Britt*, 363 N.C. at 549 ("one count of possession with intent"). And walking "into a pawn shop . . . to sell something" involves no violence whatsoever. As a result, this factor leans towards Defendant's argument when considered in isolation.

Second, save one 2011 misdemeanor for resisting a public officer, Defendant's record *prior* to this incident shows no intrinsically violent felony convictions since age 16. Since his "convict[ion] of t[hose] . . . offenses" several "decades ago," Defendant has apparently "been a law-abiding citizen." *Baysden*, 217 N.C. App. at 26. Were we to stop the analysis here, he would likely have a strong case against § 14-415.1's application.

But *third*, his "history of law-abiding conduct *following* his conviction[s]" prior to his trial here is anything but exculpatory. *Id.* at 274 (emphasis added). After his OPFP conviction but before appealing to this Court, Defendant pleaded guilty to two counts of felony first-degree burglary and one count of felony robbery with a dangerous weapon—three of the charges for which a jury of his peers had just declined to convict him. The strategic soundness of that decision is not for us to decide; his admission to these clearly dangerous felonies so soon after his challenged OPFP weighs heavily in our analysis.

Fourth, as referenced above, Defendant also incurred a single felony conviction for cocaine possession prior to these 2023 convictions.

Absent additional facts here as well, we "[p]resum[e that] Defendant's firearm possession prior to his conviction was entirely responsible and lawful." *Ducker*, 917 S.E.2d at 274–75.

And *fifth*, Defendant did not "seek vindication" by challenging § 14-415.1's application to his conduct until after his "disarm[ing] by law enforcement" in the wake of his OPFP conviction. *Nanes*, 912 S.E.2d at 210. This factor hinges on whether Defendant "voluntarily disarm[ed hi]msel[f] prior to seeking vindication of [his] right to bear arms," which he did not do so here. *Id.* Defendant instead "waited to bring his challenge [only] after he was arrested and indicted for" the OPFP and POFBF charges. *State v. Bonetsky*, 246 N.C. App. 640, 649 (2016); *accord Johnston*, 224 N.C. App. at 304. He has shown no amount of "assiduous and proactive compliance," *Britt*, 363 N.C. at 551 (citing 2004 Amendment), with either § 14-415.1 or any of its subsequent amendments because he pleaded guilty to three distinct felonies while in "possession of a firearm or other deadly weapon at the time of the[ir] commission[s]," 2011 Amendment sec. 1, § 14-415.4(a)(2)(b).

Based on these considerations, the first and second *Britt* factors weigh in Defendant's favor, while the fourth is neutral at most. But the third and fifth factors strongly weigh in the opposite direction. Partially excepting the *Johnson* Court's procedural remand for further factfinding, our courts have only ever recognized an unconstitutional application of § 14-415.1 where a litigant proactively seeks to vindicate his rights thereunder—not merely an after-the-fact challenge in the wake of certain felony convictions. *Contrast Johnston*, 224 N.C. App. at 303 (remanding to trial court "to take evidence and make findings as to" first and fourth *Britt* factors), *with, e.g.*, *Britt*, 363 N.C. at 549–50 ("assiduous and proactive compliance"), *and Baysden*, 217 N.C. App. at 29–30 (same). Thus, the *Britt* factors collectively indicate a constitutional application of § 14-415.1 to Defendant's conduct here.

IV. Conclusion

For the reasons outlined above, this Court holds that the trial court did not err by denying Defendant's (1) motion to suppress the evidence seized from his Honda for lack of probable cause and (2) motion to dismiss the POFBF charge on the grounds of N.C.G.S. § 14-415.1 *prima facie* and as-applied unconstitutionality.

NO ERROR.

Chief Judge DILLON and Judge CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 SEPTEMBER 2025)

BIGHAM v. CONT'L TIRE THE AMS. No. 24-280	N.C. Industrial Commission (W11602)	Reversed and Remanded
CONSOL. DISTRIBUTION CORP. v. McLAWHORN No. 24-658	Wake (21CVD010791)	Affirmed in part; Vacated and remanded in part; denied in part
CROUCH v. SUNCAKES N.C., LLC No. 24-980	Mecklenburg (23CVS006192)	Affirmed
DAVIDOVIC v. ALLBOUND CARRIER, INC. No. 24-1027	N.C. Industrial Commission (21-716264)	Affirmed
DRY v. CONT'L TIRE THE AMS. No. 24-332	N.C. Industrial Commission (888074)	Reversed and Remanded
ELLIS-SMITH v. SMITH No. 24-977	Durham (20CVD000860-310)	Dismissed
FITZGERALD v. NAT'L RESTORATION, LLC No. 25-37	Mecklenburg (22CVS020649-590)	Affirmed
GIBSON v. CONT'L TIRE THE AMS. No. 24-467	N.C. Industrial Commission (W11597)	Reversed and Remanded
HUNT v. CONT'L TIRE THE AMS. No. 24-340	N.C. Industrial Commission (W15975)	Reversed and Remanded
IN RE O.G.-B. No. 24-1107	Union (22JT000094)	Affirmed
LANHAM v. CONT'L TIRE THE AMS. No. 24-355	N.C. Industrial Commission (W36504)	Reversed and Remanded
LEXINGTON INS. CO. v. STATE OF N.C. No. 24-1048	Wake (22CVS000646)	Reversed and Remanded

McPHERSON v. McPHERSON No. 24-1101	Moore (22CVD001194)	Affirmed
MORRISON v. CONT'L TIRE THE AMS. No. 24-206	N.C. Industrial Commission (089001)	Reversed and Remanded
RICE v. CONT'L TIRE THE AMS. No. 24-295	N.C. Industrial Commission (X58154)	Reversed and Remanded
SCOTT v. CONT'L TIRE THE AMS. No. 24-307	N.C. Industrial Commission (X08595)	Reversed and Remanded
SMYTH v. CONT'L TIRE THE AMS. No. 24-368	N.C. Industrial Commission (196013)	Reversed and Remanded
STATE v. BAUMGARDNER No. 24-1003	Haywood (21CRS000637) (21CRS052750) (21CRS052752)	No Error in Part; Dismissed in Part; and Remanded for Correction of Clerical Error.
STATE v. BOOKER No. 24-853	Alamance (23CRS000197)	No Error
STATE v. BROOKS No. 24-514	Lincoln (21CRS052057)	No Error
STATE v. BURGESS No. 24-366	Nash (21CRS52926)	DISMISSED IN PART; IN PART VACATED AND REMANDED.
STATE v. DAVIS No. 24-712	Guilford (20CRS073401) (20CRS073808) (21CRS028781)	No Error
STATE v. DAVIS No. 25-21	Davie (22CR050320-290) (22CR050322-290) (22CR050325-290) (22CR050316-290)	Dismissed
STATE v. DUPREE No. 24-849	Johnston (18CR001369-500) (18CR054865-500)	No Error

STATE v. FLOWERS No. 24-1044	Forsyth (20CRS002069) (20CRS058785) (23CRS000502)	No Error
STATE v. HORNE No. 24-800	Union (21CRS053505) (21CRS053506) (21CRS053507)	No Error
STATE v. JACKSON No. 24-979	Martin (21CRS050769) (21CRS050770) (22CRS000013)	No Error
STATE v. JUDD No. 24-483	Wake (20CR206873-910)	No Error
STEWART v. CONT'L TIRE THE AMS. No. 24-284	N.C. Industrial Commission (X51763)	Reversed and Remanded
STEWART v. STEWART No. 24-1132	Rockingham (22CVD001593)	Dismissed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS